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RESEARCH ARTICLE

Prosecutors' Position and Its Impact on How Proceedings Are Conducted: A Comparison of German and Turkish Criminal Procedure

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ABSTRACT

The rule for criminal procedure is the principle of compulsory prosecution. However, the principle of compulsory prosecution has been argued to have drawbacks in terms of modern crime policy due to a certain benefit being expected from today's crime policy. Because public prosecutors conduct proceedings on behalf of the public, prosecutors as a rule have no discretionary authority. However, legislators have given discretionary power to public prosecutors regarding certain crimes for various reasons. The public prosecutor is the one who will evaluate the value of each piece of evidence and the existence of sufficient suspicion to reach a verdict in a trial. The aim of this study is to determine the position of prosecutors, who are equipped with important discretionary powers, in terms of criminal procedure. The study includes the regulations and discussions regarding Turkish and German criminal procedure, comparatively examining their differences in terms of authority between prosecutors in the classical and modern criminal process, prosecutors' discretionary power and its limits, and finally the regulations in which prosecutors can use discretionary power.

Keywords: Prosecutor, classical criminal procedure, modern criminal procedure

INTRODUCTION

Legal and political developments regarding prosecutors' position in criminal procedure have led to notable changes in the criminal procedure system in recent years.[1] The de facto widespread practice over the last 30 years of secret plea bargaining has been repeatedly criticized for its incompatibility with at least certain traditional procedural principles.[2] In the Turkish and German criminal procedure systems, a new independent procedural framework has been introduced for a quick consensual resolution of criminal disputes. In this context, the current study will examine the decision not to prosecute, postponement of the initiation of a public prosecution, the decision not to initiate a public prosecution, public prosecutors' control over discretion, and expedited procedure.

I. Prosecutors' Position

When examining public prosecutors' position in criminal proceedings, they are primarily responsible for initiating and continuing criminal proceedings.[3] In essence, they are obliged to "intervene in all crimes that can be prosecuted if there is sufficient suspicion."[4] Prosecutors are the supervisor of an investigation. They are the state authority responsible for criminal investigation and a hierarchically structured judicial authority.[5] According to Kühne, the public prosecutor's office is the independent organ

[1] Heinz Wagner, 'Ziele des Strafprozesses?' in: Andreas Hoyer (Ed.), Gedächtnisschrift für Jörn Eckert (Baden-Baden 2008) 939–940, 945; Thomas Weigend, 'Verständigung in der Strafprozessordnung – auf dem Weg zu einem neuen Verfahrensmodell?' in: René Bloy (Ed.), Gerechte Strafe und legitimes Strafrecht (Festschrift für Manfred Maiwald zum 75. Geburtstag) (Berlin 2010) 829, 845–847.

[2] Claus Roxin & Bernd Schünemann, *Strafverfahrensrecht* (29. Aufl. München 2017) § 10 Rn. 4–5, § 17 Rn. 7–32; Friedrich-Christian Schroeder and Torsten Verrel, *Strafprozessrecht* (6. Aufl. München 2014) Rn. 194; Wolfgang Wohlers, 'Das Strafverfahren in den Zeiten der "Eilkrankheit"' in: NJW (2010) 2470–2475, 2470 (2473– 2474).

[3] Roxin & Schünemann (n 2) § 9 Rn. 16–20; Cumhur Şahin & Neslihan Göktürk, *Ceza Muhakemesi Hukuku I* (12th ed., Seçkin 2021) 80.

[4] Roxin & Schünemann (n 2) § 14 Rn. 1–4; Werner Beulke & Sabine Swoboda, *Strafprozessrecht* (15. Aufl., C. F. Müller 2020) 132.

[5] Bahri Öztürk, *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku* (15th ed., Seçkin 2021) 218. The countries of continental Europe accept that the prosecutor's office is institutionally located within the executive branch, as it lacks any judicial function; on the other hand, it is functionally a judicial authority. Continental European countries also recognize the prosecutor's

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of criminal justice within the framework of criminal proceedings and is only a "false part" of the judiciary, which is embedded in the executive organ.[6] According to Roxin, as an independent and impartial judicial authority, the public prosecutor's office is an independent organ of the administration of justice.[7] The existence of a hierarchical structure within the organization of the Chief Public Prosecutor's Office shows public prosecutors to not be independent in terms of their own organization. However, this situation cannot be understood and applied as a reversal or elimination of an action public prosecutors have taken.[8]

According to Gökcen et al., prosecutors are not independent. Because independence is defined as not taking orders from anyone, the hierarchical relationship between the Chief Prosecutor and the Ministry of Justice and the fact that prosecutors are subordinate to the Chief Prosecutor reveal that prosecutors are not independent.[9] According to Kunter, prosecutors are not independent, and their independence should not even be wished for.[10] According to Centel, prosecutors cannot easily be impartial due to the nature of their work. The commission of a crime disrupts the social balance, and the attempt is made to restore this balance by punishing the perpetrator. In this situation, any authority that believes that it is obliged to maintain the balance will inevitably feel like a party.[11]

According to Zafer, prosecutors cannot take any action on their own behalf that only is binding to them. Within the organization of the prosecutor's office, any change can be made to its powers at any time. Each prosecutor has the authority to represent the office, both individually and jointly. This is referred to as the "indivisibility of the prosecution."[12] The prosecution's arguments and opinions, its duty to gather evidence both for and against the suspect, and its judicial discretion are all part of their judicial activity. The administration has only supervisory authority over prosecutors, so the fact that the prosecutor's office has an administrative structure due to its hierarchical structure is only a formal superficial matter.[13] The fact that the Chief Public Prosecutor gives orders to prosecutors and that prosecutors are bound by these orders stems from prosecutors being a subject of public law, and this does not affect their independence.[14]

According to Meraklı, the prosecutor's office is a judicial body that is charged with criminal prosecution and involvement in criminal proceedings.[15] The prosecutor is under a special obligation to seek sanctions impartially and to uphold justice in the interests of society. This obligation requires prosecutors not to be characterized as a side in criminal proceedings. The public prosecutor is not a party in Turkish criminal procedure. The public prosecutor should work toward establishing a legal practice that is in accordance with the material truth.[16] The obligation for a fair trial also requires that the proceedings be independent and impartial.[17] For public prosecutors, the law is not a framework but the very subject of their activity. Despite being a judicial body, the prosecutor's office is hierarchically structured within the executive power, operates as an intermediary between the executive and the judiciary, and has a "sui generis" character.[18]

According to the author's opinion, while an authority that believes it is obliged to maintain a balance will inevitably feel like a

office as an institution with a dual character. In continental European legal systems, the prosecutor's office is subordinate to the executive branch within the constitutional state order but functions as a judicial body. Cf. [Hakan Karakehya and Murat Arabacı, 'Cumhuriyet Savcısının Hukuki Statüsü, Muhakemedeki Taraf Pozisyonu ve İspat Yükünün Bulunması Üzerine' (2016) 65(4) AÜHFD 2059, 2068.] The prosecutor's office is also a hierarchical body headed by the Attorney General in England and Wales. The Attorney General only has general supervisory and managerial powers. The public prosecutor's office must be party to the proceedings both for and against the accused. This includes the obligation to investigate other authorities and to collect exculpatory evidence there. In this context, the public prosecutor's office also cooperates with the police, obtaining information from their databases. [Hans-Heiner Kühne, *Strafprozessrecht* (9. Aufl., Heidelberg 2015) Rn.1169.] The initiation and conduct of the English investigation is largely in the hands of the police, an autonomous investigative authority. In the criminal process, important decisions involving a suspect's guilt are made by the police at an early stage. [Mandy Burton, Andrew Sanders, Richard Young, & Steven Cammiss, *Criminal Justice* (Oxford University Press 2021) 428; Emmanouil Billis, *Die Rolle des Richters im adversatorischen und im inquisitorischen Beweisverfahren* (Band S 151, Schriftenreihe des Max-Planck-Instituts für ausländisches und internationales Strafrecht 2015) 149.] However, if the prosecutor is pacified, the police, who concentrate on obtaining statements from the accused, can come to the fore as an independent investigative authority. [Kühne, Rn.1171.] A similar arrangement is observed in the United States of America. In the USA, the police have a very wide discretion during investigations. The police can investigate independently of the prosecutor, and the police have a wide discretion over whether or not to bring the suspect before the prosecutor. If sufficient suspicion is reached, the police forward the file to the prosecutor. The prosecutor is not obliged to collect evidence favorable or unfavorable to the accused. [Cumhur Şahin, *Ceza Muhakemesinde İspat* (Yetkin Yayınları 2001) 78].

6 Kühne (n 5) Rn.130.

7 Roxin and Schünemann (n 2) § 14 Rn. 5–27. For more information, see: Schroeder & Verrel (n 2) Rn. 85–92; Billis (n 5) 228; Beulke & Swoboda (n 4) 146; Veli Özer Özbek, Koray Doğan, & Pınar Bacaksız, *Ceza Muhakemesi Hukuku* (14th ed., Seçkin 2021) 159; Tuba Kelep Pekmez, 'Ceza Muhakemesinde Objektif Bir Taraf Olarak Savcılık Makamı' (2021) *Anadolu Üniversitesi Hukuk Fakültesi Dergisi, 7*(2), 275–291.

8 Şahin & Göktürk (n 3) 86.

9 Ahmet Gökcen, Murat Balcı, M. Emin Alşahin, & Kerim Çakır, *Ceza Muhakemesi Hukuku* (5th ed., Adalet Yayınevi 2021) 211, 212.

10 Nurullah Kunter, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku* (8th ed., İstanbul 1986) 348.

11 According to the author; the impartiality of the prosecutor should be understood as being objective toward both the accused and the victim, favoring neither for any reason, and conducting procedures such as collecting evidence and giving an opinion only with the concern of revealing the material truth (Nur Centel, 'Adil Yargılanma Hakkı İle Silahların Eşitliği Bağlamında Savcılık ve Savunma (Bir Adli Organ Olarak Savcılık Sempozyumu)' (2006) Türkiye Barolar Birliği Yayınları 195; Cf. in the same direction; Karakehya & Arabacı (n 5) 2062.

12 Hamide Zafer, 'Türk Ceza Adalet Sisteminde Savcılığın Hukuki Statüsü' in: Nur Centel (Ed.), Koç Üniversitesi Hukuk Fakültesi Araştırma Konferansları Serisi 1 (İstanbul 2015) 16.

13 Zafer (n 12) 20.

14 Ibid 15.

15 Serkan Meraklı, *Cumhuriyet Savcısının Kamu Davası Açmada Takdir Yetkisi* (Seçkin 2014) 21.

16 Meraklı (n 15) 22.

17 Bahri Öztürk, 'Türkiye'nin Yeni Savcı Modeli Ve Adil Yargılanma' in: Eric Hilgendorf and Yener Ünver (eds.), *Prof. Dr. Köksal Bayraktar'a Armağan* (Alman - Türk Karşılaştırmalı Ceza Hukuku) (2010) *Yeditepe Üniversitesi Hukuk Fakültesi Yayınları, 3*(17), 819, 855.

18 Meraklı (n 15) 24.

party, the prosecutor as the subject who exercises conscientious opinion on certain issues in the modern criminal process needs to remain impartial and independent.

Public prosecutors occupy a unique position in most countries in two distinct respects. On one hand, they often strike a delicate balance between the executive and judicial powers of the state. On the other hand, their own powers often reflect a delicate balance, this time between independence from and subordination to the executive branch.[19] After completing an investigation, the prosecutor's office decides whether to not prosecute or to issue an indictment. Even if a crime is suspected, various possibilities still exist for the prosecutor to refrain from initiating criminal prosecution for reasons of expediency. In particular, this can happen in the case of misdemeanors by taking into account the degree of the offense and public interest and can also occur in certain other criminal cases.[20] However, due to prosecutors' monopoly over issuing an indictment, if prosecutors are free to not proceed with the case, the court will be deprived of the possibility of making a final decision regarding the legal relationship. Therefore, the court must ensure that procedural rules are correctly applied and report violations immediately. After the final conclusion of a criminal case, the prosecutor's office also deals with the execution of sentences. On average, about 35% of the case volume is handled by public prosecutors.[21] In order to better understand prosecutors' position in criminal procedure, their historical roots and the changes the office has undergone must first be examined.

II. The Historical Emergence of Prosecutors

Historically, the roots of the emergence of the prosecutor's office have not been fully elucidated, and many different approaches are found. The first approach involved strengthening the power of the sovereign and disciplining the courts. For example, in Prussia in 1843, King Friedrich Wilhelm IV's dissatisfaction with the excessive uncontrolled jurisdiction of the courts was what ultimately led to the establishment of the public prosecutor's office. In this context, one can reasonably assume that the public prosecutor's office that was later introduced in Prussia in 1846 was a continuation of the *Fiscalat*, an institution representing the sovereign regarding property matters and sometimes as the guardian of the application. This is confirmed by the prosecutor's offices that have already been established in German states, such as in Hanover in 1841, in Württemberg in 1843, and in Baden in 1845. That the prosecutor's office, which was to be modeled on the revolutionary French Code of Criminal Procedure, should not only represent the interests of the sovereign soon became clear. Enacted on October 1, 1846, the Law on the Procedure of Investigations at the Berlin Court of Appeal laid the foundations for the authority and work of the public prosecutor's office that are still valid today, in particular the duty of impartiality, which relates to the duty to investigate and appeal on behalf of the accused.[22]

In the inquisitorial process of common law that had been applied in Germany until the 19th century, no need had occurred for an organized public prosecutor's office, as no fundamental distinction had been made between criminal investigation and decision-making due to the police being able to carry out investigations. An organizationally independent prosecutor's office was first established in France during the French Revolution. By dividing these functions of criminal justice into two different bodies, a degree of procedural separation of powers was able to be established. Until a few years ago, the unanimous view was that the prosecutor's office was a "child of the revolution" and an "instrument of citizen emancipation."[23] Prosecutors have had an "unstoppable power surge" in recent decades.[24] Prosecutors had previously been subject to limitations and scrutiny by judicial authorities. In the case of particularly serious crimes, the magistrate took over the investigation as an independent authority. By the early 1970s, however, the pre-trial process had come completely under prosecutors' control.[25] To this day, the public prosecutor's office is still the main actor in investigations. Interestingly, the position of the public prosecutor's office as a hierarchical office under the Ministry of Justice has not changed.[26] In other respects, this was a purely political assessment. In Germany, the fact that the Chief Prosecutor is a "political actor" who takes instructions from and is dependent on the Minister of Justice has led to some concerns, but the fact that the legal culture is well-established in German society and that the political authority does not overtly use its power of instruction has rendered these concerns futile.[27]

The judicial system in Türkiye has also been affected by Westernization since it began in the 19^{th} century.[28] The prosecutor's

[19] Allison Marston Danner, 'Prosecutorial discretion and legitimacy' (Guest Lecture Series of the Office of the Prosecutor- June 13, 2005) *American Journal of International Law, 97*(510), 510, 524.
[20] Roxin & Schünemann (n 2) § 14 Rn. 5–27. For more information, see: Schroeder & Verrel (n 2) Rn. 85–92; Billis (n 5) 228.
[21] Kühne (n 5) Rn. 131.
[22] Ibid Rn. 133.
[23] Roxin & Schünemann (n 2) 53; Claus Roxin, *Rechtsstellung und Zukunftsaufgaben der Staatsanwaltschaft* (DRiZ 1969) 985; Zafer (n 12) 3.
[24] Roxin & Schünemann (n 2) 54. A system must be established for monitoring prosecutorial impartiality. If prosecutors are turned into a superpower, this power must be monitored. [Yener Ünver & Hakan Hakeri, *Ceza Muhakemesi Hukuku* (15^{th} ed., Adalet Yayınevi 2019) 376.]
[25] Kühne (n 5) Rn.133.
[26] For legislation, see: Article 5 of the Law on Judges and Prosecutors: "The Minister of Justice has the right of supervision over Judges and Prosecutors, except for duties related to the exercise of judicial power. Judges and Prosecutors are subordinate to the Ministry of Justice in terms of their administrative duties."
[27] Zafer (n 12) 6–7.
[28] Selahattin Keyman, *Ceza Muhakemesinde (Asıl Ceza Muhakemesinde) Savcılık* (Ankara 1970) 63.

office organization in its current form was established in 1879 with the enactment of the law *Usul-ü Muhakemat-ı Cezaiye Kanunu Muvakkat*, which was practically a full translation of the French Code of Criminal Procedure. Article 20 of this law assigned prosecutors the duty to investigate and prosecute all offenses involving crime and murder.[29] The 1961 and 1982 Turkish Constitutions used the word prosecutor while adding public before it, finalizing the title as public prosecutor. Adding public in front of prosecutor was an attempt to emphasize that prosecutors work on behalf of the public and are the protectors of the public.[30] In order to determine prosecutors' position in criminal proceedings, the position of the prosecutor should also be evaluated in relation to the police.

III. Prosecutor's Position in Relation to the Police

The public prosecutor has no executive powers and is practically a head without hands. As far as the relationship between the public prosecutor's office and the police is concerned, the Code of Criminal Procedure regulates that the public prosecutor's office conducts investigations and the police only act to support these investigations.[31] In practice, investigations largely take place in the hands of the police.[32] Especially in the fight against organized crime, the police have gradually increased their preventive measures. As a result, prosecutors appear to be unaware of the choices the police make, let alone to have the power to instruct the police regarding their preventive measures.[33]

Prosecutors are authorized to request information from all authorities, to conduct any investigation directly, or to have it carried out by members of the police force. Based on these competencies, prosecutors are the masters of investigative procedures. As such, prosecutors have a general responsibility for the rule of law and the fair and orderly conduct of procedures.[34] The expansion of the police organization's field of action, together with the increasing specialization and professionalization of the police, means that the police act increasingly independently and outside the control of the prosecutor's office. The police face the investigative process before prosecutors, and therefore prosecutors are informed about investigations from police reports. According to research conducted by Blankenburg et al., prosecutors in 90% of all cases only get involved once police investigations have concluded. Furthermore, prosecutors' criminalistic training gap is so obvious that prosecutors cannot even stand on equal footing with police. The professional experience prosecutors gain through constant contact becomes important here.[35]

After explaining the transformation of the office of prosecutor throughout history and prosecutors' position in relation to the police, the study will examine the differences in terms of authority between prosecutors in the classical criminal process and prosecutors in the modern criminal process, prosecutors' discretionary power and its limits, and finally the regulations under which prosecutors use their discretionary power. This is because the discretionary power of such an important subject of criminal procedure, especially in the modern criminal process, has clearly expanded. The discussion will begin by explaining what is meant by the classical and modern criminal processes.

IV. Prosecutors in the Classical and Modern Criminal Processes

Classical criminal proceedings refers to the criminal proceedings in which a verdict is rendered after the hearing. Classical criminal proceedings differ from modern criminal proceedings first and foremost in terms of the responsibility of establishing the facts. In classical criminal proceedings, the facts are determined bindingly only at the hearing. In modern criminal proceedings, the facts are determined by the prosecutor with the aim of avoiding time wasted determining the material truths.

In the classical criminal process, trials are open to the public. Public hearings become the real "judicial theater," the public staging of law and justice.[36] The public can follow how the accused receives justice. In this context, deliberations have high communicative and symbolic importance. This public trial of crimes is captured in the following statement: "Justice must not only be done, it must also be seen being done."[37] The classical criminal process can be symbolized by a tripartite administration with a judge at the top and the prosecution and defense at either end at the bottom. With the prosecutor on one side and the accused and their criminal lawyer on the other, they face each other in court to argue about guilt and innocence. The independent judge sits above the whole process. The public prosecutor's office often sees itself as an investigative authority that leaves bringing

[29] Öztürk (n 5) 216.
[30] Nurullah Kunter, Feridun Yenisey, & Ayşe Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku* (16th ed., Beta Yayınları 2008) 173.
[31] Kühne (n 5) Rn. 134; Beulke & Swoboda (n 4) 132.
[32] Roxin & Schünemann (n 2) 61.
[33] Ibid 62.
[34] Beulke & Swoboda (n 4) 132.
[35] Kühne (n 5) Rn. 136, 138.
[36] Thomas Weigend, 'Unmittelbare Beweisaufnahme – ein Konzept für das Strafverfahren des 21. Jahrhunderts?' in: Henning Ernst Müller, Günther M. Sander, & Helena Valkova (Eds.), Festschrift für Ulrich Eisenberg zum 70. Geburtstag (München 2009) 660.
[37] *R. v. Sussex Justices, Ex parte McCarthy* [1924] 1 King's Bench Division [KB] 256, 259.

exculpatory evidence to the accused and the defense counsel. Based on the research conducted by Blankenburg et al., public prosecutors were found to act more as a party than as an independent criminal justice body and to leave this position to the court.[38]

With the increase in crime rates, the classical procedure has become inapplicable, and alternative dispute resolution methods have emerged. Thus, the authority to impose penalties has been left to prosecutors for certain cases.[39] Such an important subject of criminal procedure has an expanded discretionary power, especially in the modern criminal process, in which criminal prosecution usually ends with a decision based on the prosecutor's interpretation of the case. The main characteristic of modern criminal proceedings is the concentration of authority in the hands of the prosecutor. Thus, the essence of these short proceedings is that the accusation almost always leads directly to the verdict. Suspicion becomes a verdict. Ordinary court proceedings are now only possible on request, in the sense of "trial on demand."[40] In the modern criminal process, the public prosecutor's office is very powerful. Unlike the classical criminal process, the prosecutor is situated above and the accused below. Therefore, as little investigation as possible occurs. With the increase in the number of crimes committed, the classical procedure, which is based on the principle of compulsory public prosecution,[41] has become inapplicable, and alternative methods and simple trial procedures have emerged, some of which are based on the consent of the participants. Thus, the authority to impose a penalty is left to prosecutors and administrative authorities and is subject to the acceptance of the suspect and certain other conditions.[42]

When examining the alternative methods of dispute resolution, the idea of restorative justice lies at the heart of these. Perhaps the most serious criticism of restorative justice is that drawbacks exist in abandoning punishment. Restorative justice practices impose serious constraints on the protection of rights. For this reason, state control in restorative justice practices should not be put on the back burner.[43] The role of the state in the restorative justice process is another point of debate. The success of voluntary processes is limited only by the ability of each side to reach an agreement. Therefore, the functioning of processes that have been given so much importance is left to its course. Victim-offender reconciliation is the most common restorative justice practice. The difference in power between the victim and the perpetrator is often stated to affect the whole process. While negotiations should be conducted on the basis of equality and voluntariness, having one side be more powerful can lead to the rights of the other side being violated.[44]

Because the solutions reached at the end of alternative methods of dispute resolution do not constitute case law, different decisions may arise in similar disputes possessing the same conditions. This constitutes a drawback in terms of ensuring unity of decisions.[45] Alternative dispute resolutions may not always reassure both sides, as it has more flexible procedural rules compared to the proceedings in state courts and does not include certain institutions that can enable the merits of the dispute to be revealed.[46]

With the addition of provisions and amendments to the legislation in the modern criminal process, one must admit that prosecutors' powers to resolve criminal disputes have been greatly enhanced.[47] In exercising this discretion, prosecutors can often make compromises in an effort to fulfill their own sense of justice.[48] Although prosecutors take into account the views of other judicial subjects, prosecutors ultimately make the final decision themselves.[49] As long as prosecutors act in accordance with the law, the decisions are discretionary and generally unreviewable.[50] However, prosecutors sometimes use different criteria and reach different conclusions in similar cases.[51]

In the shortened procedure, the prosecutor's proposed decision is approved by the court, but it is actually the prosecutor's decision. Alternative dispute resolution procedures now account for more than 90% of all judgments.[52] The modern criminal process has a different purpose than the classical criminal process, a purpose that is about efficiency and procedural economy, not

[38] Kühne (n 5) Rn.138. According to Gökcen et al., although prosecutors have been erroneously argued to be unable to be impartial at the hearing and to have a bias due to the indictment prepared, prosecutors need to protect the rights of both the public and the accused during the prosecution. [Gökcen et al. (n 9) 213].

[39] Feridun Yenisey, 'Ceza Muhakemesi Süjelerinin İradelerinin Ceza Muhakemesinin Yürüyüşüne Etkisi Sorunu (Consensual Criminal Procedures and Teir Influence on Criminal Prosecutions)', *Prof. Dr. Nur Centel'e Armağan* (2013) *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 19*(2), 453, 454.

[40] Thomas Weigend, 'Why have a Trial when you can have a Bargain?' in: Antony Duff, Lindsay Farmer, Sandra Marshall, & Victor Tadros (Eds.), Judgment and Calling to Account (Hart Publishing, Oxford/Portland 2006) 208.

[41] The author briefly defines the principle of compulsory prosecution as bringing a public prosecution in the event of the commission of a crime. The author states that the compulsion principle emerged from Kant's retaliation theory and the principle of expediency, or as the author puts it, the principle of discretion emerged from Bentham's utilitarian theory [Keyman (n 28) 95].

[42] Yenisey (n 39) 454.

[43] Yağmur Temiz Gül, *Ceza Hukukunda Alternatif Uyuşmazlık Çözüm Yolları* (2^{nd} ed., Adalet Yayınları 2021) 49.

[44] Temiz Gül (n 43) 51.

[45] Cengiz Serhat Konuralp, *Alternatif Uyuşmazlık Çözüm Yolları: Tahkim* (İstanbul Üniversitesi Sosyal Bilimler Enstitüsü, İstanbul 2011) 18.

[46] Mustafa Serdar Özbek, *Alternatif Uyuşmazlık Çözümü* (Yetkin Yayınları 2009) 241.

[47] *United States v. Stanley*, 928 F2d 575, 583 (2^{nd} Cir.), cert. denied, 112 S. Ct. 141 (1991); Steve Y. Koh, 'Reestablishing the Federal Judge's Role in Sentencing' (MLA 8^{th} ed. March 1992) Yale Law Journal (HeinOnline), *101*(5), 1109, 1122.

[48] Koh (n 47) 1123.

[49] Bruce A. Green & Rebecca Roiphe, 'Can the President Control the Department of Justice?' (2018) *Alabama Law Review, 70*, 1; Bruce A. Green, 'Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry'(2019) *Dickinson Law Review, 123*(589) (Available at: https://ideas.dickinsonlaw.psu.edu/dlr/vol123/iss3/3, 596) date of access 9/21/2023.

[50] Bruce A. Green & Fred C. Zacharias, 'Prosecutorial Neutrality' (2004) *Wisconsin Law Review* 837–38.

[51] Kay L. Levine & Ronald F. Wright, 'Prosecution in 3D' (2012) *Journal of Criminal Law and Criminology, 102*, 1119, 1152–53.

[52] Thomas Hansjakob, 'Zahlen und Fakten zum Strafbefehlsverfahren' in: forumpoenale 3 (2014) 160; Marc Thommen, 'Gerechtigkeit und Wahrheit im modernen Strafprozess' in: recht (2014) 264, 274.

about staging a trial in the public eye like theater. The staging of justice is very expensive. For this reason, modern criminal trials are short judgments. Admittedly, modern criminal proceedings are in many respects inadequate to ensure the rule of law. In order for the defendants to defend themselves successfully, a significant selection of procedures is required. The aim should be for the accused not to have to choose between a short trial or a fair trial, but rather to be able to opt for a short but fair trial.[53]

In modern criminal proceedings, the search for truth has been rationalized and replaced by an autonomous system of assumption of responsibility: The accused can accept the proposed sentence and thus assume responsibility or demand a full trial. The search for objective truth and absolute truth in criminal proceedings has also been argued to be futile. "Every memory, even the most precise one, is a fiction," according to the author Urs Widmer, who supports this view.[54] Moreover, only limited time and financial resources are available to seek the truth in criminal cases. For these reasons, consensus theories of truth are arguably acceptable. But if everyone agrees that the Earth is flat, this consensus does not change the fact that the Earth is a sphere.[55]

V. Prosecutor Discretion

The prosecutor's discretionary power should be explained in order to determine its impact on the conduct of criminal proceedings. First of all, the study should note that prosecutors have freedom of speech at hearings. Prosecutors also have the freedom to appear in court and express their personal legal opinions.[56] The evaluation of evidence is a judicial procedure carried out by the public prosecutor or the court/judge in order to determine whether the evidence obtained is in accordance with the law and whether it has the ability to clarify the matter to be proved. In criminal procedure, not only the court but also the public prosecutor have the authority to evaluate the evidence.[57] On the other hand, the prosecutor is now obliged to evaluate the collected evidence, because without evaluating the evidence, the prosecutor will not be possible to relate it to the events.[58] The prosecutor's evaluation of the evidence is discretionary.

Discretion is a decision-making power granted by the legislature to administrative authorities.[59] Giving an administrative authority discretionary power in a legal provision does not mean that it can decide completely freely. Judicial discretion is always a discretion based on duty, because the power granted to the state institution represents an obligation, not a freedom.[60] Arbitrariness is the classic case of overstepping discretion. Appropriate discretion requires a legal, reasonable, and reasoned decision.[61]

When analyzing prosecutors' discretionary power from the perspective of the International Criminal Court, the Rome Statute appears as the basis. The Rome Statute contains provisions on jurisdiction, with the broad meaning of jurisdiction in the Statute including prosecutors' discretionary power. During the discussions on the draft text of the Rome Statute, some argued that prosecutors could be a weak figure subject to manipulation by states or other groups seeking to use the power of the judiciary. On the other hand, proponents of special powers for the prosecutor argued that limiting prosecutors' ability to investigate situations identified by political institutions would undermine the independence and credibility of the court. Both sides agreed that the outcome of this debate would "fundamentally affect the structure and functioning of the Court."[62] The states that negotiated the Rome Statute chose to create prosecutors with greater independence, but this independence comes at a price. Independence necessarily entails institutional autonomy and discretion. The characteristics of a prosecutor exercising discretion to prevent misconduct are set out in the Statute. Accordingly, prosecutors must be persons of "high moral character" and "highly competent and with extensive practical experience in the investigation or prosecution of criminal cases."[63]

Many states have recognized the danger of arming prosecutors with unlimited discretion. One debate occurred over the scope of prosecutorial discretion, in particular whether it should extend to the decision to initiate an investigation. Prosecutorial discretion

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53 Andreas Eicker, 'Zum Vorentwurf für eine gesamtschweizerische Strafprozessordnung – Staatsanwaltschaftliche Kompetenz-Konzentration und ihre Kompensationsmöglichkeiten im Ermittlungsverfahren' in: AJP (2003) 19; Thommen (n 52) 274; Marc Thommen, *Kurzer Prozess – fairer Prozess? Strafbefehls- und abgekürzte Verfahren zwischen Effizienz und Gerechtigkeit* (Stämpfli 2013) 259.

54 Urs Widmer, *Reise an den Rand des Universums* (Diogenes Verlag 2013) 7.

55 Edda Wesslau, *Das Konsensprinzip im Strafverfahren – Leitidee für eine Gesamtreform?* (Nomos, Baden-Baden 2002) 160; Thommen (n 52) 272.

56 Akif Yıldırım, 'Savcılık Kurumu ve Cumhuriyet Başsavcılarının Cumhuriyet Savcıları Üzerindeki Denetim ve Gözetim Yetkisi', (2013) *Adalet Dergisi, 47*, 116–117.

57 Hasan Tahsin Gökcan, 'Cumhuriyet Savcısının Delilleri Değerlendirme Yetkisi ve Yargıtay Uygulaması' (2012) *Ankara Barosu Dergisi*, 195.

58 Öztürk (n 17) 835–836.

59 Ulrich Häfelin, Georg Müller, & Felix Uhlmann, *Allgemeines Verwaltungsrecht* (5.Aufl., Schulthess Juristische Medien AG 2006) 91; Hansjörg Stadler, *Das Ermessen der Staatsanwaltschaft im abgekürzten Verfahren nach dem Entwurf des Bundesrates zu einer Schweizerischen Strafprozessordnung (E StPO)* (Masterarbeit, Klasse Forensik II 2007) 14.

60 Fritz Gygi, *Verwaltungsrecht Eine Einführung* (Bern 1986) 152; Stadler (n 59) 15.

61 Häfelin, Müller, & Uhlmann (n 59) 93; Stadler (n 59) 16.

62 Danner (n 19) 514.

63 Ibid 550. A similar provision in the Rome Statute is found in the Mecelle. The qadi mentioned in the Mecelle also assumed the duties of today's prosecutor and interrogation judge [İlber Ortaylı, 'Kadı (Osmanlı Devleti'nde Kadı)' (2001) *DİA, Türkiye Diyanet Vakfı Yayınları, 24*, 69, 72.] One can conclude from this that the prosecutor is required to be scientific, strong in discernment, wise, insightful, honest, reliable, dignified, and robust (Mecelle, Art. 1793, 1794). As a matter of fact, according to the Decision of the Second Chamber of the Council of Judges and Prosecutors (Disciplinary Penalty): "Considering that the information and documents in the investigation file regarding the action imputed to the public prosecutor were evaluated together and that the decision in question, written by the person concerned, used a language that was far from legal evaluation and analysis and that could damage the seriousness of the judiciary in the society in any way in a person who reads this decision, and that the decision in question was shared in a WhatsApp group of which the person concerned was a member at a stage when the confidentiality of the investigation was still in progress and before it was approved..."

(i.e., the power to choose between two or more permissible courses of action) plays an important role in many national criminal justice systems. Discretion involves both risks and benefits, but can also lead to discrimination. In almost every country, prosecutors should be able to use their discretion to pursue or decline certain cases in order to maintain a functioning criminal justice system.[64]

Many states whose prosecutors have considerable discretion have adopted investigative guidelines to guide this discretion and make its exercise more transparent. For example, Hong Kong's guidelines declare that its aims are to "promote fair and consistent decision-making [and] to make the prosecution process more understandable and open to the Hong Kong public." In addition, the Netherlands, Canada, the United States of America, the United Kingdom, Australia, and Belgium all have similar national guidelines.[65] Many regulations are found on the prosecutorial organization in Turkish criminal law.[66] This is a particularly important requirement in systems where the prosecutor is independent or given wide discretion. The guidelines should provide information on the factors that prosecutors are and are not to take into account when making discretionary decisions, particularly when discretion is at its zenith in relation to decisions on investigating, charging, and admissibility.[67]

Whether the public prosecutor's office is bound by the legal interpretation of high court judgments is controversial. Because the courts can rectify this situation by issuing acquittal verdicts, the public prosecutor's office is predominantly accepted to be able to indict conduct that the jurisprudence considers to be unpunishable. On the contrary, the public prosecutor's office has been argued in case law and the literature to be bound by the jurisprudence of the higher court with regard to not issuing an indictment in a case.[68] However, at later stages of the process, particularly when a prosecutor withdraws charges, the accused is acquitted, or the conviction is overturned, the public will likely have a firmer basis to question a prosecutor's initial decision to charge. In this regard, one might ask whether the decision to charge was prudent, given what prosecutors apparently had known when bringing the case.[69] Prosecutors are sometimes suspected of bias, such as when prosecutors take undeserved or unduly harsh positions. When equally guilty people are treated differently for no apparent legitimate reason, one can argue that prosecutors are relying on illegitimate considerations or are simply acting arbitrarily. Either way, inequality offends the sense of justice. Although no consensus exists on how hard or soft the sides should be treated in absolute terms, one could argue that prosecutors' standards should not vary from case to case.[70] This relates to the understanding that prosecutors should exercise powers in a proportionate manner, and this concern tends to arise most often in cases where criminal allegations appear to be excessively harsh.[71]

VI. Public Prosecutors' Decisions to Exercise Discretion and Terminate a Prosecution

Pursuant to the principle of compulsory prosecution, public prosecutors are obliged to file an indictment once the legal conditions for a public case are met. Under the principle of discretion, even if the legal conditions are met, the public prosecutor has the discretion to decide whether filing a public case is in the public's interest, and if not, a prosecutor may choose to not file an indictment.[72] Public prosecutors assess each concrete case as to whether it is in the public's interest.[73] The discretionary power to bring on a public prosecution is a consequence of the discretionary principle of public prosecution. Therefore, it constitutes an exception to the principle of compulsory prosecution. On other hand, the discretionary power to decide not to prosecute in Article 171 of the Turkish Criminal Procedure Code provides an exception to this principle in regard to certain matters,[74] and doing so must not lead to arbitrariness.[75] Pursuant to the principle of the discretionary nature of public prosecution, public prosecutors may interfere with suspects' right to an acquittal by deciding not to prosecute. Therefore, a future regulation should allow public prosecutors to take into account the interests of the suspect in this regard while exercising their discretionary power.[76]

Prosecutors have discretionary authority over three matters during the investigation phase: (1) discretion over whether the grounds for suspicion obtained during the investigation phase are "sufficient evidence of suspicion" to file a public case, (2)

64 Danner (n 19) 518.
65 Ibid 541.
66 Law No. 2802 on Judges and Prosecutors, Regulations, Circulars, Directives and Policy Decisions. For more information, see: https://hsk.gov.tr/ date of access 9/20/2023.
67 Danner (n 19) 542.
68 Kühne (n 5) Rn. 142.
69 Bruce A. Green, 'Access to Criminal Justice: Where Are the Prosecutors?' (2016) *Texas A&M Law Review, 3*, 515, 527. Available at: https://scholarship.law.tamu.edu/lawreview/vol3/iss3/4/ date of access 9/20/2023.
70 Joshua Kleinfeld, 'Two Cultures of Punishment' (2016) *Stanford Law Review, 68*(5), 933, 937.
71 'Lewis Libby Case Was a Questionable Use of Prosecutorial Discretion' (East Valley Tribune, 3/12/2007). Available at: https://www.eastvalleytribune.com/opinion/libby-case-was-a-questionable-use-of-prosecutorial-discretion/article_f3cd2ea4-5100-5672-a8b9-724701edc147.html date of access 9/20/2023; Lincoln Caplan, 'Aaron Swartz and Prosecutorial Discretion' (New York Times, 1/18/2013). Available at: https://archive.nytimes.com/takingnote.blogs.nytimes.com/2013/01/18/aaron-swartz-and-prosecutorial-discretion/ date of access 9/20/2023.
72 For explanations in terms of these concepts and comparative law, see: Bahri Öztürk, *Ceza Muhakemesi Hukukunda Koğuşturma Mecburiyeti* (Ankara 1991) 197 onward; Öztekin Tosun, 'Ceza Davasının Açılmasında Sistemler' (1969) *İHFM, 34*(1-4), 42–71; Mustafa Özen, 'Cumhuriyet Savcısı'nın Takdir Yetkisi' (2009) *Erzincan Üniversitesi Hukuk Fakültesi Dergisi (EÜHFD), 13*(3-4), 41–68.
73 Öztürk (n 72) 209.
74 Gökcan (n 57) 196.
75 Özen (n 72) 45.
76 Ibid 44.

discretion over whether filing a public case is in the public's interest, and (3) discretion over whether an element of crime is present in the incident being subject to investigation.[77] Public prosecutors' discretionary actions can be reviewed through prosecutorial proceedings and appealed to the Office of the Chief Public Prosecutor.[78] This is because the Sword of Damocles, being the prosecution case procedure, develops a preventive effect regarding the prosecutor, one which should not be underestimated, and also reduces prosecutors' insecurity in this regard.[79] This study will explain the regulations through which public prosecutors use their discretionary power and the control of their discretionary power through a comparison of the German and Turkish legislation.

The first regulation to be examined involves prosecutors' decision not to prosecute. According to Article 170(2) of the German Code of Criminal Procedure, the proceedings will be suspended if the facts do not constitute a crime in a broader sense, if there is insufficient suspicion against a particular suspect (either because the suspect is proven innocent, the crime cannot be proven to have been committed by the suspect, or the perpetrator cannot be identified), if procedural obstacles exist, or if procedural requirements are missing. The equivalent provision is Article 172 of the Turkish Criminal Procedure Code. In the event that evidence cannot be obtained that would constitute sufficient suspicion for the opening of a public case and no possibility for prosecution has been found, a decision of non-prosecution will be made. When assessing sufficient suspicion, legislators have granted discretionary power to public prosecutors, and this discretion is based on the merits of a case.

The authority of public prosecutors to evaluate evidence regarding the opening of a public prosecution is generally considered hesitant by the Court of Cassation. In this context, prosecutors' authority to evaluate the evidence should be audited during the examination made by the authority as a result of an objection against a decision of non-prosecution. However, during this review, focusing on whether the evidence obtained in relation to the concrete case objectively constitutes sufficient doubt should be sufficient.[80]

According to Article 153(1) of the German Code of Criminal Procedure, prosecutors may decide not to prosecute. This provision gives prosecutors discretionary power.[81] In addition, approval is required from the court that would be responsible for bringing the action.[82] However, if the offense does not entail a high penalty and the consequences of the offense are minor, the prosecutor may refrain from prosecuting without the court's consent.[83] The decision is made in a judgment that can conclude the hearing.[84] Article 154 of the German Code of Criminal Procedure[85] provides that the prosecution may refrain from prosecuting in the case of insignificant collateral penalties. The purpose of the provision is to ensure a simplified and accelerated resolution of the proceedings, especially in large cases.[86] The prosecutor has a wide range of action.[87] If these conditions are met, the decision not to prosecute is at the prosecutor's discretion and is not subject to judicial review pursuant to Article 154(1) of the German Code of Criminal Procedure.[88] As can be understood from the wording of the provision, only the public prosecutor is authorized

[77] Feridun Yenisey & Ayşe Nuhoğlu, *Ceza Muhakemesi Hukuku* (11^{th} ed., Seçkin 2023) 702.

[78] "Due to the fact that the Chief Public Prosecutor is elected among colleagues whose professional experience has reached a certain stage, the authority to represent the Office of the Chief Public Prosecutor, as well as the authority to supervise and control the Office of the Chief Public Prosecutor, is regulated by law, the indictment issued after the intervention of the decision of non-prosecution by the Public Prosecutors within the supervision and control authority of the Chief Public Prosecutor has been accepted by the court, In the face of the fact that the Chief Public Prosecutor, who is held responsible for the harmonious and efficient operation of the Chief Public Prosecutor's Office, intervenes in the transactions that the Chief Public Prosecutor deems erroneous before they turn into a decision, remains within the scope of supervision and control, and in the later stages, the transaction of the Chief Public Prosecutor in the concrete case is subject to judicial supervision (acceptance of the indictment). In order to fulfill the obligation of effective investigation, which is an integral part of the right to a fair trial, and to ensure the principle of legal security, the opinion of the honorable majority of the Supreme Criminal General Assembly that the Chief Public Prosecutors cannot intervene in the process that they deem erroneous in order to fulfill the obligation of effective investigation, which is an integral part of the right to a fair trial and to ensure the principle of legal security, the opinion of the Supreme Criminal General Assembly of the Supreme Criminal General Assembly of the Supreme Court of Appeals in concrete case, in accordance with Decree No. 2009/46 K, the basic principles of criminal procedure, which determines reaching the material truth as an ideal goal, the spirit of Article 144 of the Constitution, Law No. 2802, Law No. 5, Law No. 5235, and Articles 17 and 18. The opinion of the majority of the Supreme Criminal General Assembly of the Supreme Court of Cassation that the Chief Public Prosecutor cannot intervene in the actions of the Public Prosecutors in the place with which the Chief Public Prosecutor is affiliated, as this would be contrary to the spirit of Article 144 of the Constitution, Law No. 2802 No. 5, Law No. 5235, and Articles 17 and 18, the jurisprudence of the European Court of Human Rights, and would cause great loss of rights by preventing the harmonious and efficient work of the Chief Public Prosecutor's Office organization, and accordingly, the principle of legal security would be damaged. . . " (YCGK, 84/399, 6.10.2020) More information, see: 19 CD, 12980/5711, 14.6.2017.

[79] More information, see: Gerwin Moldenhauer, in *Karlsruher Kommentar zur Strafprozessordnung* (KK-StPO/Moldenhauer) (8. Aufl., C.H. Beck, 2019) § 172, Rn.1.

[80] Gökcan (n 57) 201.

[81] Herbert Diemer, in *Karlsruher Kommentar zur Strafprozessordnung* (KK-StPO/Diemer) (8. Aufl., C.H. Beck 2019) § 153 Rn.17.

[82] Bertram Schmitt, in *Meyer-Goßner/Schmitt Strafprozessordnung* (65. Aufl., C.H. Beck 2022) para. 27; Edda Weßlau & Mark Deiters, in *Systematischer Kommentar zur Strafprozessordnung* (SK-StPO) (5. Aufl., Carl Heymanns 2016) para. 50; KK-StPO/Diemer (n 81) § 153 Rn.33.

[83] KK-StPO/Diemer (n 81) § 153 Rn.20. The European Court of Human Rights does not challenge such a hypothetical assessment of guilt. (For more information, see: BVerfG NJW 1990, 2741). The focus here is largely on the purpose of the penalty. The prosecutor needs therefore to ask whether the continuation of the criminal proceedings is necessary for specific or general preventive reasons or for the payment of the debt. Here, the prosecutor is given a relatively broad scope for assessment [For more information, see: Werner Beulke, in *Die Strafprozessordnung und das Gerichtsverfassungsgesetz: Grosskommentar / Löwe-Rosenberg* (27. Aufl., De Gruyter 2022) para. 30, Rn. 31; KK-StPO/Diemer (n 81) § 153 Rn.13, 14; Schmitt (n 82) Rn. 7; Johann M.Plöd, in KMR - Kommentar zur Strafprozessordnung, (Carl Heymanns Verlag 2015) Rn. 11; Weßlau & Deiters (n 82) Rn. 19.].

[84] Schmitt (n 82) Rn. 24; Beulke (n 83) Rn. 77; KK-StPO/Diemer (n 81) § 153 Rn.37.

[85] Article 154 of the German Code of Criminal Procedure: "(1) The public prosecutor's office may refrain from prosecuting an offense in the following cases: (1) the penalty or correctional and security measure to which prosecution may lead is not of significant weight in addition to a penalty or correctional and security measure which was finally imposed on the accused for another offense or which the accused may expect for another offense, or (2) Furthermore, if a sentence for that offense cannot reasonably be expected to be imposed within a reasonable time and if the sentence or correctional and security measure that has been finally imposed on the accused or that the accused can expect for another offense appears to be sufficient to influence the offender and defend the legal system."

[86] Federal Court of Justice, May 6, 1998 – 1 StR 59/98; KK-StPO/Diemer (n 81) § 154, Rn. 1.

[87] BGH NStZ 2004, 277 (278); Plöd (n 83) para. 13; KK-StPO/Diemer (n 81) § 154, Rn. 15.

[88] KK-StPO/Diemer (n 81) § 154, Rn. 15.

to terminate the proceedings pursuant to Article 154(1) of the German Code of Criminal Procedure. The decision of the public prosecutor pursuant to Article 154(1) of the German Criminal Procedure Code also does not require the approval of the court.[89] Article 158(6) of the Turkish Criminal Procedure Code regulates the decision not to investigate, and Articles 171(1) and 172(1) of the Turkish Criminal Procedure Code regulate the decision not to prosecute. Before starting an investigation, prosecutors are to make an assessment and determine whether an investigation needs to be conducted.[90]

The Turkish Criminal Procedure Code regulates the decision not to investigate[91] and the decision not to prosecute.[92] A decision of no investigation means that the public prosecutor does not start the investigation procedures at all as a result of a preliminary assessment.[93] The German regulations have no exact equivalent to this. This Turkish regulation, which empowers prosecutors to make a new decision, can prevent people from being unnecessarily labeled as suspects and eliminate the negative effects of being labeled as a suspect.[94]

Whether the decision of non-investigation is a decision that belongs to the investigation phase or not is debatable. According to the author's opinion, a separate preliminary investigation phase has emerged. This regulation introduces a preliminary stage to the investigation phase. Prosecutors are to make an assessment before starting an investigation and determine whether the need exists for an investigation.[95] The legal remedy against this decision is the same as against the decision of non-prosecution, which has two checks: one administrative and one judicial. While the administrative review involves a review from the Chief Public Prosecutor, the judicial review involves the prosecution case (a filed objection). A decision not to prosecution without an effective investigation is recognized as a violation of the right to a fair trial according to the decisions of the European Court of Human Rights and the Constitutional Court.[96] While new evidence and a judge's decision criteria have been introduced in order to open a public case for the same act after a decision of non-prosecution has been made, no regulation exists regarding decisions not to investigate, and a regulation should be made.[97]

Another regulation granting prosecutors discretionary power involves postponing the commencement of public prosecution. Article 153a of the German Code of Criminal Procedure[98] regulates the postponement of the commencement of public proceedings (i.e., dismissal in the case of the fulfillment of obligations). The procedural solution introduced through Article 153a of the German Code of Criminal Procedure represents a compromise between full prevention and the strict prosecution of minor offenses.[99] According to Article 153a(1) of the German Code of Criminal Procedure, only the public prosecutor's office is responsible for enforcement.[100] The need for the approval of the court responsible for bringing the case remains. The decision of the court recognizing its own jurisdiction in principle only involves whether it gives its consent or not. There is no question regarding changing the conditions or instructions.[101] Article 171(3) of the Turkish Criminal Procedure Code regulates postponing the commencement of a public case. The reason why the regulation involves public prosecutors' discretionary power is that public prosecutors are to appreciate the existence of sufficient suspicion. Some of the conditions of the regulation also require the public prosecutor to reach a certain opinion. Public prosecutors are also to determine the damages to be remedied. Because

89 Beulke (n 83) Rn. 30; KK-StPO/Diemer (n 81) § 154, Rn. 16.

90 Özbek, Doğan, & Bacaksız (n 7) 158.

91 Article 158(6) of the Turkish Criminal Procedure Code: "In the event that the act subject to the denunciation and complaint is clearly understood to not constitute a crime without the need for any investigation, or if the denunciation and complaint is clearly understood to be abstract and general in nature, the decision is to be made that no need exists for an investigation. In this case, the person complained against cannot be labeled a suspect. The decision to not investigate shall be notified to the informant or complainant, if any, and an objection may be filed against this decision according to the procedure in Article 173. If the objection is accepted, the Chief Public Prosecutor's Office is to initiate the investigation procedures. The actions taken and decisions rendered pursuant to this paragraph shall be recorded in a dedicated system. These records may only be viewed by the public prosecutor, judge, or court."

92 Article 171(1) of the Turkish Criminal Procedure Code: "In case of the existence of conditions requiring the application of the provisions on effective remorse as a personal reason that removes the penalty or a personal reason for impunity, the public prosecutor may decide not to prosecute." Article 172(1) of the Turkish Criminal Procedure Code: "In cases where the public prosecutor, after completing the investigation procedures, is unable to obtain evidence that would constitute sufficient suspicion for the opening of a public case (evidence cannot be obtained despite effective investigation) or no possibility of prosecution exists, a decision of non-prosecution shall be made."

93 Gökcen, Balcı, Alşahin, & Çakır (n 9) 563.

94 Hasan Turgut, *Osmanlı'dan Günümüze Yargı Eteği Ve Hakimin Vasıfları* (Adalet Yayınevi 2019) 125.

95 Özbek, Doğan, & Bacaksız (n 7) 158.

96 AYM, 2013/6319, 16.07.2014 (Cemil Danışman Application); AYM, 2016/9528, 9.06.2020 (Rabia Nur Yazıcı & Selma Kocapiçak Application).

97 Yenisey & Nuhoğlu (n 77) 602.

98 Article 153a of the German Code of Criminal Procedure: "1.) The public prosecutor's office, with the consent of the court in charge of initiating the main proceedings and the accused, may temporarily refrain from initiating public proceedings in the event of the commission of an offense, and may also impose conditions and instructions on the accused if it is likely to eliminate public harm in criminal prosecution and the gravity of the offense does not prevent it. The conditions or instructions are in particular as follows: (1) To provide a specific service to compensate for the damage caused by the offense, (2) To pay a sum of money to a non-profit organization or the state treasury, (3) Providing other charitable services, (4) Meeting maintenance obligations in a certain amount, (5) Make serious efforts to reach a reconciliation with the aggrieved party (perpetrator-victim reconciliation) and, in doing so, make full or partial reparation or restitution for the offense, (6) Participation in a social development course, or (7) attend an advanced seminar pursuant to Section 2b, Paragraph 2, Article 2 or a driving ability seminar pursuant to Section 4a of the Road Traffic Act. The public prosecutor's office shall give the accused a deadline for the fulfillment of the conditions and instructions, which shall be a maximum of six months in all cases of criminal offenses Nos. 1-2, 3, 5 and 7 and a maximum of one year in criminal offenses Nos. 4 and 6. If the accused fulfills the conditions and instructions, the act may no longer be prosecuted. 2.) If proceedings have been instituted, the court may, with the consent of the public prosecutor and the accused, temporarily suspend the proceedings and at the same time give the accused the conditions and instructions referred to in paragraphs 1 and 2 of subsection (1). . . The decision may not be appealed. . . (3) The statute of limitations shall be suspended within the period set for the fulfillment of the conditions and instructions."

99 Hans de Wıtt, 'Anmerkungen zum Problem Ladendiebstahl' in: Armin Schoreit (Ed.), Problem Ladendiebstahl, moderner Selbstbedienungsverkauf und Kriminalität (Heidelberg 1979) 95; Schmitt (n 82) Rn. 2; KK-StPO/Diemer (n 81) § 153a, Rn.2.

100 KK-StPO/Diemer (n 81) § 153a, Rn.26.

101 Schmitt (n 82) Rn. 31; KK-StPO/Diemer (n 81) § 153a, Rn.31.

the provision says "may decide," this regulation gives public prosecutors' full discretionary power.[102] According to the author's opinion, postponing the commencement of public prosecution should be more beneficial for the suspect and society than for the public prosecution. The concept is vague and gives too much discretion to prosecutors.

Another discretionary regulation is the decision not to initiate a public prosecution. Article 153b of the German Code of Criminal Procedure[103] stipulates that a decision not to initiate a public prosecution (i.e., dismissal) may be made in the event of the possibility of avoiding punishment (i.e., a verdict of no punishment). Prosecutors are responsible for refraining from making accusations.[104] The approval of the competent court is required to initiate the main proceedings.[105] In the Turkish Code of Criminal Procedure, public prosecutors have the discretionary power to open a public case, even when sufficient suspicion has been reached in the presence of effective remorse and personal grounds for impunity. Article 171(1) of the Turkish Criminal Procedure Code is an inconvenient provision, as no criteria are stipulated on how prosecutors are to exercise their discretion. In the case of a decision of non-prosecution, the judicial remedy is unavailable. Because the prosecutor makes the decision on behalf of the Chief Prosecutor's Office, one can file an appeal with the Chief Prosecutor. Also, seeking whether it is in the public's interest is also inappropriate, as well as not taking compensation for the victim's damages into account. Pursuant to Article 34 of the Turkish Code of Criminal Procedure, judges and courts are obliged to provide their reasoning. Prosecutors should also be obliged to show justification. A decision based on discretion must be subject to a review mechanism, provided that it does not interfere with discretion, and a legal remedy must be established. To grant discretionary power is one thing, and supervising it is another.[106]

According to Ünver and Hakeri, doctrine argues that Article 171 of the Turkish Code of Criminal Procedure grants a wide, albeit limited, discretionary power, that this regulation has a quality that may lead to arbitrariness, and that some errors are found in the regulation. In the same or similar cases, a public prosecutor in one part of the country may decide not to prosecute, while another public prosecutor may issue an indictment.[107]

The last regulation the study will examine here involves the expedited procedure, which is regulated in Articles 417-420 of the German Code of Criminal Procedure. For people detained at night to be convicted the next morning at the police station is not uncommon in large cities. This "fast-track procedure" is only advisable if the decision can be made without extensive evidence gathering and evaluation.[108] According to Blocher, the main objective of the shortened procedure is to reach a final decision as quickly and easily as possible.[109] In exercising its discretion under this abbreviated procedure, the public prosecutor's office cannot favor or disadvantage defendants for unreasonable reasons. Taking a different approach to the accused in a similar/same case must be justified.[110]

The transfer of the authority to determine the punishment to public prosecutors also reveals this to not be a classical trial activity. The court is only to listen to the suspect in the presence of the defense counsel and to rule in line with the sanction determined by the public prosecutor if the conditions are met.[111] This procedure allows prosecutors and defendants to bring misdemeanor cases to a quicker conclusion based on formal agreements without an extensive investigation and trial.[112] Public prosecutors' discretionary power in these proceedings is no greater than in ordinary criminal proceedings. However, the public prosecutor's office further strengthens its function as an investigative and prosecutorial authority through the shortened procedure.[113] Therefore, the prosecutorial exercise of discretion in this procedure should be given special attention, both in theory and practice. In exercising its discretion in the abbreviated procedure, the public prosecutor's office may not favor or disadvantage the accused. However, some of the basic principles are weakened in the abbreviated procedure, such as the public prosecutor's office avoiding certain

[102] Regarding whether the public prosecutor, who has full discretionary right, can be asked for the justification of the decision, see "... although they are given the right of discretion to postpone the opening of the public case, because the possibility exists of not filing a lawsuit in case of postponement of the opening of the public case, and because the court has reached the opinion that the reason for this should be discussed in the text of the indictment ... According to the scope of the crime attributed to the suspects, it should be understood that the public prosecutor has the right of discretion to decide on the postponement of the commencement of the public case and with the issuance of the indictment, the discretion regarding this aspect should be understood as not being used in the direction of postponement, and in Article 170 of Law No. 5271, which determines the elements that must be included in the indictment. Article 170 of Law No. 5271, which determines the elements that must be included in the indictment, without considering that there is no regulation regarding the explanation or justification of why the said discretion is not used. . ." (4 CD, 19828/1191, 18.01.2021).

[103] Article 153b of the German Code of Criminal Procedure: "(1) The public prosecutor's office may, with the consent of the court charged with initiating the main proceedings, refrain from bringing a public prosecution if the conditions are met under which the court may refrain from punishing. (2) If the case has already been initiated, the court may, with the consent of the public prosecutor and the accused, terminate the proceedings until the start of the trial."

[104] Plöd (n 83) Rn. 5; von Björn Gercke, in *Gercke/Temming/Zöller Heidelberger Kommentars zur Strafprozessordnung* (HK-StPO) (7. Aufl.. C.F. Müller 2023) Rn. 5; KK-StPO/Diemer (n 81) § 153b, Rn. 5.

[105] Schmitt (n 82) Rn. 2; Plöd (n 83) Rn. 6; KK-StPO/Diemer (n 81) § 153b, Rn. 5.

[106] Ünver & Hakeri (n 24) 1324; Thommen (n 53) 95.

[107] Ünver & Hakeri (n 24) 503.

[108] Roxin & Schünemann (n 2) 513.

[109] Stadler (n 59) 1.

[110] Ibid 19.

[111] Gülsün A. Aygörmez Uğurlubay, Nuran Haydar, & Mehmet Korkmaz, 'Serî Muhakeme Usûlüne İlişkin Sorunlar' (2019) *ASBÜ Hukuk Fakültesi Dergisi, 2*, 255, 270; Batuhan Baytaz, 'Seri Muhakeme Usulü' (2020) *Ceza Hukuku ve Kriminoloji Dergisi-Journal of Penal Law and Criminology, 8*(2), 227, 230.

[112] Stadler (n 59) 1; Thommen (n 53) 64.

[113] Ibid 2.

investigative procedures as a concession to a suspect who has confessed, avoiding elucidating individual and secondary areas of the crime, or exercising discretion in favor of the suspect in the indictment.[114]

The serial trial procedure is regulated by Law No. 7188 (dated 10/17/2019) under Article 250 of the Turkish Criminal Procedure Code as a special procedure to be implemented as of January 1, 2020. Article 9 of the Constitution states that judicial power shall be exercised by independent and impartial courts on behalf of the Turkish Nation, whereas the serial procedure has public prosecutors determine suspects' punishments like a judge. Unlike classical criminal procedure, no hearing occurs, nor any face-to-face trial with direct contact with the evidence.[115] The fact that the court is bound by the determination of the public prosecutor as to the type and amount of the sentence to be imposed is unfavorable in terms of the principle of free evaluation of evidence.[116] In this context, the judge has no discretionary power, as judges cannot examine a case's merits as they could in classical prosecution.[117] In this sense, having a judge arrive at a conscientious opinion by evaluating the evidence discussed before the judge in accordance with Article 217 of the Turkish Criminal Procedure Code is no longer possible. The ability of the judge to form an opinion according to the available evidence in the file is a regulation that was introduced after the annulment decision of the Constitutional Court.[118] Although the regulation does not provide the opportunity to arrive at a satisfied conscience, it does provide the opportunity to make a decision according to a limited opinion on file. The regulations states that the request letter is to be returned if the judge concludes that the necessary conditions have not been met or that a security measure appropriate to the nature of the proposed sentence has not been specified. The judge is given discretionary power in this regard and may change the sanction/punishment to a limited extent, the limit being that the change should not be more severe than the sanction specified in the request letter. If the judge is of the opinion that further investigation is necessary to reach the material truth, the request should be rejected and sent to the Chief Public Prosecutor's Office, because that office has the authority to expand an investigation.

CONCLUSION

In a speech to federal prosecutors, Supreme Court Justice and Attorney General Robert Jackson acknowledged the enormous power prosecutors have and the possibility of doing great harm by abusing it. The proposed solution to this problem was, in essence, to have prosecutors be of good character.[119] It was an important speech but an inadequate solution. Alafair Burke has argued that prosecutors should adopt a cautious agnosticism about the guilt of defendants, and Eric Fish has recently suggested that prosecutors should adopt an attitude more akin to that of judges in investigative legal systems.[120] Some legal scholars have suggested that prosecutors should develop a jurisprudence on prosecutorial discretion, essentially in the style of common law: Articulating the reasons for certain decisions, identifying the principles on which decisions are based and on which their decisions are exemplary, and using previous decisions as examples can set a precedent for future decision-making processes. In addition,

114 Thommen (n 53) 254.

115 Mustafa Ruhan Erdem & Candide Şentürk, 'Ceza Muhakemesi Hukukunda Yeni Bir Kurum Olarak Seri Muhakeme Yöntemi (CMK m.250)' (2019) *CHD, 14*(41), 573, 574.

116 Erdem & Şentürk (n 115) 583.

117 Aygörmez Uğurlubay, Haydar, & Korkmaz (n 111) 272.

118 ". . . in line with the sanction specified in the request. . . " in the first sentence of Paragraph (9) of Article 250 of the Law Examination of para. 44: Within the framework of these explanations, the fact that the court does not have the opportunity to evaluate the merits of the file and intervene when necessary by being bound only by the sanction determined by the public prosecutor in the request limits the judge's activity, which is directly related to the exercise of judicial power, to reach the material truth by evaluating the evidence according to the conscience in accordance with the Constitution, the code and the law, and ultimately to render a final judgment. In this respect, the rule is contrary to the principles of the exercise of judicial power by independent and impartial courts and the judgment of the judge according to conscience as set out in Articles 9, 138, and 140 of the Constitution.
Para. 54: In light of the foregoing, it cannot be argued that a person's guilt has been established in real terms according to the decision rendered by the court whose jurisdiction is restricted in violation of Articles 9, 138 and 140 of the Constitution (cf. §§ 43, 44) by imposing the obligation to render a verdict in line with the sanction specified in the request under the impugned rule. On the other hand, the restriction of the court's power to evaluate the conviction of the offense, especially within the framework of conscience, with the phrase ". . . in line with the sanction determined in the request. . . " in the rule subject to objection, eliminates the possibility of reaching the material truth by eliminating sufficient doubt in the trial. Therefore, in the summary procedure, a person may be deemed guilty before guilt is established by the court due to the decision made by the court in line with the sanction determined in the request. In this respect, the phrase ". . . in line with the sanction determined in the request. . . " in the rule has the nature of being able to damage the presumption of innocence.
Para. 9: It was unanimously decided that the phrase "...in line with the sanction determined in the request..." in the first sentence is unconstitutional in terms of subparagraph (7) of paragraph (a) of subparagraph (1) and is CANCELED.
REASONED JUSTIFICATION AGAINST (Hasan Tahsin GÖKCAN)
Para. 7: According to this procedure in the law, the duty of the court remains a notarial function. The court is understood to have no authority to evaluate the conviction within the scope of the evidence available in the file, nor to determine that the act charged is not defined as a crime in the law, nor to change the individualization of the punishment in the sentence established in the prosecutor's request if it does not deem it appropriate, as in the examples seen in comparative law.
Para. 10: The majority of the Court has decided to annul the phrase "in line with the sanction determined in the request" in the paragraph. The majority justification does not agree with the view that the unconstitutionality of the rule will disappear with the annulment of the phrase in question.
Para. 11: In accordance with the opinion, despite the annulled phrase, it is not possible for the court to rule on matters that it cannot control. In fact, for those who interpret otherwise, the annulment has created a new area of debate and uncertainty regarding the scope of the provision to be established by the court. In this case, the main justifications put forward above for the unconstitutionality of the summary procedure are also valid for the remaining part of paragraph 9. For this reason, it would be appropriate to take into account the mentioned issues in the amendment of the law that may be made after the annulment.
In conclusion, since the unconstitutionality of the simple procedure in the rule under review cannot be eliminated by annulling the phrase in paragraph 9, all of this paragraph should be annulled." (AYM, 35/26, 31.03.2021.)

119 Green (n 49) 618.

120 For a general overview, see: Alafair S. Burke, 'Prosecutorial Agnosticism' (2010) *Ohio State Journal of Criminal Law, 8*, 79; Eric S. Fish, 'Against Adversary Prosecution' (2018) Iowa Law Review, 103, 1419, 1451.

prosecutors should make some difficult decisions collectively by explaining among themselves the facts and the reasons for their decisions. Other legal scholars have even focused on public accountability mechanisms, with some having suggested expanding the judicial review of prosecutors' discretionary decisions or disciplining them.[121]

Prosecutors' influence regarding criminal procedure is likely to increase. Society does not want to be under the heavy burden of the classical trial process and demands that trials be concluded in a short time. When considering judges' workload, having some judicial powers be transferred to prosecutors, especially regarding minor crimes, is inevitable. In this regard, the task should not be how to eliminate prosecutors' powers but how to ensure or improve oversight and legal security. In Germany, the practice seems to be to submit prosecutors' decisions for court approval. In light of all these discussions, prosecutors should be noted as needing to provide justification for their decisions, having them either submit their decisions to the court for approval or expand the mechanisms of supervision.

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