

E-ISSN 2687-4113

Annales de la Faculté de Droit d'Istanbul

Number **76** Year **2025**



İSTANBUL
UNIVERSITY
PRESS



Annales de la Faculté de Droit d'Istanbul

Number: 76 • Year: 2025

Annales de la Faculté de Droit d'Istanbul

Number: 76 • Year: 2025

E-ISSN: 2687-4113 • DOI: 10.26650/annales

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SCOPUS

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Erih Plus

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Annales de la Faculté de Droit d'Istanbul

Number: 76 • Year: 2025

E-ISSN: 2687-4113 • DOI: 10.26650/annales

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Publisher

Istanbul University Press

İstanbul Üniversitesi Merkez Kampüsü,
34452 Beyazıt, Fatih / İstanbul, Türkiye
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Authors bear responsibility for the content of their published articles.

The publication languages of the journal are French, English and German.

This is a scholarly, international, peer-reviewed and open-access journal published biannually in March and September.

Publication Type: Periodical

Annales de la Faculté de Droit d'Istanbul

Number: 76 • Year: 2025

E-ISSN: 2687-4113 • DOI: 10.26650/annales

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Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Dynamics of Swedish Political Constitutionalism: Towards a Transition to Legal Constitutionalism

Abdulkadir Yıldız^{*}

Abstract

Sweden has long been known as a country where constitutionalism was predominantly carried out through political processes. In these processes, the implementation and interpretation of constitutional norms and principles were mainly conducted through political institutions and mechanisms. Political processes, notably parliamentary decision-making and executive actions have increasingly overshadowed the traditional role of legal institutions in interpreting and enforcing constitutional principles. However, in recent decades, Swedish constitutionalism has undergone a significant transformation, evolving from a political approach to a legal one. The judiciary has increasingly taken on a greater role in interpreting and applying the constitution, while constitutional review mechanisms have been strengthened. This study delves into the dynamics of Swedish political constitutionalism and examines the potential for a shift towards legal constitutionalism. Through a thorough exploration of these dynamics, this study sheds light on the evolving landscape of constitutional governance in Sweden.

Keywords

Council on Legislation, judicial review, paradigm shift, parliamentary sovereignty, Swedish constitutionalism

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To cite this article: Yıldız A, "Dynamics of Swedish Political Constitutionalism: Towards a Transition to Legal Constitutionalism", (2025) 76 Annales de la Faculté de Droit d'Istanbul 1. <https://doi.org/10.26650/annaes.2025.76.0001>



Sweden, one of the world's most stable democracies, attributes its democratic strength more to its political constitution than to its legal one. The Parliament, courts, and administration primarily structure political life, a function typically associated with a traditional constitution.¹ Due to the principle of parliamentary supremacy, the relationship between the Parliament and the courts is of immense importance for understanding Swedish constitutionalism. This relationship is particularly evident in the context of constitutional review.

Sweden is widely recognised for its political stability, democratic governance, and strong social welfare system, all of which are deeply rooted in its constitutional framework. Over the centuries, Sweden has developed a political constitutionalism that emphasises democracy, the rule of law, and human rights. This framework is fundamental to the nation's governance and the protection of individual freedoms.

Central to Sweden's political system is a strong commitment to democratic principles. The country operates under a parliamentary democracy where Swedish Parliament (Riksdag) makes laws, determines the central budget and examines the work of the government. A political consensus and the practical style of politics, rooted in Sweden's political constitution, support this traditional functioning.

Sweden's political constitutionalism emphasizes democracy and demonstrates a strong dedication to the rule of law. The Committee on the Constitution scrutinises the ministers' performance; the Swedish National Audit Office scrutinises government agencies and enterprises and ensures their compliance with directives, rules, and regulations. Then, a very well-known ombudsman guarantees transparency in the public sector. The Swedish Constitution guarantees essential freedoms and mechanisms for judicial review to prevent government overreach. Furthermore, Sweden's commitment to gender equality, public access, social welfare, healthcare, education, and social security highlights the government's responsibility to empower the rights standards.

This study aims to explore how the constitutional review functions within Sweden's framework of political constitutionalism. It holds the potential to offer valuable insights into various aspects of the country's legal system. This exploration encompasses an in-depth analysis of the role played by the judiciary, the intricate workings of the legal processes, and the foundational principles that shape the landscape of constitutional governance in Sweden.

1 Mauro Zamboni, 'The Role of Constitution in Sweden: Its Normative Patchy Floor and Its (Half-Way) Journey From Political to Legal Constitutionalism' (November 15, 2022) Faculty of Law Stockholm University Research Paper Forthcoming <<http://dx.doi.org/10.2139/ssrn.4278050>> accessed 15 June 2024, 3.

The remainder of this article is organised as follows. The article begins with a summary of the constitutional evolution of Sweden. Second, the two types of constitutionalism are explained using Sweden as an example. Sweden's political constitutionalism and its very institution of the Council on Legislation described. Moreover, Swedish constitutional system was evaluated from the perspective of judicial review. Third, Swedish constitutionalism's possibility to shift from political to legal is discussed. The role of the judiciary in safeguarding constitutional principles and independence of judiciary in Swedish context are evaluated in this section. The last section concludes.

The essence of the constitutional institutions can be seen as a part of a constitutional background.² In Husa's words, 'past events influence future events.'³ Sweden has a rich history of constitutional governance that has evolved over centuries. The roots of Sweden's constitutional framework can be traced back to medieval times when the country began establishing its legal and administrative structures. The process of shaping constitutional governance took significant strides during the transition from an absolute monarchy to a constitutional monarchy.

Sweden's medieval period laid the groundwork for its legal and political institutions. The establishment of regional assemblies marked an early form of participatory governance. The King's Act (*Konungabalken*) contained rules on how to elect kings and high officials and is referred to as the first written Swedish constitution.⁴ Since 1435, the Riksdag has acted as a representative of the people thanks to the Engelbrekt rebellion.⁵ Different classes of people in the Riksdag had balancing power on the King.⁶ These classes were the Nobility, the Clergy, the Burghers, and the Peasants. The political struggle has historically been mainly between the nobility and the king.

The 17th and 18th centuries witnessed a transformation in Sweden's governance structure. After the death of King Gustav II Adolph (1611-1632), in 1634 the first Instrument of Government was introduced under Axel Oxenstierna's rule. This instrument of government has a more narrowly descriptive and administrative function. The next Instrument of Government, in 1719, explicitly designed to function as a political constitution in the modern sense, facilitated the transition to a constitutional monarchy upon its adoption. This document delineated the powers

2 Jaakko Husa, 'Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective' (2000) 48(3) *The American Journal of Comparative Law* 345, 345.

3 Jaakko Husa, 'Locking in Constitutionality Control in Finland' (2020) 16(2) *European Constitutional Law Review* 249, 251.

4 J. Nergelius, *Constitutional Law in Sweden* (2nd edn, Wolters Kluwer Press 2015) 14.

and limitations of the monarchy, laying the foundation for constitutional principles.⁷ Starting from this time, the Riksdag were to meet every three years and pass laws.⁸ It can be argued that contrary to the well-accepted theory, the Swedish Instrument of Government may be considered the first written constitution in history.⁹ The Freedom of Press Act and the Ombudsman were originally founded in 1766. The so-called Age of Freedom, from 1719 to 1772, was Sweden's governmental system centred by Parliament.¹⁰ The Riksdag of the Estates adopted the 1772 Instrument of Government, which strengthened the power of the King.¹¹

A significant milestone in Swedish constitutional history occurred with the adoption of the 1809 Instrument of Government. It marked a pivotal moment in Sweden's transition towards a more modern and democratic form of governance while still affecting constitutional thinking in Sweden.¹² This act codified the separation of powers and established a constitutional monarchy with parliamentary representation.¹³ Again, the four estates were still there, and remained until 1866, quite a long time for being in power in a not very democratic construction of a parliament in Europe. The 1809 Instrument of Government gives executive power to the King and the legislative power is shared between the King and Riksdag.

Parliament's power grew throughout the 19th century. In 1866, two chambers of parliament were created, and the second chamber was directly elected by the people. Then, the idea that the government should be responsible to the Parliament was established.¹⁴ One thing can simply see that some constitutional reforms could apply without amendment of the constitution. Thus, constitutional change in Sweden is more a constitutional evolution than a constitutional moment that also shows an example of Scandinavian/Swedish exceptionalism.¹⁵ In other words, constitutional amendments are not the product of a deep political crisis, but rather the confirmation of the status quo.¹⁶ Loughlin's 'relational constituent power', which has been termed 'open constituent power' by Greene, legitimates the status quo by supporting dynamic but slow incremental constitutional change.¹⁷

7 Bellquist (n 5) 860.

8 Ibid 860.

9 Nergelius (n 4) 14.

10 Bellquist (n 5) 860.

11 For previous Instruments of Government available at <The Instrument of Government–50 years | Sveriges riksdag (riksdagen.se)> accessed June 10, 2024.

12 Henrik Wenander, 'Administrative Constitutional Review in Sweden: Between Subordination and Independence' (2020) 26 *European Public Law* 987, 991.

13 Bull and Cameron (n 6) 603.

14 Ibid 604.

15 Manuel Maroto Calatayud, 'Criminal Policy Evaluation and Rationality in Legislative Procedure: The Example of Sweden' in AN Martín and MMM Romero (eds), *Towards a Rational Legislative Evaluation in Criminal Law* (Springer 2016) 140.

16 F. Valguarnera, 'Judicial Policymaking in Sweden: A Comparative Perspective' (2015) 61 *Scandinavian studies in law* 185, 188.

17 Alan Greene, 'Parliamentary Sovereignty and the Locus of Constituent Power in the United Kingdom' (2020) 18(4) *International Journal of Constitutional Law* 1166, 1191.

The twentieth century saw further reforms in Sweden's constitutional framework. Around 1919, Sweden established democracy with all its components.¹⁸ The Council on Legislation's (*Lagrådet*) establishment (1909), the introduction of universal suffrage (1919), and the new Instrument of Government (1974) have all been the traditional path for constitutional government in Sweden.¹⁹ Again, the Riksdag transitioned to a unicameral structure in 1971 without a constitutional amendment. The new constitution in 1974 recognised the existing unicameralism. In other words, the principle of parliamentary supremacy in Sweden is not seen as the constitution creating the parliament, but rather as the parliament exercising its inherent constituent power. Therefore, according to Ruotsi, constitutional transformation in Sweden is evolutionary, and the distinction between constituted and constituent powers remains superficial.²⁰

A new Instrument of Government (IG) in 1974 clarified the roles of the monarchy, government, and parliament. This document solidified Sweden's commitment to democratic values, individual rights²¹, and the rule of law. The constitution states that all public power emanates from the people. However, the principle of the sovereignty of the people is realised with the representative parliamentary democracy. So, as in the 1974 IG, Riksdag is the sole body of the powers. Because the Riksdag is the principal representative of the people.²²

Starting in the 1980s and accelerating in the 2000s, there has been a significant shift towards legal constitutionalism, marked by an enhanced role for the judiciary and the establishment of constitutional review processes. This transition has been influenced by Sweden's membership in the European Union, international human rights norms, especially the European Convention on Human Rights, and the evolving political and legal culture within the country.

What organ says the ultimate word on a constitutional issue? The answer the question is somehow clear in American constitutional discourse that 'the constitution means what the Supreme Court says it means.'²³ This argument depends on the

18 Celebrations organised by Riksdag: The Swedish Parliament celebrated democracy in 2018-2022 available at < The Swedish Parliament celebrated democracy in 2018-2022 | Sveriges riksdag (riksdagen.se) > accessed May 29, 2024.

19 Johannes Lindvall et al., 'Sweden's Parliamentary Democracy at 100' (2020) 73(3) *Parliamentary Affairs* 477, 477.

20 M. Ruotsi, 'A Doctrinal Approach to Unconstitutional Constitutional Amendments: Judicial Review of Constitutional Amendments in Sweden' (2024) 20(2) *European Constitutional Law Review* 247, 279.

21 However, the catalogue of rights and freedoms was very short in the new Instrument of Government of 1974 and was immediately subject to reform and amendments in the years to come.

22 Olle Nyman, 'Some Basic Features of Swedish Constitutional Law' in Stig Strömholm (eds), *An Introduction to Swedish Law* (Springer 1981) 55.

23 See rich literature on the topic: David A. Strauss, 'Does the Constitution Mean What It Says?' (2015) 129(1) *Harvard Law Review*; Richard H. Fallon 'Taking the Idea of Constitutional "Meaning" Seriously' (2015) 129(1) *Harvard Law Review*; Eric J. Segall, 'The Constitution Means What the Supreme Court Says It Means' (2016) 129(4) *Harvard Law Review*.

implementation method, such as textualism or an originalism, rather than by whom. Because there is almost great consensus on US legal understanding that interpretation of legal norm is the authority of judicial body. It is also a result of the separation of power understanding. On the other hand, political constitutionalism is based on the political institutions' decisiveness with its own mechanisms rather than courts. This theory defends democracy against judicial review.²⁴

Legal constitutionalism involves a greater role for courts in interpreting and enforcing the constitution, often involving judicial review where courts can invalidate legislation that contravenes constitutional norms. This constitutional control understands as modern democracy's main necessity which overlaps the democracy with constitutionalism.²⁵ Constitutional control/review is the legal power of a court or a court-like body to set aside legislation or statutes for incompatibility with the constitution/fundamental law.²⁶ This is a gift of the US Supreme Court's decision in *Marbury v. Madison*. Constitutional review in the courts is understood to be a basic feature of modern/legal constitutionalism.²⁷

There are different systems of review; on timing such as ex ante or ex post, and whether voiding the law such as concrete or abstract, finally regarding to court such as centralised or decentralised review. Contemporary constitutions generally regulate constitutional review whether it is applied by a constitutional court or by conferring the power of a generalist court.²⁸ This division of review can divide political and judicial itself that also meaningful for Sweden because of Council on Legislation. Swedish constitutional review's background also reflects the balancing in favour to judicial power from parliament centre democracy.

The main feature of the US model is decentralised review that any court can exercise the conformity of law to the constitution. Naturally, this model is a dispute/case-based constitutional review. Every court has the power to find ordinary legislation unconstitutional. In this model, various litigants can invoke the constitutionality of ordinary law.²⁹ In contrast to the US model, centralised constitutional review applies by specialised constitutional court. This centralised review finds its origins in Kelsen's theory of the hierarchy of norms. Reviewing of conformity needs hierarchy between positive law. In this regard, the superiority of law or fundamental law is first

24 Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007).

25 Pablo Castillo-Ortiz, 'The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions' (2020) 39 *Law and Philos* 617, 619.

26 Tom Ginsburg, 'The Global Spread of Constitutional Review' in GA Caldeira, RD Kelemen, and KE Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford Academic online edn 2009) 81.

27 Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (2nd edn, Edward Elgar, 2018) 135.

28 Tushnet (n 27) 50.

29 Ibid 58.

glance for constitutional review.³⁰ This theory also accumulated with Montesquieu's rigid separation of powers theory.³¹ This kind of review can include both abstract and concrete cases. (e.g., Turkish Constitution Article 150, 152). According to Montesquieu, the separation of powers provides the limitation of powers, and it is the main reflection of constitutionalism.³² In the constitutional discourse, the judicial limitation of legislation also divides on the timing of the review. In this regard, judicial review is the system where courts usually get the power to try enacted laws.³³ This system can be applicable both centralised and decentralised review. Another system of review is called judicial preview, which simply means that legislation is scrutinised before it comes into effect. It normally applies to centralised review system; however, this study shows that Nordic countries such as Sweden and Finland have decentralised system as well. That control of legislation can prefer to call legislative mechanism than judicial mechanism, both countries I mentioned. Because they apply within a parliament before enactment of the law. Husa made this division in organs criterion is whether the constitutionality review is practised in legal or non-legal organs.³⁴

The late 20th and beginning of the 21st century are the golden age of the judicial supremacy that shifted from parliamentary supremacy.³⁵ Hirschl coined the term “juristocracy” to describe the phenomenon of the judiciary gaining significant power and influence within a political system, particularly through constitutional review mechanisms introduced by newly adopted or revised constitutions during this era.³⁶ It seems the real path to establishment of a constitutional court/review for avoiding totalitarian regimes and their destructiveness.³⁷ Although different jurisdictions vest varying powers in their judiciaries, judicial review has become a crucial aspect of constitutional governance. Some countries empower their high courts or specialised constitutional courts with broad oversight, while others may have a more decentralised system involving multiple legal bodies. In the end, constitutional review by courts or legal constitutionalism is regarded as a part of liberal democracy itself.³⁸ Thus, conceptualising supremacy of constitutional principles as a real democracy means

30 Eivind Smith, ‘Judicial Review of Legislation’ in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart Publishing 2018) 114.

31 Tom Ginsburg and Mila Versteeg, ‘Why Do Countries Adopt Constitutional Review?’ (2014) 30(3) *The Journal of Law, Economics, and Organisation* 587, 591.

32 Sharon Krause, ‘The Spirit of Separate Powers in Montesquieu’ (2000) 62(2) *The Review of Politics* 231, 232-34.

33 T. Bull, ‘Judges without a Court—Judicial Preview in Sweden’ in Tom Campbell et al. (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford 2011) 392.

34 Husa (n 2) 349.

35 S. Yolcu, ‘East Nordic Model of Pre-Enactment Constitutional Review: Comparative Evidence from Finland and Sweden’ (2020) 26(2) *European Public Law* 505, 510.

36 Ran Hirschl, ‘The Political Origins of the New Constitutionalism’ (2004) 11(1) *Indiana Journal of Global Legal Studies* 71, 71.

37 Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford University Press 1989) 187.

38 Husa (n 3) 251.

more than majority rule.³⁹ It also increases the role of judges against the parliament in the law-making process.⁴⁰

On the other hand, this issue differentiates both the UK and Scandinavian understanding of constitutionalism. Political constitutionalism emphasises parliamentary sovereignty and the idea that constitutional issues should primarily be resolved through political processes rather than judicial intervention. This meant that constitutional questions were typically settled through political debate and decision-making processes within the legislative body. The term “weak constitutionalism” refers to a system where the reluctance to judicial review and the strengthening of legislative power through constitutional reforms lie in the hands of the legislatures.⁴¹ In such a system, it is the responsibility of the political actors to oversee and enforce the constitutional requirements.⁴²

Swedish parliamentarism has its own peculiarities such as quickly formed cabinets, cabinets that have usually survived until the next election, and government bills that are usually passed in parliament thanks to its negative parliamentarism system and consensus politics.⁴³ In Sweden, elements of negative parliamentarism are observable in two aspects: First, long-lived governments that can see the procedural dimension. Second, consensus politics is the substantive dimension. Although the Westminster model is commonly thought ‘an acquiescent legislature’, legislatures control the executive, which is the basic specialty of parliamentarism validated in Sweden.⁴⁴

The hierarchical ordering of legal norms is a prerequisite for constitutional review. However, in Sweden, constitutional documents⁴⁵ are deeply intertwined with constitutional practices, reflecting the political components of constitutionalism.⁴⁶ For instance Swedish public administration still tends to make use in their implementation of the law, of the statutory provisions, regulations, and administrative practices for their legal decisions rather fundamental laws.⁴⁷ Swedish courts traditionally played a minimal

39 Hirschl (n 36) 75.

40 Cappelletti (n 37) 57.

41 M. C. Melero, ‘Weak constitutionalism and the legal dimension of the constitution’ (2022) 11(3) *Global Constitutionalism* 494, 494.

42 Melero (n 41) 497.

43 Lindvall (n 19) 478.

44 M. Russell and P. Cowley, ‘The Policy Power of the Westminster Parliament: The “Parliamentary State” and the Empirical Evidence’ (2016) 29(1) *Governance: An International Journal of Policy, Administration, and Institutions* 121, 121.

45 The Swedish constitution comprises four constitutional acts: the Instrument of Government (Regeringsform-RF) of 1974; the Freedom of the Press Act (Tryckfrihetsförordningen) of 1949 (a history dating back to 1766); the Freedom of Speech Act (Yttrandefrihetsgrundlagen) of 1991, regulating media other than the printed media; and the Act of Succession of 1809, regulating the right to the throne.

46 Zamboni (n 1) 1.

47 Ibid 29.

role in constitutional interpretation. Sweden's own parliament mechanisms, such as the Council on Legislation and Constitutional Committee (*Konstitutionsutskottet*) and the traditional ombudsman system (*Justitieombudsmannen*), are all parts of political constitutionalism. These mechanisms serve the constitutional control and balance between the branches.

Although the IG is the central that also describes the state organs and functioning named as a traditional constitution, the Freedom of Press Act and the Freedom of Speech Act are look more superior rather IG which has perceived supplementary regulation.⁴⁸ These two Acts have constitutional status, as indicated in chapter 1:3 of the IG, but they enjoy the status of *lex specialis* in relation to the IG in matters of freedom of expression, as outlined in IG chapter 2:1 section 2. In particular, the IG mostly considered the technical regulations of the state and policy indicators rather than a superior law.⁴⁹ It finally depends on the meaning of the constitution in political life. In Sweden, the constitution does not understand the civil Bible and living document like in the US as it mentioned.⁵⁰ This understanding of the constitution is more similar to Aristotle's understanding of the constitution (*politeia*) rather than the modern liberal meaning of the constitution.⁵¹

Supporting this constitutionalism also depends on the stableness of political circumstances over the past decades that there has been no necessity to establish a constitutional court.⁵² Less tension on values, in other words rather homogenous on political issues as Zamboni's words, 'gives a floor to decide by political organs rather courts' as a last word of constitution.⁵³ The tension between the legal dimension of constitutionalism and the political dimension of constitutionalism is resolved not by the classical judicial hegemonic window.⁵⁴ In Swedish legal culture, the establishment of a constitutional court was viewed as problematic because it would grant political power to a non-political body.⁵⁵ In other words, centralised constitutional review is not preferable in Sweden.

On the other hand, there is non-legal constitutionality control by the Council on Legislation. The significant work of the Council on Legislation is the judicial preview of law proposals. The Council on Legislation generally defined a judicial

48 Ibid 22.

49 Barry Holmström, 'The Judicialization of Politics in Sweden' (1994) 15(2) *International Political Science Review* 153, 154; Zamboni (n 1) 13.

50 Valguarnera (n 16) 188, 208.

51 Aristoteles, *Politika* transl. by Furkan Akderin (3rd edn, Say 2017) 99.

52 Veli-Pekka Hautamäki, 'Reasons for Saying: No Thanks! Analysing the Discussion about the Necessity of a Constitutional Court in Sweden and Finland' (2006) 10(1) *Electronic Journal of Comparative Law* 1, 10.

53 Zamboni (n 1) 25.

54 The separation of those dimensions by Melero refers to first regulatory and superiority and latter is appropriate design of institutional arrangements that provide the stableness depends on itself. See Melero (n 41) 497.

55 Hautamäki (n 52) 10.

body in the legal literature.⁵⁶ Yolcu, defines the Council on Legislation's control as a pre-enactment control, not a review. Because this is held in Parliament, it's part of the legislative process though review is judicial process such as French Conseil d'Etat's traditional review.⁵⁷ Its function is, however, defined in 8:20-22 of the IG as part of the legislation.⁵⁸ It described popular constitutionalism that theory reconciling parliamentary supremacy with the constitutional supremacy.⁵⁹

According to 8:20 of the IG, the Council on Legislation, which consists of justices or former justices from the two supreme courts, shall pronounce opinions on draft legislation. In a special law on the Council, the composition of the Council is further specified. To simplify somewhat, the law stipulates that the Council should normally consist of six persons, of whom four should be acting judges of the Supreme Courts. According to Act (2003:333) on the Council on Legislation, it consists of a minimum of one and a maximum of five departments (Section 3). Considering the workload, the Government decides how many departments the Council on Legislation is to consist of and during what periods of time the departments are to serve (Section 7). The Supreme Court and the Supreme Administrative Court appoint justices of each court to be members of the Council on Legislation. If necessary, these courts appoint retired justices to be members of the Council on Legislation (Section 8). A Chamber shall consist of three members (Section 4).

The Council on Legislation's examining process starts after the inquiry commission's role. A draft bill is sent to the Council on Legislation after receiving comments from the relevant institutions and organisations.⁶⁰ In Swedish political culture, unrepresented groups and minorities still have the chance to influence politics thanks to this inquiry commission process.⁶¹ Such elements serve as a social peace

In accordance with IG 8:22, the Council's scrutiny of the draft bill is focused on; (1) how the bill relates to the constitution and the legal order in general, (2) the relationship between the provisions of the proposal, (3) how the proposal relates to the requirements of legal certainty, (4) if the proposal is designed in such a way that the law can be assumed to meet the stated purposes, and (5) problems that may arise in applying the act of law.

Bull and Cameron identified two tasks of the Council on Legislation: first, quality of the law, and second, constitutionality of law.⁶² Before the Riksdag makes decisions on certain types of laws, it must seek the opinion of the Council on Legislation, as mandated by Chapter 8, Article 21 of the IG. These include laws pertaining to the following: fundamental rights regarding freedom of the press or expression, restrictions on access to official documents; legislation outlined in Chapter 2, Articles 14 to 16, 20, or 25; laws concerning the automatic processing of personal data; matters of local taxation or obligations of local authorities; provisions under Article 2, paragraph one, points 1 or 2, or chapters 11 or 12; amendments or repeal of any laws specified above.

The positive aspect of this review is that, in principle, no laws that conflict with the national constitution can enter into force. This process also provides trust to the parliament. One can say because of the political constitutionalism Swedish courts has been reluctant to review constitutionality.⁶⁵ Parliament has already gained that trust within its over two hundred years evolutionary, consensual implementation of democracy. Therefore, there has been no desire from courts to challenge Parliament's acts.⁶⁶ With its own conformity mechanisms, such as the Parliamentary Committee on the Constitution and the Council on Legislation, a balance between democracy and constitutionalism, called constitutional democracy, has been achieved.⁶⁷ The Council on Legislation's functioning, like the Finland Constitutional Committee in Parliament, is also a factor not to need centralised and abstract judicial review of constitutionality.⁶⁸ The practice of judicial review has since played a pivotal role in ensuring the compatibility of legislation with Sweden's constitutional norms. The Council on Legislation's opinions on draft law are effective on the legislative process.

The Council on Legislation's preview function provides the constitutionality before the legislation comes into force as well as it also helps to courts while they are reviewing the constitutionality if the law coming into force against the Council's interpretation.⁶⁹ Traditionally, Swedish courts have not been actively involved in reviewing the constitutionality of laws, which largely explains the key role played by the Council on Legislation in this area.⁷⁰ While the Council's arguments are often brief and political, its main objective is to ensure that the legislative process remains within constitutional bounds.⁷¹ In practice, many draft laws that are likely to infringe upon constitutional rights are withdrawn after receiving comments from the Council on Legislation. Additionally, the procedural transparency of ex ante constitutional review contributes to accountability and liberal democracy.⁷²

Sweden's constitutional control system primarily focuses on the pre-legislative phase, which includes the work of the Committee on Inquiry, the Committee on the Constitution,⁷³ and the abstract review conducted by the Council on Legislation.⁷⁴

65 Rosalind Dixon, 'The forms, functions, and varieties of weak(ened) judicial review' (2019) 17(3) *International Journal of Constitutional Law* 904, 905; Bull and Cameron (n 6) 613.

66 Husa (n 2) 374.

67 J. Nergelius, 'Judicial Review in Swedish Law—A Critical Analysis', (2009) 27(2) *Nordisk Tidsskrift for Menneskerettigheter* 142, 142.

68 J. Lavapuro et al., 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review' (2011) 9(2) *International Journal of Constitutional Law* 505, 517-18.

69 Bull and Cameron (n 62) 293.

70 Nergelius (n 4) 117.

71 Dahlberg (n 58) 2, 14.

72 Dahlberg (n 58) 29.

73 The Parliamentary Committee on the Constitution exercised the draft laws to involve constitutional rights and the Committee's evaluation on constitutionality functioning kind of preview. See Bull and Cameron (n 6) 608.

74 Calatayud (n 15) 154.

Although this system seems complex and slow, these elements provide both a pre-enactment phase constitutionality review and maximising the quality of the law.

Political constitutionalism mostly moves from the common ground or the common good of the people, which is operated by institutions. Equality and fairness are the main pillars of individuals' attendance to define public policy.⁷⁵ But legal constitutionalism moves from the principle of limitation of political power by the constitution itself. The complex point is here that who is going to reveal what the constitution says. Legal constitutionalists argue that a rights-based judicial review allows citizens to contest public decisions and can reasonably prove that their rights have been violated.⁷⁶ So to say what the constitution means is court authority. In other words, legal constitutionalists support judicial review to validate the rule of law that depends on the constitution.

Tushnet separated the constitutional review as a strong and a weak form of review.⁷⁷ Waldron, similarly, describing strong-form review courts have the authority to decline to apply a statute in a particular case.⁷⁸ In contrast, weak judicial review means courts have no authority to not apply a statute even if it contradicts the fundamental law. It reflects the political constitutionalism that a weak-form judicial review can see legitimate.⁷⁹ In fact, Swedish constitution regulates the judicial power as an authority to courts not to apply a law if it is contradicted with the superior one. However, the judiciary/court-based control plays a minor role in terms of safeguarding the constitutionality in Sweden. Thus, some scholars separated Swedish constitutionalism from traditional constitutionalism.⁸⁰ It looks Larry Kramer's popular constitutionalism approach that the final interpretive of the constitution is the people itself and because of this, whole state branches have equal authority to interpret the constitution with their respected work.⁸¹ According to Kramer, judicial review is not a pure legal process but a political-legal process in its nature.⁸² This popular constitutionalism approach is very compatible with Swedish understanding of constitutionalism.⁸³

75 Melero (n 41) 498.

76 Ibid 501.

77 Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 Michigan Law Review.

78 Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346, 1354-55.

79 Melero criticises political constitutionalism and argues that the rights-based judicial review functions to individuals equally challenge the acts of public authorities as a way of empowering people, such as parliamentary politics -or political constitutionalism's argument. – In other words, people challenge—with judicial review—the political decisions if politicians do not give enough response to their opinions. See Melero (n 41) 504.

80 Lavapuro et al. (n 68) 508.

81 Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford 2004) 58.

82 Kramer (n 81) 63.

83 On the other hand, Alon Harel and Adam Shinar challenged Kramer's popular constitutionalism by deviating from the tools

The main factor of weak judicial review is the central position of the Parliament. Sweden is not part of the US-style powerful judicial thought system nor the post-fascist system such as Germany, Italy, or Spain. The US system of constitutional review finds its normative from the American Revolution and founding principles. On the other hand, the Kelsenian model in Western Europe reflects that transforming parliamentary supremacy to judicial supremacy depends on WWII's trauma.⁸⁴ However, Sweden's distinct history does not reflect this transformation because Parliament has never been a tyrannic power to violate rights.

Understanding the Swedish case, the weakness of the constitutional review depends on the constitutional principle of popular sovereignty.⁸⁵ The democratic legitimacy of the elected representative of the legislative's authority should not be override by courts having non-elected judges.⁸⁶ Although a powerful democratic tradition and autonomous local authorities provide protection of individual rights, judicial restraint is deemed necessary also approaching this popular democracy.⁸⁷ The majority rule as a fairly homogeneous and state-centred understanding of community values erodes the general acceptability of judicial review.⁸⁸ As Tushnet observed, courts are rarely annulling the laws where a single party dominated systems for an extended period.⁸⁹ The long-term holding power of the Social Democrats has established that kind of approach in Sweden.

The idea of majority rule by Parliament as more 'democratic' than judicial review has prevailed.⁹⁰ In other words, the main mechanism for protecting rights has been the legislative process.⁹¹ The legislator's own opinions (*travaux préparatoires*) are very valid rather than challenging its conformity to superior norms/ideas.⁹² 'What is right is so because it is willed by the legislator'⁹³ summarises Scandinavian legal realism.⁹⁴ Conversely, Harel and Shinar argued that the ultimate justification of a weak judicial review depends on the right to a hearing.⁹⁵

of democracy, which is most popularly called democratic erosion, such as court packing. See Alon Harel and Adam Shinar, 'Between judicial and legislative supremacy: A cautious defence of constrained judicial review' 2012 10(4) *International Journal of Constitutional Law* 950, 956.

84 Ginsburg (n 26) 85.

85 I. Nguyễn Duy, 'New Trends in Scandinavian Constitutional Review' (2015) 61 *Scandinavian Studies in Law* 11, 19.

86 Harel and Shinar (n 83) 963.

87 J. Nergelius, 'The Constitution of Sweden and European Influences: The Changing Balance Between Democratic and Judicial Power' in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) 315.

88 Lavapuro et al. (n 68) 507.

89 Tushnet (n 27) 53.

90 Smith (n 30) 120.

91 Bull and Cameron (n 62) 279.

92 Husa (n 2) 380.

93 Jes Bjarup, 'The Philosophy of Scandinavian Legal Realism' (2005) 18(1) *Ratio Juris* 1, 6.

94 Ghavanini, A. W., et al., 'Institutions that define the policymaking role of courts: A comparative analysis of the supreme courts of Scandinavia' (2023) 21(3) *International Journal of Constitutional Law* 770, 777.

95 Harel and Shinar (n 83) 974.

Normative hierarchy as a constitutionalism's main reflection cannot easily be seen in Swedish law though 11:14 of the IG which conceptualise judicial review. The Swedish courts' reasoning accordance with to *travaux préparatoires* which covers the general purposes of the law, reflects the judicial power under the parliament. At some points, it confirms Montesquieu's judge profile as 'mouth of the legislation.'⁹⁶ Moreover, Swedish courts extreme respect for the will of the legislature known judges use their discretion less and courts wait Parliament's reaction when new solutions are needed.⁹⁷ It surely restricts the judges' interpretation degree of creativity and discretion which positioned them law-making process beside the parliament.⁹⁸ The doctrine of popular sovereignty in Sweden affiliated with the character of the parliamentary sovereignty like in British constitutionalism.⁹⁹

The other reason is the different separation of powers paralleled with weak judicial review in Sweden. In a traditional separation of powers scheme or *tripartite system*, political power is distributed among a parliament as a legislative body, the executive as a government including the head of state and public administration, and finally courts that enjoy judicial power. As mentioned above, the judiciary has not been considered a third power in Sweden. Parliamentarism and parliament's hegemony is the political defining feature of the Swedish constitutionalism.¹⁰⁰

On the other hand, the Swedish administrative bodies also enjoy significantly greater autonomy, serving as a constraint within the executive power.¹⁰¹ With its extensive autonomy on administrative authority, the executive branch can understand horizontal separation within the executive. Even though the 2010 amendments of the IG reflect the evolution to the traditional separation of powers begun with the title of both the chapter and article; historical basics of the popular sovereignty understanding of the constitution are still saved.¹⁰² Despite the written presence of judicial review, courts are willing to maintain their role as administrators of the law rather than participants of law-making. It also depends on the thought that judges serve as an extension of the public administration.¹⁰³ In other words, the judges, including those on the highest benches, tend to operate not as third parties but as part of the executive body.

The judicial adjudication process within an exceptional separation of powers theme is a factor to understand Swedish case. Rigid separation strengthens judges' power among the legislation and executive. However, the judiciary as a part of administration, get courts integral part of the executive than exercising mechanism upon other powers. There are surely historical background and constitutional reasons to this structure.¹⁰⁵ Constitutional institutions such as constitutional courts are part of both the legal and political culture. Not only Sweden but also the Scandinavian political and legal culture cautious justices and deference to exercise elected branches.¹⁰⁶

In Sweden, judicial review began to be considered as a power of the courts in the 1930s, until it was amended as a part of the current constitution in 1979, and judicial review had not been written in Swedish law. However, the existence of judicial review has been accepted since the 1964 decision of the Supreme Court.¹⁰⁷ Courts and other public bodies' judicial review authority was clearly mentioned with the constitutional amendment in 1979. However, this authority could apply whether the conflict was manifest.¹⁰⁸ Finally, in 2010, judicial review regulated such no need 'manifest conflict' anymore. This regulation surely shows some changes in the traditional constitutional structure. On the other hand, authorisation of constitutional review does not mean that it will be effectively exercised.¹⁰⁹

Under the Swedish Constitution, there are special regulations 11:14/12:10, which control of the constitutionality of the laws is legally based on: 'If a court/a public body finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied.' This diffuse system of review allows us to question the constitutionality of ordinary laws. After complaints have been lodged, the court suspends the act or norm in question until further deliberation is made. The abovementioned constitutional provision empowers courts to not apply laws (or statutes) that conflict with fundamental law or other superior statutes.

105 Zamboni (n 103) 688.

106 Ghavanini, et al. (n 94) 771.

107 Nergelius (n 4) 119.

108 See the former version of Chapter 11:14 of the Instrument of Government: "If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision may not be applied. If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest."

109 Tushnet (n 27) 50.

The Instrument of Government Chapter 2:19 provides that ‘no act of law or other provision may be adopted’, which conflicts with the European Convention on Human Rights. If any regulation conflicts with the European Convention on Human Rights or its interpretation by the European Court of Human Rights, the court has a duty not to apply that norm instead of the Convention.¹¹⁰ It means, in the substantive phase, the courts’ concrete review covers the European Convention on Human Rights beside the Constitution.

Sweden has a three-tier judicial system, and both civil/criminal and administrative instances may review legislation according to the constitutional clauses within their respective fields of action.¹¹¹ The review by the courts exercised can be either formal or material in nature. According to Nergelius, the wording of Chapter 11:14 is not clear on whether the courts are obliged to review without parties’ arguments.¹¹² The courts have the authority to exercise the laws’ conformity with the constitution without raising any argument. Because the concrete review normally depends on the courts’ evaluation of the constitutional provisions.

Sweden’s ex-post judicial review is advantageous on the coherence of legal order as concrete application that tension given rise afterwards enforcing the law.¹¹³ Besides, decentralised review process is much shorter than the separate special court approach because any court can determine the issue without sending it to a constitutional court. If the norm is deemed unconstitutional, it is set aside or left unapplied. The contested provision cannot be declared null, so the result of setting aside is ‘interpartes’ effect.¹¹⁴ In other words, the contested provision remains valid, so there is a possibility of different ruling that disadvantageous side of the method.

Although striking down the law is very rare, effects such as European Court of Human Rights and EU, Sweden’s traditional system has in process that can define judicialization of politics in Sweden.¹¹⁵ Swedish courts attempt as a real third power like in United Kingdom, Australia and New Zealand where the fundamental principle of supremacy of parliament is challenged by courts in terms of protecting rights.¹¹⁶ At the same time, social change and so on represented political parties in Parliament reveals the necessity to evolve to traditional judicial protection for democratic/political control of legislative.¹¹⁷ For instance, the less stable and vulnerable coalition

110 Bull and Cameron (n 6) 626.

111 Smith (n 30) 116.

112 Nergelius (n 87) 333.

113 See Duy (n 85) 17.

114 Ibid 18.

115 Holmström (n 49) 153.

116 Dahlberg (n 58) 29-30. See the changing structure of parliamentary sovereignty in the common law tradition Goldsworthy (n 99) 2.

117 Valguarnera (n 16) 210. See also Bergman (n 64) 616.

governments' deficient and careless attitude towards the Council on Legislation's opinions create new threats that should prevent judicial checks.¹¹⁸

Recent decisions of the Supreme Court (*Högsta Domstolen*) and Supreme Administrative Court (*Högsta Förvaltningsdomstolen*) show that judicial power is now deciding policymaking in a more decisive way.¹¹⁹ As Ghavanini and others pointed out, not just exogenous factors but also endogenous dynamics such as institutional involvement and transforming of judges interpretation approaches push the Swedish judiciary to become more autonomous.¹²⁰ If present developments continue, there will be a stronger profile for the constitutionality review by courts. Judicial bodies have a greater tendency to interpret from a constitutional point of view. One can say that the slow but constantly constitutionalising phase can be seen in the Swedish legal system.¹²¹

From a legal standpoint, judicial review ensures impartiality and independence, safeguarding this delicate process from the influences of typical political pressures.¹²²

The functioning of the judiciary in Sweden generally bears the traces and influences of political constitutionalism. Employment as a judge is a government employment in Sweden.¹²³ The government appoints judges. Although, since 2009, the government appoints judges by recommendation of the Judicial Council (*Domarnämnden*), there is still a question on the independence of the procedure.¹²⁴ The Council administers all matters regarding the appointment of permanent judges and submits the proposals of judges to the Government.

Bell argues that if judicial functioning is conceived as a public service such as Sweden rather than a state authority, then demands for accountability for the system grow.¹²⁵ Court control is justified in terms of its judicial independence rather than its political mechanisms.¹²⁶ Constitutional provisions, especially 11:3-11:7, are constitutional blocks on the government influencing the courts:¹²⁷ 'Neither the Riksdag, nor a public authority, may determine how a court of law shall adjudicate an individual case; no judicial function may be performed by the Riksdag; a legal

118 Bull and Cameron (n 6) 621.

119 Ghavanini, et al. (n 94) 771.

120 Ghavanini, et al. (n 94) 794.

121 Zamboni (n 1) 30.

122 Melero (n 41) 501.

123 See official website of 'The Judicial Council' available at <Application for appointment as a judge - Domarnämnden (domstol.se)> accessed June 10, 2024.

124 Bull and Cameron (n 6) 632.

125 John Bell, 'Sweden's Contribution to Governance of the Judiciary' (2007) *Scandinavian studies in law* 83, 86.

126 See Husa (n 2) 349.

127 Zamboni (n 103) 681; Ghavanini, et al. (n 94) 784.

dispute between individuals may not be settled by an authority other than a court of law except in accordance with law.’ On the other hand, the main guarantee on this issue is Sweden’s exceptional political/legal culture that any attempt to influence the judiciary would view as unacceptable. Supporting with professionalism and right to open access to documents provide independence of judiciary in Sweden though differ from traditional continental Europe approach.¹²⁸ The other block on the government’s influence is *travaux préparatoires*, the courts’ interpretation of law covered by legislative purpose.¹²⁹ The courts are the enforcers of Riksdag policies; they are even less than the mouth that pronounces the words of the law. It may raise a question on legislation and judiciary separation, while the legal culture of the judiciary has traditionally been deference to the legislator.¹³⁰ On the other hand, it is known that the independence of the judiciary is more than the separation of powers.

In fact, the IG’s separation of powers scheme and practising of courts are different from the traditional scheme.¹³¹ The judges sitting in the Swedish courts tend to consider themselves and operate as civil servants. This judicial self-restraint refers to judges applying the law just technically rather than the activist law-making process.¹³² Although the civil service tends to be independent from the government, from an institutional perspective, the Swedish National Court Administration (*Sveriges Domstolar*) is an agency under the government.¹³³ Because of this criticism, the new proposal to change the Instrument of Government stipulates that the court administration agency is composed of most current or former permanent judges.¹³⁴

The participation of lay judges (*nämndemän*) in the Swedish court system is another exceptional aspect of the Swedish legal system, which can be seen as part of political constitutionalism. From the very beginning of the Swedish history, 13th century, to today, lay judges have always taken part in the courts.¹³⁵ Political parties elect the lay judges. This procedure has been criticised since membership in a political party risks impartial and apolitical service in court.¹³⁶ However, the role of lay judges in the courts is the democratic justification of transparency and representation.¹³⁷

128 Bull and Cameron (n 62) 291.

129 Bull and Cameron (n 62) 291.

130 Wenander (n 12) 992.

131 Wenander (n 12) 992.

132 Ervo (n 97) 100.

133 Zamboni (n 103) 681.

134 M. Ruotsi, ‘Defending Democracy: Sweden’s Constitutional Reform Proposals in Response to Democratic Backsliding in Europe’ available at <Defending Democracy: Sweden’s Constitutional Reform Proposals in Response to Democratic Backsliding in Europe | ConstitutionNet > accessed 11 June 2024.

135 Christian Diesen, ‘Lay judges in Sweden. A short introduction’ (2001) 72(1-2) *Revue internationale de droit penal* 313, 313.

136 Diesen (n 135) 314. See a report on this discussion: Shamena Anwar, et al. ‘Politics in the Courtroom: Political Ideology and Jury Decision Making’ (2019) 17(3) *Journal of the European Economic Association* 834.

137 Sandra Jansson, *The (Un)Political Lay Judge System in Sweden* (student publication for master’s degree 2021) 1.

On the one hand, the well-known backsliding of democracy in Europe tends Sweden to reform and strengthen its judicial independence. Because Sweden is not an exception for far-right success which will not tend opinions of the Council on Legislation.¹³⁸ On the other hand, that erosion is mostly seen in the countries where legal constitutionalism has been effective.¹³⁹ However, at the end of the day, it is inevitable that some measures need to be taken in this regard. For instance, the last proposal stipulates that those permanent judges can only be removed from office upon reaching a statutory retirement age and the Supreme Court/Supreme Administrative Court composition should not have more than 20 justices as well¹⁴⁰. Thus, the proposal's purpose is to prevent court packing.

Although Sweden has a written constitution that regulates judicial review, its constitutional governance embodies the characteristics of political constitutionalism. It can be understood from the development of democracy in Sweden generally but especially accepting constitutionality control before amendment of the Instrument of Government, which has regulated constitutional review. From this point of view, Swedish democracy carried the 'constitutional precedents' as a part of political constitutionalism.

Sweden's constitutional control system mainly focuses on the pre-legislative phase, practising by the Council on Legislation. Although it shows some complexities on functioning, whether legislative or judicial process etc., the Council still serves as a constitutionality guard within its political culture.

On the other hand, in the last 20 years, Swedish constitutional law has transformed from a political weighted position to judicialization. Thus, still strong definitiveness of the Parliament, courts are on the path of separate power to adjudicate law. So, this is the way that the traditional separation of powers scheme as well. But it does not mean Swedish evolution concluded with the exact separation of powers theme. It's evolution, reasons behind it, and whether completely conclude as traditional scheme will see within future years. But one thing can say, if traditional institutions do not renew themselves, rising populist and extremist politics can be a threat to the liberal democracy more than today. Swedish and other Nordic countries have that chance to save liberal democracy with the courts' hand this time, that many other countries

138 Anders Backlund, 'Government Formation and the Radical Right: A Swedish Exception?' (2023) 58 *Government and Opposition* 882, 894.

139 Conversely, John Hart Ely represents judicial review to prevent democratic erosion such as majoritarian authoritarianism or autocratic leadership. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 103. Stephen Gardbaum criticises Ely's theory and introduces 'comparative political process theory' to better understand democratic processes. See Stephen Gardbaum, 'Comparative political process theory (2020) 18(4) *International Journal of Constitutional Law* 1429, 1430-34. Other studies of Gardbaum see Stephen Gardbaum, 'comparative political process theory II' (2024) *Global Constitutionalism*.

140 Ruotsi (n 134).

succeed after WWII. The newly delighted Swedish judiciary has more chance to accomplish this goal.

This paper has sought to shed light on Sweden's exceptional political constitutionalism. After the introduction section, Swedish constitutional developments were revealed. In the first section, the historical background of Swedish constitutional law is briefly explained. Constitutional governance phased on his way in the evolutionary phase in Sweden. Second, based on the example of Sweden, political and legal constitutionalism are distinguished from each other. In this section, the importance of constitutional review for protecting freedoms, its types and reasons and the Council on Legislation are explained in detail. Moreover, the weakness of judicial power in Sweden as a part of political constitutionalism, elaborated. The traditionally weak conceptual distinction between courts and administrative authorities, a strong form of popular sovereignty, the evolutionary structure of democracy, and historical and political peculiarities make the Swedish system for constitutional review highly decentralised. Third, the possibility to shift from political to legal constitutionalism is evaluated from the judicial body itself. Judicial review by courts and the independence of the courts are revealed. As a traditional and well-functioning democracy, Swedish system reflects less stress on the judiciary among independence. However, the global effects of populism and some general necessities of the transforming the constitutional structure depend on such EU, also reveals to strengthening the independence of the judiciary. The new constitutional proposal already shows this necessity.

The conformity review with the constitution in Sweden includes specific aspects from various angles. It does so by examining judicial preview as exercised by the Council on Legislation and judicial review as exercised by the courts. Moreover, administrative authorities have the authority to assess the conformity of national legislation with superior law. Swedish type of constitutional review system is decentralised constitutional review system. On the other hand, constitutionality control covers both the review and preview. This preview mechanism can conclude political though examination may be substantively legal. The establishment of the Council on Legislation and the courts' authority on laws examining the conformity of superior law, upholding constitutional principles.

In terms of both the legislative process and the constitutionality of that process, Swedish democracy is finding less excitement for legal scholars of comparative constitutional law. However, it provides important assumptions on constitutional governance. In this regard, Swedish exceptionalism of constitutional governance is briefly discussed in this article in terms of political constitutionalism. With this constitutionalism, constitutional review and governance can be seen from different perspectives thanks to exceptional conceptions and institutions such as the Council on Legislation.

Externally peer-reviewed.

The author has no conflict of interest to declare.

This study financially supported by Scientific and Technological Research Council of Türkiye (TÜBİTAK).

I would like to thank Carl Fredrik Bergström and Caroline Taube for their extraordinary hospitality during my stay at Uppsala University School of Law. I can also express my gratitude to distinguish professors at Uppsala University School of Law, especially Iain Cameron for his valuable comments and suggestions. I would also like to thank the Scientific and Technological Research Council of Türkiye (TÜBİTAK) for financial support during this study.

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Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

The Applicable Law to Proprietary Issues on Digital Assets considering Recent Developments: *Lex rei Sitae* or Not?

Ekin Ömeroğlu*

Abstract

The legal nature of digital assets and the applicable law for digital assets have been debated in recent years in many legal systems, including Turkish law. The inability to reach a definite conclusion on evaluating the legal nature of digital assets in Turkish law makes it difficult to determine the applicable law to proprietary issues on digital assets in private international law. In the context of conflict of laws rules, determining the applicable law for rights over digital assets depends more on the medium in which the asset is recorded than its function. National legislators and legal institutions are seeking new connecting factors beyond the traditional *lex rei sitae* principle, given that digital assets predominantly exist in electronic environments. Therefore, our study aims to address how to bridge the gap in Turkish private international law concerning the applicable law for digital asset proprietary issues by drawing on comparative law developments.

Keywords

Digital assets, Blockchain, Proprietary, Applicable Law, *Lex rei sitae*

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To cite this article: Ömeroğlu E, "The Applicable Law to Proprietary Issues on Digital Assets considering Recent Developments: *Lex rei Sitae* or Not?", (2025) 76 Annales de la Faculté de Droit d'Istanbul 27. <https://doi.org/10.26650/annaes.2025.76.0002>



Digital assets undoubtedly present new challenges for private international law. Blockchain technology and the values called “tokens” produced in chains established using this technology have emerged as a new medium of exchange and financial investment instrument that the states have not regulated in the past few years. Digital assets, and especially crypto assets, transfer the value from one point of the world to another, directly and without any cost, without an intermediary institution. Nowadays, a large part of currency token trading occurs online with cryptobrokers or via cryptoexchanges. Such transactions often have a cross-border connection and thus raise the conflict of law question regarding which law will apply to the various legal relationships. To determine the applicable law for disputes involving a foreign element, the characterisation of the connecting subject matter is necessary. When discussing proprietary rights over digital assets, characterising such disputes in terms of private international law is not easy. This is because the rules regarding property ownership are designed with physical movable and immovable items in mind rather than digital assets. Therefore, this paper will first briefly address digital assets and then discuss how disputes regarding digital assets and proprietary rights should be characterised.

Disputes relating to digital assets may arise from a debt relationship or may relate to the proprietary issues over the digital asset. In this study, we will discuss the law applicable to the disputes arising from proprietary rights over digital assets. While examining the applicable law regarding proprietary issues over digital assets, we will elaborate on national legal systems and the soft law instruments of legal institutions that have regulated provisions on private international law aspects like the question of who has digital assets and according to which rules it can be disposed of with third party effect.

In some provisions regulated by national laws and soft law instruments, the party autonomy principle and the more closely connected law have been adopted as connecting factors for determining the applicable law regarding proprietary issues over digital assets. For this reason, this study will also address concepts of the more closely connected law and the principle of party autonomy, which is accepted or proposed as the connecting factor in determining the applicable law for ownership rights over digital assets in some of these regulations.

Disputes regarding digital assets that are claimed to have a foreign element due to their nature fall within the scope of private international law¹. To determine the

¹ F. Guillaume, ‘Aspects of Private International Law Related to Blockchain Transactions’ in Daniel Kraus, Thierry Obrist and Olivier Hari (eds), *Blockchains, Smart Contracts, Decentralised Autonomous Organisations and the Law* (Edwards

conflict of law rule that will ascertain the applicable law in private international law, it is first necessary to characterise the legal relationship in question². Thus, to determine the applicable law in disputes concerning proprietary rights over digital assets, it is essential first to define what digital assets are in general terms.

Digital asset classification represents a challenge not only for substantive law but also for the conflict of laws. Generally, digital assets are digital value units that are stored in a mostly decentralised booking system and transferred as well as used as the basis for real security³. The characterisation of the connecting subject matter is mostly conducted according to the *lex fori*⁴. However, Turkish law does not define digital assets. In addition, UNIDROIT Digital Assets and Private Law Principles⁵ and ELI Principles on the Use of Digital Assets as Security⁶ contain a definition for digital assets. According to the ELI Principles, a digital asset represents value that can be subject to rights of control, use, and enjoyment and can be transferred from one person to another. It meets the criteria of being electronically stored, displayed, and managed on or through a virtual platform or database, including the dematerialised or representative form of assets traded in the real world, whether held directly or through an intermediary account. In line with the definition provided in Article 2(2) of the UNIDROIT Principles, a digital asset is an electronic record that is capable of being subject to control. In addition, according to the explanation provided in the Commentary on the UNIDROIT Principles, digital assets are defined as data created, recorded, stored, and transferable in a digital environment, over which parties have control, specifically including crypto assets such as Bitcoin⁷.

Blockchains, tokens, gaming accounts, and assets that can be purchased in the metaverse can be cited as examples of digital assets as Uni 0 lity the explan

recognised as intangible property⁹. It has been stated that, like English law, German law may also recognise cryptocurrencies as intangible property¹⁰. As discussed, many times in the Turkish law doctrine¹¹, cryptoassets are not considered money or goods. Under Turkish law, the generally accepted view is that cryptocurrencies have the value of intangible assets as well¹². The “Regulation on the Disuse of Crypto Assets in Payments¹³” includes the first provision regarding cryptoassets in Turkish law. According to Article 3(1) of the Regulation, “*crypto asset refers to intangible assets that are created virtually using distributed ledger technology or a similar technology and distributed via digital networks, but are not classed as fiat money, deposit money, electronic money, payment instrument, securities, or other capital market instruments.*”

Crypto assets, which are a type of digital assets, can be defined in simple terms. They emerge as a virtual currency created by the method of cryptography and are not subject to the management and control of a central authority¹⁴. The first cryptocurrency in the world is Bitcoin, which emerged in 2008 with an article published by Satoshi Nakamoto¹⁵. Bitcoin is transferred through a technology called blockchain, and all users included in the Bitcoin network can have the information contained therein¹⁶.

On the other hand, different approaches have been adopted worldwide regarding the legal nature of cryptocurrencies. In some legal systems, such as Japan and Switzerland, cryptocurrencies are accepted as a legal means of payment, while in Brazilian law, cryptocurrencies are considered commodities¹⁷.

- 9 Andrew Dickinson, ‘Cryptocurrencies and the Conflict of Laws’ in David Fox and Sarah Green (eds), *Cryptocurrencies in Public and Private Law* (Oxford University Press 2019) 127; Michael Ng, ‘Choice of Law for Property Issues Regarding Bitcoin under English Law’ (2019) 15 *Journal of Private International Law* 326.
- 10 S. Schwemmer, ‘Das Tokensachstatut Zur kollisionsrechtlichen Behandlung der Übertragung von Bitcoin, Kryptowertpapieren und anderen Kryptoken’ (2022) *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 333.
- 11 Kadir Berk Kapançı, ‘Özel Hukuk Penceresinden Blokzincir: ‘Sanal Para’ Değerleri ve ‘Akıllı Sözleşmeler’ Üzerine Değerlendirmeler’ in Eylem Aksoy Retornaz and Osman Gazi Güçlütürk (eds), *Gelişen Teknolojiler ve Hukuku I: Blokzincir* (On İki Levha Publishing 2020) 119; Fatih Bilgili, M. Fatih Cengil, *Blockchain ve Kripto Para Hukuku* (2nd edn, Dora Publishing 2022) 144; Asuman Yılmaz, *Kripto Para Birimi Bitcoin ve Bitcoin’in Türk Sermaye Piyasası Hukuku Açısından Değerlendirilmesi* (On İki Levha Publishing 2021) 42-44; Argun Karamanhoğlu, ‘Son Gelişmeler Işığında Kripto Paraların Hukuki Niteliği ve Kripto Para Borsalarına İlişkin Tespit ve Öneriler’ in Başak Baysal, Nilay Arat, Ahmet Abut and Tuğçe Bilgetekin (eds), *Khas Hukuk Bülteni 2020-2021 Akademik Yılı Derlemesi* (On İki Levha Publishing) 180; Mete Tevetoglu, ‘Bankacılık ve Sermaye Piyasası Hukuku Perspektifinden Bitcoin Davaları’ (2020) 9(34) *Banka ve Finans Hukuku Dergisi* 551; Osman Gazi Güçlütürk, ‘Türk Hukukunda Kripto Varlıkların Para ve Elektronik Para Niteliğinin İncelenmesi’ (2019) 4(3) *REGESTA* 397; Deniz Alp İmamoğlu, *Kripto Para Birimleri ve Türk Hukukunda Düzenlenmesi* (3rd edn, Seçkin Publishing 2022) 100.
- 12 Kapançı (n 11) 121; Bilgili, Cengil, (n 11) 144; Mesut Serdar Çekin, ‘Kripto Varlıklar Üzerinde Gerçekleştirilen İşlemlerin Borçlar Hukuku ve Eşya Hukuku Açısından Değerlendirilmesi’ (2022) 9(1) *İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi* 5.
- 13 Regulation on the Disuse of Crypto Assets in Payments, <<https://www.tcmb.gov.tr/wps/wcm/connect/c241af16-e730-45b5-bb0d-31d3af28884e/Regulation+on+the+Disuse+of+Crypto+Assets+in+Payments.pdf?MOD=AJPERES>>, accessed 27 September 2024.
- 14 Yılmaz (n 11) 6; Burcu Yüksel Ripley, ‘Cryptocurrency Transfers in Distributed Ledger Technology-Based Systems and their Characterisation in Conflict of Laws’ in Justin Borg-Barthet, Katarina Trimmings, Burcu Yüksel Ripley and Patricia Zivkovic (eds), *From Theory to Practise in Private International Law* (Hart Publishing 2024) 112.
- 15 Satoshi Nakamoto, Bitcoin: A Peer-to-Peer Electronic Cash System, 2008, <<https://bitcoin.org/bitcoin.pdf>>, accessed 12 May 2024.
- 16 Yılmaz (n 11) 10.
- 17 Türkiye Bilişim Vakfı, ‘Dünyada Blokzinciri Regülasyonları ve Uygulama Örnekleri Karşılaştırma Raporu’ (2019) <https://bctr.org/dokumanlar/Dunyada_Blokzinciri_Regulasyonlari.pdf>, accessed August 05, 2024.

Assuming that it is possible to file a lawsuit in Turkish courts in disputes regarding digital assets, which are subject to different statutes by legal systems, it is critical to determine the law under which the courts will resolve the dispute.

Disputes arising from digital assets are subject to classification based on the legal relationship involving the digital asset. The rise in cryptocurrency theft, blockchain network forks, and disputes arising from the bankruptcy of crypto exchanges have necessitated addressing the private international law aspects of digital assets, particularly cryptocurrencies. These disputes may originate from a contract involving the digital asset or from a non-contractual obligation, such as in the case of the theft of a digital asset¹⁸. Within the scope of our study, such legal relationships will not be addressed. Instead, this study focuses on determining the applicable law for disputes arising from proprietary issues over digital assets. As stated in our study, if *lex fori* characterisation is accepted in the qualification of the connecting subject matter, the law of the forum will determine what qualifies as proprietary issues¹⁹. In Turkish law, there is no legal regulation regarding the legal nature of rights over digital assets, nor is it a subject on which there is a consensus in the legal doctrine. It has been stated in Turkish law that the rights over cryptoassets will be included in the category of proprietary rights²⁰. Property rights, as they carry economic value and can be measured in monetary terms, have led to the doctrine that rights over crypto assets can also be included in the category of property rights. According to this view, the authority of the private key holder to make claims against third parties can be considered within the category of property rights, on the grounds that such authority may be determined by the value the crypto asset represents outside the blockchain network²¹. Although digital assets, which are considered intangible property and do not possess the characteristics of tangible goods, may not appear to be subject to real rights, as a *de lege ferenda* solution, it has been suggested that crypto assets could be subject to movable property ownership under the Turkish Civil Code²².

Although rights over digital assets that could be subject to property rights are not explicitly regulated by legal provisions, it has been suggested in the doctrine that matters related to the ownership, transfer, use of digital assets, and third-party rights over digital assets fall within the scope of property issues²³. Additionally, in the

18 Ng (n 9) 316; Guillaume (n 1) 62.

19 Ng (n 9) 321; Gerald Spindler, 'Fintech, Digitalization, and the Law Applicable to Proprietary Effects of Transactions in Securities (Tokens): A European Perspective' (2019) 24 *Uniform Law Review* 725; Schwemmer (n 10) 335.

20 Takavut (n 8) 363.

21 Çekin (n 12) 11-12.

22 Çekin (n 12) 27.

23 Christiane Wendehorst, 'Proprietary Rights in Digital Assets and the Conflict of Laws' in Andrea Bonomi, Matthias Lehmann and Shaheez Lalani (eds), *Blockchain and Private International Law* (Brill Nijhoff 2023) 101, 107; Tetsuo

Introduction of the UNIDROIT Principles, it is stated that proprietary aspects over digital assets, regardless of whether digital assets are recognised as property under national laws, encompass ownership rights, the protection of innocent acquirers, and security rights over digital assets²⁴.

The question arises as to whether, if rights over digital assets are likened to proprietary rights, the applicable law can be determined based on the status of real rights (*rights in rem*). Traditionally, *lex rei sitae* is accepted as a connecting factor by national laws for rights *in rem* on movables and immovables. However, digital assets differ from other properties in that they do not have any physical location. Therefore, various connecting factors related to the law applicable to proprietary issues of digital assets have been recognised through case law in some legal systems and statutory regulations in others. These connecting factors include the choice of law, the law of the supervisor, the law of the operator, the law of the issuer, the law of custody and the place of residence or business of the person in control. In addition, provisions concerning the law applicable to disputes over the property of digital assets have begun to be adopted by soft law. In this section of our study, the connecting factors recognised by national laws and soft law for determining the applicable law to disputes arising from property issues of digital assets will be examined.

Gesetzes zur Einführung von elektronischen Wertpapieren

In German law, there are no specific conflict of law rules indicating the applicable law for disputes arising from blockchain technology²⁵. However, the German Electronic Securities Act (*Gesetzes zur Einführung von elektronischen Wertpapieren* - "eWpG")²⁶ introduces a central register for electronic securities. Although the regulation in German law primarily pertains to electronically registered securities, it has been stated in German legal doctrine that it could also be an example and applicable to digital assets on the blockchain²⁷. It is stated that although the eWpG does not explicitly mention blockchain technology, it adopts a neutral approach

Morishita, 'Blockchain and Japanese Private International Law' in Andrea Bonomi, Matthias Lehmann and Shaheez Lalani (eds), *Blockchain and Private International Law* (Brill Nijhoff 2023) 783.

24 UNIDROIT Digital Assets and Private Law Principles, 5.

25 Felix M. Wilke, 'A German Approach: Lex Supervisionis Registri and Subordinate Connecting Factors' in Andrea Bonomi, Matthias Lehmann and Shaheez Lalani (eds), *Blockchain and Private International Law* (Brill Nijhoff 2023) 743.

26 Gesetzes zur Einführung von elektronischen Wertpapieren, <<https://www.gesetze-im-internet.de/ewpg/BJNR142310021.html>>, accessed September 29, 2024.

27 Matthias Lehmann, 'Kollisionsregeln für die Blockchain im Rechtsvergleich' (2023) 122 *Zeitschrift für Vergleichende Rechtswissenschaft (ZVgRWiss)* 274; Wendehorst (n 23) 109.

with the aim of adapting future developments²⁸. Therefore, the connecting factors regulated in the eWpG will be briefly addressed within the scope of this study.

Section 32 of the Law contains a conflict of laws rule. According to this provision, rights to an electronic security and dispositions over electronic security are subject to the law of the state under whose supervision the registry authority responsible for maintaining the electronic securities registrar is situated²⁹. Registrar for electronic securities means the issuer or a financial service provider designated by the issuer and responsible for registration management³⁰. However, in German law, there is no provision regarding which law to apply in cases where the place and identity of the registrar or issuer cannot be determined.

Gesetz über Token und Vertrauenswürdige Technologien

The Liechtensteiner Token and Trusted Technology Service Provider Act (*Gesetz über Token und Vertrauenswürdige Technologien* – “TVTG”)³¹, which came into force in 2020, includes both regulatory and private law provisions for token issuers and other crypto service providers³².

Under Article 3(2) of the TVTG, to apply this Act, the tokens must be created by a trustworthy technology service provider³³ with its headquarters or place of residence in Liechtenstein, or the parties must explicitly choose to apply the provisions of this Act to a legal transaction involving the tokens³⁴. In the absence of an explicit choice of law by the parties regarding the application of the TVTG, the applicable law should be determined according to the conflict of laws rules in Liechtenstein law³⁵.

28 Wilke (n 25) 732.

29 “Soweit nicht § 17a des Depotgesetzes anzuwenden ist, unterliegen Rechte an einem elektronischen Wertpapier und Verfügungen über ein elektronisches Wertpapier dem Recht des Staates, unter dessen Aufsicht diejenige registerführende Stelle steht, in deren elektronischem Wertpapierregister das Wertpapier eingetragen ist.”

30 Wendehorst (n 3) 495; Lehmann (n 27) 274.

31 Gesetz über Token und Vertrauenswürdige Technologien, 2019, <<https://www.gesetze.li/konso/2019301000/?version=1>>, accessed September 29, 2024.

32 Lehmann (n 27) 276.

33 According to Article 2(1)(i), a trustworthy technology service provider is a person who exercises one or more functions under the token issuer, token generator, trustworthy technology key depositary, trustworthy technology token depositary, trustworthy technology protector, physical validator, trustworthy technology exchange service provider, trustworthy technology verifying authority, trustworthy technology price service provider, and trustworthy technology identity service provider. For details on the definitions provided in the Liechtenstein law, see <<https://www.gesetze.li/konso/2019301000/?version=1>>, accessed September 29, 2024.

34 “Es findet Anwendung, wenn: a) Token durch einen VT-Dienstleister mit Sitz oder Wohnsitz im Inland erzeugt oder emittiert werden; oder b) Parteien in einem Rechtsgeschäft über Token dessen Vorschriften ausdrücklich für anwendbar erklären.”

35 Francesco A. Schurr, Angelika Layr, ‘DLT and PIL from the Perspective of Liechtenstein’ in Andrea Bonomi, Matthias Lehmann and Shaheza Lalani (eds), *Blockchain and Private International Law* (Brill Nijhoff 2023) 759.

(Bundesgesetz über das Internationale Privatrecht)

One of the legal systems that includes provisions on the applicable law to the disputes over proprietary issues of digital assets is Swiss law. According to Article 145a³⁶ added to the Swiss Private International Law Act in 2020³⁷, disputes regarding whether a claim is represented by a document or equivalent instrument and whether such document can be transferred shall be governed by the law specified in the relevant document. If no specific law is indicated in the document, it is presumed that the law of the state in which the issuer has its registered office, or failing that, the law of the state of its habitual residence, shall apply. In the Swiss doctrine, it has also been stated that there is legal uncertainty regarding the applicable law due to the absence of a specific provision concerning crypto assets in the Swiss PILA³⁸.

In Swiss private international law, Article 108a³⁹ of the Swiss PILA provides a definition of intermediated securities. According to that provision, intermediated securities are securities held with an intermediary as defined in the Hague Convention of 5 July 2006 on the Law Applicable to Certain in Respect of Securities held with an Intermediary⁴⁰. However, the applicability of Article 108a, which does not explicitly mention digital assets, to digital assets used as security has been discussed in the doctrine⁴¹.

One of the connecting factors put forward in the law applicable to digital assets used as security is the law of the intermediary's principal place of business, abbreviated as PRIMA (place of relevant intermediary approach)⁴² and recommended as the applicable law in international qualified ownership disputes regarding securities in the intermediary system in the Hague Convention⁴³. However, the Hague Convention cannot be applied to disputes arising from blockchain networks, which are fundamentally organised in a decentralised manner, because the Hague Convention presumes the existence of one or more intermediaries⁴⁴.

36 "Ob eine Forderung durch einen Titel in Papier- oder gleichwertiger Form vertreten und mittels dieses Titels übertragen wird, bestimmt das darin bezeichnete Recht. Ist im Titel kein Recht bezeichnet, so gilt das Recht des Staates, in dem der Aussteller seinen Sitz oder, wenn ein solcher fehlt, seinen gewöhnlichen Aufenthalt hat."

37 Bundesgesetz über das Internationale Privatrecht, 1987, <https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/de>, accessed September 29, 2024.

38 Pascal Favrod-Coune, Kevin Belet, 'Conflict of Laws and Tokens in Swiss Private International Law' in Andrea Bonomi, Matthias Lehmann and Shaheez Lalani (eds), *Blockchain and Private International Law* (Brill Nijhoff 2023) 707.

39 "Der Begriff der intermediärverwahrten Wertpapiere ist im Sinne des Haager Übereinkommens vom 5. Juli 2006 über die auf bestimmte Rechte an intermediärverwahrten Wertpapieren anzuwendende Rechtsordnung zu verstehen."

40 Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=72> (Last Accessed: 11.07.2024).

41 Lehmann (n 27) 276.

42 For further information on the PRIMA principle for international qualified ownership disputes regarding securities in the intermediary system see: Ayşe Elif Ulusu, *Milletlerarası Özel Hukukta Kaydi Menkul Kıymet Ticaretinde Hak Sahipliği İhtilaflarına Uygulanacak Hukuk* (On İki Levha Publishing 2022).

43 Wendehorst (n 3) 496.

44 Guillaume (n 1) 80; Spindler (n 19) 730; Lehmann (n 27) 276.

The law applicable to proprietary rights over digital assets in the United States is found in the Uniform Commercial Code (UCC)⁴⁵. In 2022, amendments were made to the UCC, introducing a Section 12. Section 12(107) (c) of the UCC⁴⁶ introduces the rule of waterfall⁴⁷. In other words, if no connecting factor exists, the applicable law should be determined based on the next available connecting factor in the sequence. The provision first recognises the acceptance of party autonomy. The choice of law can be made either in the digital asset itself, or where it is recorded, or for the entire system⁴⁸. If no choice of law is made, it is acknowledged under UCC Sec. 12 107(c) (5) that the law of Washington D.C. will apply.

The principles outlined in the guide prepared by the European Law Institute (ELI) regarding the Use of Digital Assets as Security⁴⁹ serve as regulatory frameworks that states can draw inspiration from when developing their national regulations on this matter.

Article 1 of the ELI Principles pertains to the use of digital assets as security by natural or legal persons. Additionally, Articles 3 and 4 of the ELI Principles contain provisions regarding the applicable law for the creation of security rights over digital assets and the law applicable to the effects of security rights over digital assets against

45 Uniform Commercial Code, <<https://www.uniformlaws.org/acts/ucc>>, accessed September 29, 2024.

46 “The following rules determine a controllable electronic record’s jurisdiction under this section:

(1) If the controllable electronic record, or a record attached to or logically associated with the controllable electronic record and readily available for review, expressly provides that a particular jurisdiction is the controllable electronic record’s jurisdiction for purposes of this article or [the Uniform Commercial Code], that jurisdiction is the controllable electronic record’s jurisdiction.

(2) If paragraph (1) does not apply and the rules of the system in which the controllable electronic record is recorded are readily available for review and expressly provide that a particular jurisdiction is the controllable electronic record’s jurisdiction for purposes of this article or [the Uniform Commercial Code], that jurisdiction is the controllable electronic record’s jurisdiction.

(3) If paragraphs (1) and (2) do not apply and the controllable electronic record, or a record attached to or logically associated with the controllable electronic record and readily available for review, expressly provides that the controllable electronic record is governed by the law of a particular jurisdiction, that jurisdiction is the controllable electronic record’s jurisdiction.

(4) If paragraphs (1), (2), and (3) do not apply and the rules of the system in which the controllable electronic record is recorded are readily available for review and expressly provide that the controllable electronic record or the system is governed by the law of a particular jurisdiction, that jurisdiction is the controllable electronic record’s jurisdiction.

(5) If paragraphs (1) through (4) do not apply, the controllable electronic record’s jurisdiction is the District of Columbia.”

47 Lehmann, ‘Digital Assets in the Conflict of Laws: A Comparative Search for the Ideal Rule’, 4 (*SSRN* 4862792, 20 May 2024) <<https://ssrn.com/abstract=4862792>> accessed August 01, 2024.

48 Lehmann (n 27) 272.

49 ELI Principles on the Use of Digital Assets as Security, <https://www.europeanlawinstitute.eu/projects-publications/publications/eli-principles-on-the-use-of-digital-assets-as-security/> (Last Accessed: 16.07.2024).

third parties. In both Article 3(2)⁵⁰ and Article 4(2)⁵¹, the same connecting factor is accepted, namely the law of the place of business of the security provider at the time the security interest is created, or, if there are multiple places of business, the law of the location of the central administration. Under the ELI Principles, the focus is on the security provider as the connecting factor due to the easier identification of digital asset providers on the blockchain.

The ELI Principles also provided an escape clause for determining the applicable law both in the creation of security rights over digital assets and in their effectiveness against third parties. According to Articles 3(3)⁵² and 4(3)⁵³ of the ELI Principles, if a digital asset is clearly connected with one particular jurisdiction, the law of that jurisdiction is deemed the applicable law. The connecting factor adopted in the ELI Principles is exemplified as applying to disputes concerning stablecoins, virtual currencies, NFTs, and utility tokens, particularly those operated by identifiable operators and hosted on permissioned ledgers⁵⁴. It should be noted that these conflict of laws rules pertain solely to the creation and effectiveness of security rights over digital assets and do not include a connecting rule regarding the law applicable to all real rights issues related to digital assets.

Another initiative aimed at unifying the legal framework internationally, prompted by the inadequacies of national laws in resolving disputes related to digital assets, cryptocurrencies, and blockchain technology, is the UNIDROIT Principles on Digital Assets and Private Law. Prepared by the International Institute for the Unification of Private Law (UNIDROIT), these Principles provide a conflict of laws rule intended to guide legislators, courts, and practitioners.

Article 5 of the UNIDROIT Principles contains a conflict of laws rule. The commentary on Article 5 states that the purpose of this rule is to ensure clarity and legal certainty in the law applicable to disputes concerning the proprietary issues

50 “For the purposes of Principle 3(1), the ‘applicable law’ is the law of the jurisdiction in which the security provider has, at the time of the creation of the security interest, its place of business, or its central administration (if it has a place of business in more than one jurisdiction) or the law of the jurisdiction in which the security provider has its habitual residence (absent a place of business).”

51 “For the purposes of Principle 4(1), the ‘applicable law’ is the law of the jurisdiction in which the security provider has, at the time of the creation of the security interest, its place of business or its central administration (if it has a place of business in more than one jurisdiction) or the law of the jurisdiction in which the security provider has its habitual residence (absent a place of business).”

52 “By derogation from Principle 3(2), in those cases where the digital asset itself is clearly connected with one particular jurisdiction, the law of that jurisdiction is deemed to be the ‘applicable law’.”

53 “By derogation from Principle 4(2), in those cases, where the digital asset itself is clearly connected with one particular jurisdiction, the law of that jurisdiction is deemed the ‘applicable law’”

54 The European Law Institute, ‘ELI Principles on the Use of Digital Assets Report of the European Law Institute’ (2022) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_the_Use_of_Digital_Assets_as_Security.pdf> accessed 22 July 2024, 27.

of digital assets⁵⁵. According to this rule, the choice of law primarily determines proprietary issues regarding a digital asset. This choice of law can be made within the digital asset itself or within the system in which the digital asset is recorded. While the UNIDROIT Principles allow for the possibility of choosing the applicable law, they require that this choice be made explicitly.

In the absence of a choice of law, the law of the issuer's statutory seat will apply to the digital asset. If no choice of law has been made and the applicable law cannot be determined, the UNIDROIT Principles offer national legislators two options. Under Option A, the law-governing rights over digital assets can be subject to specific rules of national law supported by the UNIDROIT Principles. Under Option B, the applicable law can directly reference the UNIDROIT Principles as the governing law.

In Turkish private international law, conflict of laws rules are set forth in Law No. 5718 on Private International Law and Procedure (hereinafter referred to as "Turkish PILA"), which came into effect on December 4, 2007⁵⁶. However, the Turkish PILA excludes a specific provision regarding the applicable law for proprietary rights over digital assets. In Turkish PILA, the law applicable to rights *in rem* over movable and immovable property is regulated under Article 21, which adopts the principle of *lex rei sitae*, which refers to the law of the place where the property is located. As mentioned in our study, digital assets are considered intangible property under Turkish law, and Article 21 of the Turkish PILA does not encompass the concept of intangible property.

In determining the applicable law for rights *in rem* over digital assets under the Turkish PILA, another potential provision is Article 23, which governs the law applicable to intellectual property rights. However, as this provision is limited to intellectual property rights, it is not suitable for determining the applicable law for rights over digital assets⁵⁷. Additionally, the conflict of laws rules concerning intellectual property rights accept the principle of territoriality and, therefore, cannot be applied to disputes regarding the proprietary issues of digital assets. Indeed, because digital assets do not have a physical location, there is no country of protection

⁵⁵ Ibid 41.

⁵⁶ Law No. 5718 on Private International Law and Procedure, <<https://www.mevzuat.gov.tr/mevzuatmetin/1.5.5718.pdf>>, accessed September 29, 2024.

⁵⁷ Takavut (n 8) 364.

for digital assets⁵⁸.

Even if we assume for a moment that proprietary rights over digital assets would be subject to the status of rights *in rem* and that the *lex rei sitae* rule would be applied to determine the applicable law, the lack of a physical location for digital assets would likely result in no real connection to the dispute. Because digital assets do not always have a physically identifiable location, the *lex rei sitae* rule appears inadequate to establish the most closely connected law, thereby failing to achieve private international law equity for digital assets⁵⁹.

In situations where the *lex rei sitae* principle fails, it is proposed by doctrine⁶⁰ and comparative law⁶¹ that for determining the applicable law for proprietary rights over digital assets, priority should be given to allow for the choice of law either on the digital asset itself or within the system where the digital asset is registered. In the absence of such a choice of law, it is recommended to adopt an escape clause that would enable the application of a law more closely connected to the dispute. In the following, our study will focus on the proposals of choice of law and escape clause, which could also offer solutions for digital assets' current state, especially under Turkish private international law.

Although the principle of party autonomy is proposed in the doctrine concerning the applicable law to property rights in Turkish private international law⁶², it is not recognised in legislation. In comparative law, however, the possibility of choosing the applicable law, particularly for disputes arising from property rights over movable assets, is accepted. This choice is either directly or indirectly recognised through escape clauses⁶³.

As examined in our study, when discussing determining the applicable law for disputes concerning ownership rights over digital assets, the principle of party autonomy is regulated in national legal systems and soft law instruments. In both the UCC and the UNIDROIT Principles, the party autonomy principle for disputes arising from proprietary rights in digital assets or the systems in which they are

58 Spindler (n 19) 736; Ng (n 9) 331.

59 Guillaume (n 1) 64; Ng (n 9) 326.

60 Lehmann (n 47) 28; Takavut (n 8) 370.

61 The Uniform Commercial Code and UNIDROIT Principles on Digital Assets and Private Law.

62 Ekin Ömeroğlu, *Aynı Haklara Uygulanacak Hukukun ve Yetkili Yargı Mercisinin Tayininde İrade Serbestisi Prensibi* (Adalet Publishing 2017) 159.

63 Examples of national laws that directly allow the choice of applicable law for property rights over movable assets include the laws of the Netherlands, Switzerland, the United Kingdom, and China. On the other hand, examples of national laws that provide for the indirect choice of law primarily include German law and the laws of the Netherlands and Switzerland. For detailed information, see: *ibid* 160 *ed seq*.

registered has been selected as the primary connecting factor. Liechtenstein's law, which allows for the choice of law, has adopted a more indirect approach. It set forth that the provisions regulating digital assets will apply if expressly chosen by the parties. If the provisions under The Swiss Private International Law Act Articles 108a and 106 also apply to digital assets, they provide limited party autonomy.

In Turkish private international law, it is also proposed in the doctrine that the law more closely connected to disputes involving digital assets is the law chosen by the parties. The reasoning behind this view is that if the choice of law is accepted as the law more closely connected to the dispute, it would facilitate the determination of the applicable law and increase predictability⁶⁴. However, when accepting the choice of law for disputes arising from proprietary rights over digital assets, it is beneficial to inform third parties about the chosen law to ensure that their rights are not adversely affected⁶⁵.

The position paper prepared by the Working Group on the Law Applicable to Digital Assets within the European Association of Private International Law (EAPIL)⁶⁶ emphasises the necessity for the choice of law to be visible to third parties. This ensures that third parties are aware of the chosen law. Consequently, any choice of law made for a digital asset must be included in a format or system accessible to all participants. According to Article 5(2)(b) of the UNIDROIT Principles, when determining whether the applicable law has been specified for a digital asset or platform, the records attached to or associated with the digital asset or platform must be considered. This implies that the choice of law will only be valid against third parties if it is included in such records⁶⁷. Even if, for a moment, we consider that the choice of law is only valid between the parties to the transaction to protect third parties, the application of the chosen law to disputes arising from proprietary rights over digital assets would conflict with the principles of publicity and legal certainty required in property disputes. As a solution to this issue, it is proposed in the doctrine that each participant in the network should be allowed to express their intent regarding the choice of law⁶⁸.

Given the nature of blockchain technology and digital assets, which may not have a severe connection to any particular country, allowing for the choice of law in such disputes is considered reasonable. However, choosing a national law carries the risk of being undesirable for blockchain technology users who may prefer not to be bound

64 Takavut (n 33) 359.

65 Spindler (n 13) 734; Lehmann (n 26) 24; Takavut (n 8) 361.

66 EAPIL Working Group on the Law Applicable to Digital Assets, Position Paper in response to the public consultation on the UNIDROIT Draft Principles and Commentary on Digital Assets and Private Law, <<https://eapil.org/what-we-do/position-papers/paper-on-digital-assets-2023/>> accessed 02 August 2024.

67 Ibid 6.

68 Wendehorst (n 3) 497.

by any state laws⁶⁹. In addition, it should be noted that for the chosen State's law as an applicable law, legal transactions conducted on the blockchain must be recognised under the chosen law⁷⁰.

When determining the applicable law for proprietary rights over digital assets, both current national legal rules and the connecting factors suggested in soft law regulations may not always be identifiable due to the decentralised nature of blockchain unless the parties have made a choice of law. Consequently, legislators may consider the acceptance of an escape clause for the applicable law for these disputes. An escape clause should necessarily support conflict of law rules that determine the applicable law for proprietary rights over digital assets. This would allow courts, when applying existing conflict-of-laws rules, to deviate from traditional connecting factors if they identify a law with a more close connection to the case⁷¹.

At this point, it is crucial to address how the more closely connected law to digital assets will be determined. If a permissioned blockchain is regulated or controlled by a state—such as when banks or financial institutions operate digital assets on a controlled permissioned blockchain⁷²—in our opinion, these assets can be deemed to have a more closely connection to the dispute.

In addition to the disintermediation, which is the most prominent feature of blockchain technology, it is possible for crypto assets to be held as crypto securities by a central securities depository⁷³. A digital asset held by an intermediary can be considered to be more closely connected with the law of the jurisdiction where the intermediary's central administration is located due to the intermediary's authority over the digital asset. The existence of a choice of law on the digital asset is another example that can be considered in determining the more closely connected law related to the digital asset.

In comparative law, as an example from German law, an escape clause is accepted for all disputes arising from rights *in rem* over property. According to Article 46⁷⁴

69 Lehmann (n 47) 24.

70 Guillaume (n 1) 79.

71 Lehmann (n 27) 287; Takavut (n 8) 366.

72 Eliza Mik, 'Electronic Platforms: Openness, Transparency&Privacy Issues' (2019) 6 European Review of Private Law 870; Tetsuo Morishita, 'Technical Description of DLT for Conflict Lawyers' in Andrea Bonomi, Matthias Lehmann and Shaheeza Lalani (eds), *Blockchain and Private International Law* (Brill Nijhoff 2023)59.

73 Koji Takahashi, 'Blockchain-based Negotiable Instruments: with Particular Reference to Bills of Lading and Investment Securities' in Andrea Bonomi, Matthias Lehmann and Shaheeza Lalani (eds), *Blockchain and Private International Law* (Brill Nijhoff 2023) 525.

74 "Besteht mit dem Recht eines Staates eine wesentlich engere Verbindung als mit dem Recht, das nach den Artikeln 43 und 45 maßgebend wäre, so ist jenes Recht anzuwenden."

of the *Einführungsgesetz zum Bürgerlichen Gesetzbuche* (EGBGB)⁷⁵, if there is a substantially closer connection with the law of a State other than the conflict of laws rules determined by Articles 43 to 45⁷⁶, this law shall apply⁷⁷.

At this point, it is beneficial to clarify the relationship between the German Electronic Securities Act and the provisions of the EGBGB in our study. Although the eWpG does not explicitly mention blockchain technology or digital assets, the potential applicability of these regulations considering technological advancements should be addressed. The EGBGB does not regulate specific conflict-of-law provisions related to securities and electronic securities. However, if the legal relationship documented in a security is affected by the rights *in rem* inherent in that security, it is accepted that Article 43 of the EGBGB will apply as the general connecting factor for rights *in rem*, unless supplanted by a special rule⁷⁸.

In German legal doctrine, the law applicable to disputes arising from the ownership of digital assets should also be examined under Article 46 of the EGBGB. According to *Wendehorst*, even if authorizations to and disposals of tokens are correctly qualified under property law, at least for the purposes of conflict of law, a possible application arises due to the fact that the situs rule always has the problem that physical localisation is not possible with decentralised booking systems. Appropriate connections must be sought based on Art. 46 EGBGB, which considers the principle of the closest connection⁷⁹.

The application of the escape clause in determining the applicable law for disputes arising from digital assets and blockchain technology is proposed as a solution to the possibility of being unable to identify connecting factors. However, the application of the escape clause is generally contingent upon the applicable law determined by the connecting factors being less related to the dispute and the existence of another law that is more closely connected to that dispute⁸⁰. The escape clause can be regulated to address the problem when the connecting factors indicating the applicable law for disputes arising from digital assets cannot be determined.

75 Einführungsgesetz zum Bürgerlichen Gesetzbuche 1994, <<https://www.gesetze-im-internet.de/bgbeg/>>, accessed September 29, 2024.

76 In Article 43 of the EGBGB, the conflict of laws rule regarding disputes arising from rights *in rem* over property is provided, in Article 44, the regulation governing claims arising from intrusions emanating from real property is stipulated, and in Article 45, the conflict of laws rule related to means of transportation is set forth.

77 Heinz-Peter Mansel, 'Normzweck und Tatbestandsstruktur des Art. 46 EGBGB' in Stephan Lorenz, Alexander Trunk, Horst Eidenmüller, Christiane Wendehorst and Johannes Adolff (eds), *Festschrift für Andreas Heldrich zum 70. Geburtstag* (C.H. Beck Verlag 2005) 899.

78 Wilke (n 25) 734.

79 Wendehorst (n 3) 496.

80 Wilke (n 25) 746.

Digital assets have become a significant factor that private international law can no longer overlook. The difficulties in determining the legal nature of digital assets also complicate the determination of the applicable law in disputes with a foreign element. Private international law disputes related to digital assets, which are considered to be intangible goods, may arise from various legal relationships, such as those involving contractual relationships, non-contractual obligations, or proprietary rights over digital assets. Our study specifically focused on the applicable law for disputes concerning proprietary rights over digital assets.

Disputes concerning proprietary rights over digital assets may relate to the ownership, transfer, use of digital assets, or third-party rights over digital assets. In such cases, the first conflict of law rules that come to mind for determining the applicable law are those related to rights *in rem*. The principle of *lex rei sitae*, which refers to the law of the place where a property is situated, is a fundamental connecting factor in determining the applicable law for rights *in rem* over tangible assets. However, due to the inherent lack of a physical location for digital assets, applying this principle to digital assets presents significant challenges in the context of private international law.

To determine the applicable law for disputes arising from proprietary issues of digital assets, our study first focused on defining what constitutes a digital asset and how ownership disputes should be characterised. In Turkish private law, there are currently no explicit regulations concerning the rights over digital assets. The absence of substantive legal provisions regarding proprietary rights over digital assets in Turkish law raises the question of which legal category will be used to determine the applicable law for disputes concerning proprietary issues of digital assets under the Turkish PILA. The absence of a physical presence for these assets limits the applicability of traditional legal connecting factors, necessitating consideration of the environment in which digital assets exist. Consequently, disputes regarding the proprietary rights of digital assets call for adopting new connecting factors as recognised by national legal provisions and soft law instruments.

Our study highlights various approaches adopted by different countries. Legislation such as Germany's Electronic Securities Act, Liechtenstein's Token and Trusted Technology Service Provider Act, Switzerland's Private International Law Act, and the United States' Uniform Commercial Code offer different connecting factors for determining the applicable law concerning proprietary rights over digital assets. These regulations propose distinct connecting factors based on the nature of digital assets and the systems in which they operate while also allowing for party autonomy in choosing applicable law. Additionally, soft law principles proposed by international

organisations such as the European Law Institute and UNIDROIT reflect efforts to achieve global harmonisation concerning using digital assets as security interests and the law applicable to proprietary rights over these assets. These principles facilitate a better understanding of the legal nature of digital assets and the associated rights, allowing national legal orders to enact more effective regulations.

The scope of digital assets covered by the examined legal provisions and soft law rules varies. German and Swiss law provides regulations specifically for electronic securities, whereas the UCC and the UNIDROIT Principles address digital assets in a broader context. The uniformity of conflict of laws regulations on digital assets internationally would be highly preferable. Nevertheless, upon examining the regulations within comparative law, a universally accepted connecting factor concerning the applicable law for proprietary issues of digital assets has not yet been established.

As examined in our study, we agree with the view that choice of law should be allowed in determining the applicable law for disputes concerning ownership rights over digital assets, considering the possibility that digital assets do not have a specific location and the identity of parties in blockchain transactions may be unclear. Allowing the parties to choose the applicable law would simplify the determination of the governing law and make it more predictable. Another solution would be to include an escape clause in determining the applicable law for disputes concerning proprietary rights over digital assets, allowing the identification of the law more closely connected to the dispute. In this way, even if the parties have not made a choice of law, the courts would have the discretion to investigate and apply the law more closely connected to the dispute. Clearly, the primary purpose of adopting the escape clause in conflict of laws is to ensure fairness in private international law by applying the law more closely connected to the dispute in cases where unexpected circumstances arise in the determination of the applicable law.

In conclusion, there is a need for clarity in the legal regulations concerning proprietary rights over digital assets at both national and international levels. Allowing for party autonomy or adopting an escape clause can determine the applicable law to proprietary issues over digital assets. Lastly, regardless of which connecting factor is accepted for determining the applicable law for disputes arising from proprietary rights over digital assets, it should be noted that the overriding mandatory rules of the *lex fori* will prevail if such rules exist⁸¹.

81 For example, in Turkish private international law, the Regulation on the Non-Use of Crypto Assets in Payments will be considered an overriding mandatory rule in disputes related to the rights to crypto assets where Turkish courts have jurisdiction.

Externally peer-reviewed.

The author has no conflict of interest to declare.

The author declared that this study has received no financial support.

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Annales de la Faculté de Droit d'Istanbul, 76: 47–80

DOI: 10.26650/annales.2025.76.0003
<http://annales.istanbul.edu.tr/>

Submitted: 12.08.2024

Revision Requested: 27.09.2024

Last Revision Received: 08.11.2024

Accepted: 27.01.2025

Published Online: 17.04.2025

RESEARCH ARTICLE

The principle of restrained exercise of rights (*hakların sakınılararak kullanılması ilkesi*, *l'exercice mesuré des droits*, *Gebot der schonenden Rechtsausübung*), which can be defined in broad terms as the requirement for the right holder to use the right with the method least damaging the other parties' interests when there are multiple methods to use the right providing the same outcome of benefit for the right holder, has been the subject of studies in the Turkish doctrine of the law of public limited liability companies¹ for many years. The principle has been conceptualised in the law of public limited liability companies as a means to limit the risk of abusive majority behaviour within the company. The Turkish Court of Cassation has utilised the principle to resolve disputes under the law of public limited liability companies. That being said, the principle has not attracted any special attention in Turkish civil law doctrine and judicial decisions, even though, as will be explained below, the principle is rooted in property law and is a manifestation of Article 2 of the Turkish Civil Code numbered 4721 (hereinafter 'TCiC').

The aim of this paper is to provide a comprehensive study of the principle by examining its origin and legal basis and how the principle is implemented in the property law and the law of limited liability companies. This study seeks to determine whether common features of application exist across these different legal fields, which could serve as a guide to implement the principle in other areas of private law. In line with this approach, first, the reasons for the terminological choice made in the naming of the principle and the provisions that contain the principle in relevant legislation will be presented. Subsequently, the roots of the principle that can be traced to Roman law will be explained. Following this, whether the principle falls within the scope of Article 2 of the TCiC will be examined, since this article serves as the legal basis for the principle. Then, the principle will be analysed within the boundaries of property law, followed by an examination of its implementation within the context of the law of limited liability companies.

1 Our choice of company law terminology requires a brief explanation. Following the terminology preferred in Directive (EU) 2017/1132 (of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/46), for Turkish '*anonim ortaklık*' (similar to eg French *la société anonyme* and German *Aktiengesellschaft*) 'public limited liability company' will be used. According to the Turkish Commercial Code numbered 6102 (hereinafter 'TCoC') *anonim ortaklık* is a type of 'capital company' (Turkish '*sermaye ortaklığı*'). Following the example of Directive (EU) 2017/1132, for '*sermaye ortaklığı*' limited liability company will be used in this work. Apart from *anonim ortaklık*, two other company types are classified under limited liability companies in Turkish law, i.e. *limited ortaklık* and *sermayesi paylara bölünmüş komandit ortaklık*. Following the example of Directive 2009/102/EC (of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies [2009] OJ L 258/20), for *limited ortaklık* (similar to eg French *la société à responsabilité limitée* and German *die Gesellschaft mit beschränkter Haftung*) 'private limited liability company' will be used in this work. *Sermayesi paylara bölünmüş komandit ortaklık* (similar to eg French *la société en commandite par actions* and German *die Kommanditgesellschaft auf Aktien*) is an almost extinct type of company under Turkish law practice; however, it is still preserved in TCoC; for this company type, 'partnership limited by shares' will be used. In this work, our explanations on the law of limited liability companies will focus on the law of public and private limited liability companies, since partnership limited by shares has no impact in practice and doctrine.

The principle of the restrained exercise of rights², in its essence, is based on the principle of good faith (or objective good faith) and the prohibition of abuse of rights.³ The principle is also referred to as ‘the exercise of the rights in the least damaging way’ (Turkish: *hakların en az zarar verecek şekilde kullanılması*). However, ‘damage’ is a technical legal concept and this principle can be applied even in cases where no damage has occurred. To avoid any misunderstandings, we are of the opinion that the term ‘restrained exercise of rights’ is more appropriate from a terminological standpoint.^{4,5} This is because the principle is an aspect of the prohibition of abuse of rights (TCiC 2/II) and the abuse of rights does not require any ‘damages’ to occur or ‘risk of damage’ to be present.⁶

As stated by the Swiss Federal Court and company law doctrine, the principle is of property law origin.⁷ In TCiC, the principle is explicitly stipulated as follows:

- 2 The principle is also referred to in different ways in the Turkish literature: Tekinalp, for example, refers to it as ‘the exercise of rights in the least damaging way’ (*hakların en az zarar verecek şekilde kullanılması*) or ‘the sparing exercise of rights’ (*hakların esirgenerek kullanılması*). See Ünal Tekinalp, ‘Hakların En Az Zarar Verecek Şekilde Kullanılması İlkesi (I)’ (1979) 26 (2) İktisat ve Maliye Dergisi 78, 78-79. Akyol preferred the expression ‘acting moderately in the exercise of the right’ (*hakkin kullanılmasında mutedil davranma*). Şener Akyol, *Dürüstlük Kuralı ve Hakkın Kötüye Kullanılması Yasası* (2nd edn, Vedat 2006) 102. For the expression ‘principle of restrained exercise of rights’ (*hakların sakınılarak kullanılması*) see N Füsün Nomer, *Anonim Ortaklıkta Pay Sahibinin Sadakat Yükümlülüğü* (Beta 1999) 27; Ali Paşlı, ‘Anonim Ortaklıkta Kontrol Sahibinin Özel Durumu’, (2008) 66 (2) İHM 345, 348; Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar Hukuku I* (15th edn, Vedat 2021) 693; Necla Akdağ Güney, ‘Anonim Şirketlerde Hakların Sakınılarak Kullanılması İlkesi ve Uygulaması’ in Asuman Turanboy, Aynur Yongalık, Murat Gürel and İbrahim Bektaş (eds), *Prof. Dr. Hikmet Sami Türk’e Armağan* (Turhan 2017) 45; Oruç Hami Şener, *Yargıtay Kararları Işığında Limited Ortaklıklar Hukuku*, (Seçkin 2017) 422. For the expression ‘the principle of careful exercise of rights’ (*hakların özenli kullanılması ilkesi*), see R Gülmisal Akkale Çelebi, *Limited Şirkette Ortaklıkların Bağlılık Yükümlülüğü* (Seçkin 2022) 34-35. In Swiss law, the principle is also referred to in various ways. For examples of different uses in Swiss law, see Christophe Wilhelm and Océane Varrin, *L’“exercice mesuré des droits” et l’abus de majorité en droit suisse de la société anonyme* (Schulthess Editions 2022) 55-56.
- 3 See Chapter III.
- 4 In the same direction, see Onur Görmez, ‘Topluluk Dışı Anonim Ortaklıklarda Çoğunluk Gücünün Kötüye Kullanılması’ (DPhil thesis, İstanbul University 2023) 133 fn 129. In an earlier work, the author preferred the terminology of ‘exercise of the rights in the least damaging way’. See Onur Görmez, *6102 Sayılı Türk Ticaret Kanununa Göre Rüçhan Hakkının Kısıtlanması* (Beta 2017) 217.
- 5 Article 786 of TCiC stipulates that the beneficiary of the servitude is obliged to exercise her/his right ‘in a manner to cause the least damage’ to the owner of the servient property. However, Articles 461/2, 466/3 and 591/2 of TCoc, which refer to the principle, state that no one may be unfairly subjected to ‘loss’ (*kayıp*), thus avoiding the use of the term ‘damage’ (*zarar*), which has a technical legal meaning; thus, a method that does not narrow the scope of application of the provision and the principle has been preferred. In the Swiss doctrine, while explaining the elements of the principle, it is stated that the minority must be subjected to a disadvantage/loss (*préjudice*) and the term ‘damage’ (*dommage*) is avoided as an ‘element’. See Lino Hänni, ‘Le principe de l’exercice mesuré des droits – Commentaire de l’arrêt du Tribunal fédéral 4A_531/2017 du 20 février 2018’ (2018) 2018 (3) GesKR 390, 393; Wilhelm and Varrin (n 2) 65 ff. cf Candemir Baltalı, *Anonim Şirketlerde Yönetim Kurulunda Temsil Edilme İmtiyazı* (On İki Levha 2019) 152. The author suggests that if there are no ‘damages’ to the minority, the principle shall not be applied.
- 6 M. Kemal Oğuzman and Nami Barlas, *Medenî Hukuk – Giriş, Kaynaklar, Temel Kavramlar* (28th edn, On İki Levha 2022) 289; Akyol (n 2) 22; Mustafa Dural and Suat Sarı, *Türk Özel Hukuku C.1 Temel Kavramlar ve Medenî Kanunun Başlangıç Hükümleri* (15th edn, Filiz 2020) 258; Mehmet Ayan and Nurşen Ayan, *Medenî Hukuku Giriş* (11th edn, Mimoza 2015) 227. See also and cf Nami Barlas, ‘Dürüstlük Kuralı ve Hakkın Kötüye Kullanılması Yasasının Alman Medenî Kanunundaki Düzenlenme Tarzı ve Eleştirisi’, (1997) 55 (3) İHM 191, 192 fn 2. cf also Hüseyin Altaş, *Medenî Hukuk Başlangıç Hükümleri (TMK m. 1-7)* (Yetkin 2014) 296; Jale Akipek, Turgut Akıntürk and Derya Ateş, *Türk Medenî Hukuku-Başlangıç Hükümleri-Kişiler Hukuku* (12th edn, Beta 2015) 188.
- 7 See ATF 131 III 459 – JdT 2005 I 588; Esra Hamamcıoğlu, ‘Anonim Ortaklıklarda Tek Borç İlkesi’ (Master thesis, Marmara University 2005) 12 fn 48; Hänni (n 5) 392; Akdağ Güney (n 2) 45-46; Erdoğan Moroğlu, *Anonim Ortaklık*

the beneficiary of the servitude (*irtifak hakkı sahibi*) is obliged to use her/his right in a manner that will cause the least damage to the servient owner (*yüklü taşınmaz maliki*)' (TCiC 786). This article is an adaptation of art 737/II of the Swiss Civil Code. According to the German and Italian texts of the said article, the servient owner must exercise his right as 'carefully' as possible (*in möglichst schonender Weise, ogni possibile riguardo*); however, in the French text, like Turkish law, the expression 'in the least damaging manner' (*la manière la moins dommageable*) is preferred. If there is more than one option when exercising the right, the right holder must choose the act that will cause the least damage to the immovable property owner.⁸

Under Article 745/1 of the TCiC entitled 'Passage of the conduit' the owner of the servient property may request that her/his interest be respected in accordance with equity. The provision relates to the compulsory conduit, which is an easement arising from neighbourhood law, and reflects the obligation to place the conduit in such a way as to cause the least damage to the owner. Similarly, TCiC 747/3 stipulates that the compulsory passage shall be determined by considering the interests of both parties. It can be argued that the provisions of TCiC 745/1 (SCC 692/1) regarding the conduit and TCiC 747/3 (SCC 692/3) regarding the right of way (*via*) contain a special manifestation of the principle.⁹ TCiC 745/1 stipulates that the owner of the servient property may request that her/his interest be respected in an equitable manner. This is because the conduit should be located where it will cause the least damage to the owner.

In the German Civil Code (hereinafter GCC), under the heading of 'careful use of the servitude' (German: *Schonende Ausübung*), it is regulated that the interests of the owner of the servient property (Turkish: *irtifak hakkıyla yüklenen taşınmaz*) should be protected as much as possible (GCC § 1020). The Italian Civil Code (hereinafter ICC) stipulates that the right of way (Turkish: *geçit hakkı*) should be established in the shortest and least damaging manner (Italian: *è più breve e riesce di minore danno al fondo*), and the principle is associated with the concepts of damage and minority (ICC 1051/2). The French Civil Code (hereinafter FCC) states that the right of way must be established in the place that will cause the least damage to the servient property (*l'endroit le moins dommageable*) (FCC 683/2) and adopts an approach based on the concept of 'least damage'.

Genel Kurul Kararlarının Hükümsüzlüğü (9th edn, On İki Levha 2020) 236; İsmail Cem Soykan, *Türk Ticaret Kanununa Göre Anonim Ortaklıklarda Sermaye Taahhüdü Yoluyla Sermaye Artırımı* (On İki Levha 2019) 595 fn 54; Tekinalp (Poroy and Çamoğlu), 'Ortaklıklar I' (n 2) 693, No 895; Wilhelm and Varrin (n 2) 56; Abdurrahman Kayıklık, 'Anonim Şirkette Azınlığın Korunması: Kim İçin, Neden ve Nasıl Bir Koruma?' (2022) 80 (2) İHM 407, 443; Görmez, 'Kötüye Kullanma' (n 4) 133 fn 130. See also Onur Zorluer, *Anonim Şirketlerde Azınlık Haklarının Kötüye Kullanılmasına Karşı Çoğunluğun Korunması* (Adalet 2021) 280. The author states that the principle finds its normative nature in property law. For other examples of the application of the principle in Swiss private law, see Wilhelm and Varrin (n 2) 57.

8 Michel Pellascio, *ZGB Kommentar Schweizerisches Zivilgesetzbuch, Orell Füssli Kommentar* (2016) N 11; Tarkan Göksu, *Art 737 in Sachenrecht Art. 641-977 ZGB – Art. 1-61 SchIT ZGB, CHK - Handkommentar zum Schweizer Privatrecht* (2023) N 4.

9 See Akdağ Güney (n 2) 46; Wilhelm and Varrin (n 2) 56. Regarding TCiC 745, in the same direction, see Zorluer (n 7) 280.

The principle is not explicitly regulated in the TCoC. However, Articles 461/2 and 591/2 of the TCoC on the pre-emption rights of shareholders in public and private limited liability companies, respectively, stipulate that ‘no one shall be unjustifiably benefited or prejudiced by the limitation or abrogation of the pre-emption right’. In the justification of TCoC 461, it is explicitly stated that the provision emphasises, among others, the principle of restrained exercise of rights.¹⁰ In addition, in the justification of TCoC 466, which regulates conditional capital increases in public limited liability companies, it is stated that the right of first refusal (Turkish: *önerilmeye muhatap olma hakkı*) of shareholders to buy the bonds or similar debt instruments giving the right of purchase of or conversion to shares may only be restricted when a just cause (*haklı sebep*) exists, and that the principle of restrained exercise of rights must be adhered to in such cases.¹¹ In terms of the company law, the principle can be characterised as the necessity to select a method that will have no or less impact/harm on the shareholders who will be adversely affected by the company’s any decision following the legitimate interests of the company.¹² The principle’s application in company law mainly aims to ensure that the relevant interest of the shareholder affected by the decision of company organs shall either be preserved in their entirety or, if not possible, harmed to the least extent possible.¹³

TCoC 523/2-b on dividends and reserves in public limited liability companies may also be considered to be indirectly emphasising the principle of restrained exercise of rights.¹⁴ The provision permits the appropriation of profits as reserves other than those provided for by law and the articles of association, i) if it is justified for a) the continued development of the company and b) for the distribution of dividends as consistently as possible ii) while taking into account the interests of all shareholders. A provision of this nature, with a similar wording, is also stipulated for private

10 For the justification of TCoC 461/2, which explicitly refers to the principle, see Justification for TCoC Articles, <<https://cdn.tbmm.gov.tr/KKBSPublicFile/D23/Y2/T1/WebOnergeMetni/70f5fa31-0a3f-4910-bec9-77e0f8ba0bdf.pdf>> accessed 10 August 2024, 165. In the doctrine, while explaining the relevant provision, the principle of restrained exercise of rights is also emphasised. For example, see Görmez, ‘Rüçhan Hakkı’ (n 4) 217 ff; İbrahim Bektaş, *Anonim Ortaklıklarda Yeni Pay Alma (Rüçhan) Hakkının Kısıtlanması ve Devri* (BTHAE 2023) 290 ff; cf Utku Topcan, *Anonim Şirket Pay Sahiplerinin Vazgeçilemez Nitelikteki Hakları ve Bu Hakların İhlalinin Hukuki Neticeleri* (On İki Levha 2023) 71. In the justification of TCoC 591, it is stated that ‘The regulation is parallel to the regulation in public limited liability companies. For explanations, reference should be made to justification regarding the referenced provision’; therefore, the justification of TCoC 461/2 also applies for TCoC 591/2. For the justification of TCoC 591, see Justification for TCoC Articles 218.

11 Justification for TCoC Articles 169.

12 Tekinalp, ‘En Az Zarar I’ (n 2) 79; Şükrü Yıldız, *Anonim Ortaklıkta Yeni Pay Alma Hakkı* (Beta 1996) 293; Nomer, ‘Sadakat Yükümlülüğü’ (n 2) 27-28; Yaşar Can Göksoy, ‘Anonim Ortaklıkta Pay Sahibinin Yeni Pay Alma Hakkının Kaldırılması’ in Hüseyin Ülgen, Arslan Kaya and Gül Okutan Nilsson (eds), *Bilgi Toplumunda Hukuk Ünal Tekinalp’e Armağan*, vol I (Beta 2003) 363, 407; Gül Okutan Nilsson, *Anonim Ortaklık Paysahipleri Sözleşmeleri* (Çağa Hukuk Vakfı 2004) 169; Burak Adıgüzel ‘Anonim Şirketlerde Rüçhan Hakkının Kaldırılması veya Sınırlandırılması’ (2014) 18 (1) Gazi Üniversitesi Hukuk Fakültesi Dergisi 1, 13; Tahir Saraç, *Şirketler Hukuku*, Sami Karahan (ed) (2nd edn, Mimoza 2015) 587; Görmez, ‘Rüçhan Hakkı’ (n 4) 218; Wilhelm and Varrin (n 2) 22-23; Görmez, ‘Kötüye Kullanma’ (n 4) 133-134. The decision must be based on a legitimate company interest, see Moroğlu, ‘Hükümsüzlük’ (n 7) 236; Soykan, ‘Sermaye Artırımı’ (n 7) 597. The last author states that the decision in which the principle intervenes is a ‘justified’ decision.

13 In the same direction see Veliye Yanlı, ‘Alman Hukuku’nda Anonim Ortaklıklarda Rüçhan Hakkının Sınırlandırılmasında Gözetilecek İlkeler Gerekliklik, Ölçülülük ve Eşitlik’ (1992) 2 Argumentum, 369; Adıgüzel (n 12) 14.

14 Görmez, ‘Kötüye Kullanma’ (n 4) 140.

limited liability companies under TCoC 608/3-b. In both provisions, the company's legitimate interest (i.e. its development) is not deemed sufficient in and of itself for the appropriation but is anchored to the interest of 'all shareholders'. The emphasis on all shareholders also indicates that no shareholder should be unjustifiably benefited or prejudiced by such a decision.¹⁵ These provisions on dividends may well be considered as referring to the principle of restrained exercise of rights, even if the reference is not as clear as TCoC 461/2-591/2 and 466/3.¹⁶

It should be noted that the principle may be applied even in cases where a direct reference of this nature does not exist in the relevant regulation of the law; because, as will be explained below, the principle is derived from TCiC 2 and must be observed even in the absence of an explicit/implicit reference to it.¹⁷

For the *ratio legis* of the provisions containing the principle, it is necessary to examine the place of the principle in Roman law.

In the early periods of Roman law, the principle of 'a person who exercises her/his right does injures no one' (*qui suo iure utitur neminem laedit*) was valid.¹⁸ The principle arose from the ownership right (*mülkiyet hakkı*), which authorises *usus*, *fructus*, *abusus*. It is centred on the idea of absolute and unlimited dominion over property within the scope of *ius civile*. However, during the reign of Iustinian, the principle was abandoned, the use of rights was limited, and it was envisaged to be used in a way that would not damage others.

Aemulatio acts, the elements of which are regulated in the *Corpus Iuris Civilis*, are related to the owner's intention to damage others while exercising her/his rights without providing any benefit. Accordingly, the owner, without there being her/his own benefit, cannot exercise her/his right *cum animus nocendi* (with the intention to cause damage).¹⁹ The origin of the principle of abuse of right (*male nostro iure uti*) and the principle of restrained exercise of rights, a manifestation of the former principle, is the acts of *Aemulatio* related to immovable property.²⁰

15 In terms of TCoC 523, in the same direction, see *ibid*.

16 The Turkish Court of Cassation (*Yargıtay*) relies on the principle in its judgments regarding companies' decisions not to distribute dividends. See *Yargıtay* 11 HD, E 2005/10060 K 2006/13738 T 21.12.2006; E 2012/13234, K 2014/3514 T 25.2.2014; E 2015/994 K 2015/5904 T 28.04.2015; E 2016/3145 K 2017/5875 T 30.10.2017. For an analysis of these cases, see Görmez, 'Kötüye Kullanma' (n 4) 138 fn 150 and 216 ff.

17 It is argued that since the principle is a reflection of the principle of good faith, it shall be applied in all areas of private law even if not explicitly mentioned. See Akdağ Güney (n 2) 46. See also Zorluer (n 7) 280.

18 Salvatore Riccobono, 'Roma Doktrininde Hakkın Suiistimali Nazariyesi' (tr Ziya Umur) (2011) 22 (1-4) İstanbul Üniversitesi Hukuk Fakültesi Dergisi 350, 352.

19 *ibid* 353.

20 *ibid* 350.

In the classical legal system, the element of *dolus* (bad faith/malice) was sought in the prohibition of abuse of right. Accordingly, if the owner did not have the intention to cause any damage (*animus nocendi*), acts that do not benefit her/him were not covered by the prohibition. However, when it was proved that the owner had no interest in the act or work, it was very unlikely that there was no intention to damage (*animus nocendi*) the other person.²¹

In the Iustinian legal system, the main element was not bad faith (*dolus*), but rather causing damages to others with the absence of any personal benefit, or the benefit obtained being much less than the damages caused. In other words, in the Iustinian legal system, a more severe and objective limit was drawn for the exercise of the right. According to this framework, bad faith (*dolus*) was not a requirement and property or any other right must be exercised in a way that does not damage others.²² In the context of immovable property, the term ‘damage’ should be understood as the negative impact on the neighbouring immovable due to the activities of the owner on her/his own immovable or directly towards the neighbouring immovable.²³ This principle in the law of neighbours formed the basis of another principle that was particularly applicable to the exercise of servitude that confronts ownership rights: *Servitus civiliter exercanda est!*²⁴ This Latin phrase can be translated as follows: Servitude must be exercised civilly (in a civil manner). In other words, ‘principle of restrained exercise of servitude’. According to this principle, the right holder should not exceed the utilisation authorisation provided with the servitude.²⁵

In Rome, as an agricultural society, for the need to benefit from someone else’s immovable property, the right of way (*via*) and the right of waterway (*rivus*) were regulated as a solution.²⁶ The general rule was that the entire immovable property was considered to be the subject of the servitude²⁷. However, during the establishment of the servitude, the parties may decide on which part of the immovable property the right shall be used. The beneficiary of the servitude must exercise his right ‘reasonably’ within the framework of these rules. The beneficiary must exercise her/his right in a way that will cause the least damage to the servient property and at a time that is convenient for the servient owner: *servitus civiliter exercanda est!*²⁸

21 For some examples given in this regard, see *ibid* 380.

22 *ibid* 381.

23 Buse Aksaray, *Roma Hukukunda Mülkiyet Hakkının Komşuluk İlişkileri Bakımından Sınırları* (2019) 9 (1) SDÜHFD 61, 66.

24 Pellascio (n 8) No 10.

25 Mehmet Ünal, *Sınırlı Ayni Haklar* (Savaş 2021) 133; Göksu (n 8) N 4.

26 Bahar Öcal Apaydın, *Roma Hukukundan Günümüze Taşınmaz Lehine İrtifak Hakları* (Yetkin 2014) 8. Ünal states that in Roman law, the praedial servitude is attached to the beneficiary (*praedio utilis*) of a land and immovable property together with the construction. See Ünal (n 25) 96.

27 The word ‘irtifak’ etymologically rooted in Arabic and used in Turkish, means to rest on a place, to keep company/accompaniment. The Latin equivalent of the word ‘servitude’, on the other hand, expresses the negative aspect of putting something at someone’s service, i.e. endurance/avoidance. See Ünal (n 25) 61.

28 Pellascio (n 8) No 10; Öcal Apaydın (n 26) 165. For examples given in the doctrine on this issue, see: Riccobono (n 18)

In Roman law, the principle of *servitus civiliter exercanda est* sought to establish a balance between the right of property and the servitude. In this respect, arbitrary limitation of the ownership right of the owner of the servient property was sought to be prevented.²⁹ Even though the servient owner had a duty of tolerance (*katlanma yükümlülüğü*) due to the servitude, this obligation was not unlimited. The servitude should be used at a time convenient for the servient owner and in a manner to cause the least damage to the servient property. This was an attempt to prevent the aggravation of the duty of tolerance.³⁰ Moreover, with the “*civiliter uti*” adopted in Roman law, it is envisaged that the praedial servitude right (*taşınmaz lehine irtifak hakkı*) should be exercised in a manner that takes into account the servient owner’s interests and causes the least damage to her/him.³¹ The current legal provision governing these principles is TCiC 786.

Before examining the principle’s application in property law, the legal basis for the principle should be established.

The principle of good faith (TCiC 2/I, also called objective good faith; *dürüstlük kuralı* – *verbatim* the rule of honesty) is a general rule of law that must be observed in the exercise of all rights.³²

This principle establishes a legal bond called ‘relationship of trust’ (trust-based relationship) between persons who come into contact with each other due to a right.³³ In the context of both civil law and company law, the principle of good faith fulfils the function of limitation by drawing the boundaries of the right.³⁴ The exercise of

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29 Öcal Apaydın (n 26) 165-166.

30 ibid 166.

31 Peter Liver, *Art 737 in Die Grunddienstbarkeiten Kommentar zum Schweizerischen Zivilgesetzbuch, Das Sachenrecht, Die Dienstbarkeiten und Grundlasten (Art. 730-792)*, ZK - Zürcher Kommentar (1980) No 3; Öcal Apaydın (n 26) 351; M. Kemal Oğuzman, Özer Seliçi and Saibe Oktay Özdemir, *Eşya Hukuku* (22nd edn, Filiz 2020) 822.

32 Akyol (n 2) 14; Oğuzman and Barlas (n 6) 244. On this being a general norm of behaviour see Mustafa Kılıçoğlu, *Yargıtay Kararları Işığında Dürüstlük Kuralı ve Hakkın Açıkça Kötüye Kullanma Yasağı - İsviçre - Türk Öğretisi* (Bilge 2015) 3 and 6. It is also stated that the principle of good faith is not concerned with the subjective state in which a person is and that the assessment to be made shall always be objective, which is one of the fundamental differences between the principle of good faith (ie objective good faith) and subjective good faith regulated under TCiC 3. See Halil Akkanat, *Türk Medeni Hukukunda İyiniyetin Korunması* (Filiz 2010) 11.

33 Akyol (n 2) 12.

34 In the doctrine it is stated that the principle of good faith has four main functions: i) the function of concretisation, ii) the function of complementation, iii) the function of limitation and iv) the function of correction. See Fikret Eren, *Borçlar Hukuku Genel Hükümler* (28th edn, Yetkin 2023) 19. See and cf Rona Serozan, Baki İlkay Engin and Yeşim M Atamer, *Medeni Hukuk – Genel Bölüm – Kişiler Hukuku* (9th edn, On İki Levha 2022) 279-280. The authors attribute the functions of limitation and correction primarily to the prohibition of abuse of right. Akyol states that the prohibition of abuse of right not only limits the right but also determines its content. See Akyol (n 2) 7. The author also states that the principle of good faith functions as a corrective principle. Akyol (n 2) 3. According to the author, ‘as the right exercised and the obligation fulfilled develops, the duty of loyalty, faith, care, provision information, and explanation to be shown within the framework of the principle of good faith also develop’.

a right contrary to the principle is considered an abuse of right (TCiC 2/II). For this reason, the principle of objective good faith and the prohibition of abuse of rights are often explained as the two sides of the same coin.³⁵ The prohibition of abuse of right is considered an aspect of the principle of good faith and characterised as an application of the principle.³⁶

The abuse of a right may take different forms. A right is abused if it is exercised not to obtain a legitimate benefit, but to put someone else in a difficult situation or to obtain an illegitimate gain.³⁷ In addition, even if there is a benefit to be obtained for the right holder through the exercise of the right, if this benefit is not legitimate, the right is considered to be abused. In the exercise of a right, when there are other opportunities of the same value for the right holder, the exercise of the right in a way that harms others may also be considered abuse.³⁸ Finally, an excessive disproportion between the benefit that the exercise of the right will provide to the right holder and the damage it will cause to others is also an abuse of the right.³⁹

The legal order does not prohibit persons from exercising their rights in accordance with their interests. The pursuit of one's self-interest is not unlawful, and the 'selfish' exercise of rights is not prohibited. For example, with *abusus* contained in the ownership right, a person may choose to completely destroy the object of the ownership right because he or she is "bored" with it. As a rule, the legal order does not interfere with this intrinsic choice. The limits of 'selfishness' are the principle of good faith and the prohibition of 'explicit' abuse of the right in Article 2 of the TCiC. The legal order intervenes in the selfish exercise of a right in accordance with its external effect, i.e. its impact on the third person's sphere.⁴⁰ For instance, in cases where a person's selfishness is directed towards harming the other person rather than her/his own interest, this selfishness directed outwardly is no longer protected. The prohibition of abuse of rights is meant to interfere not with selfishness, but with the excesses of selfishness.⁴¹ This framework is intertwined not only with the ownership

35 Oğuzman and Barlas (n 6) 245.

36 ibid 268-269. Article 2/II of TCiC is explained as a natural consequence and appearance of Article 2/I of TCiC. See Barlas (n 6) 192 fn 1. See and cf Akyol (n 2) 23; Serozan, Engin and Atamer (n 34) 277.

37 It is stated that a 'questionable' exercise of a right is generally lawful if it provides a benefit (*avantage*) to the person exercising the right and 'does not disturb the comfort' of another person. See Pascal Montavon, 'Première partie Structure, historique et principes généraux du droit civil / § 3. - § 4' in *Abrégé de droit civil, Art. 1er - 640 CC / LPart / LPD / LN 25* (Schulthess Verlag 2020) 25.

38 Oğuzman and Barlas (n 6) 279.

39 ibid. In the event that the disproportion is excessive, the owner of the servient property may request cancellation from the court. See Mehmet Ayan, *Eşya Hukuku III - Sınırlı Ayni Hak* (Seçkin 2017) 65. From the company law perspective, for the view that if the interests of the shareholders are negatively impacted by a decision taken in the company against the interest provided by the company and if there is a disproportion between the interest provided and the negatively impacted interest, the decision is considered to be contrary to the principle of good faith, see and cf İsmail Kırcı, *Anonim Şirket Genel Kurul Kararlarının Hükümsüzlüğü* (3rd edn, On İki Levha 2022) 82; Kerem Çelikboya *Anonim Şirketlerde Pay Sahibinin Kâr Payı Hakkı* (On İki Levha 2021) 484; Görmez, 'Kötüye Kullanma' (n 4) 109.

40 Paşlı, 'Kontrol Sahibi' (n 2) 354 ff. With respect to the shareholder, in the same direction see Ömer Teoman, *Yaşayan Ticaret Hukuku - [Hukukî Mütalâalar] Kitap 12: 2004 - 2007* (Vedat 2008) 39.

41 Görmez, 'Kötüye Kullanma' (n 4) 75-76. In terms of French law, in the same direction see Anne-Laure Champetier de

right, the subject of which is 'property', but also with 'shareholding' in company law: There is nothing unusual for the controlling shareholder of the company to act in her/his own interest as the owner of the shares.⁴² However, as stated by the Swiss Federal Court⁴³, the abuse of rights may be resorted to in limited circumstances, as SCC/TCiC Article 2/II stipulates that the abuse must be 'explicit'⁴⁴. Caution should be exercised when relying on the prohibition of abuse of right.

The principle of restrained exercise of rights derives its source from the principle of good faith⁴⁵ and the prohibition of abuse of right.⁴⁶ In this regard, the principle can be seen as a special manifestation of the prohibition of abuse of rights⁴⁷ and

Ribes-Justeau, *Les Abus de Majorité, de Minorité et d'Égalité : Etude Comparative des Droits Français et Américain des Sociétés* (Dalloz 2010) 66.

- 42 For the view that the controlling shareholders have the right to exercise their rights in their own interest by virtue of their status as the owner, see Champetier de Ribes-Justeau (n 41) 134; Paşlı, 'Kontrol Sahibi' (n 2) 353. For the 'majority', in the same direction see Görmez, 'Kötüye Kullanma' (n 4) 76. For the concept of the right to selfish ownership of the controlling shareholder under United States law and the controlling shareholder's fiduciary duty, see Lawrence E Mitchell, 'Death of Fiduciary Duty In Close Corporations' 138 (6) 1990 University of Pennsylvania Law Review 1675, 1714. For the court decision extensively cited in this study and the explanations on the relevant right therein, see *Wilkes v. Springside Nursing Home, Inc*, 370 Mass. 842, 850-852.
- 43 For decisions of the Swiss Federal Court in this respect, see ATF 95 II 157 - JdT 1970 I 344, 349; 4A_205/2008. The prohibition of abuse of right under TCiC 2/II is explained as a secondary remedy of last resort (*ultima ratio*). See Kılıçoğlu (n 32) 4.
- 44 In the doctrine, it is stated that the 'explicit' abuse of the right means the use of the right contrary to its purpose in a clear, obvious, easily visible manner, in a way that is easily understood by a person of average intelligence. See Akiye, Akıntürk and Ateş (n 6) 187.
- 45 For the view that the principle derives from or is a manifestation of the principle of good faith, see Tekinalp, 'En Az Zarar I' (n 2) 79; Ünal Tekinalp, 'Hakların En Az Zarar Verecek Şekilde Kullanılması İlkesi (II)' (1979) 26 (5) İktisat ve Maliye Dergisi 203, 203 and 205; Yıldız, 'Yeni Pay' (n 12) 293; Nomer, 'Sadakat Yükümlülüğü' (n 2) 27; Yanlı (n 13) 369; Göksoy (n 12) 407; Okutan Nilsson (n 12) 169; Hamamcıoğlu, 'Tek Borç' (n 7) 12 and 72; Anlam Altay, *Anonim Ortaklıklar Hukuku'nda Sermayeye Katılmalı Ortak Girişimler (Equity Joint Ventures)* (Vedat 2009) 509; Esra Cenkeci, *Anonim Ortaklıklarda Kayıtlı Sermaye Sistemi* (On İki Levha 2015) 241; Özlem İlbasmış Hızlısoy, *Anonim Şirketin Haklı Sebeple Feshi* (Adalet Yayınevi 2016) 91; Akdağ Güney (n 2) 45; Moroğlu, 'Hükümsüzlük' (n 7) 236-237; Baltalı (n 5) 151; Semih Sırrı Özdemir and Elanur Tamer, 'Kurumsal Yönetim İlkeleri Işığında Anonim Şirketlerde Genel Kurula İlişkin İlkelerin Değerlendirilmesi' (2019) 7 (14) *Uyumsuzluk Mahkemesi Dergisi* 329, 353; İsmail Kırca, 'Halka Açık Olmayan Anonim Şirketler ile Limited Şirketlerin Paylarını Gerçek Değerinden İhraç Etmeleri Zorunlu Mudur?' 36 (1) 2020 BATİDER 5, 25; Barış Demirsatan, *Türk Borçlar Kanunu Çerçevesinde Sözleşmenin Haksız Olarak Sona Erdirilmesi* (2nd edn, On İki Levha 2021) 146; Zorluer (n 7) 279-280; Bektaş, 'Yeni Pay' (n 10) 290; Ünal (n 25) 134. For the view that violation of the principle would constitute a breach of 'good faith', see Mehmet Bahtiyar, *Ortaklıklar Hukuku* (17th edn, Beta 2023) 175-176.
- 46 On the dogmatic basis of the principle being the prohibition of abuse of right, see Ali Haydar Yıldırım, *6102 Sayılı Yeni Türk Ticaret Kanuna Göre Limited Ortaklığın Haklı Sebeple Feshi* (Dora 2013) 209; Akdağ Güney (n 2) 49 and 52. On the principle being related to a special form of prohibition of abuse of right under TCiC 2/II, see Soykan, 'Sermaye Artırımı' (n 7) 595 In 54. The doctrine states that if there is more than one option in the exercise of a right, the exercise of a right that does not provide an additional benefit to the right holder, but will put the other party in difficulty, is considered an abuse of right. See Akyol (n 2) 103; Oğuzman and Barlas (n 6) 257. In the same direction and linking this approach explicitly to the principle of restrained exercise of rights see Kırca, 'Hükümsüzlük' (n 39) 81. cf Demirsatan (n 45) 146-147. According to the author, in a contractual setting, the principle imposes on the right holder to minimise the harm to the interests of the third parties as well, along with the interests of the other party, and any violation of the principle precedes the violation of the prohibition of abuse of rights within the confines of TCiC 2. In the Swiss doctrine, it is disputed whether the principle derives from SCO Article 2/1 or SCO Article 2/2 of SCO. On this issue, see Wilhelm and Varrin (n 2) 56 fn 284 and 285. See also Hänni (n 5) 392.
- 47 For Swiss Federal Court decisions stating that the principle is a manifestation of SCC 2/2 (TCiC 2/II), see ATF 131 III 459 - JdT 2005 I 588, 591; 4A_531/2017. The Turkish Court of Cassation has decisions based on this principle regarding the voidability (*iptal edilebilirlik*) of general assembly resolutions on the non-distribution of profit, where the resolutions contrary to the principle are considered voidable due to their "lack of good faith.". See Yargıtay 11 HD E 2005/10060 K 2006/13738 T 21.12.2006; E 2012/13234 K 2014/3514 T 25.2.2014; E 2015/994 K 2015/5904 T 28.04.2015; E 2016/3145 K 2017/5875 T 30.10.2017. While the Court aligns the principle with TCiC 2, it is not clear whether it sees the source of the principle as TCiC 2/1 or TCiC 2/II. See Görmez, 'Kötüye Kullanma' (n 4) 138-139. cf Akdağ Güney (n 2) 63. In a recent decision regarding a dispute arising from the transfer of a contract, a dissenting opinion stated that the principle is derived from the abuse of rights. See Yargıtay 6 HD E 2022/5323 K 2023/623 T 16.2.2023. The dissenting opinion includes a definition of the principle with the following statements: 'Article 2 of the Swiss Civil Code (TCiC Article 2) reflects the

should be applied with caution⁴⁸. The principle is intertwined with the principle of proportionality.⁴⁹ In Swiss law, some scholars and the Swiss Federal Court have evaluated these two principles together.⁵⁰ As mentioned above, an excessive disproportion between the benefit that the exercise of the right will provide to the right holder and the damage it will cause to others is an abuse of the right. This is where the principle of restrained exercise of rights is embodied.

Praedial servitude imposes duties on the owner of the servient property for the protection of the benefit of the dominant property. If the beneficiary does not use her/his right in accordance with its purpose, exceeds the limits of her/his authorities and does not take into consideration the interest of the servient owner while exercising her/his right, in other words, if she/he does not use her/his right in a way to cause the least damage to the servient owner, she/he is deemed to have violated the ownership right of the servient owner. Even if she/he is not at fault, she/he may be held liable, like the owner of the immovable property, pursuant to TCiC 730.⁵¹ In such cases, the interest of the owner of the dominant property must be balanced against the position of the servient owner who is already under the duty of tolerance and whose burden should not be aggravated. In other words, in this context of conflicting interests where one interferes with the other, any such interference or its means from one towards the other must be suitable to, necessary and balanced with the purpose of interference. If there is a more balanced method in interfering with the other interest, that method should be preferred. Otherwise, the interference would not be proportionate and lawful. If the disproportion in the use of servitude is excessive, the owner of the servient property may request its cancellation from the court.⁵²

principle of honesty and good faith in private law. The provision of Article 2 of TCiC is mandatory. It is a mandatory rule containing instructions directed to each individual regarding the scope of rights and obligations. Thus, it forms a general behavioural norm based on an objective criterion. This article is evaluated as a behavioural norm indicating how parties must act in a given situation and the assignment of rights and obligations to them through this means. This situation is concretised by the principle of restrained exercise of instruction rights. This right is derived from the prohibition of abuse of rights. If a person has the opportunity to act differently and this possibility is foreseeable, in other words, if they can achieve their intended purpose through this means, they must choose the path that causes the least harm to the other party.'

48 In terms of company law, in the same direction and for the view that the principle should not serve as a tool for the judge to review managerial decisions, see Wilhelm and Varrin (n 2) 70; Görmez, 'Kötüye Kullanma' (n 4) 151.

49 On the principle being the private law equivalent of the principle of proportionality applied in public law and regulated under Article 13 of the Turkish Constitution, see Rauf Karasu, *Anonim Şirketlerde Emredici Hükümler İlkesi* (2nd edn, Yetkin 2015) 38; Akdağ Güney (n 2) 45; Özdemir and Tamer (n 45) 353; Zorluer (n 7) 280; Topcan (n 10) 69; Kırca, 'Hükümsüzlük' (n 39) 82-83; cf Kayıklık (n 7) 443. In a similar direction, see Cenkcı (n 45) 190. In terms of the expression 'principle of proportionality' in the restriction of the pre-emption rights see Yanlı (n 13) 369; Murat Yusuf Akın, 'Kayıtlı Sermayede Rüçhan Hakkının Sınırlandırılması veya İlgilinin Bu Hakkı Kullanımdan Yoksun Bırakılmasındaki Kısıtlar' in *Prof. Dr. Reha Poroy'a Armağan* (İstanbul Üniversitesi Avrupa Hukuku Araştırma ve Uygulama Merkezi 1995) 25; Adıgüzel (n 12) 13. In a similar direction see İbrahim Bektaş, 'Anonim ve Limited Ortaklıklarda Yeni Pay Alma Hakkının Şirket Sözleşmesiyle Kısıtlanması Sorunu' (2021) 37 (2) BATİDER 141, 170.

50 On the view that it is a manifestation of the principle of proportionality (*proportionnalité*), see Hänni (n 5) 392; Wilhelm and Varrin (n 2) 22. For an assessment of the principle under the concept of proportionality, see Jérôme Bénédict and Jérôme Jaquier, 'Les Actionnaires Face aux Risques et aux Conséquences d'Une Dilution de Leurs Droits en Cas d'Augmentation de Capital' (2005) in François Dessemontet (ed), *Aspects Actuels du Droit de la Société Anonyme - Travaux Réunis pour le 20ème Anniversaire du CEDIDAC* (CEDIDAC 2005) 171. For the Swiss Federal Court decision, see ATF 143 III 120 – JdT 2017 II 377, 381-382. See and cf ATF 117 II 290, 301.

51 Lale Sirmen, *Eşya Hukuku* (10th edn, Yetkin 2022) 600; Oğuzman, Seliçi and Oktay Özdemir (n 31) 818.

52 Ayan (n 39) 65; Oğuzman and Barlas (n 6) 279.

The perception of the principle of restrained exercise of rights in company law is in line with the framework outlined above. The principle does not imply that the majority must consider the interests of other shareholders in a way that creates difficulty for itself.⁵³ The majority is free to act according to its own selfish interest in the exercise of its rights and is not expected to prioritise the interest of other shareholders over its own interest. That being said, if the decisions taken in the company are contrary to the principle of restrained exercise of rights, such decisions may be invalid (*geçersiz*).⁵⁴

In company law, the principle is viewed as complementing the principle of equal treatment⁵⁵, which itself is considered a manifestation of the principle of good faith⁵⁶. For instance, when a decision is taken not to distribute dividends due to the financing requirement, the decision does not violate the principle of equal treatment since no shareholder can benefit from the profit; however, although the company has a real financing requirement, setting aside reserves far in excess of the amount that would meet this requirement would violate the principle of restrained exercise of rights.⁵⁷ Thus, the principle of restrained exercise of rights complements the principle of equal treatment by expanding the shareholder's means of protection in cases where the protection of the principle of equal treatment is insufficient.

53 Görmez, 'Kötüye Kullanma' (n 4) 76. It can be argued that the majority should 'tolerate' less advancement of its interests rather than more. See Hänni (n 5) 393; Görmez, 'Kötüye Kullanma' (n 4) 149-150.

54 For a Swiss Federal Court decision pointing out that general assembly decisions in a public limited liability company may be voidable (*annulable, iptal edilebilir*) if they are contrary to the principle of proportionality and, 'more specifically', to the principle of restrained exercise of rights, see ATF 143 III 120 – JdT 2017 II 377, 381-382. The Turkish Court of Cassation shares the same view. See Yargıtay 11 HD E 2005/10060 K 2006/13738 T 21.12.2006; E 2012/13234 K 2014/3514 T 25.2.2014; E 2015/994 K 2015/5904 T 28.04.2015; E 2016/3145 K 2017/5875 T 30.10.2017.

55 See Ali Paşlı, *Anonim Ortaklık Kurumsal Yönetimi - Corporate Governance* (2nd edn, Çağa Hukuk Vakfı 2005) 186; İsmail Kırca, Feyzan Hayal Şehirali Çelik and Çağlar Manavgat, *Anonim Şirketler Hukuku*, vol 1 (BTHAE 2013) 144; Cenkeci (n 45) 242; Akdağ Güney (n 2) 50; Murat Yusuf Akın and Setenay Yağmur, 'Türk Anonim Şirketler Hukukunda Eşit İşlem İlkesinin Uygulanması Açısından Objektif Kriter Kavramı' (2018) 13 (144) *Terazi Hukuk Dergisi* 96, 101; Özdemir and Tamer (n 45) 354; Soykan, 'Sermaye Artırımı' (n 7) 595; Setenay Yağmur, *Anonim Şirketlerde Eşit İşlem İlkesi* (On İki Levha 2020) 63; İsmail Cem Soykan, 'Sermaye Artırımı Kararının Dürüstlük Kuralına Aykırılığı' in Arslan Kaya et al (eds), *Yürürlüğünün 7. Yılında ve Yargıtay Kararları Işığında Türk Ticaret Kanunu Sempozyumu -III- (Tebliğler ve Tartışmalar)* (On İki Levha 2020) 214; Kayıklık (n 7) 443; Topcan (n 10) 71, Görmez, 'Kötüye Kullanma' (n 4) 144. In a similar direction, see Yıldırım (n 46) 210. See also Nuri Erdem, *Anonim Ortaklığın Haklı Sebeple Feshi* (2nd edn, Vedat 2019) 13 fn 17. The author argues that the principle of restrained exercise of rights is a particular reflection of the principle of equal treatment and is implemented where the latter falls short to protect the interests of the company.

56 See eg Görmez, 'Kötüye Kullanma' (n 4) 118. TCoC 357 explicitly governs this principle for public limited liability companies. According to the provision, shareholders that are in the same position shall be awarded equal treatment. The principle was defined in the same manner in Turkish law prior to being explicitly regulated by this provision. See Merih Kemal Omağ, 'Anonim Şirketler Hukukunda Eşit İşlem İlkesi' (1986) 1 (1) *MÜHFAD* 2; Nedret Füsun Nomer, 'Anonim Ortaklıkta Eşit Davranma (Eşit İşlem) İlkesi' in *Prof. Dr. Oğuz İmregün'e Armağan* (Beta 1998) 469, 471; Paşlı, 'Kurumsal Yönetim' (n 55) 186. For the debate on the legal basis of the principle prior to this explicit provision, see Şükrü Yıldız, *Anonim Ortaklıkta Pay Sahipleri Açısından Eşit İşlem İlkesi* (Seçkin 2004) 53 ff; Yağmur (n 55) 39-47.

Regarding private limited liability companies, TCoC 627 stipulates that managers shall, under equal circumstances, treat shareholders equally. Therefore, only the management body is explicitly put under the duty to follow such a rule. The Turkish doctrine criticises this approach and states that even without an explicit provision, the general assembly of private limited liability companies shall also be bound by this principle. See Abuzer Kendigelen, *Yeni Türk Ticaret Kanunu Değişiklikler, Yenilikler ve İlk Tespitler* (3rd edn, On İki Levha 2016) 542; Bahtiyar, 'Ortaklıklar' (n 45) 374. In the same direction, see Fatih Bilgili and Ertan Demirkapı, *Şirketler Hukuku* (9th edn, Dora 2013) 694; Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku* (5th edn, Vedat Kitapçılık 2020) No 21-04.

On the application of the principle under Swiss law, see Wilhelm and Varrin (n 2) 19.

57 Çelikkaya (n 39) 485; Görmez, 'Kötüye Kullanma' (n 4) 215-216.

In a limited liability company relationship, the minority shareholder agrees to abide by the majority rule with the expectation that the majority will exercise its power to pursue the common purpose.⁵⁸ Therefore, even in a decision that does not violate the principle of equal treatment, a principle which may be associated with *affectio societatis*⁵⁹, and in which a legitimate company interest can be demonstrated, the minority must be protected against decisions that tend to harm the minority's interest. This protection may be achieved through the principle of restrained exercise of rights.⁶⁰

The relationship between the principle of equal treatment and the principle of restrained exercise of rights in company law can also be used in the law of obligations, and a parallel approach may be developed. In the context of the law of obligations, the principle of equality is an extension of contractual autonomy and autonomy of will. As a rule, the parties to a debt relationship are equal and subject to equal protection, regardless of their economic and social status.⁶¹ In other words, it is necessary and sufficient that the protection provided to the parties should also be equal in the face of their equality.⁶²

In a contractual relationship, it can be said that the parties have a certain confidence that the other party will use its rights in accordance with the purpose of the contract and establish the balance of rights and interests in the contract accordingly. In the event that one of the parties prefers a method that will damage the interest of the other party more when it can exercise its contractual right in a way that will cause less damage to the other party, the principle of restrained exercise of rights, which is the appearance of the prohibition of abuse of right, may find an application area.⁶³ Thus, it can be said that the assumption of being in an equal position in the establishment of the contractual relationship is completed by protecting the balance created by the parties in the process of the contractual relationship through the principle of restrained exercise of rights.

Article 786 of the TCiC, which governs the scope of the praedial servitude under the 'Limited Rights *in Rem*' section of the TCiC, explicitly stipulates the principle of the restrained exercise of rights.

58 On this subject, see below Chapter V.

59 For detailed explanations on the relationship between *affectio societatis* and the principle of equal treatment, see Görmez, 'Kötüye Kullanma' (n 4) 124-133.

60 *ibid* 145-146.

61 Eren (n 34) 17-18.

62 In relationships where the parties are not in equal positions, the weaker party may be afforded additional protection. For instance, in consumer law, regulations aimed at protecting the consumer are of this nature. See Eren (n 34) 18.

63 cf Demirsatan (n 45) 146-147. The author states that the principle may be applied in the law of obligations while asserting a claim or using a formative right.

In a praedial servitude, there is a burden (servitude) imposed on an immovable (servient property - *yüklü taşınmaz*) in favour of another immovable (dominant property - *yararlanan taşınmaz*). The praedial servitude imposes a duty on the servient owner to refrain from exercising some of the authorisation inherent in ownership or to tolerate the beneficiary's use of this immovable in accordance with her/his right (TCiC 779). In other words, a praedial servitude is a limited right *in rem* that authorises the right holder to use and/or benefit from another immovable property.⁶⁴

Whoever owns the dominant property is also the beneficiary of the praedial servitude. Because the servitude is inalienably linked to the ownership of the dominant property.⁶⁵ The beneficiary establishes a direct and partial dominance over the servient property through her/his right *in rem*.⁶⁶ The legal relationship is directly between the servient property and the beneficiary. There is no need for the intervention/permission of the servient owner in the exercise of the right.⁶⁷ Even though the servitude is used on a part of the immovable, the burden is on the whole immovable.⁶⁸ However, the authorisation to benefit from the immovable is always limited.⁶⁹ For example, the beneficiary cannot prevent the uses of the servient property that are not related to the servitude.⁷⁰

In praedial servitude, the servient owner has either a burden of 'tolerance' or a burden of 'avoidance'.⁷¹ The main reason for this is to ensure the 'benefit' of the dominant property. The protected benefit is the benefit provided to the right holder (beneficiary) by using the servitude in accordance with its content within the framework of the authorisation granted to her/him.⁷² Any other benefit of the right holder is not protected.⁷³ If there is no longer any benefit provided by the right, the servient owner may request the abandonment of this right (TCiC 785/I).

64 Liver (n 31) No 5; Gökhan Antalya, *Eşya Hukuku Cilt I* (Legal 2018) 89; Ünal (n 25) 96. With the establishment of a limited right *in rem*, the powers granted by the ownership right to the owner are narrowed, but with the termination of this right, the ownership right is automatically restored. This is called the 'principle of flexibility of the ownership right' (*mülkiyet hakkının esnekliği ilkesi*). See Şeref Ertaş, *Eşya Hukuku* (Barış Yayınları Fakülteler Kitabevi 2014) 501; Haluk Nami Nomer and Mehmet Serkan Ergüne, *Eşya Hukuku* (On İki Levha 2019) 308; Ahmet Kılıçoğlu, *Eşya Hukuku* (1st edn, Turhan 2021) 485.

65 Ertaş (n 64) 501; Ayan (n 39) 48; Antalya (n 64) 88; Hasan Erman, *Eşya Hukuku Dersleri* (9th edn, Der 2020) 161; Ünal (n 25) 95; Oğuzman, Seliçi and Oktay Özdemir (n 31) 790.

66 Ünal (n 25) 61.

67 Erman (n 65) 163; Ünal (n 25) 100; Oğuzman, Seliçi and Oktay Özdemir (n 31) 816.

68 Ayan (n 39) 48.

69 Ünal (n 25) 61, 96.

70 Oğuzman, Seliçi and Oktay Özdemir (n 31) 791 fn 93.

71 While the practices/activities of the right holder in line with his/her authorisation on the servient property are the positive (active) aspect of the servitude, the duty of the owner of the servient property to endure/avoid is the negative (passive) aspect of the servitude. See Ünal (n 25) 62.

72 Ünal (n 25) 61. See also Öcal Apaydın (n 26) 299.

73 Ünal (n 25) 61; Oğuzman, Seliçi and Oktay Özdemir (n 31) 808.

The exercise, scope and limits of the servitude are determined according to the reason for the acquisition of the servitude. However, for cases where both an ownership right and a servitude exist on the same immovable, the legislator has put forward regulations regarding the exercise, scope and limits of the servitude. These regulations include certain authorisations and duties for both the owner of the dominant property and the servient owner in the exercise of the right.⁷⁴

The right of the servient owner to demand the replacement of the servitude is an example of her/his authorizations (TCiC 791/I).^{75,76} Likewise, the servient owner may request the removal of the aggravated state in case the use of the servitude aggravates the burden on the property.⁷⁷ This authorisation is based on the requirement stipulated under TCiC 786 that the beneficiary shall consider the interest of the servient owner when exercising her/his right.⁷⁸ In other words, the provision is a special application of the rule of *civiliter uti*, which states that the servitude shall be exercised in a manner that should cause the least damage to the servient owner.⁷⁹

The duty of the servient owner is to refrain from behaviours that would obstruct and make it difficult for the beneficiary to exercise her/his rights (TCiC 786/II).⁸⁰ The servient owner must respect the beneficiary's right and refrain from innovations and activities that will make the exercise of the beneficiary's right difficult and reduce the scope of such right.⁸¹ In addition to the powers and duties of the owner of the servient property, the beneficiary's powers (*adminicula servitutis*⁸²) and duties are also regulated under the same provision.

The beneficiary has a direct right to benefit or right to use on servient property.⁸³ The beneficiary may take all necessary measures for the protection and use of this right (TCiC 786/I).⁸⁴ These measures include protection, renovation and repair works

74 Oğuzman, Seliçi and Oktay Özdemir (n 31) 816.

75 Another example is the right to request the cancellation of the servitude regulated under TCiC 785.

76 In this case, the beneficiary of the servitude cannot refuse the relocation request of the owner of the servient property. See Öcal Apaydın (n 26) 280.

77 *ibid.*

78 Oğuzman, Seliçi and Oktay Özdemir (n 31) 819.

79 Pellascio (n 8) No 10; Öcal Apaydın (n 26) 351; Ünal (n 25) 134, 165; Oğuzman, Seliçi and Oktay Özdemir (n 31) 822.

80 Another duty of the owner of the servient property is to participate in the maintenance expenses (TCiC 790).

81 Sirmen (n 51) 601; Öcal Apaydın (n 26) 281; Ayan (n 39) 60. For example, if the beneficiary of the servitude is granted the right to take sand from the servient property, the owner of the servient property may not obstruct or make it difficult for the right holder to enter and exit the immovable.

82 *Adminicula servitutis* comes from the Roman law. The beneficiary of the servitude is limited to the scope of the servitude and, in addition to benefiting from servient property, has additional powers necessary to exercise the right. Öcal Apaydın (n 26) 351.

83 Öcal Apaydın (n 26) 276; Göksu (n 8) No 2, No 3.

84 Ayan (n 39) 56. For example, in the case of a quarrying servitude, the quarrying activities should be carried out in such a way as to cause the least damage to the owner of the servient property; if part of the land is cultivated, due care should be taken to prevent damage to this part. See Sirmen (n 51) 600. Other authorisations necessary to exercise the right, even if not explicitly included in the reason for acquisition (*causa*), are also covered by the servitude. Öcal Apaydın (n 26) 277.

that serve the proper exercise of the servitude.⁸⁵ In addition, unless otherwise agreed by the parties or unless otherwise stipulated by law, the beneficiary may construct, without prior authorisation, the facilities necessary for the exercise of the right.⁸⁶ For example, the beneficiary may construct a road for her/his right of way.⁸⁷ On the other hand, the beneficiary is obliged to exercise his/her right in a way that causes the least damage to the owner of the servient property and to consider the interests of the owner (TCiC 786/I).⁸⁸ Accordingly, the beneficiary must act in a manner that will cause the least inconvenience to the servient owner and choose the most convenient time for her/him.

While exercising her/his right, the beneficiary cannot make innovations that aggravate the state for the servient property.⁸⁹ This principle is explicitly stated in TCiC 788. The servitude cannot be expanded in a way that damages the servient property. For example, the water drainage channel determined during the establishment of the servitude cannot be expanded unilaterally afterwards⁹⁰ or a motor vehicle cannot pass through the place where the right to pass on foot is recognised⁹¹. While the servient owner should not make the exercise of the right difficult, it is not obliged to accept, due to the servitude, excessive use in a manner overreaching the purpose of the servitude. In the case of excessive use, the beneficiary is deemed to have attacked the ownership right of the servient owner.⁹²

The doctrine states that the idea of keeping the servitude as tolerable as possible for the owner of the servient property has gained importance.⁹³ Indeed, the servitude may only narrow the right of the servient owner to the extent that it is suitable according to the servitude's purpose and scope. The use of the right in such a way as to cause the least damage to the owner of the servient property, in other words, the restrained exercise of her/his right, has emerged with the aim of balancing the opposing interests of the servient owner and the owner of the dominant property.⁹⁴ The beneficiary is obligated to consider the interest of the servient owner. The beneficiary must choose the behaviour and time that will cause the least inconvenience to the servient owner. If there are multiple ways to use the servitude, the beneficiary should choose the

85 Sirmen (n 51) 600.

86 Ünal (n 25) 141.

87 Sirmen (n 51) 495; Öcal Apaydın (n 26) 277; Ünal (n 25) 141.

88 For example, the owner of a right of passage (*via*) cannot damage the plants and soil while passing through the servient property. Kılıçoğlu (n 64) 493.

89 Ayan (n 39) 57; Ünal (n 25) 129.

90 Öcal Apaydın (n 26) 279.

91 Ayan (n 39) 57.

92 Oğuzman, Seliçi and Oktay Özdemir (n 31) 818. In such a case, the owner of the servient property may request the judge to prevent the use that significantly aggravates her/his burden, and if this is not possible, she/he may request cancellation in accordance with TCiC 785. Ayan (n 39) 57-58.

93 Sirmen (n 51) 573, Oğuzman, Seliçi and Oktay Özdemir (n 31) 818.

94 Öcal Apaydın (n 26) 279.

option that causes the least damage to the servient owner.⁹⁵ Accordingly, the manner and extent of the use of the servitude should be designed in a way that will cause the servient owner to endure the least sacrifice.⁹⁶ In this respect, the servitude right holder's restrained exercise of her/his right can be explained as a requirement of the rule of objective good faith (*dürüstlük kuralı*), as explained in the above chapter.⁹⁷

Failure to exercise the right in a way that will cause the least damage to the servient owner, in other words, exceeding the boundaries (the purpose of the right) in the exercise of the right constitutes an abuse of the right.⁹⁸ For example, if the beneficiary of the right of way passes through the fertile part of the servient land instead of the infertile part, this constitutes a violation of the principle.⁹⁹ In this case, the sanction of abuse of right (TCiC 2, Turkish Code of Obligations 49) shall apply. Furthermore, if the beneficiary does not use her/his right in a way that causes the least damage possible to the servient owner, the beneficiary is deemed to have violated the ownership rights of the burdened property owner.¹⁰⁰ Even if the beneficiary is not at fault, like the owner of the immovable property, they can be held liable under TCiC 730.¹⁰¹ The burdened property owner may also benefit from provisions protecting possession (TCiC 981), the action to prevent interference (TCiC 683/II), and even the provisions concerning encroaching buildings in TCiC 725/II. For example, this is the case when the dominant property owner's construction on the servient property exceeds the granted limit under the servitude.¹⁰² Ultimately, if the servient owner suffers any damage as a result of the beneficiary's failure to exercise his/her right with restraint, the servient owner may claim compensation for this damage.

Restrained exercise of rights has emerged to balance opposing interests. One side of this is the restrained exercise of servitude (*servitus civiliter exercanda est*), which is based on Roman law and expressed openly in TCiC 786/I. However, in line with the principle, the required balance between the ownership right and the servitude in property law can be evaluated in two reciprocal directions: i) from the ownership right in the servient property to dominant property, ii) from the servitude to the servient property. In terms of the duties imposed on the servient owner, the connection can be analysed in two separate parts: a) Similarity in terms of *ratio* and b) cases where a more direct connection can be established.

95 Moreover, the owner of the servient property has the right to demand that the least damaging method for benefiting be applied. See Oğuzman, Seliçi and Oktay Özdemir (n 31) 818. For Swiss law, see ATF 100 II 195 - JdT 1975 I 150.

96 Öcal Apaydın (n 26) 279; Erman (n 65) 163; Oğuzman, Seliçi and Oktay Özdemir (n 31) 818.

97 Sirmen (n 51) 600; Erman (n 65) 163.

98 Pellascio (n 8) No 12; Erman (n 65) 163; Oğuzman, Seliçi and Oktay Özdemir (n 31) 818.

99 Ünal (n 25) 134.

100 Erman (n 65) 163.

101 Sirmen (n 51) 600; Oğuzman, Seliçi and Oktay Özdemir (n 31) 818.

102 Ünal (n 25) 165.

Regarding the similarity in terms of *ratio*, the owner of the servient property is forced to endure the limitation of her/his right of ownership, if necessary. In other words, the enjoyment of her/his right is interfered with, and its use is narrowed. On the subject of interference in the exercise of a right, this legal or voluntary restriction is similar in terms of *ratio* to the restrained exercise of rights.

It may be argued that the direct connection in terms of the owner of the servient property finds its expression in TCiC 786/II. The servient owner is under a duty not to act in a manner that may obstruct or hinder the exercise of the servitude. Therefore, the servient owner is under the duty not to damage the beneficiary's right while exercising her/his rights in the servient property. It can be argued that from the perspective of the servitude owner, this requirement is a manifestation of the principle of the restrained exercise of rights.

The relationship of the principle of the restrained exercise of rights with the beneficiary is direct. The duty of tolerance imposed on the servient property's owner, whose ownership rights can be restricted due to the needs of another person without her/his will (despite having the broadest rights on the property), is balanced by the requirement that the beneficiary does not make the situation more difficult and utilises the right in the most favourable way for the owner. In this respect, the beneficiary's explicitly imposed duty to observe the principle of the restrained exercise of rights (TCiC 786/I) is directed to ensure the reasonableness and proportionality¹⁰³ of the interference in the legal sphere of the other person (whether voluntary or arising from the law) while exercising one's right.

Therefore, it is possible to define the principle in the context of property law as follows: The restrained exercise of rights is the choice of a method that will allow one right holder (beneficiary of the servitude) to exercise her/his right while another right holder (owner of the property), who endures the servitude (in other words whose interest in the property is negatively impacted) to benefit from her/his right in the most favourable way and to endure the least sacrifice (upon her/his interest in the property). In this context, the principle can be explained by establishing a balance between the two conflicting interests and making the interference "proportionate" and "reasonable".

The principle includes the following criteria in terms of property law:

i) In the praedial servitude, the duty of tolerance borne by the owner of the encumbered property is for the benefit of the dominant property. The beneficiary can only achieve this benefit by exercising the right (servitude) in accordance with its content. The boundary of exercising the right in accordance with its purpose should not be exceeded.

¹⁰³ As explained above, the principle has a close connection to the principle of proportionality. See Chapter III.

ii) The servitude may only narrow the ownership right to the extent required by its exercise according to its purpose and scope.

iii) The principle of the restrained exercise of rights is based on the requirement that the person exercising her/his right must also consider the interest of the other party. The beneficiary has a duty to consider the interest of the owner of the servient property when exercising her/his right. The interference of the servitude with the ownership right must be suitable, necessary and balanced with the purpose of the interference. If there is a more balanced method/tool in the intervention, that is, a method/tool that will cause less difficulty/inconvenience (to the servient owner), that method/tool should be preferred.

iv) The duty to consider the interest includes choosing the behaviour and time that would cause the least inconvenience to the owner of the servient property.

v) The exercise of the servitude should be conducted in a manner and to an extent that imposes the least possible burden on the owner of the servient property.

In our opinion, within the TCiC system, the restriction of the ownership right without requiring the consent of the owner by the legislator explains the tightly drawn framework of the beneficiary's exercise of her/his right.

The main application of the principle of restrained exercise of rights in company law is to restrict the discretionary power of the majority¹⁰⁴ and serves to limit the powers vested in the majority.¹⁰⁵ The principle is relied upon to ensure that the company, regardless

104 See Kayıklık (n 7) 441-444. The author offers a new classification for TCoC's minority protection mechanisms and categorises the principle as a 'gap-filling principle' supplementing the more concrete rules to provide the courts with a broader discretion against the majority principle and abusive use of control.

105 In the same direction regarding limiting the power of the majority and adverse effects of majority principle see Tekinalp, 'En Az Zarar I' (n 2) 78; Ömer Teoman, *Anonim Ortaklıkta Pay Sahibinin Oy Hakkından Yoksunluğu* (Fakülteler Matbaası 1983) 13-14; Üner Dağ, *Anonim Ortaklıklarda Pay Sahibi Açısından Oy Hakkının Kazanılması ve Kullanılması* (Beta 1996) 23-24; Göksoy (n 12) 407; Okutan Nilsson (n 12) 120; Sevgi Epeçli, 'Türk Ticaret Kanunu Tasarısı'nın Yeni Pay Alma Hakkı ile İlgili Olarak Getirdiği Düzenleme, Eleştiriler ve Öneriler' (2010) 84 (6) İstanbul Barosu Dergisi 3613; Adıgüzel (n 12) 13; Yıldırım (n 46) 209; İlbasmış Hızlısoy (n 45) 85; Erdem (n 55) 109-110; Özdemir and Tamer (n 45) 353; Yağmur (n 55) 24; Zorluer (n 7) 280-281; Tekinalp (Poroy and Çamoğlu), 'Ortaklıklar I' (n 2) 688-689, No 881; Alper Erdoğan, 'Anonim ve Limited Şirketlerin Haklı Sebep Feshi Davasında Haklı Sebep Kavramı ve Haklı Sebep İlişkin Yargı Kararlarının Analizi' (Master thesis, Ankara University 2022) 15 fn 37 and 90; Bektaş (n 10) 290; Topcan (n 10) 56 and 68. In a similar direction, see F Pelin Tokcan, *Limited Ortaklıkta Oy Hakkından Yoksunluk* (On İki Levha 2018) 116 fn 112. See also Karasu, 'Emredici Hükümler' (n 49) 38. The author states that in German company law, the principle of proportionality is generally relied upon to limit the power of the majority and then explains the confines of the principle by referencing the principle of restrained exercise of rights. See also Paşlı, 'Kontrol Sahibi' (n 2) 354-355. After stating that the limits established by TCiC 2 apply to all parties in the corporate relationship, the author argues that it is primarily the controller that has the power to violate the principles arising from TCiC 2 such as the principles of equal treatment and restrained exercise of rights and establishes a reserved perspective between the majority (controller) and the principle. It should be noted that the principle does not serve as a tool to 'eliminate' the majority principle, but as a tool to limit its dangers and must be used accordingly. See Akdağ Güney (n XX) 52-53; Soykan, 'Sermaye Artırımı' (n 7) 605; Görmez, 'Kötüye Kullanma' (n 4) 147-148. In a similar direction, see Kayıklık (n 7) 443-444.

of the company body/organ making the decision, formulates its decision by considering the interests of the shareholders that may be adversely impacted by such a decision.¹⁰⁶ Therefore, within this context, the company organs must comply with the principle.¹⁰⁷ The principle, when applied to the company organs, can be understood in broad terms as the requirement to prefer a method that will less affect or harm the interest of shareholders/members who will be adversely affected by the decision, provided such a method exists, when making a decision in pursuit of a legitimate company interest.¹⁰⁸

The need for such protection lies in the majority principle, which is prevalent in public and private limited liability companies.¹⁰⁹ This principle renders the company structure open to the majority's opportunistic behaviour¹¹⁰, in other words, exercising its control over the company in a manner that only itself and its related parties benefit from the company and its resources.¹¹¹ Independent of the minority shareholder's will, the majority's decisions possess the power to affect the legal and economic sphere of the said minority.¹¹² Even though the (rational) minority shareholder is not

106 Okutan Nilsson (n 12) 169-170; Hamamcıoğlu, 'Tek Borç' (n 7) 12. Okutan Nilsson states that the principle's purpose is to interfere with the company's will and to make the company's decision-making more just/equitable (*adaletli*) and not to meddle with the shareholder's individual wills. Therefore, the principle does not invalidate any provisions of shareholders' agreements that do not align with it. However, when the general assembly of the company takes a decision based on the votes of shareholders acting in accordance with such a provision of the shareholders' agreement, the decision reflecting the company's will is subject to voidability. See Okutan Nilsson (n 12) 171 and then 167-169.

107 Yıldırım (n 46) 210; Akdağ Güney (n 2) 57; Yağmur (n 55) 59; Bektaş, 'Yeni Pay' (n 10) 290; Görmez, 'Kötüye Kullanma' (n 4) 141-142. In a similar direction, see Tekinalp, 'Yeni Hukuk' (n 56) 356. For an approach that expresses the obligation of managers to comply with the principle in private limited liability companies when a decision regarding supplementary payment obligations is made under TCoC 603 and demonstrates that the management body is also bound by the principle, see Şener (n 2) 422.

108 Tekinalp, 'En Az Zarar I' (n 2) 79; Yıldız, 'Yeni Pay' (n 12) 293; Nomer, 'Sadakat Yükümlülüğü' (n 2) 27-28; Göksoy (n 12) 407; Adıgüzel (n 12) 13; Saraç (n 12) 587; Görmez, 'Rüçhan Hakkı' (n 4) 218; Wilhelm and Varrin (n 2) 22-23; Görmez, 'Kötüye Kullanma' (n 4) 133-134. In a similar direction, see Nicolas Rouiller, Marc Bauen, Robert Bernet and Colette Lassere Rouiller, *La Société Anonyme Suisse* (3rd edn, Schulthess Editions romandes 2022) 514 fn 1452.

109 Tekinalp (Poroy and Çamoğlu), 'Ortaklıklar I' (n 2) 103, No 120c; 316, No 465; Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar Hukuku II* (15th edn, Vedat 2023) 609, No 1740y; 612, No 1742e. TCoC 418 and 421 stipulate that the majority principle is applied in public limited liability companies and TCoC 620 in private limited liability companies. See eg Bahtiyar, 'Ortaklıklar' (n 45) 96, 172, 259, 348.

110 Self-dealing, granting itself or its relatives extensive financial rights on the board of directors, and preventing the company from distributing profits, among others, are examples of this behaviour. On majority shareholders' self-dealing, see Pierre-Henri Conac, Luca Enriques and Martin Gelter, 'Constraining Dominant Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy' (2007) 4 (4) ECFR 491, 492 ff.

111 For private limited liability companies, in this respect see Yıldırım (n 46) 204; Şener (n 2) 468-469. For public limited liability companies, in this respect see Görmez, 'Kötüye Kullanma' (n 4) 48-49. In a similar direction, see Oğuz İmregün, *Anonim Şirketlerde Pay Sahipleri Arasında Umumi Heyet Kararlarından Doğan Menfaat İhtilâfları ve Bunları Telif Çareleri* (İsmail Akgün Matbaası 1962) 1-2; Joseph A. McCahery, Erik P.M. Vermeulen, *Corporate Governance of Non-Listed Companies* (Oxford University 2008) 24-25. See also Arslan Kaya, *Anonim Ortaklıkta Pay Sahibinin Bilgi Alma Hakkı* (BTHAE, 2001) 6-7. The author expresses that the majority should actually consider the interests of the company and in its decisions act in accordance with the unwritten principles of company law, such as the principle of good faith, the principle of equal treatment, and the principle of restrained exercise of rights. Regarding the closed corporations in United States Law, in the same direction see Paul G. Mahoney, 'Trust and Opportunism in Close Corporations' Randall K. Morck (ed) in *Concentrated Corporate Ownership* (The University of Chicago 2000) 177 ff. This risk of opportunistic behaviour of the majority created by the majority rule is present both in public and private companies. For public limited liability companies, in a similar direction, see Cem Veziroğlu, *Anonim Ortaklıklar Hukukunda Esas Sözleşme Özgürlüğü ve Sınırları* (On İki Levha 2021) 127. For minority's disadvantageous position within the company related to eg information asymmetry, being locked-in in privately held companies, see also Cem Veziroğlu, 'Buy-Out of the Oppressed Minority's Shares in Joint Stock Companies: A Comparative Analysis of Turkish, Swiss and English Law' (2018) 19 (3) European Business Organization Law Review 527, 529.

112 Pash, 'Kontrol Sahibi' (n 2) 354-356.

blind to this danger¹¹³, when entering into a company it has accepted to be subject to the majority principle with the assumption that the majority will use its control to achieve the common purpose.¹¹⁴ This approach serves as a ground for justifying the limitation of the majority principle.

It should be noted that the principle does not serve as a tool to ‘eliminate’ the majority principle, but as a tool to limit its dangers and must be used accordingly.¹¹⁵ As explained above, in the case of the selfish use of rights, the mere fact of selfishness does not, in principle, constitute a violation of the law¹¹⁶; therefore, the majority’s selfish exercise of its rights within the company is not prohibited by law. The legal tools developed against the abuse by majority put forward when this selfishness shall be considered excessive and serve to limit these excesses of selfishness.¹¹⁷ In this regard, the principle of restrained exercise of rights is one of the tools that has been developed under Swiss and Turkish company laws.¹¹⁸ The rationale behind the intervention utilising the principle is the necessity to keep the majority’s ability to interfere with the legal and economic sphere of the minority under control.¹¹⁹

113 It should also be noted that in long-term relationships such as company relations, the parties involved are often overly optimistic at the stage of establishing the relationship and tend to overlook potential negative outcomes. See Melvin Aron Eisenberg, ‘The Limits of Cognition and the Limits of Contract’, *Stanford Law Review*, (1995) 46 (2) 211, 251; Fleischer (n 104) 48.

114 İmregün (n 111) 1-2; Hänni (n 5) 393; Champetier de Ribes-Justeau (n 41) 132-133; Görmez, ‘Kötüye Kullanma’ (n 4) 31-32. See also Erdem (n 55) 109. According to the author, when the majority uses its power not according to the ‘interests of the company’ but to provide benefits to itself or other special shareholder groups, this act constitutes abuse by majority.

115 See Akdağ Güney (n 2) 52-53; Soykan, ‘Sermaye Artırımı’ (n 7) 605; Görmez, ‘Kötüye Kullanma’ (n 4) 147-148. In a similar direction, see Jean-Luc Cheneaux and Guy Beroud, ‘Prix d’émission et exercice mesuré des droits’ in Rita Trigo Trindade, Rashid Bahar and Giulia Neri-Castracane (eds), *Vers les sommets du droit – Liber amicorum pour Henry Peter* (Schultess 2019) 161, 173; Kayıklık (n 7) 443-444. The Swiss Federal Court also emphasised this approach in its old decisions. See ATF 99 II 62; ATF 102 II 268; ATF 117 II 290. For a recent Vaud cantonal court decision in the same direction, see CACI 26 novembre 2020/513. However, some scholars of the Swiss doctrine view the Swiss Federal Court’s decision in 4A_531/2017 as a paradigm shift from its previous approach. See Wilhelm and Varrin (n 2) 45; cf Jeremy Bacharach and Alexandra Vraca, ‘Prix d’émission et dilution économique au regard de l’art. 652b al. 4 CO’, (2024) 5 RSDA 571, 576. See also Hänni (n 5) 393. For an analysis of the approach developed by the Swiss Federal Court over the years, see Görmez, ‘Kötüye Kullanma’ (n 4) 147 fn 190. See also Cheneaux and Beroud (n 115) 164 ff. Referring to ATF 117 II 290, 302, the authors claim that the court refrains from ruling on the ‘controversial question’ of the primacy between the principles of majority principle and restrained exercise of rights.

116 See Chapter III.

117 Görmez, ‘Kötüye Kullanma’ (n 4) 75 ff.

118 Kırca, ‘Gerçek Değer’ (n 45) 25; Wilhelm and Varrin (n 2) 45 ff. In this direction regarding public limited liability companies, see İlbasmış Hızlısoy, (n 45) 91; Akdağ Güney (n 2) 52; Tekinalp (Poroy and Çamoğlu), ‘Ortaklıklar I’ (n 2) 688-689, No 881 and 693, No 894; Kayıklık (n 7) 443; Görmez, ‘Kötüye Kullanma’ (n 4) 145. In a similar direction concerning the subject of determination of the issue price of shares, see Bacharach and Vraca (n 115) 575. The doctrine claims that it was the German Imperial Court that first accepted the application of this principle in company law. See Akdağ Güney (n 2) 47-61; Topcan (n 10) 70. On the direction that German doctrine and jurisprudence also acknowledges the principle, see Tekinalp, ‘En Az Zarar II’ (n 45) 205. See also Okutan Nilsson (n 12) 170-171. The author states that the principle is developed by the Swiss doctrine and implemented in the SCO after 1992 revisions as a sub-criterion of ‘objective reason’ with Article 706/2, which requires an ‘objective reason’ for the removal or restriction of the rights of shareholders and in the absence of such a reason makes a decision voidable and proceeds to explain that the principle is also accepted under German law as a reflection of the shareholders’ duty of loyalty and with a broad interpretation of the principle of equal treatment. It is also stated that in German law, the principle is seen as an important tool and criterion for identifying breaches of the duty of loyalty of the shareholder/member. See Mehmet Emin Bilge, ‘Limited Şirketlerde Ortakların Bilgi Alma Hakkı - “Yürürlükteki Türk Ticaret Kanunu ve Türk Ticaret Kanunu Tasarısı Hükümleri Çerçevesinde,” (2005) 9 (1-2) AÜEHFD 429, 446; Rauf Karasu, ‘Türk Ticaret Kanunu Tasarısı’na Göre Anonim Şirketlerde Pay Sahibinin Bilgi Alma Hakkı’ (2005) 23 (2) BATİDER 73, 88 and 94.

119 In a similar direction see Akdağ Güney (n 2) 46-47; Topcan (n 10) 69.

In the doctrine and judicial decisions, the principle is generally discussed in the context of public limited liability companies.¹²⁰ However, the principle may also be applicable in private limited liability companies within the context of limiting the majority power.¹²¹ On the other hand, the need for the principle in terms of abuse by majority may be limited in private limited liability companies, since it is generally accepted that the members in private limited liability companies have a duty of loyalty towards each other.¹²² We are of the opinion that if such a duty is accepted, there does not exist any reason not to utilise the framework outlined below for this principle in determining the scope of the duty of loyalty between shareholders.¹²³ If it is accepted that there is no duty of loyalty imposed on shareholders towards each other, it can be argued that the principle of restrained exercise of rights can be applied in parallel with its application in public limited liability companies.¹²⁴ Therefore, whichever approach is upheld, there should be no doubt that the principle may assume a function in private limited liability companies.¹²⁵

120 In Turkish doctrine, see eg Akdağ Güney (n 2) 45 ff. Turkish Court of Cassation's decision discussing the principle for public limited liability companies see Yargıtay 11 HD E 2012/13234 K 2014/3514 T 25.2.2014; E 2015/994 K 2015/5904 T 28.04.2015. For the Swiss doctrine, see eg Wilhelm and Varrin (n 2) 1 ff. For examples of the Swiss Federal Court, discussing the principle in the context of public limited liability companies, see ATF 143 III 120 – JdT 2017 II 377; 4A_531/2017.

121 For a study that accepts the application of the principle in a private limited liability company in cases where shares are not issued at their real value, and thus demonstrates the applicability of the principle to this type of company, see Kırca, 'Gerçek Değer' (n 45) 5 ff, especially 28. For the view that in private limited liability companies when a decision regarding the supplementary payment obligation under TCoC 603 is taken, the managers are required to comply with the principle, thereby showing that the principle can also be applied to this type of company, see Şener (n 2) 422. For the view that in private limited liability companies, any decision to introduce a privilege into the articles of association through amendments should not violate the principle see Esra Hamamcıoğlu, *Aile Tipi Limited Şirketlerde Şirket Sözleşmesi* (Yetkin 2022) 82-84; presenting the same approach for public limited liability companies see Altay (n 45) 510 fn 1215. See also Hanife Doğrusöz Koşut, *Limited Şirkette Oy Hakkı* (Vedat 2021) 160 and 165. In her work on voting rights in private limited liability company, the author argues that any restriction imposed on the member's voting right should be in line with the principle. This latter approach is also applied in public limited liability companies. See Levent Biçer, *Anonim Ortaklıkta Oy Hakkında İmtiyaz ve Sınırları* (Yetkin 2019) 86.

122 See Nomer, 'Sadakat Yükümlülüğü' (n 2) 14-15; Murat Yusuf Akın, *Şirketler Hukukunda ve Özellikle Anonim Şirketlerde Pay Sahibinin Sadakat Borcu*, (İstanbul Menkul Kıymetler Borsası 2002) 79; Rauf Karasu, 'Limited Şirketlerde İdare Yetkisi Olmayan Ortakların Şirketle Rekabet Etme Yasağı' (2004) 12 (3) BATİDER 141, 142 ff; Kemal Dadak, 'Limited Şirket Ortaklarının Sadakat Yükümlülüğü' (LLM thesis Kırıkkale University 2010) 50, 56, 65; Şener (n 2) 461-463; cf Akkale Çelebi (n 2) 115-116.

123 In the doctrine, when outlining the scope of the duty of loyalty among members in a private limited liability company, it is expressed that members are expected to demonstrate a 'softer and more positive manner of behaviour, to the extent that it is reasonably expected of them, which causes the least damage to the interests of the other members.' See Akın, 'Sadakat' (n 122) 79; Dadak (n 122) 66. As can be seen, the authors also refer to the concept of 'causing least damage'. See also Karasu, 'Rekabet Yasağı' (n 122) 149-150. The author relies on the principle to define the confines of the duty of loyalty of members of private limited liability company. See also Yıldırım (n 46) 205 fn 253. The author sees the principle as a particular reflection of the duty of loyalty. See also Fatma Burcu Savaş, 'Pay Sahiplerinin Anonim Şirkete Karşı Sadakat Yükümlülüğü' in Ömer Teoman et al (eds), *Prof. Dr. Hüseyin Ülgen'e Armağan* (Vedat 2007) 489, 504. Even though the author focuses on the shareholders' duty of loyalty in public limited liability company, she argues that in the restriction of pre-emptive rights of shareholders relying on the principle of restrained exercise of rights results in accepting the contents of the duty of loyalty without explicitly mentioning it. This approach is a clear example showing that the principle's aim and extent can be understood within the boundaries of the duty of loyalty.

124 Akkale Çelebi, who accepts the duty of loyalty only on a vertical axis, also states that this duty creates a system that protects both the minority and the company. According to the author, the minority's use of their rights and the majority's decision-making should, due to their influence on the company, prefer options that cause the least damage to the company and other members and avoid abusing the rights granted to them by law; both are results related to the duty of loyalty. See Akkale Çelebi (n 2) 234. As can be seen, the author also refers to the concept of 'causing least damage'.

125 cf Yıldırım (n 46) 209 fn 274.

The formula developed by the Swiss Federal Court and the doctrine in the principle's application to mitigate the risk of abusive majority behaviour involves an intricate balancing of interests of the company, majority and minority: When the company (company organ) makes a decision to ensure a legitimate company interest, if there exists multiple methods to achieve the same outcome, the method that causes the least harm (or no harm) to the interests of the shareholders/members other than the majority shareholder(s) (regarding said decision) should be preferred; provided that this preference does not cause any inconvenience to the majority.¹²⁶

This definition can be dissected into the following elements¹²⁷:

i) In this context, it is the company and its organs that are obliged to comply with the principle; therefore, it applies to the decisions of the company.¹²⁸

ii) There must be a company interest that is superior to the interest of the shareholders, including the minority. In other words, the relevant decision must serve a legitimate company interest.¹²⁹ If no legitimate company interest exists, there is no need to apply the principle; it is, however, possible to directly apply the breach of objective good faith.¹³⁰

iii) Since within this context, the principle aims to protect the minority against an abuse by majority, a minority interest¹³¹ that is negatively impacted should exist.¹³²

126 See Hänni (n 5) 391; Tekinalp (Poroy and Çamoğlu), 'Ortaklıklar I' (n 2) 693, No 895; Wilhelm and Varrin (n 2) 63; Soykan, 'Sermaye Artırımı' (n 7) 597; Hamamcıoğlu, 'Aile Tipi' (n 121) 84 fn 227; Görmez, 'Kötüye Kullanma' (n 4) 135; Bacharach and Vraca (n 115) 576. See also Akdağ Güney (n 2) 47. For the Swiss Federal Court's landmark decision setting the outline of the principle, see ATF 117 II 290, 302. For this decision, see Wilhelm and Varrin (n 2) 57-58; cf Akdağ Güney (n 2) 48. It is argued that with this decision, the Swiss Federal Court accepted the 'autonomous' position of the principle in relation to the prohibition of abuse of rights. See Lino Hänni and Julien Dubois, 'Egalité de traitement matérielle et devoir de fidélité – approche comparée des droits suisse et allemand de la SA' in Rashid Bahar and Rita Trigo Trindade (eds) *L'égalité de traitement dans l'ordre juridique : fondements et perspectives* (Schulthess Editions Romandes 2013) 325, 349-350. For other decisions of the Court on the principle see eg ATF 121 III 219 - JdT 1996 I 162; ATF 143 III 120 – JdT 2017 II 377; 4A_531/2017. With the latter decision, the principle has been applied to a case as a ground for voidability for the first time. It is expressed in the Swiss doctrine that, until this decision, there was no real normative scope for the principle to request the voidability of general assembly resolutions in the face of the established majority principle in Swiss case law and the principle that judges cannot review the merits of general assembly decisions. See Hänni (n 5) 392; Wilhelm and Varrin (n 2) 59-60. For a critique of the said decision, see Wilhelm and Varrin (n 2) 71.

127 See Tekinalp, 'En Az Zarar II' (n 45) 205; Teoman, 'Oydan Yoksunluk' (n 105) 14; Akdağ Güney (n 2) 55 ff; Hänni (n 5) 393; Cheneaux and Beroud (n 115) 168-169; Özdemir and Tamer (n 45) 354; Wilhelm and Varrin (n 2) 64-65; Görmez, 'Kötüye Kullanma' (n 4) 135 ff; cf Yıldırım (n 46) 210-211.

128 Görmez, 'Kötüye Kullanma' (n 4) 135.

129 Hänni (n 5) 393; Wilhelm and Varrin (n 2) 64-65; Görmez, 'Kötüye Kullanma' (n 4) 135; Cheneaux and Beroud (n 115) 168. For the view that company interest should be understood broadly, see Hänni (n 5) 393.

130 Görmez, 'Kötüye Kullanma' (n 4) 135. For the view that SCO 706/2/2 shall be directly applied in such cases under Swiss public limited liability company law, see Wilhelm and Varrin (n 2) 64-65. For the view that decisions clearly lacking any commercial justification shall be voidable under the prohibition of abuse of rights, see Hänni (n 5) 393.

131 By the minority's interest, an interest as a shareholder/member of the company should be understood; private interests are not considered. See Wilhelm and Varrin (n 2) 61.

132 Akdağ Güney (n 2) 55; Hänni (n 5) 393; Cheneaux and Beroud (n 115) 168-169; Görmez, 'Kötüye Kullanma' (n 4) 135; Bacharach and Vraca (n 115) 576; cf Baltalı (n 5) 152. Exceptionally, those constituting the majority of the capital may also rely on the principle. For instance, in cases where decisions are made with quorum numbers permitted by law in a meeting that the majority of the capital did not attend, the principle of restrained exercise of rights may have been violated even with respect to said majority. See Görmez, 'Rüçhan Hakkı' (n 4) 218. Therefore, it serves as a protection against surprise majorities and/or temporary majorities at a specific general assembly meeting. See Görmez, 'Kötüye Kullanma' (n 4) 143 fn 170.

The Swiss Federal Court and the doctrine are of the opinion that this must be of a certain gravity.¹³³

Whether the majority knows or foresees that the interest of the minority may be harmed by the relevant decision is irrelevant for the application of the principle; it is sufficient (and necessary) that the interest of the minority may be harmed by the decision.¹³⁴

iv) There should be an alternative method that achieves the same outcome without harming the minority's interest or harming it to a lesser extent.¹³⁵

The possibility of more than one method leading to the same exact outcome will be non-existent in most cases. One should not be too strict in terms of the plurality of the methods leading to the same outcome.¹³⁶

It is argued that the search for the existence of more than one method that should ensure the interest of the company distinguishes the application of the principle in the company law from its application in the property law. According to this view, regarding the property law, the principle comes into play in the choice between methods that are indistinguishable for one's own interest, whereas in the application in the company law, regarding the method chosen by the majority, the equivalence of the methods will be judged according to the interest of a third party, namely the company.¹³⁷ The accuracy of this approach, which explains the concept by basing it around the majority and positions the company as a third party, might be questioned;

133 The disadvantage or loss (*préjudice*) suffered by the minority must be of significant importance. For the Swiss Federal Court's decision in this direction, see 4A_531/2017. For a Vaud cantonal court decision in the same direction, see CACI 26 novembre 2020/513. In this direction also see Teoman, 'Oydan Yoksunluk' (n 105) 14; Akdağ Güney (n 2) 55; Hänni (n 5) 393; Özdemir and Tamer (n 45) 354; Cheneaux and Beroud (n 115) 173. This is also emphasised as the disadvantage or loss must be of qualified nature (*préjudice qualifié, erhebliche Beeinträchtigung*). See Hänni (n 5) 393; Wilhelm and Varrin (n 2) 65-67. For a Friburg cantonal court decision in this direction, see 101 2019 132.

134 Soykan, 'Sermaye Artırımı' (n 7) 604 fn 77; Görmez, 'Kötüye Kullanma' (n 4) 136. In this direction, see also Akdağ Güney (n 2) 57. Two authors previously cited in this footnote also cite this section of Akdağ Güney's work to support their opinion. On the preceding page, the author argues that the principle applies in cases where it can be expected from the majority to adhere to the principle and presents two criteria for this, one of which is that the majority must 'be able to see' (*görebilmek*) that the interests of the minority will be harmed. See Akdağ Güney (n 2) 56. Referring to this section of the article, Özdemir and Tamer argue that the doctrine relies on a criterion they name as 'expectability'. See Özdemir and Tamer (n 45) 354. In the Swiss doctrine, it is argued that the occurrence of harm to the minority shareholders should be foreseeable with a certain degree of certainty at the time the decision was made. See Wilhelm and Varrin (n 2) 68. cf Akdağ Güney (n 2) 57. Author criticises this approach by arguing that if such a condition is imposed, especially in situations where the principle of equal treatment is formally observed and the majority's true intent is skilfully concealed behind the company's purpose, the principle of restrained exercise of rights will be completely disregarded. Therefore, she rejects the application of this condition.

135 Tekinalp, 'En Az Zarar İl' (n 45) 205; Teoman, 'Oydan Yoksunluk' (n 105) 14; Akdağ Güney (n 2) 56; Hänni (n 5) 393; Cheneaux and Beroud (n 115) 168-169; Wilhelm and Varrin (n 2) 68; Özdemir and Tamer (n 45) 354; Görmez, 'Kötüye Kullanma' (n 4) 136-137; Bacharach and Vraca (n 115) 576. If there is no such method, the company's legitimate interest prevails over the shareholder's interest and the shareholder shall bear the harm on its own interest. Görmez, 'Kötüye Kullanma' (n 4) 137.

136 Akdağ Güney (n 2) 56; Wilhelm and Varrin (n 2) 68. To the extent permitted by civil procedural law, the burden of proving that the relevant method is the superior method leading to the desired outcome can be placed on the company. This is because the minority may be deprived of the means to identify and present alternative methods. On this, see Görmez, 'Kötüye Kullanma' (n 4) 136 fn 142.

137 See Hänni (n 5) 393.

since compliance with the principle is sought in the decisions of the company (taken by its organs) and there should be more than one method to ensure the company's legitimate interest, the company should not be considered as a third party in its own decisions as it is the subject whose interest is sought to be ensured in these methods.¹³⁸ However, it is true that the application of the principle in this context of company law is slightly different from that applied in property law. While applying the principle in limited liability companies, three different interests (ie company's interest, majority's interest and minority's interest) come into play, creating a triangular interaction. In the context of property law, only two opposing interests, eg beneficiary's and servient owner's interests, should be considered while applying the principle.

v) For the majority, the method to be chosen should not cause any inconvenience compared to the other possible methods.¹³⁹ For the sake of protecting the minority against abuse by majority, the latter is not expected to sacrifice its interest(s) in a way that would cause difficulties for itself, and therefore such a sacrifice cannot be imposed on the majority shareholder/member.¹⁴⁰ The inconvenience should not be imposed on the 'legitimate interests' of the majority shareholder.¹⁴¹

Not imposing any inconvenience to the majority's legitimate interest will be observed by the general assembly in its decisions since it is the majority's will that dominates the general assembly. Behind this lies the fact that the majority shareholder is not expected to let go of its own legitimate interest in order to protect the interests of others.¹⁴² For the decisions taken by the board of directors, the same criterion applies even if the decisions at the relevant organ, technically speaking, are not taken by the majority shareholder.¹⁴³

While implementing the principle, the balance of interests must be sought after.¹⁴⁴ This requirement for balance is an inherent part of the consideration within the culmination of the above-mentioned criteria. This is because to determine whether a legitimate company interest exists, and/or whether there is a method that will minimise or remove any negative impact on the minority's interest, and/or whether

138 Görmez, 'Kötüye Kullanma' (n 4) 137 fn 143.

139 Tekinalp, 'En Az Zarar İl' (n 45) 205; Teoman, 'Oydan Yoksunluk' (n 105) 14; Akdağ Güney (n 2) 56; Hänni (n 5) 393; Cheneaux and Beroud (n 115) 169; Wilhelm and Varrin (n 2) 68; Özdemir and Tamer (n 45) 354; Görmez, 'Kötüye Kullanma' (n 4) 136-137; Bacharach and Vraca (n 115) 576.

140 Akdağ Güney (n 2) 56; Özdemir and Tamer (n 45) 353; Çamoğlu (Poroy and Tekinalp), 'Ortaklıklar I' (n 2) 604; Tekinalp (Poroy and Çamoğlu), 'Ortaklıklar I' (n 2) 895; Wilhelm and Varrin (n 2) 68 ff; Görmez, 'Kötüye Kullanma' (n 4) 149 ff. For a Swiss Federal court decision indicating that the majority does not have an obligation to endure a loss solely to protect the interests of the minority, see 4C_419/2006. Whether not being able to 'further'/'improve' its interests shall be considered an inconvenience for the majority may be discussed. On this, see Hänni (n 5) 393; Görmez, 'Kötüye Kullanma' (n 4) 149-150.

141 Hänni (n 5) 390 and 393; Kırca, 'Hükümsüzlük' (n 39) 82; Wilhelm and Varrin (n 2) 68; Hamamcıoğlu, 'Aile Tipi' (n 121) 84 fn 227. For a Friburg cantonal court decision in the same direction, see 101 2019 132.

142 In this direction see Akdağ Güney (n 2) 56; Soykan, 'Sermaye Artırımı' (n 7) 603.

143 Görmez, 'Kötüye Kullanma' (n 4) 142.

144 Hänni (n 5) 393.

the majority suffers an inconvenience, it is necessary to consider the interests of all these parties in a balanced manner. Therefore, weighing the interests of the parties is an inalienable part of the principle and its elements.¹⁴⁵

The principle provides the intended protection to the minority by establishing the legal grounds to invalidate decisions¹⁴⁶ and even to trigger the dissolution of the company for just cause (TCoC 531 – 636/3)¹⁴⁷. However, the principle should not be understood as a means to allow the judge to review the (business) purposes of the company's organs' decisions. The principle enables the control of the fitness of the means to achieve the objective.¹⁴⁸ In this context, there must be a reasonable connection between the objective (ie company's legitimate interest) and the method to achieve that.¹⁴⁹ The principle puts forward a basic approach: the end does not automatically justify the means.¹⁵⁰ In the doctrine, it is emphasised that the principle should not be turned into a tool of reviewing the business/commercial and managerial decisions of the company on which the company should have sole discretion.¹⁵¹

145 Whether 'weighing the interests' should be deemed as another criterion of the principle is debated in the doctrine. For the view deeming it a separate criterion, see Wilhelm and Varrin (n 2) 69-70. For the view of seeing this as an inherent part of the principle and not considering it as a separate criterion, see Görmez, 'Kötüye Kullanma' (n 4) 137.

146 For a Swiss Federal Court decision on the voidability (*annulable, iptal edilebilir*) of general assembly decisions in a public limited liability company when the decision is contrary to the principle of restrained exercise of rights, see ATF 143 III 120 – JdT 2017 II 377, 381-382. For the same approach of the Turkish Court of Cassation see Yargıtay 11 HD E 2005/10060 K 2006/13738 T 21.12.2006; E 2012/13234 K 2014/3514 T 25.2.2014; E 2015/994 K 2015/5904 T 28.04.2015; E 2016/3145 K 2017/5875 T 30.10.2017. For Yargıtay 11 HD E 2016/3145 K 2017/5875 T 30.10.2017. In the Swiss doctrine, see Wilhelm and Varrin (n 2) 22-23; Rouiller, Bauen, Bernet and Lassere Rouiller (n 108) 514. See also Hänni (n 5) 391-392. For Turkish doctrine see Hamamcıoğlu, 'Tek Borç' (n 7) 12-13; Akdağ Güney (n 2) 58; Görmez, 'Kötüye Kullanma' (n 4) 141 fn 158.

Regarding the impact of violating the principle in board of directors' decisions, it is suggested that such a violation by the board would lead to their liability, but not the invalidity of board resolution. See Akdağ Güney (n 2) 59; Cheneaux and Beroud (n 115) 166-167. However, this approach may be questioned under Turkish law. In the registered capital system, the board of directors' decision to increase the capital and/or restrict the pre-emption rights may be voidable in cases where it violates the principle of good faith (TCoC 460/5, referring to TCoC 445); therefore, a capital increase decision taken by the board violating the principle of restrained exercise of rights is voidable. See Cenkcı (n 45) 189-190 and also there fn 121, 241-242; Soykan, 'Sermaye Artırımı' (n 7) 596 fn 57; Görmez, 'Kötüye Kullanma' (n 4) 141-142 fn 161. See also Mehmet Bahtıyar, *Anonim Ortaklıkta Kayıtlı Sermaye Sistemi ve Sermaye Artırımı* (Beta 1996) 164. The author argues that in the registered capital system, the board of directors should be bound by the same principles – such as the equal treatment principle and the principle of restrained exercise of rights – that limit the powers of the general assembly in the authorised capital system. For the view of the Swiss Federal Court that the board of directors should attribute special importance to the limits outlined by the principle when deciding to restrict pre-emptive rights, see ATF 121 III 219 – JdT 1996 I 162, 182.

147 See Ayşe Şahin, *Anonim Ortaklığın Haklı Sebeple Feshi* (Vedat 2013) 156; Erdem (n 55) 109-111; Akdağ Güney (n 2) 58; Görmez, 'Kötüye Kullanma' (n 4) 258-259. See also Erdoğan (n 105) 88-90, 97, 102, 110 and 114. According to TCoC 531 and 636/3, the judge has the discretion to apply solutions other than dissolution in order to solve the dispute. In the works examining the dissolution for just cause in public limited liability companies, the scholarship claims that the judge shall also follow the principle of restrained exercise of rights while deciding on the appropriate alternative solution to solve the dispute and choose the least damaging remedy to the shareholders. See Şahin (n 147) 508, 510; İlbaşmış Hızlısoy (n 45) 274, 282, 283; Erdem (n 55) 255-256.

148 İsmail Kırca, Feyzan Hayal Şehirli Çelik and Çağlar Manavgat, *Anonim Şirketler Hukuku – 'Genel Kurul Kararlarının Hükümsüzlüğü'*, vol 2/2 (BTHAE 2016) 103; Wilhelm and Varrin (n 2) 22-23; Görmez, 'Kötüye Kullanma' (n 4) 150-151. In a similar direction, see Özdemir and Tamer (n 45) 353. For the view that, within the scope of the principle, the means should be reasonable and suitable to achieve the purpose, see Marie-Noëlle Zen-Ruffinen and Luca Urben, 'Art. 652b' in Pierre Tercier, Marc Amstutz and Rita Trigo Trindade (eds) *Commentaire Romand – Code des Obligations II* (Helbing Lichtenhahn 2017) 427, 436, No 24.

149 Zen-Ruffinen and Urben (n 178) 436, No 24. In a similar direction, see Kırca, 'Hükümsüzlük' (n 39) 82.

150 Kırca, Şehirli Çelik and Manavgat, 'Hükümsüzlük' (n 148) 103; Görmez, 'Kötüye Kullanma' (n 4) 146. In a similar direction, see Akdağ Güney (n 2) 55.

151 Cheneaux and Beroud (n 115) 174; Soykan, 'Sermaye Artırımı' (n 7) 605; Görmez, 'Kötüye Kullanma' (n 4) 150-151. In

Although the principle is typically used to mitigate the risk of abusive majority behaviour, this should not be understood as meaning that the principle cannot be applied in other company law contexts. Doctrine argues that in the use of individual shareholding rights (such as right to dividend or right to request information), the principle must be followed; according to this approach, the rights of shareholders directly related to their individual interests are granted to enable them to protect their own interests, and in the exercise of these rights, the company's interest does not take precedence; however, shareholders must use these rights in line with their intended purpose and should not harm the company's and other shareholder's rights disproportionately, and this requirement falls within the principle of restrained exercise of rights.¹⁵² A similar approach also exists for the use of minority rights within a limited liability company.¹⁵³ Indeed, in the use of individual or minority rights in limited liability companies, the principle shall be applied¹⁵⁴; since any right shall be used according to SCO/TCiC 2 from which the principle draws its source¹⁵⁵ and the use of these rights may affect the legal sphere of the company and/or majority without their will. However, as the individual and minority rights¹⁵⁶ are of a protective nature¹⁵⁷, the principle must be cautiously applied in a manner that does not limit the benefits sought to provide to the individual or minority shareholder/member with the relevant right and the use of these rights should not be unfairly restricted, nor should the individual or minority shareholder/member be discouraged from exercising those rights.¹⁵⁸ In this sense, a restrictive approach should be upheld when determining

the same direction, by criticising the Swiss Federal Court's 4A_531/2017 decision claiming it opens the way to review the appropriateness of decisions made by the general assembly and the majority, see Wilhelm and Varrin (n 2) 77-78. Regarding the Swiss approach, see also Hänni (n 5) 392; Wilhelm and Varrin (n 2) 25-26, 57-61 and 70 ff.

152 Karasu, 'Rekabet Yasası' (n 122) 150; Karasu, 'Bilgi Alma' (n 118) 93-96. Following this reasoning, the author argues that the right to request information from the company should be used accordingly. In the same direction regarding members' exercise of the right to request information from the company via questions and the right to inspection, see Bilge (n 118) 440, 446 and 448. On the application of the principle in the use of individual shareholder/member rights, see also Tokcan (n 105) 116-117. In her work on the exclusion of the voting rights in private limited liability company, the author states that the principle is concretised in TCiC 786 but is also applied in company law, then argues that a member excluded from voting cannot be appointed as a proxy to vote due to the principle, since the member appointing a proxy may easily choose another proxy without such limitations. The principle also serves to set the boundaries of the shareholders' and members' voting rights, with its application in the general assembly decisions. For public limited liability companies, see Teoman, 'Oydan Yoksunluk' (n 105) 14; Dağ (n 105) 23; Mustafa Çeker, *Anonim Ortaklıkta Oy Hakkı ve Kullanılması* (BTHAE 2000) 194 fn 53; Tülay Gökdemir Tamer, *Anonim Şirketlerde Pay Sahibinin Oy Hakkının Kapsamı ve Etkisi* (On İki Levha 2022) 122.

153 See Erdoğan Moroğlu, 'Anonim Ortaklıkta Çoğunluk Paysahiplerinin Azınlık ve İmtiyazlı Paysahiplerine Karşı Korunması' (1994) 17 (3) 47, 54; Zorluer (n 7) 282-284. The former author argues that minority shareholders and also shareholders with privileged shares must use their rights in the manner least damaging to the public limited liability company.

154 See also Özdemir and Tamer (n 45) 353. The authors argue that the principle should not be understood as focused on certain shareholders.

155 cf Necdet Uzel, 'Anonim Ortaklık Hukukunda Azınlık Haklarının Kötüye Kullanılması (Mümkün Müdür?) -Makale I: Genel Değerlendirme-' in İsmail Kırca et al (eds), *Prof. Dr. Sabih Arkan'a Armağan* (On İki Levha 2019) 1293, 1303. The author argues that certain minority rights (TCiC 420/1, 486/3, 559) cannot be abused due to their nature, and the abuse of certain others might arise only in very exceptional circumstances.

156 On the protective nature of minority rights, see eg Yağmur (n 55) 24 fn 73; Zorluer (n 7) 274.

157 The doctrine argues that if minority or individual shareholders are protected in an unbalanced way against the majority, this might cause them to abuse their rights. See Kaya (n 111) 7-8 fn 18.

158 In this direction for minority shareholders, see Zorluer (n 7) 277; Görmez, 'Kötüye Kullanma' (n 4) 54.

whether there are multiple methods to achieve the same outcome as opposed to its broad understanding in its application to mitigate abuse by majority.¹⁵⁹

Another application area of the principle in public limited liability company law might be found in the company's relationship with the owners of the dividend right certificates (*intifa senedi*).¹⁶⁰ The principle shall be applied in decisions that affect the legal sphere of these owners and if there is a method that causes the least harm to their interests, such method should be chosen by the company.

The principle of restrained exercise of rights, originating from Roman law under the principle of *Servitus civiliter exercenda est*, was developed with the aim of balancing opposing interests. The principle derives its source from the principle of good faith and the prohibition of abuse of right. In this context, the principle is a special manifestation of the prohibition of abuse of right. This is because an excessive disproportion between the benefit the right holder provides by exercising the right and the harm it will cause to others constitutes an abuse of right.

The principle of restrained exercise of rights is explicitly regulated in TCiC 786. Pursuant to Article 786, the praedial servitude attached to the property imposes duties on the owner of the servient property (in addition to the powers), which will contribute to the protection of the benefit of the dominant property. On the other hand, the beneficiary of the servitude is obliged to use her/his right in a way to cause the least damage to the servient owner and to protect the interests of the owner (TCiC 786/I). If there is more than one method for benefiting from the servitude, the beneficiary should prefer the one that will cause the least damage to the owner of the servient property (*civiliter uti*). If the beneficiary does not use her/his right in accordance with its purpose, exceeds the limits of her/his powers, and does not take into consideration the interest of the owner while using her/his right – meaning if she/he does not use her/his right in a way that will cause the least damage to the owner of the servient property – she/he is deemed to have violated the servient owner's ownership right. In other words, if the beneficiary of the servitude exceeds the boundaries (the purpose of the right) in the exercise of the right, she/he abuses her/his right.

Although the principle of restrained exercise of rights is not explicitly regulated in the TCoC, the principle is among the protective tools developed against the risks of the majority principle, in other words, against the abuse of majority in the law of public limited liability companies. There should be no obstacle for the principle to have a similar function in private limited liability companies. The principle assumes

¹⁵⁹ See also Zorluer (n 7) 282-284.

¹⁶⁰ Çamoğlu (Poroy and Tekinalp), 'Ortaklıklar II' (n 109) 180-181 No 1223; Veziroğlu, 'Esas Sözleşme' (n 111) 327 fn 599.

the same purpose of balancing the interests in the law of limited liability company as it does in the property law. However, it differs from property law in terms of the number of interests considered due to the triangular interplay of the interests of the company, the majority and the minority within the company. In the application of the principle in limited liability company organs' decisions, there must be a company decision directed towards a legitimate company interest; the decision in question must have chosen the method that will minimise the negative impact on the interests of the minority; in addition to protecting the interests of the minority, this method should not cause an inconvenience for the majority. Thus, the principle ensures that a balance is established between these three interests and that the majority does not harm the interests of the minority, especially under the guise of the company interest. The principle is generally relied upon in decisions regarding capital increases, the restriction of pre-emptive rights and dividend distribution. It is important to reiterate that the application of the principle is not confined to the resolutions of the general assembly; the principle must also be respected in the decisions of the board of directors. It must be noted that the principle may find other application areas in company law and is not limited to mitigating abusive majority behaviour.

There are parallels in the application of the principle in both property law and company law. There must be a legitimate interest (eg the interests of the beneficiary of the servitude - the company). The exercise of the right granted by this legally protected interest interferes with the legal sphere of another (eg owner of the servient property - the minority). The principle is applied to protect the interests of those whose interests will be impacted upon by this interference. To apply the principle, a method that minimises or eliminates the negative impact on the interests of the affected party (eg the owner of the burdened property or the minority) must exist. If this method exists and is not preferred, the principle is violated. If there is no such method, the person whose legal sphere is interfered with is expected to bear the impact on her/his interest.

As explained above, the principle of restrained exercise of rights is a manifestation of the prohibition of abuse of right and is applied both in property law and company law. However, the principle may also be relevant in other areas of private law, and the framework outlined in this paper regarding the principle could serve as a blueprint in such contexts.

Externally peer-reviewed.

Conception/Design of study: O.G.,C.T.; Data Acquisition: O.G.,C.T.; Data Analysis/ Interpretation: O.G.,C.T.; Drafting Manuscript: O.G.,C.T.; Critical Revision of Manuscript: O.G.,C.T.; Final Approval And Accountability: O.G.,C.T.

The authors have no conflict of interest to declare.

The authors declared that this study has received no financial support.

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Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Legal Maxims in Ottoman Law (Literature and Functions)*

Yasin Yılmaz** 

Abstract

The article provides a comprehensive overview of the literature and role of qawā'id (legal maxims) in Ottoman law. It begins by categorizing qawā'id literature into classical and Tanzimat periods. The legal maxims literature of Ottoman period began with the transmission of Ibn Nujaym's (d. 1563) al-Ashbāh to the Ottoman centre. Later on, this literature was continued with the original works of Nāzırzāde (d. 1651) and Khādimī (d. 1762). While the classical period produced foundational works, the Tanzimat era witnessed a surge in qawā'id literature through commentaries, translations, and independent texts. The article then delves into the influence of qawā'id on the development of the new legal system during the Tanzimat period. Qawā'id became central to legal education. They played a significant role in shaping the production of legal knowledge. Their impact is evident in the evolving Islamic law, modern legal writing, new maximization efforts, and political-legal debates. In the practical realm, the article examines the application of qawā'id in both the traditional sharia courts and the newly established Ottoman Nizāmiye courts. It also explores the role of qawā'id in the Turkish's development as a legal language and the dissemination of legal culture to various segments of society. Overall, the article highlights the multifaceted role of qawā'id in the Ottoman legal system, from their foundational contributions to their influence on legal education, practise, and language development.

Keywords

Islamic law (al-fiqh), Ottoman law, legal maxims, qawā'id literature, qawā'id thought, dhawābit, Tanzimat period

* This article is summarized from my PhD thesis titled "Osmanlı Hukukunda Külli Kaideler (Felsefi Temelleri, Literatürü ve Tezahürleri)". I sincerely thank my advisor Prof. Dr. Fethi Gedikli and Asst. Prof. Ali Adem Yörük.

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To cite this article: Yılmaz Y, "Legal Maxims in Ottoman Law (Literature and Functions)", (2025) 76 Annales de la Faculté de Droit d'Istanbul 81 <https://doi.org/10.26650/annales.2025.76.0004>

The concept of legal maxim (*qā'ida*, p. *qawā'id*) can be defined as concise propositions expressing principles that encompass different issues in a general or specific area of law. In the literature of Islamic law, which forms the basis of Ottoman law, the genre of *qawā'id*, which deals with the maxims, developed as one of the different types of writing. In the early period of Ottoman law, the foundations of the legal and judicial system were laid mainly by using the Seljuk heritage. Later, the distinction between sharia and 'urfī law (sultans' law) became clear, and these fields continued to develop within themselves throughout the classical period. So much so that it became possible to speak of an Ottoman law. However, it can be said that Ottoman law remained largely faithful to Islamic law and added a wealth of interpretation and application to this legal system.

The *qawā'id* literature of Ottoman period began with the transmission of Ibn Nujaym's (d. 1563) *Ashbāh* to the Ottoman centre. This was followed by original works of Nāzırzāde (d. 1651) and Khādimī (d. 1762). Although the *qawā'id* literature of the Tanzimat period can essentially be considered a continuation of the Hanafi madhhab, it will be seen that the Tanzimat and especially the Constitutional Monarchy period, in which calls for new *ijtihād* were made, have characteristics that transcend this madhhab. In particular, the *qawā'id* literature formed around the *Mecelle-i Ahkam-ı Adliye* (Majalla) commentaries, the commentaries or translations of classical *qawā'id* texts, and this type of works written independently should be mentioned. Within the framework of the introduction of the literature, the interests and networks of the authors, the originality values of the texts and their impact rates are discussed.

Regarding the functions of the maxims, firstly, the sources in the classical period of Ottoman law are examined. In terms of sharia law, fiqh and fatwa books and in terms of 'urfī law, law codes largely met the resource needs of the judge (*qādī*). The secondary position of the maxims in classical texts was questioned during the Tanzimat period. Although the *Mazbata* of *Asbāb-ı Mūcibe* (Minutes) of Majalla contains an entry stating that judgments cannot be made on the basis of maxims, the thought of *qawā'id* was not entirely in this direction. The maxims would play a significant role in the change in Islamic law and would be used for specific purposes in the texts produced within the new legal writing genre. The process of maximization/canonization (*taq'id*), which was also fed by the Majalla, continued in the fields of law. Although largely based on the accumulation of Islamic law, western legal literature also joined the sources in the process of producing maxims in Turkish. Moreover, the position of the maxims in political-legal polemical texts should be questioned. The use of maxims in the courts of shar'iyyah/sharia, nizāmiye and supreme courts and the debates on this issue deserve to be analyzed separately.

Finally, this article concludes with a title that explores the place of maxims in legal language and culture.

I. Ottoman Period of The Literature of Legal Maxims (Qawā'id)

This period of qawā'id literature can be analyzed in two parts: the Ottoman classical period and Tanzimat period or the period beginning with the Majalla.

In this context the tradition of commentaries and glosses on Ibn Nujaym's (d. 1563) *Ashbāh* should be emphasized. Although not widespread, Nāzīrāde's (d. 1651) alphabetical qawā'id text should be evaluated as the first original qawā'id book written by an Ottoman jurist and reflecting the understanding of his period. Lastly, in the classical period, the work of Khādimī (d. 1762) should be analyzed since he incorporated the maxims into a book of *usūl al-fiqh* and largely determined the understanding of the maxims after him.

al-Ashbāh

After al-Karhī, Debusī and al-Nasafī, the most notable work in the literature of qawā'id in the Hanafī madhhab is *al-Ashbāh wa-al-Nazāir*, written by Zayn al-Dīn Ibn Nujaym (1520-1563) at the end of his life.¹ This work, which he completed in 1562,² shaped the literature after him in terms of Hanafi legal thought and reconstructed the understanding of maxims.³

Shaykh al-Islām Ebussuud Efendi wrote a *taqrīz* (an appreciation) on an early (~1562) copy of *Ashbāh*, which soon passed to the Ottoman centre. He stated that he had analyzed this beautiful work and found it to be a book that refreshes the hearts of those who read it and that those who read it want to examine the details in it in depth, that it explains the proofs of jurisprudential issues and what is meant by these issues, that it fends off the objections that may be put forward, and finally, he prayed for the author and the copyist.⁴

1 For Ibn Nujaym's life and works, see Nav'izāde Atāyī, *Hadāik al-Haqāik fī Takmile al-Şakāik*, Suat Donuk (ed), (Türkiye Yazma Eserler Kurumu Başkanlığı Yayınları 2017) 318; Kātip Çelebi (Hājī Khalīfa), *Kashf al-Zunūn 'an Asāmī al-Kutub wa-al-Funūn*, Rüşti Balı (ed), (Tarih Vakfı Yurt Yayınları 2007) 126-127; Ahmet Özel, *Hanefi Fıkıh Alimleri* (Türkiye Diyanet Vakfı Yayınları 2013) 254; Ibn Nujaym, who has a gloss on Shaykh Bedreddin's *Jāmī al-Fusuleyn*, included Molla Khusrev's *Durer* among his sources in *al-Ashbāh*. See Ibn Nujaym, *al-Ashbāh wa-al-Nazāir al-Fiqhiyah 'alā Madhhab al-Hanafiyah*, Osman Baydar (ed), (Türkiye Yazma Eserler Kurumu Başkanlığı 2022) 74, 480, 628, 700.

2 Ibn Nujaym (n 1) 522.

3 Necmettin Kızılkaya, *Hanefi Mezhebi Bağlamında İslam Hukukunda Külli Kaideler* (Litera Yayınları 2018) 220, 238, 242-243; In addition to the *al-Ashbāh*, *Bahr al-Rāik* and *Fatāwā al-Zeyniyah* were also respected in Ottoman law, and *Fatāwā* was translated into Turkish during the Tanzimat period: Ibn Nujaym, *Fetāvā-yı Ibn Nüceym ve Tercümesi*, trans. Hasan Refet, Şeyh Yahya Efendi Matbaası, İstanbul 1289/1872.

4 Ebussuud Efendi, 'Taqriz', in: Ibn Nujaym, *al-Ashbāh wa-al-Nazāir*, Süleymaniye Library (Esad Efendi), no. 521, h. 969, vr. 3a.

As can be seen, the *Ashbāh* was soon included in the corpus of authoritative Ottoman jurisprudence. Despite this, it seems that there was not a complete consensus on the content of the work. For example, Shaykh al-Islām Sunullah Efendi (d. 1612), in response to a question asked to him about the *Ashbāh*, said that there were aspects that would be accepted as well as aspects that would not be accepted.⁵ In the 18th century, in the words of Sachaklızāde (d. 1737), the *Ashbāh* was referred to as a work “worthy of being written in golden letters on the pages of the sun and the moon”.⁶ The process of the *Ashbāh* becoming authoritative in the Ottoman centre is an example of how a book gains prestige in the hierarchy of the ulemā through a formal process.⁷ Ibn Nujaym’s works, opinions, fatwas and, in the context of our subject, especially his writings on the maxims, dominated the Hanafi fiqh discourse after the 17th century.⁸

The existence of nearly two hundred manuscript copies in Anatolian libraries and the studies on it and their authors reveal the dominant position of *Ashbāh* in Ottoman law. There have been serious studies on the *Ashbāh* in the Muslim world in general and in the Ottoman geography in particular. When it is remembered that these works in the form of commentaries, glosses and other works, besides making the basic text comprehensible, have the purpose of appropriating it and adapting and maintaining it according to the time and place,⁹ the work of Ottoman jurists on the *Ashbāh* becomes more meaningful.

Studies on the *Ashbāh* in the Ottoman centre (in Rumelia and Anatolia) began in the 16th century, when the work was also written.¹⁰ Zeyrekzāde (d. 1595), who is understood to have been a *mudarris*, wrote a commentary dedicated to Murad III.¹¹ In the 17th century, Celeb Muslihuddin Mustafa b. Hayreddin Efendi (d. 1616) wrote a commentary dedicated to Ahmed I. 1616) wrote a commentary dedicated to Ahmed I.¹² Karachelebizāde Abdulaziz Efendi (d. 1658), who also served as a Shaykh al-Islām for a short time, reorganised and explained the *Ashbāh*, which he did not find useful due to the disorganisation of the subjects in his commentary.¹³

5 Büşra Ünal, *Şun ‘ullah Efendi’nin Fetāvâ’sı ve Tahlili* (Unpublished Master Thesis 2018) 158.

6 Saçaklızade Mehmed Efendi, *Tertibu'l-Ulûm (İlimlerin Tertibi)*, M R Deri and Z Pak and M A Özdoğan (ed), (Hikemiyat Yayınları 2020) 194-195.

7 Guy Burak, *The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire* (Cambridge University Press 2015) 138-139.

8 Samy Ayoub, *Law, Empire, and the Sultan (Ottoman Imperial Authority and Late Hanafi Jurisprudence)* (Oxford University Press 2020) 13, 31; Ibn Nüceym’s influence was also evident in the Ottoman geography outside the centre.

9 İsmail Kara, *İlim Bilmez Tarih Hatırlamaz: Şerh ve Haşiye Meselesine Dair Birkaç Not* (Dergah Yayınları 2021) 15.

10 A comprehensive study on the Ashbah literature has been conducted: Necmettin Azak, ‘Kavâ'id-i Fıkhiyyede Bir Literatür İncelemesi: İbn Nüceym’in el-Eşbâh ve'n-Nezâir’i ve Üzerine Yapılan Çalışmalar’ 3/2 (2020) Tahkik İslami İlimler Araştırma ve Neşir Dergisi 547.

11 See Nevzade (n 1) 1172, Azak (n 10) 554.

12 See Katip Çelebi (n 1) 434, al-Bagdadî İsmail Pasha, *Hadih al-Arifin Asmâ al-Muallifin wa Asâr al-Musannifin* (Dâr al-Turâs al-Arabiyye 1951) 43, Bursalı Mehmed Tahir, *Osmanlı Müellifleri*, A F Yavuz and İ Özen (ed), (Yaylacık Matbaası 1972) 395, Azak (n 10) 559, Burak (n 7) 138.

13 See Nevzat Kaya, ‘Karachelebizāde Abdülaziz Efendi’ in 24 DİA (2001) 381. (<https://islamansiklopedisi.org.tr/karachelebizade-abdulaziz-efendi>), Azak (n 10) 561.

In the 18th century, the studies on *Ashbāh* had continued, and Mawlānā Mehmed İzmirî (d. 1752), who was a mufti and mudarris in İzmir, prepared a commentary.¹⁴ Sünbülzade Mehmed al-Maraşî (d. 1715), who was a mufti in Maraş, could not understand the division of the maxims into two groups as 6+19 by Ibn Nujaym in his commentary, because there is nothing to separate them, they are all of a universal nature.¹⁵ The commentary of Karabeyzāde Mehmed Emin (d. 1807), who worked as a Rumeli Kazasker, was also written in this century.¹⁶

In the 19th century, Ibn Abidin's (d. 1836) notes on the *Ashbāh*, compiled by one of his students, should be mentioned as a text in the form of a gloss.¹⁷ Apart from these seven commentaries and glosses, of which manuscript copies can be found,¹⁸ studies on the *Ashbāh* in the Ottoman centre were also carried out in the form of editions, treatises and poems.¹⁹ It is possible to say that the Ottoman jurists accepted the authority of the *Ashbāh* in the early periods, however, they did not like the order of the text and sought to put it in a new order, and they also criticized some aspects of the content and improved the original text.

2. The Missing Link in the Chain: Nāzirzāde's *Tartīb al-La'ālī*

Nāzirzāde Mohammad/Mehmed b. Suleyman (d. 1651) was an Ottoman jurist about whom not much is known. The only work that has survived from him is the alphabetical kavaid work titled *Tartīb al-La'ālī fī Silk al-Amālī*.²⁰ According to the information provided by Khālīd b. Abd al-'Aziz, who published the work, Nāzirzāde may have been from Gallipoli and may have been the father of Shayhīzāda, the author of the famous *Multaqā* commentary *Majma' al-Anhur*.²¹ *Tartīb* was presented to Ebū Sa'īd Mehmed Efendi, the Shaykh al-Islām of the period.²²

Nāzirzāde stated that when he was given permission to issue fatwas, he looked through the books of scholars to satisfy the questions posed to him, that he found

14 Bursalı (n 12) 360; Bağdadî (n 12) 328; Özel (n 1) 344; Azak (n 10) 565.

15 Sunbulzāde Mehmed al-Marashî, *Tawqīf al-Ilah fī Sharhi Fennin min al-Ashbāh*, A Güneş and A D Müezzın (ed), (Noya Medya 2017) 280. He also stated that some examples are difficult to evaluate within the scope of the mentioned principle 109-110.

16 Bağdadî (n 12) 355; Azak (n 10) 569.

17 Özel (n 1) 145.

18 Among the works whose manuscript copies could not be found but mentioned by Katip Çelebi and Bağdadî under the title of *Ashbāh* are the glosses and *taliks* of Shaykh al-Islām Çivizāde Mehmed Efendi (d. 1586), Kınalızāde Ali b. Emrullah (d. 1589), Ahizāde Abdulhalim (d. 1604), Hasan b. Ali al-Kayserî (d. 1767) and Balizāde Muhammed Emin (d. 1805). See Katip Çelebi (n 1) 127; Bursalı (n 12) 246, 290, 294; Azak (n 10) 579.

19 See Azak (n 10) 570.

20 It is understood that he wrote two more treatises besides this work. See Nāzirzāde Mehmed b. Suleyman, *Tartīb al-La'ālī fī Silk al-Amālī*, Khalid b. 'Abd al-'Aziz b. Suleiman (ed), (Mektebe al-Rushd 2004) 488, 497.

21 Khālīd b. Abd al-'Aziz (n 20) 43.

22 Ebussaid Mehmed Efendi served as Shaykh al-Islām three times in 1644-6, 1651-2 and 1654-5. See Mehmet İpşirli, 'Ebussaid Mehmed Efendi' in 10 DİA (1994) 281 (<https://islamansiklopedisi.org.tr/ebussaid-mehmed-efendi>); In *Tartīb* he is referred to as "muftī al-enām fī hāzihī al-eyyām Abū Sa'īd b. Es'ād,," Nāzirzāde (n 20) 194-195; Kızılkaya, while introducing this work, confused Mehmed Efendi with his father Es'ād Efendi. See Kızılkaya (n 3) 267.

some maxims in them that could serve as evidence for his answers, and that he created his work by organizing these maxims alphabetically in order to make it easier to refer to them later.²³ Based on these statements, it can be concluded that the maxims were directly used in fatwas and accidents in the 17th century Ottoman Empire.²⁴

The introduction addresses misconceptions about the maxims, such as their unsuitability for certain rulings, their lack of universality, and their inability to be accepted as evidence. It aims to clarify these issues, enabling those familiar with the maxims to effectively resolve encountered problems.²⁵ From this, it is understood that Nāzīrzāde accepted the maxims as evidence and tried to show that they are a universal source of rulings by stating the exceptions with their reasons. Although Nāzīrzāde was influenced by Ibn Nujaym, he also criticized him.

A search of Turkey's manuscript libraries reveals that there are eight copies of the work, five of which are in Istanbul, one in Sivas and one in Konya.²⁶ The oldest copy with a date is dated 22 April 1707, the others were written in 1755, 1812 and 1846. Whether Khādimī, who will be discussed in the next section, was influenced by Nāzīrzāde is a matter of debate, but the presence of a copy in Konya leads us to the assumption that Khādimī brought it.²⁷ Khālid's comparison with the tables also strengthens this assumption. Accordingly, the fact that both lists of maxims are alphabetical, about two-thirds of them are similar, and most importantly, Khādimī's preference for the form used by Nāzīrzāde rather than the famous form in some maxims indicates such an influence.²⁸ However, even in this case, Khādimī's mentioning the maxims among the evidence in the work of *usūl al-fiqh* and gives a semi-authentic list of maxims at the end. This, however, represents an innovation in itself.

23 Nāzīrzāde (n 20) 188.

24 Kızılkaya (n 3) 267.

25 Nāzīrzāde (n 20) 190.

26 There is a copy/manuscript of the work in Bursa İnebey Library. However, there is a strangeness in this copy! Although the text is the same, Ahmad 'Abd al-Rahmān al-Bashiktashī is recorded in the place of the author in the introduction. In a study introducing this copy, the year of Bashiktashī's death is given as 1724 with reference to Bagdādī and Kehhāle, *Tartīb* is attributed to Bashiktashī, and it is stated that no other copy can be found. See Recep Cici & Mustafa Ateş & Münir Yaşar Kaya, 'Bursa İnebey Yazma Eser Kütüphanesi'ndeki Fıkıh Usulü Kitapları: Üzerine En Çok Çalışma Yapılanlar ve Bazı Nadir Eserler' 31 (2018) *İslam Hukuku Araştırmaları Dergisi* 133. Since the relevant copy is also dedicated to Shaykh al-Islām Ebū Sa'īd, who lived in the 16th century, it is concluded that Bashiktashī most likely attributed the text to himself or that the author was miswritten by the annotator/copyist. Cf. Ahmad 'Abd al-Rahmān al-Bashiktashī, *Tartīb al-La'ālī fī Silk al-Amālī* (Bursa İnebey Library, copyist Hüseyin Hafız b. İsmail, no. 625, Athens 1161)

27 The copy, which is registered in Konya Regional Manuscript Library under the inventory number 42 Kon 1238, is written in talik calligraphy and has 94 folios. It is known that al-Khādimī brought some works from Istanbul, which were transferred to the manuscript library in the centre of Konya. Mehmet Önder, *Büyük Alim Hz. Hadimi* (Güven Matbaası 1969) 6-13; Yaşar Sarıkaya, *Merkez ile Taşra Arasında Bir Osmanlı Alimi Ebu Said el-Hādīmī* (Kitap Yayınları 2008) 250.

28 Khālid (n 20) 100-110. For the view that these similarities are natural since both al-Khādimī and al-Nāzīrzāde were influenced by the same source (*Ashbāh*), taking into account that *Tartīb* was not well known, see Kızılkaya (n 3) 271.

3. The Addition of the Legal Maxims to the Usûl:

Khādimī's *Khātima Majāmi*

Abū Sa'īd al-Khādimī (d. 1762) was born in Konya, after receiving his primary education here, he went to Istanbul in 1725 and continued his madrasah education, then returned to his hometown and started teaching at his madrasah in Khādim/Hadim-Konya.²⁹ Khādimī, who wrote works in many fields, wrote a text on the usûl al-fiqh, whose full title was *Majāmi' al-Haqāiq wa al-Qawā'id wa al-Jawāmi' al-Rawā'iq wa al-Fawā'id min al-Usûl*, and which was known as *Majāmi* for short, gained enough fame to replace Molla Khusrev's *Mir'at*, which was taught in Ottoman madrasas for a long time, and entered the madrasa curricula.³⁰

In *Majāmi*, it is important that the legal maxims are mentioned among the secondary proofs of the usûl al-fiqh and 153 maxims are added to the end of the text (as *Khātima*) in alphabetical order. Mentioning the maxims as proof and adding them at the end of the work of usûl al-fiqh in this way is a new situation. For the first time, the maxims, which were previously treated in the texts of the genres of *ashbāh* and *khilāf*, have been included in a book of usûl for the first time.³¹

Khādimī's focus on concepts such as necessity and *maslaha*, which form the basis for legal change, makes his selection of maxims in both the main text and the conclusion particularly significant.³² Again, the inclusion of custom in a usûl text in connection with *ijma* (consensus) is an innovation in the Hanafī usûl tradition,³³ and *Majāmi* has gained a privileged place in the Islamic world with these features.

Many commentaries have been made on *Majāmi*'s text. The first of these commentaries, albeit incomplete, belongs to Khādimī's son Abdullah Efendi, and then Abu Hasan al-Malaṭī wrote the first complete commentary in 1764.³⁴ The most famous commentary is *Manāfi' al-Dakāik* by Muhammad Hulūsī al-Guzelhisārī

29 Sarıkaya (n 27) 59; Kaşif Hamdi Okur, *Osmanlılarda Fıkıh Usûlü Çalışmaları: Hadimi Örneği* (Mizan Yayınları 2010) 69-70; Mustafa Yayla, 'Ebû Saïd Hâdimi' 15 *DİA* (1997) 24 (<https://islamansiklopedisi.org.tr/hadimi-ebu-said>).

30 M. Kamil Yaşaroğlu, 'Mecâmiu'l-Hakâik' in 28 *DİA* (2003) 217 (<https://islamansiklopedisi.org.tr/mecamiul-hakaik>); Sarıkaya (n 27) 260; Özel (n 1) 346; Okur (n 29) 98. Khādimī's usûl al-Majāmi and Guzelhisārī's commentary are mentioned at the beginning of the maturity period after the primitive and flowering period of Ottoman fiqh literature. See Reshad Amiri, *Legal Maxims in Islamic Jurisprudence (Their History, Character and Significance)* (Unpublished PhD Thesis 2003) 156.

31 *Majāmi* can even be characterised as a book of *qawā'id*. See Orhan Çeker, 'Ebû Saïd Muhammed el-Hâdimi'nin Mecâmiu'l-Hakâik Adlı Eseri' 8 (1998) Selçuk Üniversitesi İlahiyat Fakültesi Dergisi 43.

32 The emphasis on the fact that the public authority can make some dispositions and impose some prohibitions on Islamic law based on *maslaha* shows that Hadimi was aware of the increasing influence of the state on the law. See Okur (n 29) 90.

33 Okur (n 29) 187. For a comparative analysis of the place of *Majāmi* in the usûl tradition, see Mürteza Bedir, 'Geleneğin Son Halkası: Hâdimi'nin Mecâmi'ü'l-Hakâik adlı Eseri ve Usul'de Güncel Bilgi Meselesi ya da Bugün Fıkıh Usulünü Hangi Eserlerden Okumalıyız?' A H Furat and N K Yorulmaz and O S A (ed), *Sahn-ı Semân'dan Dârülfünûn'a Osmanlı'da İlim ve Fikir Dünyası Âlimler, Müesseseler ve Fikrî Eserler (XVIII. Yüzyıl)* (Zeytinburnu Belediyesi Kültür Yayınları 2018) 150.

34 Ahmed Hamdi Şirvani, *Lawāmi' al-Daqā'iq fî Tarjamat Majāmi al-Haqā'iq*, H Örs and S E Örs (ed) (Türkiye Yazma Eserler Kurumu Başkanlığı 2017) 41.

(d. 1837), completed in 1830.³⁵ In fact, it can be said that this work has a distinct reputation from *Majāmi*. The other famous commentary is the work of Suleyman b. Abdullah al-Kırkagacī (d. 1851), known as the “commentary of *Khātima*.”³⁶

The list of maxims in *Majāmi* includes maxims taken from Ibn Nujaym’s *Ashbāh* and Merginānī’s *Hidāyah*, and maxims described by Khādimī.³⁷ The maxims in this list will also be among the primary sources of Majalla’s Introduction. The comparison shows it is seen that 65 of the maxims are the same. It should not be forgotten that 35 of them are also mentioned in Ibn Nujaym, and 6 of the 8 maxims newly formulated by Khādimī will also be included in the Majalla.³⁸

Majalla

During the Tanzimat period, which started in 1839, on the one hand, the insufficient al-fiqh knowledge of the members of the newly established Nizāmiye courts, and on the other hand, the difficulty of the judges of the shar‘iyah courts to determine the valid opinion, primarily pointed to the need for a Turkish code in the field of obligations and judicial law.³⁹ The first attempt to address this need began with the establishment of a commission within the Assembly of Tanzimat in 1855.⁴⁰ However, despite convening to prepare a text, no concrete draft was produced by the commission.⁴¹ In terms of our subject, within the framework of this initiative,⁴² there is no indication that legal maxims would be included in the code. This suggests that the idea of including the rules in the text of a law was realized in Cevdet Pasha during the process that evolved from being a member of the *Metn-i Meṭin* commission to the presidency of the Majalla Commission.

As the first product of the Majalla Commission, the Mazbata, consisting of the Introduction (*Muqaddima*) and Chapter about Sale (*Kitāb al-Buyū*) containing the rules, was entered into force 20 April 1869, with the will (*irāde-i seniyye*) of the Sultan.⁴³ The Mazbata is a fundamental text in terms of explaining the transformation

35 See Ahmet Akgündüz, “Mustafa Hulusi Güzelhisari,, in 14 DİA (1996) 331 (<https://islamansiklopedisi.org.tr/guzelhisari-mustafa-hulusi>).

36 Bursalı (12) 436; Bağdadî (n 12) 408.

37 Necmettin Azak, *Ebu Said el-Hadimi'nin Mecamiu'l-Hakâik Adlı Eserindeki Kavâid-i Külliye'nin İslam Hukukunun Temel Kaideleri İçindeki Yeri ve Önemi* (Unpublished Master Thesis 2010) 107.

38 Azak (n 37) 186.

39 M. Akif Aydın, ‘Mecelle-i Ahkam-ı Adliyye’ in DİA 28 (2003) 231 (<https://islamansiklopedisi.org.tr/mecelle-i-ahkam-i-adliyye>).

40 BOA, Y.EE., nr. 83/34, 25.05.1306; Ahmed Cevdet Pasha, Tezâkir, C Baysun (ed), (Turkish Historical Society Press 1991) 62.

41 Ahmed Cevdet (n 40) 63; Ebulula Mardin, *Medeni Hukuk Cephesinden Ahmet Cevdet Paşa* (Adalet Bakanlığı Yayınları 2021) 54-55; Osman Kaşıkçı, *İslam ve Osmanlı Hukukunda Mecelle* (Osmanlı Araştırmaları Vakfı Yayınları 1997) 31.

42 For Cevdet Pasha’s letter about the commission, see BOA, Y.EE., nr. 32/44.

43 See Aydın (n 39) 231-235.

in Islamic and Ottoman law,⁴⁴ and there are important emphases from the perspective of the qawā'id literature. In the introduction, the problems of the dual structure in which the Ottoman legal system was dragged into were mentioned, and it was stated that in addition to the difficulty of extracting and applying the necessary provisions from the al-fiqh accumulation, the provisions based on custom and tradition would also change with the change of time. After the issue of change in law, it is said that fatwa books consist of producing solutions to emerging events in the centre of principles/maxims, and it is complained that Ibn Nujaym's groundbreaking work in presenting the maxims accepted in the Hanafi madhhab in a compact manner has not been followed.

In the Ottoman context, the Majalla Commission could have done a more comprehensive work on the maxims if it had not been for the urgency of establishing legal unity in the country and the scarcity of trained jurists. One might even question whether the Commission could have prepared the rest of the code using an abstract method, similar to the approach pioneered by Ibn Nujaym, as mentioned in the book.⁴⁵ However, it was sufficient to draw attention to the necessity of advancing the studies of Islamic law within the framework of the needs and necessities of the time in a qawā'id-centred manner,⁴⁶ and it was stated that no judgement could be reached without a clear transfer from the books of the sect with the maxims included in the Introduction due to the legal context.

In the second article (articles 2-100), which is about the legal maxims, 99 maxims are listed, presumably "as a tribute to the asmā al-husnā (Names of God),".⁴⁷ To a large extent, this section consists of the maxims "arranged one after the other in an unsystematic manner without any connection, relevance and harmony between them."⁴⁸ Although the order may seem random, the context in which the Majalla Commission began its work was certainly influential in the selection of the rules.⁴⁹

In this context, the legal maxims can be viewed as general principles of law or foundational principles of legal interpretation. In legal systems, it should be shown

44 For a detailed interpretation of the Mazbata in terms of the transformation in the field of Islamic law in the modern period, see Sami Erdem, *Tanzimat Sonrası Osmanlı Hukuk Düşüncesinde Fıkıh Usulü Kavramları ve Modern Yaklaşımlar* (Unpublished PhD Thesis 2003) 71.

45 Kaşıkçı (n 41) 38.

46 Mustafa Bakır, *İslam Hukukunda Külli Kaideler* (Unpublished Post-doctoral Thesis, 1988) 55.

47 Ekrem Buğra Ekinci, Ahmed Cevdet Paşa ve Mecelle'den Düsturlar (IQ Kültür Sanat Yayınları 2021) 82.

48 Hıfzı Veldet Velidedeoğlu, 'Kanunlaştırma Hareketleri ve Tanzimat', in *Tanzimat I* (Millî Eğitim Bakanlığı Yayınları 1999) 194; Kızılkaya (n 3) 298-299. There is also a view that the maxims of the Majalla are listed in a consistent manner, that each group expresses a legal theory despite the lack of subheadings, and that their number is small, although it is obvious that some of them were added later. See Fawzy Shaban Elgariani, *Al-Qawā'id al-Fiqhiyyah (Islamic Legal Maxims): Concept, Functions, History, Classifications and Application to Contemporary Medical Issues* (Unpublished PhD Thesis 2012) 195.

49 Bakır (n 46) 56. A recent study pursues this question with the help of data science: Intisar Rabb & Yusuf Celik, 'Experiments in Tracking Canons across the Mecelle', Islamic Law Blog (16 March 2022) (<https://islamiclaw.blog/2022/03/16/works-in-progress-experiments-in-tracking-canons-across-the-mecelle/>)

how these principles, these “meta-norms” are binding on judges, and even these principles should be pointed out in the justifications of judges’ decisions.⁵⁰ Majalla is a noteworthy example in the normatisation/legalisation of maxims as principles of interpretation; since the maxims were included in a state law enacted by the sultan, they “assumed the character of a positive rule of law.”⁵¹ The codification of maxims by the Majalla had a serious impact not only in the Ottoman context but also in Islamic law in general.

Majalla

There are misconceptions that commentaries only repeat the main text and therefore cannot be evaluated in terms of originality and that the Ottoman legal community lacked intellectual dynamism because they kept writing commentaries.⁵² However, commentaries are an indicator of the vitality of legal thought.⁵³ It is not accurate to perceive the commentator as a person who only repeats the text and interprets it verbatim. To understand the production process of legal knowledge in the Ottoman Empire more deeply, it is necessary to pay attention to commentaries.

The legal maxims in the Majalla are characterized in different ways by researchers. It has been stated that the Majalla initiated the period of perfection and stability in the genre of qawā'id, that it was the pinnacle in the determination of the maxims and guided subsequent studies,⁵⁴ and that it can be considered the starting point of modern studies on qawā'id.⁵⁵ Among the reasons for the commentaries on the Majalla are the need for Arabic and fiqh knowledge in order to understand the articles properly, the desire to explain the fiqh provisions on issues that are thought to be incomplete or ambiguous, and the desire to present the articles of the Majalla in the fiqh books and the different opinions in these books to the practitioners.⁵⁶ Considering that the Majalla was prepared especially for the judges working in the courts of Nizāmiye, it is natural that the commentary writers considered the practical benefit/current needs of this group.

In general, this order is followed in the commentaries: First, the Arabic original of the maxim and its source (mostly by mentioning *Ashbāh* and *Majāmi*) are reminded,

50 Kemal Gözler, ‘Yorum İlkeleri’, in Anayasa Hukukunda Yorum ve Norm Somutlaşması (Türkiye Barolar Birliği Yayınları 2013) 19; Sevtap Metin, *Hukuk Normunun Yorumu* (Unpublished PhD Thesis 2002) 286.

51 Gözler (n 50) 28.

52 Kasım Kopuz, *Reproduction of The Ottoman Legal Knowledge: The Case Of Ibrahim Al-Halabi's Multaqa Al-Abhur and Defining The Concept of Baghy in Commentarial Writings on It (16th to 18th Centuries)* (Unpublished PhD Thesis 2019) IV.

53 For this perspective on commentaries, see William Smyth, ‘Controversy in a Tradition of Commentary: The Academic Legacy of Al-Saqqaki’s Miftah Al-Ulum’ 112 4 (1992) Journal of the American Oriental Society 589. Eyyüp Said Kaya, ‘Şerh (Fıkıh)’ in 38 DİA (2010) 560 (<https://islamansiklopedisi.org.tr/serh#4-fikih>).

54 Baktır (n 46) 56.

55 Elgariani (n 48) 191.

56 Sami Erdem, ‘Türkçede Mecelle Literatürü’ 3 5 (2005) Türkiye Araştırmaları Literatür Dergisi 673.

the concepts mentioned in the maxims are defined, what is intended to be explained in the maxim is explained in a simpler language, examples that can be evaluated under the maxim (mostly within the scope of *muamalāt* and with reference to other articles of the Majalla) are given, exceptions to the maxims are mentioned, and if any, controversial issues are mentioned. Within this template, different sequencing, emphasis and intensity can be observed in the commentaries. Since the Majalla regulates transactions, the examples given are mostly chosen from this field, but rarely examples from other fields such as *ibādāt*, *uqubāt* and *munakahāt* are also mentioned. The commentaries on the Majalla-Qawā'id written until 1918, when the Ottoman state effectively came to an end, are shown in the table below. In the following period, many studies on the Majalla were conducted in the Arab world and in Turkey.

Commentaries of Majalla-Qawā'id in the Ottoman Period (Until 1918)				
Mecelle-i Ahkām-ı Adliye Kavā'id-i Külliyesinin Şerhi	Şemsi Efendi	Correspondent	1877	Istanbul
Tashrīh al-Qawā'id al-Kulliyya	Abdüssettar Efendi	Mudarris	1878	Istanbul
(Mir'at-ı Mecelle (Arabic	Mesud Efendi	Mufti	1881	Kayseri-Istanbul
Mir'āt al-Majalla	Ömer Hilmi	Mudarris	1881	Istanbul
Tafsil li-Tawdīh al-Qawā'id al-Fiqhiyya wa-al-Usūliyya fī Awwal Majallat al-Ahkām al-Adliyya	Süleyman Hasbi	Mufti	1881	Istanbul
Durar al-Hukkām Sharh Majallat al-Ahkām	Ali Haydar	Mufti-Mudarris	1881	Istanbul
Şerh-i Mecelle-i Ahkam-ı Adliye	Mehmed Rasim	Judge	1881	Sivas
Mecelle-i Ahkam-ı Adliye'den Kavaid-i Külliye-i Fıkhiyenin İzahı	Kuyucaklızade Atıf	Mudarris	1888	Istanbul
(Sharh al-Majalla (Arabic	Selim Rüstem	Judge	1888	Beirut
Shawāhid al-Ajille fī Sharh Qawā'id al-Majallat al-Jelīlah	Hasan Sıdkı	Qadi-Mudarris	1889	Harpoot
Tevşih-i Kavaid-i Külliye	Ahmed Şükrü	Deputy	1892	Istanbul
Mecelle-i Ahkam-ı Adliye Şerhi	Türkezade M. Ziyaeddin	Bureaucrat	1894	Istanbul
Tevafukât-ı Kavā'id-i Külliye	Mehmed Rıfat	Advocat	1894	Izmir
Mecelle Takrirleri	Seydişehirli	Mudarris	1898	Istanbul
Telhis-i Kavaid-i Külliye ve Istilahât-ı Fıkhiye	Ali Ulvi	Deputy prosecuting attorney	1902	Isparta

Rūh al-Majalla	Hacı Reşid	Governor	1907	Istanbul
Mecelle-i Ahkam-ı Adliye Şerhi	Ahmed Ziya	Mudarris	1910	Konya
Mecelle Şerhi Kısım-ı Evvel: Kavaid-i Külliye	Bergamalı Cevdet	Mudarris	1911	Istanbul
Tatbikat-ı Mecelle	Mansurizade Said	Deputy- Mudarris	1911	Istanbul

In the Ottoman legal context, the translation and commentary processes by jurists, which render a text accessible and meaningful in their own language, did not consist solely of literal translation and explanation of expressions.⁵⁷ Within the framework of different transmission strategies, translators and commentators, in addition to their contributions to the text, sometimes even intervening in it, also criticize it and reflect on their own contexts. During the Tanzimat period, the interest and demand for *Ashbāh*, *Majāmi*, and *Ta'sis al-Nazar*, attributed to Dabūsī and considered as one of the founding texts of the qawa'id literature, increased, and their commentaries and translations were made. These works will be introduced by considering the identities of their authors, their place in the related literature and their effects.

The *Ashbāh* had an impact on Ali Suavi (1839-1878),⁵⁸ who attempted a reform of his own in al-fiqh, and translated some of the maxims in the *Ashbāh* into Turkish. He published them in his newspaper Muhbir in London and then printed them as a treatise in 1868.⁵⁹ This date is significant because it coincides closely with the publication of the Majalla. It should be remembered that at that time there was a debate on the codification of Islamic law or the importation of civil law through reception.⁶⁰ In the treatise with the title "The Principles of Jurisprudence" on the cover, the maxims related to custom in the method of jurisprudence are seriously emphasized, so much so that it can be said that a perspective that reduces the method of jurisprudence to legal maxims prevails. In this short text, it is important that the seven maxims included in the Majalla are given in their Arabic originals. Ali Suavi's treatise was written to prove to Europeans that Islamic law has mechanisms that can provide solutions to changing conditions and new issues and that it does not constitute an obstacle to progress.

In addition to its commentaries, *Majāmi* has been translated into Turkish twice; after an incomplete translation by Hanīf Ibrahim Efendi, Ahmed Hamdi Shirvanī

57 Miri Shefer-Mossensohn, *Osmanlı'da Bilim (Kültürel Yaratı ve Bilgi Alışverişi)*, Kübra Oğuz (trans.), (Türkiye İş Bankası Yayınları 2019) 132.

58 Abdullah Uçman, 'Ali Suavi' in 2 DİA (1989) 445 (<https://islamansiklopedisi.org.tr/ali-suavi>); Hüseyin Çelik, Ali Suavi ve Dönemi (İletişim Yayınları 2021) 37.

59 Çelik (n 58) 363; Ali Suavi, *Arabî İbare Usûlü'l-Fıkıh Nâm Risalenin Tercümesi* (Muhbir Office 1868). For its introduction and transliteration, see Sami Erdem, 'Ali Suavi'nin Usûl-i Fıkha Dair Bir Risalesi' 2 (1998) Divan 283.

60 Ali Suavi's treatise can be read as supporting the work of the Majalla Society. See Esra Yakut, *Şeyhülislamlık* (Kitap Yayınları 2005) 109-110.

(1831-1890) translated the entire text. In order to teach Majalla better at the Mekteb-i Hukuk-ı Sultanî, *Majāmi* was added to the syllabus with the decision of Cevdet Pasha and Shirvanî was appointed as the instructor.⁶¹ He undertook the task of “translating the book with the help and inspiration of the people” and added treatises on logic, debate and jadal at the end and published it under the title *Lawāmi‘ al-Daqā‘iq fî Tarjamat Majāmi al-Haqā‘iq* on 19 November 1876.⁶² In the translation, a plain language was used by taking into account the students who were the addressees, a commented translation technique was adopted by making explanations where deemed necessary while adhering to the main text, and care was taken to enrich these explanations with the legal maxims in Majalla.

The work by Mustafa Hashim (1852-1920), grandson of Grand Vizier Koca Yusuf Pasha and son of Shaykh al-Islām Ahmet Muhtar Efendi, titled *Izāh al-Qawā‘id*, is a commentary on *Majāmi Khātime*. At the end of the work, which is written in Arabic, there is Ömer Hilmi Efendi’s taqrîz. Here, the value of fiqh and qawā‘id was mentioned and the work on the commentary of the legal maxims was presented.⁶³ In the introduction of the commentary, it was stated that Khādimî had collected the maxims in the most beautiful way and that these maxims were commented on by referring to fiqh books, giving examples of jurisprudence and mentioning exceptions.⁶⁴ Praises and prayers were made to Abdulhamid II and the maxims in the *Majāmi Khātime* were commented.

One notable work is by Süleyman Sırrı Efendi (1851-1931), whose *Izāh al-Ashbāh* is the first translation and commentary of *Ashbāh* in Turkish. Sırrı Efendi must have written the work during his tenure as a lecturer of fiqh at Darulfünun between 1902 and 1913.⁶⁵ In his commentary, he followed the style of Majalla, addressed the issues by numbering them with the name of the issue, added subheadings that were not in the original text, and made frequent references to the works of Hamawî, Sunbulzāde and Hibetullah (Ibn Abidin’s teacher) as well as Ibn Abidin’s works. Considering that the codification movements were now on the path of *talfiq* (regarding the issue of combining opinions of different Madhhabs) the opinions of other sects were also included in the commentary. The current events of the period (such as wars) and the daily problems of the society (such as *narh* and *ihitiqar*) were mentioned.⁶⁶

61 Ali Adem Yörük, *Mekteb-i Hukuk’un Kuruluşu ve Faaliyetleri (1878-1900)* (Unpublished Master Thesis 2008) 9.

62 Şirvani (n 34) 66-67; This translation was highly appreciated and was printed in many editions. See Sankaya (n 27) 265.

63 Mustafa Hashim, *Izāh al-Qawā‘id* (Matbaa-i Amire 1295/1878) 89.

64 Mustafa Haşim (n 63) 2.

65 BOA, MF.MKT, nr. 762/67, 26.11.1321; He also taught Kitab al-Nikah at the Mekteb-i Hukuk. Yörük (n 61) 88. Regarding the date of the writing of the work, I found it appropriate to include 1910, the year in which a part of the work was printed, in the title. See Süleyman Sırrı, Süleyman Sırrı, *Izāh al-Ashbāh* (İkdam Matbaası 1329/1911). New Edisyon: ed. Necmettin Azak and Hüseyin Örs and Şaban Kütük (Türkiye Yazma Eserler Kurumu Başkanlığı 2022) 54.

66 See Süleyman Sırrı (n 65) 159, 605, 606.

Ibn al-Hāzim Farīd (1873/4-1938), while he was the chief of the Manisa murder court in 1912, put Dabūsī's work on his agenda, translated the text as a summary and partially commented on it through the articles of the Majalla.⁶⁷ No other commentary, commentary or gloss on *Ta'ṣīs al-Nazar* is known in the Ottoman legal literature. Therefore, the translation of this work by Ibn al-Hāzim is important in terms of qawaid literature. With this translation, al- Farīd aimed to reveal a work that explains with examples the maxims on which the disputes between the imams are based and the principles on which the issues that are disputed between the Hanafi imams and other mujtahid imams are based.⁶⁸ Some parts have been omitted in the translation, for example, the examples on slavery have not been translated, probably because they were not in accordance with the spirit of the time, and the sections on dhimmis and apostates have been completely ignored.

E. Individual Qawā'id Works

Although the literature on kavaid in the Tanzimat period was marked by the commentaries on Majalla and the reproduction of classical books, there were also semi-authentic endeavours. After the early *Farā'id* of Mahmud Hamza Efendi, the mufti of Damascus, Nurali, a Tatar Turk, titled *Yuz Qawā'id* was written in Arabic. Mustafa Nazmi's *Tamsīl* and Musa Jarullah's *Qawā'id* were written in Turkish. These are the independent kavaid works that we have been able to identify. Although the maxims found in the Majalla are included in *Tamsīl* and *Qawā'id*, different maxims extracted from fiqh books are also included in the list, although their sources are not mentioned.

Mahmūd Hamza Efendi (1821-1887), the mufti of Damascus, wrote the text entitled *Farā'id al-Bahiyya fī al-Qawā'id wa al-Fawā'id al-Fiqhiyya* in 1878, which can be considered as the first kavaid work written after the Majalla, and the book was printed in Damascus in 1881.⁶⁹ In the *Farā'id*'s introduction, it is noted that the times have changed and the science of fiqh has weakened. It is also stated that making judgments despite new issues has become difficult, and this work was prepared with the aim of using maxims to facilitate the process.⁷⁰ According to him, the maxims had a twofold potential; they could provide answers to new situations that arose and they could facilitate the process of learning and reasoning about the law for teachers and students.⁷¹ It is known that the *Farā'id* was also read in the Ottoman legal community.

67 Ibn al-Hāzim Farīd, *Te'ṣīṣi'n-Nazar ve Ruḥu'l-Fikh* (Mizanu'l-Hukuk Matbaası 1328/1912)

68 Ibn al-Hāzim (n 67) 2.

69 Mahmud Hamza, *Ferā'id al-Bahiyya fī al-Qawā'id wa al-Fawā'id al-Fiqhiyya* (Dār al-Fikr 1986) 251-253.

70 Mahmud Hamza, (n 69) 11.

71 See also Ayoub (n 8) 63; Intisar A. Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (Cambridge University Press 2015) 262-263.

Nurali bin Hasan (1852-1919) has a work titled *Yüz Kavaid-i Fıkhiye ve Yüz Kavaid-i Usûliye -Delâil ve Mesâilleri ile-* (Hundred Qawā'id al-Fiqhiyya and Hundred Qawā'id al-Usûliyya -with their Proofs and Issues).⁷² This work of Nurali can be considered within the scope of the law projects of the Muslims of Russia called *Mecelle-i Ahkam-ı Şer'îye* and Islamic law activities.⁷³ Nurali donated this work to libraries in Istanbul and Bursa and also presented it to Abdulhamid II.⁷⁴ According to the cover of the work, it was licenced for publication in Petersburg on 10 September 1901 and the author himself covered the printing costs. The work, the title of which is in Turkish and the text in Arabic, was produced by bringing together two treatises and printing them as a single book. In the first part, the maxims of fiqh are defined as principles derived from sharī'ah evidence, which form the basis for the views of the Hanafi sect.⁷⁵ Moreover, the second part defines the maxims of usûl as principles derived from rational and narrative evidence, providing the foundation for reaching religious rulings.⁷⁶ A total of 207 maxims, 101 in the qawā'id al-fiqhiyye section and 106 in the qawā'id al-usûliyye section, are listed and briefly explained by pointing to their sources and giving examples.

Mustafa Nazmi (Aklan, 1868-1958) wrote a work on qawā'id in 1902 when he was an assistant prosecutor in Çorum, and he was able to publish this text in 1907.⁷⁷ In the work titled *Tamsil-i Kavāid ve Zavābit-ı İlm-i Hukuk*,⁷⁸ 238 maxims, including the maxims of Majalla, are listed, generally in alphabetical order, the maxims are explained with examples, and the sources of some maxims in hadiths are shown.⁷⁹ Original maxims not mentioned in Majalla and *Ashbāh* were produced,⁸⁰ references were made to classical fiqh books, as well as to the codes of the Tanzimat period such as the Penal Code, the Code of Criminal Procedure, the Code of Civil Procedure, and the Land Code, and the exceptions to the maxims were pointed out occasionally.⁸¹

Musa Jarullah Bigiev (1875-1949), a Kazan Tatar, wrote his work titled *Qawā'id-i Fiqhiyya* in 1910.⁸² Carullah added 102 maxims to the 99 maxims of the Majalla,

72 Nurali bin Hasan el-Bulgārî, *Yüz Kavaid-i Fıkhiye ve Yüz Kavaid-i Usûliye (Delâil ve Mesâilleri ile)* (Matbaa-i Kerimiye 1902).

73 See Kibar Karadeniz, *Mahkeme-i Şer'îyye ve Mecelle Projesi Özelinde Rusya Müslimlerin İslam Hukuku Faaliyetleri (1788-1918)* (Emin Yayınları 2023) 185.

74 Nurali, *Sultan Abdülhamid'in Sarayında (Bir Tatar Müderrisin İstanbul, Bursa ve Surre Alayı ile Hac Hatıraları)*, Ömer Hakan Özalp (ed), (İşaret Yayınları 2021) 71, 82, 118.

75 Nurali (n 72) 2.

76 Nurali (n 72) 21.

77 He obtained a licence in July 1904 for the printing and publication of the work. BOA, MF.MKT., nr. 790/17, 23.04.1322.

78 Mustafa Nazmi, *Temsil-i Kavāid ve Zavābit-ı İlm-i Hukuk* (Şirket-i Mürettebiye Matbaası 1323/1907).

79 Mustafa Nazmi (n 78) 71, 102.

80 İbrahim Yağız, *Mustafa Nazmi'nin Temsil-i Kavaid ve Zavabit-i İlm-i Hukuk Adlı Eseri* (Unpublished Master Thesis 2019) 18 and the comparison table of Majalla and Ashbāh in Annex-1.

81 Yağız (n 80) 19.

82 Ferhat Koca, 'Musa Carullah Bigiyef Hakkında Bir Nice Söz' in *Kavaid-i Fıkhiyye (İslam Hukukunun Genel İlkeleri)* F Koca and F Karataş and A Y Küçüktiryaki (ed), (Ankara Okulu Yayınları 2018) 55.

totalling 201 maxims. The order is similar to that of the Majalla, but the phrases are not taken verbatim, but are expressed in a way that the Tatar people can understand.⁸³ After the explanation of the 99th maxim, it is stated that after the maxims quoted from the Majalla, which was collected by Ibn Nujaym, other maxims collected from fiqh and usul books will be presented.⁸⁴ In the commentary of the maxims, Qur'an verses and hadiths are referred to, the names of the sources used are not mentioned.⁸⁵

The maxims were used in the classical sources of Ottoman law. In the Tanzimat period, a new set of issues with judicial, administrative and legal dimensions was encountered. Issues such as the power relations between power and knowledge and the power of the state to give some maxims the power to be laws while ignoring others should be discussed. Majalla is in fact a shortcut to the reformulation of Islamic law in the context of the late Ottoman period and to trace the lasting traces of this system in the centre and provinces. In this period, the maxims are also a fundamental factor in the formation of legal language and legal culture. This chapter will trace the use of rules in the classical sources of Ottoman law, as well as the manifestations of rules in the field of law in the dimensions of education, knowledge production, practise and language culture.

Ottoman law, with its sharia and 'urfī law (sultans' law) dimensions, formed a unique legal structure and deserved to be named separately. This legal structure naturally had its own unique sources. In the Ottoman judicial system, there were a number of sources of information and enforcement where the judges could easily find the provisions they were looking for, and these sources are counted as handbooks (*al-furū'*) of Islamic law, legal responsas (*fatwā*), Ottoman codes (*kānūnnāmes*) and court records (*shar'īyya sijils*), all recognized within Hanafi law.⁸⁶ In the classical period -until Nāzırzāde-, Ottoman jurists did not produce an independent work in the kavaid genre. Although a work titled *al-Ashbāh wa-al-Nazāir* is attributed to Ibn Melek (d. 1395), one of the scholars of the period of Beyazıt I, it has not been found in library records.⁸⁷ Nevertheless, works on *khilāfīyāt*, which are close to the qawā'id

83 For the comparison table, see Koca (n 82) 66.

84 Musa Carullah Bigiyef, *Kavaid-i Fikhiye: Ahkam-ı Şer'iye Mecellesine Medhal Olmak Sıfatıyla*, Ahmad al-İshaki (ed), (Örnek Matbaası 1327/1910) 72.

85 Apart from the hadith sources, works such as *al-Burhan* by al-Juwayni and *al-Muwafaqat* by al-Shatibi are cited, and there are also quotations from al-Maarri's poems. See Bigiyef (n 84) 109, 118.

86 Mehmet Akif Aydın, *Osmanlı Hukuku (Devlet-i Aliyye'nin Temeli)* (İSAM Yayınları 2020) 287, 289, 290-292.

87 Although it is said to have been found in one of the Mosul libraries -with a registration number- no such work can be found. Carl Brockelmann, *Geschichte der Arabischen Litteratur* (Supp. 2) (Brill 1938) 315.

genre, were written.⁸⁸ Although the maxims were not discussed in separate books or treatises, it can be observed that jurists took into account maxims such as the change of time, custom, maslaha, social conditions, the removal of difficulty and the provision of ease, and the broad interpretation of permissions in their opinions.

al-Furū‘

The Ottoman madrasa curriculum is analyzed in three periods. Classical Hanafi texts such as *Hidāyah* were popular from the foundation until the Fatih period, Molla Khusrev’s *Durer* came to the forefront after Fatih, and İbrahim Halabî’s *Multaqā* reached widespread use during and after the reign of the Magnificent. In addition to these, it is certain that Shaykh Bedreddin’s *Tashīl*, written during the conquest period, and Ibn Abidin’s *Radd al-Mukhtar*, written in the pre-Tanzimat period, were also influential in the Ottoman legal community. We can take a closer look at the use of rules in these five main texts respectively.

When the these texts, which had a significant influence on Ottoman law, are analyzed; the maxims are mostly referred to with the expression *asl*, no distinction is made between the maxims of *furū* and maxims of *usūl*, the usage is all-encompassing to all sections of *ibādāt-muamalāt-uqūbāt*, and the maxims taken as basis by the jurists are mentioned while explaining the reasons for the different views of the sects on the issues. It is seen that the possible criticisms of the Hanafi madhhab’s view are responded to through the maxims that ensure consistency, the authors follow a narrative based on the maxims while expressing their own opinion/preference, and the maxims are used with different wording since they do not have established forms. Although the maxims seem to have been placed as a secondary element in the texts of jurisprudence, it is more than a hesitant claim to think that there are some principles/maxims in the background of jurisprudential reasoning despite the fact that the jurists do not express them explicitly in many issues. This will be seen more clearly in the case of *fatwas*.

Fatwā

In addition to *furū‘* handbooks on jurisprudence, Ottoman jurists used *fatwa* collections as a source of reference. *Fatwas* consisted of short answers to the questions asked. While Arabic *fatwa* books such as *Hāniya (Qādihan)*, *Bezzāziyya*, *Tatarhāniyya* were effective in the early periods, after the 16th century, Turkish *fatwa* works such as *Fetava-yı Ali Efendi*, *Fetava-yı Feyziyye*, *Behcetü ‘l-Fetava*, *Neticetü ‘l-*

88 For example, *al-Kāfī* written in 1317 by Hattab b. Abu al-Qasim Karahisārī, one of the jurists of the Uthman Beg period: *Sharh Nazm al-Khilāfiyāt*, written in 1317, is a commentary on Najm al-Dīn Nesefi’s (d. 1142) poetic work on *khilāf*. See Recep Cici, *Osmanlı Dönemi İslam Hukuku Çalışmaları (Kuruluştan Fatih Devrinin Sonuna Kadar)* (Arasta 2001) 59-63.

Fetava came to the fore.⁸⁹ Since the fatwa-type works consist of short answers to issues, jurisprudential proofs are generally not mentioned, so it is not common for fatwas to be based on maxims or for the judgement to be supported by maxims.⁹⁰

It can be seen that jurists such as Resul b. Salih al-Aydinî (d. 1570), Ebussuud Efendi (d. 1574), and Sunullah Efendi (d. 1612) referred to the maxims in their fatwas, albeit to a lesser extent. In particular, Ebussuud's use of qawā'id in his fatwas, which he himself produced in the Turkish language, should be regarded as a serious breakthrough. In the classical period of the Ottoman Empire, Ebussuud played a dominant role in the field of qawā'id thought. The maxims also manifested themselves prominently when issuing fatwas on newly emerging issues such as tobacco and coffee. It can be said that the mentality of the Ottoman jurists was based on certain maxims, which surfaced in the face of new issues.

Kānūnnāme

It is observed that the Ottoman Codes (*Kānūnnāme*'s), which constitute the 'urfî dimension of Ottoman law, ensured trust in the state and the law by providing unity and stability of practise, especially in matters related to state organisation, punishment, land and taxation.⁹¹ In the context of trying to reconcile the practise of fratricide with sharia law, as it was ruled in Mehmed II the Conqueror's Code of Organisation⁹² and considered within the scope of 'urfî law⁹³ it seems reasonable to consider the use of maxims under this heading. Some Ottoman scholars emphasised certain maxims in order to place fratricide on a legal basis.⁹⁴

The 1525 Egyptian Code of Laws is a very important code that expresses the legal consequences of the Ottomans' establishment of sovereignty in the region in 1517, regulates the structure inherited from the Mamluk period practise within the framework of Ottoman law and maintains the established customs and traditions.⁹⁵ It is noteworthy that the sultan's language explains that the authority to legislate is directly derived from sharia law, and that the maxim of "what is customary is as if

89 See Şükrü Özen, 'Osmanlı Dönemi Fetva Literatürü' 5 (2005) Türkiye Araştırmaları Literatür Dergisi 335; on the emergence of Ottoman Turkish as a language of law from the 15th century onwards, this language's struggle for existence against Arabic, its acquisition of a public quality that could be shared by the public, and the role of fatwas in this context, see Himmet Taşkömür, '16. Yüzyıl Osmanlı Kültür ve Düşünce Hayatı Üzerine Bazı Gözlemler' A H Furat and N K Yorulmaz and O S A (ed), *Sahn-ı Semân'dan Dârülfünûn'a Osmanlı'da İlim ve Fikir Dünyası Âlimler, Müesseseler ve Fikri Eserler (XVIII. Yüzyıl)* (Zeytinburnu Belediyesi Kültür Yayınları 2018) 29-36.

90 Kızılkaya (n 3) 421.

91 See Halil İnalçık, 'Kanunname' in 24 DİA (2001) 333 (<https://islamansiklopedisi.org.tr/kanunname>).

92 *Kanunname-i Al-i Osman*, Mehmed Arif (ed.), (Ahmed İhsan ve Şürekası Matbaası 1329/1911) 27.

93 Aydın (n 86) 115.

94 For the discourses that can be based on the maxims and their analyses, see Mehmet Akman, *Osmanlı Devleti'nde Kardeş Katli* (Eren Yayınları 1997) 150-156.

95 Abdurrahman Atçıl, 'Memlükler'den Osmanlılar'a Geçişte Mısır'da Adli Teşkilat ve Hukuk (922-931/1517-1525)', 38 (2017) *İslam Araştırmaları Dergisi* 89.

it were legitimized by sharia” is invoked.⁹⁶ In the 1528 Kānūnnāme of Aydın, in the Kānūnnāme of Skopje-Selanik from the reign of Selim II (1566-1574), and in the law compilations of Ottoman jurists such as Dede Cöngi (d. 1567), Pîr Mehmed Efendi (d. 1611), and Hezarfen Hüseyin Efendi (d. 1691), there are references to the maxims.

When we look at the examples of the use of the maxims in the *Kānūnnāmes*, we see that the maxims were mostly used with their Arabic originals (probably in order to increase their effectiveness) for purposes such as strengthening the legitimacy of ‘urfî law in the eyes of sharia law, providing justification for the continuation or change of certain practises in the context of land law, and supporting the fatwas or judgments given.

Shar‘iyya Sijils

Ottoman court records, the Sharia registry books, are among the primary sources in terms of Ottoman law.⁹⁷ Although the rules are not frequently mentioned in the registers, some examples of their use are found. In these examples, it is seen that the rules are used with their Arabic originals. In some cases, the sources of the rules are also mentioned. In the examples encountered, in addition to *Ashbāh*, *Qādiḥan* is also mentioned.

Even though there is no direct mention of the relevant maxims, issues related to the change of *ahkām* and customs stand out in the registers. When the registers are analyzed in general, it is seen that the sultans changed the law according to the needs of the society by establishing rules in areas regulated by Islamic law, such as the practise of official sectarianism, the binding of marriages to the permission of the qādī, the land regime, and the endowment of money. There are also many records indicating that local and private customs were taken into consideration.⁹⁸

Both in classical fiqh sources and in the western legal literature, the maxims were considered an integral part of legal education and were considered important as the key to making the subjects easier for students to grasp. The most important aim of the Ottoman madrasas in the classical period was the training of judges who would serve in the expanding geography of the empire. Accordingly, the curriculum was constructed as fiqh-centred. The basic books taught here and the use of maxims in these books have been discussed above.

96 Ahmed Akgündüz, *Osmanlı Kanunnameleri ve Hukukî Tahlilleri* (Fey Vakfı ve Osmanlı Araştırmaları Vakfı 1990-1996) 4 86. ‘Urfî law was defined as an independent and autonomous field and was placed on an equal footing with sharia law on this basis. See Fatma Gül Karagöz, *The Evolution of Kanunname Writing in the 16th and 17th Century-Ottoman Empire: A Comparison of Kanun-ı Osmani of Beyazid and Kanunname-i Cedid* (Unpublished Masters Thesis 2010) 48.

97 See Fethi Gedikli, ‘Osmanlı Hukuk Tarihi Kaynağı Olarak Şer‘iyye Sicilleri’ 3 5 (2005) *Türkiye Araştırmaları Literatür Dergisi* 187.

98 Gedikli (n 97) 193.

It is clear that Cevdet Pasha designed the Majalla as a fiqh textbook at the same time. The fact that the first article begins with a definition of fiqh, explains it in detail, and provides examples of the maxims within the text of the law is sufficient evidence of this. From the date of its adoption, Majalla would be placed at the centre of legal education from madrasah to school as both a fiqh textbook and a law. It is not difficult to guess that special attention was paid to the Introduction, i.e. the legal maxims, in the Majalla lessons and that it was emphasized more than other sections. Although the *Ashbāh*, which was rarely seen in the madrasa curricula of the classical period, and *Majāmi*, which filled the usūl al-fiqh section of the curriculum in the 18th century, presented the maxims to the students' attention, it was only with the Majalla that the maxims became central in legal education.

In 1855, the Muallimhane-i Nuvvab was opened,⁹⁹ followed by the Kavanin and Nizamāt Dershanesi, which was established in 1870 and continued for about seven years,¹⁰⁰ the Mekteb-i Sultanī Law School, which operated between 1874 and 1881,¹⁰¹ the Mekteb-i Hukuk, which started its activities in 1880,¹⁰² the Thessaloniki Law School (1907-1913),¹⁰³ the Konya Law School (1908-1919),¹⁰⁴ and the Baghdad Law School (1908-1916),¹⁰⁵ Majalla qawā'id lessons were taught.

During the Ottoman classical period, Hanafi jurists did not consider a legislative role for the sultan, the boundaries of which were theoretically drawn by them, as an encroachment on their authority. In other words, the relationship between the Ottoman Empire and Hanafi jurists was shaped in a process supported by the legal acceptance of the sultan's participation in law-making.¹⁰⁶ With the Tanzimat period, the Ottoman Empire began to infuse its law with European law, and reforms were made at the level of laws and courts based on the western example, as well as a transformation in the dimension of legal thought.¹⁰⁷

99 This institution would later be named Mekteb-i Nüvvab in 1885, Mekteb-i Qudāt in 1908, and Madrasa al-Qudāt in 1909. See Jun Akiba, 'A New School for Qadis: Education of the Sharia Judges in the Late Ottoman Empire' 35 (2003) Turcica 125. The process of 'reforming' the Madrasa al-Qudāt towards the Mekteb-i Hukuk (School of Law) was parallel to the expansion of the jurisdiction and jurisdiction of the Nizāmiye courts to the detriment of the sharia courts. See Ali Adem Yörük, *Müderris ve Hukukçu Rizeli Hafız Kasım Efendi (II. Meşrutiyet Dönemi Hukuk Eğitiminde Üslup Arayışları)* (Dergah Yayınları 2014) 130.

100 Yörük (n 61) 19-22.

101 This school can be considered as the first version of Istanbul University Faculty of Law in terms of the organisation of legal education in Istanbul. See Fethi Gedikli, 'İstanbul Üniversitesi Hukuk Fakültesi Ne Zaman Kuruldu?' 69 1-2 (2011) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 91.

102 Yörük (n 61) 79-81

103 Vahit Cemil Urhan, 'Selânik Hukuk Mektebi (1907-1913)' in Balkan Tarihi Araştırmaları I, Bülent Akyay (ed), (Trakya Üniversitesi Balkan Araştırma Enstitüsü Yayınları 2021) 349.

104 Yasin Yılmaz and Mehmet Kiremitçi, 'Konya Hukuk Mektebi'nde Anayasa Hukuku Dersleri' 68 (2022) Adalet Dergisi 285.

105 Abdullah Cengiz, 'Bağdat Hukuk Mektebi' 34 (2023) Iğdır Üniversitesi Sosyal Bilimler Dergisi 186.

106 Ayoub (n 8) 19.

107 Fethi Gedikli, 'Hukuki Düşünce yahut Cumhuriyetin Hukuk Devrimi -Bedevilikten Medeniliğe Geçiş-', in Tanzimat'tan Günümüze Türk Düşüncesi (Nobel Yayınları 2015) 893..

While it is possible to view the Majalla within the framework of continuity in the Ottoman legal system and the Hanafi tradition, this does not hold true for the production of legal knowledge. In the classical period, Muslim jurists could develop a legal thought that was more independent of state influence.¹⁰⁸ The centralized and nation-state system, on the other hand, intervened in the law more competitively. Unlike nation-states, in empires, laws were not imposed on the people, and there was a process of direct or indirect negotiation with local dynamics in the creation of law.¹⁰⁹ While in the classical period, the process resulted in the production of a legal text by a jurist and the subsequent adoption of this book by the state and the people, in the Tanzimat period, there was now a production of legal knowledge officially imposed by the state. In other words, the production of legal knowledge, which was a civil intellectual activity in which the state -although it had some influence- was not directly involved, was completely formalized. The text that was worth of commentary was no longer determined by the text itself, its quality or its author, but by the state itself.

Since its inception, Islamic law has been systematized in a dynamic process in order to respond to the needs of societies, and the activity of *ijtihād* has continued in a lively manner. By the Ottoman period, there was no need for absolute and founding *ijtihād*, and a relative stability was achieved in the law. Even in this state, when the examples given in the above on fatwas are recalled, the institution of *ijtihād* was somehow operated, especially for newly emerging issues. It can be concluded that the maxims carried a serious weight in the change of Islamic law as they came to the fore in these new issues. During the Tanzimat period, when the need for change intensified, interest in *qawā'id* increased in the process that can be initiated with Ali Suavi's approach, discussed above, which reduced the *usūl al-fiqh* to *qawā'id*, and then continued with the Majalla.

The fact that the Ottoman ulema compiled a selection of maxims at the beginning of the Majalla, the first code of Sharia law, played an important role in the serious influence of legal maxims in the field of *fiqh*.¹¹⁰ Since *qawā'id* express abstract principles, they had the potential to be used effectively in the renewal of Islamic law and the exercise of *ijtihād*.¹¹¹ In this context, it can be assumed that the Majalla chose to select the first hundred articles from the *qawā'id* literature in order to link

108 Hallaq emphasises that Islamic law is the law of jurists not only because it was constructed by jurists, but mainly because 'jurists were the bearers of the authority that sustained it for more than a thousand years'. Wael Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge University Press 2009) 245.

109 See Jill Harries, *Law and Empire in Late Antiquity* (Cambridge University Press 1999) 36.

110 Mohammad Hashim Kamali, 'Legal Maxims and Other Genres of Literature in Islamic Jurisprudence' 20 1 (2006) Arab Law Quarterly 99.

111 Kamali (n 110) 78.

canonization to codification. Accordingly, codification should actually be perceived as a continuation of the qawā'id literature.¹¹²

Ottoman jurists such as Mansurizade Said, Celal Nuri and Mustafa Şeref regarded qawā'id as the only unchangeable constant of Islamic law. The process of canonization is to transform the *nass* (Qur'an and Sunnah) into universal propositions that can be used in law through a direct or indirect process. *Nasses* with universal characteristics were directly canonized using expressions similar to the original, while local and historical *nasses* were canonized through an indirect process, considering their meaning and purpose, or were used to explain or exemplify the maxims. Therefore, it is unnecessary and even dangerous for the *nass* to have a direct source value in the field of law.

The evolution of Ottoman law towards the Continental European legal system with the codification movement had manifestations not only in the judicial organization and legal education, but also in the legal doctrine. Commentaries on the code, which emerged as a legitimate and recognized form of writing, should be considered products of this new doctrine, although they can be linked to the ancient tradition of commentary. The commentaries written for the purposes of explaining either the whole code or one or more groups of articles, defining basic concepts, establishing relations with the whole codification and showing the sources of the articles have created a rich literature.¹¹³

The texts written by scholar jurists, especially textbooks that include "law (*hukūk*)" in their titles¹¹⁴ also constitute a significant number. In these texts, it can be said that the maxims were used functionally to place the codes within a Sharia framework, demand the amendment of codes or the creation of new ones, justify customary law as one of the sources of law, and question and explain the theoretical-philosophical foundations of legal issues.

3. Attempts at Maximization/Canonization (*Taq'id*)

In the type of writing that began to be established in the legal literature of the Tanzimat period, law was divided into natural and subject law in accordance with the French model, and the distinction between public and private was adopted in

¹¹² Ayoub (n 8) 156.

¹¹³ The first law commentary is probably Ohan Vahan Efendi's *Şerh-i Kanun-ı Ticaret* 1278/1861), a commentary on the commercial code. See Kara (n 9) 16.

¹¹⁴ The first book written within this framework was *Hukuk-ı Mîlî* (1847) by Ottokar, who worked as an interpreter at the Austrian Embassy in Istanbul. Ali Suavi's text is also important in that it includes the French word *droit/duruva*. See Kemal Gözler, "Hukuk Kelimesi Kaç Yaşında? Etimoloji Bize Ne Söyler,," www.anayasa.gen.tr/hukuk-kac-yasinda.htm (31.07.2019)

subject law. As the sub-branches of this division, the fields of state, constitutional, administrative, tax, criminal, civil, debts, commercial and execution and bankruptcy law were distinguished. In some of the texts written in this new style, it is seen that the maxims related to the field of study were also determined. Although these maxims were largely based on Islamic law, western sources were also used directly or indirectly.

In the legal literature of the Tanzimat period, there was an attempt to maximize almost every field of law. It is no coincidence that some of these attempts at maximization came from Majalla commentators such as Seydişehrî, Ali Haydar, and Hacı Reşid. During this period, in addition to the classical fiqh sources, Latin and French legal maxims were also among the sources that Ottoman jurists fed on. Whether systematic or not, the new legal community interest in the maxims remained alive. It is certain that this interest made serious contributions to the vocabulary of Turkish legal maxims.

The presentation of concepts and institutions, which were essentially the product of western theories, within an Islamic framework was a common concern during the Tanzimat and Constitutional Monarchy periods. During the Ottoman modernization, political debates, which also had legal dimensions, occurred between intellectuals and statesmen. In these debates, religion came to the fore as the only legitimizing force within the framework of the adaptation paradigm.¹¹⁵ One of the legitimizing tools provided by religion and Sharia/Islamic law in the context of the mentioned debates is the maxims. Although they were not used as frequently as verses and hadiths, the maxims were expected to have a power of influence close to the *nasses*.¹¹⁶

It is possible to give different examples from the Tanzimat, Constitutional Monarchy and transition periods to the Republic regarding the use of qawā'id in political debates that also had legal dimensions. Intellectuals such as Namik Kemal, Mansurizâde and bureaucrats such as Talat Pasha and Mustafa Kemal Pasha referred to the maxims in their speeches and writings. In terms of the course of the debates, it is seen that the maxims played an important role as one of the legitimization tools that came to the rescue at the points of need. Although arbitrary uses can be encountered, it can be said that the maxims are presented as reliable propositions in polemical/judgmental texts, and their ability to persuade the other side is trusted.

115 See İsmail Kara, *İslamcıların Siyasi Görüşleri 1* (Hilafet ve Meşrutiyet) (Dergah Yayınları 2014) 22-23; Nurullah Ardiç, *Islam and the Politics of Secularism: the Caliphate and Middle Eastern Modernisation in the early 20th Century* (Routledge 2012).

116 On the use of nusûs as a means of legitimisation, see Kara (n 115) 39-44.

Sharia Nizāmiye

In the cautious view defended by the majority, the benefits of the maxims in many aspects, such as education, are accepted, but it is not considered possible for them to be the basis of judgement on their own. In fact, there is an opinion that the maxims are used indiscriminately and judgements are made easily.

When the expressions used by the Majalla in different places are evaluated together, it can be said that equilibrium rather than caution has been observed. In other words, Majalla has taken a stance that evaluates the maxims as a whole without completely excluding them from practise and that they can be used provided that they find a transmission. Indeed, in order for the legal maxims to be used as evidence, an example from the books of *furū'* or *fatwa* was required. In fact, the maxims can be used as evidence in the first stage and a judgement can be reached, but it is necessary to support it with a second stage, that is, with a transmission from the *fiqh* tradition. In addition, the quality of being evidence is not found in the maxims individually, but when considered as a whole, the maxims, or rather the bundles of maxims adopted by a particular *madhhab/école*, can be seen as one of the safest ways to reach a judgement.

The Ottoman Court of Appeal has also ruled that judgments should not be made on the basis of one or more of the legal maxims. Nevertheless, some court judgements and *fatwas* make references to the maxims. In other words, we are faced with an ambivalent view on how to use and where to place the maxims in *fatwas* and judicial decisions.

Fiqh

In the first chapter, it was discussed that the pre-Islamic Turks had sayings that could be considered as legal principles. These legal rules, which were manifested as proverbs, were regarded as laws in areas and periods when oral law was valid and sufficient among the people, and the phrase “proverb does not enter the Qur'an, but it goes with it” expressed the respected place of these maxims in the people's understanding of law.¹¹⁷ In the interlinear translations of Arabic *fiqh* books made near the establishment of the Ottoman Empire, the first Turkish forms of the maxims developed in Islamic law were encountered. In the Ottoman legal literature of the classical period, the maxims were mostly used in their Arabic originals. However, it was mentioned that it was possible to accept some propositions used in Turkish by Ebussuud Efendi in his *fatwas* as maxims.

In the Tanzimat period, the process of Turkification of the legal language in general and the maxims in particular gained formality and speed with the Introduction of

117 Ali Rıza Önder, 'Atasözlerinde Tüze Kuralları' 1974 Türk Folkloru Araştırmaları Yıllığı/Beleten 109.

Majalla within the context of the codification movement.¹¹⁸ It can be said that Turkish owes its development as a competent legal language to a great extent to the Majalla.¹¹⁹ In this period, the relevant literature, namely the Majalla commentaries written by Ottoman jurists, the commentaries and translations of classical qawā'id books and most of the independent qawā'id works were also written in Turkish.

During the Tanzimat period, sharia law continued to be reformulated as in the case of Majalla, while 'urfī law was evolving into a new order inspired by French law by expanding its sphere of domination. In this period, law began to be standardized in both dimensions and was shaped within the framework of an understanding of justice based on positive law.¹²⁰ One can start from Majalla's Introduction to investigate how this new culture occurred in the society and to what extent it spread to different layers. In the Introduction, which we have analyzed in the literature section, four sections are emphasized, firstly in the section on the Majalla as an easy-to-understand law on fiqh, and then in the section on the maxims in particular.

Four layers can be mentioned here: law teachers and students, judges, civil servants and the public. The first layer was touched upon through the central place given to the Majalla in legal education. Those who were to learn and teach Islamic law were to be guided towards a maxim-centred understanding. The value of the Introduction of Majalla as a fiqh textbook was also emphasized. The second layer was the judges who were members of the court system. The legal culture formed especially in the Nizāmiye courts, which the judges had to adopt, was based on standardizing a judicial practise that focused on order. This was based on the belief in the power of scientific progress to design nature and society along rational lines. In this mentality, detailed legal regulations were considered as the achievement of an objective and rationalist structure in the judicial sphere.¹²¹

The third layer comprises civil servants in administrative affairs. The fact that they were also addressed can be attributed to Cevdet Pasha's understanding of the constitution. Pasha opposed the idea of a written constitution and thought that Islamic law and the Ottoman tradition, which found expression in legal maxims, could be accepted as the unwritten constitution of the state.¹²² The fourth layer, the people, who were said to be able to control the conformity of their affairs to Sharia through

118 The most important development that broke the dominance of Arabic in the field of Islamic law was the preparation of the Majalla in Turkish. See Suraiya Faroqhi, *Osmanlı Kültürü ve Gündelik Yaşam (Ortaçağdan Yirminci Yüzyıla)* (Elif Kılıç (trans.), (Tarih Vakfı Yurt Yayınları 2005) 32.

119 Fethi Gedikli, *Hukuk Dili ve Adli Yazışmalar* (İstanbul Üniversitesi Açık ve Uzaktan Eğitim Fakültesi Yayınları 2019) 76.

120 Edhem Eldem, *Mitler, Gerçekler ve Yöntem (Osmanlı Tarihinde Aklıma Takılanlar)* (Tarih Vakfı Yurt Yayınları 2018) 284.

121 Avi Rubin, *Ottoman Nizamiye Courts (Law and Modernity)* (Palgrave Macmillan 2011) 156.

122 See Ayhan Ceylan, *Meşveret Düşüncesi ve Uygulaması in Türk Hukuk Tarihinde Meşveret Düşüncesi ve Uygulama* (Unpublished PhD Thesis 1998) 139; Bedri Gencer, *Hikmet Kavşağında Edmund Burke ile Ahmed Cevdet* (Melisa Matbaacılık 2011) 141-142; İrem Diler, *Ahmed Cevdet Paşa'nın Devlet, Hukuk ve Yeni Osmanlılarla Karşılaştırmalı Olarak Anayasa Görüşü* (Unpublished Master's Thesis 2019) 69.

maxims, also had different layers within themselves. In the classical period, the legal culture in the Ottoman Empire was disseminated among the social strata through fiqh manuals such as *Hidāyah* and basic works such as *Mızraklı Ilmihal*. During the Tanzimat period, laws and especially the Majalla were also included in this culture.

The article explores the development and significance of legal maxims (*qawā'id*) in Ottoman law, tracing their evolution from the classical period through the Tanzimat and Constitutional Monarchy periods.

Legal maxims in Islamic law, which are central Ottoman jurisprudence, encapsulate general principles applicable across various legal issues. Initially rooted in Seljuk traditions, Ottoman law evolved to distinguish between *sharia* (Islamic law) and *'urfī* (sultanī) law, with significant contributions from Islamic legal literature, notably Ibn Nujaym's *Ashbāh*, Nāzīrzāde's works, and Khādimī's writings. The Tanzimat reforms aimed to unify Ottoman law, leading to the creation of the Majalla, which codified 99 legal maxims. Commentaries on the Majalla, illustrate the ongoing scholarly engagement with *qawā'id*. Additionally, translations and commentaries of classical works like *Ashbāh* and *Majāmi* further demonstrate the dynamic nature of Ottoman legal scholarship.

The evolution of *qawā'id* literature reflects the broader transformation of Ottoman law, from classical Islamic traditions to a more codified and systematic legal system during the Tanzimat reforms. The integration of maxims into legal codes like the Majalla highlights their enduring relevance and the complex interplay between traditional Islamic jurisprudence and modern legal reform.

The role of legal maxims in Ottoman law represents a profound intersection between tradition and transformation. Throughout the classical period, Ottoman jurists relied on maxims as fundamental tools for interpreting and applying Islamic law. These maxims guided the application of law across various sources, from handbooks of Islamic jurisprudence and fatwa literature to Ottoman codes and court records. The maxims served not merely as theoretical constructs but also as practical instruments shaping judicial decisions and legal practise.

With the advent of the Tanzimat period, the legal landscape of the Ottoman Empire underwent significant reformatations. The integration of European legal principles and codification efforts, epitomized by the Majalla, signified a pivotal shift. The Majalla's incorporation of maxims highlighted their enduring influence while adapting them to a modernizing legal framework. The selection and codification of maxims within the Majalla were not merely continuations of tradition but represented a strategic

adaptation to meet the evolving needs of a state undergoing modernization.

In legal education, the prominence of maxims in Ottoman madrasas and later legal institutions underscores their role in shaping the legal culture and language. The Majalla's emphasis on maxims as central to legal education demonstrates their importance in cultivating a jurisprudential foundation that bridged classical Islamic law with modern legal practises.

The transition from a legal system rooted in traditional jurisprudence to one increasingly influenced by European models illustrates the dynamic nature of legal maxims. They continued to function as pivotal elements in the transformation of legal thought and practice, influencing both legislative reforms and the broader legal culture.

Ultimately, the study of legal maxims in Ottoman law reveals their dual role as both a repository of traditional wisdom and a catalyst for legal reform. They embody the enduring legacy of Islamic jurisprudence while also reflecting the adaptability of legal systems in the face of changing political and social landscapes. The ongoing significance of maxims in modern legal contexts further affirms their foundational role in shaping the evolution of law from the Ottoman Empire to contemporary legal systems.

Externally peer-reviewed.

The author has no conflict of interest to declare.

The author declared that this study has received no financial support.

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Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Re-thinking Part-Time Employment Contracts under Turkish Law within the context of Divisible Monetary Benefits and Especially Concerning Remuneration for Additional Hours considering the Court of Justice of the European Union's Case Law

Artür Karademir* 

Abstract

This study examines the treatment differences between part-time and full-time employees in Turkish labour law, focusing on divisible and indivisible benefits and additional working hours. It highlights the Turkish Labour Code's Article 13, which mandates *pro rata temporis*, requiring that divisible monetary benefits be calculated proportionally to hours worked. The paper argues that the views put forward in the doctrine regarding indivisible benefits, which suggest that solutions should be reached based on the purpose of granting indivisible benefits, should also apply to divisible monetary benefits. Given the law's broad regulation concerning divisible benefits, it is stated that this regulation should be limited through teleological interpretation and that divisible monetary benefits that are independent of working hours should also be provided fully to part-time employees, rather than proportionally. This paper also highlights the discrepancy in premium rates for hours that exceed normal working hours. It argues that this difference lacks a legitimate basis. Drawing on recent rulings by the Court of Justice of the European Union, it proposes revising Turkish labour laws to align more closely with EU principles and ensure that part-time employees receive fair compensation and benefits without facing systematic disadvantages due to their employment contract type.

Keywords

Part-Time, Overtime, Additional hours, Divisible benefits

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To cite this article: Karademir A, "Re-thinking Part-Time Employment Contracts under Turkish Law within the context of Divisible Monetary Benefits and Especially Concerning Remuneration for Additional Hours considering the Court of Justice of the European Union's Case Law", (2025) 76 Annales de la Faculté de Droit d'Istanbul 113. <https://doi.org/10.26650/annaes.2025.76.0005>



The Court of Justice of the European Union (CJEU) made a significant decision on October 19, 2023¹, that directly affected employees working under part-time employment contracts. This decision pertains to the principle of non-discrimination between part-time and full-time employees and the principle of pro rata temporis. The CJEU interpreted the imposition of the same working hours required to qualify for additional compensation for overtime as unfavourable treatment towards part-time employees compared to full-time employees. The CJEU reaffirmed this stance in another decision in 2024².

In Turkish law, the principles of non-discrimination and pro rata temporis related to part-time employment contracts were developed with the European Union's regulatory framework in mind. While Turkish law prohibits 'different treatment', its objective is to prevent part-time employees from being disadvantaged simply because of the nature of their contract compared to their full-time counterparts. Although the above-mentioned decisions do not have a direct impact on Turkish labour law, they should still influence it, since, as in the cases addressed by the CJEU, it would be beneficial to explore new, more equitable approaches to compensation for extra hours for part-time employees that do not result in unfavourable treatment.

Additionally, while Turkish Labour Code³ specifies that divisible monetary benefits must be paid in proportion to the employee's working hours, it does not address the distribution of non-divisible benefits⁴. In determining whether indivisible benefits should be provided fully or proportionally to the working hours of an employee working under a part-time employment contract, some authors contend that consideration should be given to the purpose of granting these indivisible benefits⁵. It is also worth examining whether this view put forward in the doctrine can be applied to divisible monetary benefits as well. Given that the provision in the law regarding

1 Case C-660/20 *MK v Lufthansa CityLine GmbH* [2023] ECLI:EU:C:2023:789.

2 See joined cases C-184/22 and C-185/22 *IK and CM v KfH Kuratorium für Dialyse und Nierentransplantation e. V.* [2024] ECLI:EU:C:2024:637.

3 Code Number 4857 dated 22.05.2003 (OG 10.06.2003/25134).

4 Nuri Çelik, Nurşen Caniklioğlu, Talat Canbolat and Ercüment Özkaraca, *İş Hukuku Dersleri* (36th edn, Beta 2023) 213.

5 Nurşen Caniklioğlu, 'İş Kanununun 10. Yılında Belirli Süreli İş Sözleşmesi ile Kısmi Süreli İş Sözleşmesi ve Uygulamada Yaşanan Sorunlar' in Ali Cengiz Köseoğlu (ed), 10. Yılında 4857 Sayılı İş Kanunu (Uygulama Sorunları ve Çözüm Önerileri) Sempozyumu (Ankara Yıldırım Beyazıt Üniversitesi Hukuk Fakültesi 2016) 200; Gülsevil Alpagut, 'Belirli ve Kısmi Süreli İş Sözleşmelerinde Ayrım Yasağı ve Oransallık İlkesi' in Talat Canbolat (ed), Prof. Dr. Ali Güzel'e Armağan Cilt I (Beta 2010) 25, 38; Hamdi Mollamahmutoglu, Muhittin Astarlı and Ulaş Baysal, *İş Hukuku* (7th edn, Lykeion 2022) 742. Cf. Ömer Ekmekçi and Esra Yiğit, *Bireysel İş Hukuku* (On İki Levha 2024) 77. The authors state that 'the application of indivisible benefits to part-time employees is at the employer's discretion and is not a legal requirement. For instance, an employer may choose not to provide foreign language training to part-time workers. In such cases, the employee cannot claim partial access to this benefit based on their working hours., See and cf. Sarper Sözek and Süleyman Başterzi, *İş Hukuku* (Beta 2024) 279. The authors state that 'as a rule, part-time employees benefit from non-monetary benefits without discrimination.' Also see and cf. Ahmet Sevimli, *4857 Sayılı İş Kanununda Düzenlenen Kısmi Süreli İş Sözleşmeleri* (Beta 2019) 69. The author states that 'an employee's exclusion from a training program provided by the employer aimed at enhancing skills and abilities solely due to the part-time nature of their contract would violate the principle of prohibition of discrimination set forth in the Code.'

proportional payments of monetary benefits lacks specific limitations, it may result in unfair outcomes. Therefore, it is necessary to discuss whether there is an implicit gap in the law that might justify a teleological interpretation to prevent part-time employees from being disadvantaged merely due to their employment contract type.

In European Union law, the concept of working hours is closely linked to employee health and safety. Accordingly, similar to Turkish law, EU regulations impose various limits on overtime. Directive 2003/88/EC⁶, which provides fundamental rules on working and rest periods, restricts overtime although it does not define overtime work per se. The European Foundation for the Improvement of Living and Working Conditions (‘Eurofound’) defines overtime as work conducted beyond the employee’s regular working hours, at the request and with the consent of the employer, outside the standard weekly working hours and for which the employee is entitled to compensation⁷.

There is no uniform approach within EU member states regarding the compensation for work exceeding normal hours. For instance, overtime is either compensated financially or by time off in Croatia and Romania, while in Estonia, overtime compensation is only provided in monetary terms⁸. According to Eurofound’s 2022 Report, the general practice is a 50% premium on regular hourly wages for overtime. However, in Germany, Ireland and the Netherlands, there is no statutory requirement for overtime pay, although collective or individual agreements may contain such provisions⁹.

Austrian law differentiates between additional hours and overtime. The Working Hours Act¹⁰ (‘AZG’) sets the regular daily working hours at 8 h and the weekly working

6 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299.

7 European Foundation for the Improvement of Living and Working Conditions, *Overtime in Europe: Regulation and practice*, Publications Office of the European Union (Publications Office of the European Union 2022) 1.

8 Ibid 7.

9 Ibid 7. It should be noted that under German law, according to 612 Paragraph 1 of the German Civil Code (BGB), if there is no specific provision in a collective or individual agreement, it is assumed that remuneration for work exceeding the regular working hours is implicitly agreed upon, provided that the employee has a legitimate expectation of being entitled to such remuneration. According to the German Federal Labour Court, ‘the legitimate expectation required under 612 Paragraph 1 BGB exists in most areas of working life. However, there is no general rule that those in senior positions have a legitimate expectation of being compensated for overtime work. The expectation of remuneration is always determined by an objective standard, taking into account social norms, the nature, scope, and duration of the work, as well as the relationship between the parties, while disregarding the personal views of the parties. This expectation can particularly be inferred from collective agreements in the relevant sector that foresee overtime pay for similar work. The obligation to provide evidence and bear the burden of proof regarding the existence of an expectation of remuneration lies, according to general principles, with the person claiming compensation’ (BAG 5 AZR 406/10, 17.08.2011).

10 For the full text of the relevant Act, see <<https://www.ris.bka.gv.at>> accessed November 11, 2024. For further reading on

hours at 40 h. Article 6 of the Act defines the concept of overtime, stipulating that overtime, *inter alia*, occurs when the standard weekly working hours are exceeded. In cases of overtime, employees are entitled to a 50% wage premium on the hourly rate. The general rule is that this amount is paid if not agreed otherwise in a collective or enterprise agreement (AZG Art. 10/2). On the contrary, the law specifies that part-time employees who exceed their agreed working hours receive a 25% premium on the hourly rate (AZG 19d/3), and they also have the right to additional time off in exchange for additional hours (AZG 19d/3b).

In Finnish law, a tiered wage system is also in place for extra working hours. Article 16 of the Finnish Working Hours Act¹¹ addresses overtime and additional hours separately. Similar to Turkish law, this regulation specifies that additional hours apply when the agreed working hours are set below the standard weekly working hours of 40 hours, covering up to 40 hours per week. Under Article 20/1, this compensation must be calculated on the basis of the employee's basic wage rate. The second paragraph, however, pertains to overtime pay and stipulates that, unlike additional hours, overtime should be paid at a premium rate. For the first 2 h exceeding the normal daily working hours (8 hours), the wage is paid at a 50% premium on the hourly rate. For hours beyond these first two, the hourly wage is increased by 100%. For weekly overtime, a 50% premium is applied. As observed, Finnish law differentiates between additional hours and overtime, favouring an increase in compensation for full-time employees.

As noted above, German law regulates the payment for extra working hours either through individual or collective agreements. As in Austria and Finland, different wage policies had been followed for workers with varied working hours in Germany as well. So much so that the Court of Justice of the European Union made particularly insightful assessments on two German disputes in 2023 and 2024 regarding differing wage policies applied to extra hours.

We present below the summaries of these decisions and the possible outcomes they may create. However, before addressing the explanations related to these decisions, it would be beneficial to outline the Court of Justice of the European Union's approach to equality claims of part-time employees in comparison to full-time employees, particularly in the context of compensation for work exceeding the regular working hours.

work beyond normal hours by employees working under part-time employment contracts under the Austrian law, see also Sascha Obrecht, 'Final Call für Lufthansa CityLine – Diskriminierung Teilzeitbeschäftigter bei Überstundenzuschlägen' (2024) 5 Das Recht der Arbeit 431, 436; Alpay Hekimler, 'Avusturya'da Kısmi Süreli Çalışma İle İlgili Yasal Düzenlemeler ve Uygulamaları' in Kübra Doğan Yenisey (ed), Prof. Dr. Savaş Taşkent'e Armağan (On İki Levha 2019) 143 ff.

11 For the full text of the relevant Act, see <<https://www.finlex.fi/en/laki/kaannokset/2019/en20190872>> accessed November 11, 2024.

Over the years, the CJEU has had opportunities to assess the equality claims of part-time employees vis-à-vis full-time employees in various cases brought before it. The CJEU's *Helmig and Others* decision in 1994¹² is notable in this regard.

On the other hand, it should be noted that the CJEU had issued rulings on allegations of inequality in compensation for working hours between part-time and full-time employees even before the *Helmig and Others* decision. Indeed, the CJEU's *Jenkins* decision in 1981¹³ can be cited as an example of this. What distinguishes the *Helmig and Others* decision from the perspective of the CJEU's previous practice is the difference in the methodology applied in this case. Therefore, to present the development in the CJEU's approach, it would be useful to briefly mention the *Jenkins* decision before discussing the *Helmig and Others* decision in detail.

In the case of *Jenkins*, the specific issue was the fact that Mrs. Jenkins, a part-time employee, received an hourly wage lower than that of full-time employees, which was evaluated in the context of indirect discrimination against women. According to the CJEU's opinion, if the hourly pay rate varies between part-time and full-time work, it is up to the national courts to determine on a case-by-case basis, taking into account the case specifics, its background, and the employer's intent, whether a pay structure actually constitutes gender-based discrimination¹⁴.

The first decision in which the CJEU investigated whether there was a 'different treatment' before addressing the part-time employee's claims in the context of discrimination against women was the *Helmig and Others* decision. In this ruling, the CJEU determined that part-time employees were not subjected to unfavourable treatment. The decision stated that these employees received the same total pay as the full-time employees for the same number of hours. The fact that part-time employees did not receive overtime pay until they reached the same working hours as full-time employees was not deemed by the CJEU to constitute discriminatory treatment at that time¹⁵. The principle, in this case, is that each hour worked should be compensated

12 Joined cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludewig v Kreis Segeberg* [1994] ECLI:EU:C:1994:415.

13 Case 96/80 *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.* [1981] ECLI:EU:C:1981:80.

14 *Ibid* para. 14.

15 Joined cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludewig v Kreis Segeberg* [1994] ECLI:EU:C:1994:415, paras. 29, 31. See also Obrecht (n 10) 434.

consistently. Thus, the 19th hour of work for an employee contracted to work 18 hours should be paid the same as the 19th hour for an employee contracted for 40 hours. Failing this, employees might argue that they are being discriminated against. This approach, assuming a uniformity of hours regardless of the conditions under which the employees worked, ultimately led the CJEU to decide that the claimants had no grounds for a claim under the rules covering the prohibition of non-discrimination¹⁶.

Setting aside positive or negative criticisms regarding the outcome of the decision, this ruling sparked the initial discussions on the relationship between the remuneration of working hours for part-time employees and the principle of equality. With the Helmig and Others decision, the CJEU introduced a significant novelty and adopted a method of analysis characterised as the 'double test'¹⁷. Accordingly, it should first be examined whether the application of a single triggering threshold for overtime compensation constitutes differential treatment. Then, it should be determined whether this application results in indirect discrimination¹⁸.

In its decision in *Elsner-Lakeberg* in 2004¹⁹, the CJEU diverged from the Helmig and Others decision by adopting the view that each component of compensation should be evaluated separately rather than through an overall assessment. In the *Elsner-Lakeberg* case, Mrs. Elsner Lakeberg was a part-time teacher. Her working hours were 15 hours per week and 60 hours per month. For full-time teachers, the weekly working time was 24.5 hours and the monthly working time was 98 hours. Mrs. Elsner Lakeberg requested compensation for the 2.5 hours of overtime she worked within the month, but her request was denied. According to the regulation applicable to her situation, overtime that did not exceed 3 hours per month was not compensated²⁰. Although the CJEU acknowledged that overtime compensation was calculated the same way for part-time and full-time employees, it concluded that applying the same 3-hour limit to everyone constituted unfavourable treatment for part-time employees. The reason is that 3 hours of overtime corresponded to 3% of the monthly working time for a full-time employee but 5% for a part-time employee. Therefore, applying the same overtime threshold (3 hours) to everyone placed a greater burden on part-time employees²¹.

16 Barry Fitzpatrick, Docksey Christopher and Rikki Holtmaat, 'Overtime Payments for Part-time Workers: Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, *Angelika Helmig v Stadt Lengerich* and others [1995] IRLR 216 (ECJ)', (1995) *Industrial Law Journal* 24(4) 387, 391.

17 Ibid 389.

18 Joined cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludewig v Kreis Segeberg* [1994] ECLI:EU:C:1994:415, para. 23.

19 Case C-285/02 *Edeltraud Elsner-Lakeberg v Land Nordrhein-Westfalen* [2004] ECLI:EU:C:2004:320.

20 Ibid. paras. 6, 7, and 8.

21 Ibid para. 17.

The Court of Justice of the European Union issued a significant decision directly affecting employees working under part-time employment contracts on October 19, 2023. In this decision, the CJEU took a clear stance on the application of the principles of non-discrimination and *pro rata temporis*. The case at issue originated from a dispute in German judicial practice. In the specific case, the claimant had been working as a pilot for the Lufthansa CityLine airline since 2001, and from 2010, the claimant's working hours, under a part-time employment contract, corresponded to 90% of a full-time pilot's working hours. According to the agreement between the parties, the claimant's wages were reduced by 10%, but the claimant was granted an additional 37 days of leave per year²².

The disputed provisions in the case were found in the collective agreement to which the defendant airline was a party. Under this collective agreement, overtime pay ('additional pay') increases incrementally according to various flight hours. Generally, under the section titled 'Compensation for Additional Flight Duty Hours' in the collective agreement, overtime pay was set at 1/100 of the basic wage starting from the 106th monthly flight duty hour, 1/85 from the 121st flight duty hour, and 1/73 from the 136th flight duty hour. For long-haul flights, however, lower thresholds of 93, 106, and 120 flight duty hours were set to qualify for additional pay. The CJEU referred to the flight duty hours required to qualify for overtime pay, as set in the collective agreement, as 'trigger thresholds'²³.

The claimant argued that he should be entitled to overtime pay once he exceeded a reduced trigger threshold proportional to his part-time hours. According to the claimant, the part-time nature of his employment contract placed him in a worse position than a full-time employee, disregarding the principle of *pro rata temporis*, with no valid justification for this different treatment²⁴.

The claimant requested that the employer pay the wage differential resulting from the proportionally reduced trigger thresholds according to his part-time working hours. The trial court ruled in favour of the claimant, but upon appeal, the State Labour Court dismissed the case. During the appeal review, the German Federal Labour Court referred the matter to the Court of Justice of the European Union, asking whether failing to proportionally reduce the trigger thresholds based on the claimant's working hours was consistent with the provisions of the Framework Agreement²⁵. Essentially, the Federal Labour Court's

22 Case C-660/20 *MK v Lufthansa CityLine GmbH* [2023] ECLI:EU:C:2023:789, para. 14.

23 Ibid. paras. 15, 16.

24 Ibid para. 19.

25 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by

question was as follows: If a national law permits overtime pay to be contingent on the same working hour thresholds for both part-time and full-time employees, does this constitute less favourable treatment of part-time employees compared to their full-time counterparts under Article 4.1 of the Framework Agreement²⁶?

The CJEU first determined that the claimant already qualified for a certain payment when exceeding the stipulated working hours, but this payment was based only on the basic wage. Thus, he was not entitled to the 'additional' (overtime) pay from the first hour of exceeding his assigned working hours. In this situation, the core of the dispute was not whether a part-time employee should receive compensation for hours exceeding their stipulated working hours but rather whether the employee should qualify for the 'additional' pay specified in the collective agreement²⁷. In other words, it centred on whether the high trigger thresholds set for full-time pilots should be proportionally reduced based on the working hours of the claimant pilot.

The CJEU rightly emphasised that a pilot working under a part-time employment contract must complete as many flight duty hours as a full-time pilot to qualify for additional pay, and these thresholds were not proportionally reduced according to his individual working hours. Under these conditions, the CJEU found that part-time pilots were unlikely to reach the trigger thresholds necessary to qualify for additional pay or would do so far less frequently than their full-time counterparts. Although the hourly pay rate for both pilot categories appeared equal up to the trigger thresholds, these thresholds represented a longer flight duty for part-time pilots and, therefore, a greater burden than for full-time pilots. Since part-time employees would rarely meet the conditions to qualify for additional pay, the claimant was subject to unfavourable treatment, violating Article 4.1 of the Framework Agreement²⁸.

The CJEU also evaluated whether this disparity in the trigger thresholds could be justified. Some of the compelling reasons highlighted in the judgement included that equalising the trigger thresholds for both categories of pilots ignored the potential extra burdens outside of work associated with part-time employment²⁹. Moreover, implementing a single trigger threshold instead of establishing adjusted thresholds according to employment type would conflict with the airline's goal of deterring excessive working hours among pilots³⁰. Consequently, the CJEU held that setting the same trigger thresholds for part-time and full-time employees constitutes unfavourable treatment.

UNICE, CEEP and the ETUC [1998] OJ L 014.

26 Case C-660/20 *MK v Lufthansa CityLine GmbH* [2023] ECLI:EU:C:2023:789, para. 29.

27 Jacob Jousen, 'Die nächste Etappe zur Mehrarbeitsvergütung bei Teilzeitbeschäftigung - Anmerkung zu EuGH, Urteil vom 19.10.2023 – C-660/20 (MK/Lufthansa CityLine)' (2024) 2 *Recht der Arbeit* 118, 119.

28 Case C-660/20 *MK v Lufthansa CityLine GmbH* [2023] ECLI:EU:C:2023:789, para. 47.

29 *Ibid* para. 63.

30 *Ibid* para. 65.

The CJEU maintained the principles and reasoning it adopted in 2023 in another decision it issued in 2024. The case in the Court of Justice of the European Union's decision of July 29, 2024, also stemmed from a dispute that arose within German judicial practice. In this case, the defendant employer was a company providing dialysis services. The claimants, who were employed as care assistants under part-time employment contracts with the defendant, argued that the provision in the collective agreement requiring them to exceed the trigger thresholds applied to full-time care assistants to qualify for additional pay was unlawful. The claimants requested that the time off granted in exchange for the additional hours worked be calculated based on the specific structure of their own (part-time) employment contracts. In other words, the claimants sought redress for the adverse treatment resulting from the application of the overtime scheme for full-time care assistants to them (without any proportional adjustment)³¹.

In its 2024 decision, the CJEU repeated the principles established in the Lufthansa CityLine decision. Accordingly, for part-time care assistants, like the claimants, if the working hours that qualify them for additional pay are not proportionally reduced in line with the individually agreed working hours in their contracts, it should be concluded that they are subject to 'less favourable' treatment compared to full-time employees under Article 4.1 of the Framework Agreement. The primary grounds the CJEU used to reach this conclusion were, again, that part-time employees must bear a greater burden to qualify for additional pay and that setting a uniform overtime threshold conflicts with the purpose of deterring excessive working hours³².

Another reason the CJEU cited for finding that the part-time care assistants in this case were subject to adverse treatment was the risk of exploitation of flexible working arrangements. According to the decision, exceeding the part-time working hours agreed upon by the parties imposes a lower financial burden on the employer than exceeding the working hours of a full-time employee, as these additional hours do not incur a premium payment in this case. This arrangement actually encourages employers to impose overtime on employees with part-time contracts rather than on those with full-time contracts³³.

Another important issue discussed in the CJEU's ruling was whether setting a reduced overtime threshold specifically for part-time employees could be considered unfair to full-time employees. In other words, the question to be answered was

31 See joined cases C-184/22 and C-185/22 *IK and CM v KfH Kuratorium für Dialyse und Nierentransplantation e. V.* [2024] ECLI:EU:C:2024:637, paras. 20, 21.

32 Ibid. paras. 40, 41, 50.

33 Ibid para. 49.

whether allowing part-time employees to qualify for additional pay from the first hour they exceed the working hours set in their contracts, similar to full-time employees, would constitute adverse treatment towards full-time employees. The CJEU's answer to this question was negative. According to the decision, this assumption is incorrect, as, in this case, full-time employees, in terms of overtime, would be treated in the same way as part-time employees based on the principle of *pro rata temporis*³⁴. In summary, the CJEU stated that, in this scenario, there was no injustice against full-time employees and that they were not subject to discriminatory treatment.

The *Lufthansa CityLine* decision is likely to significantly influence the issue of objective justifications for less favourable treatment of part-time employees regarding overtime pay. Indeed, according to a scholarly opinion, this case marks the first time the CJEU has taken a clear position on the question of objective justification for less favourable treatment, so much so it is seen as 'surprising' considering its depth of analysis³⁵.

Note that the CJEU's recent decisions have had repercussions in German law on both the collective and individual labour law levels. It has been argued that the abovementioned decisions undermine the autonomy of the social partners in collective labour law and increasingly create inequality for full-time employees in terms of individual labour law. In contrast, it has also been emphasised that the principle of equality is what precisely as the CJEU put it and the CJEU rightfully paid due consideration to time-off of the part-time employees as a default objective of the legal regime of work beyond regular working hours³⁶.

Similarly, a view that positively assesses the CJEU's decisions suggests that the tiered wage policy established for working hours, as mentioned above, needs to be re-evaluated in Austrian law as well and the Austrian Supreme Court of Justice needs to reconsider its approach with respect to making reference to the *Helmig* decision when adjudicating on the remuneration of work beyond normal hours³⁷.

34 Ibid para. 51.

35 Eva Kocher, 'A first step to clarity: Review of ECJ judgement of 19 October 2023, C-660/20 (MK vs Lufthansa CityLine GmbH), ECLI:EU:C:2023:789' (2024) 15(2) European Labour Law Journal 368, 374. See also François Biltgen, 'Sieben Jahrzehnte europäische Einigung und Bundesarbeitsgericht' (2024) 5 Recht der Arbeit 257, 270. The author states that the background to this case involved, on the one hand, the possibility of contradictory case law from the CJEU and, on the other hand, an intense legal debate in Germany. Since a decision in 2018, the Federal Labour Court has held the view that different remuneration constitutes discrimination. However, other courts and a portion of the German legal literature had expressed doubts about this stance. See also, Dieter Krimphove, 'Die Arbeitsrechtliche Rechtsprechung des EuGH im Jahre 2023' (2024) 1 Arbeitsrecht Aktuell 1, 5. According to the author, the *Lufthansa CityLine* decision has an 'enduring relevance'.

36 For supporting views and criticisms, see Kocher (n 35) 374-375.

37 Obrecht (n 10) 439. See also, OGH 8 ObA 89/11p, 28.06.2012. In the case brought before the Austrian Supreme Court, under the collective agreement in question, part-time employees are not entitled to any payment for the first two hours

All in all, the Court of Justice of the European Union's decisions in 2023 and 2024 are significant for shifting the focus from formal equality to substantive equality (or 'contextual approach') between part-time and full-time employees and for solidifying this approach in its rulings. Indeed, while formal equality is based on the principle that similar cases should be treated in the same way, focusing on impartiality by ensuring equal treatment in comparable situations or different treatment in non-comparable ones and thus remaining passive and fixed in relation to the context of the comparison, substantive equality, however, actively seeks to alter the context to foster more equitable outcomes, incorporating social dimensions³⁸ and adding to the equation the notion of 'effect' the relevant treatment has on a particular group of people³⁹, which in fact, was what the CJEU considered by taking into account the potential non-work-related burdens faced by part-time employees.

Lastly, it is natural for the recent decisions of the CJEU to have implications for Turkish law as well. These decisions have created an opportunity to re-evaluate the principles adopted in the law, particularly regarding the compensation of work beyond regular working hours. Therefore, it would be beneficial to outline the legal regime concerning part-time employment contracts in Turkish Law, particularly in the context of rules, scholarly opinions and their applications that may lead to claims of different or less favourable treatment for part-time employees.

In Turkish law, the legal framework for part-time employment contracts was first established by Labour Code No. 4857 as a product of the need for flexibility in working life⁴⁰. During Labour Code No. 1475⁴¹, there had been no provision regulating part-

exceeding their contractually agreed working hours. However, once the initial two-hour period is exceeded, they are entitled to an additional payment of 25% of the hourly wage for each subsequent additional hour. In contrast, full-time employees are entitled to a 50% increase over the hourly wage for each overtime hour. The applicant argues that part-time employees should also be entitled to a 50% increase over the hourly wage for each hour exceeding their individually agreed weekly working hours, just like full-time employees. According to the applicant, this is because part-time employees often bear greater burdens due to responsibilities such as childcare, caregiving, or taking on a second part-time job to meet their economic needs. The Austrian Supreme Court, however, referred to the CJEU's decision in *Helmig*. According to the ruling, 'if the remuneration paid to full-time employees for the same work and the same number of hours is higher than that paid to part-time employees, [only then] an inequality exists. This means that part-time employees must not receive lower pay than full-time employees for the same number of hours worked. In this context, there is no discrimination against part-time employees as claimed by the applicant.

38 Marc de Vos, 'The European Court of Justice and the March Towards Substantive Equality in European Union Anti-Discrimination Law' (2020) *International Journal of Discrimination and the Law* 20(1) 62, 63-64.

39 Rikki Holtmaat, 'The Issue of Overtime Payments for Part-Time Workers in the *Helmig* Case - Some Thoughts on Equality and Gender' in Yota Kravaritou (ed), *The Regulation of Working Time in the European Union: Gender Approach* (Peter Lang 1999) 422 ff.

40 Can Tuncay, 'Brief History and Flexibilisation Efforts of Turkish Labour Law' (2013) 15(Özel Sayı) *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi* 341, 355; Süzek and Başterzi (n 5) 276; Miraç Şamil Pekşen, 'Kısmi Süreli İş Sözleşmesiyle Çalışanların Hafta Tatili Hakkı' (2023) (54) *Türkiye Adalet Akademisi Dergisi* 339, 342.

41 Code Number 1475 dated 25.08.1971 (OG 01.09.1971/13943).

time employment contracts. However, it should be noted that part-time work has been accepted in doctrine and court rulings during this period as well⁴². On the other hand, the lack of a legal regulation on part-time employment contracts before the enactment of Code No. 4857 led to disputes⁴³. In this regard, it was appropriate for Labour Code No. 4857 and the regulations⁴⁴ introduced concerning working hours to provide a legal definition for part-time employment contracts and, albeit partially, bring the issue into the legal framework. However, it should also be noted that the legal regime adopted for part-time employment contracts, particularly concerning employee entitlements, lacks adequate comprehensiveness and may still lead to uncertainties on certain significant points⁴⁵. One of these uncertainties pertains to the legal consequences if a part-time employee works beyond the agreed working hours in the contract. Before examining considerations regarding such work, it is beneficial to clarify the concept of a part-time employment contract and reflect on its characteristics.

The legal framework for part-time employment contracts is found in Article 13 of the Labour Code and Article 393/2 of the Turkish Code of Obligations⁴⁶. While Article 393/2 of the Turkish Code of Obligations does not define the concept of 'part-time', it specifies that such work is a type of employment contract. According to Article 13 of the Labour Code, if the regular weekly working hours of an employee are significantly less than those of a comparable full-time employee, the contract is a part-time employment contract.

Note that the Turkish Code of Obligations, unlike the Labour Code, does not require the criterion of 'significantly fewer' working hours. In the Maritime Labour Code⁴⁷ and the Press Labour Code⁴⁸, part-time employment contracts are not regulated. However, because the Turkish Code of Obligations is a general law, part-time employment contracts can be established under these laws without the criterion

42 Şener Akyol, 'İşin Düzenlenmesi Açısından Yargıtay'ın 1975 Yılı Kararlarının Değerlendirilmesi' Yargıtayın İş Hukuku Kararlarının Değerlendirilmesi 1975, (İş Hukuku ve Sosyal Güvenlik Hukuku Türk Milli Komitesi 1976) 34 ff; Tankut Centel, *Kısmi Çalışma* (Kazancı 1992) 26; Mollamahmutoğlu, Astarlı and Baysal (n 5) 426; Caniklioğlu (n 5) 180; Pekşen (n 40) 343.

43 See Emin Zeytinoğlu, 'Kısmi Süreli Fazla Çalışma Şekilleri ve 4857 Sayılı İş Kanunundaki Görünüm' (2004) 62(1-2) 449, 454.

44 See Regulation on Overtime and Work in Excess Hours Related to the Labour Code (OG 06.04.2004/25425). See also the Regulation on Working Hours Related to the Labour Code (OG 06.04.2004/25425).

45 Mollamahmutoğlu, Astarlı and Baysal (n 5) 432; Caniklioğlu (n 5) 180; Pekşen (n 40) 344.

46 Code Number 6098 dated 11.01.2011 (OG 04.02.2011/27836).

47 Code Number 854 dated 20.04.1967 (OG 29.04.1967/12586).

48 Code Number 5953 dated 13.06.1952 (OG 20.06.1952/8140).

of ‘significantly less working hours’⁴⁹.

The reasoning of Articles 5 and 13 of the Labour Code states that part-time employment contracts were regulated in line with European Union legislation. In EU law, the main legislation regarding part-time employment contracts is Council Directive 97/81/EC⁵⁰ and the Framework Agreement⁵¹ on Part-Time Work annexed to the Directive. According to Article 3 of the Framework Agreement, the term “part-time worker” means an employee whose normal working hours, calculated on a weekly basis or on average over a period of employment of up to one year, are less than those of a comparable full-time worker. Similarly, in the definition in the International Labour Organisation’s Part-Time Work Convention No. 175, the term “part-time employee” refers to an employee whose normal working hours are agreed to be less than those of a comparable full-time employee. When the international regulations and the provisions of the Turkish Labour Code are compared, it should be stated that the definition introduced by the Turkish Labour Code does not align with international definitions in terms of the ‘significantly less’ criterion⁵².

In Turkish doctrine, it is emphasised that a part-time employment contract consists of three elements⁵³. Accordingly, the distinguishing feature of a part-time employment contract is the reduction in working hours. The matter expressed as ‘significantly less’ in the Labour Code is concretised in Article 6 of the Regulation on Working Hours Related to the Labour Code as work performed up to two-thirds of the comparable work done under a full-time employment contract in the workplace. Second, part-time work is fundamentally a contractual work regime. In other words, work arrangements where the law mandates a reduction in working hours cannot be characterised as part-time employment contracts⁵⁴. This element is also referred to as ‘voluntariness’⁵⁵. The third element of a part-time employment contract is that such work must be regular and continuous⁵⁶.

49 Caniklioğlu (n 5) 185.

50 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] OJ L 014.

51 See above (n25).

52 Caniklioğlu (n 5) 182.

53 Ünal Narmanlioğlu, *İş Hukuku Ferdi İş İlişkileri I* (Beta 2014) 231; Serkan Odaman, *Esneklik Prensibi Çerçevesinde Yargıtay Kararları Işığında Türk İş Hukukunda Çalışma Süreleri ve Yöntemleri* (Legal 2013) 142 ff; Muzaffer Koç and İbrahim Görücü, ‘4857 Sayılı İş Kanunu’na Göre Kısmi Çalışma Uygulaması ve Sonuçları’ (2011) 1(28) Çalışma ve Toplum 149, 151; Sevimli (n 5) 10 ff; Gizem Sarıbay, ‘Kısmi Süreli İş Sözleşmeleri’ in Mehmet Uçum (ed), Prof. Dr. Devrim Ulucan’a Armağan (Legal 2008) 278 ff; Çiğdem Yorulmaz, *Kısmi Süreli İş Sözleşmesi* (Yetkin 2008) 26 ff.

54 Mollamahmutoğlu, Astarlı and Baysal (n 5) 433; Şahin Çil, *İş Hukukunda İşçinin Ücreti* (Turhan 2010) 173-174; Ömer Uğur, ‘4857 Sayılı İş Kanununa Göre Kısmi Süreli İş Sözleşmelerinde Ücret’ (2021) 6(11) İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi 97, 103.

55 See Caniklioğlu (n 5) 181.

56 Uğur (n 54) 102.

Pursuant to Article 13/2 of the Labour Code, an employee employed under a part-time employment contract may not be subject to different treatment compared to a full-time counterpart solely due to the part-time nature of the employment contract, unless there is a justified reason for such a distinction. Similarly, Article 5 of the Code stipulates that the employer cannot treat a part-time employee differently from a full-time employee without essential grounds. The reasoning behind these provisions is to prevent an employee, who may be seen as less integrated into the workplace due to working fewer hours than a full-time employee, from being subjected to less favourable conditions⁵⁷. If an employee working under a part-time employment contract is subject to different treatment solely because of the contract type, the employee has the right to claim the rights they were deprived of, along with compensation equal to up to four months' salary (Labour Code, Art. 5/6).

The reasoning behind the prohibition of discrimination is expressly provided in Article 4 of the Framework Agreement and Article 4 of ILO Convention No. 175. According to these provisions, employees working under part-time employment contracts should not be subject to 'less favourable' conditions than full-time employees merely because they work part-time. In this regard, it is understood that the primary objective of the prohibition of discrimination (or prohibition of 'differential treatment' as referred to in Article 13 of the Labour Code) is to protect the employee working under a part-time employment contract by preventing 'less favourable' treatments.

When determining whether the employer has violated the prohibition of discrimination, it is not necessary for the employer to have acted with the intent to discriminate. As stated in the Turkish doctrine, the aim of the prohibition is not only to hold the person engaging in discriminatory behaviour accountable but also to prevent discriminatory practices⁵⁸. Indeed, in the Court of Justice of the European Union's decisions mentioned above, it is understood that employers did not act solely with discriminatory intent, as evidenced by their defences, such as 'compensating for workload⁵⁹' or arguing that 'subjecting both part-time and full-time employees to the same trigger thresholds would be unfair to full-time employees⁶⁰'. Nevertheless, the CJEU rightly determined that the prohibition of discrimination was violated.

Regarding whether the discrimination is based on a justified reason (or 'substantial' reason, as referred to in Article 5 of the Labour Code), it should be noted that economic

⁵⁷ Mollamahmutoğlu, Astarlı and Baysal (n 5) 741.

⁵⁸ Kübra Doğan Yenisey, 'Eşit Davranma İlkesinin Uygulanmasında Metodoloji ve Orantılılık İlkesi' (2005) 2(7) *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi* 973, 983; Alpogut (n 5) 30.

⁵⁹ See Case C-660/20 *MK v Lufthansa CityLine GmbH* [2023] ECLI:EU:C:2023:789, para. 20.

⁶⁰ See joined cases C-184/22 and C-185/22 *IK and CM v KfH Kuratorium für Dialyse und Nierentransplantation e. V.* [2024] ECLI:EU:C:2024:637, para. 28.

considerations alone do not constitute a justified reason under Turkish law. Similarly, in the CJEU's case law, it is explicitly emphasised that budgetary concerns do not justify discrimination⁶¹. Additionally, the mere fact that differential treatment is based on a collective agreement alone does not, in itself, constitute a justified reason for discrimination under Turkish law⁶². Similarly, no general, abstract provision of law alone is considered an objective justification for discrimination in the CJEU's case law⁶³. According to the CJEU, whether a practice constitutes discrimination can be determined by considering the specific context in which differential treatment occurs, the unique characteristics of the tasks, or the legitimate social policy objectives of a member state. The disparity created among employees must be based on objective and transparent criteria to ensure it meets a real need, is appropriate for the objective, and is necessary for achieving that objective⁶⁴.

Whether part-time employees are subject to discrimination without a justified reason is determined in comparison to the status of a comparable full-time employee. Therefore, identifying the comparable employee is important. According to Article 13/3 of the Labour Code, the comparable employee is an employee who works full-time in the same or a similar job in the workplace. If there is no such employee in the workplace, a full-time employee who performs the same or similar work in a suitable workplace within the same branch of activity is taken as the basis. This provision aligns with the international regulations inspired by Turkish law.

In Turkish doctrine, it is rightly stated that based on the phrase 'in a suitable workplace within the same branch of activity' in Article 13/3 of the Labour Code, not just any activity within that branch should be considered; rather, the closest occupational field within that branch that matches the work performed by the part-time employee should be taken into account. For example, if the petroleum, chemical, rubber, plastic, and pharmaceutical sectors, categorised as sector number 4, are considered, a worker operating in an oil field should not be directly compared to a worker employed in the pharmaceutical sector⁶⁵.

61 Case C-660/20 *MK v Lufthansa CityLine GmbH* [2023] ECLI:EU:C:2023:789, para. 66.

62 Alpagut (n 5) 31; Sevimli (n 5) 61; Hakan Balkan, *Bireysel İş Hukuku Açısından Kısmi Süreli İş Sözleşmeleri* (Beta 2021) 173. See also: 'In the event that it is established that the claimant worked on a part-time basis, the provision in Article 6/c of the Collective Agreement, which stipulates that part-time employees are not eligible for these benefits, should be considered invalid, given that the defendant failed to prove a justifiable reason for this provision. Accordingly, it should be accepted that the claimant is entitled to benefit from the provisions of the Collective Agreement in proportion to their working hours' (22nd CC of the Court of Cassation 20568/4851, 04.03.2019 <www.legalbank.net> accessed 23 October 2024).

63 Case C-660/20 *MK v Lufthansa CityLine GmbH* [2023] ECLI:EU:C:2023:789, para. 57.

64 Ibid para. 58.

65 Doğan Yenisey (n 58) 986; Alpagut (n 5) 34; Balkan (n 62) 172.

When determining whether a full-time employee is a comparable employee, it should also be examined whether the work they perform is the same or similar. Although the concepts of the same or similar work form the basis of the principle of equality in EU law,, there is no legal definition of these concepts in the directives related to this principle. However, according to the CJEU's established case law, the term 'same work' is entirely qualitative and focuses solely on the nature of the work actually performed. The assessment of whether employees perform the same work is to be made by the national courts. Evaluating whether employees are in a similar situation requires consideration of various factors, such as the type of work, skills required, effort, responsibilities, training requirements, and working conditions. The fact that employees are classified in the same job category according to their employment contracts or job descriptions alone does not prove that they perform the same or similar work⁶⁶.

Similar explanations to those in EU law have been provided in the Turkish doctrine regarding the comparison between the work performed by part-time employees and that of comparable full-time employees. Accordingly, it is stated that the work should be comparable in terms of effort, responsibility, and other requirements, as well as the physical and mental burden it imposes on the employee, its place in the production process, and its market value⁶⁷.

In ILO Convention No. 175 and the Framework Agreement, it is also regulated as a criterion for comparison that part-time employees and comparable full-time employees are subject to the same type of employment relationship. The term 'same type of employment relationship' refers to whether both the part-time and full-time employment contracts are, for example, fixed-term or indefinite, continuous or non-continuous, or whether they are based on a temporary employment relationship⁶⁸. It should be noted that this criterion is not explicitly mentioned in the Labour Code. However, since similar working conditions must be observed when determining the comparable employee under Turkish law, it should be accepted that this criterion, recognised in EU law regarding the sameness of employment type, is implicitly included in Turkish law to the extent that it affects the outcome⁶⁹.

According to Article 13/3 of the Labour Code, if there is no such employee in the workplace, a full-time employee who performs the same or similar work in a suitable

66 Case C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961, paras 42, 44, 50; Case C-243/95, *Hill and Stapleton v. Revenue Commissioners* [1998] ECR I-3739, paras 34-35. For further explanations, see also Dilek Dulay Yangın, 'Ulusalüstü Hukukta Eşit Değerde İş İçin Eşit Ücret İlkesi' (2018) 15(59) *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi* 829, 848 ff.

67 For the criteria used to determine the comparable employee, see Caniklioğlu (n 5) 171; Alpagut (n 5) 35; Gaye Burcu Yıldız, 'Bireysel İş İlişkisinin Kurulması, Hükümleri ve İşin Düzenlenmesi' Yargıtay'ın İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2015, (On İki Levha 2016) 151; Sarıbay (n 53); Balkan (n 62) 169.

68 Balkan (n 62) 170.

69 See and cf. *ibid.* 170.

workplace within the same branch of activity is taken as the basis. Although the working conditions of the comparable full-time employee in the workplace shall be considered when determining whether the prohibition of discrimination has been violated, the absence of such an employee within the workplace poses a significant challenge for the employer of the part-time employee⁷⁰. In fact, national occupational standards can be used when determining whether the work is the same or similar. However, in our opinion, it is nearly impossible for the employer to know details about employees in another workplace within the relevant branch, such as their computer or language skills, years of service, or the value they generate for the workplace. Furthermore, considering that Turkish collective labour law practice is not as widespread as in Germany, expecting the employer to develop an intuition about the sector due to a lack of comparable data would be merely hypothetical. Additionally, it should be noted that the wage inquiry data from the Turkish Statistical Institute lacks sufficient up-to-date information and does not include distinguishing factors or details on various additional payments⁷¹. In this situation, the legal requirement that the employer should be aware of practices in other workplaces, coupled with the fact that data from these workplaces are not stored by national authorities, leading to a lack of essential information before the trial stage, presents a significant contradiction in a rule-of-law state where predictability of the future and the avoidance of randomness are essential.

The above-mentioned criticisms are also valid in terms of the trial stage. As is well known, in cases where there is a dispute regarding the amount of the wages, national courts reach a conclusion by conducting a benchmark salary analysis with associations or trade unions in the relevant sector⁷². On the other hand, it is not likely for an association, or especially a trade union that has not entered into a collective agreement, to possess a detailed database regarding wage supplements.

Under Article 13/2 of the Labour Code, the wages and divisible monetary benefits of a part-time employee shall be paid in proportion to the duration worked compared

70 Caniklioğlu (n 5) 171; Alpagut (n 5) 32.

71 For example, according to the report prepared by the Turkish Statistical Institution ("TURKSTAT") in response to our request on 04.11.2024 from the TURKSTAT Demand Management Information System, 'the average monthly gross wage for November 2022 of salaried employees within the unit group code 5120 - COOKS of the International Standard Classification of Occupations (ISCO-08), based on the 2022 Earnings Structure Statistics results for the search term 'Cook,' is 9,105.91 TL. When updated to October 2024 according to the Consumer Price Index, the value of 9,105.91 in November 2022 becomes 21,219.66 TL.' As can be seen, a 2024 study relies on data from 2022. Moreover, especially for additional benefits such as bonuses or other incentives, which are based on a specific agreement between a full-time comparable employee and the employer, that is, not a mandatory component of the employment contract, there is also no answer as to how such additional benefits should be determined for comparable workers at other workplaces.

72 See Grand General Assembly of Civil Chambers of the Court of Cassation 397/1163, 29.11.2023 <www.lexpera.com.tr> accessed 8 January 2025.

to a full-time employee. Detailed explanations of this principle, known as the principle of *pro rata temporis*, are found in the reasoning for Article 13 of the Labour Code. According to the reasoning, 'while the aim is to eliminate discrimination against part-time employees, it cannot be expected that they would be put on equal footing with full-time employees for all working conditions; otherwise, a complete inequality would arise. In this respect, if there are justified reasons for differentiation, differences between the two types of contracts should be considered natural ... an employee who starts working in the afternoon cannot benefit from the employer's transportation provided for morning shifts or from lunch, and this does not imply discrimination. The part-time employee shall benefit from divisible benefits, such as an annual fuel allowance, in proportion to their working hours. For example, if a full-time employee working 45 hours per week receives an annual fuel allowance of 60 million, the same allowance shall be paid to a part-time employee working 15 hours per week as 20 million. However, in cases of indivisible benefits, when the conditions for entitlement are met, there shall be no difference between the two types of contracts. For example, the notice period in indefinite and part-time employment contracts cannot differ from that of full-time contracts.'

In the Turkish doctrine, explanations parallel to the examples provided in the reasoning are also given. Accordingly, the principle of *pro rata temporis* does not apply in every case. A distinction should be made between the divisible and indivisible benefits⁷³. However, aside from the reasoning, while the Code stipulates that divisible monetary benefits are paid proportionally, there is no statutory provision in the Code as to how indivisible benefits shall be distributed.

It was previously mentioned that there is no provision in the Code on the method to be followed regarding indivisible benefits. Some authors express that the purpose of establishing indivisible benefits should be examined first. According to the view suggesting that the purpose of granting indivisible benefits should be considered, it should be examined whether the purpose of granting the indivisible benefit is independent of the employee's working hours. If the purpose of granting this benefit is independent of the employee's working hours, then the principle of *pro rata temporis* shall not apply, and the benefit shall be granted to the part-time employee in full, as it is for the full-time employee. For example, if a part-time employee makes a purchase from the workplace, they should be entitled to the same discount as full-time employees⁷⁴. As far as we are concerned, the same interpretation can be applied to the private health insurance provided to employees. Although private health insurance

⁷³ Mollamahmutoğlu, Astarlı and Baysal (n 5) 742.

⁷⁴ Alpagut (n 5) 38 ff; Caniklioğlu (n 5) 200; Mollamahmutoğlu, Astarlı and Baysal (n 5) 742.

has a financial cost for the employer, this additional benefit should be considered independent of working hours and should thus be provided to part-time employees without applying the principle of *pro rata temporis*⁷⁵.

Regarding divisible monetary benefits, some authors are of the view that part-time employees should benefit proportionally from payments such as bonuses and gratuities, as well as social allowances like marriage and birth allowances, benefits such as wage increases for having a child, holiday and leave allowances, and fuel assistance provided to employees in the workplace⁷⁶. Indeed, both Article 13 of the Labour Code and its reasoning clearly indicate that divisible monetary benefits should be paid in proportion to the number of hours worked. Another view in the doctrine, however, rightfully holds that ‘the principle of *pro rata temporis* provides part-time employees with a right to claim entitlements that are adjusted in proportion to their working hours, specifically concerning wages and other divisible benefits. In this context, benefits such as year-end bonuses, jubilee bonuses, birth and death allowances, vacation payments, and profit-sharing can be given as examples. However, particularly when it comes to social benefits, if it is accepted that the purpose of granting these benefits is independent of the working hours, the principle of proportionality does not apply, and the benefit must be provided in full⁷⁷.’

In addition, it has been observed in the doctrine that a relationship is established between the length of the working period and the payment. According to a view, ‘when it comes to wage supplements, if it is envisaged that the significance of a job will be felt after working for a certain period and that the employee will earn a premium by working for that period, then a part-time employee who has not worked for the stipulated period cannot benefit from the premium according to the principle of *pro rata temporis*⁷⁸.’ In our opinion, the issue of whether the length of the working hours can be used as a justification for non-payment was resolved in EU law by the Court of Justice of the European Union’s *MK v Lufthansa CityLine GmbH* decision. Indeed, the CJEU is of the view that the impact of workload on individuals and the

75 For a similar example, see Sarıbay (n 53) 296; Yorulmaz (n 53) 85. The authors rightly state that a part-time employee who arrives at the workplace, for instance, in the afternoon, may not be entitled to transportation assistance. However, if a public transportation card is provided, the employee should fully benefit from this assistance. Cf. Sevimli (n 5) 69. The author points out that, even when they have a monetary value, indivisible benefits such as a suit, shoe, health insurance or a vehicle should be proportionally provided to the part-time employees in terms of their monetary equivalent to the extent that the provision of the full amount of these benefits constitutes a violation of the equality claims of the full-time employees.

76 Çelik, Caniklioğlu, Canbolat and Özkaraca (n 4) 212; Caniklioğlu (n 5) 199; Zeytinoğlu (n 43) 457; Yorulmaz (n 53) 85; Balkan (n 62) 174.

77 Alpagut (n 5) 40. For a supporting view, see Odaman (n 53) 155. The author states that ‘part-time employees shall also benefit from employer-provided additional payments (such as bonuses, premiums, child allowances, maternity and marriage benefits, heating allowances, clothing allowances, etc.) to the extent that their characteristics are compatible, just like full-time employees.’

78 Mollamahmutoğlu, Astarlı and Baysal (n 5) 742.

specific pressures exerted by the job should not be overlooked⁷⁹. In other words, the workload may vary for each employee. Consequently, in the CJEU's case law, it is decided that part-time employees should also be paid in accordance with the principle of *pro rata temporis*.

It is safe to say that the established case law of the Turkish Court of Cassation aligns with the principle of *pro rata temporis* indicated in Article 13 of the Labour Code and the general acceptance in Turkish doctrine. Accordingly, for example, 'the minimum wage is the minimum wage to be paid to employees in return for normal working hours. Although the employer cannot be required to pay the full minimum wage to a part-time employee, the wage to be paid to the employee for a certain period should not fall below the minimum wage calculated for the same period⁸⁰.'

According to another ruling of the high court, 'the wage and divisible monetary benefits of a part-time employee should be paid in proportion to the duration worked compared to a full-time equivalent employee. Given the content of the file and the final ruling in the service determination case, it is accepted that the claimant worked nine hours per week, and thus the monthly wage amount to be paid to the claimant is one-fifth of the minimum wage ($9/45 = 1/5$)⁸¹.'

Similarly, 'in the specific dispute, the claimant worked part-time for a wage corresponding to 8 days per month. Although the Local Court accepted in its reasoning that the claimant worked 8 days per month, it was incorrect to rule on the wage entitlement based on half the minimum wage rather than the amount corresponding to 8 days⁸².'

Again, 'the court should have accepted that the claimant worked part-time for 15 hours per week and calculated the wage entitlements based on the wage for this duration; however, it was incorrect to calculate the entitlements based on a part-time schedule of 30 hours per week⁸³.'

In the Court of Cassation's case law, the need to calculate the basic wage proportionally based on the duration worked by a part-time employee also applies to wage supplements. Accordingly, 'it has been concluded that the claimant is also

79 Case C-660/20 *MK v Lufthansa CityLine GmbH* [2023] ECLI:EU:C:2023:789, para. 63.

80 Grand General Assembly of Civil Chambers of the Court of Cassation 21-143/159, 12.03.2003 <www.legalbank.net> accessed October 23, 2024. See also Şahin Çil, 'Yargıtay Kararlarına Göre İşçinin Ücreti' (2009) 3(15) *Sicil İş Hukuku Dergisi* 70, 72.

81 22nd CC of the Court of Cassation 838/25532, 27.11.2018 <www.legalbank.net> accessed October 23, 2024.

82 9th CC of the Court of Cassation 342/8812, 11.04.2016 <www.legalbank.net> accessed October 23, 2024.

83 9th CC of the Court of Cassation 5712/20031, 02.06.2015 <www.legalbank.net> accessed October 23, 2024.

entitled to a premium. However, as the claimant worked part-time, this divisible payment should be awarded proportionally according to the working hours, as required by the legal provision mentioned⁸⁴.

According to another ruling by the Court of Cassation, ‘Article 13 of the Labour Code stipulates that there should be no discrimination between part-time and full-time employees, and based on this finding, it should be accepted that the claimant employee is entitled to child and family allowances, limited to the duration of their actual work⁸⁵.’

The lack of any connection in the law or its reasoning between divisible monetary benefits, such as childbirth or marriage allowances and the question whether these benefits are independent from the working hours has a negative impact on part-time employees. In this regard, as far as we are concerned, the way in which the principle of *pro rata temporis* is regulated in the Labour Code is inappropriate. What should have been done was to assess whether the divisible monetary benefits are independent of working hours, and to examine whether these benefits are indexed to the employee’s wage (e.g., ‘New Year’s bonus equal to one month’s salary,’ ‘marriage allowance equal to three months’ salary,’ etc.) or are set as a fixed amount. Indeed, according to a doctrine, ‘if a bonus is calculated and applied based on the employee’s wage, different treatment may be justified; however, if a fixed-amount bonus is given as a one-time loyalty reward on the employee’s 20th anniversary, it would be appropriate to grant the same amount to both full-time and part-time employees⁸⁶.’

In our opinion, the same acceptance in doctrine that requires consideration of the purpose of granting indivisible benefits should have been accepted in the law for divisible monetary benefits as well. Above, we mentioned that the reasoning behind the prohibition of discrimination is to eliminate any disadvantages caused by the fact that a part-time employee may be less integrated into the workplace. For example, taking the child benefits into account, it is entirely contrary to the prohibition of discrimination for a part-time employee to receive less child benefit than a full-time employee. A child benefit paid as a fixed amount, not based on a multiple of the monthly wage, is unrelated to the days or hours the employee is physically present at the workplace. Moreover, in doctrine, although child benefits and marriage allowances have not been individualised, some authors emphasise that ‘this principle

84 9th CC of the Court of Cassation 5351/6538, 25.05.2022 <www.legalbank.net> accessed October 23, 2024.

85 9th CC of the Court of Cassation 3523/6364, 12.02.2015 <www.legalbank.net> accessed October 23, 2024.

86 Balkan (n 62) 174.

should not apply in cases of fixed payments not based on working hours⁸⁷,’ indicating that such payments should be made uniformly.

It may be helpful to clarify the matter with an example. According to an example given by some authors, who express that part-time employees should benefit proportionally from social allowances like marriage and childbirth allowances etc., ‘if transportation expenses are provided in the workplace, then a part-time employee who works every day would receive full payment, while an employee working on some days would receive a payment proportional to the days worked⁸⁸.’ In this example, contrary to what is generally observed with indivisible monetary benefits, if the purpose of granting a divisible monetary benefit had not been taken into account, the part-time employee would only receive a proportionate transportation payment based on working hours, even if they came to the workplace every day. However, it is clear that not receiving full transportation expenses would be an unjust solution, even if the employee comes to work every day for a few hours, and the authors agree that this payment should be made in full.

On the one hand, the necessity of providing the full amount to part-time employees, considering the purpose of the divisible monetary benefits, as in the transportation expenses example and on the other hand, for example in terms of child benefits, where a direct proportional relationship is established in the reasoning of the Labour Code and in some scholarly views without considering the purpose of granting that particular benefit, creates a situation that is difficult to reconcile. For this reason, either the letter of the law and the example of “fuel assistance” mentioned in the reasoning should be strictly adhered to, and a proportionate relationship must be established for divisible monetary benefits (which clearly does not lead to a fair result in the case of transportation expenses), or, as in the case of transportation expenses, the regulation related to the proportional relationship for divisible monetary benefits introduced by Article 13 of the Labour Code should be limited in a manner consistent with its purpose through interpretation methods. We argue that the second solution is more accurate. Taking the purpose of granting divisible monetary benefits into account in favour of the employee, and thus adopting the method of teleological reduction, necessitating the limitation of the legal regulation related to pro rata temporis for divisible monetary benefits in relation to the working hours, it emerges that payments such as child benefits, year-end bonuses, and marriage assistance should, contrary to what is stated in the reasoning, be fully paid to employees working under part-time

87 Mollamahmutoğlu, Astarlı and Baysal (n 5) 742.

88 Çelik, Caniklioğlu, Canbolat and Özkaraca (n 4) 213. Also see and cf. Öner Eyrenci, *Uygulama ve İş Hukuku Açısından Kısmi Süreli Çalışmalar* (Mozaik 1989) 49. According to the author, who gives the same example and expresses his view prior to the enactment of the rule in Article 13 of the Labour Code, which regulates that divisible monetary benefits are to be paid proportionally: ‘part-time employees in the workplace can, as a rule, benefit from these wage supplements just like full-time employees. This is because simply working shorter hours at the workplace does not constitute a reason for differential treatment.’

contracts. On the other hand, in the face of the explicit regulation of the Code, it would be the most accurate solution to adopt an amendment in the law without the need of engaging in implicit gap-filling through interpretation.

Finally, it should be noted that the provision in the final paragraph of Article 13 of the Labour Code should also be considered. According to this provision, a parent may request part-time work until a period that cannot be considered short expires. In this case, after ensuring that the parent employee receives the full payment of child benefits, child allowances, year-end bonuses, etc. during their full-time working period or in the winter, they will be able to exercise their right to transition to a part-time employment contract. In summary, we believe it would have been appropriate for the legislator to make a separate regulation regarding fixed payments that are divisible monetary benefits and independent of working hours, without leading the employee into such 'roundabout' ways, or at least to include such a statement in the reasoning.

As mentioned above, the law regarding the labour entitlements of a part-time employee employed under a part-time employment contract does not contain detailed regulations. An issue lacking in the law is the possibility of this employee working beyond the hours agreed in the contract. According to Article 8 of the Regulation on Overtime and Work in Excess Hours Related to the Labour Code, a worker employed under a part-time employment contract cannot be required to work overtime or in additional hours. Despite this prohibition, it is highly likely in practice for such workers to be subjected to extra working hours⁸⁹.

If an employee employed under a part-time employment contract must work beyond the hours agreed upon in the contract, they may demand compensation for this work⁹⁰. According to Article 41/3 of the Labour Code, in cases where the parties agreed on a decreased weekly working hours, work performed up to 45 hours per week constitutes work in additional hours, and an employee working under these conditions shall be paid an hourly wage with a 25% premium. It should be noted that while Article 41/2 of the Labour Code regulates that work exceeding 45 hours per

89 Murat Özveri, *Türkiye İşçi Hukuku Cilt I* (Emine Ceren Özveri Eğitim ve Dayanışma Vakfı 2023) 932; Sarıbay (n 53) 305.

90 Eyrenci (n 88) 52; Öner Eyrenci, Savaş Taşkent, Devrim Ulucan and Esra Baskan, *İş Hukuku* (Beta 2020) 292; Polat Soyer, 'Yeni Düzenlemeler Karşısında Fazla Saatlerle Çalışmaya İlişkin Bazı Düşünceler' (2004) 1(3) *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi* 797, 808; Ercan Akyiğit, 'Maden İşyerlerinde Çalışma Süreleri ve Fazla Çalışma', (2014) 25(3-4-5-6) *TÜHİS İş Hukuku ve İktisat Dergisi* 21, 26; Muhittin Astarlı, *İş Hukukunda Çalışma Süreleri* (Turhan 2008) 179-180; Odaman (n 53) 159; Seçkin Nazlı, 'Part-Time Employment in European Union Countries and Turkey' (Master's thesis, Marmara University 2003) 71; Efe Yamakoğlu, *Türk İş Hukukunda Fazla Saatlerle Çalışma* (Kazancı 2011) 89; Yorulmaz (n 53) 93.

week shall be paid at a 50% increased premium rate, the third paragraph, setting this rate at 25%, was brought before the Turkish Constitutional Court for annulment. The Constitutional Court ruled against the claims, stating that ‘an employee who works the normal weekly duration of 45 hours is subjected to more wear and tear compared to an employee whose working hours are contractually determined to be less than this duration. Therefore, paying an additional 25% for additional work performed by employees with a weekly working duration of less than 45 hours, and paying an additional 50% for overtime work performed by employees exceeding 45 hours per week, ensures that principles of labour harmony, justice, and equity are upheld for employees in different circumstances⁹¹.’

Accordingly, the doctrine⁹² and the Court of Cassation’s case law align with the wording of Article 41/3 of Labour Code in terms of the part-time employees’ entitlements. For example, ‘in order to resolve the doubt about whether the tasks requested from the defendant on a daily and weekly basis according to the content of the employment contract can be completed in the 1.5 hours per day set out in the contract for 6 days a week, an expert examination should be conducted, and if there is work exceeding 9 hours per week but under 45 hours, it should be calculated as additional hours and granted⁹³.’

There are also cases where part-time employees are made to work additional hours as if they were full-time employees under the guise of a part-time employment contract. In such cases, the Court of Cassation rules that the legal regime related to the part-time employment contract should not be exploited by the employer, and the relevant employee should be considered as a full-time employee. Although some decisions do not include detailed explanations on the regularity and continuity of extra work, it should be stated that if the employee is ‘continuously’ employed for over 30 hours per week, they should be granted the same wages and benefits as a full-time comparable employee⁹⁴. Thus, for example, ‘in the expert report on which the judgement is based, it was calculated that the claimant worked 18 hours of overtime

91 Turkish Const. Court, 66/72, 19.10.2005 (OG 24.11.2007/26710). It is necessary to state that we do not agree with the reasoning of the Constitutional Court in this matter. This is because it appears that the high court has failed to consider the non-work-related burdens of part-time employees. Moreover, an employee who works 45 hours a week receives full compensation for their 45 hours of work. In other words, a full-time employee already receives greater compensation in proportion to their greater working hours compared to a part-time employee. In summary, there is equality among employees in terms of receiving remuneration for their regular working hours. Furthermore, if the Constitutional Court’s reasoning is accepted, it is likely to result in unfavourable outcomes for part-time employees in the practice of collective labour law. Indeed, some collective agreements in practice stipulate that the overtime pay for full-time employees shall be paid at a higher rate than the legally mandated rate (e.g., 70%, 80%, etc.). If the Constitutional Court’s reasoning is adopted, it will not be possible for a part-time employee to demand similarly increased pay for additional hours, based on the argument that they are not equal to a full-time employee.

92 Çelik, Caniklioğlu, Canbolat and Özkaraca (n 4) 214; Caniklioğlu (n 5) 188; Zeytinoğlu (n 43) 459; Sevimli (n 5) 165; Sarıbay (n 53) 305; and Balkan (n 62) 275.

93 22nd CC of the Court of Cassation 17841/24950, 20.11.2018; 22nd CC of the Court of Cassation 19028/25305, 17.09.2015 <www.legalbank.net> accessed October 23, 2024 <www.legalbank.net> accessed October 23, 2024.

94 Caniklioğlu (n 5) 184; Akıyigit (n 90) 26; Sevimli (n 5) 172-173; Astarlı (n 90) 198; Çil (n 54) 175-176; Balkan (n 62) 115, 278.

by subtracting the 30 contracted hours from the 48 hours they worked weekly from 08:30 to 17:30 with a one-hour break, 6 days a week. Although a part-time employment contract was signed between the parties, it was incorrect to calculate overtime based on a weekly working time of 30 hours rather than acknowledging a full-time employment contract with a weekly working time of 45 hours⁹⁵.

According to the Court of Cassation, in the event that an employee alleged to work under a part-time employment contract is continuously required to work additional hours, their entitlements should be calculated not based on an actual work time exceeding 30 hours per week but should be aligned directly with the working hours of a comparable full-time employee. On the other hand, it should be noted that the 9th Civil Chamber of the Court of Cassation reached the opposite conclusion in a decision made in 2014, which it later acknowledged was based on a ‘material error.’ According to this decision, ‘in the specific case, although the defendant argued that the claimant was employed part-time, it is established that they were actually employed for over 30 hours per week, so it is reasonable to conclude that they worked under a full-time employment contract. However, in terms of wage claims, the claimant could not provide concrete evidence that they worked at least 45 hours each week. Since wages are in exchange for work performed, accepting the claimant as working under a full-time employment contract does not mean assuming they necessarily worked a minimum of 45 hours each week. Therefore, the claimant’s monthly salary should be determined based on the actual hours worked each month⁹⁶.’ Conversely, on a subsequent date, the same Chamber ruled in the same case that ‘the legal sanction for employing an employee who should be employed part-time for over 30 hours per week requires accepting that they work full-time and are entitled to a weekly wage equivalent to 45 hours, regardless of whether they work the full 45 hours or not. “It is incorrect to comply with the appellate ruling based on a material error, rejecting the difference in wage claims⁹⁷.” The General Assembly of the Court of Cassation shares this opinion as well⁹⁸.

Since the employee shall be deemed full-time under the Court of Cassation’s case law, regarding weekly hours exceeding 30 but below 45, there will be no entitlement to additional pay for additional hours, in cases where the employee alleged to work under a part-time employment contract is continuously required to work additional hours. In this case, it will generally be assumed that this employee works according to the weekly 45-hour schedule. If the worker actually exceeds 45 hours in a week,

95 22nd CC of the Court of Cassation 29133/2131, 10.02.2020; 7th CC of the Court of Cassation 3905/22525, 17.11.2015 <www.legalbank.net> accessed October 23, 2024 <www.legalbank.net> accessed October 23, 2024.

96 9th CC of the Court of Cassation 6719/38499, 16.12.2014 <www.legalbank.net> accessed October 23, 2024.

97 9th CC of the Court of Cassation 6944/8814, 11.04.2016 <www.legalbank.net> accessed October 23, 2024.

98 Grand General Assembly of Civil Chambers of the Court of Cassation 847/200, 06.02.2013 <www.legalbank.net> accessed October 23, 2024.

they shall be entitled to a 50% premium for each excessive hour as stipulated under Article 41/2 of the Labour Code. For instance, according to the Court of Cassation, ‘considering the claimant’s weekly working hours, it is clear that they do not follow the part-time working system regulated by law; rather, it is understood that the claimant works for over 30 hours per week. Therefore, there is no legal basis for the calculation made by accepting that work performed between 42 and 44 hours but below 45 hours constitutes additional hours⁹⁹.’

Another decision rendered by the 9th Civil Chamber of the Court of Cassation in 2023 aligned with the above-mentioned case-law. In the case at hand, the Regional Court of Appeal ruled that work exceeding 30 hours per week should be considered full-time work. On the other hand, the employee’s claim for overtime pay was rejected, as the normal weekly working hours of 45 hours had not been exceeded. Similarly, considering the fact that the employee was deemed to be working under a full-time employment contract, rather than a part-time employment contract, it was stated that work exceeding 30 hours but remaining below 45 hours should not be considered as work performed in additional hours, since work in additional hours is limited to employment relationships where the standard weekly working hours are set below 45 hours. The Court of Cassation upheld the decision of the Regional Court of Appeal¹⁰⁰.

The Court of Cassation’s approach of deeming an employee employed under an (apparent) part-time employment contract as a full-time employee because they are continuously required to work over the 30-hour weekly limit is essentially a valid approach aimed at preventing the exploitation of part-time employees. However, this approach does not change the fact that the legal regulations subject part-time and full-time employees to different treatment. Indeed, especially in cases of ‘occasional’ work in additional hours, a part-time employee is entitled to a 50% premium (as a full-time employee) 6.9 (emplo

if they exceed the 45-hour threshold. On the other hand, a full-time employee can access the 50% premium from the very first hour of additional work beyond the normal working (45) hours. Based on the Court of Justice of the European Union's decisions mentioned above, it seems that this distinction created by the Labour Code between employees should be reconsidered and the difference in the premium rates (25% vs. 50%) for work exceeding normal hours between part-time and full-time employees should be seen as having no legitimate basis¹⁰¹.

In the Court of Justice of the European Union's case law, the differentiation between these employees can be justified based on the state's legitimate social policy objective. In this context, the idea that a statutory regulation (Article 41 of the Labour Code) alone can justify this distinction could be primarily based on the state's social policy objective. Indeed, shaping working life in line with the goal of flexibility in a way that also meets the needs of employers could be seen as a legitimate aim. Nevertheless, according to the CJEU's decisions, it must be ensured that this distinction serves a real need, is suitable for the intended purpose, and is necessary for that purpose, relying on objective and transparent criteria. However, neither in the legislative reasoning nor in the preparatory work is there statistical or commercial evidence supporting the entitlement of part-time employees to a lower premium rate for additional hours than full-time workers. Therefore, it is unclear whether the 25% premium or, in other words, the 25% difference between workers, results from an objective and transparent evaluation, free from arbitrariness.

Furthermore, a legal amendment to provide part-time employees with an additional 50% premium from the first hour of work beyond normal hours would not contradict the idea of 'unfairness for full-time employees' noted in the reasoning of Article 13 of the Labour Code. The overtime premium paid to a part-time worker for occasional additional hours would already be based on their relatively lower agreed-upon wage, which is inherently lower than that of a full-time employee. In other words, whether for base wages or excess hours work pay, the wages of a part-time employee would still be lower in proportion to working hours than the entitlements of a full-time employee. Moreover, the principle of *pro rata temporis* implies that compensation hourly should be equal¹⁰². It does not entail a gradual increase in rates for work exceeding normal hours.

Again, the creation of a disparity in the premium earned from the very first hour beyond normal hours for the said employees demonstrates, in the CJEU's view,

101 For a critique of the legal regulation stipulating that payment for additional hours must be made at an increased rate of 25% based on another justification see Müjdat Şakar, *İş Hukuku ve Sosyal Güvenlik Hukuku* (Beta 2024) 77. According to the author, despite the fact that there is no difference in the nature of work exceeding regular hours, it is as if a weekly working time below 45 hours, to be determined by contracts, is being imposed by enabling a remuneration of only an increased rate of %25. This imposition violates the principle of freedom of contract.

102 Balkan (n 62) 175.

that potential non-work-related burdens are not taken into account for part-time employees. For example, according to Article 13 of the Labour Code, the time spent by an employee who has transitioned to part-time work due to parenthood and spends their non-working hours caring for their child cannot be considered less valuable than the non-working time of a full-time employee¹⁰³.

In our view, the differentiation created between employees cannot be explained on the grounds of occupational health and safety as well. The argument that this distinction stems from concerns regarding occupational health and safety cannot explain why extra working hours pay for radiation officers and for office workers, for example, is calculated at the same rate of 50%. In fact, both radiation officers and office workers are entitled to a 50% premium starting from the first hour of work exceeding normal working hours¹⁰⁴. Indeed, in terms of occupational health and safety, what should have been done was to reduce working hours for hazardous jobs, rather than setting a specific rate to the disadvantage of one group.

According to a supporting doctrinal view that does not agree with the opinion that it is natural for there to be a difference in the remuneration of overtime work between part-time and full-time employees, and that higher remuneration for full-time employees results from occupational health and safety considerations while no such risk exists for part-time employees, ‘first and foremost, such a justification is outcome-oriented, which is methodologically incorrect ... When someone engages in part-time employment instead of full-time work due to health, family, or personal reasons, any work performed beyond the contractually agreed hours can represent a significant burden for a part-time employee as well¹⁰⁵.’

103 At this point, while it can be argued that issues arising from an employee's private life should not affect the employment relationship, it must be noted that the aforementioned arguments are equally valid when considering the working conditions of a part-time employee. Indeed, under Article 8 of the Regulation on Overtime and Work in Excess Hours Related to the Labour Code, requiring a part-time employee to work beyond the agreed hours is prohibited. This prohibition was introduced in recognition of the possibility that a part-time employee may enter employment contracts with multiple employers. Consequently, if a part-time employee works beyond the hours stipulated in their contract, the risk of losing income from another job or being unable to fulfil obligations to another employer is a significant burden that cannot be overlooked. For the aim of the mentioned prohibition, see Ali Cengiz Köseçoğlu and Sibel Kabul, ‘4857 Sayılı İş Kanunu Bağlamında Çalışma Süresinin Aşılması: Fazla Çalışma’ (2014) 72(2) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 233, 255; Cevdet İlhan Günay, ‘Fazla Saatlerle Çalışmanın Hukuki Sonuçları’ (2007) 2(6) Sicil İş Hukuku Dergisi 5, 19; Yamakoğlu (n 90) 87. Indeed, a part-time employee who is required to work beyond the agreed hours despite the prohibition shall be entitled to claim compensation for such work as payment for additional hours.

104 See the Code on Radiology, Radium, and Electrical Treatment and Other Physiotherapy Institutions (OG 19.04.1937/3153). Also see the Regulation on Healthcare Services Provided Using Ionising Radiation and Radionuclides (OG 13.04.2023/32162). According to Additional Article 1 of the Code on Radiology, Radium, and Electrical Treatment and Other Physiotherapy Institutions, and Article 7 of the Regulation on Healthcare Services Provided Using Ionising Radiation and Radionuclides, the working hours of radiation officers are regulated as 35 hours per week. However, there is no provision in the legislation regarding premium pay in cases where the 35-hour working time limit is exceeded. In the doctrine and the Court of Cassation's case law, it is accepted that a radiation officer is entitled to a 50% premium pay for overtime work exceeding the ‘statutory’ 35-hour limit. For further and detailed information on the legal regime of working hours of radiation officers, see İrem Yayvank Namlı, ‘Radyasyonla Çalışan İşçilerin Çalışma Süreleri ve Fazla Çalışma’ (2024) 174 Türkiye Barolar Birliği Dergisi 445, 463 ff.

105 Eyrenci (n 88) 54. For a supporting view and the opposing case law of the Court of Cassation during the period of Labour Code No. 1475, see Savaş Taşkent, ‘İşin Düzenlenmesi Açısından Yargıtayın 1984 Yılı Kararlarının Değerlendirilmesi’ Yargıtayın İş Hukuku Kararlarının Değerlendirilmesi 1984, (İş Hukuku ve Sosyal Güvenlik Hukuku Türk Milli Komitesi 1986) 132 ff; Kadir Arıcı, *Çalışma Sürelerinin Hukukî Gelişimi ve Yeterliliği Açısından 1475 Sayılı İş Kanunu'nda*

Furthermore, the 25% rate introduced by the labour law regime concerning occasional extra hours for part-time employees is numerically challenging to reconcile with the legal system. Since a part-time employment contract does not necessarily mean ‘half-time’ in the literal sense. The ratio between an employee with a weekly normal working time of 45 hours and an employee with a weekly working time of 30 hours is not exactly ‘half and half,’ so the compensation for work in additional hours should not be arranged as exactly half of the compensation for overtime work. Moreover, considering that this issue is not a matter of goods exchange but rather that the employment contract establishes a personal relationship, such a mathematical ratio does not align with the character of labour law.

It appears that EU member states have adopted different solutions regarding work performed beyond normal hours, each according to their own dynamics. In this context, the sources of law regarding the benefits provided for work beyond normal hours and the necessity of providing these benefits may vary. Additionally, some member states differentiate between part-time and full-time employees regarding compensation for hours exceeding the normal working time.

In Turkish law, similar to Austrian and Finnish law, the concepts of additional hours and overtime work are regulated separately. The compensation for work in additional hours is determined to be lower than that for overtime work. While it is theoretically possible for a part-time employee to work overtime, this scenario rarely occurs. Therefore, if an employee employed under a part-time employment contract works beyond normal hours, they will not be entitled to a 50% premium starting from the first hour of such work. Moreover, even if they reach the 45-hour weekly limit, they would still bear a heavier workload than a full-time employee. In this respect, a different treatment is applied between full-time employees and employees employed under a part-time employment contract. This situation is contrary to both Article 5 of the Labour Code and the prohibition of discrimination regulated under Article 13 of the Labour Code.

Çalışma Süreleri (Kamu-İş 1992) 80; Günay (n 103) 12. For an explanation of the case law of the Court of Cassation adopting the rule that exceeding only the working hours specified in the contract, without surpassing the legal working hours, does not entitle the employee to overtime pay unless otherwise agreed upon by the parties, see also Yamakoğlu (n 90) 30. In contrast, the following statement from the decision of the Grand General Assembly of Civil Chambers of the Court of Cassation regarding a dispute under the period governed by Labour Code No. 1475 is noteworthy: ‘The normative regulations concerning overtime work in full-time employment (Labour Code Articles 35 and 61) are also applicable to part-time work.’ It should be noted that, pursuant to Article 35 of Labour Code No. 1475, ‘the wage for each hour of overtime work shall be paid by increasing the hourly rate of the normal wage by fifty percent.’ For the decision, see Grand General Assembly of Civil Chambers of the Court of Cassation 21-143/159, 12.03.2003 <www.legalbank.net> accessed 9 January 2025. For the legal developments during Labour Code No. 1475, also see Hatice Karacan Çetin, *4857 Sayılı İş Kanununa Göre Fazla Çalışma* (6th edn, Seçkin 2019) 256.

The idea that a part-time employee should also be entitled to a 50% premium for work in additional hours would not constitute an unfairness towards full-time employees, as in this case, the part-time employee would still be entitled to compensation based on their reduced working hours. Indeed, the Court of Justice of the European Union's rulings in 2023 and 2024, it was emphasised that the difference in compensation for work beyond normal hours between full-time and part-time employees could not be justified. In these decisions, it was rightly pointed out that possible non-work-related burdens were not considered for the part-time employees. Considering that working hours serve to protect not only occupational health and safety but also the worker's social and family life, it cannot be said that these values carry different weight for full-time and part-time employees. The specific cases and reasons addressed in the latest CJEU rulings indicate a need to reconsider the accepted principles regarding the compensation for additional hour work of part-time employees.

Another issue that should be evaluated in terms of the prohibition of discrimination is the fact that part-time employees are entitled to divisible monetary benefits proportional to their working hours. On the other hand, this situation, as in the example of work in additional hours, causes an unfair distinction between full-time and part-time employees. The overly broad wording of Article 13 of the Labour Code, which stipulates that divisible monetary benefits shall be calculated proportionally, or in other words, the lack of a limitation on whether these benefits are provided independently of working hours, is inappropriate. Although the wording of the Code is clear, in our opinion, it would be meaningful to claim that this unsatisfactory regulation should lead legal actors to a need of filling an implicit gap in the law.

Externally peer-reviewed.

The author has no conflict of interest to declare.

The author declared that this study has received no financial support.

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Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Legal Effects of the Use of Artificial Intelligence Tools by Administration in the Zoning Plan Process of Preparation and Implementation*

Onur Kaplan** , İlayda Koçak*** 

Abstract

One of the most important stages in terms of regulating land plots and ensuring that construction is carried out in an orderly manner is the process of preparing zoning plans. Accurate preparation of zoning plans based on real numerical data will facilitate the implementation process and will also reduce the legal disputes that will arise. At this point, the use of artificial intelligence tools in zoning plans will be beneficial in terms of ensuring the optimisation of setback distances, identifying public goods and facilitating zoning programs and zoning plan applications based on them. However, the use of these tools, especially when operated autonomously or because of machine learning, can also lead to machine-based defects. Accordingly, the preparation and implementation processes in zoning plans should be carried out in a way that includes human intervention, considering the connection between settlement, property and the right to live in a healthy and balanced environment. This study will explain the legal powers of the use of artificial intelligence (AI) tools in the preparation and implementation processes of zoning plans and how this situation will be reflected in the judicial review phase will be explained, also taking into account the principles of zoning law.

Keywords

Zoning plan, Artificial intelligence, Zoning program, Planning, Implementation

* Prepared within the scope of the Yaşar University BAP-140 project titled "Creating a Framework Text on the Principles to be Followed by Administrative Authorities in Turkish Public Administration Regarding Artificial Intelligence in Administrative Activities".

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To cite this article: Kaplan O, Koçak İ, "Legal Effects of the Use of Artificial Intelligence Tools by Administration in the Zoning Plan Process of Preparation And Implementation", (2025) 76 Annales de la Faculté de Droit d'Istanbul 147. <https://doi.org/10.26650/annales.2025.76.0006>



In land planning activities carried out by administrative authorities, the determination of the current situation and the prediction are at the forecasting. Accordingly, the accurate determination of the current situation and identification of the needs constitute the main output of this activity. At this point, it is necessary to draw attention to the use of AI tools in administrative activities under the influence of the digital transformation phenomenon. Thanks to the use of AI tools, it will be possible to accurately reveal how the relevant area is actually used, urban design, design alternatives and which areas are needed.¹ In planning activities that are inefficient due to the use of analogue tools, alternatives cannot be produced and real digital data cannot be collected and processed.² During the preparation phase of zoning plans, it is possible to act in accordance with the purpose of public benefit by considering the urban texture, to comply with the principle of gradual unity of plans, and to create satellite photographs, aerial photographs and digital data sets for the planned areas using AI tools.³ In this way, the land planning activity, which is in the 'data hungry'⁴ as expressed in the doctrine, is fed by large data sets and forms a basis for subsequent transformation and similar activities.⁵

In particular, thanks to the algorithms to be entered, the positive and negative aspects of the area to be planned for the future will be analysed as a result of quantitatively revealing issues such as the size of the area and its suitability for construction.⁶ In addition, population and pedestrian densities, precedent and height values can be determined in a healthier way. Likewise, in this way, the coastal edge line, the location and number of cultural and natural assets and the boundaries of archaeological sites that should be considered in the planning process can be determined with fewer errors. In addition, the AI tools used will help to determine the elements that need to be taken into account during the implementation of zoning plans, such as the public goods, whether there is a need for expropriation, the location of the parcels where the buildings are located in relation to each other, the determination of the setback distances from the road, and the amount and optimal location of the deduction of the development readjustment share (DRS).

- 1 Wei He and Mingze Chen, 'Advancing Urban Life: A Systematic Review of Emerging Technologies and Artificial Intelligence in Urban Design and Planning' (2024) 14 (3) Buildings <<https://www.mdpi.com/2075-5309/14/3/835>> accessed 9 March 2025.
- 2 Dorota Kamrowska-Zaluska, 'Impact of AI-Based Tools and Urban Big Data Analytics on the Design and Planning of Cities' (2021) 10 (11) Land <<https://www.mdpi.com/2073-445X/10/11/1209>> accessed 12 February 2025.
- 3 Okan Yılmaz and Mehmet Alkan, 'Applicability of Spatial Planning System Package for the LADM Turkey Country Profile' (2024) 28 (4) Transactions in GIS 858, 860.
- 4 Thomas W. Sanchez, Hannah Shumway, Trey Gordner and Theo Lim, 'The Prospects of Intelligence in Urban Planning' (2023) 27 (2) International Journal of Urban Sciences <<https://ideas.repec.org/a/taf/rjusxx/v27y2023i2p179-194.html>> accessed 9 March 2025.
- 5 Kamrowska-Zaluska (n 2) 12.
- 6 Sanchez et al (n 4) 181.

In this case, it can be said that the use of AI tools will have positive effects in the creation and implementation process of zoning plans that affect the legal status of the area in terms of zoning law. It should be noted that in order for these effects to become evident in real terms, the applications to be made as a result of the use of AI tools should be made transparent. If this transparency is not guaranteed, it can be stated that legal disputes arising from the execution of administrative procedures carried out in secret will increase.⁷ Undoubtedly, the fact that these tools are used and act within certain algorithms will not exempt administrative authorities from legal liability. The variety of tools and autonomous actions that can be used will bring to the agenda the lack of service or strict liability of the administration in the context of damages arising from the implementation actions taken as a result of the implementation of zoning plans.

Finally, administrative and judicial remedies should be open and effectively used in order to review the conformity with the law of zoning plans, which are regulatory administrative acts, as well as administrative acts within the scope of zoning plans.⁸ In view of the obligation to announce zoning plans through announcements, the announcement of the effective date of these acts as a procedural stage that has an impact on the litigation process can also be achieved through the use of AI tools.⁹ In particular, following the contribution of individuals in the preparation of zoning plans, it will be easier to follow the final process and this process will be more accessible to individuals. This is because it is possible to talk about a plan that can be made accessible to more people through AI tools, rather than just a simultaneous announcement on the local government website.¹⁰

When the planning activity of the administration appears in the form of land planning activity in addition to economic and social planning¹¹, the legal instrument

7 Łukasz Dubiński, 'The Issue of Openness and Impartiality of Administrative Proceedings Resolved on the Basis of an Algorithm' (2021) (192) *Procedia Computer Science* 2807, 2812-13.

8 Also see; Nilay Arat, 'Administrative Silence under Turkish Law' in Pedro Aberastury, Oscar Aguilar Valdez (eds.), *Administrative Silence* (Intersentia 2023) 435ff; Halit Uyanık, 'Türk İdare Hukukunda Zimni Red ve Zimni Kabul Müesseseleri Üzerine Değerlendirmeler', İstanbul Üniversitesi Hukuk Fakültesi Mecmuası (Prof. Dr. Veddi Aral'a Armağan), (2014) 72 (1) 673, 675-76.

9 Dubiński (n 7) 2813.

10 Art. 8/b of Law No. 3194: '(...) These plans shall be announced simultaneously for one month from the date of approval in the announcement places determined by the mayor's office and on the websites of the relevant administrations. Plans may be objected to within one month of the announcement period. The objections and plans sent to the municipal council by the mayor's office shall be examined and finalised by the municipal council within fifteen days'.

11 See; Turgut Tan, *Planlamanın Hukuki Düzeni* (TODAİE Yayınları 1976) 17; Oya Turunçoğlu, *Türk Planlılığının Pozitif Hukuk Açısından Görünümü ve Değerlendirilmesi* (DPT Yayınları 1977) 2; Lütfi Duran, 'Türkiye'de Planlamanın Hukuki Rejimi' (1975) 8 (3) *Amme İdaresi Dergisi* 3, 4; N. İlker Çolak, *İmar Hukuku* (2nd edition, On İki Levha Yayıncılık 2014) 77; Kerem Canbazoglu and Dilhun Ayaydin, 'İmar Planlarının Yargısal Denetimi-I' (2011) (93) *Türkiye Barolar Birliği Dergisi* 239, 242.

that enables this is the zoning plan. In this respect, zoning plans are one of the subcategories of the term '*planning*', which is a higher concept.¹² Zoning plans also differ from the concept of a cadastral map as a document that determines the current topographic situation of the city and provides the representation of public goods in various dimensions.¹³ As a matter of fact, the country plans¹⁴ (development plans, as expressed in the doctrine¹⁵) are the hierarchical top plan, which also constitutes the basis for zoning plans.¹⁶

The provision of public services by administrative authorities in a continuous and sustainable manner, the solution of problems arising from urbanisation on a macro scale, the allocation of space for urban functions on the urban land and the protection and development of historical and natural values depend on it.¹⁷ The zoning planning activity appears as a specialised planning activity that enables the administration to manage the existing immovable properties in a sustainable manner.¹⁸ It is necessary to have some documents in order to build a new city on the existing land and to plan the construction of an old city, that is, to determine and define the shape it will take in the future.¹⁹ It is known that many plans made by some people who have limited power and who are ignorant of this science, but who are very technical men, are not applicable and cause many damages and mistakes that cannot be repaired and

12 In this respect, zoning plans express a '*technical planning*' and differ from the concept of '*urbanisation*' which aims at the social development of the city's health problems, housing problems, proximity of certain people to their workplaces and economic and social conditions. Sadık Artukmaç, *Türk İmar Hukuku* (4th edition, Ayyıldız Matbaası 1976) 14.

13 Artukmaç (n 12) 14. '*A baseline map: It is the map that will be the basis for the plan studies and shows the current use of the land, public buildings, topographic situation*'. Yıldızhan Yayla, *Şehir Planlamasının Başlıca Hukuki Meseleleri ve İstanbul Örneği* (İstanbul Üniversitesi Hukuk Fakültesi Yayınları 1975) 34. Also see; Sait Karabulut, Aslıhan Er and Refhan Abdioğlu, *Şehir Planlama Hukuku* (On İki Levha Yayıncılık 2023) 57. The concept of a baseline map is a document that provides technical data for the preparation of zoning plans and shows the factual reason. Article (Art.) 5 of Law No. 3194 mentions that in the preparation of the zoning plans, it is necessary to first create the state-of-the-art maps. Likewise, polygon and triangulation points to be taken as a basis in the survey maps and the pattern and characteristic points required to determine the topographical condition of the land in specific areas and all fractures, existing roads, underground surface facilities, detail points with appropriate distribution and density to be reference to the equivalent height curves are measured in a way that can also benefit from AI tools. A digital terrain model is produced based on these detailed points. See Regulation on Industrial Areas and Industrial Workplaces in Disaster Areas Art. 7/1.

14 Art. 166/1 of the 1982 Turkish Constitution ('*Constitution*'): '*Planning the economic, social and cultural development, in particular the rapid, balanced and harmonious development of industry and agriculture throughout the country and the efficient use of national resources by taking inventory of and evaluating them, and the establishment of the necessary organisation for this purpose are the duties of the State*'. See also for the concept of the country plan. Hasan Gök, *İmar Mevzuatına Aykırılık Hallerinde Uygulanacak İdari ve Cezai Yaptırımlar* (Yetkin Yayıncılık 2021) 24; Canbazoğlu and Ayaydın (n 11) 242. The information to be obtained about the country and regional planning to which urban planning is connected will help to better understand planning. İ. Hulusi Güngör, *Şehirler Nasıl İmar Edilir* (Çeltüt Matbaacılık 1969) 18.

15 Eraslan Özkeya, *İmar Hukuku Ders Notları* (Yeditepe Üniversitesi Hukuk Fakültesi Yayınları 2007) 27; Denizler Şanlı, '*Planlama Yetkisinin Analizi*' (2009) (3) Ankara Barosu Dergisi 47ff.

16 The Strategy and Budget Presidency is tasked with the duty of preparing a national plan as stipulated in the Constitution. The purpose of Presidential Decree No. 13 is to regulate the procedures and principles regarding the establishment, organisation, duties and powers of the Strategy and Budget Presidency with a general budget under the Presidency of the Republic. Official Journal (OJ). 24.07.2018-30488. It is possible to conclude when the provisions of Art. 5, 56 and 57 of the Constitution are evaluated together.

17 Ruşen Keleş, *100 Soruda Türkiye'de Şehirleşme, Konut ve Gecekondu* (3rd edition, Gerçek Yayınevi 1983) 44.

18 Muharrem Güneş and Mehmet Uzunay, '*Belediyelerde İmar Planlama Süreci ve Denetim*' (2017) (6) Ombudsman Akademik 161-62.

19 Celâl Esad Arseven, *Şehircilik (Urbanizm)* (Devlet Basımevi 1937) 22.

corrected afterwards.²⁰ However, it is useful to first understand what these types of plans are.

In order to ensure the healthy development of cities and towns, the plan that guides, controls and serves the development of land use is called the zoning plan.²¹ In this respect, zoning plans differ from physical plans, which are ‘a type of planning that deals with the land use of a settlement and the solution of zoning problems at the planning level, but does not include the solution of social and economic problems’.²² The main purpose of the administration in preparing zoning plans and the amendment of existing zoning plans is to ensure the public interest, as in other administrative acts.²³ Indeed, zoning plans, which ‘aim to meet the social and cultural needs of the people of the region they affect, to create a healthy and safe environment, and to improve the quality of life’²⁴, are prepared by the competent administrations by considering the scientific, environmental, artistic and health conditions of the region.

Although zoning plans are referred to by this name, they do not refer to a single plan, but are in a gradual unity²⁵ with the higher plans and the programmes²⁶ and implementations prepared by the related zoning plans. This principle of unity makes it necessary for the hierarchically lower plans in the hierarchy to be made in accordance with the upper plan.²⁷ As can be seen from the definitions of various zoning plans, it

20 Arseven (n 19) 6.

21 Karl B. Lohman, *Şehir İmar Planları Tanzimi Esasları* (Transl. Uluhan, Celal M.) (Ulusal Matbaa 1942) 7.

22 Erol Ünal, Feridun Duyguluer and Z. Ersin Bolat, *İmar Terimleri Sözlüğü* (TODAİE Yayınları 1998) 38. However, there are also common aspects in terms of the planning technique. For example, in zoning plans, there are ‘determination and research phase’, ‘data evaluation phase’ and ‘planning phase’ phases, respectively. Ayten Çetiner, *Türkiye’de İmar Planlama Eylemleri ile Dayanması Gereken Bilimsel Kurallar* (İstanbul Teknik Üniversitesi Matbaası 1965) 5-6.

23 Although the purpose of administrative acts is to ensure the public interest, special powers may be granted to administrative authorities for specific public interest. Halil Kalabalık, *İmar Hukuku Dersleri* (9th edition, Seçkin Yayıncılık 2019) 153ff.

24 Repealed Regulation on the Principles of Plan Making, Art. 3/11.

25 Art. 6 of the Law entitled ‘Levels of Planning’ stipulates that plans shall be prepared as ‘Regional Plans’ and ‘Development Plans’ in terms of the areas and purposes they cover, and that development plans shall be prepared as ‘Master Development Plans’ and ‘Implementation Development Plans’, and Art. 8 sets out the principles to be followed in the preparation and implementation of plans, and subparagraph (b), It is explained that zoning plans shall consist of a master development plan and an implementation zoning plan, and that the ‘master’ and ‘implementation zoning plans’ of the places within the municipal boundaries shall be made or commissioned by the relevant municipalities by ensuring compliance with the regional plan and environmental layout plan decisions, if any, and shall enter into force upon approval by the municipal council. File nr. 2018/381, Decision nr. 2018/1207 (Konya Regional Administrative Court 2nd Administrative Case Chamber, 5 June 2018). See also. Melih Ersoy, ‘Planlar Arası Kademelenme’ in *Bölgesel Kalkınma ve Yönetişim Sempozyumu* (ODTÜ Mimarlık Fakültesi Yayınları 2006) 215.

26 The limited financial means of the municipalities in comparison with the magnitude of the services to be provided, the level of organisation of the municipal administration being at the same level with these services, and the lack of sufficient quality and quantity of technical, administrative and auxiliary staff in the municipalities make the implementation process of zoning programmes difficult. However, the main purpose of zoning programmes is to put into practice zoning plans that create directive and multiplying effects in their surroundings. Zühtü Can, ‘Belediye Yönetimleri Açısından İmar Planları ve Programları’ in Tamer Gök (ed) *Türkiye’de İmar Planlaması* (ODTÜ Mimarlık Fakültesi Yayınları 1980) 203.

27 Although the hierarchically higher zoning plans determine the basis and rules of the following plan, a unique plan independent of the upper scale plan is created by the administration. Ömer Köroğlu, *İmar Hukukunda Planlama Süreci*

will be seen as country plan²⁸, regional plan²⁹, spatial strategy plan³⁰, environmental (order) plan³¹, master development plan³² and implementation zoning plan.³³ AI tools will also contribute to observe the compatibility of these plans with each other. Because, because of the use of these tools, it will be determined which details will be included in accordance with the upper plan, rather than simply extending the plans of different scales.

It is possible to exemplify the zoning plans, which must keep pace with the needs of transforming and changing cities and are prepared directly for individuals, can be described as master zoning plans and implementation zoning plans. Master development plans and implementation development plans, which are called zoning plans in the narrow sense, are administrative acts.³⁴ Zoning plans, which lay down general abstract norms that affect the status of the area they affect,³⁵ appear as regulatory acts, although they have aspects that differ from the abstract character of regulatory acts.³⁶ It is also not appropriate to make any scale distinction in terms of the use of AI tools. Likewise, AI tools can be used in cases where there is a specific purpose, such as the protection of coasts, the construction that can be carried

ve Arazi ve Arsa Düzenlemeleri (On İki Levha Yayınları 2016) 45. There are also decisions of the Council of State in a similar context. File nr. 2011/5864, Decision nr. 2014/5208 (Turkish Council of State ('TCS') 6th Chamber, 9 July 2014); File nr. 2010/6336, Decision nr. 2014/4768 (TCS 6th Chamber, 17 June 2014); File nr. 2012/1220, Decision nr. 2014/4420 (TCS 6th Chamber, 5 June 2014); File nr. 2019/17643, Decision nr. 2023/5006 (TCS 6th Chamber, 23 May 2023); File nr. 2019/16837, Decision nr. 2022/8321 (TCS 6th Chamber, 4 October 2022).

- 28 When the justification of Art. 6 of the Law No. 3194 is analysed, it is explained that the existing plan levels are regulated in order to create a zoning planning in accordance with the objectives of national development and to make local administrations effective in the formation of these plans.
- 29 Art. 5 of the Law No. 3194: '(...) The plan to be prepared to determine socio-economic development trends, development potential of settlements, sectoral targets, distribution of activities and infrastructure...'
- 30 Spatial strategy plans, which are mentioned in the Zoning Law but do not have a clear definition, are a type of plan that is prepared on the basis of regional plans and determines development strategies for the plans under it. Büşra Akdemir, 'İmar Planlarında Hiyerarşi' (2021) 1 (1) Konya Barosu Dergisi 133, 135; Karabulut, Er and Abdioğlu (n 13) 20.
- 31 Art. 5 of Law No. 3194: '(...) it is a plan that determines the principles and criteria within the framework of general land use decisions that guide the sub-scale plans for settlements, development areas and sectors in accordance with the objectives and strategies of the spatial strategy plans, if any, and is prepared in the region, basin or province as a whole, and is a whole with its plan provisions and report...'
- 32 Art. 5 of Law No. 3194: '(...) drawn on the base maps in accordance with the general spatial principles of the regional plans, if any, and the environmental layout plans, if any, with the cadastral status, if any, and showing the general usage patterns of the land pieces, the development directions and sizes of the settlement areas, population densities and thresholds, transportation systems, and as a basis for the preparation of the implementation zoning plans...'
- 33 Art. 5 of Law No. 3194: '(...) drawn in accordance with the principles of the master development plan on the certified state-of-the-art maps, with the cadastral status, if any, processed, and showing in detail the building blocks of various regions, their density and layout, roads, and the implementation stages and other information that will be the basis of the zoning implementation programmes required for implementation ...'
- 34 Yayla (n 13) 14; Hatice Kansu, 'Türk Hukukunda İmar Planlarının Düzenleyici İşlem Niteliği' (DPhil thesis, University of Istanbul Institute of Social Sciences 1994) 20.
- 35 M. Ayhan Tekinsoy, 'İmar Planlarının Hukuksal Niteliği, İmar Planı İptalinin Bu Plana Dayanarak Verilmiş Ruhsatlar Üzerindeki Etkisi' (2008) (2) Ankara Barosu Dergisi 46, 48.
- 36 Cenk Şahin, 'Danıştay Kararlarına Göre İmar Planının Yargı Yerince İptal Edilmesinin Hukuki Durumuna Etkisi Eleştirel Bir Bakış' (2018) 76 (2) İstanbul Hukuk Mecmuası 757, 764. There are also decisions of judgement in a similar context. File nr. 2010/887, Decision nr. 2013/3816 (TCS Administrative Appeals Board, 11 November 2013); File nr. 2010/887, Decision nr. 2013/3816 (TCS Administrative Appeals Board, 11 November 2013); File nr. 2008/39, Decision nr. 2008/134 (Turkish Constitutional Court ('TCC'), 22 July 2008); File nr. 2018/9388, Decision 2020/2880 (TCS 6th Chamber, 2 March 2020); File nr. 2018/3991, Decision nr. 2020/3807 (TCS 6th Chamber, 12 March 2020).

out within the framework of the implementation zoning plan on coastlines or the determination of the type of construction in special protection zones.³⁷ Here, just as the will of the administrative authority is at the forefront in determining the scale and details in terms of the preparation of zoning plans, the use of these tools will also be the product of the will of the administrative authority.³⁸ At this point, the autonomous use of artificial intelligence tools and the preparation of zoning plans in this way can be considered. This problem will be addressed in the remainder of the study.

Since zoning plans are ‘prepared on the basis of research and data on the economic, demographic, social, cultural, historical and physical characteristics of the city, determining urban settlement and development trends by creating alternative solutions, land use, protection, restriction decisions, organisation and implementation principles’, they are the joint responsibility of engineers, urban planners and administrative authorities.³⁹ Considering the speed of change in the society and the current complexity of zoning plans, it is inevitable for the administration to use technological tools while preparing zoning plans. It will be necessary to determine the most appropriate AI tool by evaluating the current conditions of the day in the preparation of zoning plans.⁴⁰ The main reason for this need is to ensure the principles of ‘adaptation’⁴¹, ‘continuity’ and ‘equality’⁴², which are essential in the provision of public services.

In the preparation of zoning plans, local administrations will need to transfer less financial resources, while these plans will need to be presented in the fastest and most effective way.⁴³ In fact, the use of AI tools; since it can process and analyse different types of data at the same time, it will be able to prepare faster and adaptable plans

37 Elif Orta, *İmar Hukukunda Plan Hiyerarşisi ve Planların Çatışması* (Legal Yayıncılık 2005) 76-7.

38 Jean-Bernard Auby, ‘Administrative Law Facing Digital Challenges’ (2020) 1 (1) European Review of Digital Administration & Law 7, 8; Xiaoyu Liu, ‘Legal Regulation of Automatic Administration in the Era of Artificial Intelligence’ (2022) 2 Innovation Economics and Management Research (IEMR) 238, 239; Filip Geburczyk, ‘Automated Administrative Decision-Making under the Influence of the GDPR-Early Reflections and Upcoming Challenges’ (2021) 41 Computer Law&Security Review 1, 12 <<https://doi.org/10.1016/j.clsr.2021.105538>> accessed 11 February 2025; Camilla Ramotti, ‘Participation in Algorithmic Administrative Decision-Making’ (2024) (3) BioLaw Journal 455, 455.

39 İlhan Tekeli, ‘Mülkiyet Kurumu, Kamu Yararı Kavramı ve İmar Planları Üzerine’ (1988) 88 (2) Planlama Dergisi 6, 6.

40 İl Han Özyaz, *Günışığında Yönetim* (Filiz Kitabevi 2004) 237.

41 Although the determination of public services is within the discretion of the legislative organ, it is within the discretionary power of the administration to adapt the content of the existing public service to the current conditions. Ahmet Bağnaçık, ‘Kamu Hizmetinin Uyarlama İlkesi Üzerine Bir Değerlendirme’ (2018) 26 (3) Selçuk Üniversitesi Hukuk Fakültesi Dergisi 155, 162.

42 Onur Karahanoğulları, *Kamu Hizmeti* (Turhan Yayınevi 2015) 188ff.

43 Tuğrul Akçura, *İmar Kurumu Konusunda Gözlemler* (Orta Doğu Teknik Üniversitesi Yayınları 1982) 37. For this reason, in addition to planning at the commune level, planning is also organised at the central administrative level. Çetiner (n 22) 18-19. However, these studies may also lead to incompatibility in terms of the compatibility of different plans or differences in will. See also; Oğuz Sancakdar, *Belediyenin İmar Planını Yapması-Değiştirmesi ve İptal Davası* (Yetkin Yayıncılık 1996) 81-2.

according to the needs. The method, also known as ‘*game theory*’⁴⁴ will simulate the most appropriate plan and its alternatives. It will be possible to measure the post-implementation impacts of different zoning plan possibilities before the plans are prepared, and thus it will be easier to identify the prioritised needs. The identification of prioritised needs will ensure efficient use of resources and prevent unnecessary financial resource transfers.⁴⁵ As environmental impact assessments can be carried out before the implementation of land use plans, cities that are better suited to sustainable environmental conditions can be built.⁴⁶ The risk of error will be reduced as human error will be eliminated in the data analysis process of AI tools and in the preparation of zoning plans after this process.

In the preparation of zoning plans, ensuring the participation of citizens by local administrations,⁴⁷ informing the people who will be affected by the zoning plan to be made and ensuring ‘*transparency*’ in the preparation of zoning plans will become more possible with AI tools. Taking all these advantages into consideration, the use of AI tools by administrative authorities is a necessity today rather than an option.

The dimension of compliance with the technical criteria set out in the plans and the continuation of construction activities in this direction with various permits (building construction and occupation etc.) brings the level of applicability of the plans onto the agenda in the plan implementation phase after the ‘*preparation*’ and ‘*approval*’ of the plans in the context of planning activity.⁴⁸ In this respect, the integration of AI tools also has effects and consequences in the implementation phase of the plans.

44 Selim Taşkaya, ‘*Creating City Based Zoning Plans with Game Theory Approach, Example of 1000 Plans*’ (2023) 35 (3) International Journal of Advances in Engineering and Pure Sciences 297, 304; Steven Tadel, *Game Theory (An Introduction)* (Princeton University Press 2013) 101; Martin J. Osborn and Ariel Rubinstein, *A Course in Game Theory* (The MIT Press 1994) 24; Robert Gibbons, *Game Theory for Applied Economists* (Princeton University Press 1992) 29.

45 Murat Erol, ‘*Yapay Zekanın Kamu Hizmetinin Sunumuna Etkileri*’ (2021) 148 (66) Adalet Dergisi 293, 300.

46 Environmental Law No. 2872, Art. 2/4: ‘(...) The process of improvement, protection and development in all areas (social, economic, physical, etc.) of all environmental values that constitute the environment of both present and future generations, without jeopardising the existence and quality of the resources that future generations will need...’.

47 For the view regarding the inclusion of citizens in the process because of the digital transformation of local administrations as an example of e-municipalism, see also. Yakup Karaca and Namık Kemal Öztürk, ‘*Yeni Nesil Belediyecilik: Dijital Belediye Uygulamaları*’ (2019) 2 (3) Uluslararası Yönetim Akademisi Dergisi 528, 534.

48 Tolga Ünlü, ‘*Planlamada Denetim Mekanizmalarının Yeniden Tanımlanması Gerekliği Üzerine*’ (2003) (3) Planlama Dergisi 41, 42.

In particular, it will be possible to determine the places to be expropriated⁴⁹ and reserved as public service areas, widening of roads, creation of new service goods,⁵⁰ the determination of the situations in which land division, subdivision and unification⁵¹ should take place and DRS deductions should be made, and the produce different scenarios can be produced in this regard. The question of how to create healthy and organised cities and feasible plans that can meet all the needs of the inhabitants of these cities⁵² can be solved through the use of AI tools.

According to Arslan, ‘the phenomenon of urbanisation determines the changes in the urban structure according to the speed and form of the change in the relations of production’.⁵³ Indeed, although the general appearance of industrialisation and urbanisation in Turkey is in the form of population agglomeration, the class structure and income groups of the cities are changing rapidly.⁵⁴ Since it is possible to evaluate the population structure despite changing situations and to analyse statistical data with AI tools, compliance with the changing situation can be ensured more easily. In order to obtain a plan with these characteristics requires, first of all, multidimensional and disciplined studies must be carried out before and during the planning process. In this respect, the ability of AI tools to collect and process more data will contribute to the easier progress of the process. In addition, the use of AI tools can be a good alternative for preventing problems arising from the risk of natural disasters.⁵⁵ In

49 Art. 13/2 of Law No. 3194: ‘The payment of the property tax shall be suspended until the areas included in the land development plans are expropriated. When the expropriation is realized, the property tax to be accrued between the date of suspension and the date of expropriation shall be paid by the administration which executed the expropriation. Where the places stated in the first paragraph are allocated to a purpose which does not require expropriation by a change in the plan before expropriation is realized, the property owner shall pay the property tax for the time passed since the date of suspension’. <<https://www.lawsturkey.com/law/law-on-land-development-planning-and-control-3194>> accessed 11 February 2025.

50 The success of the implementation of zoning plans depends to a great extent on the expropriation of privately owned urban land. Especially in areas allocated for public service, the construction of service goods will be possible by transferring the privately owned land to public ownership. For this reason, expropriation is considered a suitable legal instrument for plan implementation. However, the realisation of expropriation is difficult due to inadequate and in some cases incomplete legal regulations. Ümit Doğanay, ‘Metropolitan Planların Uygulanmasında Yasal ve Parasal Sorunlar’ in Mehmet Çubuk (ed) *Türkiye’de Metropolitan Alan Planlama Deneyim ve Sorunları Kolokiyumu* (Mimar Sinan Üniversitesi Sosyal Bilimler Enstitüsü Yayını 1985) 337.

51 Art. 16 of Law No. 3194: ‘Municipal executive committees or provincial administrative committees shall approve the compliance with this Law and regulations of the subdivision or amalgamation ex officio or upon request, establishment or deletion of easement on immovable properties within municipal boundaries and adjacent areas. The approval procedure shall be completed within 30 days starting from the receipt of the request by municipalities or governorships, and notified to the land registry office for registration or deletion. The land registry office must complete the registry procedure within one month. Where owners of the immovable properties placed under joint ownership pursuant to the provisions of this Law fail to reach an agreement among themselves within six months from the date of notification by the relevant administration, or if no petitions to eliminate joint ownership are filed with the court, then the relevant administration may initiate a legal action to eliminate joint ownership as if it were an owner. The elimination of joint ownership and partition of the land by consent of the parties or by court ruling shall be subject to the foregoing provisions’. <<https://www.lawsturkey.com/law/law-on-land-development-planning-and-control-3194>> accessed 11 February 2025.

52 Mehmet Gürlü, *İmar Planları ve Uygulama Tekniği* (TMMOB Harita ve Kadastro Mühendisleri Odası Yayınları 1983) 57.

53 Rıfki Arslan, ‘Metropolitan Alanlarda Uygulama ve Finansman Güçlükleri’ in Mehmet Çubuk (ed) *Türkiye’de Metropolitan Alan Planlama Deneyim ve Sorunları Kolokiyumu* (Mimar Sinan Üniversitesi Sosyal Bilimler Enstitüsü Yayını 1985) 351.

54 Arslan (n 53) 351.

55 In particular, risk estimation and predictability based on the smart city concept can minimise disaster-related damages in urban areas. Acting on the said risk estimation during the implementation of zoning plans will give basic answers to the questions of the depth, height and building material of the constructions in that place. Federico Cugurullo and Ying Xu,

this way, it may be possible to ensure that settlements in areas that will be exposed to disasters caused by earthquakes, floods and fires are made in consideration of this situation or that building bans are applied.⁵⁶

It is possible to classify the AI tools that can be used in the process of zoning planning into AI tools to be used in the process of preparation of zoning plans and AI tools to be used in the process of implementation of zoning plans. However, the AI tools used in the preparation and implementation of zoning plans also show transitivity within themselves. If this transitivity is divided on the basis of subject: **(i) Data collection with satellites and geographic information systems, (ii) Preparation of simulations on urban planning and implementation, (iii) Application with blockchain in zoning parcels.**

In the preparation of zoning plans, the main source of the administration is the information on the current situation of the relevant region and the future projections based on this information. It seems impossible for the relevant administration to obtain and process all this information accurately in a short period of time, given the problems of convening boards, the lack of infrastructure and personnel, and the expanding cities.⁵⁷ For this very reason, simulation tools that can perform data storage and processing at the same time accelerate the preparation process of zoning plans. The Tensorflow⁵⁸ and Earth Engine⁵⁹ programmes especially help urban planners to determine the parcel conditions, to determine the density of the city and to identify the areas where the density is progressing.⁶⁰

To reveal the physical conditions of the scattered parcels and to create zoning areas in line with the needs of the region and to use the relevant AI tools in the

'When AIs Become Oracles: Generative Artificial Intelligence, Anticipatory Urban Governance, and the Future of Cities' (2024) Policy and Society 1, 13; Sayed Ahmad Eslaminezhad, Mobin Eftekhari and Mohammad Akbari, *'GIS-Based Flood Risk Zoning Based On Data-Driven Models'* (2020) 6 (4) Journal of Hydraulic Structures 75, 75; Maryam Mokhtari, Sahar Abedian and Sayed Ahmad Almasi, *'Rock fall Susceptibility Mapping Using Artificial Neural Network, Frequency Ratio, and Logistic Regression: A Case Study in Central Iran, Taft County'* (2020) 4 (1) AUT Journal of Civil Engineering 63, 63.

56 Erol Ünal, *İmar Planlama Uygulama* (Bayındırlık ve İskan Bakanlığı 1996) 63ff.

57 Ahmet Menderes, *İmar Plânı Konusuna Genel Bakış* (1966) 22 (246) İller ve Belediyeler Dergisi 148, 149.

58 Yao Yao et al, *'Sensing Urban Land-Use Patterns by Integrating Google Tensorflow and Scene-Classification Models'* <<https://www.alphaxiv.org/abs/1708.01580>> accessed 4 February 2025.

59 Zelaya Kaya and Adalet Dervişoğlu, *'Determination of Urban Areas Using Google Earth Engine and Spectral Indices; Esenyurt Case Study'* (2023) 10 (1) International Journal of Environment and Geoinformatics 1, 2.

60 There is also. Supattra Puttinaovarat and Paramate Horkaew, *'A Geospatial Platform for Crowdsourcing Green Space Area Management Using GIS and Deep Learning Classification'* (2022) 11 (3) ISPRS International Journal of Geo-Information 1, 2 <<https://www.mdpi.com/2220-9964/11/3/208>> accessed 12 February 2025.

redistribution and allocation of parcels⁶¹ will facilitate the provision of urban justice.⁶² The determination of the areas covered or not covered by the plot and land arrangements (PLA) and DRS applications⁶³ in the broad sense, which we encounter in the arrangement of scattered parcels and making them in accordance with the zoning plan, or the determination and definition of public property, can also be easily determined with AI tools.

Processing the information obtained through navigation devices⁶⁴ and satellite imagery that we use in our daily lives through deeplearning⁶⁵ will enable the planning activities of the administration to proceed more effectively. It can be used not only for urban density⁶⁶ or traffic optimisation⁶⁷ but also for planning energy consumption to create green cities.⁶⁸ Determination of areas under disaster risk with the use of satellite imagery tools⁶⁹ and AI tools that help to identify risky structures and structures contrary to the licence will also help to reduce the damage caused by disasters.⁷⁰

GIS, which continuously records information such as population density, energy demand, determination of public service requirements and traffic density,⁷¹ is also an

- 61 Xiaoping Liu et al, 'Classifying Urban Land Use By Integrating Remote Sensing And Social Media Data' (2017) 31 (8) International Journal of Geographical Information Science 1675, 1679.
- 62 The notion of 'urban justice' will appear as one of the basic principles to be followed in making and implementing zoning plans. Aydın Gülan, 'Türk İmar Hukuku'nda 'Hamur Kuralı' Uygulaması, 3194 Sayılı İmar Kanunu'nun 18. Madde Uygulamasına İlişkin Teorik Bir Yaklaşım' (Associate Professor Thesis 2000) 38-9.
- 63 On the method of PLA and the determination of the area by the administration see also. Tahir Muratoğlu, *Teşkilat, Planlama ve Uygulama Boyutuyla İmar Hukuku* (2nd edition, Seçkin Yayıncılık 2021) 244ff; Celâl Karavelioğlu and E. Cemil Karavelioğlu, *İmar Kanunu 18. Madde Uygulaması* (5th edition, Karavelioğlu Hukuk Yayınevi 2010) 35ff.
- 64 Mark Bilandzic, Marcus Foth and Alexander De Luca, 'CityFlocks: Designing Social Navigation for Urban Mobile Information Systems' (2008) Association for Computing Machinery 174, 178.
- 65 Jun Zhang et al, 'Extraction of Urban Built-Up Area Based on Deep Learning and Multi-Sources Data Fusion-The Application of an Emerging Technology in Urban Planning' (2022) 11 (8) Land 1212, 1213 <<https://doi.org/10.3390/land11081212>> accessed 11 March 2025.
- 66 Pengjun Wu et al, 'Deep Learning Solutions for Smart City Challenges in Urban Development' (2024) 14 Sci Rep 1, 2 <<https://doi.org/10.1038/s41598-024-55928-3>> accessed 5 January 2025.
- 67 Muhammad Aqib et al, 'Rapid Transit Systems: Smarter Urban Planning Using Big Data, In-Memory Computing, Deep Learning, and GPUs' (2019) 11 (10) Sustainability 2736.
- 68 Guangtao Fu et al, 'The Role of Deep Learning in Urban Water Management: A Critical Review' (2022) 223 Water Research 1, 3.
- 69 Munish Bhatia, Tariq Ahamed Ahanger and Ankush Manocha, 'Artificial Intelligence Based Real Time Earthquake Prediction' (2023) 120 Engineering Applications of Artificial Intelligence 1, 4.
- 70 Saman Ghaffarian, Firouzeh Rosa Taghikhah and Holger R. Maier, 'Explainable Artificial Intelligence in Disaster Risk Management: Achievements and Prospective Futures' (2023) 98 International Journal of Disaster Risk Reduction 1, 12 <<https://doi.org/10.1016/j.ijdrr.2023.104123>> accessed 11 March 2025.
- 71 Rima Sultani, Ahmed Soliman and Khalid Al-Hagla, 'The Use of Geographic Information System (GIS) Based Spatial Decision Support System (SDSS) in Developing the Urban Planning Process' (2009) 20 APJ, Architecture & Planning Journal 97, 113; Avishai Ceder, *Public Transit Planning And Operation: Modeling, Practice And Behavior* (2nd edition, CRC Press 2016); Thomas Cornillie, 'Public Transportation Systems: Principles of System Design, Operations Planning and Real-Time Control' (2022) 88 (1) Journal of the American Planning Association 145, 146; Pawel Gora, 'Designing Urban Areas Using Traffic Simulations, Artificial Intelligence and Acquiring Feedback From Stakeholders' (2019) 41 Transportation Research Procedia 532, 533.

AI tool for modelling the data. GIS, which was first used in Canada⁷² and used only for land surveying in its first form, has transformed with developing technologies and has taken its present form. In North America and Europe in particular, GIS-derived satellite data⁷³ play a useful role in the ongoing development of the respective regions, neighbouring settlements and infrastructure facilities.⁷⁴

GIS, which collects data to determine current land use, necessary and potential service management,⁷⁵ environmental impact and ecosystem assessment, transport and infrastructure, and property value,⁷⁶ is also used in Turkey within the Ministry of Environment, Urbanisation and Climate Change.⁷⁷ Today, the National GIS⁷⁸ is used as an administrative support in the collection and processing of geographic data⁷⁹ within the Ministry under the General Directorate of GIS of Turkey and in disaster management and urban planning with the development of technology. The establishment of GIS in Turkey was provided by the Action Plan published by the abolished State Planning Organisation in the context of the Information Society Strategy.⁸⁰ GIS, which regulates the mapping, infrastructure and superstructure, and zoning plan activities of local governments, provides the coordination of urban information systems.

In the context of the preparation of zoning plans, the administration tries to predict the future needs and development of the city.⁸¹ Many factors are considered,

72 Mahnaz Gümrükçüoğlu, 'Coğrafi Bilgi Sistemleri: Anlamı, Yararları, Sorunları ve Geleceği' (2003) 7 (1) SAU Fen Bilimleri Enstitüsü Dergisi 67, 68.

73 Paul A. Longley, 'Geographical Information Systems: Will Developments in Urban Remotesensing and GIS Lead to 'Better' Urban Geography?' (2002) 26 (2) Progress in Human Geography 231, 233.

74 Sonila Khafa and Albana Kosovrasti, 'Geographic Information Systems (GIS) in Urban Planning' (2015) 1 (1) European Journal of Interdisciplinary Studies 74, 80.

75 Eman Alshari, Khalil Al-Wagih and Ebrahim Mohammed Senan, 'Artificial Intelligence for Analyzing Decadal Land Changes in Sana's- Yemen From 1980 to 2020 Using Remote Sensing & GIS' (2024) 1 (2) Al-Razi University Journal of Computer Science and Technology 1, 2.

76 Peter Burrough and Rachael McDonnell, *Principles of Geographical Information Systems* (Oxford University Press 1998) 28.

77 Vida Maliene, Vytautas Grigonis, Vytautas Palevicius and Sam Griffiths, 'Geographic Information System: Old Principles With New Capabilities' (2011) 16 (1) Urban Design International 1, 5.

78 Presidential Decree No. 47 (OJ.07.11.2019/30941).

79 Art. 3 of Presidential Decree No. 49: '(...) d) Geographic information system: The hardware, software, human resources, standards and methods required for the production, supply, storage, processing, management, analysis, sharing, presentation and keeping up-to-date of all kinds of geographic data, e) Geographic data: All kinds of data containing location information, f) Geographic data service: Work and processes aimed at sharing geographic data and data information in accordance with standards, g) Geographic data theme: A group of geographic data prepared in accordance with national or international standards on a specific subject...'.⁸¹

80 Tapu ve Kadastro Genel Müdürlüğü, 'T.C. Başbakanlık DPT Bilgi Toplumu Stratejisi Eylem Planı (2006-2010) Kamu Yönetiminde Modernizasyon 75 Numaralı Eylem 'Coğrafi Bilgi Sistemi Altyapısı Kurulumu' (Kym-75 Cbs-A

such as population growth and the associated need for infrastructure and social facilities. For this reason, it will be possible to complete the forecasting activity in a data-oriented and need-based manner by preparing the most optimal zoning plan. Considering the consequences of more than one plan, the administration will have to implement the plan that achieves the most efficient result with the least interference in the rights of the persons concerned. For this reason, AI tools that simulate the effects of the data obtained from the relevant area on different development plans will help the administration to transfer its resources in the most accurate way.

Although simulation tools such as UrbanSim were initially used only for determining the transport infrastructure, their scope has expanded today.⁸² Simulation tools that present the possibilities of development plans⁸³ that can be applied to the relevant region in 3D considering the data entered into it will help the preparation of realistic and sustainable development plans.

Immovable property, which is mostly the subject of zoning plans, is a right that must be registered. According to the Turkish Civil Code, the registration of the property right provides a legal guarantee for the relevant right. In the context of zoning law, registration and cancellation of the previous rights are obligatory in the formalisation of the existing immovable property rights as a result of acts such as subdivision, unification and settlement of disputes, especially as a result of PLA.⁸⁴

This information, which is open to be learnt by the relevant person in accordance with the principle of reliance on the title deed, can also be learnt online through E-government⁸⁵ and RECIS⁸⁶ in accordance with electronic governance (e-governance). However, there are still erroneous records in the title deed information registered by the relevant public officials, and these erroneous records are the responsibility of the administration. The blockchain application will ensure that these records are kept and

82 Sirivilai Teerarojanarat, David Fairbairn and Sanphet Chunithipaisan, 'Urban Growth Simulation with Urbanism' (12-14 September 2004) Proceedings of the FOSS/GRAASS Users Conference-Bangkok, Thailand 1, 3.

83 Xiang Yan, Xinyu Liu, Xilei Zhao, 'Using Machine Learning for Direct Demand Modeling of Ridesourcing Services in Chicago' (2020) 83 Journal of Transport Geography 1, 4.

84 Kalabalık (n 23) 381. Also see; H. Burak Gemalmaz, *Mülkiyet Hakkı*, Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi-6, (Avrupa Konseyi 2018) 2-5.

85 Yılmaz Üstüner and Nilay Yavuz, 'Turkey's Public Administration Today: An Overview and Appraisal' (2018) 41 (10) International Journal of Public Administration 820, 829.

86 In Turkish TAKBİS. Veysel Başpınar, 'Elektronik Tapu Sicili Düzenlenirken, Tapu Sicilinin Aleniyeti ve Diğer Alanlarla İlgili Alınması Gereken Tedbirler' (2008) 57 (3) Ankara Üniversitesi Hukuk Fakültesi Dergisi 97, 99; İpek Çevik, 'Alman Hukukunda Elektronik Tapu Sicilinin Gelişimi ve Oluşumu' (2018) 24 (2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 1086, 1089; Hülya Meral, Md Moynul Ahsan, 'Türkiye'de Tapu Sicilinde Hisse Hataları' (2021) 3 (2) Türkiye Arazi Yönetimi Dergisi 66, 67.

audited more accurately and will speed up the land subdivision and division acts that are carried out with the consent of the property owners.

Unlike traditional land registries, the records added to the blockchain system, which has no centre, are encrypted and unchangeable. Therefore, the blockchain is more secure,⁸⁷ transparent and faster.⁸⁸ In fact, in the context of different countries,⁸⁹ the registration of land registry records on the blockchain also appears in the form of pilot applications.

The phases to be followed in the preparation process of zoning plans can be expressed as the preparation of a baseline map, obtaining reports and opinions from relevant institutions, and threshold analysis.⁹⁰ In addition to the construction of the baseline map, the use of AI tools to determine the basic zoning plan bases and to prevent overlap, analysis and synthesis will also ensure compliance with the principle of gradual unity of plans.⁹¹ The preparation can be done in stages according to the plan scenarios to be created, since there is no obligation to make all of the zoning plans at once. Based on the definitions made for areas of use in Art. 5 of the Regulation on the Preparation of Spatial Plans⁹², the legal status and boundaries of areas such as official institution area, industrial area, cultural facility area, and industrial zone can be taken into consideration in more detail and conflicts will be minimised. This situation also makes it possible to identify the factual reasons for any changes to be made to the zoning plan.

Undoubtedly, with regard to specific plans such as the spatial strategy plan or environmental layout plan, thanks to the fact that AI tools can process more data in a shorter time, the objectives set within the framework of ‘*development plan*’, ‘*regional plan*’, ‘*regional development strategies*’ and ‘*other strategy documents*’, facts such as the texture and silhouette of the environment will be taken into consideration.⁹³ Due

87 Russell Paulet, Md. Golam Kaosar, Xun Yi and Elisa Bertino, ‘Privacy-Preserving and Content-Protecting Location Based Queries’ (2014) 26 (5) IEEE Transactions on Knowledge and Data Engineering 1200, 1204.

88 Krishnapriya S and Greeshma Sarath, ‘Securing Land Registration using Blockchain’ (2020) 171 Procedia Computer Science 1708, 1715.

89 Alexandru Oprunenco and Chami Akmeemana, ‘Using Blockchain to Make Land Registry More Reliable in India’ (UNDP, 1 May 2018) <<https://www.undp.org/blog/using-blockchain-make-land-registry-more-reliable-india>> accessed 12 March 2025; Viljar Peep, ‘Land Administration in Estonia: A Synthesis of Old Institutions and Modern Technology’ (Land Law & Administration, 21 March 2024) <<https://www.bk-agarwal.com/post/land-administration-in-estonia-a-synthesis-of-old-institutions-and-modern-technology>> accessed 12 March 2025; Anetta Proskurovska and Sabine Dörny, ‘Is a Blockchain-based Conveyance System the Next Step in the Financialisation of Housing? The case of Sweden’ (2018) 17 SSRN Liser Electronic Journal 1, 7.

90 Kalabalık (n 23) 95ff.

91 Hasan Nuri Yaşar, *İmar Hukuku* (Filiz Kitabevi 2008) 31-2.

92 OJ.14.06.2014/9030.

93 Art. 6/5 of the Spatial Plans Production Regulation: ‘The objectives set out in the development plan, regional plans,

to the ability of AI tools to better determine the needs in urban areas in a more optimal way (=population, intensity of use of goods/services), zoning plans are prevented from being limited to issues such as enlargement or reduction of certain plans and the principle of generality will be ensured.⁹⁴

The principle of protection of the environment and natural and cultural values is ensured by thematic planning according to the location of the natural and cultural historical values.⁹⁵ In this respect, within the framework of the accessory theory⁹⁶ of the situation in question, the zoning plan drawn up according to the legal status of the area and/or property also changes thematically. In this sense, the factual and legal situations determined in urban spaces with the help of AI tools will facilitate the access and participation of disadvantaged groups such as the disabled and the elderly in cultural and social infrastructure areas in the context of the principle of equality.⁹⁷ The same applies to areas that can be used in the event of disasters and emergencies, road widening to reduce vehicle traffic, or the creation of car parks to meet parking needs. In this way, public benefit is enshrined as a fundamental value.⁹⁸

The use of AI tools, which will contribute to the creation of a ‘data pool’ for both updating zoning plans and obtaining the opinions of relevant public institutions and organisations (=principle of cooperation)⁹⁹, will also provide ‘predictability’ in issues such as ‘transport system, water, risk, infrastructure, economy and specialisation zones, areas with limited development’.¹⁰⁰ In this way, risk-mitigating measures will be taken and individuals will act in accordance with the principles of ‘legal certainty and security’ in terms of freedom of settlement and the use of property right. Finally, in accordance with Art. 19 of the Regulation on the Preparation of Spatial Plans, it will be possible to ensure that land use decisions on zoning plans (such as preventing uses that may cause environmental problems, conducting micro zoning studies, identifying energy lines that may affect human health, stream protection areas and areas under the risk of disaster, compliance with special rules in the use of agricultural lands), the definition of the coastal edge line and the use of schematic and graphic

regional development strategies and other strategy documents shall be taken into account when preparing spatial strategy plans and environmental layout plans’.

94 Çolak (n 11) 93.

95 A. Kürşat Ersöz, ‘Koruma Amaçlı İmar Planlarının Hukuki Niteliği ve Yargısal Denetimi’ in Ümit Süleyman Üstün et al (eds) *II. Selçuk Hukuk Kongresi Tam Metin Kitabı* (On İki Levha Yayıncılık 2022) 465. Also see; Zehreddin Aslan, ‘Doğal Çevrenin Korunmasına Yönelik Alınan Önlemler ve Yasaklar Karşısında Danıştay’ın Tutumu’, (1995) (11-12-13) İstanbul Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, 91, 91.

96 Benjamin Blaqui re, *Les 100 mots du droit administratif* (PUF 2024) 11.

97 Art. 10/3 of the Constitution: ‘Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality’.

98 File nr. 2020/6414, Decision nr. 2024/5059 (TCS, 30 September 2024); File nr. 2020/4275, Decision nr. 2024/1925 (TCS, 20 March 2024) Lexpera, 01.03.2025. For the term ‘public interest’ and similarly used concepts, see; Cemil Kaya, *Kararlarından Hareketle Kamu Yararı Kavramına Danıştay’ın Bakışı* (On İki Levha Yayıncılık 2011) 52ff.

99 Çolak (n 11) 103.

100 File nr. 2017/7727, Decision nr. 2021/1296 (TCS, 4 February 2021); File nr. 2018/6901, Decision nr. 2022/1288 (TCS, 9 February 2022) Lexpera, 01.03.2025.

grammar are compatible with the documents contained in the plan and its annexes.¹⁰¹ In fact, the issue of technical research, which is currently has to be carried out by plan authors, can be done by minimising the use of personnel, cost and margin of error with the use of AI tools. This situation, especially when the relevant infrastructure is in place, will also reduce the cost concerns of local administrations in relation to the preparation of zoning plans.

In terms of administrative law, the implementation of a regulatory act as a basis for individual acts in such a way that disputes do not arise afterwards will be evaluated by the appropriateness of the data sets used in the preparation phase of that administrative act, as well as by minimising the negative impact on the fundamental rights and freedoms of individuals during the execution phase. In this context, utilisation of AI tools during the implementation phase of zoning plans will reduce the number of requests for revisions, additions and amendments to these plans (*=it will play a positive role in terms of the principle of continuity in the context of the principle of administrative stability*¹⁰²). In order to minimise the usage problems arising from zoning activities during the implementation phase and to comply with the principle of prohibition of misuse, determination of the ratio of residential use in the mixed areas of ‘*Housing+Commerce*’, ‘*Commerce+Residential+Tourism*’, ‘*Tourism+Commerce*’ will reduce the practices involving negative interference with fundamental rights and freedoms during the implementation process.

According to Art. 13 of Law No. 3194, the legal instruments used in the implementation of zoning plans can be counted as expropriation, subdivision and unification, and PLA activities, including the deduction of the DRS.¹⁰³ Since all of these implementation tools involve the use of public power, they may be unlawful depending on the ability of the zoning plans to be implemented. At this point, with the use of AI tools, it can be accurately determined which implementation tool will be prioritised. For example, by accurately identifying public goods, the transfer of immovable property or the allocation of certain goods to the relevant administrative authority as stipulated in Law No. 3194 may be realised (Art. 11/1)¹⁰⁴, or areas that

101 Art. 19 of the Spatial Plans Production Regulation: ‘(...) g) Establishing land use decisions by determining preventive strategies and policies for resources that cause environmental problems...’.

102 Çolak (n 11) 95.

103 Art. 13 of Law No. 3194: ‘(...) Where property owners transfer the portions beyond the share of common use reserve from redivision as prescribed in this Law in the land and landlots at locations indicated in the first paragraph on the approved land development plans to the relevant administrations free of charge, such transfer shall not be subject to property transfer taxes’.

104 Art. 11/1 of Law No. 3194: ‘The land and landlots owned by the Treasury and special administrations, except the immovable property owned by the General Directorate of Foundations and military forbidden zones, security zones and places of operational and defence purposes owned by the Turkish Armed Forces directly related to national security, which

have been previously deducted/not deducted from the DRS may be identified. This will undoubtedly reduce public expenditures (=the principles of fiscal balance and appropriation will be observed)¹⁰⁵ and may also remove the financial and legal liability of the relevant public official through the use of AI tools before the administrative authority performs expropriation in the context of development programmes.

Finally, because of the implementation of the zoning plans, individual acts such as building licences and occupancy permits may also be established.¹⁰⁶ The Planned Areas Zoning Regulation¹⁰⁷ should also be considered in terms of the legality of these acts. In this framework, issues such as determination and application of the ratio of floor and floor area, building height, setback, minimum size of the parcels, whether the parcel has a road frontage, whether there are parcels that cannot be built as a result of the application of subdivision and unification, whether earthquake joint gaps are left, and whether non-residential functions can be used in residential areas can be determined by using AI tools. In addition to this, in order to ensure the optimal use of the fragmented parcels created by expropriation, it will be possible to ensure that the parcel is established in such a way that the parcel is suitable for building, and that the parcels that will become buildable as a result of the merging of the parcels will be subject to the unification process.¹⁰⁸ It should be noted that since all of these applications aim to create certain scenarios during the implementation phase of zoning plans and to take into account the legal disputes that may arise, they contribute to the creation of the best scenario depending on the AI tools and the data sets entered.

The preparation and implementation of zoning plans may affect the interests of the persons concerned, and therefore the contractual and extra-contractual liability of the administration will be in question.¹⁰⁹ In addition, the use of AI tools makes the process

fall in such places earmarked for public services as public squares, roads, parks, green areas, parking lots, public transport stations and terminals shall be transferred abandoned free of charge to municipalities within municipal boundaries and adjacent areas or to special provincial administrations outside municipal boundaries and adjacent areas upon a proposal from the municipality or governorship and the approval by the Ministry of Finance and Customs and the entry at the land register shall be deleted. However, if there are buildings on such places, the present value to be appraised only for the buildings except for the landlot shall be paid. The price and form of payment shall be agreed by the parties'.

105 Çolak (n 11) 334.

106 Taner Ayanoglu, *Yapı Hukukunun Genel Esasları* (Vedat Kitapçılık 2014) 157.

107 OJ.03.07.2017/30113.

108 Halil Kalabalık, 'İmar Hukukunda İfraz ve Tevhid Yöntemi ve Karşılaşılan Sorunlar-II' (2008) (30) *Yerel Siyaset Dergisi* 71, 72.

109 The main source of the contractual responsibility of the administration is that the responsibility of the administration is a primary responsibility regardless of who provides the services in the duties and powers of the administration. Özay (n 40) 250. As a matter of fact, the fact that the administration bears an objective responsibility reveals the responsibility of the administration in the form of defective and strict responsibility. Ragıp Sarıca, 'Hizmet Kusuru ve Karakterleri' (1949) 15 (4) *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 858, 860. One of the constitutional duties imposed on the

of preparing zoning plans more efficient,¹¹⁰ ensures that the process of preparing development plans is more in line with more democratic administrative principles¹¹¹ and reduces human error;¹¹² the uncertainties regarding AI data processing and decision-making will not change the fact that AI tools are not infallible and may make wrong decisions.¹¹³ For this reason, the use of AI tools in the preparation of the zoning plan will not eliminate the responsibility of the administration.¹¹⁴ However, the AI-specific ‘black box’¹¹⁵ and ‘deeplearning’¹¹⁶ phenomenon in the decision-making process of AI tools makes it difficult to clearly attribute fault and causality in the resulting damage.¹¹⁷

Another problem in determining responsibility in areas where AI tools are used is whether or not the AI tools have a personality.¹¹⁸ However, although artificial

administration by the principle of (social) rule of law is that the administration must be held accountable for all its acts and actions. İlhan Özay, *Devlet İdari Rejim ve Yargısal Korunma* (Filiz Kitabevi 1986) 39; Lütfi Duran, *Türkiye İdaresinin Sorumluluğu, Sorumluluğun Temeli ve Sebepleri Sorumluluğa Yol Açan Olgular* (Sevinç Matbaası 1974) 12; Yıldızhan Yayla, *Anayasa Hukuku Ders Notları* (Fatih Yayınevi Matbaası 1985) 90; Gürsel Kaplan, *İdari Yargılama Hukuku* (10th edition, Ekin Basım 2024) 280; Turan Yıldırım and Gül Üstün, ‘İdarenin Sorumluluğu’ in Nur Kaman (ed), *İdare Hukuku* (9th edition, On İki Levha Yayınları 2024) 629ff; Onur Karahanoğulları, *İdare Hukuku* (Turhan Kitabevi 2022) 546; Ender Ethem Atay and Hasan Odabaşı, *Teori ve Yargı Kararları Işığında İdarenin Sorumluluğu ve Tazminat Davaları* (2nd edition, Seçkin Yayıncılık 2010) 56; Şeref Gözübüyük and Turgut Tan, *İdare Hukuku Cilt I* (14th edition, Turhan Kitabevi 2021) 701; Mehmet Akif Bardakçı, ‘İdarenin Eylemlerinden Kaynaklanan Sorumluluğu’ (DPhil thesis, 2013) 70; Müzeyyen Eroğlu Durkal, ‘İdarenin Sorumluluğunun Ortaya Çıkışı ve Temeli’ (2019) 23 (1) Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi 159, 164. The responsibility of the administration and the principle of social rule of law are also included in various judicial decisions. For some of these judgements, see also. Seyfettin Örgen, App no 2021/21101 (TCC, 23 October 2024); Mehmet Evelek, App no 2020/27829 (AYM, 3 October 2024); Mehmet Gasır, App no 2019/8569 (TCC, 20 December 2023); File nr. 2001/257, Decision nr. 2003/702 (TCS 10th Chamber, 25 February

intelligence can establish transactions, it does not have a will of its own. The AI tools, which produce the transactions it establishes mostly as ‘automatic act’ as a result of the tasks assigned to it, will not have a personality, nor will it have the capacity of right and action.¹¹⁹ However, considering the development of technology, it is foreseen that in the future, AI tools will not only be an administrative support tool but also an autonomous zoning planner.¹²⁰

For these reasons, it will be possible to categorise the responsibility of the administration arising from the use of AI tools while preparing the zoning plans as follows: *(i) the liability arising from the machine errors caused by the inadequacy of the AI tools, (ii) the liability arising from the faulty use of the AI tools by the persons carrying out the public service.*

Determining the responsibility of the administration to compensate for the damages caused as a result of the zoning plan prepared by using AI tools and the implementation of this zoning plan is valuable in terms of establishing the financial liability of the administration.¹²¹ However, if the resulting damage cannot be attributed to the person using the AI tool, it will be necessary to determine whether there is a causal link between the damage and the AI tool.¹²² Indeed, incorrect and incomplete programming of AI tools may lead to incorrect results despite the correctly processed data. In such a case, the AI tool manufacturer,¹²³ who is the right holder in relation

Hukuk ile İlgili Güncel Tartışmalar’ in *İstanbul, Ankara ve İzmir Baroları Çalıştay Raporu* (2019) 57 <https://www.istanbulbarosu.org.tr/files/docs/yapay_zeka_caginda_hukuk2019.pdf> accessed 12 March 2025. Another view is that AI tools should have a sui generis personality, and in fact, the European Parliament’s 2017 recommendation also proposed the creation of an electronic type of personality. European Parliament Report, ‘Report with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)), Introduction B’ <https://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.html> accessed 12 March 2025. For opinions in a similar direction, see also. Sinan Sami Akkurt, ‘Avrupa Parlamentosu’nun “Robotik Hakkında Medenî Hukuk Kurallarına İlişkin 16 Şubat 2017 Tarihli Tavsiye Kararı”nın Genel Bir Tahlihi ve Yasalaştırma Öngörüler’ (2019) 17 (198) *Legal Hukuk Dergisi* 2537, 2550-1; Şebnem Akipek Öcal, ‘Yapay Zeka ve Hukuki Niteliği’ in Erdem Büyüksağış (ed), *Hukuk Perspektifinden Yapay Zeka* (On İki Levha 2022) 20; Erdem Doğan, *Yapay Zekanın Hukuki Statüsü ve Sorumluluğu* (Seçkin Yayıncılık 2022) 209.

119 Kemal Gözler, *İdare Hukuku Cilt I* (3rd edition, EkinYaymevi 2019) 189.

120 This situation is also referred to as the four stages of AI-based development planning. These stages were determined by anticipating technological developments regarding the use of AI tools in zoning planning processes. As a matter of fact, the transformation of AI tools, which are currently used in Turkey only at the stage of data collection and mapping based on these data and preparation for zoning plans, into the main body that prepares zoning plans with limited human intervention with the developing technology, is revealed with these stages. Zhong Ren Peng, Kai Fa Lu, Yanghe Liu and Wei Zhai, ‘The Pathway of Urban Planning AI: From Planning Support to Plan-Making’ (2023) 44 (4) *Journal of Planning Education and Research* 2263, 2269.

121 Hasan Nuri Yaşar, ‘İdarenin Sorumluluğu Üzerine Düşünceler’ (2008) 66 (1) *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 201, 214.

122 As a rule, a causal link is not required in the context of the strict liability of the administration. However, in order for the administration to be liable for the damage caused by the use of the AI vehicle, it will be necessary to determine the source of the damage in order to determine the fault rate of the administration. As a matter of fact, the imposition of a legal liability on the administration for selecting the AI vehicle can be ensured by this causal link. Nida Malbeleş and Merve Ayçe Özmeriç, ‘İdarenin Sözleşme Akdetme Zorunluluğu ve Sözleşme Görüşmelerinden Doğan Sorumluluğu’ (2020) 2 (1) *Türk Alman Üniversitesi Hukuk Fakültesi Dergisi* 133, 145.

123 Mark Burry, ‘A New Agenda for AI-based Urban Design and Planning’ in İmdat As, Prithwish Basu, Pratap Talwar (eds) *Artificial Intelligence in Urban Planning and Design: Technologies, Implementation, and Impacts* (Elsevier 2022) 17.

to the AI tools, will also be the person who should assume the responsibility.¹²⁴ In addition, even if there is no defect in the AI tools utilised by the administration, the strict liability of the administration will continue in the damages that may be caused will continue.¹²⁵

In order to determine the responsibility of the administration, it will also be necessary to reveal who created the faulty AI tool. The AI tools, which are the tools to be used in the preparation of zoning plans, may be prepared by the administration itself¹²⁶ or, if it is authorised to have them prepared, they may be acquired through procurement.¹²⁷ If the inadequacy of the AI tools created by the administration itself or through the use of public service procedures for land use planning is caused by the administration that created the tool or had it created, there is a service failure.

If the AI tool, which is designed to be utilised at any stage of the preparation and implementation of the zoning plan and which works flawlessly in its initial state, subsequently starts to give erroneous results despite the administration's adequate and necessary supervision, only the strict liability of the administration will be in question here.¹²⁸ If the damage arises without any fault of the administration; if the damage arises from the existing autonomous decision-making process of the AI vehicle for an unforeseen reason despite all kinds of precautions of the administration, the administration's strict liability will be in question here.¹²⁹

The administration will also be responsible for selecting the most appropriate product¹³⁰ because of the need and supervising this product. This liability will appear as a defect liability arising from the failure of the contracting authority to perform the public service correctly. The manufacturer may be held liable for the defect liability of the manufacturer of the AI tool tendered by the contracting authority due to the

124 Armağan Ebru Bozkurt Yüksel, 'Yapay Zeka Buluşlarının Patentlenmesi' (2018) (11) Uyuşmazlık Mahkemesi Dergisi 585, 611.

125 John Kingston, 'Artificial Intelligence and Legal Liability' (2016) International Conference on Innovative Techniques and Applications of Artificial Intelligence 269, 278; Paulius Čerka, Grigienė Juita and Sirbikyė Gintarė, 'Liability for Damages Caused by Artificial Intelligence' (2015) 31 (3) Computer Law&Security Review 376, 385.

126 Here, the term 'administration' is used to refer to the administration in a broad sense, including private law persons conducting administrative activities.

127 It is also necessary to evaluate the effects of the acquisition of an auxiliary AI tool in the preparation of zoning plans through tenders on the state in terms of cyber security. For detailed information on the subject, see also. Jenna Kerwin, 'What Is the Role of AI in Cybersecurity' (Excelsior University, 1 August 2024) <<https://www.excelsior.edu/article/ai-in-cybersecurity/>> accessed 2 March 2025; Ahmet Efe, 'Yapay Zeka Odaklı Siber Risk ve Güvenlik Yönetimi' (2021) 5 (2) International Journal of Management Information Systems and Computer Science 144, 160.

128 Woodrow Barfield, 'Liability for Autonomous and Artificially Intelligent Robots' (2018) 9 Journal of Behavioral Robotics 193, 197; Başak Bak, 'Medeni Hukuk Açısından Yapay Zekanın Hukuki Statüsü ve Yapay Zeka Kullanımından Doğan Hukuki Sorumluluk' (2018) (35) Türkiye Adalet Akademisi Dergisi 211, 222.

129 However, if the administration also has a defect related to the supervision regarding the use of the faulty AI vehicle, then there will be a cumulative defect. Mesut Serdar Çekin, 'Otonom Araçlar ve Hukuki Sorumluluk' (2018) (33) Türkiye Adalet Akademisi Dergisi 283, 298.

130 Melikşah Yasin, 'Kamu Hizmeti' in Nur Kaman (ed), *Idare Hukuku* (9th edition, On İki Levha Yayınları 2024) 254ff; Ali Erbaşı, 'Kamu İdarelerinin Mal Alımı İhalelerinde En Uygun Tedarikçinin Analitik Hiyerarşi Proses Yaklaşımı İle Belirlenmesi' (2012) (9) International Journal of Economic and Administrative Studies 165, 166; Serkan Seyhan, 4734 Sayılı Kamu İhale Kanunu Kapsamındaki İhalelerin İdari ve Yargısal Denetimi (On İki Levha Yayınları 2019) 5ff.

damage caused by a reason that was not recognised at first.¹³¹ In determining the fault of the contracting authority for the damage caused by the defect of the AI vehicle tendered, the '*behaviour of the third party*'¹³² should also be considered.

Although the use of the AI tool reduces human error in the preparation and implementation of zoning plans,¹³³ the use of the AI tool will not eliminate the damages that will occur as a result of zoning plans. The use of AI tools today still involves human intervention,¹³⁴ so the resulting damage may be caused by the AI tool as well as by the people using the AI tool. For this reason, the primary responsibility of the administration regarding the use of AI tools is to train the personnel who will be involved in the zoning planning processes to understand these tools and make the necessary interventions.¹³⁵ As a matter of fact, the liability of the administration in the selection of the public personnel who will prepare and implement the land-use plan will be questioned.¹³⁶

The liability of the AI tool may arise not only from the inaccuracy of the data on which it bases the zoning plan, or from the production of erroneous results based on these data, but also from the process of obtaining these data.¹³⁷ In the process of preparing zoning plans, it is essential to demonstrate that the necessary personal data are not processed¹³⁸ into the system without authorisation and that transparency¹³⁹

131 Cemil Güner, '*Yapay Zekanın Verdiği Zarardan Doğan Sözleşme Dışı Sorumluluğa Uygulanacak Hukuk*' (2020) (15) Uyuşmazlık Mahkemesi Dergisi 229, 258.

132 Mutlu Kağıtçıoğlu, '*Yapay Zeka ve İdare Hukuku (Bugünden Geleceğe Yönelik Bir Değerlendirme)*' (2021) 11 (1) Hacettepe Hukuk Fakültesi Dergisi 118, 152.

133 Hulüsi Alphan Dinçkol, '*Yapay Zekanın İdari Yargı Üzerindeki Etkileri*' (2024) 12 (1) Sakarya Üniversitesi Hukuk Fakültesi Dergisi 47, 56; Ravil Mukhamediev et al, '*Review of Artificial Intelligence and Machine Learning Technologies: Classification, Restrictions, Opportunities and Challenges*' (2022) 10 (15) Mathematics 1, 10.

134 Mateusz Pszczyński, '*Administrative Decisions in the Era of Artificial Intelligence*' (2020) (11) Adam Mickiewicz University Law Review 251, 260.

135 Zafer Üskül, '*Kamu Yönetimi Personelinin Hizmet İçi Eğitimi*' (1975) 11 (1) Eskişehir İktisadi ve Ticari İlimler Akademisi Dergisi 281, 283; Zeynep Engin and Philip Treleaven, '*Algorithmic Government: Automating Public Services and Supporting Civil Servants in using Data Science Technologies*' (2019) 62 (3) The Computer Journal 448, 458; Dmitry Kuzmin, '*The Competencies of Civil Servants in the Field of Regulation of Technological Risks in the Practical Application of Artificial Intelligence*' in Aleksei Bogoviz, Julia Ragulina (eds) *Industry Competitiveness: Digitalization, Management, and Integration* (Springer 2021) 911; Samuela Rostaş, '*Education and Professional Training of Public Servants in the Age of Artificial Intelligence*' (2024) 18 (1) AGORA International Journal of Juridical Science 231, 232. Hakan Dulkadiroğlu, '*Dijital Çağda Devlet Memurlarının Eğitimini Yeniden Düşünmek*' (2019) 52 (2) Amme İdaresi Dergisi 115, 118.

136 Harun Sağlam, '*Türk Hukukunda Kamu Görevlilerinin Kişisel Kusurlarından Kaynaklanan Zararlardan Dolayı İdarenin Sorumluluğu ve Kamu Görevlilerine Rücu Edilmesi*' (LLM Thesis, University of Atatürk 2010) 43.

137 Barış Özçelik, '*Yapay Zekanın Veri Koruma, Sorumluluk ve Fikri Mülkiyet Açısından Ortaya Çıkardığı Hukuki Gereksinimler*' (2021) (66) Adalet Dergisi 87, 99; Onur Sarı, '*Yapay Zekanın Sebep Olduğu Zararlardan Sorumluluk*' (2020) (147) Türkiye Barolar Birliği Dergisi 252, 306; Şafak Narbay and Şerife Nur Kırızlı, '*Otonom Araçlarda Yapay Zeka, Kişisel Verilerin İşlenmesi ve Sonuçları*' (2023) 11 (1) Sakarya Üniversitesi Hukuk Fakültesi Dergisi 49, 59.

138 Fitsilis (n 117) 49.

139 Stefan Larsson and Fredrik Heintz, '*Transparency in Artificial Intelligence*' (2020) 9 (2) Internet Policy Review 1, 9; Peter Parycek, Verena Schmid and Anna Sophie Novak, '*Artificial Intelligence (AI) and Automation in Administrative Procedures: Potentials, Limitations, and Framework Conditions*' (2024) 15 Journal of the Knowledge Economy 8390,

regarding the processed data can be ensured in order to ensure the principles of urbanism regarding zoning planning. For this reason, the rules regarding which data will be stored by the AI tools to be designed, how long these data will be stored and how they will be processed will need to be audited by the public official using the AI tool.¹⁴⁰ Otherwise, the administration will have to be responsible for the damages that may arise from non-compliance with the principles of the administrative procedure during the preparation of the zoning plans.¹⁴¹ For example, the administration will also be expected to ensure the principle of urban justice and equality in the preparation and implementation of zoning plans. Nevertheless, if any damage is caused by the AI tool making zoning and proposals for the distribution of public services based on data on the crime rate and ethnic identity of the people living in the area that is the subject of the zoning plan in a biased manner;¹⁴² this damage will be expected to be compensated by the administration.

The preparation of zoning plans is a process and the first contact of the public official and AI tools is to ensure that the data required for the creation of the plans are entered into the system correctly, or if these data are obtained with the help of AI tools, to test the accuracy of the data.¹⁴³ As a matter of fact, the determination of the purpose of use of the area that is the subject of zoning plans and the arrangements to be made on this area (land and/or plot) depends primarily on the quality of these data. The legal responsibility of the administration will be in question for the correct entry of the data and the supervision of the information obtained from the AI tools. For example, the administration will be liable for the damages that may occur in the zoning plan prepared as a result of the suggestion of places that are not suitable for construction within a local unit as a settlement area by the AI tool or the incorrect determination of the location of the cultural assets in the relevant region during the preparation of the zoning plans and the damages that may occur in the implementation of this plan, arising from the control of the data.

8391; Enrico Carloni, 'Transparency within the Artificial Administration Principles, Paths, Perspectives and Problems' (2024) 16 (1) Italian Journal of Public Law 8, 9.

140 The administration is the data controller in the processes of collecting, storing and processing the data required for administrative activities. For this reason, there is a defective responsibility of the administration in the unauthorised processing and storage of data. Çağla Tansuğ, *İdari Faaliyetlerde İşlenen Kişisel Verilerin İdare Tarafından Korunması* (On İki Levha Yayıncılık 2023) 33.

141 Turan Yıldırım and Muhammed Göçgün, 'İdarenin Düzenleyici İşlemlerinde Eşitlik İlkesi' (2016) 3 (2) İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi 39, 40.

142 Burcu Zoğlar Durmaz, 'Kamuda Yapay Zeka' in Selin Çetin Kumkumoğlu et al. (eds) *Yapay Zeka Çağında Hukuk Yıllık Rapor* (İstanbul Barosu 2023) 24; Gregory Nelson, 'Bias in Artificial Intelligence' (2019) 80 (4) National Library of Medicine 220, 221; Eirine Ntoutsis et al. 'Bias in Data-Driven Artificial Intelligence Systems' (2020) 10 (3) WIREs Data Mining and Knowledge Discovery 1, 3; Osonde Osoba and William Welser, *An Intelligence in Our Image* (Rand Corporation 2017), 17.

143 Dominique Hogan Doran, 'Computer Says "No": Automation, Algorithms and Artificial Intelligence in Government Decision-Making' (2017) 13 (3) Journal of the Judicial Commission of New South Wales 345, 350.

The implementation of urban planning and zoning plans, which appear as regulatory acts, often restricts the various rights and interests of individuals, especially the right to property,¹⁴⁴ for the purpose of public interest.¹⁴⁵ Ensuring the balance between administration, which benefits from the presumption of legality with its unilateral will, and the individuals depends on the supervision of administrative acts by persons independent of the administration. For this reason, ‘*in the case of zoning plans, it is necessary to examine whether the purpose for which the immovable is allocated in terms of its location, size, location and function is appropriate in terms of urban planning principles, planning principles and public interest*’.¹⁴⁶

Currently, AI tools still exist only as a tool and since they are the reason for the activities of the administration,¹⁴⁷ the audit of the zoning plans prepared mostly by using AI tools is not a special case. However, it is also observed that the use of only the data obtained from the AI tool and the absence of human intervention and examination in administrative acts regarding zoning based on AI tools is also a reason for the cancellation of some decisions.¹⁴⁸

The zoning plans will not be finalised before the end of the announcement period; therefore, they cannot be subject to litigation before the end of the announcement period.¹⁴⁹ It will be necessary to discuss whether the information and data produced

144 Esin Örcü, *Taşınmaz Mülkiyetine Bir Kamu Hukuku Yaklaşımı: Mülkiyet Hakkının Sınırlandırılması* (İstanbul Üniversitesi Hukuk Fakültesi Yayınları 1976) 45; Çağatay Kesinok, ‘Kent Planlama ve Uygulamasında Menfaat İhlali ve Dava Açma Ehliyeti’ in Melih Ersoy, Çağatay Keskinok (eds) *Mekan Planlama ve Yargı Denetimi* (Yargı Yayınevi 2000) 15.

145 Tekin Akıllıoğlu, ‘*Kamu Yararı Kavramı Üzerine Düşünceler*’ (1988) 9 (1-3) İdare Hukuku ve İlimleri Dergisi 11, 11; Ümit Doğanay, ‘*Toplum ve Kamu Yararı Kavramları*’ (1974) (7) Mimarlık 5, 5. Although the public interest is the only objective of all administrative acts, considering the uncertainty of the concept, most of the time the limits of the concept of public interest are determined by the judicial body in each administrative act that is audited. Ruşen Keleş, ‘Kent ve Çevre Değerleri Bağlamında Kamu Yararı Kavramı’ in Melih Ersoy, Çağatay Keskinok (eds) *Mekan Planlama ve Yargı Denetimi* (Yargı Yayınevi 2000) 3.

146 File nr. 2017/762, Decision nr. 2020/5519 (TCS 6th Chamber, 17 June 2020); File nr. 2007/4479, Decision nr. 2009/1807 (TCS 6th Chamber, 25 February 2009); File nr. 1996/523, Decision nr. 1996/5823 (TCS 6th Chamber, 17 December 1996); File nr. 2006/4568, Decision nr. 2009/11206 (TCS 6th Chamber, 18 November 2009); File nr. 2006/4726, Decision nr. 2009/11204 (TCS 6th Chamber, 18 November 2009); File nr. 1998/2072, Decision nr. 1999/620 (TCS 6th Chamber, 7 December 1999).

147 Necip Fazıl Akburakçı, ‘*Yapay Zekânın İdarenin Takdir Yetkisi ve Karar Alma Mekanizmalarına Etkisi*’ (2021) (20) İdare Hukuku ve İlimleri Dergisi 77, 86.

148 File nr. 2023/10303, Decision nr. 2024/3974 (TCS 4th Chamber, 13 June 2024) (TCS Kararlar Dergisi 2024/17); File nr. 2015/11397, Decision nr. 2020/130034 (TCS 6th Chamber, 17 December 2020).

149 Şevki Davut and Şenol Coşkun, ‘*İmar Planlarına Karşı Açılacak İptal Davalarında İdari Dava Açma Süresi*’ (2011) 69 (1-2) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 1209, 1224; Andreea Raluca Slave et al, ‘*Assessing Public Opinion Using Self-Organizing Maps. Lessons from Urban Planning in Romania*’ (2023) (231) Landscape and Urban Planning 1-3. Zoning plans have to be announced on the website of the relevant Municipality and on two different boards in the Municipality building. The publication of zoning plans on the website is related to the digital delivery of public services. It is tried to facilitate the relevant persons to have information and to ensure the transparency of the administration. For this reason, it should be evaluated within the concept of digital governance. Anutosh Das, ‘*Urban Planning, Information Technology and Artificial Intelligence: The Theory of Evolution*’ (Preprints, 10 August 2021) <<https://doi.org/10.20944/preprints202108.0228.v1>> accessed 4 March 2025 ; Ahmet Tarhan, ‘*Halkla İlişkilerde Tanıma ve Tanıtma Aracı Olarak İnternet: Belediyelerin Web Sayfaları Üzerine Bir Analiz*’ (2007) 4 (4) Selçuk İletişim Dergisi 75, 76; Pınar Eraslan Yayınoglu, İdil Sayımer and Zafer Arda, ‘*Belediyelerin Kurumsal Web Sitesi Kullanımı Üzerine Bir İnceleme: Londra Büyükşehir Yönetimi ve İstanbul Büyükşehir Belediyesi Web Sitesi Ana Sayfalarının Karşılaştırılması*’ (2007) 7 Galatasaray

by the AI tools, which appear as an auxiliary tool for the administration in the transactions to be established by the administration regarding the zoning plan, can be subject to litigation independently from the administrative case based on these data. It will be possible to evaluate the acts of the AI tools that will help the administration to carry out the public service as a ‘*preparatory act*’¹⁵⁰ and as a ‘*declaratory act*’¹⁵¹ that may constitute the reason for the administrative activities.

Due to the fact that zoning plans are regulatory acts, it is thought that a full remedy case cannot be filed for a damage caused by a zoning plan, based on the idea that regulatory acts do not directly violate the rights of individuals. Although it is not possible to find an example of this, it would not be correct to say that only the decrease in the value of the immovable property of the person with the zoning plan will not create a violation of rights for the person.

In order to implement the zoning plans, a case for annulment may be filed against the acts of the administration based on the zoning plan, and if there is a violation of a right, a full remedy case may be filed by the person concerned. However, the period within which a case may be filed for the implementation of the zoning plan and the zoning plan is limited by a special article in the Law.¹⁵²

Rather than creating a separate will in the preparation and implementation of zoning plans, AI tools constitute the reason for the unilateral executive will of the administration. Within the scope of Law No. 6306¹⁵³, the relevant area

Üniversitesi İletişim Dergisi 129, 136; Aslı Yağmurlu, ‘*Siyasal Katılım ve Halkla İlişkiler: Ankara Merkez İlçe Belediyeleri İnternet Siteleri Üzerine Bir İnceleme*’ (2011) (471-472) Türk İdare Dergisi 197, 200 ; However, zoning plans are not exempt from legal review in this process. In this process, an administrative appeal may be filed for the cancellation of the zoning plans. Semin Yavuz Gargın, ‘*İmar Planlarından Doğan Hukuki Uyuşmazlıklarda Dava Açma Süresi*’ (2025) 29 (1) Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi 413, 455; Hüseyin Melih Çakır, ‘*7221 Sayılı Kanunla İmar ve Parselasyon Planlarına Karşı Dava Açma Süresinin Sınırlandırılması*’ (2024) 30 (2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 506, 510; Melih Ersoy, ‘*İmar Planı Değişiklikleri ve Yargı Denetimi*’ (1997) 17 (1-2) ODTÜ Mimarlık Fakültesi Dergisi 53, 58. Administrative appeal is not a mandatory remedy and the decision rendered by the administration as a result of this appeal is definite. Kaya Burak Öztürk, *Hak Arama Özgürlüğü Çerçevesinde Zorunlu İdari İtiraz* (Yetkin Yayınları 2015) 52; Dilşat Yılmaz, ‘*Türk İdare Hukuku’nda İdari İşlemin “Kesin”liği Üzerine Bir Değerlendirme: “Kime Göre?”, “Ne İçin?” Kesinlik*’ (2017) 21 (2) Gazi Üniversitesi Hukuk Fakültesi Dergisi 105, 112.

150 Yıldızhan Yayla, *İdare Hukuku* (2nd edition, Beta Yayıncılık 2010) 109; Metin Günday, *İdare Hukuku* (9th edition, İmaj Yayınevi 2017) 124; Ender Ethem Atay, ‘*Müfettişlerin Hazırladıkları Disiplin Soruşturma Raporlarından Dolayı Sorumlu Tutulabilirliği Sorunu*’ (2016) (7) Uyuşmazlık Mahkemesi Dergisi 167, 172; Hülûsi Alphan Dinçkol, ‘*İcrai Olmayan İşlem Türlerinden Yol Gösterici İşlemin Hukuki Değeri*’ (2021) 27 (2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 1107, 1110.

151 Onur Kaplan, *İdari İşlem Teorisi Açısından İdare Hukukunda Tespit Edici İşlemlerin Yeri* (On İki Levha Yayıncılık 2021) 343. ‘*Acts of the administration*’ that do not produce a legal effect for those concerned and are not executory cannot be subject to judgement as per the law. Dilşad Yılmaz, *İdari İşlemin İcrailik Özelliği* (Astana Yayınları 2014) 28. However, it can be handled and audited together with the administrative act for which it constitutes the basis. Onur Kaplan and Gül Fiş Üstün, ‘*Tespit Edici İşlemlerle Bağlantılı Olarak İdari Yargılama Hukukunda Tespit Davalarının Uygulama Alanı ve Gerekliği Üzerine Bir Değerlendirme*’ (2020) 26 (1) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 131, 140.

152 Even though the time period for filing a case for the cancellation of the zoning plans prepared with the assistance of the AI tool has passed, an action for the cancellation of the zoning plan may also be filed within a period of five years from the finalisation of the zoning plan, together with the implementation action taken by the administration based on the zoning plan. Art. 8/13 of the Law No. 3194: ‘*A lawsuit may be filed against finalised zoning plans or parcelisation plans within five years from the date of finalisation in any case*’.

153 Law on the Transformation of Areas Under Disaster Risk, OJ.31.05.2012/28309.

may be determined as a risky area due to the risky buildings and unlicensed buildings detected by the AI tool, or although an immovable property suitable for the public need has been detected by the AI tool, a DRS¹⁵⁴ may have been taken from the immovable property belonging to the real person in order to create a public service area.¹⁵⁵ At this point, the lawfulness of the procedural element of the administrative act shall also be examined in accordance with the ordinary judicial procedure.

Another possibility regarding the use of the AI tool is the determination of the area and immovable property regulated by the zoning plan, in other words, the determination of the subject matter of the administrative act. In fact, the administration using the AI tool and, if a causal link can be established, the administration producing the AI tool and other relevant institutions may be responsible for the determination of the zoning areas determined¹⁵⁶ during the preparation of the zoning plans in violation of the principles of urbanism.

For all these reasons explained, the legal review of the zoning plan and the implementation procedures to be carried out because of this zoning plan will not be separated from the ordinary procedures. However, since it is difficult to determine the authority to which we will address the claim for the damages resulting from the use of AI tools, a recourse problematic will arise.¹⁵⁷ If the contracting authority is not at fault for the damage caused by the AI vehicle produced by persons other than the contracting authority in connection with the use of the AI vehicle and the tender procedure, the contracting authority may require the private person producing the AI

154 İbrahim Karaaslan, Nuh Azgınoğlu and Murat Taşyürek, 'İmar Uygulamalarında Dağıtımın Veri Madenciliği Yöntemi Kullanılarak Yapılması' (2022) 11 (3) Nigde Omer Halisdemir University Journal of Engineering Sciences 506, 509.

155 The deductions to be made from the immovable property belonging to private law persons, or the deductions that are applied when there is no need for such a deduction or such a deduction, and that are contrary to the principle of equality that must be complied with when deducting the DRS, should be cancelled as they violate the right to property. For similar decisions, see also. File nr. 1989/641, Decision nr. 1990/2207 (TCS 6th Chamber, 20 November 1990); File nr. 2011/7373, Decision nr. 2013/956 (TCS 6th Chamber, 18 February 2013); File nr. 2001/2999, Decision nr. 2003/1045 (TCS 6th Chamber, 19 February 2003); File nr. 2010/12286, Decision nr. 2014/1512 (TCS 6th Chamber, 3 March 2014); File nr. 2008/3603, Decision nr. 2010/4508 (TCS 6th Chamber, 5 May 2010). For principles see also; Melikşah Yasin, 'Kentsel Dönüşüm Uygulamalarına İlişkin Temel İlkeler' in Melikşah Yasin/Cenk Şahin (Ed.), *Kentsel Dönüşüm Hukuku* (İstanbul Üniversitesi S.S.Önar İdare Hukuku ve İlimleri Araştırma ve Uygulama Merkezi Yayınları 2013) 14ff.

156 Orhan Kuntay, 'Yaşatılmaya Çalıřılan Ölü: Zoning (Bölgeleme)' (Mimarlık Dergisi, 2004) <<http://mimarlikdergisi.com/index.cfm?sayfa=mimarlik&DergiSayi=27&RecID=322>> accessed 9 March 2025; Mehmet Uçar and Handan Arslan, 'Milli Parklarda Bölgeleme ve Planlama: Cilo ve Sat Dağları Milli Parkı Örneğı' (2024) 34 Fırat Üniversitesi Sosyal Bilimler Dergisi 483, 490. For the decisions stating that the overlapping of industrial zones, conservation areas, forestry and agricultural areas in the zoning plans or their being located in very close areas, which would create a conflict if they are located together with residential areas, are grounds for cancellation. File nr. 2021/10712, Decision nr. 2023/3318 (TCS 2nd Chamber, 8 June 2023); File nr. 2014/6307, Decision nr. 20215/4184 (TCS 6th Chamber, 15 June 2015); File nr. 2015/6285, Decision nr. 2016/874 (TCS 6th Chamber, 1 March 2016); File nr. 2018/223, Decision nr. 2019/611 (Konya Regional Administrative Court 5th Administrative Case Chamber, 17 April 2019); File nr. 2008/7832, Decision nr. 2010/10934 (TCS 10th Chamber, 7 December 2010); File nr. 2016/3172, Decision nr. 2019/6463 (TCS 6th Chamber, 26 June 2019); File nr. 2020/73, Decision nr. 2020/239 (İzmir Regional Administrative Court 3rd Administrative Case Chamber, 11 March 2020); File nr. 207/1881, Decision nr. 2019/497 (Konya Regional Administrative Court 2th Administrative Case Chamber, 12 March 2019); File nr. 2012/1901, Decision nr. 2013/353 (TCS 6th Chamber, 30 January 2013); File nr. 2020/1885, Decision nr. 2024/1076 (TCS 6th Chamber, 21 February 2024).

157 Seyhan (n 118) 305.

vehicle to compensate for this damage in accordance with the provisions of the law of obligations.¹⁵⁸

It is possible to characterise zoning plans as living legal documents because they derive from many implementation procedures and affect the property rights of individuals. In the preparation of such an important administrative act, which establishes the principles of local development, it is important to take into account the various technological possibilities, within the framework of the principle of adaptability, as well as the opinions of various institutions and organisations. It should be noted that the positive effects of the use of AI tools in the context of land planning activities are more evident in terms of determining the amount of land to be covered by the plan and the optimal use of the land covered by the plan. Accordingly, AI tools will play an important role in calculating and evaluating the optimal density in the creation of public goods such as roads and parks. In this way, obtaining real numerical data, determining public goods along with their boundaries in the area subject to the plan, and enabling people to exercise their fundamental rights and freedoms through the use of public goods will be more effectively realised.

In fact, the existence of these opportunities cannot be ignored in the preparation and implementation of zoning plans, given the AI tools developed in recent years and the clear emphasis on the phenomenon of digital transformation in development plans. Such an approach would also be contrary to the provisions of Art. 5 and Art. 56 of the Constitution. The programmes from which architects and designers benefit in terms of building blocks can be used as an AI tool in the planning of larger areas, that is, in the preparation and implementation of zoning plans. Undoubtedly, the input of population densities, topographical features and economic characteristics of the areas covered by the zoning plan as data can lead to a zoning plan that responds more accurately to needs. Similarly, about the implementation of the principle of gradual unity of plans, the use of AI tools can make it easier to ensure compliance with the higher-level plan. All these developments will be beneficial in terms of the conformity of the lower-scale zoning plans to be made and may also reduce the legal disputes that may arise. Thanks to the use of AI tools, a much more effective announcement method can be applied than just announcing on the municipality's

158 Von Friedrich Graf von Westphalen, 'Produkthaftungsrechtliche Erwägungen beim Versagen Künstlicher Intelligenz (KI) unter Beachtung der Mitteilung der Kommission COM (2020) 64 final' translated by İpek Aldemir Toprak, '*Komisyon'un COM (2020) 64 Final Raporu Işığında Yapay Zekanın Hatalı İşleyişi İle İlgili Ürün Sorumluluğu Hukukuna İlişkin Düşünceler*' (2021) 27 (1) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 741, 744; Erdem Büyüksağış, Elif Ceren Türkoğlu and Onur Alptekin, 'Yapay Zeka İşletenin Hukuki Sorumluluğu' in Erdem Büyüksağış (ed), *Hukuk Perspektifinden Yapay Zeka* (On İki Levha Yayıncılık 2022) 86. Defect liability may also arise for faulty algorithms that were not recognised at the time the AI tool was provided, but were recognised later in the process due to machine learning.

website and bulletin board, and violations of the right to a fair trial arising from the delay or strict interpretation of the time limit for filing a case can be prevented.

In addition to these positive features, the use of AI tools in the preparation and implementation of zoning plans may have negative effects. In particular, the autonomous learning capability of AI tools, the possibility of making decisions in a non-transparent manner, the lack of human intervention, the emergence of the concept of machine error, or the risks related to how this information will be stored in the process of obtaining digital real data are also valid here. In addition to the legal arrangements that need to be made in order to minimise these risks, it should be emphasised that participation should be ensured in real terms in zoning plans. The use of AI tools can also lead local authorities to inertia, away from human intervention. In this respect, human intervention should not be completely excluded, and it is necessary to address the question of the legal liability of administrative authorities in relation to such use of AI tools. Of course, the use of AI tools will not absolve administrative authorities from legal liability, as any possible declaration of will to make, modify or withdraw the plans belongs to the administrative authority. Therefore, administrative cases will not be able to rely on this defence, and it will be much more important to present and investigate the data entered into the AI tools, including how it was obtained. It should be emphasised that the principle of transparency and the prohibition of discrimination should be respected in order to reduce the number of administrative cases.

Externally peer-reviewed.

The author has no conflict of interest to declare.

The author declared that this study has received no financial support.

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Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Preventing Sex Crimes In The Usa Federal Sex Offender Laws

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Abstract

The impact of the increased number of sex offenders has put pressure on governments to enact legislation with the aim of preventing those offenders in the USA. Federal law determined minimum standards for the prevention of sexual offences and mandated states that their laws should conform to minimum federal requirements even if they may go beyond the limits of those standards. In doing so, federal law gives states wide discretion to enact harsher legislation to deal with sex offenders. Within this mandatory framework, states have provided alternative approaches to address the concerns about sex offenders, namely sex offender registration, community notification, civil commitment, three-tier system laws and even chemical and/or surgical castration. For these reasons, in this work, the principle issue at stake is to examine and give a general explanation of federal sex offender laws with a view to understanding the aforementioned requirements and conclude that these measures can be implicated into the Turkish Criminal Justice System, if and to the extent that all arrangements are made and all legal requirements are fulfilled.

Keywords

Preventive measures, U.S. federal sex offender laws, Registration, Community notification, Civil commitment, Three-tier system, Criminal justice system

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To cite this article: Akbaba ZB, "Preventing Sex Crimes In The USA: Federal Sex Offender Laws"(2025) 76 Annales de la Faculté de Droit d'Istanbul 185. <https://doi.org/10.26650/annaes.2025.76.0007>



Over the past two decades, the impact of the increased number of sex offenders has put pressure on governments to enact legislation with the aim of preventing those offenders in the USA. When high-profile sexual assaults on children by previously convicted offenders increased significantly,¹ public reaction changed the concept of punishment for sex offenders because it supported the idea that the deterrent effect of a prison sentence is not sufficient to reduce sexual offences.² In response, a number of different and unique initiatives have been introduced by the legislatures in the USA, such as sex offender registration, community notification, civil commitment, and three-tier system laws for the protection of members of the public.³ Currently, sex offender registration, community notification, three-tier system and civil commitment statutes are the primary components of sex offender laws.⁴ Dugan specifies that these regulations have two main purposes: (1) permitting people to protect themselves from violent sex offenders and; (2) preventing or at least decreasing recidivism.⁵ Leora Sedaghati also stresses that the aim of those regulations is not a kind of punishment for sex offenders; it is a protection of society from them.⁶ Even though those measures were initially taken by individual states, such as California (1984), Arizona (1985), Utah (1987) and Oregon (1989)⁷, sexual crimes prevention became a federal goal in the wake of witnessing the emergence of the sex offender act at a federal level

- 1 Richard G Wright, 'Sex Offender Post-Incarceration Sanctions: Are There Any Limits?' (2008) 34 *New England Journal on Criminal and Civil Confinement* 17, 26. However,, the statistics on offender recidivism show that these assumptions are faulty, and sex offenders are less prone to re-offend than people convicted of other crimes. For more information, see also, Michelle L Meloy, 'The Sex Offender Next Door: An Analysis of Recidivism, Risk Factors and Deterrence of Sex Offenders on Probation' (2005) 16 *Criminal Justice Policy Review* 211, 227; Lisa L Sample and Timothy M Bray, 'Are Sex Offenders Different? An Examination of Re-arrest Patterns' (2006) 17 *Criminal Justice Policy Review* 83, 98; Terance D Miethe, Jodi Olson and Ojmarrh Mitchell, 'Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offense Type' (2006) 43 *Journal of Research in Crime and Delinquency* 204, 213; Hollie Matthews and Christopher Calia, 'Recidivism of 2002 Released' (Massachusetts Department of Correction, 2009) 23 <http://www.mass.gov/Eoops/docs/doc/research_reports/recidivism/rec2002.pdf> accessed May 30, 2021. According to Hanson and Bussiere, the empirical realities are the opposite of the assumptions; 'the present findings contradict the popular view that sexual offenders inevitably reoffend. Only a minority of the total sample (...) were known to have committed a new sexual offense'. Karl R Hanson and Monique T Bussiere, 'Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies' (1998) 60 *Journal of Consulting and Clinical Psychology* 348, 357.
- 2 Wayne A Logan, 'Sex Offender Registration and Community Notification: Past, Present, and Future' (2008) 34 *New England Journal on Criminal and Civil Confinement* 3, 5.
- 3 Caroline L Lewis, 'The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Private and Substantive Due Process' (1996) 31 *Harvard Civil Rights-Civil Liberties Law Review* 89, 94. Sex offender registration is a system to register the information of sex offenders with the local authorities to track of their whereabouts and activities. Community notification system gives members of the public access to view the information of sex offenders. Civil commitment process allows a judge to decide whether a sex offender who meets the definition of a Sexually Violent Predator or is alleged to be mentally ill should be required to go to a psychiatric hospital. Three-tier system is a classification system for sex offenders according to their risk to the community based on the severity of the crime committed.
- 4 Tom "Tad" Hughes, 'The Creation of and Considerations Surrounding Megan's Law, *The D.A. Can't Get No Relief*' in Ronald M Holmes and Stephen T Holmes (eds), *Current Perspectives on Sex Crimes* (Sage Publications 2002) 135.
- 5 Meghann J Dugan, 'Megan's Law or Sarah's Law? A Comparative Analysis of Public Notification Statutes in the United States and England' (2001) 23 *Loyola of Los Angeles International and Comparative Law Review* 617, 618.
- 6 Leora Sedaghati, 'Megan's Law: Does It Serve to Protect the Community or Punish and Brand Sex Offenders?' (2001) 3 *Journal of Legal Advocacy & Practice* 27.
- 7 For more information, see, Scott Matson and Roxanne Lieb, 'Sex Offender Registration: A Review of State Laws' [1996] *Washington State Institute for Public Policy* 1, 13-20.

and came to fruition in 1994.⁸ Federal law determined minimum standards for the prevention of sexual offences and mandated states that their laws should conform to minimum federal requirements even if they may go beyond the limits of those standards.⁹ In doing so, federal law gives states wide discretion to enact harsher legislation to deal with sex offenders. Within this mandatory framework, states have provided alternative approaches to address the concerns about sex offenders, namely sex offender registration, community notification, civil commitment, three-tier system laws and even chemical and/or surgical castration. For these reasons, in this work, the principle issue at stake is to examine and give a general explanation of federal sex offender laws with a view to understanding the aforementioned requirements and conclude that these measures can be implicated into the Turkish Criminal Justice System, if and to the extent that all arrangements are made and all legal requirements are fulfilled.

The current federal sex offender law originates in three legislative initiatives regarding registration and community notification systems in the USA. In 1994, Congress passed the Jacob Wetterling Act, which required states to obtain specific information from designated sex offenders and to provide a registration list. Two years later, the Jacob Wetterling Act was amended with Megan's Law and mandated that states notify members of the public of dangerous sex offenders. In 2006, Congress passed the Adam Walsh Act, which replaced the registration and community notification provisions of the Jacob Wetterling Act and redesigned these provisions, creating the civil commitment and three-tier systems. To understand the new and unusual concept of sex offender laws in the USA, this article examines the changes in punishment for sex offences through the evolution of sex offender laws since the 1990s. This examination will be carried out by taking the specific provisions of federal sex offender laws into consideration, such as registration, community notification, civil commitment, and three-tier system provisions.

The origins of federal law pertaining to sex offender registration and community notification were founded by the end of the twentieth century. In 1994, Congress passed the Jacob Wetterling¹⁰ Crimes Against Children and Sexually Violent Offender

8 Kimberly B Wilkins, "Sex Offender Registration and Community Notification Laws: Will These Laws Survive?" (2003) 37 University of Richmond Law Review 1245, 1245. In 1994, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act was enacted.

9 Wilkins (n 8) 1249-50.

10 On the evening of 22 January 1989, 11-year-old Jacob Wetterling was abducted from a group of 3 boys by an unknown gunman. The gunman told the boys to leave their bikes and lay face down on the ground, and thereafter he told the two of them to run into the woods. When they reached the wooded area, they turned around and the gunman and Jacob were gone.

Registration Act¹¹—signed by President Bill Clinton on September 13, 1994—which encouraged states to require sex offenders' registration as part of the Violent Crime Control and Law Enforcement Act of 1994.¹² This statute served as a child protective statute and received five different amendments: Megan's Law,¹³ the Pam Lychner Sex Offender Tracking and Identification Act of 1996,¹⁴ the Jacob Wetterling Improvements Act of 1997,¹⁵ the Protection of Children from Sexual Predators Act of 1998,¹⁶ the Campus Sex Crimes Prevention Act of 2000,¹⁷ and the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003.¹⁸ In 2006, Congress replaced the Jacob Wetterling Act with the Adam Walsh Child Protection and Safety Act of 2006.¹⁹

The Jacob Wetterling Act established guidelines for states to track sex offenders by confirming their residence after their release from prison into society. Under this legislation, states establish sex offender registries by obtaining specific information from designated sex offenders. For this purpose, the Attorney General should set up guidelines for this registration programme, which requires the following:

- A. a person who is convicted of a criminal offense against a victim who is [a] minor or who is convicted of a sexually violent offense to register a current address with a designated State law enforcement agency for the time period specified in subparagraph (A) of subsection (b)(6); and
- B. a person who is [a] sexually violent predator to register a current address with a designated State law enforcement agency unless such requirement is terminated under subparagraph (B) of subsection (b)(6).²⁰

To date, Jacob has not been found, no arrest has been made, and his case remains open. For more information, see Jacob Wetterling Resource Centre, 'Jacob's Story' <<http://www.jwrc.org/WhoWeAre/History/JacobsStory/tabid/108/Default.aspx>> accessed December 06, 2020.

11 42 U.S.C. 14071 (1994).

12 If states fail to comply with the programme which is designated in this Act, they would lose 10% of the funds for which they are eligible under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968. 42 U.S.C. § 14071(f)(2) (A)

13 Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996), (codified as amended at 42 U.S.C. 14071) hereinafter Megan's Law.

14 Pam Lychner Sex Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (1996), (codified as amended at 42 U.S.C. 14072) hereinafter the Pam Lychner Act.

15 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2461-2471 (1997).

16 Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2985 (1998).

17 Campus Sex Crimes Prevention Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1537-1539 (2000).

18 PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 604-606 (2003).

19 Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. 16901 (2006); Pub. L. No. 109-248, 120 Stat. 587-650 (2006), hereinafter the Adam Walsh Act.

20 42 U.S.C. § 14071(b)(6)(B) (1994) discloses the conditions for terminating the registration requirement. The condition is if there is a determination that a person no longer suffers from a mental abnormality or personality disorder, which made that person commit a predatory offence- an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimisation of a sexually violent offense, the registration requirement must be terminated.

Paragraph (1) of Section 14071(a) cites that states must register two discrete groups of sex offenders. The first group is persons convicted of a sexually violent offence or a criminal offence against a victim who is a minor. The second group consists of sexually violent predators. These groups are defined in paragraph (3):

- A. The term ‘criminal offense against a victim who is a minor’ means any criminal offense that consists of-
 - i. kidnapping of a minor, except by a parent;
 - ii. false imprisonment of a minor, except by a parent;
 - iii. criminal sexual conduct toward a minor;
 - iv. solicitation of a minor to engage in sexual conduct;
 - v. use of a minor in a sexual performance;
 - vi. solicitation of a minor to practice prostitution;
 - vii. an attempt to commit an offense described in any of clauses (i) through (vii), if the State-
 - (I) makes such an attempt a criminal offense; and
 - (II) Chooses to include such an offence in those that are criminal offences against a victim who is a minor for the purposes of this selection.

For the purposes of this subparagraph, conduct that is criminal only because of the age of the victim shall not be considered a criminal offence if the perpetrator is 18 years of age or younger.

- B. The term ‘sexually violent offence’ means any criminal offence that consists of aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code, or as described in the State criminal code) or an offence that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse (as described in such sections of title 18, United States Code, or as described in the State criminal code).
- C. The term ‘sexually violent predator’ means a person who has been convicted of a sexually violent offence and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offences.

The Jacob Wetterling Act determined the minimum standards for the state registration of sex offenders and mandated that the information collected under this Act and a State registration programme must be exposed to law enforcement agencies and government agencies.²¹ Therefore, the original form of the Jacob Wetterling Act obligated states to register persons convicted of a criminal offence against a victim who is a minor, or convicted of a sexually violent offence, or those who are sexually violent predators. According to subsection (d), a state prison officer or the court must notify the person about the obligation of registration and provide information about the registration programme such as the frequency of informing the authorities about changing the address whether in the same State or to another one. At a minimum level, persons who are required to register must inform the authorised agencies about their addresses and provide fingerprints and photographs of themselves. Moreover, the information of the person who has to register as a result of being a sexually violent predator must include the name of the person, identifying factors, estimated future addresses, offence history, and documentation of any treatment received for mental abnormality or personality disorder.²² According to subparagraph (A) of Subsection (b) (6) of Section 14071, the length of the registration has to be 10 years from the time beyond release from prison, placed on parole, supervised release, or probation.²³

i. Examination of the Registration Requirement

In response to public concern about sex offenders, the registration system was designed to help law enforcement officials track sex offenders after they were released from prison and to deter future crimes.²⁴ However, the debates surrounding the registration system illustrate that, although this system seeks to ensure public safety, it violates the offenders' rights and discourages them from being a part of society.²⁵

The main reason for creating a registration system was so that it could be used to solve the crimes committed by potential offenders who displayed similar behaviours previously. Considering this perception, the registration system was intended to decrease the recidivism rates, prevent sex offenders from reoffending, and protect children from repeat sex offenders.²⁶ Sample and Bray pointed out that because of the prediction of 'once a sex offender, always a sex offender' the legislature enacted

21 42 U.S.C. 14071(d) (1994).

22 42 U.S.C. § 14071(b)(1)(B) (1994).

23 42 U.S.C. § 14071(b)(6)(A) (1994).

24 Cheryl Hanna, 'Living with Risk: The American Experience with Sex Offender Legislation' (1997) 46 University of New Brunswick Law Journal 153, 155.

25 Scott Matson and Roxanne Lieb, 'Sex Offender Registration: A Review of State Laws' (1997) 17 Children's Legal Rights Journal 22, 22-24.

26 Abril R Bedarf, 'Examining Sex Offender Community Notification Laws' (1995) 83 California Law Review 885, 893.

the registration law to address the problem of re-offenders.²⁷ Although the intention of the legislature was supported by members of the public, the empirical research on the recidivism of sex offenders shows that sex offenders are less likely than other offenders to be recidivists.²⁸ The United States Department of Justice research on the re-arrest and recidivism rates of State prisoners released in 1983 shows that, with the exception of murderers, rapists have the lowest recidivism rate of all offenders and they are less likely to be re-arrested for committing any other crimes.²⁹

ii. Criticism of the Registration Requirements

According to Dr Jill Levenson, an expert on sex offender treatment and management, when the recidivism rates and the necessity of sex offender laws are considered, the recidivism rates are not sufficiently high to give rise to those regulations.³⁰ Moreover, another research project on recidivism rates among sex offenders—before and after the implementation of the registration system in Iowa—showed that the difference in recidivism for both groups was just 0.5%, which means that the registration system is not as effective as expected.³¹ However, it can be said that this assumption misstates the facts about the registration system and recidivism rates due to the dark figure (offences that do not come to light because they are not reported to the police by victims) of sexual offences.

Due to the assumption of recidivism and the likelihood of re-offending, some commentators believe that incarceration or any treatment is not effective. Therefore, they argue that other alternatives, such as registration system, should be acceptable. In this sense, the treatment programme for sex offenders can be classified as *non-biological therapies* and *biological therapies*. One of the most common non-biological therapies is ‘cognitive-behavioural therapy’ which provides ‘social skills training, sex education, cognitive restructuring, aversive conditioning, and victim empathy therapy’.³² The biological therapies include surgical castration or pharmacological (drug) therapy, which will be evaluated in the following chapters of this thesis. As Marques points out, when a sex offender, who has never undergone a treatment, commits another offence after release from prison, members of the public call for treatment programmes. However, after receiving treatment, if the same

27 Lisa L Sample and Timothy M Bray, ‘Are Sex Offenders Dangerous’ (2003) 3 *Criminology & Public Policy* 59, 60.

28 Bedarf (n 26) 896.

29 Allen J Beck and Bernard E Shipley, ‘Recidivism of Prisoners Released in 1983’ (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report, 1989) 6 <http://blueshifhome.com/recidivism/statistics/bjs/BJS%20-%20Recidivism%20of%20Prisoners%20Released%20in%201983_NCJ-116261.pdf> accessed June 02, 2021.

30 Human Rights Watch, ‘No Easy Answers: Sex Offender Laws in the US’ (2007) 19 *Human Rights Watch* 1, 21 <<http://www.hrw.org/en/reports/2007/09/11/no-easy-answers>> accessed May 30, 2021.

31 Geneva Adkins, David Huff and Paul Stageberg, ‘The Iowa Sex Offender Registry and Recidivism’ (Iowa Department of Human Rights, Division of Criminal and Juvenile Justice Planning and Statistical Analysis Center, 2000) 28 <http://www.humanrights.iowa.gov/cjpp/images/pdf/01_pub/SexOffenderReport.pdf> accessed May 30, 2021.

32 Adam Shajnfeld and Richard B Krueger, ‘Reforming (Purportedly) Non-Punitive Responses to Sexual Offending’ (2006) 25 *Developments in Medical Health Law* 81, 93.

scenario occurred, the harsh sexual offender laws would be preferred and treatment would be placed on the back burner.³³ Proponents of the registration system claim that the failure of rehabilitation can be seen from the recidivism rates. At this point, Furby, Weinrott and Blackshaw cite that after incarceration or clinical treatment, sex offenders tend to reoffend.³⁴ In their research, with an evaluation of their findings, they concluded that

*we can (...) say with confidence that there is no evidence that treatment effectively reduces sex offense recidivism (...) [and] (...) clinical treatment reduces rates of sex offenses in general and no appropriate data for assessing whether it may be differentially effective for different types of offenders.*³⁵

However, some studies have reported more positive conclusions on the effectiveness of sex offenders' treatment. For instance, Marshall and Barbaree reported that 'the treatment goal of reducing deviant sexual desires was achieved'.³⁶ Therefore, rather than spending public funds on registration, it must be directed towards treatment and rehabilitation of sex offenders because the aim of the criminal justice system is to rehabilitate offenders and reintegrate them into society. If there is a chance to accomplish this aim, funds could be better spent on this purpose. At this point, the implementation of pharmacological drug therapy (chemical castration) seems to serve the main purpose of the criminal justice system; however, if it is used as a treatment, not as a punishment.

Another debate over the registration law relates to the suggestion that it provides a legal ground for police officers to arrest or detain registered sex offenders when those offenders are in a suspicious situation.³⁷ For instance, if a police officer becomes suspicious of someone who is around a playground or a school, that police officer can detain that person and investigate his/her criminal record in a short period of time with the help of the registration list. Although the registration law helps authorities and provides a legal ground for their actions, opponents of sex offender registration requirements believe the scope of the registration laws is over-inclusive and the duration of registration is too long.³⁸ Therefore, it could obstruct the aim of these laws

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because people who should register under the statute but pose no risk to society would burden the authorities and distract or prevent them from monitoring the dangerous offenders.

Furthermore, fiscally and practically, the law enforcement agencies have insufficient resources to track all the registered sex offenders.³⁹ Law enforcement officials complained about the length of the registration, the expansion of the registration laws, the increased number of offenders, and the lack of personnel and equipment.⁴⁰ Therefore, narrowing the scope of the registration law can address the concerns mentioned above. For instance, limiting the number of offenders who are subject to the registration system can be an effective way to ensure public safety, to support sex offenders' reintegration into society and to dispel the concerns about this system.

However, despite the registration laws receiving such criticism, the stories of Polly Klaas and Megan Kanka directed federal legislators—by receiving the support of the public and the media—to extend the scope of the Jacob Wetterling Act. Both of these girls were assaulted and murdered by repeat sex offenders who had been convicted of criminal sexual assault and released from prison.⁴¹ For this reason, these heinous crimes led to the notion that the registration system was not enough to deter sex offenders and that if law enforcement agencies know the whereabouts of previously convicted sex offenders, the public should know about their presence as well.⁴² At this point, in addition to the critiques on registration system, it seems that the main problem is because of the public concerns about sex offenders; governments overreact or react too quickly and pass new regulations or punishments without evaluating the consequences or outcomes rather than improving the existing system and making it more effective.

The continued number of sexual offences prompted the Congress to amend the Jacob Wetterling Act with different types of new requirements.⁴³ Considering the facts, some members of the Congress argued that taking a precaution that informs the public when a previously convicted sex offender moves into their neighbourhood could be

39 Kelsie Tregilgas, 'Sex Offender Treatment in the United States: The Current Climate and an Unexpected Opportunity for Change' (2009-10) 84 Tulane Law Review 729, 733.

40 Human Rights Watch, (n 30) 44-46.

41 Lisa L Sample and Mary K Evans, 'Sex Offender Registration and Community Notification' in Richard G Wright (ed), *Sex Offender Laws, Failed Policies, New Directions* (Springer Publishing 2009) 213.

42 Wright, 'Sex Offender Post-Incarceration Sanctions: Are There Any Limits?' (n 1) 19-20.

43 During the mid-1990s every state passed a Megan's Law, and Congress decided to regulate these requirements with a federal Megan's Law. Jason F Mohan, 'A Community's Response to a Shocking Crime: The Jessica Lunsford Act and the Florida Sexual Offender Registry' (2007) 40 Suffolk University Law Review 703, 707.

an effective remedy.⁴⁴ The first amendment of the Jacob Wetterling Act was Megan's Law⁴⁵, which was enacted in 1996.⁴⁶ This amendment redesignated Subsection (d) of Section 170101, which was about the release of information. Although the original form of the Jacob Wetterling Act stated that the information was to be treated as *private data*, the statute allowed that it could be revealed to law enforcement agencies and to governmental agencies and that some 'relevant information'⁴⁷ could be released for the protection of the public from a definite person. Megan's Law amended the aforementioned subsection and 'eliminated the general requirement that information collected under state registration programmes be treated as private data'.⁴⁸ It provided that the information of a person who was required to register under this Act could be made public for any reason permitted under the laws of the State.⁴⁹ In 1997, the U.S. Department of Justice issued guidelines for the States about the application and the compliance of Megan's Law through a Press Release.⁵⁰ The Press Release clarified two main points about releasing the information requirement, which were focused on the guidelines: (1) the information relating to registered sex offenders must be disclosed not only to law enforcement agencies but also to members of the public 'as necessary to protect the public from registered offenders'; (2) it has to be done without any arbitrary basis. By doing so, any governmental or non-governmental organisations, prospective employers, or the victims of sex offences can access the information of registered sex offenders.⁵¹ As a result, under Megan's Law, the release of information to the public changed the nature of the Jacob Wetterling Act, and after this amendment, the Act was composed of two main components: registration and community notification.⁵²

44 Tracy L. Silva, 'Dial "1-900-PERVERT" and Other Statutory Measures that Provide Public Notification of Sex Offenders' (1994-5) 48 Southern Methodist University Law Review 1961, 1963.

45 In 1994, a seven-year-old girl named Megan Kanka was raped and murdered in New Jersey by a person who was a sex offender. She was convicted twice and had served six years in prison because of a criminal offense against a victim who was a minor, Jesse Timmendequas. Megan was lured into the grasp of her neighbour by offering to show her a puppy. Her body was found in a park near her home. Thereafter, this tragedy triggered a legislative action and an act that came to be known as Megan's Law. For more information, see, Megan Nicole Kanka Foundation, 'Our Mission' <<http://www.megannicolekankafoundation.org/mission.htm>> accessed December 15, 2024.

46 It was modelled after a statute enacted in New Jersey (N.J. STAT. ANN. 2C:7-1-11), in 1994, following the murder of Megan Kanka by a previously convicted sex offender living nearby.

47 Regarding the *relevant information*, federal law gives law enforcement agencies discretionary powers to determine which information can be released. 42 U.S.C. 14071(d)(2) (1996).

48 Department of Justice, Office of the Attorney, 'Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act' (1997) 62 Federal Register 39009, 39010 <<http://www.gpo.gov/fdsys/pkg/FR-1997-07-21/pdf/97-19047.pdf>> accessed 13 December 2020.

49 42 U.S.C. 14071(d)(1) (1996).

50 U.S. Department of Justice Press Release, 'Justice Department Releases Megan's Law Guidelines' (7 April 1997) <<http://www.justice.gov/opa/pr/1997/April97/140vaw.htm>> accessed December 13, 2020.

51 Department of Justice, Office of the Attorney, 'Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act' (n 48) 39019.

52 On June 22, 1996, former President Clinton made the following statement about Megan's Law in his weekly radio address: [W]e are fighting for something (...) for freedom to walk around the block at night and feel safe (...) and not worry about your children playing in the yard. (...) we are fighting for our children and their future. (...) we have taken decisive steps to help families protect their children, especially from sex offenders. (...) that's why in the crime bill we required every state in the country to compile a registry of sex offenders, and gave states the power to notify communities about child sex offenders and violent sex offenders that move into their neighbourhoods. (...) last month I signed Megan's law. That insists

Moreover, the Press Release on Megan's Law gave a large discretion to the States: (1) community notification should be applied both to sexually violent offenders and child molesters; and (2) by the phrase 'affirmative approach', States could extend the scope of the community notification and registration requirements by providing open-registration-lists or keeping neighbours informed of the existence of high-risk offenders.⁵³

In accordance with the guidelines, states must provide a registration system for offenders who are convicted after the establishment of the registration system, although registering the information of previously convicted offenders is optional for states.⁵⁴ Thus, under these guidelines, it can be said that if States consider it necessary to impose any new requirements on offenders convicted prior to the amendment of subsection (d) of section 170101, Megan's Law has a retroactive effect.⁵⁵ As can be seen in the States' Acts, 41 states mandated the retroactive application of community notification statutes among the 50 states and the District of Columbia.⁵⁶

i. Examination of Community Notification

The idea of disclosing the information of sex offenders and identifying them in society has gained the support of an overwhelming majority of the public.⁵⁷ Parents, especially, may feel empowered to protect their children from potentially dangerous people, and once an offender has been identified, it would be easy to prevent and control crimes committed by reoffenders, particularly against children, by knowing

that states tell a community whenever a dangerous sexual predator enters its midst. Too many children and their families have paid terrible price because parents did not know about the dangers hidden in their own neighbourhoods. Megan's law (...) will help to prevent more of these terrible crimes (...) The crime bill laid the foundation for this national registry by requiring states to track sexual offenders within their borders. Megan's law makes sure parents get this information so they can take steps to watch out for their children.

'President Clinton's Weekly Radio Address' *CNN* (22 June 1996)

<<http://edition.cnn.com/US/9606/22/clinton.radio/transcript.html>> accessed December 13, 2020.

- 53 U.S. Department of Justice Press Release, 'Justice Department Releases Megan's Law Guidelines' (7 April 1997) <<http://www.justice.gov/opa/pr/1997/April97/140vaw.htm>> accessed December 13, 2024.

Moreover, the guidelines declare that states can make the risk assessment about the offenders and determine the level of their danger and disseminate their information according to their character or the type of the offense that they commit. Department of Justice, Office of the Attorney, 'Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act' (n 48) 39019.

- 54 [T]o comply with the Megan's Law amendment, a state must establish a conforming information release program[me] that applies to offenders required to register on the basis of convictions occurring after the establishment of the program[me]. States do not have to apply new information release standards to offenders whose convictions predate the establishment of a conforming program[me], but the act does not preclude states from applying such standards retroactively to offenders convicted earlier if they so wish.

Department of Justice, Office of the Attorney, 'Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act' (n 48) 39019.

- 55 '[T]he Act is not intended to, and does not have the effect of, making states less free than they were under prior law to impose such requirements. Hence, the Act's standards constitute a floor for State program[me], not a ceiling. States do not have to go beyond the Act's minimum requirements.' Department of Justice, Office of the Attorney General, 'Megan's Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act' (1999) 64 Federal Register 572, 575 <<http://www.gpo.gov/fdsys/pkg/FR-1999-01-05/pdf/98-33377.pdf>> accessed February 8, 2024.

- 56 Alan R Kabat, 'Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy For a Symbol's Sake' (1997-8) 35 American Criminal Law Review 333, 359-61.

- 57 Bedarf (n 26) 906.

who those sex offenders are.⁵⁸ Supporters of community notification laws believe that under public surveillance, sex offenders are less likely to commit another crime; hence,, the laws deter future sex crimes.⁵⁹ As a practical matter, however, there are many debates surrounding community notification laws. Some suggest that they cause a panic in society and expose the identities of victims; offenders would be subject to vigilantism and ostracism and these laws give rise to employment or housing discrimination.⁶⁰ Nevertheless, the proponents of community notification laws support the dissemination of the information. However, the government has problems with the constitutional and practical concerns of this system.⁶¹

Although making the public aware of the presence of sex offenders in their neighbourhoods has the benefit of reducing the risk of victimisation, it leads to a *moral panic* regarding the identifiable threat. Cohen described moral panic as where ‘a condition, episode, person or group of persons emerges to become defined as a threat [mostly by the mass media] to societal values and interests’.⁶² In accordance with this description, the stories of assaulted children were reported intensively by the media, and this manipulation led to a high level of public fear and anxiety that sex offenders can attack at any time.⁶³ At this point, according to Goode and Ben-Yehuda, there are five elements of the definition of the moral panic; concern, consensus, hostility, disproportionality and volatility.⁶⁴ In this context, concern points to the sensation and consternation, which are mostly caused by media, and social agitation; consensus refers to being in instant need of help over the extent of the problem; hostility illustrates the reaction of the public towards the roots of the threat; disproportionality indicates the balance between the perceived danger and the real danger; and volatility represents the movements of the persistence panic.⁶⁵

As far as sex offences are considered, the concern can be seen either in social movements or in legislative activity. For instance, after horrible sexual crimes, parents often raise funds to emotionally support other victims and their families or

58 Wilkins (n 8) 1252.

59 Carol L Kunz, ‘Comment, Toward Dispassionate, Effective Control of Sexual Offenders’ (1997-8) 47 American University Law Review 453, 473.

60 Maureen S Hopbell, ‘Balancing the Protection of Children against the Protection of Constitutional Rights: The Past, Present and Future of Megan’s Law’ (2003-4) 42 Duquesne Law Review 331, 342.

61 Kristen M Zgoba, ‘Spin Doctors and Moral Crusaders: The Moral Panic Behind Child Safety Legislation’ (2004) 17 Criminal Justice Studies 385, 386. Community notification has been challenged as a violation of the constitution regarding sex offenders’ rights. In this sense, the dissemination of the information can violate Equal Protection, Due Process Clause and Privacy Rights, Prohibition of Cruel and Unusual Punishment or Ex Post Facto Clauses guaranteed under the U.S. Constitution. For more information, see also, Simeon Schopf, “‘Megan’s Law’: Community Notification and the Constitution” (1995-6) 29 Columbia Journal of Law and Social Problems 117.

62 Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, (3rd edn, Routledge 2002) 9.

63 John Pratt, ‘Sex Crimes and the New Punitiveness’ (2000) 18 Behavioral Sciences 35, 46; David Finkelhor and Richard Ormrod, ‘Kidnapping of Juveniles: Patterns from NIBRS’ [2000] Juvenile Justice Bulletin 1 <http://www.ncjrs.gov/html/ojdp/2000_6_2/contents.html> accessed June 03, 2021.

64 Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Construction of Deviance* (Blackwell 1994) 34-51.

65 Zgoba, (n 61) 389-97.

engage in lobbying activities for harsher laws. As for the legislation aspect, the term *predator*, which is used in sex offender laws and has no legal or psychological basis,⁶⁶ indicates the level of dangerousness of sex offenders and the legislative body intends to depict them as more brutal. From this point of view, the problem is not with the use of this emotive term, which is a metaphor, but with the use of an unfamiliar or non-existing word in a legal context that is a pejorative way of describing sex offenders. In this sense, the use of this term reflects the legislature's concerns and their strong reaction to atrocious crimes.

According to Welch, Price and Yankey, for the members of the public, with respect to moral panic, 'there must exist a widespread belief that the problem at hand is real, it poses a threat to society, and something should be done to correct it'.⁶⁷ In sex offence cases, with media contribution, the social reaction against sexual offences put pressure on governments and resulted in sex offender laws.⁶⁸

Moral panic causes hostility towards sex offenders who harm children.⁶⁹ Dissimilar to other offences, sexual crimes against children are subject to different types of punishments or regulations, which create an assumption that sex offenders are not like other criminals and are much more dangerous than those people.⁷⁰ As seen from the nature of community notification, this system is stricter than the registration requirement and poses a danger to the privacy and safety of sexual offenders. Besides the overbroad scope of the community notification laws—for instance, people who committed a sexual offence long ago can be included on the list—they cause 'public ridicule, ostracism, job discrimination, housing discrimination and other forms of ongoing punishment'⁷¹, which prevents sex offenders from rebuilding a new life.⁷² Due to the stigma and obstruction, most sex offenders move away to places where they hope to be less known and not to be faced with the difficulties of the notification system. Otherwise, because of hostility, they will be harassed, their houses will be vandalised, and they will be attacked by vigilantes or isolated from their living areas.⁷³

⁶⁶ Ibid 390.

⁶⁷ Michael Welch, Eric A Price and Nana Yankey, 'Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media' (2002) 24 *Youth & Society* 3, 10.

⁶⁸ *ibid*.

⁶⁹ Ibid 11.

⁷⁰ Zgoba (n 61) 391-2.

⁷¹ Hopbell (n 60) 342.

⁷² Lewis (n 3) 92.

⁷³ Alex B Eyssen, 'Does Community Notification for Sex Offenders Violate the Eighth Amendment's Prohibition against Cruel and Unusual Punishment?' A Focus on Vigilantism Resulting from "Megan's Law" (2001-02) 33 *St Mary's Law Journal* 101, 115-6; Tregilgas, (n 39) 736-6.

Disproportionality means that ‘the perceived danger is greater than the potential harm’.⁷⁴ Due to the nature of sex offences, there is a belief that the threat and the damage—emotional, physical, or financial—of these crimes are excessive. However, public anxiety about sexual crimes relies on ‘false or exaggerated claims’.⁷⁵ For instance, there is a notion that sex offenders are mostly strangers and knowing their identities and whereabouts will prevent future crimes. However, according to the empirical evidence, the overwhelming majority of victims of sex offences knew their attackers.⁷⁶ According to Snyder, with respect to the data of victim-offender relationships in sexual assaults in 12 states, 13.8% of children were assaulted by strangers, 26.7% of them were attacked by a family member and approximately 60% of victims were assaulted by an acquaintance.⁷⁷ Therefore, as opposed to the assumption that sex offenders are strangers, it is more likely that although victims know their attackers, they continue to be attacked by them and cannot avoid being abused. At this point, community notification can be a solution to prevent further harassment. However, this issue raises another argument that releasing the information and criminal records of sex offenders—for instance, incestuous relationships—may result in identifying the victims, as well. Although Megan’s Law prohibits disclosing the identity of a victim of an offence, when the notification lists reveal the criminal background of an offender, this may lead to a double victimisation of a victim. Unfortunately, this double victimisation may have other traumatic effects on victims who have experienced trauma because of being a victim of previous sexual assault.⁷⁸ In this sense, although the potential harm is not as great as the perceived danger, the consequences caused by the perceived danger cause another problematic issue for the notification system.

Regarding volatility, the fluctuations and the stabilisation of the degree of panic can be seen in the legislative activity. For instance, early twentieth century sex offenders were treated the same as other criminals and received the same punishments.⁷⁹ In the late 1930s, the fear of sexual crimes intensively increased and the legislatures reflected this fear by enacting specific sex offenders’ statutes with a different

74 Welch, Price and Yankey (n 67) 15.

75 Ibid 16.

76 For more information, see also, Lawrence Greenfield, ‘Sex Offences and Offenders: An Analysis of Data on Rape and Sexual Assault’ (Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2 July 1997) <<http://www.mincava.umn.edu/documents/sexoff/sexoff.pdf>> accessed May 31, 2021; Lana Stermac, Janice Du Mont and Shelia Dunn, ‘Violence in Known-Assailant Sexual Assaults’ (1998) 13 *Journal of Interpersonal Violence* 398; Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, ‘National Crime Victimization Survey’ (Collection Period 1973-2008) <<http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=245>> accessed May 31, 2021.

77 Howard N Snyder, ‘Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics’ (America Statistical Association, 2000) 10 <<http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrlr.pdf>> accessed May 31, 2021.

78 Richard G Wright, ‘Sex Offender Registration and Notification: Public Attention, Political Emphasis, and Fear’ (2003) 3 *Criminology & Public Policy* 97, 100-1.

79 Rachel Blacher, ‘Historical Perspective of the “Sex Psychopath” Statute: From the Revolutionary Era to the Present Federal Crime Bill’ (1994-5) 46 *Mercer Law Review* 889, 897.

approach.⁸⁰ By 1960, the involuntary civil commitment procedure was considered as a treatment of sex offenders instead of punishing them after conviction.⁸¹ In the 1980s, the legislatures reconsidered the accepted punishments and treatment and ‘shifted [their statutes] from rehabilitating convicted criminals to punishing them in proportion to the severity of their crimes’.⁸² By 1990, the trend of punishing sex offenders was replaced by the registration and notification system after conviction. According to Palermo and Farkas,

because of the media’s focus on sex offenders, pressure is applied on legislators and politicians to support the sex offender laws (...) no politician wants to appear callous or unresponsive to a frightened community worried about their safety and the safety of their children (...) [therefore] these political and social forces [are] the passage of sex offender specific laws in a variety forms.⁸³

Hence, whenever a heinous sex crime occurred, it was highly publicised by the media and it increased the level of panic in the society, due to the fact that the legislators felt deeply responsible to restructure sex offender laws. As a result, without any hesitation, several methods, such as chemical or surgical castration, have been devised to address the problem of dangerous sex offenders. However, it indicates that these restructured sex offender laws overstep their aim of preventing sex offenders from striking again and protecting society from those people and have made the process more complex. As is seen from the consequences of the community notification laws, rather than meeting the needs of society, they caused a great moral panic resulting in distraction from the real problems of victims and sex offenders.

Only five months after the Megan’s Law amendment, The Jacob Wetterling Act was expanded with the Pam Lychner⁸⁴ Sexual Offender Tracking and Identification Act of 1996. The first step towards a national registration system increased the registration requirement such as the information that the FBI can keep in the national database, registration for life, the submission of the information directly by registrants, and so forth. One of the most important provisions under this amendment was the establishment of the Federal Bureau of Investigation (FBI) database to create

⁸⁰ Ibid 899.

⁸¹ Beth K Fujimoto, ‘Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders’ (1992) 15 University of Puget Sound Law 879, 880.

⁸² Brian G Bodine, ‘Washington’s New Violent Sexual Predator Commitment System: An Unconstitutional Law and An Unwise Policy Choice’ (1990) 14 University of Puget Sound Law Review 105, 113.

⁸³ George B Palermo and Mary A Farkas, *The Dilemma of the Sexual Offender* (Charles C. Thomas Publisher 2001) 154.

⁸⁴ Pamela Sue Rogers –Pam Lychner- was a real estate broker and in 1990 while she was waiting for a customer with her husband, a workman from a cleaning company who had cleaned the house the day before came to the house because of unfinished business. The workman was a convicted rapist and child molester and had been released on early release. That day, he tried to assault Pam Lychner; however, with the help of her husband, he failed. For more information, see, Lisa Gray, ‘After the Crash’ *Houston Press* (Houston, 23 October 1997) <<http://www.houstonpress.com/1997-10-23/news/after-the-crash/>> accessed May 31, 2023.

a national database to monitor the movement of certain sexual offenders: (1) who are child molesters; (2) who are sexually violent predators; or (3) who have been convicted of a sexually violent offence.⁸⁵

The Jacob Wetterling Act before the amendment considered the transmission of conviction data and fingerprints to the FBI necessary and sufficient, and this transmission was to be fulfilled by the State Law enforcement agency.⁸⁶ However, the Pam Lychner Act obliges States' law enforcement agencies to provide all the information prescribed by subsection (b) (1) to the FBI.⁸⁷ According to this new amendment, the FBI database must include the current residence address, if the address is changed; the new address, fingerprints, a photograph, a form—this form declares the duty of the registrant who has to read and sign it⁸⁸—, name of the person, identifying factors, anticipated future residence, offence history, and documentation of any treatment received for the mental abnormality or personality disorder of the person. Moreover, as a precaution, besides the transmission of the information by individual states, the sex offenders should directly register their information under some circumstances. First, if a state has not provided a *minimally sufficient sexual offender registration program*,⁸⁹ certain sexual offenders who are convicted of criminal offences against minors or of sexually violent offences and/or who are sexually violent predators must directly submit their information—a current address, fingerprints, and a current photograph—to the FBI.⁹⁰ Second if those offenders move to another state, they have to directly notify the FBI and state in which their new residence is located, with the current address, fingerprints, and photograph. This notification must be made within 10 days of settling down in his new home.⁹¹ The target of this requirement is to provide public safety when sex offenders move to another state that does not have any registration or notification programme.⁹²

The Act is based on two different types of time period for the registration of a person with the FBI. Apart from the notification and preservation of the information in the state registration database, certain sex offenders are bound to report their information for ten years to the FBI, after their release from prison or when placed on parole or probation.⁹³ If an offender is convicted of the aforementioned offences

85 42 U.S.C. 14072(b) (1996).

86 42 U.S.C. 14072(b)(2) (1996).

87 42 U.S.C. 14072(b)(2) (1996).

88 42 U.S.C. § 14072(b)(2)(A)(v) (1996).

89 The Pam Lychner Act defines the term minimally sufficient sexual offender registration programme as a state sexual offender registration programme which has to provide a list of sexual offenders required to register under the Jacob Wetterling Act. 42 U.S.C. 14072(a)(3) (1996).

90 42 U.S.C. 14072(c) (1996).

91 42 U.S.C. 14072(g)(3) (1996).

92 Hanna (n 24) 158.

93 42 U.S.C. 14072(d)(1) (1996).

more than once or *aggravated sexual abuse*⁹⁴ or determined as a sexually violent predator, he has to continue to fulfil the registration requirement for life.⁹⁵ For the state registration programme, the minimum length of registration is 10 years for sex offenders who are child molesters, sexually violent predators, or sexually violent offenders. In addition, if a sexual offender has a previous conviction(s) for one of those crimes, he is subjected to the registration requirement for life.⁹⁶

In relation to providing the community with information, the Pam Lychner Act has the same provision as Megan's Law: the FBI can disclose the information if it is necessary for the protection of the public.⁹⁷ However, the provision about the identity of victims precisely forbids the release of the information of victims by the FBI.⁹⁸

There are two different categories by which the Act has attempted to deal with unregistered sex offenders or unverified information. First, if the address or the location of the person required to register cannot be confirmed by the FBI or the FBI is informed about this situation by a State agency; that person is accepted as in breach of the national registration requirement. Therefore, his name was put on the National Crime Information Center Wanted list.⁹⁹ Secondly, if a person required to register intentionally disobeys the requirement conditions for the first time in the case of committing either one or more than one of the abovementioned offences.¹⁰⁰

94 Aggravated sexual abuse is defined in 18 U.S.C. § 2241;

a. BY FORCE OR THREAT.-Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General, knowingly causes another person to engage in a sexual act-

1. by using force against that other person; or

2. by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, (...)

b. BY OTHER MEANS.-Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of pursuant to a contract or agreement with the Attorney General, knowingly-

1. renders another person unconscious and thereby engages in a sexual act with that other person; or

2. administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, other similar substance and thereby-

A. substantially impairs the ability of that other person to appraise or control conduct; and

B. engages in a sexual act with that other person;

or attempts to do so, (...)

c. WITH CHILDREN.-Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, (...)

95 42 U.S.C. 14072(d)(2) (1996).

96 42 U.S.C. 14072(b)(6) (1996).

97 42 U.S.C. 14072(f)(1) (1996).

98 42 U.S.C. 14072(f)(2) (1996).

99 42 U.S.C. § 14072(g)(5)(C)(ii) (1996).

100 At this point, in the first situation, the fine is a maximum of \$100,000, and in the second situation, in addition to the \$100,000 fine, that person is punished by imprisonment for a maximum of 1 year. However, if this intentional infringement occurs more than once, the punishments are 10 years gaol sentence and \$100,000 fine. 42 U.S.C. 14072(i) (1996). The original form of the Jacob Wetterling Act did not determine a specific penalty for purposely fail to register; if a person

i. Examination of Pam Lychner Act

In addition to the debates on Jacob Wetterling Act and Megan's Law, although a national database is an important tool to prevent future sex crimes and an effective way to optimise the notification system, it is not devoid of imperfections. The root of the problem of the national database system is that the information in the national database is provided by state law enforcement agencies and can be incorrect. The risk of inaccurate information in states' databases results from an increased number of sex offenders, over-worked law enforcement agencies, out-of-date information or some false information, and this could harm innocent people.¹⁰¹ While the information is transferred from local databases to the national database, the FBI does not control the validity of the information. Thus, the problems caused by incorrect information in state law enforcement agencies could be easily transferred from the local level to the national level.

As far as the Jacob Wetterling Act and its amendments are concerned, it may be argued that, as the number and the content of the amendments are increased, the requirements for the registration of sexual offenders are getting tougher. In this sense, it is controversial whether the evolution of the Jacob Wetterling Act with several amendments served the main purpose of these regulations and put them in a proper shape regarding people's anxiety or made the situation worse.

The increase in the number of these strict requirements has caused severe debates on rights, privacy, and the safety of society. All the indicated amendments show that the protection of the community and the rights of victims were of considerable importance during the process of the legislation. However, due to the number of amendments, the legislative body dealt with the patchwork of federal law by enacting the Adam Walsh Act. As mentioned above, federal sex offender laws determine the minimum standards for the prevention of sexual offences and states' laws should conform to those standards. Therefore, in the next section, this study will try to evaluate the Adam Walsh Act and the new set of standards regulated under this Act, which are civil commitment and three-tier systems. It should also be noted that the registration system and the community notification requirement, which are examined under the Jacob Wetterling Act, are the basic elements of the sex offender laws and, thus, they will be tersely mentioned within the framework of the Adam Walsh Act.

required to register intentionally fails, he should be punished by criminal penalties. For more information, see also 42 U.S.C. 14071(c) (1994).

101 In California, a 54-year-old man appeared in the state's CD-ROM sex offender database that he had been convicted of child abuse because of a misspelling, and until he realised this error, he received numerous threatening phone calls. Jane A Small, 'Who Are the People in Your Neighborhood?' Due Process, Public Protection, and Sex Offender Notification Laws' (1999) 74 New York University Law Review 1451, 1465. In another case, due to the registration and notification requirements, a convicted sex offender showed her sister-in-law's address as her residence. Even if she did not stay at that address, the sister-in-law received threats because her address was shown as a sex offender residence. For more information, see, Mary Pemberton, 'Sex Offender Law Victimized Innocent Family' *Los Angeles Times* (Los Angeles, 16 November 1997) <<http://articles.latimes.com/1997/nov/16/news/mn-54325>> accessed May 31, 2021.

On July 27, 2006, the Adam Walsh¹⁰² Child Protection and Safety Act was signed by President George W. Bush. With this Act, the federal government's authority is significantly widened regarding sex offender regulations in comparison with the Jacob Wetterling Act.¹⁰³ Essentially, the Adam Walsh Act took the place of the Jacob Wetterling Act in respect of provisions including sex offender registration and notification, which means that these provisions under the Jacob Wetterling Act are no longer in force and has imposed different types of post-incarceration control methods on sex offenders.¹⁰⁴ However, those methods were criticised because 'legislators will often enact and expand sex offender policies regardless of their efficacy and primarily in response to calls from constituents and depictions of horrible sex offenders in the media'.¹⁰⁵ Although guidelines from federal agencies could be important to understand the legislative intent, it can be seen from the Congressmen's speeches that the main motivation for enacting the Adam Walsh Act was mostly and solely to protect society and children from dangerous sex offenders.¹⁰⁶

Apart from these reports, Attorney General Michael B. Mukasey explains the main reason for enacting the Adam Walsh Act in place of the Jacob Wetterling Act in the Final Guidelines June 2008.¹⁰⁷ According to Mukasey, although the Jacob Wetterling Act went through several changes, it was still not sufficient to address the needs of society. With the Adam Walsh Act, those amendments are aggregated with a comprehensive new set of standards for effective public protection. Moreover, it was designed to close the loopholes of the Jacob Wetterling Act, such as the prevention of invalid information of registrants and the registration of fugitive sex offenders.¹⁰⁸

i. Examination of Registration and Community Notification Requirements under the Adam Walsh Act

The new version of the Jacob Wetterling Act 'has raised the bar on sex offender registration'¹⁰⁹ and notification laws by expanding the requirements of sex offender

102 'On July 27, 1981, in Hollywood, Florida, 6-year-old Adam Walsh was abducted at a mall. Two weeks later, some Adam's remains were discovered in a canal more than 100 miles from his home.' 42 U.S.C. § 16901(2)(a) (2006). Moreover, under 42 USC. 16901(2) (2006), the stories of children who were the victims of heinous attacks by sex offenders are listed.

103 Richard G Wright, 'From Wetterling to Walsh: The Growth of Federalization in Sex Offender Policy' (2008) 21 Federal Sentencing Reporter 124, 124.

104 These methods are civil commitment, residency restriction, and electronic monitoring. However, due to the scope of this research, this section will only evaluate registration, community notification and civil commitment.

105 Wright, 'From Wetterling to Walsh: The Growth of Federalization in Sex Offender Policy' (n 103) 126.

106 For Congressional Records, see, CONGRESSIONAL RECORD, 'Adam Walsh Child Protection and Safety Act of 2006' 152 CONG. REC. H5705 (daily ed. July 25, 2006) <<http://www.gpo.gov/fdsys/pkg/CREC-2006-07-25/pdf/CREC-2006-07-25-pt1-PgH5705.pdf#page=21>> accessed May 31, 2021.

107 Michael B Mukasey, 'The National Guideline for Sex Offender Registration and Notification, Final Guidelines' (U.S. Department of Justice, Office of the Attorney General, June 2008) <http://www.goccp.maryland.gov/msac/documents/final_sornaguidelines.pdf> accessed May 31, 2021.

108 Ibid 4.

109 Daniel J. Schubert, 'Challenging Ohio's Adam Walsh Act: Senate Bill 10 Blurs the Line Between Punishment and

registration and notification programmes and 'standardises registration requirements among the states'¹¹⁰. Under the Adam Walsh Act, Title I includes the Sex Offender Registration and Notification Act (SORNA), which designates the duration of registration requirements, definition of relevant phrases, information required in registration lists, access to sex offender information through the Internet, the scope of community notification, and the crime of failing to register.¹¹¹ However, Costigliacci criticises the scope of the Adam Walsh Act considering some created hypothetical scenarios to expose the 'irrationality of the requirements'.¹¹² For instance, some provisions of the Adam Walsh Act penalise crimes that do not include any sexual or violent element; thus, while the Act aims to protect minors from sex offenders who pose a great risk to society, it oversteps the line and causes harm to individuals who do not present any danger to children.¹¹³ According to Farley, the Adam Walsh Act does not discriminate between sexual and non-sexual offenders and, regrettably, the new registration and community notification requirements under the Adam Walsh Act label non-sexual or non-violent offenders who do not pose any danger to society and tend to reoffend.¹¹⁴ Therefore, due to the over-inclusive requirements, even if there may not be any link between the offence committed and sex, the offenders are required to register as a sex offender.¹¹⁵ At this point, it seems fair to say that the over-inclusive scope of the Adam Walsh Act oversteps the main aim to be achieved. For instance, if a person takes a child without notifying the parents in order to protect the child from parental harassment, as a result of the requirements of the Adam Walsh Act, this conduct should be punished, and this person is registered as a sex offender. Another example is the case of a group of children who are all around the age of 12 and are trying to steal some items from a store. Thereafter, they are captured by a security guard and locked in an office until the arrival of the police officers. However, if the police officers do not find any evidence that the children were shoplifting, the security guard should be registered as a sex offender as a result of the unlawful imprisonment of a minor in accordance with the Adam Walsh Act, even if the security

Remedial Treatment of Sex Offenders' (2010) 35 University of Dayton Law Review 277, 281.

110 Andrew R. Hodges, 'Balancing Evils: State Sex Offender Registration and Notification Laws' (2008) 10 Journal of Law in Society 134, 140.

111 [T]he SORNA reforms are generally designed to strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public and to eliminate potential gaps and loopholes under the pre-existing standards by means of which sex offenders could attempt to evade registration requirements to the consequences of registration violations.

Department of Justice, Office of the Attorney General, 'Applicability of the Sex Offender Registration and Notification Act' (2007) 72 Federal Register 8894, 8895 <<http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=01qcmM/2/2/0&WAISSaction=retrieve>> accessed May 31, 2021.

112 Steven J Costigliacci, 'Protecting Our Children from Sex Offenders: Have We Gone Too Far?' (2008) 46 Family Court Review 180, 184.

113 Ibid 193.

114 Lara G. Farley, 'The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century' (2007-2008) 47 Washburn Law Journal 471, 486.

115 Tregilgas (n 39) 732.

guard has reasonable suspicion.¹¹⁶ For this reason, Sample and Bray believe that the excessive expansion of registration and notification requirements to more sex offenders falls short of fulfilling the main purpose of preventing sex offences.¹¹⁷

ii. Classification of sex offenders: the Three-Tier System

It is possible to divide SORNA into two parts: (1) the provisions building up a national registry; and (2) the provisions related to the penalties for registration violations.¹¹⁸

According to the Adam Walsh Act, a person who commits a sex offence and is convicted for this reason will be classified as a sex offender.¹¹⁹ The Act determines three different types of sex offenders using a crime-conviction-based approach. Considering this approach, sex offenders are denominated as Tier I, Tier II and Tier III offenders concerning the severity of a crime. According to this creation, while Tier I offenders embody the least serious offenders and mainly ‘catch-all’¹²⁰ offenders who do not fall under Tier II or Tier III, Tier III represents the most serious offenders.¹²¹ Moreover, there are two exceptional situations that are excluded in terms of sex offence: (1) where there is a ‘foreign conviction’ because of committing a sex crime but does not concur with the conditions under this Act, does not serve the aim of this title and does not provide any protection for fundamental fairness and due process clause; and (2) in the case of an adult victim, if consensual sexual conduct becomes the subject of an offence and the victim is not ‘under the custodial authority of the offender’ or if the victim is over 12 years old and the offender is just a maximum of 4 years older than the victim (the supposed ‘Romeo and Juliet Clause’).¹²² In the first situation, if the foreign conviction is obtained with insufficient protection of fundamental fairness and due process, this conviction will not be accepted as a sex offence conviction. In the second situation, the Romeo and Juliet Clause shows a distinction between a mutual decision and the abusive action of a sex offender. Although an adult-molesting a child is reprehensible, consensual sexual activity between a minimum 13-year-old teenager and a maximum 17-year-old teenager is acceptable.

116 Costigliacci (n 112) 185. As seen from these hypothetical scenarios, the irrationality of the requirements under the Adam Walsh Act has led to an unfair registration practices and an excessive number of registered sex offenders. It can be said that the legislature has gone too far to protect children from those who do not mainly pose any risk to the children’s safety.

117 Sample and Bray, ‘Are Sex Offenders Dangerous?’ (n 27) 77.

118 Corny R Yung, ‘One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions’ (2009) 46 Harvard Journal on Legislation 369, 379.

119 42 U.S.C. 16911(1) (2006).

120 Lori McPherson, ‘Practitioner’s Guide to the Adam Walsh Act’ (2007) 20 Update 1, 2.

121 42 U.S.C. § 16911(2)-(4) (2006).

122 42 U.S.C. § 16911(5)(B), (C) (2006). For more information about “Romeo and Juliet Clause”, see, McPherson (n 120) 3.

The aim of the legislative initiative for establishing a tier system is to determine the level of risk that sex offenders pose and to make the public aware of those risks by disclosing their information.¹²³ However, the controversial point of the three-tier system is that the crime-conviction-based approach is not sufficient to assess the offenders who pose a potential risk because it is based solely on the offences resulting in conviction.¹²⁴ The reason is that even if sex offenders commit the same crime, the risk that they pose can be different due to the other factors, such as gender, age, mental health, stability, support, and victim preference.¹²⁵ At this point, the type of crime committed or the prior conviction history can be one of the components of these factors, but there is not any empirical evidence to show that the reason for conviction is the determining element of recidivism risk.¹²⁶ Moreover, the reason for conviction relies not only on evidence but also on some other facts such as the offender's personality, the trustworthiness of the victim or the ability of the lawyer. Therefore, it may be argued that the reason for conviction and the committed offence do not overlap, and in this sense, a conviction-based approach does not explicitly reflect the risk of recidivism.¹²⁷ Apart from these issues, the research results indicate that the recidivism rate of Tier I offenders is higher than that of both Tier II and Tier III offenders.¹²⁸ Regarding this point, it can be said that a crime-conviction-based approach is not solely adequate to determine the level of recidivism risk. For these reasons, SORNA may cause a 'false sense of security' due to the belief that Tier I offenders do not tend to reoffend.¹²⁹ Although several instruments have been created for the prediction of sexual recidivism among sex offenders, they do not provide a comprehensive assessment to determine the risk level.¹³⁰ Nevertheless, there are two widely known risk assessment instruments called 'Static-99 and MnSOST-R'¹³¹

suggests that these risk-based instruments are much more effective than the Adam Walsh Act crime-conviction-based approach due to the individualised assessment.¹³³

Considering these facts, the question can be raised as to which type of sex offender should be required to undergo chemical castration. For instance, if chemical castration is used regarding the determination of the risk of a person to the public under the federal sex offender laws, Tier III offenders, which are the highest risk potential offenders, may undergo this implementation. On the other hand, with the help of chemical castration, laws reduce recidivism and protect society from recidivists. As seen from the aforementioned research results, Tier I offenders are arrested for sexual offences more than Tier 2 and Tier 3 offenders. Thus, it seems plausible to use chemical castration for Tier I offenders to serve the purpose of the legislation. However, in this case, according to the three-tier system, chemical castration may be implemented for all sex offenders without any distinction. In this context, this controversial point will be addressed more thoroughly in the following chapters while examining chemical castration as a state regulation.

iii. Adolescent Sex offenders and the Adam Walsh Act

Juveniles are explicitly within the scope of the Adam Walsh Act.¹³⁴ This means that if an offender is 14 years old or over at the time of the offence which is ‘comparable to or more severe than aggravated sexual abuse’ or ‘was an attempt or conspiracy to be committed’, SORNA will apply to this person.¹³⁵ According to this definition, the Adam Walsh Act regards juveniles as sex offenders within the scope of SORNA, provided that they are Tier III offenders. Nevertheless, the juvenile provisions are the most hypercritical point of the Adam Walsh Act. Some people support the idea that the Act fails to differentiate juvenile offenders from adult offenders¹³⁶ and does not consider the main purpose of the juvenile justice system while punishing juvenile offenders.¹³⁷ It is generally accepted that the basis of juvenile justice relies on the belief that children are innocent, not able to perceive the criminal mind or motive and

133 Wayne A Logan, ‘Criminal Justice Federalism and National Sex Offender Policy’ (2008-9) 6 *Ohio State Journal of Criminal Law* 51, 87.

134 Enniss (n 124) 703.

135 42 U.S.C. 16911(8) (2006).

136 Human Rights Watch (n 30); Michael F Caldwell, ‘Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders’ (2007) 19 *Sexual Abuse, A Journal of Research and Treatment* 107; Maggie Jones, ‘How Can You Distinguish a Budding Pedophile from a Kid with Real Boundary Problems?’ *New York Times* (New York, 22 July 2007) <http://www.nytimes.com/2007/07/22/magazine/22juvenile-t.html?_r=1&pagewanted=print> accessed May 31, 2021; Luige del Puerto, ‘Arizona Officials Express concerns Over Federal Sex Registry Law’ *Arizona Capitol Times* (Arizona, 30 November 2007) <http://findarticles.com/p/news-articles/arizona-capitol-times/mi_8079/is_20071130/arizona-officials-express-concerns-federal/ai_n51710061/> accessed May 31, 2021; Lisa Sandberg, ‘Sex Registry Called Too Harsh for Juveniles’ *Houston Chronicle Austin Bureau* (Houston, 17 February 2008) <<http://www.chron.com/disp/story.mpl/metropolitan/5549287.html>> accessed May 31, 2021; Enniss (n 124); Logan, ‘Criminal Justice Federalism and National Sex Offender Policy’ (n 133); Elizabeth J Letourneau and others, ‘Effects of Sex Offender Registration Policies on Juvenile Justice Decision Making’ (2009) 21 *Sexual Abuse: A Journal of Research and Treatment* 149; Tregilgas (n 39).

137 Tregilgas (n 39) 734.

the consequences of their behaviours, and thus, are different from adults and need protection.¹³⁸ In this sense, the juvenile justice system is an intersection of the idea of child welfare and the criminal justice system.¹³⁹ For this reason, in most jurisdictions, the juvenile criminal justice system has been built on rehabilitation or at least less harsh punishments compared to adults.¹⁴⁰ However, it may be argued that the Adam Walsh Act was enacted without assessing this general assumption because juveniles are subject to the same regulations such as registration and community notification as adults under the Adam Walsh Act. Moreover, it is ambiguous whether they are subject to the administration of chemical castration or not. On July 31, 2007, the Coalition for Juvenile Justice criticised the provisions of the Adam Walsh Act concerning juveniles by writing a letter to Laura Rogers, then the Director of the SMART Office in the Department of Justice in the USA.¹⁴¹ In this letter, the Director of the Coalition of Juvenile Justice argued that SORNA violates the confidentiality requirements; it has detrimental effects on the effectiveness of rehabilitation; and it does not give any opportunity to juveniles to correct their mistakes made in childhood. In this sense, the registration and community notification requirements for juveniles can result in stigmatisation and ostracism.¹⁴² With regard to the statistics of juvenile sex offenders, they have lower recidivism rates and are predisposed to be rehabilitated more effectively.¹⁴³ Nonetheless, if they do not receive the treatment and help they may need, such as supervising their activities and assisting them, this might cause some serious problems in their future lives.

iv. General Requirements for the Registration and Notification Systems regarding the Three-Tier System

A sex offender must register and update the information required for registration in every state where the offender lives, works and attends school.¹⁴⁴ The Act determines

138 Lamar T Empey, 'The Social Construction of Childhood, Delinquency, and Social Reform' in Malcolm W Klein (ed), *The Juvenile Justice System* (Sage Criminal Justice System Annuals, Sage Publications 1976) 37.

139 Robert Harris and David Webb, *Welfare, Power, and Juvenile Justice: The Social Control of Delinquent Youth* (Tavistock Publication, 1987) 9.

140 Howard E Barbaree and William L Marshall, *The Juvenile Sex Offender* (2nd edn, Guilford Press 2006) 2. Some scholars have also emphasised the importance of rehabilitation in the juvenile justice system rather than incarceration. Kimberly Kempf-Leonard and Lisa L Sample, 'Disparity Based on Sex: Is Gender Specific Treatment Warranted?' (2006) 17 *Justice Quarterly* 89; Donna M Bishop, 'Public Opinion and Juvenile Justice: Myths and Misconceptions' (2006) 5 *Criminology and Public Policy* 653.

141 Letter from Nancy Gannon Hornberger to Laura Rogers (31 July 2007) <<http://juvjustice.org/media/fckeditor/SORNA%20Comments.pdf>> accessed April 18, 2021. This letter was written to Laura L. Rogers who is the Former Director of the SMART Office in the Department of Justice in the USA.

142 *ibid*.

143 Department of Justice, Center for Sex Offender Management, 'Understanding Juvenile Sexual Offending Behavior: Emerging Research, Treatment Approaches and Management Practices' (CSOM, December 1999) <<http://www.csom.org/pubs/juvbrf10.html>> accessed April 18, 2022; The Association for the Treatment of Sexual Abusers, 'The Effective Legal Management of Juvenile Sexual Offenders' (ATSA, 11 March 2000) <<http://www.atsa.com/ppjuvenile.html>> accessed April 18, 2022; National Center on Sexual Behavior of Youth, 'Frequently Asked Questions About Adolescent Sex Offenders' (Center on Child Abuse and Neglect, University of Oklahoma Health Sciences Center, 2004) <<http://www.ncsby.org/pages/publications/FREQUENTLY%20ASKED%20QUESTIONS%20ASO.pdf>> accessed April 18, 2022.

144 42 U.S.C. 16913(a) (2006).

precisely which information has to be provided by sex offenders.¹⁴⁵ In addition to revealing the information listed in the Act,¹⁴⁶ the Attorney General can demand extra information.¹⁴⁷ Besides, states have to guarantee some specific information that must be included in the registry lists.¹⁴⁸

The three-tier classification system is the key point of the Adam Walsh Act because of the duration of registration requirement and the frequency of verification of information.¹⁴⁹ The registration period and periodic verification must be in conformity with this system. At this point, the tier status of the sex offenders determines the length of registration and the frequency of appearing in person to update the information.¹⁵⁰ For instance, Tier I offenders should register for 15 years and verify their information annually, Tier II offenders are required to register in person every six months for 25 years, and Tier III offenders must register for life and update their information every 3 months.¹⁵¹ Unlike its predecessor, the Adam Walsh Act requires that in the case of a ‘clean record’¹⁵², the length of the registration period must e d2 [(ause (I ran25 Tw 1)189o-</I

Besides expanding the ambit of the registration system, it may be argued that SORNA redesigned a comprehensive, uniform and unique community notification system by making the information listed in the registry available via a website or directly providing the information of a sex offender to the establishments prescribed by the law. Considering this fact, there are two different ways to access sex offenders' information by way of a website: (1) Jurisdictions' Internet Site;¹⁵⁵ and (2) National Website.¹⁵⁶ Moreover, according to the Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program, officials in states should 'provide the information in the registry' to the Attorney General, law enforcement agencies, schools and public housing agencies or each jurisdiction where sex offenders reside, work or attend school, social services and any organisation, company or individual who demands to receive information about a sex offender.¹⁵⁷ However, the information disclosed under the Adam Walsh Act is limited. The exceptions to the public availability of information are enumerated as 'mandatory exemptions'¹⁵⁸ and 'optional exemptions'.¹⁵⁹ Although the amount of information disclosure varies considerably depending on the particular state law, states should comply with these exemptions and some information must be excluded from the Internet dissemination.

With the aim of creating a national sex offender registry and providing maximal compliance, legislatures impose a burden on offenders by enacting new federal crimes for registration violations.¹⁶⁰ In this respect, federal law determines a federal criminal liability and an obligation that states enforce penalties for violating registration requirements.¹⁶¹ As a matter of state obligation, states must provide a minimum of one year of incarceration for the compliance failure of registration requirements.¹⁶² Moreover, any individual required to register who 'travels in interstate or foreign commerce' and knowingly fails to fulfil the registration obligations should be fined and/or imprisoned for a maximum of 10 years.¹⁶³ However, the problematic point regarding federal criminal liability is the 'men rea requirement'.¹⁶⁴ It is difficult

155 Jurisdictions' Internet Site is the public registry websites of states on which the public can access all information about sex offender in the registry. 42 U.S.C. 16918(a) (2006).

156 National Website, also called the Dru Sjodin National Sex Offender Public Website, is the only national search site that incorporates the information of sex offenders listed on the Jurisdiction's Internet Site and discloses sex offender data nationwide. 42 U.S.C. 16920 (2006).

157 42 U.S.C. 16921 (2006).

158 The mandatory exemptions are the victim's identity, the sex offender's social security number, any action of the sex offender that did not result in conviction and any other information determined by the Attorney General. 42 U.S.C. 16918(b) (2006).

159 The optional exemptions are the information about a tier I sex offender, the sex offender's employer's or school's name and any other information determined by the Attorney General. 42 U.S.C. 16918(c) (2006).

160 Yung (n 118) 379.

161 Logan, 'Criminal Justice Federalism and National Sex Offender Policy' (n 133) 79.

162 42 U.S.C. 16913(e) (2006).

163 18 U.S.C. 2250(a) (2006). Furthermore, individuals who knowingly fail to register and commit a 'crime of violence' should be incarcerated for a minimum of five years and a maximum of thirty years in addition to the punishment for registration violation. 18 U.S.C. 2250(c) (2006).

164 [T]here are two conditions to be fulfilled before penal responsibility can be imposed. The one thing is the doing of some

to identify that an individual fails to register or update the required information ‘knowingly’ and ‘to imagine many fact patterns in which lack of knowledge is a defence since knowledge of the law is presumed under U.S. common law’.¹⁶⁵

v. Examination of Civil Commitment

The new federal phenomenon designed under the Adam Walsh Act is *Civil Commitment*. Civil commitment is a type of civil confinement that consists of ‘control, care, and treatment’¹⁶⁶ mechanisms and ‘supervision, care, and treatment’ after release from such confinement for ‘sexually dangerous people’.¹⁶⁷ The aim of this new control mechanism is to confine convicted sex offenders who are about to be released from incarceration after completing their prison sentence due to the possibility of them posing a risk.¹⁶⁸ However, La Fond criticises this assumption on the ground that civil commitment is not a control mechanism. The main purpose of civil commitment laws is to incarcerate sex offenders who pose a certain danger for recidivism and cannot be imprisoned under the current criminal system for an indefinite period of time.¹⁶⁹ On the other hand, Smith argues that although civil commitment laws are criticised regarding the constitutional protection and financial costs, these laws are supported in a positive way due to the protection of members of the public by the continued confinement of people who are sexually violent predators.¹⁷⁰

Section 4248 of the Act systemises the process of civil commitment: if an individual ‘is in the custody of the Bureau of Prisons’ or ‘has been committed to the custody of the Attorney General’ or is someone ‘against whom all the criminal charges have been dismissed solely for reasons relating to that person’s mental condition’ and certified as a ‘sexually dangerous person’ by the Attorney General, Director of the Bureau of the Prisons or a person authorised by the Attorney General, that individual will be subject to civil commitment by order of the court.¹⁷¹ The court should order a

act by the person to be held liable. (...) The other is the mens rea or guilty mind with which the act is done. It is not enough that a man has done some act which on account of its mischievous results the law prohibits the act, an inquiry must be made into the mental attitude of the doer.

Patrick John Fitzgerald, *Salmond on Jurisprudence* (12th edn, Sweet & Maxwell 1966) 151 (emphasis added).

¹⁶⁵ Yung (n 118) 380.

¹⁶⁶ The sex offender treatment programme is described under the Code that it “will assist the individual in overcoming a psychological or physical dependence or any condition that makes the individual dangerous to others.” 18 U.S.C. 4247(a)(1)(C) (2006).

¹⁶⁷ 42 U.S.C. 16971(e)(1) (2006). A sexually dangerous person means ‘a person suffering from a serious mental illness, abnormality, or disorder, as a result of which the individual would have serious difficulty in refraining from sexually violent conduct or child molestation’. 42 U.S.C. 16971(e)(2) (2006); see also, 18 U.S.C. 4247(a)(5), (6) (2006). According to Barker, the definition of ‘sexually dangerous person’ is ambiguous because the statute does not clarify the meaning of ‘sexually violent conduct’ or ‘child molestation’. Emily Eschenbach Barker, ‘The Adam Walsh Act: “Un”-Civil Commitment’ (2009) 37 *Hastings Constitutional Law Quarterly* 141, 143.

¹⁶⁸ W Lawrence Fitch, ‘Sex Offender Commitment in the United States’ (1998) 9 *Journal of Forensic Psychiatry & Psychology* 237, 237.

¹⁶⁹ John Q La Fond, ‘The Costs of Enacting a Sexual Predator Law’ (1998) 4 *Psychology, Public Policy, and Law* 468, 475.

¹⁷⁰ Douglas G Smith, ‘The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment’ (2008) 49 *Boston College Law Review* 1383, 1384.

¹⁷¹ Civil commitment has been the subject of a number of cases such as *O’Connor v. Donaldson*, 422 U.S. 563 (1975), *Rennie*

hearing for the determination of the offender's mental condition whether that person is sexually dangerous or not.¹⁷² However, there is no requirement in the Act that the hearing must be given within a reasonable time. An individual who has never been convicted of any sex crime or accused of it could be civilly committed at any time 'after the commencement of prosecution and prior to the sentencing of the defendant' or 'after the commencement of probation or supervised release and prior to the completion of the sentence'.¹⁷³ In other words, if a person who was convicted of any other crime such as burglary or homicide and is certified as a sexually dangerous person, that individual can be subject to the civil commitment process.

The certificate that shows that the individual is a sexually dangerous person does not have to include any advice or opinion from a medical, psychiatric or psychological expert. However, the court has discretion to order a psychiatric or psychological examination.¹⁷⁴ If the Attorney General makes an allegation of dangerousness in the certificate without presenting any evidence, it can be an effective certification to stay a person's release from the prison for the inception of the civil commitment process.¹⁷⁵ In this sense, it should be noted that an individual can be labelled as a dangerous sex offender without any examination by a medical, psychiatric or psychological expert. If the allegation of the dangerousness of an individual is found to be 'clear and convincing evidence'¹⁷⁶ by the court, this person should be placed under the custody of the Attorney General.¹⁷⁷ Following this process, with the determination of the individual's mental condition by the court, the release of this person should be stayed for the initiation of the civil commitment process.¹⁷⁸ However, as Barker puts it, the statute does not include any information about the court hearing process of designating an individual as a sexually dangerous person and the scope of the 'clear and convincing evidence'.¹⁷⁹

v. Klein, 462 F. Supp. 1131 (1978), *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *United States v. Comstock*, 560 U.S. ____ (2010). In the case of *United States v. Comstock*, the Supreme Court ruled that "when such a certification is filed, the statute automatically stays the individual's release from prison." 176 L. Ed. 2d 878 at 879 (2010).

172 18 U.S.C. 4248(a) (2006).

173 18 U.S.C. 4241(a), 4248 (a), (d) (2006).

174 18 U.S.C. 4248(a), (b) (2006).

175 18 U.S.C. 4248(a), (d) (2006).

176 Clear and convincing evidence indicates that 'the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials'. Bryan A Garner (ed), *Black's Law Dictionary* (West Publishing 2009) 636. In this sense, clear and convincing evidence must satisfy the court that there is a considerable probability that an individual suffers from a mental illness, abnormality, or disorder.

177 18 U.S.C. 4248(d) (2006). In the case of *United States v. Comstock*, the Supreme Court noted that "if the Government proves its claims by 'clear and convincing evidence', the court will order the prisoner's continued commitment." 176 L. Ed. 2d at 880.

178 18 U.S.C. 4248(a) (2006).

179 Barker (n 167) 144.

In the case of *Kansas v. Hendricks*, the Supreme Court addressed the constitutional concerns with respect to the Kansas Civil Commitment Act.¹⁸⁰ The Supreme Court believed that dangerousness is not sufficient to justify indefinite involuntary civil commitment. In addition to proof of dangerousness, mental disorder, illness, or abnormality has to be considered for civil commitment proceeding to show that an individual suffers ‘from a volitional impairment rendering [that person] dangerous beyond [his/her] control’.¹⁸¹ On the other hand, in *Foucha v. Louisiana*, the Supreme Court held that if a person does not have any mental disorder, illness, or abnormality, but also there is proof that that person would be dangerous to others, in this sense, indefinite detention in a mental facility can be acceptable and does not violate the constitutional rights of the person.¹⁸² As seen from these Supreme Court decisions, it is not clear whether dangerousness, mental disorder, illness, or abnormality should be the basic condition of a civil commitment proceeding.¹⁸³

After individuals are committed to the custody of the Attorney General, they should be released into the appropriate official of the State in which they reside. The authorised State takes the responsibility for ‘custody, care, and treatment’ of individuals; otherwise, they are set up in a ‘suitable facility’ for treatment and stay there until the relevant state accepts responsibility or the individuals are not sexually dangerous or will not be sexually dangerous when released under a proper treatment programme as described in law.¹⁸⁴

The determination of ending the civil commitment process can only be taken by the Director of the facility in which an individual is placed. On the determination of the Director that the person is no longer sexually dangerous, the court should hold a hearing about his release. However, at this point, the court has a wide discretion to consider whether this release should be conditional or unconditional. If it is unconditional, the court should immediately discharge that person. On the other hand, if it is conditional, the court should order a *conditional discharge* and an *explicit condition of release*. The conditional discharge requires that the individual must be released under a ‘prescribed regimen’ of care and treatment, which has been prepared for him by the Director of the civil commitment facility, and the explicit condition of release entails that he complies with these *prescribed regimes*. The court has the authority to change the conditions of discharge or eliminate the conditional release at any time after the main decision.¹⁸⁵

180 138 L. Ed. 2d 501 (1997).

181 138 L. Ed. 2d at 502.

182 118 L. Ed. 2d 437 at 440 (1992).

183 In a similar vein, Fitch and Ortega argued that “whether this mental abnormality must be one for which meaningful treatment is available, however, is not clear.” W Lawrence Fitch and Richard J Ortega, ‘Law and the Confinement of Psychopaths’ (2010) 18 Behavioral Sciences and the Law 663, 676.

184 18 U.S.C. 4248(d) (2006).

185 18 U.S.C. 4248(e) (2006).

The concept of using civil commitment has raised several concerns regarding its context. The supporters of this procedure stand up for the necessity of the civil commitment system for the protection of members of the community from 'a small but dangerous group of individuals' by confining them after they are released from prison.¹⁸⁶ However, as Janus puts it, the overbroad scope of civil commitment comes from the 'intense political pressure' due to the combination of 'legitimate concerns for public safety' with 'sensational media coverage'; not from the necessity.¹⁸⁷ On the other hand, the proponents of this policy believe that civil commitment should be justified by emphasising the importance of dealing with public safety instead of referring to intense political pressure. Besides, civil commitment is a 'constitutionally accepted policy'¹⁸⁸ to protect community members from sexually dangerous people.¹⁸⁹

On the other hand, this policy has been criticised for legal and medical reasons.¹⁹⁰ The common argument is that civil commitment provides treatment after an offender has completed the prison sentence rather than providing a rehabilitative alternative to prison or combining treatment with a prison sentence; thus, the main purpose of this policy is blurred.¹⁹¹ Regarding the American Psychiatric Association's Task Force, the primary purpose of the civil commitment law is not clear. If the main aim is treatment, the commitment process cannot be postponed until the completion of the prison sentence.¹⁹² In this sense, there is a dilemma over sex offenders' mental capacity. That is to say, the offenders are accepted as having mental capacity and held liable for their crimes; however, when they are about to be released from prison, the court takes a dim view of their mental capacity and civilly commits them.¹⁹³ Owing to this fact, the American Psychiatric Association depicts the main aim of

186 Andrew J Harris, 'The Civil Commitment of Sexual Predators: A Policy Review' in Richard G Wright (ed), *Sex Offender Laws: Failed Policies, New Directions* (Springer Publishing Company 2009) 340.

187 Eric S Janus, 'Sex Predator Commitment Laws: Constitutional But Unwise?' (2000) 30 *Psychiatric Annals* 411, 415.

188 See *Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Allen v. Illinois*, 478 U.S. 364 (1986).

189 John Kirwin, 'One Arrow in the Quiver-Using Civil Commitment as One Component of a State's Response to Sexual Violence' (2003) 29 *William Mitchell Law Review* 1135, 1204.

190 The evaluation of debates over the medical concerns is beyond the scope of this article; instead, only brief comments are provided on this issue in connection with civil commitment. In addition, due to the overbroad scope of the constitutional rights of civilly committed individuals, the constitutional concerns raised by the civil commitment of sexually violent predators and their punitive or therapeutic features can be evaluated in another work.

191 See, Fitch (n 168) 238-40; W Lawrence Fitch and Debra A Hammen, 'The New Generation of Sex Offender Commitment Laws: Which States Have Them and How Do They Work?' in Bruce J. Winick and John Q La Fond (eds), *Protecting Society From Sexually Dangerous Offenders* (American Psychological Association 2003) 28; Eric S Janus, 'Treatment and the Civil Commitment of Sex Offenders' in Bruce J. Winick and John Q La Fond (eds), *Protecting Society From Sexually Dangerous Offenders* (American Psychological Association 2003) 119-20; John Q La Fond, 'The Costs of Enacting a Sexual Predator Law and Recommendations for Keeping Them From Skyrocketing' in Bruce J. Winick and John Q La Fond (eds), *Protecting Society From Sexually Dangerous Offenders* (American Psychological Association 2003) 283; Hodges (n 110) 147; Fitch and Ortega (n 183) 663-4.

192 For more information, see, American Psychiatric Association, *Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association*, (APA 1996).

193 Peter C Pfaffenroth, 'The Need for Coherence: State's Civil Commitment of Sex Offenders in the Wake of *Kansas v. Crane*' (2003) 55 *Stanford Law Review* 2229, 2251.

civil commitment as confinement rather than rehabilitation.¹⁹⁴ Therefore, there is ambiguity over the line between criminal and civil proceedings with respect to civil commitment.¹⁹⁵ It is essential to mention that the real purpose of civil commitment is the preventive detention of dangerous sex offenders by extended confinement. On this issue, it should be noted whether the civil commitment facilities can use chemical castration as a part of treatment or not. With respect to the aim of the civil commitment policy, if chemical castration is implemented under the civil commitment laws, it has to be in accordance with the requirements of treatment and correspond to the aim of treatment in every way. In this sense, while the concept of chemical castration is being evaluated in the following chapters, the treatment/punishment aspect of chemical castration, either aside from other policies or under the requirements of the Adam Walsh Act, will be discussed.

Moreover, another controversial point regarding civil commitment is the cost of implementing this policy. Due to the flexibility of states in adopting this implementation, the probable effects of civil commitment have not been measured and, thus, estimating the costs of the civil commitment procedure considering the Adam Walsh Act seems tough. According to Friedland, the significant cost of civil commitment is derived from the difficulty in treating dangerous sex offenders. He also notes that ‘the available data indicates that the cost of civil commitment will be much higher to a state than the equivalent cost of imprisonment and treatment’.¹⁹⁶ As a potential alternative, Smith believes that increasing the penalties for sex crimes is a way of avoiding the enormously expensiveness of civil commitment. In any case, the costs of greater penalties for dangerous sex offenders will be less than the costs of civil commitment.¹⁹⁷ At this point, the main purpose of this policy should be expressed in clear terms as to what extent (or not) civil commitment provides treatment to sex offenders and rehabilitates them. Otherwise, one can argue that the aim of this policy is explicitly to incarcerate these offenders for as long as possible rather than rehabilitating or treating them.¹⁹⁸

Although there are various legal approaches to deal with sexually dangerous people, due to the assessment of alternative methods to deter sex offenders, federal sex offender laws in the USA can be analysed in three vital steps. The gist of this observation is that there have been three basic periods and legal regulations of federal

¹⁹⁴ See (n 192).

¹⁹⁵ Pfaffenroth (n 193) 2253.

¹⁹⁶ Steven I. Friedland, ‘On Treatment, Punishment, and the Civil Commitment of Sex Offenders’ (1999) 70 University of Colorado Law Review 73, 130.

¹⁹⁷ Smith (n 170) 1426.

¹⁹⁸ Fond, ‘The Costs of Enacting a Sexual Predator Law and Recommendations for Keeping Them From Skyrocketing’ (n 191) 297.

sex offender laws that have occurred throughout the USA since 1990. The first step was begun with the Jacob Wetterling Act, in 1994 by enacting registration requirements for sex offenders. Subsequently, federal sex offender laws gained acceleration with an amendment in 1996, called Megan's Law, which required states to establish a community notification system and that was the second step of federal intervention. Due to the several amendments to the Jacob Wetterling Act, the legislative body tried to deal with the *patchwork* of federal legislation on sex offenders and, thus, the third step was the Adam Walsh Act. It includes the restructuralisation of registration and community notification systems and has imposed post-incarceration civil commitment of sexually dangerous offenders who suffer from a mental abnormality. In addition, Title I of the Adam Walsh Act, known as SORNA, creates a three-tier system for classifying sex offenders according to their risk to society based on the severity of the offence committed.

With the aim of controlling and managing sexually dangerous people and increasing public safety from them, the federal sex offender laws place emphasis on 'social control mechanisms' together with prolonged confinement rather than on the 'conventional prison sentence'.¹⁹⁹ From this point of view, one could say that it is pivotal that legislation requires punishment in conjunction with treatment for sex offenders since these offenders pose a problematic area for the criminal justice system. As Peters remarks, traditional incarceration alone is not an effective way to prevent sex crime, and releasing from prison with little or no treatment raises concerns about the security of society.²⁰⁰ Therefore, it is reasonable to accept that the criminal justice system can provide alternative solutions. This leads one to suppose that, as far as the improvements of medical science have been considered, the legal response to sex offenders can take an alternative attitude to address the increasing concerns regarding sex offences.²⁰¹ As Berlin puts it, 'if legislation and punishment alone cannot fully solve the problem, medicine and science need to be called into action. Furthermore, if society can be made safer by such means, why not use them?'²⁰²

This article has attempted to analyse the evolution of the registration system, the community notification policy, the classification of sex offenders regarding the level of danger and the civil commitment procedure within the scope of the federal sex offender legislation in the USA. From a more general perspective, it is noteworthy to mention that state laws are those that are passed by the state legislatures and cannot contradict the federal constitution and must not infringe on any federal constitutional

199 Fond, 'The Costs of Enacting a Sexual Predator Law and Recommendations for Keeping Them from Skyrocketing' (n 191) 297.

200 Kimberly A. Peters, 'Chemical Castration: An Alternative to Incarceration' (1992-3) 31 *Duquesne Law Review* 307, 327.

201 Edward A Fitzgerald, 'Chemical Castration: MPA Treatment of the Sexual Offender' (1990-1) 18 *American Journal of Criminal Law* 1, 1-2.

202 Fred S Berlin, 'The Case for Castration, Part 2' (1994) 26 *Washington Monthly* 28, 29.

rights. At this point, it should be noted that medical interventions, including psychological and psychiatric treatments (also known as *pharmacotherapy*), can be an alternative approach provided by some states to address the problem of sexually dangerous people in the USA. Furthermore, federal law mandates states to conform to the minimum requirements of federal sex offender laws. Therefore, the legal arrangements for psychological and psychiatric treatments should meet the minimum requirements of federal sex offender laws and should be made in conformity with the federal constitution.

In this article, the policies under the federal sex offender laws were evaluated to be able to place the administration of these measures in the Turkish Criminal Justice System in a proper context. In addition, the human rights' concerns about these preventive measures must also be examined, but this examination can be done more thoroughly in another work with reference to the effects of federal sex offender laws on human rights.²⁰³ The main argument in this article is, however, to evaluate the regulations for sex offenders in the USA to discuss and understand whether they will be consistent with the Turkish Justice System.

In Turkey, the legislation on sexual crimes has undergone several important reforms in the past two decades. After the Turkish Penal Code of 2005 and the 2014 amendments, in Section Six, under the heading of Offences Against Sexual Integrity, four types of sexual offences against sexual inviolability are regulated, including sexual assault (Art.102); child molestation (Art.103); sexual intercourse between/with persons who have not attained the lawful age (Art.104); and sexual harassment (Art.105).²⁰⁴ However, when the penalties for such crimes are considered, imprisonment is generally adopted as the only punishment, and the punishment for committing such crimes can vary depending on the severity of the crime. Given the general characteristics of such articles, the first paragraphs mostly focus on the basic form of the crime, and the following paragraphs mainly regulate the aggravated form of these offences. For instance, under Article 102;

(1) Any person who violates the physical integrity of another person, by means of sexual conduct, shall be sentenced to a penalty of imprisonment for a term of two to ten years, upon the complaint of the victim. If the said sexual behaviour ceases at the level of sexual importunity, the term of imprisonment shall be from two years to five years.

203 The assessments of the Supreme Courts' decisions on the aforementioned regulations are crucial and should be discussed more thoroughly within the context of rights and liberties. However, due to the scope of this article, such an assessment can be made in another work. For more information about these decisions, see, *Connecticut Dept. of Public Safety v. Doe*, No: 01-1231, 538 U.S. 1, Decided 5 March 2003; *Smith et. al. v. Doe et. al.*, No: 01-729, 538 U.S. 84, Decided 5 March 2003; *Reynolds v. United States*, No: 10-6549, 200 U.S. 321, Decided 23 January 2012; *Nichols v. United States*, No: 15-5238, 200 U.S. 321, Decided 4 April 2016; *Gundy v. United States*, No: 17-6086, 200 U.S. 321, Decided 20 June 2019.

204 For the English version of the Turkish Penal Code, <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2016\)011-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)011-e)> accessed December 14, 2023.

(2) Where the act is committed by means of inserting an organ, or other object, into the body, the offender shall be punished with a term of imprisonment no less than twelve years. [...]

[...]

(5) Where, as a result of the offence, the victim enters a vegetative state, or dies, a penalty of aggravated life imprisonment shall be imposed.

Different from Articles 102, 104 and 105, Article 103, which regulates the sexual abuse of children, also defines this offence. Under Article 103/1, sexual abuse covers the following acts;

(a) All kinds of sexual attempt against children who are under the age of fifteen or against those attained the age of fifteen but lack the ability to understand the legal consequences of such act,

(b) Sexual behaviours committed against children by force, threat, fraud or another reason affecting the willpower.

However, given that imprisonment by itself is not sufficient to prevent certain offenders or to motivate them to change and to desist from crime, and, in fact, sexual crime against children is a very emergency and a sensitive issue, since this type of crime is linked to paedophilic disorder, it must subject to specific preventive measures in addition to imprisonment. Thus, the measures to prevent sexual crimes in the USA, i.e., sex offender registration, community notification, civil commitment and medical interventions should be embedded into the Turkish Criminal Justice System. The legislation, however, should ensure that these measures are adopted by taking the Turkish legal system and the rights and freedoms of offenders into account, and by making up the deficiencies in accordance with changing and developing these preventive measures. For instance, the Law on the Execution of Penalties and Security Measures (hereinafter, the Law No.5275) is a fundamental law regarding the execution of penalties and security measures, including measures for perpetrators of sexual crimes. Article 107 includes a conditional release clause and, for sexual crimes, Article 107/2 states that;

(d) Those sentenced to term imprisonment for sexual assault (except for article 102, second paragraph), sexual intercourse with minors (except for article 104, second and third paragraphs) and sexual harassment (article 105),

[...]

can benefit from conditional release if they serve two-thirds of their sentence. Although Article 107 provides the opportunity for the sex offenders to have a Get Out of Jail Free Card, certain sexual offences are exempted from the conditional release provision, such as committing sexual assault by means of *inserting an*

organ or other object into the body, committing sexual intercourse against a person who is under a restraint of marriage, committing a sexual offence where the offender provides care for a child prior to adopting the child or the offender is under an obligation to protect, look after or supervise the child under a custodial relationship. Under Article 108/9, offenders convicted of sexual assault described in Article 26/2 of the Turkish Penal Code, the crime of sexual abuse of children and sexual intercourse with a minor, defined in Article 103 and Article 104/2-3, respectively, had been subject to medical treatment, therapeutic programmes, residency restrictions, work restrictions and bans from certain activities requiring care and supervision obligations about children. However, it was stated under Article 108/9 that these treatments and/or obligations would be ‘decided by the execution judge during the execution of the sentence and within the control period’. On this matter, the Turkish Psychiatric Association brought the Regulation on the Treatment Imposed on Offenders Convicted of Crimes against Sexual Inviolability and other Convicts (hereinafter the Regulation), which was based on the Law No. 5275, before the Council of State on the grounds that this Regulation would lead the administrative organ to excess the power to regulate. According to the Council of State, the definition of treatment under Article 108 of the Law No. 5275 was ambiguous and its scope was indefinite, which would result in the infringement of the bodily integrity of the offenders, which was guaranteed under Article 17 of the Turkish Constitution. Thus, the Regulation was partly cancelled and thus, the execution of treatments for sex offenders indicated was suspended.²⁰⁵ Yet, no new regulation regarding this matter has not been enacted.

Not the treatment itself or the pharmacotherapy programmes that are used to prevent sex offenders but the application of registration and community notification measures in Turkey have been criticised that the disclosure of the offenders over the Internet may have prominent impacts in terms of negatively affecting offenders’ reintegration into society due to stigmatisation and the danger of misuse of information, which may lead to the killing of these offenders for revenge. In addition, any judicial record can be an obstacle for these offenders in the public and private sectors in terms of continuing their lives. Although informing the members of society is a seemingly practical solution, it is not permanent and realistic. On the other hand, it was argued that keeping a separate sexual offence registry in Turkey may have some advantages such as a healthier policy can be used to control sexual crimes considering the statistical information provided by data to be obtained and the scientific evaluations based on it. Such information can greatly facilitate the preventive-administrative and judicial activities of law enforcement forces and can also have a preventive effect on individuals against recidivism. In addition, keeping the offenders’ information up to

205 For more information about the Council of State’s decision, see Council of State, 17 September 2020, Merits No. 2016/12975, Decision No. 2020/3048 <<https://karararama.danistay.gov.tr>> accessed October 3, 2024.

date might have a deterrent effect on them due to the feeling of being watched and the fear of being caught immediately.²⁰⁶

Considering the arguments mentioned above, one can say that it would be more humane and preventive to assess and classify sex offenders psychologically and psychiatrically and to focus on these security measures in conjunction with pharmacotherapy measures. Registration and community notification systems cannot be considered as an effective and permanent solution by themselves for the offenders who need some medical intervention. However, the imposition of pharmacotherapy with a more cautious, controlled and even restructuralised registration and community notification system can contribute to the prevention of such criminals.²⁰⁷

Externally peer-reviewed.

The author has no conflict of interest to declare.

The author declared that this study has received no financial support.

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207 For more information on the use of pharmacotherapy for paedophilic sex offenders, see Zeynep Burcu Akbaba, *Kimyasal Hadım Uygulaması ve Ceza Adaleti Sistemindeki Yeri* (Savaş Publication 2018); Zeynep Burcu Akbaba, *The Permissibility of Pharmacotherapy for Paedophilic Sex Offenders in the Light of the Rights Protected under the European Convention on Human Rights* (University of Leicester, 2015) Unpublished Doctoral Thesis.

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Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Der eheliche Vorschlagsanteil in der Errungenschaftsbeteiligung unter der Anwendung der Härteklausel in Artikel 236 Absatz 2 des türkischen Zivilgesetzbuches: Eine rechtsvergleichende Analyse

Marital Share in Acquisitions under the Application of the Hardship Provision in Article 236(2) of the Turkish Civil Code: A Comparative Legal Analysis

Nilgün Başalp Yıldırım^{*} 

Zusammenfassung

Dieser Aufsatz widmet sich der Vorschrift in Art. 236 Abs. 2 des türkischen Zivilgesetzbuches (TZGB), welche eine abweichende Regelung von Art. 215 des Schweizerischen Zivilgesetzbuches (ZGB) ist. In Fällen von Scheidung aufgrund der besonderen Scheidungsgründe *Ehebruch oder Nachstellung nach dem Leben* verleiht diese Bestimmung dem Richter die Ermessensbefugnis, den Vorschlagsanteil des schuldigen Ehegatten in der Errungenschaftsbeteiligung aus Billigkeitsgründen zu reduzieren oder aufzuheben. Zum besseren Verständnis wird im Kontext der Rezeption des ZGB zunächst ein kurzer Überblick über die Scheidungsgründe im aktuellen türkischen Scheidungsrecht im Vergleich zum schweizerischen Recht gegeben. Es folgt eine Erörterung der Lehrmeinungen zu Art. 236 Abs. 2 TZGB sowie eine kritische Analyse der rechtlichen Grundlagen dieser Vorschrift. Durch die Untersuchung der aktuellen Rechtsprechung werden anschließend die Auswirkungen und Herausforderungen bei der Anwendung dieser Bestimmung verdeutlicht. Abschließend wird erörtert, ob eine unbillige Vorschlagsbeteiligung auch ohne die Anwendung der Härteklausel aufgrund des Verbots des Rechtsmissbrauchs verwehrt werden könne, wobei exemplarisch ein Fall aus der schweizerischen Rechtsprechung herangezogen wird. Der Aufsatz schließt mit der Empfehlung Art. 236/2 TZGB einer Revision zu unterziehen.

Schlüsselwörter

Vorschlagsanteil, Errungenschaftsbeteiligung, Billigkeitsminderung, Rechtsmissbrauchsverbot, Härteklausel in Artikel 236 Absatz 2 TZGB

Abstract

This paper examines the provision in Article 236/2 of the Turkish Civil Code (TCC), which differs from Article 215 of the Swiss Civil Code (SCC). In cases of divorce due to the specific grounds of adultery or endangerment of life, this provision provides the judge with the discretion to reduce or nullify the participation of the culpable spouse in the surplus of the other spouse on equitable grounds within the ordinary matrimonial regime of participation in acquisitions (*Errungenschaftsbeteiligung*). To improve understanding, a brief overview of the grounds for divorce in Turkish law, in comparison with Swiss law, is provided within the context of the Swiss Civil Code's reception in Turkey. The discussion then addresses scholarly opinions on Article 236/2 TCC, along with a critical analysis of this provision's legal basis. By examining the current case law, the impacts and challenges in applying this provision are highlighted. Finally, it is considered whether an unjust participation share could also be denied without applying the hardship clause, based on the prohibition of abuse of rights, illustrated by an example from Swiss case law. The paper concludes with a recommendation to revise Article 236/2 of the Turkish Civil Code.

Keywords

Participation in the Surplus, Matrimonial participation in acquisitions, Equitable reduction, Prohibition of abuse of rights, Hardship Provision in Article 236(2) TCC

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To cite this article: Basalp Yıldırım N, "Marital Share in Acquisitions under the Application of the Hardship Provision in Article 236(2) of the Turkish Civil Code: A Comparative Legal Analysis", (2025) 76 Annales de la Faculté de Droit d'Istanbul 229. <https://doi.org/10.26650/annales.2025.76.0008>

Extended Summary

The entitlement of the spouse for participation in the surplus, which constitutes a statutory claim, merely requires that the acquisitions were made during the matrimonial regime of participation in acquisitions (*Errungenschaftsbeteiligung*). Established case law affirms that this right to participate in the surplus does not depend on whether the spouse contributed directly or indirectly to asset acquisition during the marriage. In other words, the spouse's involvement in wealth creation is irrelevant in determining their entitlement to a statutory share. This reflects a broad principle of the ordinary matrimonial property regime, which regulates that acquisitions made during the marriage are subject to a participation share for the other spouse.

Furthermore, the judge has no discretion to reduce the participation share based on divorce grounds other than those narrowly specified in Article 236/2 of the Turkish Civil Code (TCC), namely, adultery and endangerment of life. Due to the established case law, this restriction applies even if considerations of equity arise.

Overall, it becomes clear that a revision of Article 236/2 TCC is necessary to address the issues of inequity. The underlying assumption of the provision, that both spouses have equally contributed to the family's welfare regardless of the nature of their contributions and have thus jointly acquired the assets, should also be reflected in its application. This implies that the statutory claim can only be upheld if this presumption is not rebutted in the individual case.

In exceptional cases of extreme inequity—where, for instance, one spouse has clearly abused their position or has not contributed at all to the family's welfare—the courts should have the discretion to deny the participation share entirely. The current legal framework, however, lacks this flexibility, mandating that the participation claim be upheld even in clear cases of inequity unless one of the specific grounds in Article 236/2 TCC is met.

Considering the boundaries of Article 236/2 TCC, the judge is not permitted to reduce or annul the participation of the culpable spouse. Established case law prohibits the application of Article 2/2 TCC to circumvent inequitable outcomes not addressed by Article 236/2 TCC. Therefore, even in case of abuse of rights, denying participation remains untenable under the consistent jurisprudence of the Court of Cassation. A remedy could only be achieved through a statutory amendment.

Article 236 TCC urgently requires revision. The criticism of the doctrine is more than justified. At the very least, Article 236/2 should be entirely abolished and, similarly to Swiss law, in extreme cases, equitable decisions should be made possible through Article 2/2 TCC. Alternatively, Article 236/ 2 TCC should be amended in

such a way that the inconsistencies are rectified through a special provision, akin to § 1381 BGB or as already drafted and suggested in the doctrine. Such revisions would ensure that statutory provisions achieve their intended purpose: a fair participation in the acquisitions made during the marriage.

In conclusion, it is evident that a revision of Article 236/2 TCC would effectively address the identified issues. Until an appropriate statutory change is enacted, judicial discretion should focus on reducing the participation share according to equity principles, rather than entirely eliminating it. Instead of a complete annulment of the participation claim, it would be more equitable to consider the marriage's duration and each spouse's contributions, and to reduce the participation in the other spouse's surplus proportionally. Nonetheless, in cases of extreme inequity, the participation claim should be entirely denied.

Der ordentliche Güterstand in der Türkei ist die Errungenschaftsbeteiligung gemäß Art. 202 des türkischen Zivilgesetzbuches (TZGB). Haben die Ehepartner keinen anderen Güterstand gewählt, so gelten *ipso iure* für ihre vermögensrechtlichen Beziehungen die Regeln der Errungenschaftsbeteiligung (Art. 202 – 242 TZGB). Bei der Auflösung der Errungenschaftsbeteiligung gewährt Artikel 236/1 TZGB jedem Ehegatten einen gesetzlichen Anspruch auf die Hälfte oder auf den durch Vereinbarung festgelegten Anteil des Vorschlags (TR: *Artık Değer*)¹ des anderen Ehegatten. Diese gegenseitigen Ansprüche werden miteinander verrechnet und enden bis zur Höhe der wenigeren Forderung. Die höhere Forderung verbleibt in Höhe der Differenz, die gemäß Art. 239 TZGB als Beteiligungsforderung (TR: *Katılma Alacağı*) bezeichnet wird.

Die Beteiligungsforderung ist ein relatives Recht familienrechtlichen Ursprungs, das der Gläubigerehegatte gegenüber dem anderen geltend machen kann und grundsätzlich die Zahlung eines Geldbetrages betrifft. Artikel 236/1 TZGB stellt somit eine dispositive Rechtsnorm dar, die besagt, dass der Beteiligungsanteil des Ehegatten am Vorschlag des anderen Ehegatten (der sog. *Verteilschlüssel*)², sofern keine abweichende Vereinbarung getroffen wurde, jeweils zur Hälfte ist.³ Demnach steht jedem Ehegatten oder seinen Erben die Hälfte des Vorschlags des anderen Ehegatten zu.

Diese Regelung rührt vom Grundgedanken her, dass die Errungenschaften im Güterstand der Errungenschaftsbeteiligung gemeinsam erwirtschaftet wurden.⁴ Bei der Auflösung der ehelichen Gemeinschaft wird der während des Güterstandes erwirtschaftete Erfolg unabhängig von der Art der individuellen Beiträge (Haushaltsführung, Kinderbetreuung, Erwerbstätigkeit, usw.) wertmäßig gleichermaßen auf beide Ehegatten verteilt.⁵

1 Art. 231 TZGB (Art. 210 ZGB) definiert den Vorschlag als den verbleibenden Betrag, der sich ergibt, wenn vom Gesamtwert der Errungenschaften jedes Ehegatten, einschließlich der hinzugerechneten Vermögenswerte (Art. 230 TZGB) und Ersatzforderungen (Art. 229 TZGB), die auf ihr lastenden Schulden abgezogen werden (Art. 231 – 238 TZGB). Demnach ist der Vorschlag der Gesamtwert der Errungenschaften und somit das Resultat einer Berechnung. Mustafa Dural, Tufan Ögüz and Mustafa Alper Gümüş, *Türk Özel Hukuku III Aile Hukuku* (2024) N 1224. Vgl. Heinz Hausheer and Regina Aepli-Müller, *Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB* (2022) Art 210 N 7; Thomas Sutter-Somm and Felix Kobel, *Familienrecht* (2009) N 353 - 354.

2 Sutter-Somm and Kobel (n 1) N 357.

3 Heinz Hausheer, Ruth Reusser and Thomas Geiser, *Berner Kommentar, Das Eherecht: Das Güterrecht der Ehegatten: Allgemeine Vorschriften und der ordentliche Güterstand der Errungenschaftsbeteiligung, Art. 181-220 ZGB* (1992) Art. 215 N 4; Alexandra Jungo, *Handkommentar zum Schweizer Privatrecht Personen- und Familienrecht Art. 1-456 ZGB Partnerschaftsgesetz* (2023) Art. 215 N 1; Daniel Steck and Roland Fankhauser, in *FAMKOMM Kommentar zum Familienrecht Scheidung, Band I: ZGB und Band II: Anhänge* (2022), Bd I: ZGB, Art 215 N 1.

4 Hausheer and Aepli-Müller (n 1) Art. 215 N 1 - 2.

5 Hausheer, Reusser and Geiser (n 3) Art. 215 N 5.

Art. 236 Abs. 2 TZGB ermächtigt den Richter, anders als im schweizerischen ZGB, bei den Scheidungsgründen *Ehebruch* und *Nachstellung nach dem Leben* die Vorschlagsbeteiligung nach Maßgabe der Billigkeit zu verringern oder aufzuheben.⁶ Diese Härteklausel stößt auf Kritik, die im Folgenden nach einer kurzen Darstellung der Scheidungsgründe im türkischen Zivilgesetzbuch näher beleuchtet wird. Ziel dieses Aufsatzes ist es, diese Härteklausel und ihre rechtlichen Grundlagen umfassend zu analysieren. Darüber hinaus wird die aktuelle Rechtsprechung des türkischen Kassationsgerichts zitiert, um die rechtlichen und praktischen Auswirkungen dieser Bestimmung zu verdeutlichen und Fragestellungen aufzuzeigen. Abschließend wird erörtert, ob eine unbillige Vorschlagsbeteiligung auch ohne Anwendung der Härteklausel aufgrund des Verbots des Rechtsmissbrauchs abgewiesen werden kann. Ein Fallbeispiel hierfür ist ein Urteil des schweizerischen Kantongerichts Freiburg aus dem Jahr 2003, in dem unter besonderen Umständen dieser Ansatz verfolgt wurde.

Zivilgesetzbuch

Angenommen, die Reformbemühungen zu den Scheidungsgründen im schweizerischen Recht um die Jahrhundertwende wären erfolglos geblieben und sämtliche seinerzeit an dem schweizerischen Scheidungsrecht geäußerte Kritikpunkte⁷ hätten teilweise weiterhin Relevanz, so würde dies bei manchem Schweizer Familienrichter sicherlich einen kalten Schauer über den Rücken laufen lassen. Genau eine solche Konstellation findet sich im türkischen Scheidungsrecht wieder, das verschuldenstechnisch auf einem *hybriden* System basiert, dessen Wurzeln im schweizerischen Zivilgesetzbuch in der Fassung vor der Ehescheidungsreform liegen⁸ und eine eigenständige Erweiterung im Jahr 1988 erfahren haben. Diese

6 Art. 236 Abs. 2 TZGB: Zina veya hayata kast nedeniyle boşanma halinde hakim, kusurlu eşin artık değerdeki pay oranının hakkaniyete uygun olarak azaltılmasına veya kaldırılmasına karar verebilir. [Im Falle einer Scheidung aufgrund von Ehebruch oder Nachstellung nach dem Leben kann der Richter entscheiden, den Anteil des schuldigen Ehegatten am Vorschlag des anderen Ehegatten nach Maßgabe der Billigkeit zu reduzieren oder vollständig aufzuheben.]

7 Vgl. Heinz Hausheer, „Die wesentlichen Neuerungen des neuen Scheidungsrechts“ *ZBJV* (1999) 135(1) 1, 4; Regula Rhiner, *Die Scheidungsvoraussetzungen nach revidiertem schweizerischem Recht* (2001) 80–86; Botschaft Nr. 95.079 über die Änderung des Schweizerischen Gesetzbuches (Personenstand, Eheschliessung, Scheidung, Kindesrecht, Verwandtenunterstützungspflicht, Heimstätten, Vormundschaft und Ehevermittlung) vom 15 November 1995, https://www.fedlex.admin.ch/eli/fga/1996/1_1_1/de (zuletzt besucht am 18 Juli 2024), Ziff. 143 and Ziff. 144.3 (zit. Botschaft Scheidung).

8 BBl Nr. 26 vom 7. Juli 1998, 3491. Die seit dem 1. Juli 2001 in Kraft getretene revidierte Scheidungsgesetzgebung brachte tiefgreifende Änderungen mit sich. Die Reformen bewirkten, dass in der Schweiz sowohl die Voraussetzungen als auch die Folgen einer Scheidung grundsätzlich verschuldensunabhängig ausgestaltet wurden. Eine Scheidung auf gemeinsames Begehren (Art. 111 und 112 ZGB) wurde geregelt. Darüber hinaus kann seither nach vierjähriger (seit 2004 zweijähriger) Trennung jeder Ehegatte einseitig die Scheidung beim Gericht beantragen (Art. 114 ZGB). In extremen Fällen, in denen einem Ehegatten die Fortführung der Ehe aus schwerwiegenden und ihm nicht zurechenbaren Gründen unzumutbar ist, ermöglichte der schweizerische Gesetzgeber eine sofortige Auflösung der Ehe durch Klage (Art. 115 ZGB). Der Anspruch auf nachehelichen Unterhalt richtet sich seit der Revision nach objektiven Kriterien wie der Aufgabenteilung während der Ehe, der Ehedauer, dem Alter und der Gesundheit der Ehegatten sowie deren Einkommen und Vermögen, anstatt nach deren Verschulden am Scheitern der Ehe. Vgl. Rhiner (n 7) 103–106; Ingeborg Schwenzer and Tomie Keller, „Recent Developments in Swiss Family Law“ *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* (2015) 35(1) 1, 8–9.

Kombination soll im Folgenden kurz erläutert werden.

Das türkische Zivilgesetzbuch (TZGB) ist am 8.12.2001 verkündet worden.⁹ Durch das Inkrafttreten dieses Gesetzes am 1.1.2002 ist das alte türkische Zivilgesetzbuch (aTZGB) von 1926, welches eine Rezeption des schweizerischen Zivilgesetzbuches (ZGB) war, abgelöst worden.¹⁰ Leider wurde im neuen türkischen Zivilgesetzbuch die schweizerische Ehescheidungsreform¹¹, die seit dem 1. Januar 2001 in der Schweiz in Kraft ist, nicht ausreichend berücksichtigt. Die bedeutendste Neuerung dieser Reform bestand darin, dass sowohl die Scheidungsvoraussetzungen als auch die Scheidungsfolgen grundsätzlich unabhängig vom Verschulden ausgestaltet wurden.¹² Im türkischen Scheidungsrecht sind hingegen die Scheidungsvoraussetzungen als auch die Scheidungsfolgen schon seit der Rezeption des schweizerischen Gesetzbuches grundsätzlich verschuldensabhängig ausgestaltet. Die weiterhin bestehenden besonderen Scheidungsgründe beruhen größtenteils auf dem Verschuldensprinzip. Auch beim allgemeinen Scheidungsgrund der *Zerrüttung der ehelichen Gemeinschaft* hat das Verschulden eine erhebliche Bedeutung. Ebenso ist bei der Beurteilung der materiellen Folgen der Scheidung eine Bewertung des Verschuldens der Parteien erforderlich.¹³

Die besonderen Scheidungsgründe in den Artikeln 161-164 TZGB (namentlich *Ehebruch, Nachstellung nach dem Leben, Misshandlung oder Ehrenkränkung, Begehung einer Straftat und unehrenhafter Lebenswandel, Verlassen*) belassen dem schuldlosen oder weniger schuldigen Ehegatten das Recht zur Klage. Ein weiterer besonderer Scheidungsgrund ist die *Geisteskrankheit* gemäß Artikel 164 TZGB. Nach den Voraussetzungen der Vorschrift kann die Ehe aufgrund der Unzumutbarkeit des Zusammenlebens geschieden werden. In Fällen, in denen die Scheidung auf die *Zerrüttung der ehelichen Gemeinschaft* (Art. 166 TZGB) gestützt wird, hat der Beklagte das Recht, Einspruch zu erheben, wenn der Kläger das Scheitern der Ehe schwerwiegender verschuldet als der Beklagte. Ist die Ausübung des Einspruchsrechts jedoch rechtsmissbräuchlich und ist die Fortsetzung der Ehe für den Kläger und die Kinder nicht mehr zumutbar, so kann das Gericht gemäß Artikel 166 Absatz 2 TZGB die Scheidung aussprechen.¹⁴ Rechtsvergleichend ist festzuhalten, dass

9 Resmi Gazete (Amtsblatt) v 8 Dezember 2001 Nr 24407.

10 Vertiefend zur Thematik der Rezeption und Weiterentwicklung vgl. Yeşim M Atamer, „Rezeption und Weiterentwicklung des schweizerischen Zivilgesetzbuches in der Türkei“ *RabetsZ* (2008) 72(4) 723–754; Ahmet M Kılıçoğlu, „Medeni Kanunumuzun Nasıl Değiştirdik“ in *Prof. Dr. Cevdet Yavuz'a Armağan Cilt II, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* (2016) 22(3) 1717–1757. Zu den wichtigsten Änderungen im Familienrecht vgl. İlhan Uluşan, „Die Neugestaltung des Familienrechts durch das neue türkische Zivilgesetzbuch“ *NZ* (2002) 87, 225–234.

11 Botschaft Scheidung, (n 7). Siehe bitte: Ruth Reusser, *Zur Revision des schweizerischen Scheidungsrecht, Grundgedanken, Scheidung und ihre Folgen* (1996) 65 ff.

12 Heinz Hausheer, „Zur Ehescheidungsreform in der Schweiz“ *Z/RV* (1996) 37 177, 177; derselbe, (n 7) 4.

13 Dural, Ögüz und Gümüş (n 1) N 561a; Pınar Altınok Ormancı, „Fransız Boşanma Hukuku Revizyonunun Getirdikleri: Türk Boşanma Hukukunda Olası Bir Revizyon İçin Değerlendirmeler“ *Ankara Üniversitesi Hukuk Fakültesi Dergisi* (2022) 71(4) 1431, 1446–1450.

14 Dural, Ögüz und Gümüş (n 1) N 564–645a; Kasım Özen, *Die Scheidungsgründe im türkischen Zivilgesetzbuch* (2010)

dieser bisher erläuterte Rechtsrahmen auf einer Verknüpfung vom Zerrüttungs- und Verschuldensprinzip beruht und auf die Rezeption des schweizerischen Zivilgesetzbuches (in der Fassung von 1907) zurückzuführen ist.¹⁵

Das in der Türkei zum Scheidungsrecht Reformbedarf besteht wurde bereits öfters in der türkischen Lehre zu Wort gebracht.¹⁶ Zu Recht, denn die Wahl des Verschuldensprinzips als Anknüpfungspunkt für die Scheidungsvoraussetzungen und Scheidungsfolgen, verstärkt die Feindseligkeiten zwischen den Ehegatten und verwandelt den Scheidungsprozess in ein Schlachtfeld. Die Fokussierung auf die Verschuldensfrage erschwert allen Beteiligten die Scheidung, insbesondere aber fügt sie Kindern zusätzlichen Schaden zu. Verfassungsrechtlich ist es die Aufgabe des Staates, das Wohl der Familie und der Kinder zu schützen. Darüber hinaus erschwert die Untersuchung der Verschuldensfrage in den Gerichtsakten den Scheidungsprozess erheblich, was den Familienrichter zusätzlich belastet. Daher liegt es in erster Linie im Gemeinwohl, sich im Scheidungsrecht von der Verschuldensfrage zu verabschieden. Angesichts der genannten Gründe wäre es sinnvoll, ein neues Scheidungsrecht im türkischen Zivilgesetzbuch einzuführen, das die besonderen Scheidungsgründe abschafft und stattdessen einen verschuldensunabhängigen Ansatz für Scheidungsgründe und -folgen verfolgt. Ein solcher Ansatz würde nicht nur den Scheidungsprozess beschleunigen, sondern auch dazu beitragen, die emotionalen Belastungen für alle Beteiligten zu verringern.

Aufgrund des Reformbedarfs fügte der türkische Gesetzgeber bereits 1988 den Scheidungsgründen unter Artikel 134 TZGB (heute Art. 166 TZGB) zwei zusätzliche hinzu und etablierte ein hybrides System. Dadurch wurden diese neuen Scheidungsgründe in das bestehende System eingebettet, wodurch das Prinzip der Zerrüttung der ehelichen Gemeinschaft im Gesetz erweitert wurde.¹⁷

35–160; Halil Akkanat, „Grundlegende Prinzipien bei der Scheidung im Einvernehmen im Rahmen der Durchführung des türkischen Revisionsgerichts“, *Annales De La Faculté De Droit d'Istanbul* (2005) 37(54) 257, 257–260.

15 Zum ZGB von 1907: Hausheer, (n 7) 4.

16 Dural, Ögüz und Gümüş (n 1) N 561a; Haluk Burcuoğlu, „1984 Türk Medeni Kanunu Ön Tasarısında Boşanma“ *İ.Ü. Mukayeseli Hukuk Araştırmaları Dergisi* (1988) 109, 119; derselbe, „4721 Sayılı Yeni Medeni Kanunun Boşanma Düzenlemesinin Eleştirisi ve Uygulamada Karşılaşılabilecek Sorunlar“ *Antalya Barosu Dergisi* (2004) 25(5/51) 40–69; Bilge Öztan, „Medeni Kanun'un Kabulünün 70'inci Yılında Aile Hukuku“ *Ankara Üniversitesi Hukuk Fakültesi Dergisi*(1995) 44(1) 79, 86/87, 125; Saibe Oktay Özdemir, „Türk Hukukunda Boşanma Sisteminde Revizyon İhtiyacı“ *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* (2015) 35(1) 29, 29–31; dieselbe, „2002 Tarihli Türk Medeni Kanunu Ne Kadar Yenidir?“ in Ali Çivi (ed) *İsviçre Medeni Kanunu ve Borçlar Kanunu'nun Alınışının 80. Yılı/80 Jahre schweizerisches ZGB und OR in der Türkei, Symposium vom 28. April 2006*, (2007) 53, 61/62; Ebru Ceylan, „İsviçre, Fransa, Belçika, İspanya ve İtalya Hukukundaki Boşanma Sebeplerinin Türk Hukukuyla Mukayesesi ve Değerlendirilmesi“ *Uyuşmazlık Mahkemesi Dergisi* (2018) 6(12) 315, 331; Altınok Ormancı (n 13) 1454; Özge Yücel, *Boşanma Hukukunda Kusur İlkesinden Kusurdan Bağımsızlığa Geçiş* (2023) 565; Dilara Buket Didin, „Kusur: Türk Boşanma Hukuku Ekseninde Bir Değerlendirme“ *Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi* (2024) 19(219) 417, 432/433.

17 Bilge Öztan, „Das türkische Familienrecht unter besonderer Berücksichtigung der Familienrechtsnovelle“ *ZfRV* (1992) 20, 34; Hilmar Krüger, „Änderungen im türkischen Familienrecht“ *StAZ* (1991) 7 181–183. Siehe bitte für eine Übersetzung der geänderten Artikel des TZGB durch beider Teilrevisionen von 1988 und 1990: Yeşim M Atamer, „Änderungen im türkischen Zivilgesetzbuch und Obligationenrecht in den Jahren 1988–1995“ *Annales de la Faculté de Droit d'Istanbul* (1996) 30(46) 240–251.

Seit der Reform¹⁸ von 1988 erlaubt das TZGB eine *einvernehmliche Scheidung* (*Anlaşmalı Boşanma*) bei Ehen, die länger als ein Jahr dauern, vorausgesetzt, ein vom Familienrichter genehmigtes Scheidungsprotokoll über finanzielle und kinderbezogene Angelegenheiten liegt vor.¹⁹ Außerdem bestimmt Art. 166 Abs. 4 TZGB, dass nach einer abgewiesenen Scheidungsklage eine Scheidung möglich ist, wenn die Ehegatten ab dem Datum der Abweisung drei Jahre lang getrennt gelebt haben.²⁰ Diese drei Jahresfrist, rechtlich benannt als *faktische Trennung* (*Fiili Ayrılık*), wurde kürzlich vom Verfassungsgericht für verfassungswidrig erklärt, wodurch Art. 166 Abs. 4 TZGB ab dem 19. Januar 2025 nicht mehr in Kraft sein wird.²¹ Das Verfassungsgericht stellte fest, insbesondere gestützt auf die lange verfahrensimmenente Dauer einer Scheidungsklage in der Praxis, dass Art. 166/4 TZGB kein angemessenes Gleichgewicht zwischen dem Recht auf Achtung des Privat- und Familienlebens und dem Schutz der Familie herstellt und somit das Prinzip der Verhältnismäßigkeit verletzt.²²

Ein auf das Verschuldensprinzip und das Vorliegen besonderer Scheidungsgründe gestützte System wurde in den meisten europäischen Ländern sowie in der Schweiz aufgegeben.²³ In der allgemeinen Gesetzesbegründung des TZGB wird ausgeführt, dass während der Kommissionsarbeiten intensiv diskutiert wurde, ob im türkischen Zivilgesetzbuch auf spezifische Scheidungsgründe verzichtet und stattdessen ein allgemeiner Scheidungsgrund, ähnlich wie im Bürgerlichen Gesetzbuch (BGB), basierend auf dem Prinzip der *Zerrüttung der Ehe* eingeführt werden sollte. Angesichts der Tatsache, dass bereits durch die Teilrevision von 1988 das Prinzip der *Zerrüttung der Ehe* in Artikel 134 aTZGB um zwei weitere Scheidungsgründe ausgedehnt wurde und die besonderen Scheidungsgründe in der Rechtspraxis keine Probleme bereiten, plädierte die Kommission jedoch dafür, das bestehende Scheidungsrecht beizubehalten. Zudem wurde hervorgehoben, dass die Abschaffung des *Ehebruchs* als besonderer Scheidungsgrund und seine Integration in den allgemeinen Scheidungsgrund der *Zerrüttung der Ehe* zu Fehlinterpretationen in der Gesellschaft führen könnte.²⁴

18 Gesetz zur Änderung bestimmter Artikel des TZGB und des Artikels 49 OR, veröffentlicht im Amtsblatt (Resmi Gazete) am 12. Mai 1988, Nr 19812, Gesetz Nr 3444.

19 Atamer (n 17) 242/243; Dural, Ögüz and Gümüş (n 1) N 646 – 658b; Akkanat (n 14) 260 – 265.

20 Dural, Ögüz and Gümüş (n 1) N 659 - 669. Vertiefend zu den Scheidungsgründen im türkischen Scheidungsrecht vgl. Dural, Ögüz and Gümüş (n 1) N 562 – 669.

21 Das Verfassungsgericht hat am 22. Februar 2024 im Fall Nr. E.2023/116 entschieden, dass der vierte Absatz von Artikel 166 des türkischen Zivilgesetzbuches verfassungswidrig ist und aufgehoben wird. Das Urteil wurde im Amtsblatt (Nr 32522 v 19 April 2022) veröffentlicht und wird neun Monate nach seiner Veröffentlichung in Kraft treten.

22 Anayasa Mahkemesi (Verfassungsgericht), Urteil v 22. Februar 2024, Aktenzeichen (Az) 2023/116 E, Erwägung Nr. 35.

23 Die Zerrüttung der ehelichen Gemeinschaft wird in der Regel als einziger Scheidungsgrund anerkannt. Dies gilt, wenn die Ehegatten gemeinsam die Scheidung beantragen, eine gewisse Zeit getrennt gelebt haben oder wenn eine Scheidungsklage vom anderen Ehegatten akzeptiert wird. Bei strittigen Scheidungen wird die Scheidung ausgesprochen, wenn die Fortsetzung der Ehe für einen der Ehegatten unzumutbar geworden ist. Beispiele finden sich in den §§ 1564 - 1568 BGB und den Artikeln 111 - 116 ZGB.

24 Genel Gerekçe (Allgemeine Begründung (des Gesetzes)), in Türk Medeni Kanunu Tasarısı ile Türk Kanunu Medenisinde

Die Vorschrift in Art. 236 Abs. 2 TZGB, der Gegenstand dieser Abhandlung ist, knüpft an zwei der besonderen Scheidungsgründe, die in der Schweiz bereits seit der Jahrhundertwende Rechtsgeschichte sind. Um die Beteiligung am Vorschlag zu kürzen oder sogar aufzuheben, bedarf es nach Art. 236/2 TZGB eines Urteils, das die Scheidung namentlich aus den Gründen des *Ehebruchs* oder der *Nachstellung nach dem Leben* ausspricht. Nur dann ist der Richter ermächtigt, den Beteiligungsanteil des ehebrecherischen oder vorsätzlich nach dem Leben des anderen Ehegatten trachtenden Ehegatten nach Billigkeit ganz oder teilweise zu verkennen. An die Gesetzestexte beider Scheidungsgründe soll unten erinnert werden.

Ehebruch:

Jeder Ehegatte ist berechtigt, wegen Ehebruchs des anderen Ehegatten Scheidungsklage zu erheben.

Die Klage verwirkt mit Ablauf von sechs Monaten von dem Tage an, an dem der zur Klage berechtigte Ehegatte Kenntnis von dem Scheidungsgrund erlangt, spätestens jedoch mit Ablauf von fünf Jahren nach der Ehebruchshandlung.

Wer verziehen hat, hat kein Klagerecht.

Gemäß Artikel 161 TZGB setzt das Scheidungsurteil wegen Ehebruchs voraus, dass eine eheliche Gemeinschaft zwischen den Ehegatten besteht, einer der Ehegatten mit einer dritten Person bewusst und willentlich eine sexuelle Beziehung eingegangen ist, keine Hinderungsgründe für die Klage bestehen und der andere Ehegatte aufgrund des Ehebruchs eine Scheidungsklage eingereicht hat.²⁵

Nachstellung nach dem Leben, schwere Misshandlung und Ehrenkränkung

Hat ein Ehegatte dem Leben des anderen Ehegatten nachgestellt, oder ihn schwer misshandelt, oder ihm eine schwere Ehrenkränkung zugefügt, so kann dieser auf Scheidung klagen.

Değişiklik Yapılması Hakkında Kanun Tasarısı (Entwurf des türkischen Zivilgesetzbuches und Entwurf eines Gesetzes zur Änderung des türkischen Zivilgesetzbuches), E.1/611, 1/425, 2/361, 2/680, K.17, 21.06.2001, <https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d21/c073/tbmm21073011ss0723.pdf> (zuletzt besucht am 18 Juli 2024), 9/10.

25 Dural, Ögüz and Gümüş (n 1) N 564; Ahmet M Kılıçoğlu, *Aile Hukuku* (2022) 92/93; Mehmet Erdem and Aslı Makaracı-Başak, *Aile Hukuku* (2022) 101; Cem Baygın, „Evlilik Birliğinde Sadakat Yükümlülüğü“ in Şebnem Akipek Öcal, Özge Uzun Kazmacı, Ahmet Ayar, Zeliha Gizem Özçelik and Nesli Şen Özçelik, *Medeni Kanun'un ve Borçlar Kanunu'nun 90. Yılı Uluslararası Sempozyumu 1926'dan Günümüze Türk-İsviçre Medeni Hukuku* (2017) Cilt II, 731, 736. Rechtsvergleichend siehe bitte: Art. 137 ZGB (a.F.): „Hat ein Ehegatte einen Ehebruch begangen, so kann der andere Ehegatte auf Scheidung klagen. Die Klage verjährt mit Ablauf von sechs Monaten, nachdem der klagberechtigte Ehegatte von dem Scheidungsgründe Kenntnis erhalten hat, und in jedem Falle mit Ablauf von fünf Jahren seit dem Ehebruch. Keine Klage hat der Ehegatte, der dem Ehebruch zugestimmt oder ihn verziehen hat.“

Die Klage verwirkt mit Ablauf von sechs Monaten, seitdem der Klageberechtigte den Scheidungsgrund kennt, und in jedem Falle mit Ablauf von fünf Jahren seit dessen Eintritt.

Wer verziehen hat, hat kein Klagerecht.

Die Bestimmung in Artikel 162 TZGB regelt drei verschiedene Scheidungsgründe. Da jedoch nur die Nachstellung nach dem Leben als Voraussetzung für die Herabsetzung oder Aufhebung des Beteiligungsanteils relevant ist, werden die anderen Scheidungsgründe an dieser Stelle nicht behandelt.

Die Nachstellung nach dem Leben des Ehepartners erfordert, dass der Ehegatte vorsätzlich versucht, dem anderen Ehegatten das Leben zu nehmen. Diese Handlung stellt gleichzeitig nach den Artikeln 35 und 81 des türkischen Strafgesetzbuches (TStGB) den Tatbestand der versuchten (vorsätzlichen) Tötung dar.²⁶

III. Die Härteklausel in Art. 236 Absatz 2 des türkischen Zivilgesetzbuches

Artikel 236 Absatz 2 des türkischen Zivilgesetzbuches sieht für die besonderen Scheidungsgründe *Ehebruch* oder *Nachstellung nach dem Leben* eine Härteklausel vor. Demnach hat der Richter die Ermessensbefugnis, die Vorschlagsbeteiligung des „schuldigen“ Ehegatten bei der güterrechtlichen Auseinandersetzung nach Billigkeit zu verringern oder vollständig aufzuheben, vorausgesetzt, die restriktiven Bedingungen der Vorschrift sind erfüllt. Ob der Zweck der Regelung darin besteht, den Ehegatten zu bestrafen, der durch sein schwerwiegendes Verschulden die Scheidung verursacht hat, ist in der Lehre umstritten. Eine Lehrmeinung argumentiert, dass diese Vorschrift als Sanktionsnorm im Sinne einer zivilrechtlichen Strafe fungiert und auf die Bestrafung des schuldigen Ehegatten abzielt.²⁷ Eine andere hingegen, dass der Zweck der Vorschrift darin besteht, den anderen (leidtragenden) Ehegatten in Angesicht der Schwere des Scheidungsgrundes vor (weiteren) unbilligen Nachteilen durch die Auflösung des Güterstandes zu schützen und dass die Vorschrift nicht

26 Dural, Ögüz und Gümüş (n 1) N 564; Kılıçoğlu (n 25) 95; Erdem und Makaracı-Başak (n 25) 106/107. Rechtsvergleichend siehe bitte: Art. 138 ZGB (a.F.): „Hat ein Ehegatte dem Leben des andern nachgestellt, oder ihn schwer misshandelt, oder ihm eine schwere Ehrenkränkung zugefügt, so kann dieser auf Scheidung klagen. Die Klage verjährt mit Ablauf von sechs Monaten, seitdem der Verletzte den Scheidungsgrund kennt, und in jedem Falle mit Ablauf von fünf Jahren seit dessen Eintritt. Keine Klage hat der Ehegatte, der dem Schuldigen verziehen hat.“

27 Faruk Acar, *Aile Hukukumuzda Aile Konutu, Mal Rejimleri, Eşin Yasal Miras Payı* (2021) N 1120 Fussnote 1147; Alper M Gümüş, *Teoride ve Uygulamada Evliliğin Genel Hükümleri ve Mal Rejimleri (TMK 185–281)* (2008) 396; Emel Badur, „Zina veya Hayata Kast Nedeniyle Boşanma Halinde Kusurlu Eşin Artık Değere Katılma Payı“ *Çankaya Üniversitesi Hukuk Fakültesi Dergisi* (2016) 1(2) 39, 60; Yücel (n 16) 273; Gülşah Sinem Aydın, „Türk Medenî Kanunu’nun 236. Maddesinin İkinci Fıkrasının Eşlerden Birinin Diğerini Kasten Öldürmesi Hâlinde Uygulanıp Uygulanmayacağı Sorunu“ *Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi* (2018) 13(165–166) 9, 30; Zafer Zeytin, *Edinilmiş Mallara Katılma Rejimi ve Tasfiyesi* (2021) N 730: Der Gesetzgeber habe es als nicht gerecht empfunden dem schuldigen Ehegatten denselben Beteiligungsanteil, der dem unschuldigen Ehegatten zusteht, zu gewähren.

bezweckt, eine Zivilrechtsstrafe gegen den schuldigen Ehegatten zu verhängen.²⁸ Wäre der Hauptzweck die Bestrafung des Ehegatten, der *Ehebruch* oder *Nachstellung nach dem Leben* begangen hat, hätte der Gesetzgeber auch eine Erhöhung des Beteiligungsanteils des (*unschuldigen*) Ehegatten vorsehen können.²⁹ Zudem ist es im Ermessen des Richters die Entscheidung über die Reduzierung oder Aufhebung zu tätigen. Die Billigkeitsgründe, die seinem Ermessen zugrunde liegen, müssen in seinem Urteil detailliert dargelegt werden. Hätte der Gesetzgeber eine zivilrechtliche Strafe anstreben wollen, hätte er auch ohne diesen besonderen Ermessensspielraum in der Vorschrift festgelegt, dass der Beteiligungsanteil des schuldigen Ehegatten pauschal, zum Beispiel um die Hälfte, reduziert wird.³⁰

Offensichtlich abweichend von Art. 215 ZGB, der ursprünglichen Regelung im schweizerischen Recht zur Vorschlagsbeteiligung, hat der türkische Gesetzgeber mit der Zivilrechtsreform aus dem Jahr 2001 diese Härteklausel als richterliche Ermessensregelung unter Artikel 236 Abs. 2 TZGB eingeführt. In der Begründung zu Art. 236 TZGB wird ausdrücklich darauf hingewiesen, dass der zweite Absatz der Bestimmung vom Justizausschuss der Nationalversammlung (TBMM) in den Text eingefügt wurde. Diese Ergänzung wird im Bericht des Justizausschusses wie folgt begründet: *“Artikel 236 des Entwurfs wurde zusammen mit seiner Überschrift neu formuliert, um dem Richter im Falle einer Scheidung aufgrund von Ehebruch oder Nachstellung nach dem Leben die Möglichkeit zu geben, den Anteil des schuldigen Ehegatten am Vorschlag des anderen Ehegatten nach Billigkeit zu verringern oder aufzuheben.”*³¹

Rechtsvergleichend ist festzuhalten, dass in der Schweiz in den parlamentarischen Beratungen zur Reform des Scheidungsrechts eine entsprechende Härteklausel, die dem Gericht die Möglichkeit gegeben hätte, aus Billigkeitsgründen von der gesetzlichen Beteiligung am Vorschlag abzuweichen, ausdrücklich mit Verweis auf die Rechtssicherheit abgelehnt wurde.³² Der Gesetzgeber entschied sich bewusst dagegen, die ehelichen Beiträge beider Ehegatten gegeneinander abzuwägen. Dies beruhe auf der Konzeption der Ehe als wirtschaftliche Schicksalsgemeinschaft, weshalb Differenzen im Sparverhalten oder auch gravierende Vernachlässigungen der ehelichen Pflichten nicht zu einem Billigkeitsentscheid führen sollten. Wenn sich

28 Işık Önay, „Özel Hukuk Cezası Kavramı ve Ceza Hukukunun Genel İlkelerinin Özel Hukuk Cezalarına Uygulanabilirliği“ *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* (2023) 29(2) 1320, 1342/1343.

29 Enes Uyar, *Edinilmiş Mallara Katılma Rejiminde Katılma Alacağının Hâkim Kararıyla Kaldırılması veya Azaltılması (TMK m.236/2)* (2024) 70/71.

30 Uyar, (n 29) 71.

31 Adalet Komisyonu Raporu, in *Türk Medeni Kanunu Tasarısı ile Türk Kanunu Medenisinde Değişiklik Yapılması Hakkında Kanun Tasarısı*, E.1/611, 1/425, 2/361, 2/680, K.17, 21.06.2001, <https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d21/c073/tbmm21073011ss0723.pdf> (zuletzt besucht am 18 Juli 2024) 313. Zur Entstehung der Vorschrift in Art 236 Abs 2 TZGB und zu den Diskussionen bei der Einfügung des Absatzes im Justizausschuss siehe: Kılıçoğlu, (n 10) 1748/1749.

32 Hausheer, Reusser and Geiser (n 3) Art 215 N 4; Steck and Fankhauser (n 3) ZGB / Art 215 N 1.

der Ehegatte nicht scheiden, aber dennoch wirtschaftlich schützen will, bleibe ihm der Weg der Gütertrennung. Dieser Ansatz schließe jedoch nicht die Anwendung des Rechtsmissbrauchsverbots nach Art. 2 ZGB aus.³³

2. Kritische Betrachtung und praktische Relevanz der Härteklausele in Art.

Die Härteklausele in Art. 236 Abs. 2 TZGB wird von einer Meinung in der Lehre als eine nicht besonders befriedigende Regelung angesehen, und es wird betont, dass sie dennoch die Sicherstellung wirtschaftlicher Gerechtigkeit innerhalb der Ehe gewährleistet. Nach dieser Auffassung sollte ein Ehegatte, der sich schuldhaft verhält und dadurch das Fundament der ehelichen Gemeinschaft erschüttert, nicht von den wirtschaftlichen Vorteilen dieser Gemeinschaft profitieren können. Schließlich sollte niemand aus seinem eigenen Fehlverhalten Nutzen ziehen können.³⁴ Eine andere Meinung hebt hervor, dass der Beteiligungsanteil das Ergebnis einer gemeinsamen Erwirtschaftung ist und betont, dass der Gesetzgeber mit dieser Bestimmung „die eheliche Ethik, die Treuepflicht der Ehegatten und das kollektive Gewissen der Gesellschaft“ berücksichtigt.³⁵ Unterdessen führe dies zu einer Zivilrechtsstrafe, die darauf abzielt, den Ehebrecher durch wirtschaftliche Sanktionen indirekt zu bestrafen.³⁶

Im Gegensatz zu diesen Meinungen wird die Härteklausele in der herrschenden Lehre besonders scharf kritisiert. Kritiker argumentieren, dass die Beteiligung am Vorschlag eine direkte Rechtsfolge der Errungenschaftsbeteiligung ist und daher eine Scheidung aufgrund der genannten Scheidungsgründe keinen Einfluss darauf haben sollte. Denn gerade die Logik des gesetzlichen Güterstandes beruht auf dem Gedanken, dass die in der Ehe erworbenen Errungenschaften gemeinsam erwirtschaftet wurden.³⁷ Im Rahmen der ehelichen Arbeitsteilung und Zusammenarbeit trägt jeder Ehegatte zum Erwerb der Errungenschaften des anderen bei. Ungeachtet des Verschuldens eines Ehegatten, sei es durch *Ehebruch* oder *Nachstellung nach dem Leben*, und der daraus resultierenden Scheidung, sollten diese Scheidungsgründe nicht als Rechtfertigung dienen, diesen bereits erleisteten Beitrag zu verkennen.³⁸ Die Anwendung von Art.

33 Botschaft Nr. 79.043 über die Änderung des Schweizerischen Gesetzbuches (Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht) v 11 Juli 1979, https://www.fedlex.admin.ch/eli/fga/1979/2_1191_1179_1119/de (zuletzt besucht am 18 Juli 2024), Ziff. 222.541, letzter Absatz, (zit. Botschaft Eherecht); Hausheer, Reusser and Geiser (n 3) Art 215 N 12.

34 Zeytin (n 27) N 731.

35 Acar (n 27) N 1120 Fussnote 1147.

36 Gümüş (n 27) 396-397; Acar (n 27) N 1120 Fussnote 1147; Badur (n 27) 60; Aydın (n 27) 24.

37 Vgl. Hausheer and Aebi-Müller (n 1) Art 215 N 1.

38 Kılıçoğlu (n 25) 347; Suat Sarı, *Evlilik Birliğinde Yasal Mal Rejimi Olarak Edinilmiş Mallara Katılma Rejimi* (2007) 230; Şükran Şipka, "Hakkaniyet Oranı, Zina veya Hayata Kast Nedeniyle Boşanmanın, Edinilmiş Mallara Katılma Rejiminden

236/2 TZGB bedeutet jedoch, dass der gesetzliche Beteiligungsanteil des Ehegatten, der durch den Beistand als Ehegatte durch die Jahre hindurch erworben wurde, bei einer Scheidung aus den in Artikel 236/2 TZGB genannten Gründen außer Acht gelassen werden kann.³⁹ In dieser Hinsicht wird angeführt, dass diese Vorschrift bewusst in dieser Weise gestaltet wurde, um Ehemännern, auch wenn sie selbst *Ehebruch* begehen, mehr Schutz zu gewähren. Dies beruht auf der Annahme, dass sowohl der *Ehebruch* als auch die *Nachstellung nach dem Leben* typischerweise von Ehemännern begangen wird und dass das in der Ehe erworbene Vermögen wiederum in den meisten Fällen im Eigentum der Ehemänner steht.⁴⁰ Infolgedessen verlieren durch Art. 236/2 TZGB eher Ehefrauen, die eventuell durch jahrelange Haushaltsführung und Kinderbetreuung ihren Ehemännern eine erfolgreiche Erwerbstätigkeit ermöglicht haben, ihren Beteiligungsanteil an den gemeinsam erwirtschafteten Errungenschaften, die im Eigentum des Ehemannes sind.

Die schärfste Kritik vertritt die Ansicht, dass selbst der Gesetzgeber den Anspruch auf Beteiligung gemäß Art. 236 Abs. 2 TZGB nicht als ein aus geleistetem Beistand in der Ehe erworbenes Recht betrachtet, sondern vielmehr als eine bloße „Geste“.⁴¹ Denn gerade der Scheidungsgrund des *Ehebruchs* in Art. 236 Abs. 2 TZGB stellt im Vergleich zu anderen besonderen Scheidungsgründen wie *Misshandlung* oder *Ehrenkränkung* keine unerlaubte Handlung dar und kann dennoch aus Billigkeitsgründen zu einer gerichtlichen Aufhebung des Beteiligungsanteils führen, während dies bei den anderen genannten Gründen nicht der Fall ist. Es scheint, als stuft der Gesetzgeber das Verschulden bei *Ehebruch* schwerwiegender ein als bei *Misshandlung* oder *Ehrenkränkung*.⁴²

Ferner wird argumentiert, dass sowohl *Ehebruch* als auch *Nachstellung nach dem Leben* bereits durch den Gesetzgeber in den Scheidungsfolgen und im Erbrecht mit verschiedenen Sanktionen belegt wurde. Eine zusätzliche Auswirkung auf die verschuldensunabhängige Beteiligung am Vorschlag sei daher nicht mehr gerechtfertigt.⁴³ In Angesicht des revidierten Scheidungsrechts anderer Rechtsordnungen sei es um so unverständlicher sich beim Beteiligungsanteil am Verschulden orientieren zu müssen.⁴⁴ Zudem wird bemängelt, dass in anhängigen Scheidungsverfahren lediglich aus dem Bestreben heraus, von dieser Regelung zu profitieren, formell auf diese Gründe abgestellt werden könne. Dadurch könnten belastende Umstände sowohl für die Ehegatten als auch für ihre Kinder in die

Doğan Katılma Alacağına Etkisi (TMK.m.236/f.2),, in Prof. Dr. Hasan Erman'a Armağan (2015) 851-860, 854.

39 Bile Öztan, *Aile Hukuku* (2015) 534; Şipka (n 38) 854; Kılıçoğlu (n 25) 347.

40 Kılıçoğlu, (n 25) 348. Vgl: Turan Ateş, *Türk Medeni Kanununda Edinilmiş (Kazanılmış) Mallara Katılma Rejimi* (2007) 131; Seda Emine Şahin, *Edinilmiş Mallara Katılma Rejiminde Katılma Alacağı* (2024) 140.

41 Yücel (n 16) 272.

42 Yücel (n 16) 274.

43 Kılıçoğlu (n 25) 347; Sarı (n 38) 230; Şipka (n 38) 854.

44 M. Beşir Acabey, *Teorik ve Pratik Yönleriyle Edinilmiş Mallara Katılma Rejimi ve Tasfiyesi* (2020) 174.

Gerichtsakten aufgenommen werden.⁴⁵ De lege ferenda wäre es angebracht, Art. 236 Abs. 2 TZGB aufzuheben.⁴⁶ Zu ergänzen ist, dass ohne eine entsprechende Härteklausel im Zivilgesetzbuch im Einzelfall auch das Verbot des Rechtsmissbrauchs nach Artikel 2 Absatz 2 TZGB hätte greifen können, wenn auch aus Gründen der Rechtssicherheit nur mit größter Zurückhaltung.

b) Praktische Relevanz der Härteklausel

Angesichts der nahezu einstimmigen Kritik in der Lehre ist es wichtig anzuzeigen, wie oft es zu Scheidungen aufgrund den Scheidungsgründen *Ehebruch* oder *Nachstellung nach dem Leben* kommt. Nach den Daten des türkischen Instituts für Statistik (TÜİK) beruhen von den insgesamt 171.881 im Jahr 2023 vollzogenen Scheidungen 137 auf *Ehebruch*, 33 auf *Nachstellung nach dem Leben* (oder *Misshandlung*) und 165.051 auf *Zerrüttung der Ehe*.⁴⁷ Von den insgesamt 180.954 vollzogenen Scheidungen im Jahr 2022 beruhen 128 auf *Ehebruch*, 40 auf *Nachstellung nach dem Leben* (oder *Misshandlung*) und 176.485 auf *Zerrüttung der Ehe*.⁴⁸ Diese statistischen Werte zeigen an, dass Scheidungsverfahren, die auf den in Art. 236/2 TZGB erwähnten Scheidungsgründen beruhen, einen besonders geringen Anteil unter den Scheidungen ausmachen. Mit Recht wird in der Lehre hervorgebracht, dass dieser Schein nicht trügen sollte. Denn obwohl der Scheidungsgrund in der Klageschrift häufig als *Ehebruch* angegeben wird, wird aufgrund der Beweisschwierigkeiten in der Regel zusätzlich der allgemeine Scheidungsgrund *Zerrüttung der ehelichen Gemeinschaft* nach Art. 166/1 TZGB als weiterer Grund angegeben. Folglich sollte deshalb die geringe Anzahl der Scheidungsverfahren aus besonderen Gründen in der Statistik des TÜİK nicht dahingehend interpretiert werden, dass entsprechende Behauptungen vor dem Familiengericht nicht vorgebracht werden. Gerade die Schwierigkeit des Beweises kann dazu führen, dass die Urteile der Gerichte nicht auf *Ehebruch* oder *Nachstellung nach dem Leben* basieren, sondern auf *Zerrüttung der ehelichen Gemeinschaft*, was die Statistik eindeutig erklären könnte.⁴⁹

Die Statistik offenbart jedoch auch eine auffallende Diskrepanz zwischen dem allgemeinen Scheidungsgrund der *Zerrüttung der ehelichen Gemeinschaft* und den besonderen Scheidungsgründen. Dies weist auf eine gesellschaftliche Rechtswirklichkeit hin, die der Gesetzgeber nicht ignorieren sollte. Es besteht Reformbedarf im Scheidungsrecht.

⁴⁵ Oktay Ö

3. Tatbestandsvoraussetzungen des Artikel 236/2 TZGB

a) Anwendbarkeit des gesetzlichen Güterstandes der

Für die Entfaltung der Wirkungen des Güterstandes muss eine gültige Ehe vorliegen. Selbst bei einer fehlerhaften Ehe im Sinne von Art. 145 TZGB bleibt der Güterstand bis zur gerichtlichen Ungültigkeitserklärung anwendbar. Dieser Entscheid beendet die fehlerhafte Ehe ohne rückwirkende Kraft (Art. 156 TZGB). Für die Abwicklung des Güterstandes sowie für Fragen der Entschädigung, des Unterhalts und des Familiennamens gelten die gleichen Regelungen wie bei einer Scheidung gemäß Art. 158 TZGB. Anders verhält es sich jedoch bei einer nichtexistenten Ehe. In diesem Fall ist keine Ehegemeinschaft entstanden, da die faktische Beziehung zwischen den Partnern nicht den Anforderungen einer Eheschließung gemäß Art. 134 TZGB entspricht. Eine nichtexistente Ehe liegt nach TZGB zum Beispiel dann vor, wenn die Beziehung nicht durch einen Standesbeamten begründet wurde⁵⁰ oder zwischen gleichgeschlechtlichen Partnern eingegangen wurde.⁵¹

(2) Zugehörigkeit der Ehegatten zum gesetzlichen Güterstand

Der Beteiligungsanteil am Vorschlag des anderen Ehegatten ist gesetzlich im Güterstand der Errungenschaftsbeteiligung verankert. Ebenso ist die richterliche Befugnis, den Beteiligungsanteil zu verringern oder gar aufzuheben, in Art. 236 Abs. 2 des türkischen Zivilgesetzbuches (TZGB) geregelt, wobei das Bestehen des Güterstandes der Errungenschaftsbeteiligung vorausgesetzt wird. Daher darf die Anwendung dieses Güterstandes nicht durch Trennung (Art. 180 TZGB), Aufhebung des Zusammenlebens (Art. 197 Abs. 2 TZGB) oder den Übergang zu einem außerordentlichen Güterstand (Art. 206 TZGB) beendet worden sein. Dementsprechend muss zum Zeitpunkt der Entstehung der persönlichen Beteiligungsforderung der Güterstand der Errungenschaftsbeteiligung Anwendung finden. Dieses Erfordernis wird in zahlreichen Entscheidungen des Kassationsgerichts betont. Ein illustrativer Auszug aus einem Entscheid ist wie folgend:

„Im konkreten Fall haben die Ehegatten am 20.07.1989 geheiratet und wurden durch die rechtskräftige Scheidung auf Grundlage des am 11.07.2007 eingereichten Scheidungsantrags geschieden. Der Güterstand endete gemäß Art. 225 Abs. 1 des türkischen Zivilgesetzbuches mit der Einreichung der Scheidungsklage. Da keine andere Wahl eines Güterstandes durch Vertrag geltend gemacht wurde, galt vom Tag der Eheschließung bis zum Inkrafttreten des Gesetzes Nr. 4721 am 01.01.2002 der

⁵⁰ Dural, Ögüz and Gümüş (n 1) N 407 – 414.

⁵¹ Dural, Ögüz and Gümüş (n 1) N 375 – 400a.

Güterstand der Gütertrennung (Art. 170 des Gesetzes Nr. 743), und von diesem Datum bis zum Ende des Güterstandes der Güterstand der Errungenschaftsbeteiligung (Art. 10 des Gesetzes Nr. 4722, Art. 202 Abs. 1 TZGB). Das zur Auflösung stehende Grundstück wurde am 15.08.2003, während der Gültigkeit des Güterstandes der Errungenschaftsbeteiligung, erworben und auf den Namen des beklagten Ehegatten eingetragen. Bei der Auflösung des Güterstandes sind die Vorschriften des für die Ehegatten geltenden Güterstandes anzuwenden (Art. 179 TZGB).“⁵²

(3) Wegbedingung von Art. 236/2 TZGB

Falls die Ehegatten durch einen Ehevertrag einen anderen als den gesetzlich festgelegten Vorschlagsbeteiligungsanteil gewählt haben, gilt die vertragliche Vereinbarung. Selbst aber in diesem Fall wird Art. 236/2 zur Anwendung kommen können, wodurch dem Richter die Befugnis eingeräumt wird, den Beteiligungsanteil zu reduzieren oder sogar aufzuheben.⁵³ Da jedoch Art. 236 TZGB dispositiver Natur ist, steht es den Ehegatten auch frei, diese vertraglich gänzlich abzubedingen.⁵⁴ Zu klären ist, ob Art. 236 Abs. 2 TZGB auch dann anwendbar bleibt, wenn die Ehegatten eine abweichende Vereinbarung zur Beteiligung am Vorschlag getroffen haben und offensichtlich deren Anwendung sogar bei Scheidung ausdrücklich vereinbart haben. In diesem speziellen Fall greift Art. 238 TZGB, der festlegt, dass abweichende Vereinbarungen zur Beteiligung am Vorschlag nur dann wirksam sind, wenn das Gericht die Auflösung der Ehe durch Annullierung oder Scheidung oder den Übergang zur Gütertrennung anordnet und deren Anwendung im Ehevertrag ausdrücklich vorgesehen ist.⁵⁵ Zu ergänzen ist, dass eine allgemeine Klausel, die festlegt, dass die Vereinbarung für alle Beendigungsfälle des Güterstands gilt, ausreicht, um sicherzustellen, dass Vereinbarungen über die Vorschlagsbeteiligung auch bei einer Beendigung des Güterstands außer durch Tod gültig sind.⁵⁶

Art. 236/2 TZGB

Für die Anwendbarkeit von Art. 236 Abs. 2 ZGB ist es erforderlich, dass das Gericht die Scheidung aufgrund der Gründe *Ehebruch* oder *Nachstellung nach dem Leben*

⁵² Yargıtay 8. Hukuk Dairesi [8. Zivilsenat des Kassationsgerichts], Urteil v 1 April 2019, Az 2019/552 E, 2019/3464 K (www.lexpera.com.tr, zitiert Lexpera).

⁵³ Vgl. Badur (n 27) 52; Ersöz (n 46) 207.

⁵⁴ Gümüş (n 26) 397.

⁵⁵ Zarife Şenocak, "Edinilmiş Mallara Katılma Rejiminde Artık Değere Katılma ile İlgili Mal Rejimi Sözleşmeleri ve Tenkisi", *AÜHFD* (2009) 58(2) 377, 389.

⁵⁶ Dural, Ögüz and Gümüş (n 1) N 1235.

ausgesprochen hat.⁵⁷ Die ständige Rechtsprechung zeigt, dass diese beschränkte Anzahl der anerkannten Scheidungsgründe für die Anwendung der Vorschrift dem Richter keinen Ermessensspielraum für Auslegung oder Analogie lässt. Zum Beispiel kann der Richter in einem Scheidungsverfahren, das auf *Zerrüttung der ehelichen Gemeinschaft* nach Art. 166/1 TZGB gestützt ist, aufgrund der strengen Auslegung des Kassationsgerichts nicht entscheiden, den Beteiligungsanteil zu reduzieren oder aufzuheben, wenn das Verhalten zwar das Vertrauen besonders erschüttert, aber nicht den Grad des *Ehebruchs* erreicht. Dies gilt ebenso für eine Misshandlung im Sinne von Art. 162 TZGB, die aber nicht den Grad einer *Nachstellung nach dem Leben* gemäß Art. 162 TZGB erreicht.⁵⁸

Unter Berücksichtigung dieser strengen Auslegung können solche Handlungen in Verbindung mit der Forderung nach Beteiligung am Vorschlag des anderen Ehegatten daher auch keine Grundlage für einen Rechtsmissbrauch im Sinne von Art. 2 ZGB darstellen. Diese Auffassung führt dazu, dass Art. 236 Abs. 2 TZGB nicht mehr anwendbar ist, selbst wenn beispielsweise ein Fall von *Nachstellung nach dem Leben* vorliegt, die Scheidungsklage jedoch auf *faktische Trennung* (Art. 166 TZGB) oder *Zerrüttung der Ehe* (Art. 166 TZGB) gestützt ist. Diese Auslegung wird in den Entscheidungen des Kassationsgerichts unmissverständlich bestätigt.⁵⁹ Es ist berechtigterweise zu kritisieren, dass in Fällen, in denen der Tatbestand der genannten Scheidungsgründe vorliegt, die Scheidungsklage jedoch unter dem allgemeinen Scheidungsgrund der *Zerrüttung der ehelichen Gemeinschaft* gemäß Art. 166 TZGB erhoben wird, die Anwendung von Art. 236 Abs. 2 TZGB nicht eingeleitet wird. Die ständige Rechtsprechung des Kassationsgerichts zeigt, dass der schuldige Ehegatte weiterhin von der vollen Beteiligung profitieren kann, selbst wenn der Tatbestand der Scheidungsgründe *Ehebruch* oder *Nachstellung nach dem Leben* erfüllt wird, dieser in der Klageschrift erwähnt und das Vorliegen des Tatbestandes und die Unbilligkeit der Vorschlagsbeteiligung vom Gericht bestätigt wird:

„Das Gericht hat die Klage gemäß Art. 236 Abs. 2 TZGB abgewiesen, indem es feststellte, dass der Kläger keinen Anspruch auf einen Beteiligungsanteil an dem streitgegenständlichen Grundstück habe, weil der Kläger den Beklagten betrogen, gegen die Treuepflicht während der Ehe verstoßen und nicht in gutem Glauben gehandelt habe. Diese Entscheidung ist jedoch weder gesetzeskonform noch entspricht sie den Grundsätzen und der Rechtsprechung des Senats. Im Fall ... wurde die Scheidung der Parteien gemäß Art. 166 Abs. 1-2 TZGB aufgrund des schuldhaften Verhaltens der Ehefrau ausgesprochen. Für die Anwendbarkeit von Art. 236 Abs. 2 TZGB muss jedoch das Scheidungsgericht die Scheidung wegen Ehebruch

57 8. Zivilsenat des Kassationsgerichts, Urteil v 6 Oktober 2016, Az 2016/1406 E, 2016/13160 K (Lexpera).

58 Şipka (n 38) 854.

59 8. Zivilsenat des Kassationsgerichts, Urteil v 24 März 2015, Az 2014/19664, 2015/6716 K, in Karamercan (n 49) 1095.

(Art. 161 TZGB) oder *Nachstellung nach dem Leben* (Art. 162 TZGB) ausgesprochen haben. Da im vorliegenden Fall die Ehe der Parteien nicht aufgrund von Ehebruch oder *Nachstellung nach dem Leben* beendet wurde, ist Art. 236 Abs. 2 TZGB nicht anwendbar. Daher hätte das Gericht in Übereinstimmung mit den oben genannten Grundsätzen und der Rechtsprechung des Senats zugunsten des Klägers einen Beteiligungsanteil zusprechen müssen. Die getroffene Entscheidung ist daher nicht gesetzeskonform.“⁶⁰

Auch wenn Art. 236 Abs. 2 TZGB zwingend auf *Ehebruch* oder *Nachstellung nach dem Leben* gestützt werden muss und diese Auffassung aufgrund ihrer Praktikabilität in der Rechtspraxis unterstützt wird, widerspricht es dem Zweck der Vorschrift, zu behaupten, dass sie nicht anwendbar ist, wenn der Ehegatte die Scheidungsklage trotz Vorliegens dieser Gründe unter dem allgemeinen Scheidungsgrund der *Zerrüttung der ehelichen Gemeinschaft* einreicht. Insbesondere wenn der Ehegatte im Antragsteil der Klageschrift nicht explizit auf *Ehebruch* oder *Nachstellung nach dem Leben* verweist, aber diese Gründe im Inhalt der Klageschrift erwähnt, und dementsprechend die Sachlage die Voraussetzungen erfüllt, widerspricht es dem Zweck der Vorschrift, ihre Anwendung abzulehnen, falls im konkreten Fall die Unbilligkeit der Vorschlagsbeteiligung vorliegt.⁶¹

Art. 236/2 TZGB

Auf die Frage, wie zu verfahren ist, wenn die *Nachstellung nach dem Leben* tatsächlich zum Tod des Ehegatten führt, gibt der Gesetzgeber keine Antwort. Angesichts der Tatsache, dass der Gesetzgeber ausdrücklich die *Nachstellung nach dem Leben* anspricht, wird in der Lehre kontrovers diskutiert, ob Art. 236 Abs. 2 TZGB auch dann anwendbar ist, wenn ein Ehepartner den anderen vorsätzlich tötet. Offensichtlich kann in der angesprochenen Sachlage nicht von einem Scheidungsurteil die Rede sein, da die Ehe durch das Tötungsdelikt des Ehegatten endet. Aber ob das Verschulden des Ehegatten dazu führen kann, auch seinen Beteiligungsanteil aufzuheben ist eine wichtige Frage im Rahmen von Art. 236/2 TZGB.

Der Gesetzgeber bestimmt in Art. 181 Abs. 2 TZGB, dass die Erben ein laufendes Scheidungsverfahren fortführen können und dass der überlebende Ehepartner aus der Erbschaft ausgeschlossen wird, falls sein Verschulden in diesem Verfahren nachgewiesen wird. Diese Bestimmung und ihre Begründung verdeutlichen die Haltung des Gesetzgebers gegenüber dem Ehepartner, der den Scheidungsgrund

60 8. Zivilsenat des Kassationsgerichts, Urteil v 1 April 2019, Az 2019/552 E, 2019/3464 K (Lexpera). Siehe ebenso: 8. Zivilsenat des Kassationsgerichts, Urteil v 6 November 2018, 2016/13910 E, 2018/18247 K, in Karamercan (n 49) 1095; Urteil v 27 September 2017, Az 2015/18037 E, 2017/11613 K, in Karamercan (n 49) 1094; Urteil v 24 März 2015, Az 2014/196664 E, 2015/6716 K, in Karamercan (n 49) 1095.

61 Vgl. Karamercan (n 49) 1094.

durch sein Verschulden verursacht hat. Da die Ehe durch den Tod des anderen Ehegatten endet, wird das Scheidungsverfahren normalerweise eingestellt. Art. 181 Abs. 2 TZGB ermöglicht jedoch den Erben, das Verfahren fortzusetzen, wenn das Verschulden des überlebenden Ehegatten bezüglich des Scheidungsgrundes schwerwiegender war als das des verstorbenen Ehegatten.⁶² Mit anderen Worten, es geht im Scheidungsverfahren nicht mehr um die Scheidung, sondern lediglich um die Feststellung des Verschuldens des überlebenden Ehegatten⁶³:

„Aus dem im Aktenbestand befindlichen Personenstandsregister ergibt sich, dass der Beklagte-Kläger ... nach dem Scheidungsurteil, jedoch vor dessen Rechtskraft, am 09.06.2020 verstorben ist. In diesem Fall endete die Ehe mit dem Tod, und die gegenseitig erhobenen Scheidungsklagen wurden gegenstandslos. In der durch den Vertreter des Beklagten-Klägers ... eingereichten Berufungserklärung wurde gemäß Artikel 181 Abs. 2 des türkischen Zivilgesetzbuches erklärt, dass das Verfahren zur Feststellung der Schuld fortgesetzt wird. Daher ist es erforderlich, die Erben des Klägers in das Verfahren einzubeziehen, festzustellen, dass eine Entscheidung hinsichtlich der gegenstandslos gewordenen Scheidungsklagen nicht mehr erforderlich ist, und das Verfahren zur Feststellung des Verschuldens fortzusetzen, um zu entscheiden, ob der überlebende Ehegatte ein Verschulden in einem Maße aufweist, das die Scheidung rechtfertigen würde. Aus diesem Grund war der Beschluss aufzuheben.“⁶⁴

Nach einer Auffassung in der Lehre entspricht es dem Willen des Gesetzgebers, der auch die Möglichkeit der Herabsetzung oder Aufhebung des Beteiligungsanteils bei *Nachstellung nach dem Leben* vorgesehen hat, dieselbe Konsequenz auch für den Beteiligungsanteil am Vorschlag des ermordeten Ehegatten walten zu lassen, wenn der andere Ehepartner den Tod verschuldet.⁶⁵ Somit soll Art. 181 TZGB über seinen Wortlaut hinaus auf diesen wertungsgemäss ähnlichen Fall erstreckt werden. Damit sollen die Erben analog zu Art. 181 Abs. 2 TZGB die Möglichkeit zur Feststellung des Verschuldens gegeben werden, um dem schuldhaften Ehegatten die Beteiligung am Vorschlag des ermordeten Ehegatten nach Art. 236/2, der in dieser Frage eine Lücke aufweise, zu verwehren.⁶⁶ Auf Grundlage des Rechtssatzes *vom Geringeren auf das Grössere (Erst-Recht-Schluss)* wird argumentiert, dass wenn schon die

62 Eine ähnliche und sich von Art. 181/2 TZGB grundlegend unterscheidende Bestimmung ist in § 1933 BGB geregelt. Demnach sind das Erbrecht des überlebenden Ehegatten sowie „das Recht auf dem Voraus“ ausgeschlossen, wenn zum Zeitpunkt des Todes des Erblassers die Voraussetzungen für die Scheidung der Ehe gegeben waren und der Erblasser die Scheidung beantragt oder ihr zugestimmt hatte. Dasselbe gilt, wenn der Erblasser berechtigt war, die Aufhebung der Ehe zu beantragen und den Antrag gestellt hatte. Mustafa Dural and Turgut Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku* (2023) N 208; Rona Serozan and İlkay Baki Engin, *Miras Hukuku* (2022) N 65.

63 Uluşan (n 10) 228; Dural and Öz (n 62) N 207; Şipka (n 38) 857.

64 2. Zivilsenat des Kassationsgerichts, Urteil v 27 April 2022, Az 2022/3237 E, 2022/4036 K (Lexpera).

65 Acar, (n 27) N 1121; Kılıçoğlu, (n 25) 349.

66 Zeytin (n 27) N 731; Şükran Şipka, *Türk Hukukunda Edinilmiş Mallara Katılma Rejimi ve Uygulamaya İlişkin Sorunlar* (2011) 273; Badur (n 27) 48; Aydın (n 27) 29/30; Uyar (n 29) 95/96.

Nachstellung nach dem Leben des Ehegatten zu einer Reduzierung oder Aufhebung der Vorschlagsbeteiligung führt, dies *a fortiori* bei der Tötung des Ehegatten gelten muss.⁶⁷ Es versteht sich von selbst, dass hierfür gemäß Art. 181 TZGB ein laufendes Scheidungsverfahren zum Zeitpunkt des Todes des Ehegatten erforderlich ist.

Diese Lehrmeinung stützt ihre Argumentation auf die Begründung des Art. 181 TZGB an, wonach der Gesetzgeber mit dieser Vorschrift sehr offensichtlich eine zivilrechtliche Sanktionsnorm einführen wollte⁶⁸: „*Insbondere in Fällen, in denen eine Scheidungsklage aufgrund von Ehebruch, Nachstellung nach dem Leben, schwerwiegender Misshandlung oder ehrlosem Lebenswandel erhoben wird, kann die Situation dazu führen, dass der schuldige Beklagte trotz des Todes des klagenden Ehegatten Erbe wird, was zu ungerechten und unfairen Ergebnissen führt. Um solche Ungerechtigkeiten zu vermeiden, wurde der zweite Absatz des Artikels eingeführt.*“⁶⁹

Eine andere Lehrmeinung hält die Anwendung von Art. 236/2 TZGB in dieser Frage wegen des eindeutigen Gesetzeswortlauts, der auf die *Scheidung durch Ehebruch* oder *Nachstellung nach dem Leben* abstellt, für nicht möglich. In diesem Fall ende die Ehe durch den Tod und nicht durch eine Scheidung, weshalb Art. 236 Abs. 2 TZGB nicht zur Anwendung kommen kann.⁷⁰ Ferner sei die Vorschrift eine Ausnahmeregelung, die über ihre Grenzen hinaus nicht angewendet werden könnte.⁷¹ Nach dieser Lehrmeinung wäre der richtige Ansatz Art. 2 TZGB um die Vorschlagsbeteiligung des Ehegatten, der des Mordes am anderen Ehegatten schuldig ist, zu verwehren. Denn Art. 236/2 TZGB sieht vor, dass der Beteiligungsanteil nur bei einer rechtskräftigen Scheidung aufgrund von *Ehebruch* oder *Nachstellung nach dem Leben* reduziert oder aufgehoben werden kann. Zwar können die Erben z.B. bei *Ehebruch* das Verfahren fortführen und durch Nachweis des Verschuldens des überlebenden Ehegatten dessen Erbrecht gemäß Art. 181 TZGB ausschließen, doch bleibt der Anspruch auf Beteiligung am Vorschlag hiervon unberührt, da er unabhängig vom Erbenstatus besteht.⁷² Das zeigt sich auch darin, dass das geltende Recht bei der Gütergemeinschaft nicht einmal im Falle der Erbunwürdigkeit dem überlebenden Ehegatten seine gesetzliche Beteiligungsforderung entzieht.

Das bei Erbunwürdigkeit gemäß Art. 578 Abs. 1 TZGB der den Tod verursachende Ehegatte seinen Erbenstatus verliert steht außer Frage. Aber ob analog zu Art. 181 TZGB sogar sein Beteiligungsanteil am Vorschlag des verstorbenen Ehegatten aufgehoben werden kann, und im Rahmen von Art. 1 TZGB eine Lückenfüllung

67 Aydın (n 27) 33; Uyar (n 29) 94/95.

68 Acar (n 27) N 1118; Badur (n 27) 45; Aydın (n 27) 30.

69 Erläuterung zu Art. 181 TZGB, abrufbar unter: https://www.tbmm.gov.tr/sirasayi/donem21/yil01/ss723_Madde_Gerekceleri_1.pdf / (zuletzt besucht am 16 August 2024).

70 Gümüş (n 26) 397; Öztan (n 39) 535; Baygın (n 25) 752.

71 Öztan (n 39) 535; Sarı (n 38) 230; Baygın (n 25) 752.

72 Vgl. Şipka (n 66) 275; dieselbe (n 38) 857.

per Analogieschluss mit dem Zweck von Art. 236 ZGB vereinbar ist, ist äußerst zweifelhaft. Wie bereits dargelegt, zielt m. E. Art. 236 TZGB nicht darauf ab, den schuldhaften Ehegatten zu bestrafen, sondern lediglich den geschädigten Ehegatten vor unbilligen Nachteilen zu schützen, die durch die Auflösung des Güterstandes entstehen können. Schließlich hätte der Gesetzgeber nicht auf Billigkeitsgründe verweisen müssen, wenn er eine zivilrechtliche Sanktionsnorm für die in der Vorschrift genannten Scheidungsgründe schaffen wollte.⁷³ Denn bei Ehebruch und Nachstellung nach dem Leben wird die Vorschlagsbeteiligung unmittelbar weder aufgehoben noch reduziert. Vielmehr liegt der Schwerpunkt der Vorschrift auf dem richterlichen Ermessen, das darauf abzielt, den betroffenen Ehegatten vor unbilligen Nachteilen zu schützen. Eine zivilrechtliche Strafe wäre erst dann gegeben, wenn die Vorschrift primär darauf abzielen würde, die verpönten Handlungen durch eine sog. Präventivfunktion verhindern zu wollen und den schuldigen Ehegatten zu bestrafen.⁷⁴

Abschließend sei angemerkt, dass im Falle der Qualifizierung der Vorschrift als zivilrechtliche Strafe sie auch dem Analogieverbot unterliegen müsste.⁷⁵ Es ist offensichtlich, dass eine Anwendung in der vorliegenden Fragestellung aus diesem Grund erst recht nicht in Betracht kommen kann.⁷⁶ Falls Art. 236 Abs. 2 TZGB unbedingt als Sanktionsnorm im Sinne einer zivilrechtlichen Strafe auf der Grundlage des Verschuldens des schuldigen Ehegatten ausgelegt werden soll, dann bedarf es eines eindeutigeren Wortlauts wie bei der Erbunwürdigkeit in Art. 578 TZGB, der in Art. 236 Abs. 2 TZGB in dieser Deutlichkeit nicht vorhanden ist.⁷⁷

Diese Schlussfolgerung wird umso heikler angesichts der *makaberen* Tatsache, dass Art. 236 Abs. 2 tZGB zur Anwendung kommen kann, wenn der Ehegatte eine *Nachstellung nach dem Leben* des anderen Ehegatten begeht, die jedoch *erfolglos* bleibt und es zur Scheidung kommt. Erfolgt die Tat hingegen *erfolgreich* und der Ehegatte stirbt, bleibt die Anwendung dieser Vorschrift aus.⁷⁸ Dieses Beispiel verdeutlicht, dass Art. 236 Abs. 2 TZGB zwar eine besondere Billigkeitskomponente gemäß Art. 2 TZGB aufweist, jedoch aufgrund seines Wortlauts restriktiv auf bestimmte Scheidungsgründe beschränkt ist. Liegen diese spezifischen Voraussetzungen nicht vor, kommt Art. 236 Abs. 2 TZGB nicht zur Anwendung. Angesichts der besonderen Umstände in der vorliegenden Fragestellung muss *ultima ratio* auf Art. 2 TZGB recurriert werden.

73 Vgl. Aydın (n 27) 35.

74 Önay (n 28) 1342/1343.

75 Önay (n 28) 1343.

76 Vertiefend zur Thematik der zivilrechtlichen Strafe vgl. Heinrich Honsell, "Der Strafgedanke im Zivilrecht – ein juristischer Atavismus", in Lutz Aderhold, Barbara Grunewald, Dietgard Klingberg and Walter G. Paefgen (Hrsgb), *Festschrift für Harm Peter Westermann: Zum 70. Geburtstag* (2008) 315-336; Reto Heizmann, *Strafe im schweizerischen Privatrecht, Phänomenologie und Grenzen gesetzlich begründeter Strafsanktionen des Privatrechts* (2015).

77 Siehe oben (n 6).

78 Demet Özdamar, Ali Gümrah Toker, Ferhat Kayış, Burcu Yağcıoğlu and Aliye Akgün Toker, *Yasal Mal Rejimi ve Tasfiyesi* (2022) 126.

Schlussfolgernd kann in dieser Frage eine Beteiligung am Vorschlag des ermordeten Ehegatten nur dann verweigert werden, wenn dies gemäß Art. 2 TZGB rechtsmissbräuchlich ist.⁷⁹ Im Einzelfall könnte in Angesicht des Rechtssatzes *Nemo auditur propriam turpitudinem allegans*⁸⁰ Art. 2 TZGB zum Zuge kommen. Allerdings wird in der schweizerischen Lehre hervorgehoben, dass Rechtsmissbrauch zwar vorbehalten bleibt, aber auch in dieser Frage nur mit äußerster Zurückhaltung angenommen werden sollte. Der Reformgesetzgeber habe schließlich bewusst eine klare Unterscheidung zwischen dem Beteiligungsstatus und dem Erbenstatus etabliert, zumal im alten Recht noch festgelegt war, dass dem erbunwürdigen Ehegatten nur so viel vom Gesamtgut zustand, wie er auch bei einer Scheidung erhalten hätte können (aArt. 225 Abs. 3 ZGB⁸¹), und dies nicht ins neue Recht übertragen wurde.⁸²

Dem Wortlaut von Art. 236 Abs. 2 TZGB zufolge kann die Vorschlagsbeteiligung nur zum Nachteil des *schuldigen* Ehegatten gekürzt oder aufgehoben werden. Das bedeutet, dass Art. 236 Abs. 2 TZGB nur in den Fällen angewendet werden kann, in denen die Scheidung aus den in der Vorschrift genannten Gründen erfolgt ist, und nur gegen den Ehegatten, der den *Ehebruch* oder die *Nachstellung nach dem Leben* verschuldet. Die Vorschlagsbeteiligung des unschuldigen Ehegatten darf selbstverständlich nicht reduziert oder aufgehoben werden.

Der Begriff *schuldiger Ehegatte* in Art. 236/2 TZGB lässt keine Rückschlüsse auf das Ausmaß des Verschuldens zu, weshalb die Vorschlagsbeteiligung des schuldigen Ehegatten sowohl bei schwerwiegenderem als auch bei gleichwertigem Verschulden verringert werden könnte. Aus diesem Grund wird in der Lehre kontrovers diskutiert, ob Art. 236 Abs. 2 TZGB in Fällen zur Anwendung kommen kann, in denen beide Ehegatten gleichermaßen *schuldig* sind. Beispielsweise könnten beide Ehegatten als gleichmäßig schuldhaft betrachtet werden, wenn beide Ehebruch begangen haben oder gegenseitig vorsätzlich einander nach dem Leben getrachtet haben.⁸³ Das Kassationsgericht hat in der Frage wie bei gleichmäßigem Verschulden zu verfahren ist, noch keine ständige Rechtsprechung entwickelt. In einem Urteil des 8. Zivilsenates wurde jedoch entschieden, dass die Beteiligungsanteile bei Ehebruch

79 Öztan (n 39) 535; Uyar (n 29) 97.

80 Niemand kann angehört werden, der sich auf seine eigene Schändlichkeit beruft.

81 aArt. 225 ZGB (Abs. 1): „*Stirbt ein Ehegatte, so fällt die eine Hälfte des Gesamtgutes dem überlebenden Ehegatten zu. Die andere Hälfte geht unter Vorbehalt der erbrechtlichen Ansprüche des Überlebenden auf die Erben des Verstorbenen über.*“ (Abs. 2): „*Ist der überlebende Ehegatte erbunwürdig, so kann er aus der Gütergemeinschaft in keinem Falle mehr beanspruchen, als ihm bei Scheidung der Ehe zukommen würde.*“

82 Thomas Geiser, „Neuere Rechtsprechung zum Eherecht“, *AJP/PJA* (2009) 1 57-69, 67.

83 Gegen eine Herabsetzung beider Anteile: Badur (n 27) 50.

beider Ehegatten wegen beidseitigem Verschulden nicht reduziert werden.⁸⁴ In einem anderen Fall, in dem einer der Ehegatten wegen Ehebruchs und der andere wegen Nachstellung nach dem Leben die Scheidung eingereicht hatten, entschied der 8. Zivilsenat des Kassationsgerichts in der Verschuldensfrage, dass unabhängig vom Ausmaß des gegenseitigen Verschuldens der Ehegatten keine gegenseitige Abwägung des Verschuldens erfolgt und das beide Ehegatten gleich schuldhaft sind.⁸⁵

Das Tatbestandsmerkmal Verschulden in Art. 161 TZGB setzt voraus, dass der Ehegatte den Ehebruch verschuldet. Demnach muss der Ehegatte den Ehebruch bewusst und absichtlich begehen, das heißt, willentlich eine sexuelle Beziehung mit einer anderen Person des anderen Geschlechts eingehen. Damit der Ehegatte als schuldhaft gilt, muss er diese Handlung wissentlich und absichtlich ausführen, was impliziert, dass der Ehegatte, der den *Ehebruch* begeht, in der Regel urteilsfähig sein muss.⁸⁶

Das Tatbestandsmerkmal Verschulden in Art. 236/2 TZGB setzt voraus, dass der Ehegatte die Nachstellung nach dem Leben des anderen Ehegatten „vorsätzlich“ verschuldet.⁸⁷ Handlungen, die das Vorsatzelement nicht erfüllen und lediglich fahrlässig begangen wurden, können nicht Gegenstand dieser Vorschrift sein. Jedoch umfasst der Anwendungsbereich jene Handlungen eines Ehegatten, die seinen Partner in Lebensgefahr bringen, etwa durch schwere körperliche Gewalt oder Vergiftung. Im Gegensatz dazu können ehrverletzendes Verhalten oder schwerwiegende Misshandlungen, die zwar unter 162 TZGB fallen, nicht unter Art. 236 TZGB subsumiert werden.⁸⁸

84 8. Zivilsenat des Kassationsgerichts, Urteil v 25 November 2014, Az 2014/8031 E, 2014/21578 K, (Lexpera).

85 Kassationsgericht, Rechtsrat in Zivilsachen [Hukuk Genel Kurulu], Urteil v 6. April 2021, Az 2017/2-2667 E, 2021/413 K, in Karamercan (n 49) 1098/1099: *“Die Bewertung der Schuldhaftigkeit der von den Parteien begangenen Handlungen, die zur Scheidung führten, hängt stärker von der Beschaffenheit dieser Handlungen als von ihrer bloßen Anzahl ab. Ebenso ist der Umstand, welcher Ehegatte die erste schuldhafte Handlung begangen hat, unerheblich für die Gewichtung der Schuld. Anders ausgedrückt, das schuldhafte Verhalten eines Ehegatten berechtigt den anderen Ehegatten nicht ebenfalls zu schuldigem Verhalten. Unabhängig vom Zeitpunkt und der Reihenfolge der schuldhaften Handlungen der Parteien müssen die Ereignisse, die zum völligen Zusammenbruch der ehelichen Gemeinschaft führten, als Gesamtheit betrachtet werden, um die Schwere der Schuld der Ehegatten festzustellen. Angesichts der Tatsache, dass das schuldhafte Verhalten des Ehegatten der Ehegattin nicht das Recht gibt, mit einem anderen Mann zusammenzuleben, steht außer Frage. Beide Parteien sind in gleichem Maße an den Scheidungsgründen schuldhaft beteiligt.“*

86 Özen (n 14) 42; Badur (n 27) 49-50; Fahri Erdem Kaşak, *“Zina veya Hayata Kast Nedeniyle Artık Değerdeki Pay Oranının Azaltılması veya Kaldırılması (TMK m. 236/II),, ASBÜ Hukuk Fakültesi Dergisi (2020/1) 111 – 130, 122; Ersöz (n 46) 206.*

87 Ateş (n 39) 129; Özen (n 14) 57; Kaşak (n 86) 122/123.

88 8. Zivilsenat des Kassationsgerichts, Urteil v 14 November 2018, Az 2016/15105 E, 2018/18680 K, (Lexpera): *„Art. 236 Abs. 2 TZGB kann nur angewendet werden, wenn die Scheidung gemäß Art. 162 Abs. 1 TZGB erfolgt und die vorsätzliche Lebensgefährdung von einem Ehegatten gegen den anderen gerichtet ist.“*

Die ständige Rechtsprechung des Kassationsgerichts weist darauf hin, dass nur bei Vorhandensein eines Beteiligungsanteils die Vorschrift zur Anwendung kommen kann: „*Um gemäß Art. 236 Abs. 2 TZGB eine Entscheidung über die Reduzierung oder Aufhebung des Beteiligungsanteils nach Billigkeit treffen zu können, muss zunächst der Anteil des Klägers auf Beteiligung am Vorschlag durch eine Untersuchung bestätigt werden. ... Das Gericht muss zunächst untersuchen, ob der ... Beteiligungsanteil am Vorschlag besteht. Falls ein Beteiligungsanteil am Vorschlag vorhanden ist, kann Art. 236 Abs. 2 TZGB zur Anwendung kommen.*”⁸⁹

e) Billigkeit der Herabsetzung oder Aufhebung des Vorschlagsanteils

Die Verringerung oder Aufhebung des Anteils des „schuldigen“ Ehegatten am Vorschlag des anderen Ehegatten muss aus Billigkeitsgründen gerechtfertigt sein. Bei der Entscheidung, aufgrund einer Scheidung wegen *Ehebruch* oder *Nachstellung nach dem Leben* den Beteiligungsanteil angemessen herabzusetzen oder aufzuheben, sind verschiedene Faktoren zu berücksichtigen, wie der Beginn und die Dauer des Ehebruchs (bzw. die Schwere der Nachstellung nach dem Leben), die Schwere und Art des Verschuldens, die Dauer der Ehe, den geleisteten Beistand der Ehegatten während der Ehe, das beidseitige Verschulden und wann die Errungenschaften erworben wurden.⁹⁰ Da der Entscheid nach Maßgabe der Billigkeit zu erfolgen hat, ist der Richter angehalten, die Gründe, die für eine Herabsetzung oder Aufhebung des Beteiligungsanteils sprechen, detailliert darzulegen.⁹¹

In der Lehre wird nahegelegt, dass der Richter Art. 236 Abs. 2 TZGB möglichst restriktiv auslegt und den ehelichen Beistand des *schuldigen* Ehegatten berücksichtigt, um den Beteiligungsanteil nicht vollständig aufzuheben, sondern lediglich zu reduzieren.⁹² Mit anderen Worten, der Richter sollte sein Ermessen mit Bedacht und Zurückhaltung ausüben und keine übermäßige Kürzung der Vorschlagsbeteiligung vornehmen.⁹³ Diese Empfehlung wird von der türkischen Rechtsprechung in den meisten Fällen beachtet.⁹⁴ In Ausnahmefällen jedoch, bei

89 8. Zivilsenat des Kassationsgerichts, Urteil v 30 November 2015, Az 2014/12512 E, 2015/21469 K, (Lexpera).

90 Şipka (n 38) 860; Ersöz (n 46) 206; Badur (n 27) 51; Kaşak (n 86) 124; Şahin (n 39) 142.

91 Sarı (n 38) 231.

92 Şipka (n 38) 860.

93 Kılıçoğlu (n 25) 349; Dural, Öğüz and Gümüş (n 1) N 1240; Şipka (n 38) 860; Kaşak (n 86) 118; Şahin (n 39) 140/141.

94 Bölge Adliye Mahkemesi [Regionales Berufungsgericht] Samsun, 4. Hukuk Dairesi [4. Zivilsenat], Urteil v 30 Oktober 2018, Az 2018/2263 E, 2018/2473 K, in Karamercan (n 49), 1113 – 1120, 1117: „Zwar gibt es bei der Bestimmung des Beteiligungsanteils gemäß den vom Sachverständigen festgestellten Beträgen keine Verfahrens- und Gesetzesverstöße, jedoch hätte gemäß Artikel 236 Absatz 2 TZGB ein angemessener Abzug vom Beteiligungsanteil des Ehemannes erfolgen müssen, was unterlassen wurde. Aus diesem Grund ist der Berufung der Klägerin stattzugeben. Die Parteien

besonders schwerwiegenden Billigkeitsgründen, verwehrt das Kassationsgericht den gesamten Beteiligungsanteil.⁹⁵ Ein derartiger Fall trat in erster Instanz auf, als ein Ehegatte im gemeinsamen Eigenheim Ehebruch beging und den Edelschmuck seiner Ehefrau an seine am Ehebruch beteiligte Beziehungspartnerin verschenkte.⁹⁶

Abgesehen von einer Scheidung aufgrund von *Ehebruch* oder *Nachstellung nach dem Leben* werden nach ständiger Rechtsprechung keine weiteren Scheidungsgründe anerkannt, die durch richterliches Ermessen eine Reduzierung oder Aufhebung der Vorschlagsbeteiligung aus Billigkeit rechtfertigen könnten.⁹⁷ Diese Auslegung entspricht der ständigen Rechtsprechung: „Grundsätzlich wird der Beteiligungsanteil aus dem erworbenen Vermögen gemäß Art. 236 Abs. 1 TZGB auf die Hälfte des Vorschlags festgelegt. Dabei sind die Artikel 229, 230, 219, 231 und 236 des TZGB zu berücksichtigen. Jede Berechnung, die zu einer Reduzierung des Beteiligungsanteils unter dem Vorwand der Billigkeitsminderung führt, ist jedoch verfahrens- und gesetzeswidrig.“⁹⁸

In der Lehre wird hingegen vertreten, dass der eheliche Beistand und insbesondere die Unterstützung, die sich die Ehegatten während der Ehe gegenseitig gewähren, maßgeblich zur Erwirtschaftung der Errungenschaften beitragen. Diese Vermutung liege der gesetzlichen Vorschlagsbeteiligung zugrunde, die in Art. 236/1 TZGB geregelt ist. Die Vorschrift basiere somit auf der Annahme, dass das eheliche Zusammenwirken, die Arbeitsteilung und der gegenseitige Beistand im Alltag der Ehegatten entscheidend zur Schaffung der Errungenschaften beitragen.⁹⁹ Allerdings, wenn in einem konkreten Fall das Zusammenwirken nicht gegeben ist und diese Vermutung widerlegt werden kann, mit anderen Worten der individuelle Fall diesem in Art. 236 TZGB angenommenen Modell der gemeinsamen Erwirtschaftung widerspricht, sollte es im Ermessen des Richters liegen, die Vorschlagsbeteiligung

haben vor der Scheidungsklage etwa 12 Jahre faktisch getrennt gelebt. Die oben genannten Errungenschaften, die dem Beteiligungsanspruch unterliegen, wurden während der Trennungszeit durch die Arbeit des Mannes erworben. Die Klägerin ist Hausfrau und hat kein eigenes Einkommen. Aufgrund des Ehebruchs des beklagten Ehemannes ist dieser für das Scheitern der Ehe verantwortlich. Obwohl der Beteiligungsanteil des Mannes 50 % aller Errungenschaften beträgt, ist gemäß Artikel 236 Absatz 2 TZGB unter Berücksichtigung der Dauer der Ehe, des Beitrags und der Arbeitsleistung der Parteien eine angemessene Reduzierung des Beteiligungsanspruchs des Mannes um 10 % aus Gründen der Billigkeit und des Akteninhalts angemessen. Demnach sollten bei der Verteilung der Vermögenswerte, die der Beteiligungsforderung unterliegen, 45 % dem Mann und 55 % der Frau zugeteilt werden.“

95 8. Zivilsenat des Kassationsgerichts, Urteil v 9 Dezember 2019, Az 2019/6005 E, 2019/11095 K, in Karamercan (n 49) 1125/1126.

96 Siehe bitte für dieses Urteil in erster Instanz: Demre Aslıye Hukuk Mahkemesi (Aile Mahkemesi sıfatıyla), Urteil v 25 Mai 2019, Az 2018/1.0, 2019/1.8 K, in Karamercan (n 49) 1123-1125, 1025.

97 Fahri Akçin, “Eşler Arasındaki Mal Rejiminin Tasfiyesi Davalarında Uygulamalar,” in Şebnem Akipek Öcal, Özge Uzun Kazmacı, Ahmet Ayar, Zeliha Gizem Özçelik and Nesli Şen Özçelik, *Medeni Kanun'un ve Borçlar Kanunu'nun 90. Yılı Uluslararası Sempozyumu 1926'dan Günümüze Türk-İsviçre Medeni Hukuku* (2017) Cilt I, 187-202, 193.

98 8 Zivilsenat des Kassationsgerichts, Urteil v 14 November 2014, Az 2013/17841 E, 2014/20912 K, (Lexpera).

99 Öztan (n 39) 533/534; Ahmet M. Kılıçoğlu, *Katki – Katılma Alacağı* (2021) 142; Şıpka (n 38) 854; Yücel (n 16) 276.

bei der Auflösung des Güterstandes zu verwehren. Wenn zum Beispiel ein Ehegatte drogen-, spiel- oder alkoholsüchtig ist und dadurch die eheliche Gemeinschaft sowie das wirtschaftliche Wohl der Familie erheblich über die Jahre hinweg beeinträchtigt hat, sollte es erst recht bei der Scheidung dieser Ehe unbillig sein, dem in der Ehe leidtragenden Ehegatten die Auszahlung des Vorschlagsanteils zuzumuten.¹⁰⁰ Ein weiteres Beispiel ist der Fall, in dem ein Ehegatte ohne triftigen Grund den anderen Ehegatten verlässt und die Ehe jahrelang eigentlich nicht gelebt wird, wodurch der verlassende Ehegatte auch keinen Beitrag leistet, während der andere allein für den Unterhalt der Kinder sorgt und durch eigene Leistung z.B. eine Wohnung in diesem Zeitraum erwirbt. In einer solchen Situation wäre es unbillig, wenn eine Beteiligungsforderung an dieser „Errungenschaft“ nach jahrelanger schuldhafter Abwesenheit geltend gemacht werden könnte.¹⁰¹

In solchen Härtefällen zeigt sich deutlich, dass der Wortlaut von Art. 236 Abs. 2 TZGB klar definierte Grenzen setzt. Ob dies als bewusste Entscheidung des Gesetzgebers, die besprochenen Fälle nicht zu erfassen, ein rechtspolitisches Defizit darstellt oder ob es sich um eine planwidrige Unvollständigkeit des geltenden Rechts handelt, bleibt offen. Ein rechtspolitisches Defizit kann nur durch gesetzgeberische Intervention behoben werden, während eine planwidrige Lücke *de lege lata* durch die Rechtsprechung geschlossen werden kann.¹⁰² Angesichts der Tatsache, dass der Gesetzgeber eine spezifische Billigkeitsregelung unter Art. 236/2 TZGB vorgesehen hat, liegt die Vermutung nahe, dass eine bewusste Entscheidung des Gesetzgebers vorliegt.

Wie bereits oben erwähnt, die Herabsetzung des Beteiligungsanteils am Vorschlag des Ehegatten, kann nur gemäß dem Wortlaut von Art. 236/2 TZGB wegen Scheidung aufgrund von *Ehebruch* oder *Nachstellung nach dem Leben* nach Billigkeit erfolgen. Wie unbillig dies in der Sachlage im konkreten Fall auch erscheinen mag, ohne das Vorhandensein einer dieser beiden Gründe, besteht das Kassationsgericht auf die Auszahlung des Beteiligungsanteils am Vorschlag des Ehegatten.¹⁰³ Diese Einschränkung in Bezug auf die Scheidungsründe liege darin begründet, dass im gesetzlichen Güterstand der Errungenschaftsbeteiligung, anders als im Erbrecht, auch der Beitrag oder die Leistung des anderen Ehegatten Berücksichtigung findet. Würde man die Gründe, die es ermöglichen, das Recht des Ehegatten auf einen Anteil an den Errungenschaften, an denen er direkt oder indirekt mitgewirkt hat, zu entziehen, weiter fassen, so würde dies dem Grundgedanken des gesetzlichen Güterstandes widersprechen.¹⁰⁴ Der Ordnungswert von Art. 236/1 TZGB verlangt für sich allein große Zurückhaltung bei der Annahme eines Rechtsmissbrauches.

¹⁰⁰ Yücel (n 16) 276.

¹⁰¹ Kılıçoğlu (n 99) 142.

¹⁰² Vgl. Ernst A. Kramer, *Juristische Methodenlehre* (2005) 165.

¹⁰³ Siehe bitte oben (n 57).

¹⁰⁴ Acar (n 27) N 1120.

Da jedoch die Vermutung des Gesetzgebers, dass beide Ehepartner direkt oder indirekt zum Wohl der Familie beigetragen haben, in mancher Sachlage sich von selbst widerlegt, wie zum Beispiel in den oben angesprochenen Fällen, greift diese Argumentation in solchen Härtefällen nicht. In der Tat entsteht in einem derart gelagerten Fall eine Diskrepanz zwischen der Vorschrift und dem ihr zugrunde liegenden Modell.¹⁰⁵ Unmittelbar stellt sich die Frage eines möglichen Rechtsmissbrauchs, wenn ein Ehegatte aufgrund erheblicher Vernachlässigung seiner ehelichen Beitragspflichten tatsächlich nicht zur Erwirtschaftung des Vorschlags beiträgt und dennoch auf seinem Anspruch auf Beteiligung am Vorschlag beharrt. Art. 2/2 TZGB sollte in einem solchen individuellen Fall zum Zuge kommen und den *offenbaren* Rechtsmissbrauches einer Beteiligungsforderung aus Art. 236/1 TZGB Schranken setzen können.

(3) Billigkeitsentscheide in der Schweizer Rechtsprechung

Rechtsvergleichend ist es nicht überraschend, dass sich das Bundesgericht aus Gründen der Rechtssicherheit mit Billigkeitsentscheiden ebenso schwertut. Aber in einem Fall hatte das Kantonsgericht Freiburg zu entscheiden, ob eine entsprechende Forderung bei einer Ehe, die zwar 10 Monate dauerte, aber tatsächlich nur 5 Tage gelebt wurde, als rechtsmissbräuchlich einzustufen sei. In diesem speziellen Fall verließ die Ehefrau das gemeinsame Zuhause bereits fünf Tage nach der Eheschließung und kehrte nie zurück. Der Ehemann reichte nach ca. 10 Monaten die Scheidungsklage ein. Die Forderung der Beklagten einer hälftigen Teilung der Beträge auf den Konten des Klägers (von Eheschluss bis) zum Zeitpunkt der Auflösung des Güterstandes wurde angesichts der sehr kurzen Dauer des gemeinsamen Lebens nicht stattgegeben. Das Kantonsgericht entschied, dass die Teilung verweigert werden darf, wenn sie einen Rechtsmissbrauch darstellt.¹⁰⁶

Aus den genannten Gründen wird in der Lehre eine Revision des Gesetzestextes befürwortet. De lege ferenda wird vorgeschlagen, dass Art. 236 Abs. 2 TZGB aufgehoben wird.¹⁰⁷ Eine andere Lehrmeinung hingegen schlägt vor dem Artikel 236 TZGB eine ergänzende Ermessensregelung in einem weiteren Absatz hinzuzufügen. Diese lautet wie folgend: „*Für Zeiträume, in denen die Ehegatten faktisch getrennt leben und ihren ehelichen Pflichten nicht nachkommen, kann der Richter den Beteiligungsanteil nach den Grundsätzen der Billigkeit entsprechend reduzieren.*“¹⁰⁸

105 Vertiefend zur Thematik der Überdehnung des Regelrechts und das Rechtsmissbrauchsverbot als Korrektiv vgl.: Ernst Zeller, *Treu und Glauben und Rechtsmissbrauchsverbot* (1981) 355 – 367.

106 Kantonsgericht Freiburg, I. Berufungskammer, Urteil v 18 Juni 2003 in der Sache A.B. gegen B.B. - A1 2002-5, *FamPrs.* ch 2004, 384: „*Yu la très courte durée de la vie commune (5 jours; cf. consid. 3c ci-devant), la défenderesse abuse de son droit en demandant le partage par moitié des montants se trouvant sur les comptes du demandeur à la date de la dissolution du régime. Partant, le recours doit aussi être rejeté sur ce point.*“

107 ErsÖz (n 46) 200.

108 Kılıçoğlu (n 99) 143.

Ein umfassenderer Vorschlag, der die in der Lehre vorgebrachten Kritikpunkte teilweise berücksichtigt, sieht eine Änderung des zweiten Absatzes vor und ergänzt die Vorschrift um zwei zusätzliche Absätze¹⁰⁹: „(Abs. 2) Im Falle einer Scheidung aufgrund von Ehebruch kann der Richter entscheiden, den Anteil des schuldigen Ehegatten am Vorschlag angemessen zu verringern oder vollständig aufzuheben.

(Abs.3) Wenn während eines aufgrund von Ehebruch laufenden Scheidungsverfahrens der klagende Ehegatte stirbt und ein Erbe des Verstorbenen das Verfahren fortsetzt und das Verschulden des anderen Ehegatten nachweist, gilt der zweite Absatz nur dann, wenn der Verstorbene zu Lebzeiten Maßnahmen ergriffen hat, um den schuldigen Ehegatten von der Erbfolge auszuschließen.

(Abs. 4) Im Falle einer Scheidung oder des Todes aufgrund von Nachstellung nach dem Leben kann der schuldige Ehegatte keinen Anteil am Vorschlag beanspruchen.“

In Angesicht der Rechtsprechung zu Billigkeitsurteilen bezüglich Art. 236 TZGB wäre die Abschaffung des Art. 236 Abs. 2 TZGB und die Neufassung einer sachgerechten Billigkeitsnorm ohne die Beschränkung auf zwei spezifische Scheidungsgründe eine angemessene Lösung. Dies würde die Möglichkeit eröffnen, Fälle zu berücksichtigen, in denen ein Ehegatte über längere Zeiträume hinweg seinen ehelichen Pflichten nicht nachgekommen ist und dennoch Ansprüche auf den gesetzlichen Beteiligungsanteil geltend macht. Durch eine solche Ergänzung könnte gewährleistet werden, dass der ohnehin benachteiligte Ehegatte vor unbilligen Nachteilen geschützt wird.

Rechtsvergleichend kann ein Blick auf das Bürgerliche Gesetzbuch wegweisend sein. Die Billigkeitsnorm hinsichtlich der Leistungsverweigerung wegen grober Unbilligkeit ist im deutschen Recht in § 1381 BGB verankert. Diese Vorschrift erlaubt es dem Schuldner, die Erfüllung der Ausgleichsforderung zu verweigern, wenn der Ausgleich des Zugewinns unter Berücksichtigung der Umstände des Einzelfalls als grob unbillig erscheint:

„§ 1381 BGB - Leistungsverweigerung wegen grober Unbilligkeit

1. Der Schuldner kann die Erfüllung der Ausgleichsforderung verweigern, soweit der Ausgleich des Zugewinns nach den Umständen des Falles grob unbillig wäre.
2. Grobe Unbilligkeit kann insbesondere dann vorliegen, wenn der Ehegatte, der den geringeren Zugewinn erzielt hat, längere Zeit hindurch die wirtschaftlichen Verpflichtungen, die sich aus dem ehelichen Verhältnis ergeben, schuldhaft nicht erfüllt hat.“

109 Aydın (n 27) 35.

Diese Bestimmung gewährleistet, dass ein Ehegatte, der über einen längeren Zeitraum seine wirtschaftlichen Pflichten in der Ehe schuldhaft vernachlässigt hat, nicht durch die Zugewinnausgleichsansprüche des anderen Ehegatten begünstigt wird. Sie schützt den Ehegatten, der seinen Pflichten nachgekommen ist, vor den unbilligen Konsequenzen, die sich aus der Vernachlässigung der Pflichten durch den anderen Ehegatten ergeben könnten.

Der Anspruch des Ehegatten auf den Vorschlagsanteil, der einen gesetzlichen Anspruch darstellt, setzt lediglich voraus, dass die Errungenschaften während des gesetzlichen Güterstandes erworben wurden. Ob der Ehegatte gearbeitet hat oder in irgendeiner Weise zur Erwerbung der Errungenschaften beigetragen hat,

Unstimmigkeiten durch eine spezifische Billigkeitsregelung behoben werden. Eine Vorgehensweise ähnlich wie in § 1381 BGB oder wie in den bereits von der türkischen Lehre vorgeschlagenen Entwürfen würde eindeutig mehr fallgerechte Lösungen ermöglichen. Folglich kann nur durch eine derartige Revision gewährleistet werden, dass die gesetzlichen Bestimmungen ihrem eigentlichen Zweck gerecht werden: einer gerechten Beteiligung an den während der Ehe erworbenen Errungenschaften.

Bis eine entsprechende gesetzliche Regelung erlassen wird, sollte das Ermessen des Richters darauf abzielen, den Beteiligungsanteil nicht vollständig zu streichen, sondern ihn nach Maßgabe der Billigkeit zu reduzieren. Denn anstelle einer vollständigen Aufhebung der Beteiligungsforderung wäre es in den meisten Fällen gerechter, die Dauer der Ehe und den geleisteten Beistand des Ehegatten zu berücksichtigen und den Beteiligungsanteil am Vorschlag des anderen Ehegatten in einem angemessenen Umfang zu reduzieren. In äußerst unbilligen Härtefällen sollte jedoch eine vollständige Verweigerung der Beteiligungsforderung in Betracht gezogen werden.

Revue par les pairs à l'extérieur.

Der Autor hat keinen Interessenkonflikt gemeldet.

Finanzielle Unterstützung: Der Autor erklärte, dass diese Studie keine finanzielle Unterstützung erhalten hat.

Externally peer-reviewed.

The author has no conflict of interest to declare.

The author declared that this study has received no financial support.

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Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

What Is Wrong With Sovereignty? A Critical Approach Through the Limitations of Legal Violence

Doğukan Bingöl*

Abstract

This article provides a critical perspective on current debates about sovereignty through the structural limitations of legal violence. A central discussion revolves around the question of whether the disaggregation of sovereignty as a result of international and global developments should be welcomed or resisted. While some argue that this provides better protection for human rights and international cooperation, others defend sovereignty as it ultimately means self-determination and democratic rule. However, being able to evaluate these arguments and developments requires an understanding of how sovereignty functions and what is problematic with it. To achieve this, the article grasps sovereignty from its two interrelated facets: Sovereignty signifies, on the one hand, that the legitimacy of law and political power comes from a popular source. On the other hand, it points to the supremacy of the authority that creates and enforces law through violence if necessary. Hence, the instrumentalization of violence is integral to its functioning. However, this method has structural drawbacks as the legal order built by violence requires its further instrumentalization, compelling the sovereign to compete with the people as the constituent source rather than just representing it. This endangers the promises of sovereignty, such as self-determination and democracy, and the article maps out these drawbacks by following Walter Benjamin's analysis of legal violence. Hence, the real problem of sovereignty lies in its functioning rather than its territorial configurations. This awareness of the problem inherent in sovereignty provides critical guidance in evaluating the arguments and developments about the concept's future.

Keywords

Sovereignty, Legal violence, Self-determination, Walter Benjamin, International law, Critical perspectives

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To cite this article: Bingöl D, "What is Wrong With Sovereignty? A Critical Approach Through the Limitations of Legal Violence", (2025) 76 Annales de la Faculté de Droit d'Istanbul 263. <https://doi.org/10.26650/annaes.2025.76.0009>



This article aims to contribute to contemporary debates about sovereignty from a critical perspective through the limits of the relationship between law and violence. Sovereignty, as one of the fundamental concepts of modern legal-political thought, has been under discussion since World War I, and it has undergone many changes up to our day. These changes were welcomed and doubted from varying perspectives by various theoretical and political standpoints, and the discussions about the concept even reached the point of whether the concept has a future or not. An important portion of these discussions revolves around the transformations of the national or popular expressions of the concept. However, sovereignty is also being criticised from other angles. One critical approach examines how sovereignty functions through violence and whether this method of operation aligns with the political promises it is supposed to uphold. Hence, these critiques are concerned more with how the concrete institutionalizations of the concept operate and how this mode of operation relates to other legal-political projects of modern thought, such as human rights, self-determination, democracy, justice, etc. Since such a perspective questions the structural limits of the concept by identifying the paradoxes inherent in sovereignty, it offers valuable insights when it comes to discussing the promises, shortcomings, and future of the concept. Hence, I create a synthesis by asking the question of how these critical approaches to sovereignty can contribute to the ongoing discussions about sovereignty.

In the first section of the article, I present an overview of the current debates on sovereignty, especially on the question of whether sovereignty is transforming into something new in the face of international/global mobilizations and, if so, whether these transformations should be welcomed. In my view, the main contenders can be summarised as a) those who welcome the dissolution of the concept because this signifies better and expansive protection for human rights, the expansion of cosmopolitan norms and values, etc.; b) those who are disturbed by the dissolution of the concept because the concept was a tool for collective autonomy and self-determination. Some authors question the accuracy of this opposition and the clash of arguments, showing that these views may be based on different conceptualizations of sovereignty. I conclude this section by highlighting that it is difficult to weigh these arguments against each other because the sovereignty they speak of may vary. After all, sovereignty itself is a historical-theoretical compound, and different readers can focus on its different elements.

Therefore, in the second section, I sketch two interrelated facets of sovereignty as a central concept in modern legal-political thought. On the one hand, sovereignty inescapably implies that the legal and political authority is referred back to the people through various conceptual designs such as social contract theory, consent, etc. since

the transcendental, religious grounds of legitimacy become unfeasible with modern transformations. On the other hand, sovereignty also signifies a supreme power that can overawe all, create laws, and enforce them. Hence, the correspondence between law and violence is integral to the concept since it connects the source of law to the assumption that law will be backed up by a mechanism of violence when necessary. This also summarises the attitude of modern legal-political thought towards violence as a political problem, unifying it in the hands of a sovereign who will supposedly give order to society and protect it from the chaos of the state of nature. Hence, this logic assumes that using violence is a necessary and inevitable moment of founding a legal-political order and it backs up the coerciveness of the legal system with its legitimate monopolisation by sovereignty.

Next, I try to analyse the structural limitations of this strategy of using violence in the legal sphere to provide efficacy and obedience so that we can better map out the paradoxes of sovereignty. Following Walter Benjamin's fundamental analysis of the effects of legal violence, I argue that this violent method, which is integral to sovereignty, binds the legal system to seek more violence to guarantee its further existence. This dependence on violence requires state 1) to prioritise the mission of empowering and maintaining its monopoly of violence, trivialising the other normative content. Hence, political and legal promises of the legal order, such as the protection of human rights, providing welfare and justice, etc., fall back against this structural necessity. 2) Since the very existence of the legal order depends on this, sovereignty competes with other constituent forces that may appear in society, which leads the state to either capture or smother these so that it stays in power. From this perspective, the very functioning of the concept points to a narcissistic, insecure bind on society, and even the supposed bare minimum that is expected from sovereignty, such as security or collective autonomy, seems doubtful.

Finally, I try to interpret the arguments we encounter in current debates over these insights. My first question is to what extent internationalisation and/or globalisation transforms this violent mode of operation. Here, however, it is essential to note that the changes in the territorial scope of the sovereign entity do not necessarily alter its operational logic. Answering this question requires that we realise the central role of sovereign states in both the formation and implementation of the process of internationalisation/globalisation. My second question is to what extent the defence of sovereignty over self-determination is viable. Especially reviewed from the critical perspective outlined above, such an argument may ignore the paradoxes of sovereignty and risk overturning the gradual progress achieved by global or local human rights movements. However, the argument is not without merit, and its essence should not be mixed with the pathologies of sovereignty.

Sovereignty is one of the central concepts of modern legal-political thought. Since Bodin, it is argued that sovereignty defines and determines the differing constellations of modern politics and law. For centuries, it has remained a key concept and evolved through contributions from many theorists, politicians, and through social and cultural transformations from varying contexts. As a result, different genealogies to the concept are possible, even though it is argued that sovereignty generally refers to similar legal-political constellations. It possessed and still possesses many qualities and traits that, in various ways, constitute our conception of modern legal and political phenomena: It distinguishes between domestic and international; it solves the issues of jurisdiction and order; it is through sovereignty that the question of who has the authority to create and enforce laws is answered; the independence and freedom of peoples and nations depend upon it, and so forth.¹

However, the 20th century witnessed various institutional and organisational developments nourished by theoretical doubts towards the concept, especially over some of its qualities that are deemed destructive towards “human values”.² Since the League of Nations experiment, international lawyers have highlighted how sovereignty has been used to pit the selfish interests of certain communities against the global world. It is used to justify oppression and to hide it under the veil of non-intervention principle.³ In this vein, and especially after World War II, the concept is associated with the moral bankruptcy of the war, and it is criticised as far as it represents states’ insistence on their isolationist attitudes against international cooperation.⁴ The idea that sovereignty means the ultimate, irresponsible authority has also undergone a critical consideration. Hence, the period of reconstruction after the Second War was marked by an effort to transcend this antiquated concept with international cooperation, as it always signified political violence and imperialistic desires.⁵ The ideas of better protection of human rights, holding the perpetrator states accountable, and safeguarding peace and democracy all depended upon international cooperation, which could only happen if the sovereignty of the individual states were limited.

1 Christian Volk, ‘The Problem of Sovereignty in Globalized Times’ (2019) 18 *Law, Culture and the Humanities* 716, 716–719; Dieter Grimm, *Sovereignty. The Origin and Future of a Political and Legal Concept* (Belinda Cooper tr, Columbia University Press 2015) 3–4; Alexander P d’Entreves, *The Notion of the State* (Oxford University Press 1967) 96; Quentin Skinner, ‘The Sovereign State: A Genealogy’ in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press 2010) 27, 29.

2 Louis Henkin, ‘That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera’ (1999) 68 *Fordham Law Review* 1, 1.

3 Martti Koskeniemi, ‘The Many Faces of Sovereignty. Introduction To Critical Legal Thinking’ (2017) 2 *Kutafin University Law Review* 282, 283, 288.

4 Henkin (n 2) 2–3.

5 Christopher Bickerton and others, ‘Conflicts of Sovereignty in Contemporary Europe: A Framework of Analysis’ (2022) 20 *Comparative European Politics* 257, 258.

In the second half of the 20th century, these political aims and institutional endeavours, along with other commercial, social and technical developments with overarching effects, did indeed transform the concept or the reality to which it refers. Skinner reports that some authors even go so far as to claim that sovereignty is no more.⁶ This might be deemed as a hasty conclusion, of course, and there are more mitigated formulations to describe the *status quo*. Benhabib, among others, claims that there is a shift from classical Westphalian sovereignty, where states exercised absolute and arbitrary power over a particular territory, to a liberal international understanding of the concept, where equality of states is derived from the adherence to shared principles and values, like the observance of human rights standards, the rule of law, etc.⁷ For instance, it is generally accepted that international mechanisms for enforcing human rights gain a gradual priority over the sovereigntist answers, which iterate absolute internal authority. Therefore, in this respect, it is considered that state sovereignty has eroded: Apart from allowing the use of force only in the cases where it is justified with self-defence, the current international order does not leave the human rights of individuals unattended. Many global and regional international human rights protection mechanisms now possess legal-institutional positions that may override and/or penetrate national jurisdiction. It would not be wrong to say that, as far as these changes represent better protection for human rights, democracy, and the rule of law, they are welcomed. In this sense, at the very least, the disaggregation in sovereignty is considered as a move forward since it helps to envisage a new global community, normative dialogues between different cultures, and better-coordinated protection for human rights.⁸

However, one must note that not all developments that lead to the weakening of sovereignty are celebrated in this manner. Sharing or delegation of sovereign powers may seem doubtful or concerning in the cases where they are bargained out by the demands of global circulations of the capital. Rather than empowering human rights norms, the effects of these developments on sovereignty can be seen as a strain on the independence and self-determination. So, as Benhabib puts it, they may collide rather than coincide with the efforts of international human rights movements.⁹ This is because nation-states and their sovereign actions are still the primary elements in protecting and implementing international human rights law. After all, as Jack Donnelly describes, the nation-state is still both the “principal violator and essential protector” of international human rights law.¹⁰ Thus, the regulative and executive powers of sovereignty are still needed as far as they are essential in the protection of human rights, and they are considered to be helpful in holding giant transnational

6 Skinner, ‘The Sovereign State: A Genealogy’ (n 1) 43.

7 Seyla Benhabib and others, *Another Cosmopolitanism* (Robert Post ed, Oxford University Press 2006) 23–24.

8 Grimm (n 1) 85; Henkin (n 2) 3–4, 7.

9 Seyla Benhabib, ‘Twilight of Sovereignty or the Emergence of Cosmopolitan Norms?’ *Rethinking Citizenship in Volatile Times*, *Dignity in Adversity: Human Rights in Troubled Times* (Polity 2011) 97, 106.

10 Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd ed, Cornell University Press 2013) 25.

corporations and companies accountable for their conduct in violation of human rights standards.¹¹

On the other hand, states' share of sovereign powers with an international web of global governance is also considered to be doubtful because the latter cannot sufficiently carry and institutionalise popular sovereignty.¹² This also applies to regional organisations that are rather more aligned both culturally and economically, like the EU, than others might be. Authors who question the contemporary inclinations from this perspective argue that the bare minimum of sovereignty is that it functions as a vessel for the collective autonomy and self-understanding of communities. In this sense, sovereignty means that the rules that govern the people come from the people themselves and not from an unidentifiable or imperial source. So, the peoples can rule themselves through the imagination of sovereignty, and this collective consciousness should not be easily abandoned.¹³ Hence, as far as they undermine sovereignty, contemporary developments run the risk of trivialising the potentials and procedures of collective action both at institutional and practical levels. Since the delegation of a sovereign power to decide on, say, a market or economy issue ultimately means that some other person or persons, possibly from a web of experts or technocrats, will decide upon that, this may, in effect, decrease the impact of public deliberations about the issue. The same could be argued for the representative capacity of parliaments, legislative campaigns, democratically held elections, etc.¹⁴

Koskenniemi vocalises this concern in a more theoretically aware manner: The issue with the boom in transnational/global governance is that the more penetrative it becomes, the more depoliticising it may become. When policies and decisions that might be a subject of public discussion and political preference are outsourced to an international agency that may or may not be an expert on the issue, what really happens is that the political is replaced with a supposedly technical one. This, in turn, is a very political attitude, as the questions of who makes the decisions and how they are taken are crucial when it comes to politics and law, especially when the alternative is not supplanted with mechanisms for accountability. Since legal and political authority means much more than simply the cumulative benefit of managerial decisions but also includes how a specific decision is taken and will be concretised or implemented, peoples and intellectuals concerned with this loss or weakening of sovereignty cannot be blamed.¹⁵ After all, it is not outright nonsense to doubt that international law and regulations may sometimes be employed to disguise

11 Henkin (n 2) 7–9.

12 As an example of the legitimacy problems that occur in the contemporary EU, see Bickerton and others (n 5) 265. See also Grimm (n 1) 117–118, 128.

13 Raf Geneens, 'Sovereignty, Action, Autonomy' in Bas Leijssenaar and Neil Walker (eds), *Sovereignty in Action* (Cambridge University Press 2019) 96–7, 108–19.

14 Benhabib (n 9) 97–98.

15 Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1 *Asian Journal of International Law* 61, 66–69. On this, see also Neil Walker, 'When Sovereigns Stir' in Bas Leijssenaar and Neil Walker (eds), *Sovereignty in Action* (1st edn, Cambridge University Press 2019) 45.

the selfish interests of imperial powers, and sovereignty can at least be considered as a defence against this.¹⁶

Which is it, then? Should we welcome and encourage the disaggregation of sovereignty, or should it be resisted and lamented? Can the same set of changes to the institutional form of our modern legal-political world be both progressive for the protection of human rights and disruptive for self-determination and democracy at the same time? If so, what are the duties of legal theorists and lawyers? Should one simply pick a side and theorise accordingly?

Of course, there can and should be other formulations to the dilemma. Koskenniemi, for example, suggests that one should go beyond the duality of “bad” sovereignty versus “good” international law to better understand the problems of the contemporary legal and political world. While he admits that there may have been a justified reasoning for international lawyers to form these associations, his attitude is a nominalist one, which recognises that these concepts do not possess essential or fixed meanings. Thus, such polarizations do not remain accurate forever, and one must always consider the practical outcomes when employing a sovereigntist or internationalist language.¹⁷ Despite being very useful in mapping out the preferable and objectionable outcomes of specific practical matters, this perspective falls short in providing a theoretical and general criterion for interpreting the above dilemma. Accepting that in a particular set of configurations, sovereignty may further the self-determination of a specific group of people better than an international governance mechanism, or vice versa, does not provide us with a conceptual tool to delineate what is problematic with the concept. What is needed here is a method that can critically answer why and how sovereignty encapsulates the idea of self-determination and collective autonomy and what gets lost in the process of internationalisation. Without first understanding what was (and is) problematic with the functioning of the sovereignty, one cannot answer whether the dissolution of it through internationalisation of law and politics can sufficiently remedy our problems with it. Similarly, when one loses sight of the institutional conditions of internationalisation-globalisation and starts out from the sovereignty-international polarisation, it becomes harder to identify the real structural-methodological paradoxes of the concept. Ultimately, it is sovereign states themselves who championed and furthered this internationalisation and/or globalisation, and the increasing activity of trans-or supranational organisations depends upon the worldwide extension of sovereignty. Thus, as Giddens puts it, rather than weakening state sovereignty, these developments rely upon it.¹⁸

16 David Dyzenhaus, ‘Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought’ (2015) 16 *Theoretical Inquiries in Law* 358 <<https://www.degruyter.com/document/doi/10.1515/til-2015-104/html>> accessed 11 October 2021; Koskenniemi (n 3) 289.

17 Koskenniemi (n 3) 285–289.

18 Volk (n 1) 730–1; Grimm (n 1) 88–89, 97; Anthony Giddens, *The Nation-State and Violence* (Polity Press 1985) 5–6.

Procuring such a method, however, is not easy. As stated in the first paragraph of this paper, the concept's existence transcends centuries. Throughout these centuries, the concept has been developed or contributed to by different intellectual sources and legal-political transformations. Hence, the concept relates the foundational principles of modern legal-political thought to each other, and it unites different configurations of public power. On the one hand, for example, it represents the ultimate authority of the princely rulers. On the other hand, it has become a key concept for the constitutionalisation of political power and the concretisation of popular rule. Therefore, the meanings and appeals of the concepts change throughout history and in varying political topographies.¹⁹ Despite this, however, I argue that the grasp of two facets of sovereignty allows a critical engagement with the concept, which can possibly be used to delineate the dysfunctional workings of the concept from the "good" that comes from it. 1) Sovereignty, throughout modern legal-political thought, comes forward as a new and secular source of law and political power once the divine sources or religious justifications of these latter phenomena become unfeasible. It is through this facet of sovereignty that we can infer self-determination, collective autonomy, being a vessel for democracy, etc., from the concept. From this perspective, sovereignty merges with the concepts of social contract, consent, and representation, ultimately encapsulating all the potential outcomes of modern constitutionalism. However, grasping the concept from this angle is not enough to understand its operation. Because, notwithstanding that it comes from demos, people, or nation, it is considered that every legal idea and rule requires an enforcement mechanism. Likewise, the benefits of legal orders cannot be achieved without an authority or political power to execute the law in the first place. Thus, this conception of sovereignty is inevitably interrelated with which power and how law will be concretised and implemented in real life. Hence, the idea of instituting a power that can be independent of other social relations and that can be imposed on them is also integral to the idea.²⁰ Therefore, 2) sovereignty inescapably implies that this authority or political power has the final say in all legal-political issues. Hence, the public institution of power has the highest and ultimate authority through sovereignty. This, of course, requires that power to channel all potential realms for social power to itself, including ultimately the means of violence.

In the next section, I will try to summarise what I make of these two facets of the concept, hopefully leading to a better understanding of how sovereignty works. Sovereignty, I argue, while being used as a reference point for the popular origins of law and political power, fundamentally impairs democracy and self-determination, for it integrally functions over the instrumentalization of violence to be the highest, ultimate authority. This legal-political method, which is centred around the use of

¹⁹ Volk (n 1) 716–717.

²⁰ Geneens (n 13) 96.

violence, has structural drawbacks that are difficult to remedy fully or sufficiently. Hence, I aim to show that the relationship between these two facets of sovereignty is antagonistic, and the functioning we see in the second facet is disruptive for the first. After I examine this with the help of critical literature on the relationship between law and violence, my next aim will be to discuss how this critical understanding of sovereignty may serve us to interpret the ongoing debates about the concept.

Although there are pre-modern usages or references of the concept, conceiving sovereignty as a source of law inevitably requires a focus on what it came to signify through modern legal-political transformations, starting with Bodin.²¹ Bodin's reception in literature usually focuses on how he envisioned a perpetual public authority that rule all, a power from which laws and the legal powers of lesser magistrates emanate. Despite his preference for monarchy, Bodin's theory is also remembered nowadays for providing institutional patterns that later were employed by democratic and constitutional movements. Richard Tuck, for instance, notes that despite the absolutist readings of his work, Bodin's separation of government from sovereignty may provide a theory "peculiarly appropriate for a modern democratic state", since the latter assumes a sovereign people who authorise laws and governors but do not rule itself.²² However, the crucial idea in Bodin's theory, or rather the intellectual transformation that signified through him, lies elsewhere, albeit prototypically. Even though Bodin's theory is tinted with religious grounds, the very idea that a temporal entity can create law points to a fundamental transformation in the conception of law. Prior to the idea of sovereignty, the rules and the political power to execute them came from god, and the sheer idea that one can create laws would be to deny the status of god. Hence, laws can only be found in customs or in earlier precedents; they cannot be made by humans.²³

The theoretical motivations for such a shift in the understanding of law are inescapably related to the religious conflicts that were enflamed by the Reformation, together with developing conceptualizations that remove the divine halo from political and legal institutions.²⁴ The need to surpass religious quarrels to provide order and unity requires a new approach that sees the legislation in a secular manner. In this respect, Bodin's enterprise can be seen as a step in the search for a new basis

21 For usages of the concept before its modern understanding, see Grimm (n 1) 13; d'Entreves (n 1) 97.

22 Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press 2016) 44, 49.

23 Grimm (n 1) 16, 22; d'Entreves (n 1) 89–90, 100–101.

24 Ian Hunter, 'Secularization: The Birth of a Modern Combat Concept' (2015) 12 *Modern Intellectual History* 1, 10; John Witte, 'Law and the Protestant Reformation' in Heikki Pihlajamäki, Markus D Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018) 589–590; Marcel Gauchet, 'Les Tâches de La Philosophie Politique' [2002] *Revue du Mauss* 275, 281.

for law and political power, which does not originate from a transcendental and/or religious source. This ultimately leads to the awakening of the idea of the social contract. Of course, as a legal-political motif that grasps political-social relations in terms of contractual patterns, this idea harkens at least back to the sophists, and it has numerous theoretical inspirations.²⁵ Its modern deployment, however, seeks to establish legal and political authority without any religious references.²⁶

How is this achieved? Although there are different criteria to categorise even the modern versions of social contract theory, their most crucial and critical function lies in their justification of legal-political authority over human conduct or will. Naturally, different theories project different versions of the state of nature, sometimes leading to radical variations in the qualifications in the composure of legal and political authority. Yet again, they have a common goal of creating a new, immanent (that is, within reach of observable experience) source for law and political power: These phenomena now come to be considered to be based on the human will (in varying forms), and they are conceived through human conduct.²⁷ In Hobbes' version, for instance, sovereignty becomes much more than just an attribute of public power. Through representation derived from the social contract, the people become the existential principle and the source of legitimacy for the state and sovereignty. Thus, the state or the commonwealth becomes an artificial entity that is formed through the institution of sovereignty by the people.²⁸

From then on and with further contributions from other theorists, sovereignty has always implied that the authority of law and political power comes from people, for no other source was feasible under modern conditions.²⁹ Hence, through authorisation and representation, it was considered that either the sovereign derived its power from the people or the people itself was the real sovereign. As long as it comes from the people, sovereignty could always be considered democratic in principle. Even though it was used by Hobbes to support monarchical rule, this theory had an explosive potential, and it is this potential that was actualised later on by quests for democratic

25 David G Ritchie, 'Contributions to the History of the Social Contract Theory' (1891) 6 *Political Science Quarterly* 656, 656; Johann Sommerville, 'The Social Contract (Contract of Government)' in George Klosko (ed), *The Oxford Handbook of the History of Political Philosophy* (Oxford University Press 2011) 575–578 <<https://doi.org/10.1093/oxfordhb/9780199238804.001.0001>>; Harro Höpfl and Martyn P Thompson, 'The History of Contract as a Motif in Political Thought' (1979) 84 *The American Historical View* 919, 919–920.

26 Antony Black, 'The Juristic Origins of Social Contract Theory' (1993) 14 *History of Political Thought* 57, 71–72. It should be noted that, of course, the idea of explaining political relationships over contractual, individual, and arbitrary grounds is not without opposition. Hume and Hegel are known dissenters to the idea of the social contract theory on different grounds. For more on this, see Christopher J Berry, 'From Hume to Hegel: The Case of Social Contract' (1977) 38 *Journal of the History of Ideas* 691, 691; Ritchie (n 25) 673, 675.

27 Franz Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Berg Publishers 1986) 7–8, 28.

28 Thomas Hobbes, *Leviathan* (Crawford B Macpherson ed, Penguin Books 1985) 189–192, 227–228; d'Entrevies (n 1) 105.

29 Grimm (n 1) 30–31; Skinner, 'The Sovereign State: A Genealogy' (n 1) 37; Quentin Skinner, *The Foundations of Modern Political Thought. Volume Two: The Age of Reformation* (Cambridge University Press 2004) 351. Even today, this theoretical ground is referred to in varying occasions, see Bickerton and others (n 5) 259; Koskeniemi (n 15) 65.

rule and constitutionalism.³⁰ Throughout constitutional history, sovereignty comes to signify that law comes from the popular elements and no power is legitimate unless it shows its constitutional origin.³¹ Thus, as one moves towards late modernity, this democratic principle of sovereignty matures: The state finds its constituent element and the ultimate foundation of its authority in the people. Precisely because of that, it is claimed that the close relationship between law and political power is peculiar to the state because law is the immediate remnant of people as constituent power.³² There are, of course, variations to the denomination of this popular and constituent element, like “people” or “nation”, both with their own cultural and political implications. Each designation has its peculiarity, and they may play crucial roles in concrete legal-political arguments.³³ Nevertheless, to understand how sovereignty encapsulates self-determination and collective autonomy, these further categorizations may be overlooked. For modern states, people’s participation in power and law is the “foremost ground of legitimation”.³⁴

Now, my argument is that all the positive contents of sovereignty, such as self-determination, the security of secular rule, collective autonomy, external protection, etc., are all further determinations of this popular principle that was always integral to the modern understanding of the concept. The argument that sovereignty protects us from imperial rule or the rule of others other than us³⁵ is implied in the popular origin of the concept because we, the people, and not some other popular entity, created our legal-political order. The idea that not the rules that emanate from a supernatural power or a god but the rules that our own artificial government direct our activities is also implied in the concept because it was us, and not an invisible divine entity, who built the legal order. Again, our chances of directing our social and individual lives as we deem fit and just through collective action are also implied in the principal design of sovereignty, for claiming mastery of our actions and being able to enter into covenants is essential to the idea. As far as constitutionalism means that the workings of society, law, and political power must follow a specific set of manners, procedures, and divisions whose legitimacy is owed to people as the original source of sovereignty, constitutionalism too is theoretically included in the concept. However, since we cannot infer legitimacy and justification for the political power and law from something other than human will and/or consent, these interpretative consequences

30 David S. Grewal and Jedediah Purdy, ‘The Original Theory of Constitutionalism’ (2018) 127 Yale Law Journal 490, 675–677.

31 Grimm (n 1) 47–51, 68.

32 Gianfranco Poggi, *The State: Its Nature, Development and Prospects* (Polity Press 2004) 25–29.

33 Olga Bashkina, ‘Nation against People: Whose Sovereign Power?’ in Bas Leijssenaar and Neil Walker (eds), *Sovereignty in Action* (Cambridge University Press 2019) 164–165; Pasquale Pasquino, ‘Popular Sovereignty: The People’s Two Bodies’ in Bas Leijssenaar and Neil Walker (eds), *Sovereignty in Action* (Cambridge University Press 2019) 144–146; Grimm (n 1) 43.

34 d’Entreves (n 1) 178–179.

35 Tuck (n 22) 279.

are just further determinations of the concept. It is usually these traits that intellectuals typically tend to be protective of in contemporary discussions about sovereignty. After all, these are the progressive elements of modernity, and they are closely knit with the promises of the Renaissance, which reiterate the creative power of human agency, its rational capacity to understand, and its power to virtuously determine its own fate.³⁶ Sovereignty, in this sense, is nothing other than the ontological-theoretical expression of these cumulative transformations that legal and political theory underwent and settled on popular origin as a new source. And as far as this holds to be true, it is considered, it must be protected.

However, understanding the law and political power solely through inquiries about their supposed source is helpful only to a limited extent. As mentioned before, how the assumed will of a particular people or community is realised in concrete life is also quite important. Therefore, it is important to remember that every legal and political objective requires a corresponding mechanism of coercive authority is also included in sovereignty.³⁷ Even though the origins of law and legal categories are now traced back to the consent or conventions of the people, Hobbes argues, for example, without a coercive power that can compel people to fulfil their covenants, there can be no talk of law.³⁸ Hence, as summarised as the second facet of the concept, sovereignty also signifies an overawing, supreme power that can create laws, execute them, and employ sanctions on those who violate them. The rule of law inevitably requires a mechanism of force or violence. Sovereignty also signifies this correspondence between law and violence, which is granted by the state.³⁹ In this sense, sovereignty is the highest legal power, but if it is not paired with a real strength to enforce the law or if this strength comes from another entity, the former is not sovereign.⁴⁰

Schmitt's oeuvre, for example, is greatly nourished by this understanding of sovereignty. In his early writings, he argues that the state's value lies in its ability to concretise and enforce law, and the law cannot be fully understood without the sovereignty that fulfils this mission.⁴¹ Without a concrete "pivotal authority" that creates order in the first place and guarantees the ordinary functioning of legal-political institutions, the law as an abstract system of norms cannot implement

36 Machiavelli's impact on this trajectory should also not be forgotten; see Quentin Skinner, *The Foundations of Modern Political Thought. Volume One: The Renaissance* (Cambridge University Press 2002) 90–98, 109; Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton University Press 2004) 110–111, 189.

37 Koskenniemi (n 15) 65.

38 Hobbes (n 28) 202.

39 d'Entreves (n 1) 105, 129.

40 Neumann (n 27) 24.

41 Carl Schmitt, 'The Value of the State and the Significance of the Individual' in Lars Vinx and Samuel Garret Zeitlin (eds), Lars Vinx and Samuel Garret Zeitlin (trs), *Carl Schmitt's Early Legal-Theoretical Writings* (Cambridge University Press 2021) 197; Carl Schmitt, 'Statute and Judgement' in Lars Vinx and Samuel Garret Zeitlin (eds), Lars Vinx and Samuel Garret Zeitlin (trs), *Carl Schmitt's Early Legal-Theoretical Writings* (Cambridge University Press 2021) 72–73, 103.

itself⁴². Of course, his focus on the decision in identifying the sovereign and the personification of sovereignty brought by this⁴³ can be first declined with references to the dissolution of absolutism. With the rise of constitutionalism and popular sovereignty, after all, sovereignty has become increasingly impersonal. Its absolutist and arbitrary tendencies fade away, and the concept gets abstracted into the legal order itself: If none of the constituted powers in the state can claim it fully and absolutely, and if they are all subjected to each other's supervision, then sovereignty must now be residing with the people, dormant and inactive except in the cases of constitutional activity.⁴⁴

However, this reasoning concerns the identification of the sovereign entity. Therefore, the difficulty we encounter in answering this question under contemporary conditions does not necessarily obviate the coerciveness of sovereignty. Even though it is impossible to pinpoint a person or a body of persons with unlimited, absolute power in modern constitutional states, no one can deny that the state still depends upon a monopoly of organised force. Hence, the state claims superiority to other social and individual entities in society through this monopoly, and the maintenance of this organised force is one of its primary tasks.⁴⁵ The sovereign missions of maintaining domestic order and defending the community against both internal and external threats are closely linked with this functioning.⁴⁶

Without a doubt, this functioning is mainly owed to the monopoly of violence. As classically put forward by Weber, violence is the peculiar means of the modern state, even though this is not its only means of influence.⁴⁷ There can, of course, be different forms of social power, but the state's political power is deemed superior because of its control over the monopoly of violence. Through this, the political power of the state gains relative control over other forms of social power, and no one is permitted to use violence unless it is allowed by the state.⁴⁸ This functioning is also very vital for the rule of law since law competes with other normative systems (religions, morality, custom, the rules of etiquette, etc.) in directing or regulating social activity. The main leverage of law against, and the ultimate point of distinction from these is that law can trigger the state's mechanisms of violence. In this respect, what state officials, including judges and courts, really do is to determine in which conditions

42 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press ed, University of Chicago Press 2005) 30–35. The quote is from p. 33.

43 Ibid. 5–6, 30.

44 Grimm (n 1) 48–51, 68–71.

45 AD Lindsay, 'Sovereignty' (1924) 24 *Proceedings of the Aristotelian Society* 235, 246–247.

46 Jens Bartelson, 'Double Binds: Sovereignty and the Just War Tradition' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press 2010) 83.

47 Max Weber, 'Politics as a Vocation' in C. Wright Mills and HH Gerth (eds), C. Wright Mills and HH Gerth (trs), *From Max Weber: Essays in Sociology* (Oxford University Press 1946) 77–78.

48 Poggi (n 32) 5, 8–11, 21; Weber (n 47) 78.

and how severely this mechanism will be operated.⁴⁹ In cases where legal authority is not obeyed, this mechanism threatens individuals with violent implementation and, if necessary, enforces the decision with violent means.⁵⁰ Hence, the general coerciveness that law performs through different forms of sanctions is actually derived from the monopoly of violence, whose territorial control coincided with the formation of state sovereignty.⁵¹ Undoubtedly, the legal order usually distinguishes its own legitimate, supposedly rational, and controlled violence from other illegitimate, chaotic uses of violence, and it labels its own violence with more sterilised names like coercion, punishment or sanctions.⁵²

When the supremacy of sovereignty is united with the boundlessness of human will as its foundation, it inescapably connotes an unlimited, absolute authority to create and enforce laws. As far as this means that because of modern transformations, there can be no theoretical limits (as in transcendental boundaries) to what the people as the constituent power can will, this is accurate. People can will anything. On the other hand, this connotation is also opposed today with reference to the interdependence of contemporary nations and states in their economic, industrial, commercial, technological, etc., relationships. This interdependence, it is argued, makes it unfeasible to imagine sovereignty with its traditional absolute, supposedly uncheckable connotations.⁵³ As far as this signifies that no single power today can exclude itself from the rest of the world, this can be accurate.

However, when criticising sovereignty over its feasibility, another transformation should also be noted. In terms of perfecting the violent functioning of sovereignty, contemporary states surpass the traditional forms of legal-political power, such as feudal rulers, monarchies, and empires. Hence, Giddens abstains from calling these older legal-political formations as “government” per se because they could not literally govern their subjects, and they could not settle their subjects’ lives in detail, as modern states can. Their rule could be severe, but because of the technical

49 Robert Cover, ‘Nomos and the Narrative’ in Martha Minow, Michael Ryan and Austin Sarat (eds), *Narrative, Violence, and the Law: The Essays of Robert Cover* (The University of Michigan Press 2004) 141–144. Excluding H. L. A. Hart, throughout different generations of legal positivism, the coerciveness of legal rules has come forward as the main criterion of distinction from other types of normative systems. See, for example, John Austin, *The Province of Jurisprudence Determined* (Wilfrid E Rumble ed, Cambridge University Press 1995) 19–21, 29–30; Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Harvard University Press 1949) 21; Alf Ross, *On Law and Justice* (University of California Press 1959) 53–56. For Hart’s objection, see Herbert L.A. Hart, *The Concept of Law* (Oxford University Press 2012) 26–44. For different examinations and confirmations of this argument, see Norberto Bobbio, ‘Law and Force’ (1965) 49 *The Monist* 321, 325; Frederick Schauer, *The Force of Law* (Harvard University Press 2015) 39–41, 85–87.

50 Robert Cover, ‘Violence and the Word’ in Martha Minow, Michael Ryan and Austin Sarat (eds), *Narrative, Violence, and the Law: The Essays of Robert Cover* (The University of Michigan Press 2004) 203.

51 Grimm (n 1) 77–78.

52 Peter Fenves, “‘Out of the Order of Number’: Benjamin and Irigaray toward a Politics of Pure Means’ (1998) 28 *Diacritics* 43, 43; Austin Sarat, ‘Situating Law Between the Realities of Violence and the Claims of Justice: An Introduction’ in Austin Sarat and Thomas R Kearns (eds), *Law, Violence, and the Possibility of Justice* (Princeton University Press 2001) 6; Austin Sarat and Thomas R Kearns, ‘Making Peace with Violence: Robert Cover on Law and Legal Theory’ in Austin Sarat (ed), *Law, Violence, and the Possibility of Justice* (Princeton University Press 2001) 53–54.

53 Koskeniemi (n 15) 61; Geneens (n 13) 92.

impossibilities in transportation, communication, and, more importantly, military technology and bureaucracy, the reach of this rule was very limited and could not be spread with the same intensity.⁵⁴ On the contrary, modern states possess a much more extended and penetrative capacity on this ground than any prior legal-political formation. Modern armed forces excel prior armed forces in their destructive capacity, manoeuvrability, and organisation, providing the modern state an actual dominance over the rest of the society unlike any traditional power could imagine⁵⁵. Hence, as warfare becomes more and more professionalized and centralised, society becomes purged of any significant means of violent resistance against the armed forces of modern states. As societies become more pacified, the means of violence become more perfected and better monopolised in the hands of the state. The efficiency of this structure is the backbone of modern legal systems, guaranteeing that the legal order is always backed by the threat or actual use of violence.⁵⁶

Sovereignty, in conclusion, apart from its theoretical ties with popular will and collective autonomy, also represents this supremacy of the legal order over its assumed creators, that is, the people. Below, I will argue that the method of creating and maintaining this supremacy of sovereignty through the use of violence contradicts all the implied benefits of sovereignty as the source of law and political power, rendering the concept dysfunctional.

However, as a legal-political institution, how can the functioning of sovereignty be disruptive against self-determination and democracy? There are several ways to argue this, and for the sake of clarity, a point needs to be noted. It can always be argued that as a concrete determination of a theoretical potentiality, the former signifies an end for the latter. So, when the potentiality is concreted into something, it cannot be another thing. By itself, however, this does not necessarily consume the potentiality permanently. Therefore, when people form a collective will to unite and create a consent-based organisation, their potential to withdraw their consent and form another organisation does not end. Invoking this potentiality again may mean that the former organisation may dissolve, but the potentiality remains latent. Theoretically, human beings can will different things at different times, and this ultimately leads to the fundamental problem of how to grant stability to political activity itself. But this dilemma is owed to the tension between potentiality and actuality, and in this sense, it is a challenge for even the fiercest advocates of action and freedom.⁵⁷

54 Giddens (n 18) 56–57.

55 Samuel E Finer, 'State- and Nation-Building in Europe: The Role of the Military' in Charles Tilly (ed), *The Formation of National States in Western Europe* (Princeton University Press 1975) 155, 159.

56 Giddens (n 18) 18, 20.

57 Arendt, for example, after pointing out that the very idea of limiting the capacity to act is destructive for the action, suggests that the only way to limit power without destroying it is by multiplying it, see Hannah Arendt, *On Revolution* (Penguin Books 1990) 151–152.

Criticising a political idea over its method of realisation, however, is different from this. Criticism can be directed to the legal-political idea itself, or it can be directed to a specific method that is employed to realise the idea. As I try to explain below, the structural dictates arising from the use of violence contradict or hinder the sovereignty as the modern source of law, or rather, the legal-political promises of modernity. Hence, unlike the above dilemma, this obstruction arises from a particular method of a specific configuration of modern legal-political thought and is not a categorical problem that applies to all existence and will-formation. More importantly, if such a criticism can present how and on what grounds the method clashes with the promise, it can also provide the much-needed critical method that will allow us to delineate “the bad” sovereignty from “the good” one. This will be the task of the next section.

Criticising modern legal-political thought over its violent legal-political methods is not new, and it can be traced at least back to the French anarchist–Marxist thinker Georges Sorel. Dating back to 1905, one of the leading concerns of Sorel’s *Reflections on Violence* is how appropriating the method of using the coercive power of the state to build and enforce an order can become corruptive for the emancipative promises of the revolutionary movement.⁵⁸ Although quite influential, surely his is not the only account of the issue. There are and can be different accounts or approaches to understand the place of violence in legal and political theories. Since this is not the place to list them all, however, I aim to make use of Walter Benjamin’s “Toward the Critique of Violence”, which is one of the most fundamental texts not only in the literature on the relationship between law and violence but also in political philosophy and critical theory.⁵⁹ What makes Benjamin’s account preferable is that his analysis goes beyond a simple condemnation of violence, providing us with a methodical analysis of the wider effects of the use of violence on the whole legal system. Hence, rather than merely stating that law inevitably depends on violence, Benjamin shows that this relationship of dependence cannot remain accidental and temporary in the legal-political system.

Written from the WW I era, Benjamin of “Critique” witnessed both the war and afterwards, the period of political unrest, soldier rebellions, revolutionary movements, and bloody struggles in Germany. Hence, Benjamin’s focus is on the more comprehensive and inescapable consequences of using violence in the creation

58 Georges Sorel, *Réflexions Sur La Violence* (Librairie Des Sciences Politiques et Sociales 1925) 123, 147–148, 260–263. For the history of the text, see “Note on the text” in the English translation, Georges Sorel, *Reflections on Violence* (Jeremy Jennings ed, Thomas Ernest Hulme tr, Cambridge University Press 1999) xxxv.

59 Catherine Kellogg, ‘Walter Benjamin and the Ethics of Violence’ (2013) 9 *Law, Culture and the Humanities* 71, 72; Udi Greenberg, ‘Orthodox Violence: “Critique of Violence” and Walter Benjamin’s Jewish Political Theology’ (2008) 34 *History of European Ideas* 324, 324.

and maintenance of legal orders. Since even the most consistent sovereign legal order starts with bloody events⁶⁰, the question was critical. As far as modern legal theory also assumes the use of violence for the codified, legal ends of a given legal order and the constitution of such an order by violent means; if necessary, the reasoning applies.⁶¹ If the text is interpreted from a materialistic point of view,⁶² its argumentation and critical findings can be outlined in three steps.

First, by examining the cases where individuals or collectives other than the state are permitted to use violence, Benjamin concludes that the legal order tries diligently and vigorously to purge society from the spontaneous, unauthorised uses of violence.⁶³ Second, Benjamin points out that violence is not something completely alien to or incompatible with the law. On the contrary, he shows, through different examples such as military triumphs and workers' strikes, that violence is used in creating stable legal relations. With equal importance, it is also used to enforce individual legal rules against individual persons. Hence, legal violence is distinguished into two categories: *law-positing violence* and *law-preserving violence*.⁶⁴ Third, he connects the dots: If violence has become instrumental in the positing of a legal order as law-positing violence, then the legal order is bound to possess the capacity to employ violence more than ever. Since nobody will maintain obedience to an order to which they were subjected through violence, the maintenance of this obedience requires further capacity to employ violence. Therefore,

“... law-positing does not simply relinquish violence; rather, now in a rigorous sense and, indeed, immediately, it turns this violence into the law-positing kind by establishing not an end that would be free of, and independent from, violence but, on the contrary, an end that, under the name of power, is necessarily and intimately bound up with it.”⁶⁵

When summarised and uttered plainly, the critical finding of the text is that for a legal order established through violent means, violence can never be an accidental

60 Koskeniemi (n 15) 66.

61 Kellogg (n 59) 74–75.

62 The question of whether one should read both Benjamin and specifically this text over the author's theological interests versus his materialist-Marxist inclinations is a massive debate in Benjamin literature. There is no victory for either side yet. For this discussion, see Judith Butler, 'Critique, Coercion, and Sacred Life in Benjamin's "Critique of Violence"' in Hent de Vries and Lawrence E. Sullivan (eds), *Political Theologies: Public Religions in a Post-Secular World* (Fordham University Press 2006) 204–205; Maciej Witkowski, 'Political Violence and Instrumental Use of Religion in the Works of Carl Schmitt and Walter Benjamin' (2022) 13 *Religions* 917, 10; Marc De Wilde, 'Violence in the State of Exception: Reflections on Theologico-Political Motifs in Benjamin and Schmitt' in Hent de Vries and Lawrence E. Sullivan (eds), *Political Theologies: Public Religions in a Post-Secular World* (Fordham University Press 2006) 191–193; Vivian Liska, 'The Legacy of Benjamin's Messianism: Giorgio Agamben and Other Contenders' in Rolf J. Goebel (ed), *A Companion to the Works of Walter Benjamin* (Camden House 2009) 195–196.

63 Walter Benjamin, 'Toward the Critique of Violence' in Peter Fenves and Julia Ng (eds), Julia Ng (tr), *Toward the Critique of Violence: A Critical Edition* (Stanford University Press 2021) 42.

64 Ibid. 45.

65 Ibid. 55–56.

or subsidiary element. Since violence cannot persuade people by communicating reason and its effectivity comes from the domination of others,⁶⁶ the order built by violence requires its continuous existence for execution. Therefore, the legal system and power are necessarily and intimately, by the nature of their constitutions, bound up with violence. To maintain authority and efficacy, the legal system must possess this forever. This relationship works in both ways: On the one hand, this means that legal order and sovereignty must keep their monopoly of violence sharp, developed, and ready to strike at all times. On the other hand, it means that society needs to be prepared for the unobstructed diffusion of violence. This requires the elimination of all the spontaneous, unauthorised uses of violence. Therefore, in Benjamin's account, the preservation of the monopoly of violence becomes the secret, omnipresent goal of the legal order.⁶⁷

Therefore, Benjamin's understanding of the problem points to a fundamental relationship of necessity between legal order and violence. To better understand how this contradiction is reflected in the concept of sovereignty, two further manifestations of this relationship can be highlighted. First, it can be said that, by the token of this relationship of necessity between law and violence, both legal order and sovereignty undergo a normative transformation. If the very execution of the normative contents of a specific legal-political order depends upon the existence of sufficient violent means, the maintenance of this latter capacity becomes the universal necessity of sovereignty. After all, all the benefits expected from law and order, such as security, welfare, equality, justice, and protection of human rights, depend upon the state's capacity to enforce the law. This leads to a structural differentiation and makes the possession and maintenance of the monopoly of violence the primary task of sovereignty. Consequently, the original aims and expectations of the normative content of the legal order become trivialised and secondary to this general mission. Thus, self-determination and the realisation of democracy too inescapably become trivialised in the process. If the outcome of a collective decision weakens the sovereign order and diminishes its power, what are the chances that this decision will be welcomed by the sovereign state?

This brings us to the second point. This violent functioning that is integral to the sovereignty as a particular historical configuration of popular source of law restricts, rather than empowers, democracy and popular will formation. To maintain a monopoly on violence, another strategy that this system employs is the prevention or diligent control of the innovative impulses that occur in society. Such a system

66 Hannah Arendt, 'On Violence', *Crises of the Republic* (Harcourt Brace 1972) 155; Arendt, *On Revolution* (n 57) 12, 26, 202.

67 Christoph Menke, 'Law and Violence', *Law and Violence: Christoph Menke in Dialogue* (Manchester University Press 2018) 31. Hamacher's interpretation is similar too, see Werner Hamacher, 'Afformative, Strike' (1991) 13 *Cardozo Law Review* 1133, 1134.

inescapably behaves “in a restrictive manner toward its constitutive forces”.⁶⁸ This contradiction can be best explained through what Balibar calls the “antinomic nature of sovereignty”.⁶⁹ Here, the antinomy lies in establishing law and political power through the strategy of sovereignty. More specifically, this strategy ends the violence and chaos of the state of nature through the institution of a sovereign power with a monopoly on violence. While the founding act seems consensual and voluntarist, the efficacy remains dependent on a nonconsensual method; hence, anti-political — if we follow an Arendtian understanding. This strategy, which, according to Balibar, is best exemplified in Hobbes, aims to do away with the state of nature where spontaneous dispositions of violence lead to a state of war. But since this state of war is terminated only by the continuous control over and concentration of the means of violence, “(...) state power can keep the peace in the social body only if it is virtually at war with it.”⁷⁰ Hence, the moment the sovereign power’s claim to represent the common interest becomes doubted and the society fails to meet the expectations of the sovereign entity, the latter tends to close the gap with varying degrees of violence, starting from the legitimate uses of violence to systematic violations of human rights and more.⁷¹ At the very least, it possesses the institutional and political means to do so. This institutional tension converts the relationship between state sovereignty and the people to a relationship of manipulation and captivity rather than a mere representation. Or, as Balibar puts it, “The state is the bosom enemy of the society it protects.”⁷²

Altogether, the specific determinations of this methodological necessity steer legal-political power to a “colonial expansion”⁷³; through which the legal system must either capture and legalise everything or push them to a sphere of illegality to be later dealt with violence⁷⁴. To ensure that the conditions for its own existence and execution, it has to move in an appropriative, expansive manner. The specific normative aims of the system cannot be realised fully and objectively because of the dictates of this necessity. Nor can the people, as the assumed constituent element or power, determine its fate or institutional formation without the interventions of this narcissistic need for expansion. Indubitably, developments and transformations that are brought about by constitutionalism and the rule of law can be considered as institutional checks against

68 Hamacher (n 67) 137.

69 Etienne Balibar, *Violence and Civility: On the Limits of Political Philosophy* (GM Goshgarian tr, Columbia University Press 2015) 77.

70 Ibid. 32.

71 Ibid. 77–78.

72 Ibid. 32.

73 Antonia Birnbaum, ‘Variations of Fate’ in Carlo Salzani and Brendan Moran (eds), Carlo Salzani and Brendan Moran (trs), *Towards the Critique of Violence: Walter Benjamin and Giorgio Agamben* (Bloomsbury 2015) 94.

74 This makes some of the contemporary followers of Benjamin acknowledge the fact that the unchanging content of the law is ultimately violence, see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, Stanford University Press 1998) 65.

the shortcomings that stem from sovereignty as a legal-political design running on violence. However, benefits of these control mechanisms themselves depend upon the “correct” functioning of the monopoly of legitimate violence, turning their operation into a paradoxical equation. Despite the achievements of constitutional democracy, the 20th century witnessed unprecedented levels of violence that were perpetrated by the sovereign states, making the efficacy of these control mechanisms even more doubtful. More importantly, such institutional designs are mostly aimed at diminishing the pathological symptoms rather than addressing the nature of the problem.⁷⁵ This requires a full-fledged interrogation of the central place of violence possessed in our understanding of law and politics, which was the very ambition of Arendt’s intellectual quest. This is, of course, a topic for another paper.

Nevertheless, the analysis of the relationship between the two facets of sovereignty allows us to critically speculate on the arguments and claims in the current debates about the concept. This will be the focus of the last section.

As brilliantly pointed out by Volk, one of the main problems we encounter in the contemporary debates on sovereignty is that most of the arguments overlook that sovereignty itself conditions our understanding of politics and law, not to mention our worldview. This leads to a circular, unproductive theorising about sovereignty, which can only further the state-centred thinking in law and politics and, through that, the history of state power.⁷⁶ A critical grasp of the concept’s method of functioning, however, allows one to question what was problematic about the concept in the first place. Upon that, one can further speculate on what grounds the contemporary developments and events can be considered as ameliorative transformations. And if they are truly transformations, with which facet of the sovereignty are they concerned?

As argued above, the real problem with sovereignty was never the name or the territorial boundaries of the popular source that it was supposed to represent and concretise institutionally. Instead, the issue lied in how it did this, in the way or method it was inclined to realise its political purposes and normative ideas. Hence, after World War II, the nation-state was deemed guilty on partially mistaken reasons: States’ guarantee of democracy and human rights was problematic not because states were configured on the nation and national territory; it was problematic because it depended on a violent and paradoxical functioning which could always run amok. That was the primary reason that led Arendt to analyse totalitarian governments not specifically as problems of certain nations but as the problems of modernity, tracing the totalitarian terror and violence through colonial violence back to the modern principle of “power for power’s

75 Sheldon Wolin, ‘Violence and the Western Political Tradition’ (1963) 33 *American Journal of Orthopsychiatry* 15, 20–21.

76 Volk (n 1) 728, 736.

sake”.⁷⁷ Therefore, the first question must be to what extent internationalisation and/or globalisation can transform this mode of operation centred upon violence? To what extent does international cooperation displace the state institutions and their coercive mechanisms for implementation, which are widely exercised through the monopoly of legitimate violence and against pacified civil populations?

As Giddens, among many, points out, rather than weakening it, the internationalisation process and international law depend upon the existence of state sovereignty and systematisation of world order through it. Most international organisations are formed and brought to life by sovereign states, and these organisations function through them. Therefore, many of these international or global obligations can be considered as self-imposed by sovereign states.⁷⁸ Aside from that, even those abhorred impacts of globalisation, such as deregulation of economic activities, privatisation, and the sharing of sovereign powers with semi-private agents, are transformations that actually occur within/through the state, with the permission of sovereign bodies rather than being imposed upon them. From this perspective, the much-debated duality of self-sufficient sovereign states versus supranational/international organisations seems to be a fallacy.⁷⁹ Even if it were true, we would have to be doubtful whether it changes the method of sovereignty, since, as long as the instrumentalization of violence remains central, this would just be another form of sovereign order, such as an empire or a new regional legal-political order.⁸⁰ This would not be the dissolution of sovereignty, nor would it be transcending it. Because what changes here is just the territorial configuration of the concept rather than the way it functions. Therefore, there would not be any new safeguards to prevent the structural flaws arising from the instrumentalization of violence integral to the sovereignty. In conclusion, these are quite powerful reasons to doubt the progressive and emancipatory potentials of internationalisation, not to mention their durability and efficacy. Especially when the international community can be quite picky regarding which states’ actions or operations will be defined as violations of this order.

On the other hand, the above critical understanding of sovereignty provides a better ground to critically enquire whether we should concede that sovereignty must be protected because it provided self-determination and functioned as a vessel for collective autonomy. The critical analysis presented above argues that sovereignty

77 Margaret Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (Cambridge University Press 1992) 33–34; Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, Inc 1985) 136–140; Waseem Yaqoob, ‘Reconciliation and Violence: Hannah Arendt on Historical Understanding’ (2014) 11 *Modern Intellectual History* 385, 389–390.

78 Even in the European Union, as an intense example of the sharing of sovereign powers, no member state has given up the monopoly of legitimate violence, and the organisation depends upon member states’ coercive means for implementation, see Giddens (n 18) 5–6; Henkin (n 2) 5; Grimm (n 1) 88–90, 97.

79 Volk (n 1) 731.

80 d’Entreves (n 1) 131.

never fulfilled this mission fully, and if it did, it did so for the efficiency reasons that are dictated by an *economy of violence*.⁸¹ As summarised previously, the theoretical foundations of modern legal-political thought eliminate any other source for legal and political authority. Hence, concrete ambitions on this ground have only one option: They must claim that they represent people so that their coercion seems legitimate and gets responded with obedience. Sovereign states and governments will always claim this both domestically and externally. However, the sheer existence of this

So, what use does this critical grasp of sovereignty and the tension between its two facets provide us? It can be argued that it provides us a reality check: There are arguments for both sides, but to what extent do these arguments comply with the findings of critical approaches on law, and especially on the relationship between law and violence? How can one legitimise the further progress and perfection of the international/global managerial mindset when the sovereign states, as the middlemen, lack the legitimacy they claim in the first place? There is no guarantee that such organisations will be free from the structural paradoxes of legal violence and that they will perform in conformity with the “universally” acknowledged standards of human rights. The idleness of the contemporary international order in reacting to certain ongoing human rights violations and war crimes does say much about the sincerity of this supposed progress and the agility of the protection it promises. On the other hand, sovereigntist claims cannot and should not be trusted either. These are often used by states to deny responsibility for their actions. Hence, recognising the paradox that the instrumentalization of violence brings to the legal-political sphere warns us against the legitimacy-milking strategies of varying agents from both national and international levels. Insofar as these institutions depend upon the imposed impotence of the peoples whom they claim to represent⁸⁵, none of them fares better than others. Missing this point and focusing on the assumed advantages and disadvantages of either side, however, conceals the centrality of sovereignty as the instrumentalization of violence on both sides.

On the other hand, diagnosing where and how sovereignty stops being conducive to self-determination allows us to separate its core value from what corrupts it. Ultimately, we can admit that defending sovereignty through self-determination is not without merit. Sovereignty, in so far as it represents the human capacity to act and form consensual organisations, was the very promise of modern thinking and the Enlightenment. Hence, being able to communicate reason and meaning, to make and hold promises, to dare and build one’s own fate and social order are all packed into the concept. When followed to its rational-logical outcomes, this implication also means being free from the rule of others and deciding the specific content of what is good, what is right, and what is true, etc., in a process through which one can become an equal and actual part. Consciousness, execution, and possession of this capacity to determine one’s own fate are political questions per se, and it is reasonable to doubt their delegation to a point further from the nation-state.

85 Etienne Balibar, ‘Prolegomena to Sovereignty’ in James Swenson (tr), *We, the people of Europe? Reflections on Transnational Citizenship* (Princeton University Press 2004) 135.

In conclusion, it can be conceded that sovereignty has many merits and shortcomings, and participants in the discussion can argue for its dissolution or maintenance according to their own political and theoretical inclinations. The possibility of a real dialog, however, starts with describing what we understand from the concept. As argued above, the concept can be presented as a historical-theoretical compound that includes social, legal, political, etc. ingredients. Therefore, we must present our theoretical ground in purporting how and why the concept should be discredited and praised. Hence, to better justify my reasoning, I attempted to grasp sovereignty from what I considered to be its two outstanding facets: sovereignty as the popular source of law and sovereignty as the method of law's realisation. My aim in doing this was to gain a sure ground in building a critical method for understanding what is wrong with sovereignty.

After all, sovereignty represents an important opportunity that is brought about through modern transformations in legal and political theory. It is a chance for humanity to grasp control of its own fate, and from that perspective, sovereignty is the product of the encounters and combinations of many factors that brought out modern thought in the first place. Therefore, it should not be put aside, since it is the symbol into which the legal and political promises of modern thought and enlightenment are consolidated. The issue, however, is being able to identify what corrupts these promises. If this can be done, it becomes easier to delineate what to keep and what to let go. In this light, channelling the inputs of a critical understanding of sovereignty to ongoing debates becomes an utmost necessity. When we deploy Benjamin's critical analysis of legal violence to the functioning of the concept, for instance, we can identify where the disruptive motivations of the concept come from. Surely, this reasoning ultimately raises the question of whether it is even possible to structure another way or configuration of the place of violence in the legal-political realm. This, however, is another question that can only be advanced after the diagnosis of the problem.

When its components can be separated through this critical intervention, sovereignty as the method of law's violent realisation appears as just a historical-territorial configuration through which people actualised their constituent capacity. Acknowledging that this capacity exists and that it is not bound up or consumed with a specific configuration of a specific mode of legal-political operation is of utmost importance. This is why breaking the circular, unproductive arguments about the future of sovereignty is vital, because the ideas that are offered around the duality of sovereignty versus international/global tend to overlook what was problematic with the sovereignty in the first place. This possibly incurs further reproduction of the problem in potentially new configurations of sovereign entities.

I would like to thank Reyda Ergün, Orkun Güner, and Seyla Benhabib for their scholarly discussions, comments, and support. Errors or deficiencies, of course, belong to the author.

Externally peer-reviewed.

The authors have no conflict of interest to declare.

The authors declared that this study has received no financial support.

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Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

The Law Applicable to the Goodwill Indemnity Claims Arising From Exclusive Distributorship Agreement Under Turkish Private International Law

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Abstract

In Türkiye, a country characterised by the prevalence of exclusive distributors, several issues frequently arise concerning goodwill indemnity claims involving a foreign element. These issues include determining the applicable law, the international jurisdiction of Turkish courts, and the arbitrability of such claims. The fact that the Turkish Commercial Code numbered 6102 explicitly stipulates that “goodwill indemnity claims cannot be waived in advance” in a mandatory manner raises the debate as to whether this provision is an overriding mandatory rule. Whether the provision in question is an overriding mandatory rule is a critical issue in determining the applicable law. This is due to the application of overriding mandatory rules to all disputes, irrespective of the presence of a foreign element. Moreover, choice of law agreements are possible in the field of contracts where the principle of party autonomy is recognised. The aim of this article is to analyse the implications for Turkish private international law arising from the selection of a governing law that either precludes goodwill indemnity claims or permits the waiver of such claims in advance. Additionally, this article will seek to clarify how to determine the applicable law in situations where no choice of law has been made, in accordance with the Turkish Act on Private International Law and Civil Procedure of 2007 no. 5718.

Keywords

Exclusive distributors, Goodwill indemnity, Overriding mandatory rules, Party autonomy, Choice of law agreements

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To cite this article: Tekin E, “The Law Applicable To The Goodwill Indemnity Claims Arising From Exclusive Distributorship Agreement Under Turkish Private International Law”, (2025) 76 Annales de la Faculté de Droit d'Istanbul 291. <https://doi.org/10.26650/annales.2025.76.0010>

Türkiye is characterised by a significant presence of agents and exclusive distributors within its commercial landscape. To promote and market their goods or services, or to enhance their distribution within the Turkish market, foreign merchants must engage with commercial agents or exclusive distributors who, while holding significant influence in the relevant market, operate as independent business entities. According to the exclusive distributorship agreement concluded between the parties, the exclusive distributor assumes risks such as creating a customer portfolio for the goods or services of the supplier¹.

Goodwill indemnity claim, also known in practice as portfolio indemnity, is a right of claim that arises from the termination of agency, exclusive distributorship, and other similar permanent contractual relationships that confer monopoly rights. Article 122 of the Turkish Commercial Code² (TCC) numbered 6102, titled “Goodwill Indemnity”, stipulates the conditions for goodwill indemnity in commercial agency agreements. This provision also applies to the termination of exclusive distributorship agreements and other similar permanent contractual relationships conferring monopoly rights, unless its application is contrary to the principles of equity (TCC art. 122/5). The wording of this provision generates various discussions concerning private international law. Indeed, the conditions for claiming goodwill indemnity are explicitly delineated in the text of the article. This article examines these conditions from the perspective of private international law.

The classification of the provision in the TCC concerning the goodwill indemnity claim as an overriding mandatory rule obviates the need to determine the applicable law on this matter. If the provision stipulating that the indemnity cannot be waived in advance is classified as an overriding mandatory rule, it should be applied directly, irrespective of the foreign elements involved in the dispute. Therefore, this article seeks to elucidate whether the provision in question falls within the scope of the concept of the overriding mandatory rule under Turkish law.

The legal characterisation of the goodwill indemnity claim is crucial for determining the applicable law. Hence, it is also necessary to address whether the goodwill indemnity claim falls under the law governing the contract. The principle of party autonomy recognised in substantive law is also reflected in the relations falling within the subject matter of private international law³. Article 24 of the Turkish Act

1 Samet Can Olgaç, *Tek Satıcılık Sözleşmesi ve Tek Satıcının Denkleştirme İstemi* (Seçkin Publishing 2021) 51-52.

2 Official Gazette (OG), dated 14.02.2011, numbered 27846.

3 Cemal Şanlı, Emre Esen, İnci Ataman-Fıganmeşe, *Milletlerarası Özel Hukuk* (10th edn, Beta Publishing 2023) 324; Ergin Nomer, *Devletler Hususi Hukuku* (23rd edn, Beta Publishing 2021) 322; Gülin Güngör, *Türk Milletlerarası Özel Hukuku* (Yetkin Publishing 2021) 173; Ziya Akıncı, *Milletlerarası Özel Hukuk* (Vedat Publishing 2020) 53-53; Sibel Özel, Mustafa Erkan, Hatice Selin Pürselim, Hüseyin Akif Karaca, *Milletlerarası Özel Hukuk* (3rd edn, On İki Levha Publishing 2024) 405; Hacı Can and Ekin Tuna, *Milletlerarası Özel Hukuk* (5th edn, Adalet Publishing 2021) 450; Aysel Çelikel and Bahadır Erdem, *Milletlerarası Özel Hukuk* (16th edn, Beta Publishing 2020) 369 et seq.

on Private International Law and the Civil Procedure of 2007⁴ (TAPIL) numbered 5718 stipulates that the applicable law in contractual debt relations may be explicitly chosen. However, in practice, this choice is usually made in favour of the supplier which is economically stronger than the exclusive distributor. In other words, the chosen law may be a law that does not allow for indemnity or a law that allows for the waiver of indemnity in advance. Public order is an exceptional method that prevents the application of foreign law in Turkish private international law. An issue this article seeks to address is the question of when public order intervention comes into play.

Even when a choice of law agreement exists between the exclusive distributor and the supplier, in the absence of such an agreement, the applicable law should be determined in accordance with the objective conflict of laws rules. In the absence of a choice of law by the parties, an explanation should be provided regarding the method by which the law applicable to goodwill indemnity claims will be determined. As the law applicable to exclusive distributorship contracts is not explicitly regulated in TAPIL, unlike the Regulation on the law applicable to contractual obligations (Rome I⁵), it will be determined based on the general provisions applicable to contracts. According to Article 4(1)(f) of the Rome I Regulation, a distribution contract shall be governed by the law of the country in which the distributor has their habitual residence. Under Turkish law, in the absence of a choice of law, the applicable law is determined based on the characteristic performance theory. This theory is also incorporated in contemporary regulations, including the Rome I Regulation and the Swiss Federal Act on Private International Law⁶ (PILA) of December 18, 1987. Therefore, the applicable law in exclusive distributorship contracts will be determined by identifying the characteristic performance.

Finally, the circumstances that preclude the application of foreign law under Turkish law will be analysed. In this context, it is essential to address the overriding mandatory rules and the public order exception. In particular, it is necessary to clarify whether the provision concerning the goodwill indemnity claim, as regulated under Article 122 of the TCC, constitutes an overriding mandatory rule of Turkish law. Adopting this provision as an overriding mandatory rule would necessitate that if a law is chosen that offers greater protection to the exclusive distributor operating in Türkiye than Turkish law does, such a choice of law should be considered invalid.

4 OG, dated 12.12.2007, numbered 26728.

5 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6.

6 Article 117 of the PILA stipulates that, in the absence of a choice of law, contracts are governed by the law of the state with which they have the closest connection. This connection is also presumed to be the habitual residence of the party obligated to perform the characteristic obligation. See art. 117 of PILA, <https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/fr>, accessed March 2, 2024.

The right of the exclusive distributor to demand goodwill indemnity has been regulated for the first time under art. 122/5 of the TCC⁷. This provision regarding the right of the agent to goodwill indemnity shall also be applicable to exclusive distributorship and other similar contractual relationships granting exclusivity rights, and it is stated that the exclusive distributor may demand goodwill indemnity due to the termination of the exclusive distributorship agreement. Although the origin of art. 122 of the TCC regulating the goodwill indemnity claim of commercial agent is § 89b of the German Commercial Code (*Handelsgesetzbuch*, HGB), art. 122/5 of the TCC is a provision that has no equivalent in the origin and is unique to Turkish law. However, it is possible to benefit from the German law and the opinions in the doctrine with respect to the other paragraphs of the provision. In order for the exclusive distributor to claim goodwill indemnity, the exclusive distributorship agreement must first be terminated. From this point of view, it would not be wrong to say that the prerequisite for a goodwill indemnity claim is the termination of the exclusive distribution agreement. The underlying idea is that the financial benefits to be obtained by the exclusive distributor in a period when the exclusive distributorship agreement has not yet expired are based on the exclusive distributorship agreement that is still in force. Apart from this prerequisite, the right to claim the goodwill indemnity of the exclusive distributor depends on the cumulative existence of the three conditions stipulated under art. 122/1 of the TCC. The first of these conditions is that the principal continues to obtain significant benefits after the termination of the contractual relationship through new customers found by the exclusive distributor. As it is seen, the fulfilment of this condition depends on the fact that the benefit obtained from the principal is of a significant nature. In other words, the principal is not required to pay a goodwill indemnity to the exclusive distributor for the benefits that are not of a significant nature obtained by the principal after the termination of the exclusive distributorship agreement. For this condition to be fulfilled, it is not sufficient for the principal to obtain significant benefits after the termination of the exclusive distribution agreement. These benefits must also arise from new and continuous customers found by the exclusive distributor. In such a case, the burden of proof is on the exclusive distributor to prove that the benefits obtained by the principal arise from the new customers acquired by the exclusive distributor. In other

7 In essence, it is not foreign to Turkish law and was accepted by the doctrine and judicial decisions during the time of the abrogated TCC No. 6762, citing art. 134/II as a ground, Yaşar Karayalçın, *Ticaret Hukuku, I. Giriş-Ticari İşletme* (3rd edn, Ankara 1968) 534-535; Sabih Arkan, *Ticari İşletme Hukuku* (12th edn, BTHAE 2008) 215-216; Arslan Kaya and others, *Ticari İşletme Hukuk* (6th edn, Vedat Publishing 2019) 878. For the opposite view that art. 134/II of the abrogated TCC cannot be the ground for the goodwill indemnity of commercial agent, see also Özge Ayan, *Acentenin Denkleştirme Talep Etme Hakkı* (Seçkin Publishing 2008) 121.

words, the exclusive distributor cannot claim compensation for the benefits obtained by the principal after the termination of the exclusive distributorship agreement for the customers that the exclusive distributor did not bring to the principal.

Another condition for the exclusive distributor to claim goodwill indemnity is that, as a result of the termination of the contractual relationship, the exclusive distributor loses the right to claim goodwill indemnity for the transactions conducted or to be conducted in a short period of time with the customers brought to the principal by the exclusive distributor. In other words, if the exclusive distributor would not have been entitled to demand remuneration due to the transactions conducted by the principal even if the exclusive distributorship contract had continued, the sole distributor would not be able to demand goodwill indemnity.

The basis of the exclusive distributor's claim for goodwill indemnity is the fact that the customers acquired as a result of the exclusive distributorship activities carried out continuously with the principal continue to bring benefits to the principal even after the termination of the exclusive distributorship agreement, while the exclusive distributor cannot be paid any payment since the exclusive distributorship agreement has expired. Therefore, the idea of equity lies at the heart of the claim. It should also be noted that equity is not only one of the conditions for the exclusive distributor to claim goodwill indemnity, but it is also an issue that should be taken into consideration in the calculation of the amount of goodwill indemnity⁸.

Apart from these prerequisites and three conditions, art. 122/3 of the TCC should also be taken into consideration for the exclusive distributor to be able to claim goodwill indemnity after the termination of the exclusive distributorship agreement. If the exclusive distribution contract is terminated under one of the circumstances specified in art. 122/3 of the TCC, the exclusive distributor shall not be entitled to claim goodwill indemnity. In cases where the contract is terminated by the exclusive distributor without any act of the principal justifying the termination, or by the principal due to the fault of the exclusive distributor, the exclusive distributor cannot claim goodwill indemnity.

Overriding mandatory rules constrain the principle of party autonomy and can result in the circumvention of the law chosen by the parties⁹. According to article 6 of TAPIL,

8 Arslan Kaya, *Türk Ticaret Kanunu Şerhi, Acentelik* (2nd edn, Beta Publishing 2016), 261; Mustafa İsmail Kaya, *Acentelik Hukuku* (Adalet Publishing 2014) 355. Extraordinary discounts granted to exclusive distributors when purchasing the product subject to the contract, other financial support such as premiums, and the attraction power of the trade mark may prevent the establishment of a provision in favour of exclusive distributors or may be seen as a reason for a reduction in the calculation of the good will indemnity amount, Koray Demir, 'Tek Satıcının Denkleştirme Talebi' in Prof. Dr. Sabih Arkan'a Armağan (Oniki Levha Publishing 2019) 414-415.

9 Mustafa Erkan 'Möhük madde 31 Bağlamında Türk Hukukunda Doğrudan Uygulanan Kurallara Bakış' (2011) 15(2) *Gazi*

when foreign law is applicable, any case falling within the scope of Turkish law's overriding mandatory rules, based on the regulatory purpose and scope of application, will be governed by those rules. The article does not provide a definition of the overriding mandatory rules. However, the Rome I Regulation, which is mandatorily applicable in European Union member states, establishes the general framework for these rules¹⁰. According to Art.9 of the Rome I Regulation, overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

Overriding mandatory rules are those enacted to achieve the economic, financial, social, and political objectives of the state¹¹. They are applicable to all legal transactions and relations within their scope, regardless of the specific legal context. Although overriding mandatory rules may seem predominantly associated with public law, certain provisions related to private law are also directly applicable. Overriding mandatory rules are compulsory provisions that extend their influence to private law relationships and are primarily oriented towards serving the public interest¹². Overriding mandatory rules may consequently originate from government policies, including those related to economic, agricultural, customs, or foreign exchange matters, as well as social policies designed to protect parties involved in transactions such as rental agreements, services, and consumer interests¹³. It would be incorrect to categorise every provision that protects the public interest as an overriding mandatory rule¹⁴. In this context, the purpose of the provision, its scope of application, and the intention behind its application are crucial factors. In Turkish law, examples of overriding mandatory rules include exchange control regulations, restrictions on foreign trade, rules governing the protection of cultural property, import and export regulations, and labour restrictions¹⁵.

When applying the overriding mandatory rules of Turkish law as *lex fori*, no distinction is made regarding whether the dispute involves a foreign element. In other words, these rules are directly applicable even if the dispute involves a foreign element. The question of whether regulations concerning goodwill indemnity

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10 Giesela Rühl 'Commercial Agents, Minimum Harmonisation and Overriding Mandatory Provisions in the European Union: *Unamar*' (2016) 53 *Common Market Law Review* 209.

11 Hatice Özdemir Kocasakal, *Doğrudan Uygulanan Kurallar ve Sözleşmeler Üzerindeki Etkileri* (Galatasaray Üniversitesi Yayınları 2001) 13.

12 Nomer (n 3) 187.

13 Vahit Doğan, *Milletlerarası Özel Hukuk* (8th edn, Savaş Publishing 2022) 279.

14 Doğa Elçin 'Karşılaştırmalı Hukuk Işığında Türk Hukukunda Sözleşmeyle İrtibatlı Üçüncü Devletin Doğrudan Uygulanan Kuralları' in *Prof. Dr. Ata Sakmar'a Armağan* (Beta Publishing 2011) 338.

15 Özdemir Kocasakal (n 11) 118.

claims arising from the termination of exclusive distributorship contracts constitute overriding mandatory rules has been a subject of debate in both European Union law and Turkish law. It is therefore necessary to clarify whether TCC Article 122, which governs goodwill indemnity claims, and articles 17-19 of Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents no. 86/653¹⁶ (Directive), which served as the model for this article, qualify as overriding mandatory rules¹⁷.

In the relationship between the exclusive distributor and the supplier, it is evident that the exclusive distributor holds a comparatively weaker position relative to the supplier. Exclusive distributors, in fact, assume greater risks that enhance the significance of the contract, such as increasing market share and expanding the customer base by broadening the distribution of goods, services, or brands within their area of operation¹⁸. This raises the question of whether the private law provisions designed to protect the weaker party are overriding mandatory provisions¹⁹. Under Turkish law, the protection of the weaker party in the context of conflict of laws is ensured either by instituting an objective conflict of laws rule that favours the weaker party or by imposing limitations on party autonomy²⁰. Therefore, even in labour and consumer contracts, the choice of the applicable law is allowed, without prejudice to the minimum protection provided by the mandatory provisions of the law of the employee's habitual place of work and the law of the consumer's habitual residence. It is evident that the exclusive distributor occupies a weaker position relative to the supplier. However, unlike employees and consumers, the exclusive distributor is typically classified as a merchant²¹ in practice. Under art. 18/2 of the TCC, all

16 Council Directive 86/653/EEC of December 18, 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L 382.

17 The European Court of Justice (ECJ)'s decision in *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.* (C-381/98, 9 November 2000) affirms that parties cannot evade the application of Articles 17-19 of the Directive concerning the right to a goodwill indemnity claim by opting for the law of a non-EU country. According to the ECJ, the objective of articles 17 through 19 of the Directive is to safeguard the freedom of establishment and the conduct of undistorted competition for all commercial agents operating inside the internal market. For detailed information about the judgement see Hendrikus L. E. Verhagen 'The Tension Between Party Autonomy and European Union Law: Some Observations on *Ingmar GB Ltd V. Eaton Leonard Technologies Inc.*' (2002) 51(1) *International and Comparative Law Quarterly* 138 *et seq.* However, in the case of *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare* (C-184/12, 17 October 2013), the ECJ permitted the circumvention of the relevant provisions of the Directive through the application of overriding mandatory rules of Member State law (*lex fori*) that offer broader protection to the agent or exclusive distributor. In other words, the provisions of the *lex fori*, which provide broader protection in favour of the agent, are attributed "superior mandatory force" vis-à-vis the Directive. For detailed information about the *Unamar* judgement see. A. İpek Sarıöz Büyükalp 'Denkleştirme Talebinin Hukuki Niteliği ve Kanunlar İhtilafı Hukuku Bağlamında Değerlendirilmesi' (2019) 21(2) *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi* 559 *et seq.* Rühl (n 10) 211 *et seq.* It is likely that national courts will interpret the *Unamar* ruling as a "carte blanche" to apply forum law rather than the selected or generally applicable

merchants must conduct their commercial activities with the prudence expected of a diligent businessperson. Therefore, we contend that it is not appropriate to adopt Article 122 of the TCC as an overriding mandatory rule on the basis of ‘protection of the weaker party,’ as this would unjustifiably undermine party autonomy. Furthermore, if this provision were to be adopted as an overriding mandatory rule, it would preclude the application of the chosen law, even if that law provides stronger protection to the agent or exclusive distributor than Turkish law²².

While it has been contended that the provision in question is designed to protect agents and exclusive distributors within the domestic market and to foster a favourable competitive environment, thereby serving the interests of the state²³, we maintain that this provision does not constitute an overriding mandatory rule. It is evident that the provision in question offers protection to the exclusive distributor with the aim of establishing a favourable competitive environment²⁴. However, this alone is insufficient to classify the provision as an overriding mandatory rule. Indeed, Article 122 of the TCC does not universally guarantee a goodwill indemnity claim. Such a claim is recognised only in cases where the agent loses the right to seek payment from the principal and is considered within the framework of equity. Article 122 of the TCC, after enumerating the conditions, employs the phrase “the agent may request appropriate compensation from the principal.” Given that the provision uses the phrase “may request” rather than the definitive language, it means that the provision does not qualify as an overriding mandatory rule in line with the regulation’s intended purpose²⁵. Moreover, Article 122 of the TCC stipulates that the goodwill indemnity claim applicable to agency relationships also extends to the termination of exclusive distributorships and other similar permanent contractual arrangements granting monopoly rights, unless such an application would be inequitable. The purpose of Article 122 of the TCC is to ensure equitable treatment for the exclusive distributor, who may otherwise be inadequately compensated for their efforts and contributions to the supplier, within the context of the contractual provisions and the specifics of the individual case²⁶. Thus, although the provision in question promotes

22 Ayoğlu argues that art. 122 of the TCC should be recognised as an overriding mandatory rule under art. 6 of the TAPIL when the law chosen by the parties offers less protection to agents or exclusive distributors operating in Türkiye compared to the Turkish law, particularly concerning goodwill indemnity claims. However, if the law chosen by the parties provides greater protection to the agent or exclusive distributor than that afforded by Turkish law, this choice of law should be upheld as valid. See Tolga Ayoğlu ‘Dağıtım Sözleşmelerine Uygulanmak Üzere Yabancı Bir Hukuk Sisteminin Seçilmesinin Denkleştirme Talebi Bakımından Etkisi’ (2017) 151-152(12) *Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi* 24. The aforementioned opinion cannot be endorsed because overriding mandatory rules must be applied irrespective of considerations of substantive justice. Thus, if Article 122 of the TCC is recognised as an overriding mandatory rule, Turkish courts should apply this provision to goodwill indemnity claims made by an agent or exclusive distributor operating in Türkiye.

23 For opinions characterising this provision as an overriding mandatory rule, see Ayoğlu (n 22) 19-20; Cemile Demir Gökyayla, ‘Milletlerarası Özel Hukukta Dağıtım Sözleşmelerine Uygulanacak Hukuk’ in Sibel Özel and Mustafa Erkan (eds), *Milletlerarası Özel Hukukta Sözleşmesel Meseleler (Uluslararası Konferans 11 Ekim 2018)* (On İki Levha Publishing 2018) 65.

24 Ömür Karaağaç, *Milletlerarası Nitelikli Franchise Sözleşmelerine Uygulanacak Hukuk* (Lykeidon Publishing 2022) 316.

25 Sariöz Büyükalp (n 17) 566.

26 Karaağaç (n 24) 317.

a favourable competitive environment, it is primarily focused on the interests of the parties involved rather than the state interest and provides only minimal protection to the exclusive distributor²⁷. For these reasons, we conclude that Article 122 of the TCC concerning goodwill indemnity claims does not constitute an overriding mandatory rule under Turkish law. Indeed, judicial decisions corroborate this perspective.

In the judgement rendered by the 11th Civil Chamber of the Turkish Court of Cassation on October 24, 2023²⁸, the case concerning a claim for goodwill indemnity, predicated on the allegation of unjust termination of an exclusive distributorship agreement, was reversed due to the failure to ascertain and elucidate the provisions of English law, which had been designated as the applicable law in the dispute. In another case²⁹ involving a claim for goodwill indemnity following the termination of an exclusive distributorship agreement, the 11th Civil Chamber of the Turkish Court of Cassation addressed the contract's applicable law provision, which stated in Section 19 that "this contract shall be interpreted in accordance with the laws of England and shall be governed by the laws of England." Citing Article 24/1 of TAPIL, which stipulates that contractual obligations are governed by the law explicitly chosen by the parties, the court determined that the court of first instance had failed to apply the chosen law to the dispute, warranting a reversal of the judgement in favour of the plaintiff. In certain rulings³⁰, it has been underscored that the validity of the choice of law or jurisdiction agreement is affirmed on the basis that the merchant is required to act as a prudent businessperson in accordance with Article 18/2 of the TCC. Therefore, If Article 122 of the TCC were characterised as an overriding mandatory rule, the parties would be unable to choose the applicable law. Consequently, these decisions do not address whether the relevant provision constitutes an overriding mandatory rule; instead, party autonomy is acknowledged.

However, in certain rulings³¹, when the validity of the jurisdiction agreement is contested, the reasoning is grounded in the determination of the applicable law. It is essential to highlight that although the overriding mandatory rule is a concept within the framework of applicable law³², it functions independently of the exclusive jurisdiction of Turkish courts³³.

27 Sariöz Büyükalp (n 17) 567.

28 Decision No: 2023/6125, For the full text of the judgement see. <<https://legalbank.net/arama/mahkeme-kararlari>>, accessed June 14 2024.

29 Decision No: 2016/3183, Date: 22.03.2016, Full text of the judgement see <www.lexpera.com.tr>, accessed June 17, 2024.

30 Decision No: 2017/2162, Date: 19.06.2017 İstanbul Regional Court of Appeal, see <www.lexpera.com.tr>, accessed June 17, 2024.

31 Decision No: 2021/265 11.2.2021, İstanbul Regional Court of Appeal, <www.lexpera.com.tr>, accessed June 20, 2024.

32 The derogation from imperative norms through choice-of-law clauses should be distinguished from that affected by forum selection clauses and should not be treated equivalently. See Jürgen Basedow, 'Exclusive Choice-of-Court Agreements As a Derogation From Imperative Norms' in Patrik Lindskoug, Ulf Maunsbach, Göran Millqvist, Per Samuelsson, and Hans-Heinrich Vogel (eds), *Essays in Honour of Michael Bogdan* (Juristförlaget i Lund 2013) Max Planck Private Law Research Paper No. 14/1, 30.

33 For the view that the request for goodwill indemnity constitutes an overriding mandatory rule and should be adjudicated within the exclusive jurisdiction of Turkish courts, see. Ali Önal 'Yabancı Unsurlu Tek Satıcılık Sözleşmelerinden Doğan

Under Turkish law, the law governing the obligations arising from contracts with a foreign element is regulated under Articles 24 to 29 of the TAPIL. While Article 24 of TAPIL provides a general conflict of laws rule for determining the applicable law to contracts, the subsequent articles establish specific conflict of laws rules for particular types of contracts³⁴. However, exclusive distributorship agreements are not regulated by a special conflict of laws rule. Consequently, as the law applicable to claims arising from the termination of an exclusive distributorship agreement is not specifically addressed in TAPIL, it is governed by Article 24 of TAPIL. This provision, grounded in the principle of party autonomy, allows the parties to explicitly select the law governing the contract. In the absence of a choice of law by the parties, the law governing the contractual obligation shall be determined in accordance with the objective conflict of laws rule established in Article 24(4) of TAPIL.

The law agreed by choice of law, or in the absence of such choice, the law determined in accordance with Article 24(4) TAPIL, shall govern the contractual obligation as a whole. In other words, as a requirement of the principle of unity of contract, this law will provide solutions on issues such as the conclusion of the contract and the substantive validity of the contract, its performance, interpretation, non-performance, termination, the reasons for its termination, the provisions and consequences of its termination (such as compensation claims, penalty clause, interest for default) and the periods of limitation and prescription to which it is subject³⁵. The goodwill indemnity that may be claimed following the termination of an exclusive distributorship agreement, provided that the conditions outlined in Article 122 of the TCC are met, should also be considered within the scope of the law governing the contract³⁶.

Denkleştirme (Portföy) Tazminatı Davalarında Milletlerarası Yetkili Mahkeme Sorunu* (2024) 1(1) *Doğu Akdeniz Üniversitesi Hukuk Fakültesi Dergisi* 16. However, this view cannot be endorsed. If the exclusive distribution activities conducted in Türkiye are adjudicated in Turkish courts and Turkish law is applied as an overriding mandatory rule, it could adversely affect Turkish trade. This situation may lead foreign firms to abstain from offering their goods and services in Türkiye. As a matter of fact, the interests to be considered in disputes with a foreign element are different from the interests considered in domestic substantive law. Similarly, the interests-underlying the rules determining the international jurisdiction of Turkish courts are different from those of the conflict of laws rules. Furthermore, this acceptance may place the exclusive distributor, who is intended to be protected, in a more disadvantageous position. This is because enforcing such decisions in the supplier's country of origin may prove challenging.

34 These include, respectively, contracts concerning immovable property, consumer contracts, employment contracts, contracts related to intellectual property rights, and contracts on the carriage of goods.

35 Bilgin Tiryakioğlu, *Taşınır Mallara İlişkin Milletlerarası Unsurlu Satım Akitlerine Uygulanacak Hukuk* (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1996) 44; Duygu Ercan, *Denkleştirme Taleplerinden Doğan Uyuşmazlıklarda Uygulanacak Hukuk ve Türk Mahkemelerinin Milletlerarası Yetkisi* (On İki Levha Publishing 2021) 70.

36 However, according to Ayoğlu, this request should not be considered within the scope of Article 24(1) of the TAPIL. The term “contractual obligation” is employed in the text of TAPIL. However, goodwill indemnity arises from *ex lege* under the Turkish Commercial Code. See Ayoğlu (n 22) 14 *et seq.* See that the contract is the source of the goodwill indemnity claim Sarıöz Büyükalp (n 17) 564 *et seq.*

The law governing the validity of provisions related to the waiver of the goodwill indemnity claim in the exclusive distributorship agreement shall be determined in accordance with Article 32 of TAPIL³⁷. Accordingly, the existence and substantive validity of a contractual relationship or any of its provisions are governed by the law applicable to the contract, which will be enforced provided the contract is deemed valid.

It is both a theoretical and practical necessity to subject contracts involving foreign elements to a specific legal system³⁸. Beyond establishing the general legal framework and legitimacy of the contract, the chosen law also addresses issues that are not explicitly regulated within the contract. The option to select the applicable law in contracts involving foreign elements further enhances legal certainty and predictability. The capacity of parties to anticipate the applicable law before the emergence of a dispute serves both their interests and assists judicial authorities in managing potential future disputes. Therefore, Article 24 of the TAPIL allows the parties to determine the law applicable to the dispute³⁹.

According to Article 24(1) of the TAPIL, “The law explicitly chosen by the parties shall govern the contractual obligation relations. A designation that can be clearly inferred from the contract’s provisions or is understood from the state of affairs is also valid.” When the parties have designated the law of a state to govern their obligations through a choice-of-law clause, the selected law shall be applied in its entirety, including both its mandatory and supplementary provisions⁴⁰.

Although the doctrine notes the difficulty of providing a clear example of a choice of law that does not explicitly constitute a choice of law but can be unequivocally understood, it is suggested that such a scenario may be identified when the mutual claims and defences presented in the parties’ pleadings and reply pleadings are based on the law of a single country⁴¹.

It is important to note that, in accordance with Article 24 of TAPIL, a choice-of-law must be made with the explicit authorisation of the parties concerning a specific state’s law. In this context, the selection of various rules and codes developed by specialised official bodies such as UNIDROIT and UNCITRAL, or by international professional

37 Ercan (n 35) 70-71.

38 Şanlı, Esen, Ataman-Figanmeşe (n 3) 323.

39 The Rome I Regulation and the Swiss Federal Act on Private International Law of 18 December 1987 (PILA), as contemporary instruments of private international law, both permit the parties to select the governing law. According to Art. 3 of The Rome I Regulation “A contract shall be governed by the law chosen by the parties.” Under Art. 116 of the PILA, “Le contrat est régi par le droit choisi par les parties.”

40 Verhagen (n 17) 135.

41 Şanlı, Esen, Ataman-Figanmeşe (n 3) 325.

organisations such as FIDIC, as well as international commercial customary law (*lex mercatoria*) or Islamic law, does not technically constitute a choice of law⁴². However, the parties may turn these provisions into contractual provisions. In fact, this pertains to the incorporation of any document or text into the contract, thereby rendering it a provision or integral part of the contractual agreement⁴³. As incorporation does not constitute a choice of law, these rules are applicable only insofar as they align with the mandatory provisions of the law governing the contract⁴⁴.

Under Article 24(4) of TAPIL, in the absence of an explicit choice of law by the parties, the law most closely connected to the contract shall govern the contractual obligation. The same provision further includes certain mandatory presumptions to guide the determination of the law most closely connected to the contract⁴⁵. Depending on whether the contract was made during professional or commercial operations, these presumptions change⁴⁶. Consequently, under this provision, the law most closely connected to the contract is that of the country in which the obligor of the characteristic performance has their place of business at the time the contract is concluded, provided that the contract is formed within the context of commercial and professional activities. If the obligor of the characteristic performance does not possess a place of business, the law of such party's domicile shall apply. In cases where such party has multiple places of business, the law of the place of business that is most closely related to the contract in question shall be deemed the governing law. For contracts not formed within the context of commercial and professional activities, the law most closely connected to the contract is that of the habitual residence of the obligor of the characteristic performance at the time the contract is concluded. Nevertheless, regardless of whether the contract is established within the context of commercial or professional activities, if, based on all the circumstances, a law is identified as being more closely related to the contract, that law shall govern the contractual obligation.

42 Nomer (n 3) 309.

43 Berk Demirkol *Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun'un 24. Maddesi Çerçevesinde Sözleşmeye Uygulanacak Hukuk* (2nd edn, Vedat Publishing 2014) 72-73; Cemile Demir Gökyayla *Milletlerarası Özel Hukukta Tek Satıcılık Sözleşmeleri* (2nd edn, Vedat Publishing 2013) 292; Aslı Bayata Canyaş *AB ve Türk Hukuku Uyarınca Sözleşmeye Uygulanacak Hukuka İlişkin Genel Kural* (Adalet Publishing 2012) 26; Nuray Ekşi 'Kanunlar İhtilâfı Alanında "Incorporation"' (2000) 19-20 (1-2) *Public and Private International Law Bulletin* 263.

44 Ekşi (n 43) 276; Zeynep Derya Tarman '5718 Sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun (MÖHUK) Uyarınca Yabancılık Unsuru Taşıyan Akdi Borç İlişkilerinde Hukuk Seçimi' 2010 26(1) *Banking and Commercial Law Journal (Batider)* 147.

45 Şanlı, Esen, Ataman-Figanmeşe (n 3) 345.

46 Emre Esen and Melis Avcı, *Private International Law in Türkiye* (Istanbul University Press 2024) 142.

Thus, to determine the applicable law in the absence of a choice of law, it is essential to clarify the concepts of characteristic performance and contracts formed within the context of commercial or professional activities.

In the absence of a choice of law, TAPIL establishes the applicable law based on the criterion of the law most closely related to the contractual obligation. The concept of characteristic performance is frequently used in presumptions regarding the determination of the most closely connected law. Therefore, the determination of the most closely connected law requires clarification of the concept in question.

Characteristic performance is not defined and is determined according to the contract categories⁴⁷. The performance that realises the economic purpose of the contract, which is the reason for the conclusion of the contract and against which money is paid, as a rule, is the characteristic performance⁴⁸. Characteristic performance indicates the distinguishing aspect of the contract from other contracts and is the performance of the person who performs the act that constitutes the name of the contract⁴⁹.

In contracts that impose an obligation on one party, the characteristic performance is easy to determine⁵⁰. However, it is stated that in contracts imposing obligations on two parties, the characteristic performance is often the counter-performance other than the payment of money; because in these contracts, the act of payment of money does not characterise the contract and does not give its name to the contract⁵¹. In this context, for example, in sales contracts, the seller is the characteristic performance obligor. In contracts such as loan agreements where both performances are payments of money, the characteristic performance is the performance of the party that assumes the most risk⁵².

In *sui generis* contracts such as exclusive distributorship, the determination of the characteristic performance will not be easy. An exclusive distributor pays a fee for the goods purchased from the supplier. Unlike sales contracts, the performance in exchange for money is not considered as characteristic performance in exclusive distributorship contracts. In the case of *sui generis* contracts, it is more appropriate to focus on the criteria

47 Fügen Sargın 'Karakteristik Edim Teorisine Eleştirel Bir Yaklaşım' (2001) 50(2) *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 46.

48 Sibel Özel 'Sözleşmesel İlişkide MÖHUK m. 24/II'de Öngörülen Objektif Bağlama Kuramının Mukayeseli Hukuk Açısından Değerlendirilmesi' (2002) 22(2) *Public and Private International Law Bulletin* 582.

49 Özel, Erkan, Pürselim, Karaca (n 3) 428-429; Demirkol (n 43) 251.

50 Adolf F. Schnitzer 'Les Contrats Internationaux en Droit International Privé Suisse' 123 *Recueil des Cours* (1968) 562.

51 Özel, Erkan, Pürselim, Karaca (n 3) 429; Çelikel and Erdem (n 3) 384 *et seq*;

of which party has undertaken the more risky performance and which performance gives the contract its social and economic weight⁵³. In the exclusive distributorship contract, the exclusive distributor has other obligations other than the obligation to pay money. The exclusive distributor undertakes various obligations such as increasing the release of the goods subject to the contract in the contract area, preparing the market where the goods will be distributed, stocking, advertising and after-sales service⁵⁴. As a matter of fact, what gives its name to the exclusive distributorship contract is that the exclusive distributor sells the goods subject to the contract to third parties in the contract area only by themselves⁵⁵. The development of the market and the formulation of a marketing strategy are central to the exclusive distributorship contract. The obligation to enhance or upgrade the product version constitutes the primary performance responsibility of the exclusive distributor, and this obligation is essential in defining the distinctive nature of the contract⁵⁶. The exclusive distributor is obligated to ensure the availability of the supplier's products within the designated market area, to maximise the sale of these products and to procure them exclusively from the supplier. The exclusive distributor assumes the risks associated with these activities as well as the costs incurred to promote and enhance sales. The sales relationship in this context arises as a necessity and outcome of fulfilling the demands of customers acquired through version enhancement efforts. It remains secondary to the primary activity of version enhancement itself. For these reasons, the performance of the exclusive distributor constitutes the defining feature of exclusive distributorship agreements. Therefore, the characteristic performance obligor is the exclusive distributor⁵⁷.

The language of Article 24(4) of the TAPIL suggests a different outcome regarding the connecting factors for contracts entered into the context of commercial or professional activities. Therefore, it is essential to clarify the interpretation of contracts formed in accordance with commercial or professional activities under Turkish law. While determining whether a transaction is a commercial transaction or not, the provisions of Art. 3 and Art. 19 of the TCC should be evaluated together. Under Art. 3 of the TCC, all transactions and acts concerning a commercial enterprise and the matters regulated in this Code shall constitute commercial transactions. Since the exclusive distributorship agreement is not regulated under the TCC, whether a commercial transaction is in question should be determined according to whether the transaction concerns a

53 Mario Giuliano 'La Loi Applicable aux Contrats: Problèmes Choisis' 158 *Recueil des Cours* (1977) 237; Ercan (n 35) 88 *et seq*; Gülören Tekinalp *Milletlerarası Özel Hukuk, Bağlama ve Usul Hukuku Kuralları* (13th edn, Vedat Publishing 2020) 313.

54 Ercan (n 35) 89.

55 Demir Gökyayla (n 43) 380.

56 Demir Gökyayla (n 43) 380.

57 Tekinalp (n 53) 313; Demirkol (n 41) 384; Demir Gökyayla (n 41) 391-392; Cemil Güner, *Milletlerarası Unsurlu Acente İlişkisine Uygulanacak Hukuk* (Adalet Publishing 2014) 168.

commercial enterprise or not. From this point of view, if the exclusive distributor is a legal entity merchant, it shall be presumed that the transaction concerns its business (Art. 19/1 TCC). If the exclusive distributor is not a legal entity, the obligation shall be deemed ordinary and not commercial if the exclusive distributor clearly notifies the other party at the time of the transaction that it is not related to its commercial business, or if the situation is not favourable for the business to be deemed commercial.

The interpretation of the concept of an exclusive distributor's place of business, which serves as a connecting factor, will be determined in accordance with Turkish law. A place of business is defined as a location where business activities are conducted in an actual, regular, and continuous manner, and where independent decision-making is feasible⁵⁸. For natural persons, the place of business refers to the location where the centre of their commercial activities is situated; for legal entities, it is generally the location of the headquarters⁵⁹.

Article 24(4) of the TAPIL designates the law of the country "most closely connected" to the contract as the applicable law in the absence of an explicit choice of law. The legislature relied on presumptions to indicate the law most closely connected to the matter at hand. However, if a law exists that has a closer connection to the contract than the presumptive laws, this more closely connected law must be applied in accordance with Article 24(4) of the TAPIL. As the judge is not free to determine the most closely connected law and is constrained by presumptions, the exception for the "more closely connected law" functions to ensure fairness in the specific case⁶⁰. In other words, the law determined by the judge based on presumptions may not necessarily represent the "most closely connected law" in practical terms. Therefore, considering the specific circumstances of the case, it is always possible that a law more closely connected than the one determined by these presumptions may exist. Therefore, the more closely connected law takes precedence and overrides the presumption if the habitual residence or place of business of the party responsible for the characteristic performance, which serves as a presumption for determining the most closely connected law, does not satisfy that presumption⁶¹. In this regard, the exception rule functions as a corrective mechanism for determining the most closely connected law⁶². This is a natural consequence of developing a general conflict of laws rule applicable to all types of contracts⁶³.

58 Özel, Erkan, Pürselim, Karaca (n 3) 433.

59 Demir Gökyayla (n 43) 375.

60 Şanlı, Esen, Ataman-Fıganmeşe (n 3) 351; Tekinalp (n 53) 290.

61 Özel, Erkan, Pürselim, Karaca (n 3) 436.

62 Paul Lagarde 'Le Principe de Proximité dans le Droit International Privé Contemporain' 196 *Recueil des Cours* (1986) 97; Özel, Erkan, Pürselim, Karaca (n 3) 436.

63 Özel, Erkan, Pürselim, Karaca (n 3) 436.

In determining the more closely connected law, various factors and conditions may be considered, including the place of contract formation, the place of conclusion of the contract, the location of the parties' places of business, their habitual residences, the language of the contract, and the jurisdiction clause⁶⁴. However, these contractual connecting factors must be concentrated in a jurisdiction distinct from the one identified by the presumptions⁶⁵. In assessing whether this concentration has occurred, the common contacts of the parties are more significant than their non-common contacts⁶⁶. For instance, the performance of an exclusive distributor typically constitutes a characteristic performance. However, if a significant portion of the contract is executed in the country of the provider and both parties are nationals of that country, the law of that jurisdiction may be regarded as more closely connected⁶⁷.

Given that the exclusive distributorship contract establishes a continuous obligation, it is possible for the place of business or residence of the exclusive distributor, who is the debtor for the characteristic performance, to change over time following the conclusion of the contract. In fact, in determining the applicable law in the absence of a choice of law, the TAPIL has utilised the points of contact existing at the time of the contract's conclusion as a foundational basis. If the place of business changes shortly after the conclusion of the contract, the place of business at the time of the conclusion of the contract may no longer be relevant to the contract⁶⁸. In such a case, the law of the new place of business, which is evidently more closely connected to the contract, may be applied under the exception rule⁶⁹. However, the rationale for incorporating presumptions in the determination of the most closely connected law is to ensure predictability and legal certainty⁷⁰. For this reason, the exception rule should be interpreted restrictively⁷¹. The purpose of the exception rule is not to supplant the primary presumptions but to mitigate the drawbacks that may arise from their application⁷². If the exclusive distributor changes its place of business after the conclusion of the contract without the other party's knowledge, the exception rule cannot be applied due to the principle of foreseeability⁷³. In brief, as derived from the wording of the TAPIL, the exception rule should be considered when a law that is more closely related to the contract exists, based on all relevant circumstances of the case. However, in long-term contracts, where adherence to the law of the place

64 Güner (n 57) 201.

65 Gülin Güngör, *Temel Milletlerarası Özel Hukuk Metinlerinin Sözleşmeden Doğan Borç İlişkilerine Uygulanacak Hukuk Konusundaki Yakınlık Yaklaşımı* (Yetkin Publishing 2007) 238.

66 Özel, Erkan, Pürselim, Karaca (n 3) 437.

67 Demir Gökyayla (n 43) 386-387.

68 Demirkol (n 43) 334.

69 Demir Gökyayla (n 43) 369.

70 Özel, Erkan, Pürselim, Karaca (n 3) 439.

71 Özel, Erkan, Pürselim, Karaca (n 3) 439.

72 Demirkol (n 43) 327-329.

73 Ercan (n 35) 97-99.

of business at the time of the conclusion of the contract does not promote equity in the specific case, the exception provision should be applied to establish a reasonable balance between the interests of the parties and the principle of foreseeability.

Article 5 of the TAPIL states that if a foreign law provision used in a particular litigation is expressly against Turkish public policy, it will not be applied; instead, Turkish law will be applied if it is judged necessary. In its decision dated February 10, 2012, the General Assembly of the Turkish Court of Cassation⁷⁴ characterised a violation of public policy as follows: "... it may be understood as a breach of private law principles grounded in the principle of good faith, as well as legal principles reflecting the shared moral values and notions of justice embraced by civilised societies. This includes considerations such as the society's level of civilisation, its political and economic system, human rights and freedoms, the foundational values of Turkish law, the general Turkish conception of morality and ethics, the underlying concept of justice in Turkish laws, the general policies guiding Turkish legislation, the fundamental rights and freedoms enshrined in the Constitution and the common principles recognised in the international arena." This judgement has framed the vague concept of public order.

It is important to emphasise that, when assessing the violation of public order in cases involving foreign elements, the specific connection between the legal relationship, the parties, and the relevant country plays a significant role in the determination⁷⁵. Consequently, a choice of law stipulating that an exclusive distributor operating in Türkiye must waive its right to goodwill indemnity in advance may be deemed contrary to Turkish public order when the specific circumstances of the case are taken into consideration. As previously noted, the exclusive distributor, as the party responsible for the characteristic performance, assumes the risk associated with the version. The exclusion of goodwill indemnity for the exclusive distributor, who is in a weaker position relative to the supplier, may contravene the principles of good faith and result in a violation of the Turkish public order. However, it should be noted that it is clearly understood from the wording of Article 5 of TAPIL that public order intervention is exceptional. Within the framework of Article 5 of TAPIL, when assessing the circumstances of the specific case and the legal relationship, factors such as the long-term nature of the contract between the parties, the fact that the supplier entered the Turkish market for the first time with this exclusive distributor,

74 Turkish Court of Cassation of Appeals General Assembly Decision No: 2012/1, Date: 10.02.2012.

75 Şanlı, Esen, Ataman-Figanmeşe (n 3) 88.

the exclusive distributor's role in achieving a certain market share for the brand, the economic balance between the parties, and the provisions of the contract, may be considered⁷⁶. When considering all these factors, if it is determined that the supplier aimed to deprive the exclusive distributor of goodwill indemnity in violation of the principle of good faith, an intervention based on public order may be warranted.

Türkiye's commercial landscape is marked by the prominent presence of agents and exclusive distributors. As a result, Turkish courts frequently handle goodwill indemnity claims involving foreign elements. Article 122 of the TCC establishes the conditions under which goodwill indemnity is applicable to agency. The wording of this provision has prompted extensive discussions regarding its implications within the realm of private international law. If the provision prohibiting the advance waiver of indemnity is classified as an overriding mandatory rule, it should be applied directly, regardless of any foreign elements present in the dispute. Although it has been argued that the provision in question is intended to protect exclusive distributors within the domestic market and promote a competitive environment, thereby serving the interests of the state, we contend that this provision does not qualify as an overriding mandatory rule. Therefore, we contend that it is not appropriate to adopt Article 122 of the TCC as an overriding mandatory rule on the basis of 'protection of the weaker party,' as this would unjustifiably undermine party autonomy. Furthermore, if this provision were to be adopted as an overriding mandatory rule, it would preclude the application of the chosen law, even if that law provides stronger protection to the agent or exclusive distributor than Turkish law. Accordingly, this study examines the applicable law governing disputes arising from exclusive distributorship contracts within the framework of Article 24 of the TAPIL. It is important to highlight that in cases where a clear violation of Turkish public order occurs, the provisions of Article 5 of TAPIL will be applicable.

Externally peer-reviewed.

The author has no conflict of interest to declare.

The author declared that this study has received no financial support.

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DOI: 10.26650/annaes.2025.76.0011
<http://annaes.istanbul.edu.tr/>

Submitted: 02.12.2024

Revision Requested: 04.01.2025

Last Revision Received: 07.02.2025

Accepted: 05.05.2025

Published Online: 21.05.2025

RESEARCH ARTICLE

As we are in the midst of a digital transformation, employment relations are also transforming. In addition to protecting the employee side of the contract, which is the core idea of the employment law, there is also a concerted effort to strike a delicate balance and maintain stable employment relations in the face of challenging transformations, including digitalisation¹. As admitted by ETUC², many aspects of the ongoing digitalisation process are not yet clear or understood. However, it is possible to say that certain key issues emerge as particularly challenging in terms of employment relationships. One of them is the “social media in disciplinary proceedings” since one of the most critical issues surrounding digitalisation is the protection of employees against dismissal³.

In this article, the impact of social media activities and related disciplinary proceedings will be highlighted in the context of Turkish employment law. Within the purpose of our study, disciplinary proceedings due to social media activity will be investigated in relation to termination, as the applicable disciplinary procedures are typically brought before the judiciary when they result in a termination sanction.

On the one hand, the matter of termination is a sensitive issue, and in particular, the employer’s right to terminate is confined by comprehensive legal regulations. On the other hand, the employment security system in Turkish law will not be comprehensively evaluated here⁴. As a brief description, it should be noted that certain groups of employees are covered by employment security, and the employer’s right to terminate employment in these cases is more confined in terms of procedure and valid grounds for termination. Therefore, the discussion below on whether social media activity is considered a valid reason will only be relevant for employees covered by the employment security system. In terms of Turkish law, reinstatement due to invalid termination will not be possible for the employees excluded from the employment security system. However, the principles reached regarding the limits of the employee’s freedom of expression undoubtedly apply to all employment relationships.

1 Ömer Ekmekçi, Refik Korkusuz and Ömer Uğur, *Turkish Individual Labour Law* (2nd edn, On İki Levha 2023) 4-5; Sarper Süzek and Süleyman Başterzi, *İş Hukuku* (24th edn, Beta 2024) 20.

2 ‘The Key to Fair Digitalisation’ <<https://www.etuc.org/en/key-fair-digitalisation>>. See also, ETUC resolution on digitalisation: “towards fair digital work”, adopted by the Executive Committee on 8-9 June 2016, <<https://www.etuc.org/en/issue/digitalisation>> (accessed 15.11.2024).

3 Also see Ricardo Del Punta, ‘Social Media and Worker’s Rights: What is at Stake?’ (2019) 35(1) *International Journal of Comparative Labour Law and Industrial Relations* 93 ff.; Virginia Mantouvalou, ‘“I Lost My Job over a Facebook Post: Was that Fair?” Discipline and Dismissal for Social Media Activity’ (2019) 35(1) *International Journal of Comparative Labour Law and Industrial Relations* 101 ff.

4 For further explanations in English, see Ekmekçi, Korkusuz and Uğur (n 1) 144 ff.; Tankut Centel, *Introduction to Turkish Labour Law* (Springer 2017) 177 ff.; Toker Dereli, Pınar Soykut Sarıca and Aslı Taşbaşı, *Labour Law in Turkey* (Kluwer Law International 2023) 217 ff.; Şebnem Kılıç, ‘Employment Law’, *Introduction to Turkish Business Law* (Peter Lang 2022) 222 ff.

On this basis, an overview of the social media activity will be presented. The question of what is considered in this context should be answered first. Then, the use of social media will be outlined through two issues that are frequently raised during the termination phase: The relationship between the use of social media and the obligation to work (performance), and the duty of loyalty of the employees. According to one view, the old image of the ‘silent employee (worker)’, whose personality remains hidden to the employer, is gradually fading due to the increase in social media activities. As social media activity increased and diversified, employee revelations about their personality increased. This transformation raises important concerns about employees’ fundamental rights, particularly in balancing the freedom of expression with the employer’s expectations of loyalty and performance⁵. In addressing this, the profound conflict between the employee’s freedom of expression and the contractual duty of loyalty (also between the employee’s fundamental rights and the employer’s right to manage) should be emphasised in the following sections.

In essence, the issue is worth discussing not only at the termination stage but also during the conclusion of the contract. Employers may use data analysis systems to monitor employees’ social media data footprints to identify relatively problematic patterns⁶. Such cases, where employers consider the past social media activity of prospective employees during the recruitment process, also pose serious legal problems. However, there is no employment contract yet during this process. Therefore, its impact is relatively limited, as a rule⁷, and here we examine the use of social media in disciplinary processes rather than its impact on recruitment.

In this vein, when evaluating the impact of employees’ social media activities on the employment relationship, the impact on the contractual rights and obligations of the parties should be emphasised. A distinction should be made here. On the one hand, excessive use of social media can prevent employees from fulfilling their obligation to work properly, and these behaviours, which are in some way related to performance, can pave the way for disciplinary proceedings. On the other hand, the

5 Del Punta (n 3) 99-100.

6 Also see ‘Report on Promoting fair and ethical recruitment in a digital world: Lessons and policy options’ (International Labour Organization and the International Organization for Migration 2020).

7 However, using artificial intelligence as a recruiting tool is also on the agenda in Turkish doctrine. Nevertheless, it is difficult to say that this use has become widespread. For a limited number of reviews in the doctrine, see Gülsevil Alpagut and Aybüke Karaca Yağcı, ‘İşyerinde Yapay Zeka Uygulaması ve Ayrımcılık’ (2023) 49 Sicil İş Hukuku Dergisi; Murat Engin and Başak Ozan Özparlak, ‘İşe Girişte Yapay Zeka ve Ayrımcılık’, *Hukuk Perspektifinden Yapay Zeka* (On İki Levha 2022); Vuslat Özyurt, ‘İşçinin İfade Özgürlüğü’ (Doctoral dissertation, İstanbul University 2024) 383 ff.

On the other hand, the right to information recognised by the Act on Personal Data Protection, despite the lack of a specific regulation for the recruitment process, also covers this circumstance. In other words, a potential employee has the right to request information from the employer who uses an artificial intelligence system in the recruitment process (Alpagut and Karaca Yağcı 27.). See also Sevil Doğan, ‘İşverenin İş Sözleşmesinin Kurulmasından Önce Sosyal Medya Araştırması’, *Dijital İş Hukuku Uygulamaları* (Adalet 2024) 207 ff.

use of social media may impact some disciplinary procedures due to the content of the posts.

People use social media for various purposes and in different ways. While some use it only for socialising and interacting with acquaintances, others use it to express their opinions, to engage in discussions with other opinion holders to whom they have access, or to conduct political debates⁸. In any case, it shows that it is difficult to draw clear boundaries between personal/private and professional use⁹. Therefore, Article 26 of the Constitution, which is the fundamental guarantee regarding the issue, should also be addressed. It is necessary to determine the limits of the freedom of expression guaranteed by the Constitution within the employment relationship. For this purpose, the issue is discussed below in the light of the individual application decisions of the Constitutional Court.

Before that, it should first be explained what is intended to say by the term of social media activity. It is worthy of note that the social media activity does not only mean producing content. All aspects of social media use such as liking, posting, reposting, commenting on sharing, and sending a message to a specific person or a group should also be considered as social media activity¹⁰.

At this point, the effect of “liking” the content should be discussed separately. According to one view in the doctrine, clicking on the “Like” button below the content carries the same weight as saying, “I like what you said”¹¹. In terms of the approach of the judiciary in Türkiye, the Court of Cassation also concluded that sharing an insulting post about the employer and clicking on the “Like” button below this content does not have the same weight as a direct insult, but by considering this as a show of sympathy for the content. However, the Court of Cassation ruled that the employee’s act of “clicking Like button” is also a breach of the duty of loyalty and there is a valid reason for termination, although it cannot be subject to immediate termination for just cause¹².

8 Mantouvalou (n 3) 102; Efe Yamakoğlu, *Bilişim Teknolojilerinin Kullanımının İş Sözleşmesi Taraflarının Fesih Hakkına Etkisi* (On İki Levha 2020) 105.

9 Mantouvalou (n 3) 102. For further discussions, also see Özyurt (n 7) 269 ff.

10 Aşlı Çalışkan Yıldırım and Ömer Uğur, ‘İşveren Bakımından Fesih Sebebi Olarak İşçinin Sosyal Medya Kullanımları’ (2022) 80 İstanbul Hukuk Mecmuası 1173. See also Özyurt (n 7) 271 ff.

11 Çalışkan Yıldırım and Uğur (n 10) 1203; Hediye Ergin, ‘Sosyal Medya Paylaşımlarıyla İşverenin İtibarını Zedeleyen İşçinin İş Sözleşmesinin Feshi’ (2023) 49 Sicil İş Hukuku Dergisi 50.

12 See, the Court of Cassation, 9th Chamber, 18603/26061, 17.9.2015. Also see Hande Heper, ‘Düşüncüyü Açıklama Hakkının Çalışma Yaşamındaki Görünümü: İşçinin İfade Özgürlüğü’ (2022) 3 Çalışma ve Toplum 1912. Undoubtedly, the content that is liked must be contrary to the duty of loyalty. On the other hand, the approach of the criminal courts is also different. The 4th Criminal Chamber of the Court of Cassation ruled that the mere act of “liking” an insulting social media post does not constitute the crime of insult. See, the Court of Cassation, 4th Criminal Chamber, 5598/33171, 17.11.2014.

On the other hand, the ECtHR decision in *Selma Melike v. Turkey* is of importance in this regard¹³. According to this judgment, clicking on the “Like” button merely expresses sympathy for the content published, and not an active desire to disseminate it. In our view, parallel to the ECtHR decision, a “Like” should not necessarily be interpreted as an endorsement. This tool can also be used as a marker (save button) for the users despite the speed of social media streams¹⁴.

In this respect, the decision of the Court of Cassation is open to criticism. Moreover, considering the speed of the social media streams, posts are often the result of impulsive and spontaneous actions and can spread very quickly and be viewed by thousands of people, regardless of the user’s intentions¹⁵. It should also be noted that freedom of expression undeniably protects not only valuable and substantive expressions but also more trivial ones¹⁶. Therefore, in order to initiate disciplinary processes, at least the existence of an active sharing that has meaning within a certain context should be sought. In addition, according to the approach of the Constitutional Court, the expressions used by individuals should be evaluated as a whole in a certain context with other expressions¹⁷. Based on this, in our opinion, those presumptions reduce the impact of a single activity of “Liking”. From our point of view, actions that do not carry an active intention of dissemination should not be attributed a meaning beyond the meaning given by the users¹⁸.

There is no specific regulation in Turkish law regarding the use of the Internet for private purposes at work and the use of social media during working hours. Therefore, the parties can limit the use of the Internet for private purposes with the aid of the contractual arrangements. In this respect, the procedure for the use of social media in the workplace can be regulated collectively or individually.

13 ECtHR, *Selma Melike v. Turkey*, Apl. 35786/19, 15.6.2021, para. 51. Also see CC, Oğuz Kurumlu Apl., 2019/12167, 11.1.2023, para. 23.

14 For a similar view, see Özyurt (n 7) 291 ff.

15 Mantouvalou (n 3) 106.

16 Mantouvalou (n 3) 103.

17 Also see the decision of the Constitutional Court, CC, İlder Nur Apl., 2013/6829, 14.4.2016, para. 37-39.

18 For a similar view, see Özyurt (n 7) 292. Also see the decision of the Constitutional Court, CC, Kadri Eroğul Apl., 2019/976, 11.5.2022, para. 26. Otherwise, as the Constitutional Court has correctly pointed out in this decision, the over-interpretation of statements by drawing indirect connections, even if not directly addressed, would make public speech impossible.

For further explanations, see, Vuslat Özyurt, ‘Sendikanın Boykot Çağrısına İlişkin Sosyal Medya İçeriğinin İşçi Tarafından Beğenilmesinin/Paylaşılmasının İş Sözleşmesine Etkisi: Yargıtay’ın Farklı Yaklaşımları Üzerinden İşçinin Sadakat Borcu ve İfade Özgürlüğü Bağlamında Bir Değerlendirme’ (2021) 6(1) Çankaya Üniversitesi Hukuk Fakültesi Dergisi 443 ff.

In addition, it is also possible for the employer to make arrangements within the scope of the right to manage¹⁹. In this context, the provisions in the workplace (personnel) regulations annexed to the employment contract can regulate the use of social media. Employers may issue general instructions that are binding on all employees or a specific group, as well as specific instructions addressed directly to an employee. In practice, it can be seen that employers limit the use of social media to a certain extent through written regulations under the names of “code of conduct”, “code of ethics”, and similar labelling²⁰.

In this context, the first to be examined is the confinements of the discretionary authority of the employer. Obedience to such regulations must be to the extent required by the rule of good faith (Art. 399 of TCO), and those regulations must not be contrary to mandatory provisions, morality, public order, and personal rights or impossible in terms of their subject matter (Art. 27 of TCO). These confine the employer’s right to manage²¹.

The fundamental guideline is that the employer cannot give instructions that violate the personal rights of the employees and cannot interfere with their private lives²². In this vein, the absolute prohibition of employees’ use of the Internet (beyond social media) is controversial. One view accepts an absolute ban²³, while the majority view considers such a ban to be an excessive practice in the light of the right to manage, freedom of communication of employees, and the obligation to protect the psychological and physical well-being of employees²⁴.

19 Süzek and Başterzi (n 1) 87; Nuri Çelik and others, *İş Hukuku Dersleri* (36th edn, Beta 2023) 140; Hamdi Mollamahmutoğlu, Muhittin Astarlı and Ulaş Baysal, *İş Hukuku* (7th edn, Lykeion 2022) 594; Öner Eyrenci and others, *İş Hukuku* (Beta 2020) 24; Sevil Doğan, *İş Sözleşmesinde Bağımlılık Unsuru* (Seçkin 2016) 159.

20 Erhan Birben, ‘İşçinin Özel Yaşamı Nedeniyle İş Sözleşmesinin Feshi’, *İş Hukukunda Genç Yaklaşımlar II* (On İki Levha 2016) 141; Çelik and others (n 19) 274. For example, the employer may set a maximum time limit for use, designate a specific area in the workplace for private computer use, restrict the websites and social media platforms that can be accessed, and prohibit the sharing of images displaying the whole or part of the workplace, the employer’s name, or its emblem. See also Zeki Okur, ‘İşyerinde İşçinin Bilgisayar ve İnternet’i Özel Amaçlı Kullanımının İş İlişisine Etkisi’ (2005) 8 Kamu-İş Dergisi 59.

21 Çelik and others (n 19) 314; Mollamahmutoğlu, Astarlı and Baysal (n 19) 87, 93; Ömer Ekmekeçi and Esra Yiğit, *Bireysel İş Hukuku* (On İki Levha 2023) 388 ff.; Sezgi Öktem Songu, ‘İşçilerin İşyerinde Özel Amaçlı İnternet ve E-Posta Kullanımına İşverenin Müdahalesi Üzerine Bir Değerlendirme’, *Prof. Dr. Sarper Süzek’e Armağan Cilt I* (Beta 2011) 1062, 1072. It must be remembered that the right to manage in question is at the bottom tier of the (unofficial) legal sources of Employment Law. See also Süzek and Başterzi (n 1) 88, 92; Mollamahmutoğlu, Astarlı and Baysal (n 19) 88.

22 For a judgment repeating the guidelines, see also the Court of Cassation, 9th Chamber, 3669/20770, 25.11.2019.

23 Öktem Songu (n 21) 1060. Some views hold that in cases where the private life has direct and adverse effects on the employment relationship, it is accepted that regulations broadly limiting personal rights, private life and freedom of communication can be introduced with the employee’s consent. See, Şükran Ertürk, *İş İlişisinde Temel Haklar* (Seçkin 2022) 127-128; Seracettin Göktas, ‘Türk İş Hukukunda İşverenin İşçinin Özel Yaşamına Saygı Borcu’ (2021) 38 Anayasa Yargısı 12-13, 19; F Burcu Savaş, ‘İş Hukukunda “Siber Gözetim”,’ (2009) 3 Çalışma ve Toplum 97, 119.

24 Erdem Özdemir, ‘İnternet ve İş Sözleşmesi: Yeni Teknolojilerin İş İlişisine Etkileri Üzerine’ (2008) 13 Sicil İş Hukuku Dergisi 13, 19; İlke Gürsel, ‘Kişisel Verilerin Korunması Hakkının İşçi ve İşveren İlişkilerine Etkileri’ (2016) 13 Legal İş ve Sosyal Güvenlik Hukuku Dergisi 763, 834; Göktas (n 23) 1, 34; Yeliz Bozkurt Gümrükçüoğlu, ‘İşçinin Sosyal Medya Kullanımının İş Hukukundaki Etkileri’ (2018) 7 PressAcademia Procedia 372-373; Selen Uncular, ‘Teknolojinin Etkisiyle Dönüşen İş İlişisinde Giriş Kontrol Sistemleri, Yer Belirleme Sistemleri ve Sosyal Medya Vasıtasıyla İzleme’ (2020) 3 Çalışma ve Toplum 1673, 1684; Duygu Çelebi Demir, ‘İşçinin İnternet Kullanımının ve E-postasının Denetlenmesi’, *Dijital İş Hukuku Uygulamaları* (Adalet 2024) 601.

The view of the overwhelming majority holds that the employee should be permitted to use the Internet at the workplace for private purposes, provided that it does not cause a detrimental effect on the workplace and remains within reasonable margins. Accordingly, it can be said that the use of the Internet is not limited to emergencies, provided that it does not involve additional costs to the employer, remains within reasonable and acceptable margins, does not hinder the obligation to perform work properly, and does not cause a detrimental effect on workflow²⁵.

One view, which we also uphold, states that the employer's discretionary authority in those cases should be exercised moderately²⁶. The Constitutional Court has also stated that the regulations made by the employer should not touch upon the essence of the fundamental rights²⁷. Within this framework, when interfering in the private life of the employee, the employer must be based on a justifiable reason, must inform the employee in advance about the intervention, and must choose the method that is necessary, capable of justifying the interference, and the degree of intrusion must be as scarce as possible by complying with the principle of proportionality.

The recent decisions of the Constitutional Court also support the majority view against an absolute ban on the use of the Internet through the principle of "as scarce as possible intrusion". In our view, the principles in question also apply to restrictions on social media activities.

On the other hand, the existence of the employer's instructions alone is not sufficient. Even though employers are often advised to have a clear policy on the social media activities of employees, there are legitimate reservations that the mere existence of such policies will ensure compliance with the law²⁸. We therefore consider that the test of proportionality is also required in all cases.

The second issue to be examined is the consequence of non-compliance with lawful restrictions on Internet usage and social media activities. Failure to comply with the employer's instructions regarding the performance is considered a direct

25 Çalışkan Yıldırım and Uğur (n 10) 1178; Özdemir (n 24) 19. Confer, the Court of Cassation, 9th Chamber, 27583/5294, 17.3.2008. In this outdated decision, the Court of Cassation ruled that the use of the Internet for private purposes in the workplace is prohibited unless there is an express or implied consent of the employer, an emergency, or any other work-related reason.

However, we believe that this decision is difficult to reconcile with the current situation, given the proliferation of the Internet as a common tool in almost every aspect of our daily lives. Even in non-emergency situations, the use of the Internet for reasonable periods falls within the ordinary course of life.

26 Okur (n 20) 54; Birben (n 20) 142; Ali Güzel, 'İş Hukukunda "Yetki," ve "Özgürlük,"' (2016) 15 İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi 93, 115; Mantouvalou (n 3) 118 ff.

For further explanations on the principle of proportionality, see also Deniz Ugan Çatalakaya, *İş Hukukunda Ölçülülük İlkesi* (On İki Levha 2019) 284 ff.

27 CC, Samet Ayyıldız Apl., 2018/34548, 28.12.2021, para. 34. See also Süzek and Başterzi (n 1) 60.

28 Mantouvalou (n 3) 112.

breach of the primary obligation (to perform work)²⁹. Therefore, in the vast majority of cases, if there is a breach of an explicit (and lawful) instruction of the employer regarding Internet use, then there will be a direct breach of the obligation to perform work instead of a breach of the obligation to comply with the instructions (to obey).

In case of cyber-loafing³⁰, the employer must warn the employees who disrupt their work due to social media or Internet use if the employee is covered by the employment security system. Then, it is necessary to determine whether there is a valid reason for termination with notice³¹. The Court of Cassation ruled that if the behaviour of the employee, who was found to have used the Internet for private purposes during working hours despite being warned in advance, caused negativity in the workplace, the valid ground for termination was justified³². Therefore, it must be ascertained whether the employees could have avoided the concrete breach of the obligation if they had intended to, in short, whether they were negligent. In addition, the Court of Cassation emphasises that in such cases, the periods of overlapping working hours with the periods allocated for Internet use should be determined in a way that is suitable for inspection during the proceeding³³.

At the final stage, it should also be examined whether the breach in question is severe enough to give the employer the right to terminate the contract immediately. This is possible in the event of a total failure to perform work even after being warned about the duties (Art. 25/II-h of the Labour Act). On the other hand, immediate termination may be justified due to the features of the websites visited, regardless of the time spent on the Internet. In particular, in cases where an employee accesses betting or obscene sites, the Court of Cassation justifies immediate termination due to the risk of leaving a trace on the Internet network used through the workplace and damaging the employer's reputation within the framework of termination based on employee behaviour incompatible with honesty and integrity (Art. 25/II-e of the Labour Act)³⁴.

In summary, the use of social media must be tolerated by the employer provided that it does not cause a detrimental effect on the workplace and remains within reasonable margins. It is necessary that the employer's business interests (i.e. detrimental effect on workflow or reputation) are damaged due to the employee's breach to mention a

29 Accordingly, instructions clarifying the content of the obligation to perform work are considered within the principal obligation. The scope of those instructions varies from a broad outline to a fully developed performance specification. Ekmekeçi, Korkusuz and Uğur (n 1) 81; Sözek and Başterzi (n 1) 86, 363; Çelik and others (n 19) 275.

30 See also Yamakoğlu (n 8) 92 ff.; Ali Gürsoy and Betül Erkanlı Başibüyük, 'İş Hukuku Boyutuyla Örgütlerde Sanal Kaytarma', *Örgütsel Davranış ve İş Hukukuna Yansımaları* (Seçkin 2020) 239 ff.

31 Undoubtedly, this is the case for employees covered by employment security. See also fn. 4 and Gökteş (n 23) 33.

32 The Court of Cassation, 9th Chamber, 27212/620, 13.1.2016; 39671/37399, 13.12.2010; 19150/26792, 10.10.2006. See also Yamakoğlu (n 8) 94.

33 The Court of Cassation, 22nd Chamber, 248/5281, 14.3.2017.

34 The Court of Cassation, 9th Chamber, 27583/5294, 17.3.2008.

valid reason or just cause for termination³⁵. The type of termination will be determined according to the severity of the breach.

In addition, it should be noted that rules and regulations on the use of the Internet and social media, which stem from the employer's right to manage, are subject to the proportionality test, even if these regulations are highly recommended to employers.

In the doctrine, the duty of loyalty is defined as the obligation of the employee to protect the rightful interests of the employer as required by the trust relationship between the parties and the rule of good faith³⁶. According to Article 396 of the TCO, the employee must act honestly and faithfully in the protection of the employer's rightful interests³⁷.

More precisely, the Court of Cassation describes this obligation as “*not harming the counterparty's personality, properties, and other assets protected by law upon performing contractual obligations, (...) avoiding all kinds of behaviours that may endanger the purpose pursued by the contract, particularly those that may weaken the mutual trust between parties*”³⁸. On the other hand, when determining the scope of the duty of loyalty, the fundamental rights of the employee must also be considered³⁹.

While evaluating the impact of social media use on employment relationships and mutual trust, the audience that the posts reach should be considered. In order to strike a fair balance between the employee's freedom of expression and their duty of loyalty to the employer, it is necessary to examine by whom, with whom, and under what circumstances the social media posts are shared⁴⁰.

Considering the speed at which social media posts spread, it is very likely that more than the originally anticipated users may be privy to the content⁴¹. In the

35 Süzek and Başterzi (n 1) 602; Çelik and others (n 19) 529; Mollamahmutoğlu, Astarlı and Baysal (n 19) 1023 ff.; Ekmekçi, Korkusuz and Uğur (n 1) 146. See also Eyrenci and others (n 19) 204; Fatih Uşan and Canan Erdoğan,

doctrine, it is accepted that in the termination process, a distinction should first be made according to the degree of confidentiality and the audience reached by social media posts⁴². Therefore, private sharing should generally be considered confidential if it reaches one or a few recipients⁴³. On the other hand, in a case before the Court of Cassation, the concrete situation showed that even within a closed group, the degree of confidentiality can be considerably reduced due to the large number of group recipients⁴⁴

The guiding principle is that an employee's contract cannot be terminated because of social media posts that are within the bounds of criticism. In other words, these posts are protected under the right to freedom of expression⁴⁹. In this vein, a fair balance has to be struck between the conflicting interests of employer and employees⁵⁰. It must also be assessed whether the interference is proportionate to the legitimate aim of the employer. Furthermore, relevant and sufficient grounds must be given by the courts in making their decisions according to the Constitutional Court⁵¹. Termination sanction imposed without concretising which statement made and in what way this statement violates the relationship of trust between the parties results in a violation of the right to expression⁵².

It should be assumed that the statements made by the employees, which reflect the concrete situation and are within the bounds of criticism, such as on the failure to pay the overtime wages to the employees, working overtime in excess of the legal limit, and the failure to pay their wages on time and in full, do not violate the duty of loyalty⁵³.

Second, unless the employer can prove that the employer's business interests have been damaged and that the workflow and workplace peace have been disrupted by these posts, it cannot be said that a lawful termination is based solely on these expressions⁵⁴. Undoubtedly, the employer must prove that the employee's relevant behaviour has a detrimental effect on workflow and workplace peace⁵⁵.

49 Yıldız (n 43) 110; Yamakoğlu (n 8) 114 ff.; Heper (n 12) 1909 ff.; Alper Güler and Şebnem Kılıç, 'İş Hukuku Boyutuyla Örgütsel Sinizm', *Örgütsel Davranış ve İş Hukukuna Yansımaları* (Seçkin 2020) 328 ff.; Savaş Kutsal and Kolan (n 42) 541-542. For the view that the right to criticise does not include any conduct by employees to challenge the employer or to speak or act against the employer's authority, see Ekmekçi and Yiğit (n 21) 389.

50 Ekmekçi and Yiğit (n 21) 389; Ugan Çatalkaya (n 26) 375; Ergin (n 11) 46; Aybuke Karaca Yağcı, 'İşçinin İfade Özgürlüğü ve İfade Özgürlüğünün Sınırlandırılması', *Dijital İş Hukuku Uygulamaları* (Adalet 2024) 538. See also Deniz Ugan Çatalkaya, 'AYM Bireysel Başvuru Kararları Işığında İşyerinde Haberleşmenin İzlenmesi Karşısında İşçinin Özel Yaşama Saygı Hakkı ve Haberleşme Özgürlüğünün Korunması', *İNTES Anayasa Mahkemesi Bireysel Başvuru Kararları Çerçevesinde İş Hukukunun Değerlendirilmesi Semineri* (2023) 110 ff.

51 CC, Mehmet Ekizler Apl., 2022/58456, 18.4.2024, para. 21, and the decisions mentioned therein. See also Muhittin Astarlı, 'Anayasa Mahkemesi Bireysel Başvuru Kararları Çerçevesinde İş Hukuku Uygulamaları', *İNTES Anayasa Mahkemesi Bireysel Başvuru Kararları Çerçevesinde İş Hukukunun Değerlendirilmesi Semineri* (2023) 119 ff.

52 See, CC, Volkan Çakır Apl., 2017/35488, 7.4.2021, para. 39; İdil Alakuş Dere Apl., 2019/38252, 11.1.2023, para. 22. For another decision of the Constitutional Court, which found no violation in a case where employees' financial loss were compensated, see also Burhan Diktepe Apl., 2018/10550, 21.12.2022, para. 21.

53 Yıldız (n 43) 110; Yamakoğlu (n 8) 118. For example, in a concrete case, it was not deemed intolerable for the employer that employees voiced their criticism about the employer not paying their social security contributions, which is one of the working conditions, and shared posts on social media for this purpose (the Court of Cassation, 9th Chamber, 1405/14318, 26.6.2019).

See also, CC, Serap Aslan Acet Apl., 2020/38733, 2.5.2024, para. 17-19; Volkan Çakır Apl., 2017/35488, 7.4.2021, para. 37-40; Kasım Çiftçi and others Apl., 2019/33243, 4.7.2022, para. 34.

54 Yıldız (n 43) 110; Güler and Kılıç (n 49) 329. Confer, Ekmekçi and Yiğit (n 21) 672, 679 ff. In the doctrine, especially in the case of disclosure or denunciation of a crime, the view prevails that this behaviour should not be considered a breach of the duty of loyalty, considering the public interest, which is a higher interest. For further information regarding "whistleblowing", see also Mustafa Alp, *Çalışanın İşvereni ve İş Arkadaşlarını İhbar Etmesi (Whistleblowing)* (Beta 2013); Çelik and others (n 19) 319; Ugan Çatalkaya (n 26) 376; Heper (n 12) 1914 ff.

55 For a decision stating that termination without evidence of detrimental effect is unlawful, see the Court of Cassation, 9th Chamber, 34334/752, 22.1.2018. Also see below, fn. 70.

The relevant social media posts should be examined separately regarding immediate termination for just cause. In this vein, if the employee (i) expresses any speech or action committing an offense against the honour or reputation of the employer or a member of the employer's family, or if the employee makes unfounded, grave accusations against the employer that jeopardise the employer's honour and dignity (25/II-b), (ii) harasses the employer, a member of the employer's family, or a fellow employee in the workplace, and (iii) commits a dishonest act against the employer that is incompatible with loyalty (25/II-e), the employer may, then, terminate the contract immediately. All these cases are listed among the grounds for just causes for termination by the employer under Article 25/II of the Labour Act⁵⁶.

In terms of the assessment of whether or not to be considered within the scope of expressions that may jeopardise honour and dignity, the High Court evaluates the weight of the act based on criteria such as whether the employer is a direct party to the sharing, whether the sharing is limited to the employee's circle, and whether the content consists of general expressions⁵⁷. For instance, (even if not a family member) insulting or making unfounded accusations against the employer's acquaintances or with whom the employer has a business partnership may constitute a valid reason for termination, especially for small businesses where the employer's personality is of importance⁵⁸. On the other hand, those allegations against third parties, such as other employees, customers, etc., that affect honour, and reputation may also be accepted as a just cause for termination depending on the concrete case⁵⁹.

Insulting posts about identified or identifiable persons are also considered sufficient grounds for termination, even if the employee does not express a full name⁶⁰. On the other hand, if it cannot be understood that the statement in question was made against someone who can be subject to just causes for termination, the termination is not justified⁶¹. Immediate termination must be unavoidable for the party entitled to

56 Sexual harassment, which is recognised as a unique form of harassment, is addressed in a separate subparagraph (Art. 25/II). On the other hand, a compliment made via social media can be considered merely inappropriate behaviour, when it is not desired by the recipient. As long as it does not reflect on the workflow and the workplace, and most importantly, as long as it does not become a persistent attitude, it should not be regarded as grounds for termination. However, the way this behaviour is perceived and its effects should be considered on a case-by-case basis. See Kübra Doğan Yenisey, 'İş İlişkinin Sona Ermesi ve Kıdem Tazminatı', *Yargıtay'ın İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2016* (On İki Levha 2018) 517-518.

57 For the decision review, see *ibid.* 387, 502-504 (Court of Cassation, 9th Chamber, 2635/12272, 23.5.2016). For the view that upheld the decision, see also Savaş Kutsal and Kolan (n 42) 542.

58 Çalışkan Yıldırım and Uğur (n 10) 1203. See also, the Court of Cassation, 9th Chamber, 2244/22331, 19.12.2016; 2778/422, 23.1.2017.

59 Çelik and others (n 19) 651. Making unfounded accusations against senior executives, such as "theft and bribery" is also included in this scope. See, the Court of Cassation, 22nd Chamber, 34583/918, 22.1.2015.

60 The Court of Cassation, 9th Chamber, 2778/422, 23.1.2017.

61 Savaş Kutsal and Kolan (n 42) 539; Çalışkan Yıldırım and Uğur (n 10) 1202. Likewise, in the Kadri Eroğul application, the Constitutional Court considered that it was unclear to whom the applicant's statements were directed. The expressions used by a person should not be given a meaning that goes beyond the meaning given by that very person (CC, Kadri Eroğul ApI., 2019/976, 11.5.2022, para. 26). Also, according to the High Court, it was not properly assessed that the applicant was also the director of an association protecting workers' rights (*ibid.*).

terminate and must be implemented as a last resort. Therefore, social media sharing that does not reach this weight can be considered a valid reason.

In terms of the content of the post, it is necessary to examine the valid grounds for termination enhanced by case law for employees covered by employment security⁶². Harassing the employer through social media and posting expressions that damage the employer's dignity may be considered grounds for termination, depending on the severity of the conduct. In this context, the extent to which the trust relationship between the parties has been damaged will be used as a criterion to determine the type of termination⁶³.

Another critical issue is when employees use social media accounts to engage in hate speech against a person or a specific group of people on the basis of race, language, religion, sect, etc. Even if such statements do not constitute a criminal offense, they can be considered grounds for termination. In a case before the Constitutional Court, the Court evaluated the "alleged use of derogatory language and hate speech". In these cases, it is necessary to explain the reasons why the sharing led to the disruption of the trust relationship between the employer and the employee and what negative situation it caused in the workplace. Since the content of the posts in question was not disclosed and their effect on the employee's contractual obligations was not concrete, the Constitutional Court found a violation⁶⁴. Undoubtedly, it should also be evaluated whether the sharing was confidential and was legally obtained⁶⁵.

Finally, it cannot be assumed that employees waive their freedom of expression simply by entering into an employment contract. They will undoubtedly continue to benefit from the protection of freedom of expression. Any ordinary remarks and expressions against the employer are not considered a breach. Therefore, the cynical expressions of the employee should not be considered a direct breach of the duty of loyalty⁶⁶. For instance, criticism in a particular area of expertise or criticism of defects and improprieties in the work organisation is protected by freedom of expression⁶⁷.

62 In the relevant decision of the Appellate Court, the employee shared an article on social media criticising the aisle arrangements in the store and opposing the company's policies. Upon this, the employer asked the employee to delete the post, and the employee immediately obeyed the employer's request. Nevertheless, the employer terminated the employee's employment contract, stating that this behaviour constituted a breach of the duty of loyalty. In this concrete case, the Court of Appeal reversed the decision of the first instance court, focusing on the type of termination. As it is understood from the judgment, these posts, which express mistrust of company policies, are considered a valid (but not just) cause for the employer to terminate the contract (Ankara District Court of Appeal, 6th Chamber, 850/982, 16.5.2017).

63 The distinction between just causes and valid reasons is made in the doctrine according to the severity of the termination ground. Just causes are so severe that they outweigh the weight of the valid reasons. On the other side, the valid reason is deemed a justification that is not sufficient to provide a reason for the immediate termination of the employment contract on one hand, but not so simple that the employee's warning is sufficient on the other hand. See also Ekmekçi, Korkusuz and Uğur (n 1) 147, 150; Centel (n 4) 179.

64 CC, İdil Alakuş Dere APl., 2019/38252, 11.1.2023, para. 20-22. See also Karaca Yağcı (n 50) 538.

65 Çalışkan Yıldırım and Uğur (n 10) 1216.

66 See also Gürer and Kılıç (n 49) 329.

67 The Court of Cassation, 9th Chamber, 2244/22331, 19.12.2016.

However, if the employee's use of social media has negatively affected the relationship of trust between the parties and this negativity has led to the continuation of the employment relationship cannot be reasonably expected, only in these cases the employee's behaviour should be considered as a reason for termination⁶⁸. Therefore, it will be necessary to evaluate the expressions of the employees separately in light of each concrete case and to reach a conclusion by comparing the effect of the behaviour on the employer and the effect of the sanction on the employee⁶⁹. In other words, it is necessary to determine concretely how the employer's business interests have been damaged and the connection between said harm and the pertinent posts. The failure to concretise the connection between those during the proceedings is considered a ground for violation⁷⁰.

Here, we would like to emphasise the following assessment of the Constitutional Court. According to this ruling, it should be remembered that the employee is not a civil servant who must have a certain and profound level of trust and loyalty relation with the administration. In this regard, the obligation of loyalty and confidentiality that employees working under private law have is not as strict as the obligations of loyalty and confidentiality that civil servants working under public law are expected to fulfil⁷¹.

Another point that should be underlined here is that, as a rule, the duty of loyalty ends with the termination of the employment contract⁷². In a concrete case, a group of former employees formed to set up a website and shared posts against their former employer. In the proceedings, it is undisputed that the website founders were former employees of the employer and that the employees reacted to their collective dismissals via the website. In this concrete case, the employer's claims for damages arising from unfair competition were rejected, and it was ruled that the incident should be evaluated within the scope of the freedom of expression of former employees who were exposed to unlawful acts⁷³. In summary, as it is understood from the Court of Cassation decision, such posts are also considered within the scope of freedom of expression.

68 Yıldız (n 43) 109.

69 Ugan Çatalkaya (n 26) 374.

70 CC, Volkan Çakır Apl., 2017/35488, 7.4.2021, para. 37-39. Accordingly, it is not legally accepted to rely on abstract and general statements for justification (Kasim Çiftçi and others Apl., 2019/33243, 4.7.2022, para. 34-36).

71 CC, Hülya İnan Apl., 2019/10642, 11.1.2023, para. 23; Oğuz Kurumlu Apl., 2019/12167, 11.1.2023, para. 23-24; İdil Alakuş Dere Apl., 2019/38252, 11.1.2023, para. 21. The Constitutional Court also stated that these strict restrictions were necessary due to the unique qualities of the public service, while providing certain advantages. See, Muhammet Serkan Şener Apl., 2016/13501, 17.11.2021, para. 38.

72 However, for the distinction introduced by the Turkish Code of Obligations regarding the post-contractual effect of the employee's obligations within the scope of the duty of loyalty, see also Süzek and Başterzi (n 1) 365; Çelik and others (n 19) 320; Ekmekçi and Yiğit (n 21) 392; Centel (n 4) 109.

73 The Court of Cassation, 11th Chamber, 2370/8090, 19.12.2018.

As a general framework, terminations based on an employee's social media posts should be considered lawful to a limited extent, and the impact and content of the posts should be scrutinised with caution. We also take the view that the employee's right to freedom of expression must be interpreted with vigilance against the imbalance of power inherent in the employment relationship⁷⁴.

In line with the issues discussed under the heading of digitalisation, this article embraces a descriptive approach to the regulations and jurisdiction in Türkiye regarding the impact of social media in disciplinary proceedings, especially during the termination stage.

First, in our view, passive activities such as "Liking" should be approached more moderately when evaluating the termination sanction. The expressions used by employees should be evaluated as a whole within a certain context with other expressions. Accordingly, from our point of view, if an active intention to disseminate cannot be determined, disciplinary sanctions would be contentious, although there are opinions in the doctrine and court decisions to the contrary.

In addition, the majority of the doctrine advise promoting responsible use of social media and to establish a social media or Internet use policy in the workplace. However, within the framework of the Constitutional Court's as scarce as possible approach to interferences with fundamental rights, policy documents that impose absolute bans should also be viewed with scepticism. At any rate, the test of proportionality should also be assessed. We align with the view in the doctrine that the legality of absolute bans is questionable in today's context.

There is a distinction to be made regarding the social media posts of the employees that lead to termination. First, excessive use of social media can prevent employees from fulfilling their obligation to work properly, and these behaviours, which are in some way related to performance, can pave the way for disciplinary proceedings. In other words, the employer must tolerate this situation, provided that it does not have a detrimental effect on the workplace/work flow and remains within reasonable margins.

Second, the content of the posts should be evaluated within the scope of the duty of loyalty. It cannot be assumed that employees waive their freedom of expression simply by entering into an employment contract. The Court of Cassation's decisions evaluate social media content, especially in the termination process, and examine the lawfulness of the termination according to the concrete effect of the shared content on

74 Mantouvalou (n 3) 103. See also Özyurt (n 18) 461.

the employment relationship. For instance, criticism in a particular area of expertise or criticism of defects and improprieties in the work organisation is protected by freedom of expression. It is also necessary to examine by whom, with whom, and under what circumstances the social media posts are shared.

In other words, it is necessary to determine concretely how the employer's business interests have been damaged and the connection between said harm and the pertinent posts. Undoubtedly, social media posts incompatible with the roles of the employee can be considered a valid reason in this frame. However, the failure to concretise the connection between those during the proceedings is considered a ground for reversal.

To draw a general conclusion, within the scope of the obligation of loyalty, the content of the statements and the audience they are shared with are important. Social media posts including relatively minor comments should not be subject to termination. Also, an employer's response to such inappropriate conduct should be dependent on the extent to which it could or potentially could damage an employer's/ reputation or business.

From our point of view, the employee's freedom of expression should be protected against overreactions by employers. In other words, termination can be used as a sanction in cases that are proportionate to the current situation within a very limited scope. In our opinion, the majority of the decisions of the Constitutional Court analysed in this article also support this view.

Externally peer-reviewed.

The author has no conflict of interest to declare.

The author declared that this study has received no financial support.

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