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## CONTENTS / İÇİNDEKİLER

Dear Readers,

We are pleased to present you with the new issue of the Journal of Criminal Law and Criminology (JPLC) in these difficult days, when we are struggling with a global epidemic that affects the whole world and when many activities are almost at a standstill. During this extraordinary period, when we have had to live with certain measures due to Covid-19, we have continued our work diligently in order not to disrupt our scientific activities. In this context, we carried out our planned event, 'Turkish Criminal Law Days', in the form of an online webinar on 31 May-1 June 2020. Marking the anniversary of Turkish Criminal Law Reform, this event has been held annually every June since 2005. In addition to many participants from Turkey, academics from Germany, Switzerland, and Hungary also had the opportunity to participate in the event and we are proud to inform you that it proved to be very efficient and successful in accordance with the feedback that came in during and after the program.

Hereby, the 2020 edition of the annual Law on the Bosphorus International Summer School, will take place on a digital platform. Responding to the current global crisis, this year, the Summer School will adopt as an over-arching theme, Human Rights under (the COVID19 Pandemic). Following its usual format, the Summer School will explore Human Rights Law from the perspective of various legal domains, this year exploring the implications of the current pandemic on Human Rights concerns in diverse contexts, such as public health, economic risk, education, privacy, freedom of expression and assembly, general access to justice, public and private policy performance and, in keeping with the permanent key focus of the Summer School, Criminal Justice.

In this way, in the name of the Criminal Law and Criminology Research and Application Center, which hosts many other scientific activities organized in national and international areas, we bring you a number of important works through the Journal of Criminal Law and Criminology, which we publish in two issues each year, both in print and online, in open access. In this issue of our journal, which has been scanned both in TUBITAK-ULAKBIM TR Index and in the Web of Science Core Collection, Emerging Sources Citation Index (ESCI), an important index in the national and international field, we present to all interested parties articles that have been carefully selected from among the writings of academicians who have been working in the national and international field, and which reached their final status after being evaluated by double-blind review.

This issue of our journal commences with Galma Akdeniz's article in which she examines what determines the weight of a crime based on the idea of classification of crimes. In this context, the results of the tests and statistical analyses carried out using Warr's crime weight model revealed the findings of perceptions about the weight of different types of crime. While it is a Criminology study, it is also a study that should be considered in terms of material criminal law, especially based on the purpose of punishment.

Next, Liane Wörner and Nicolai Preetz, in their joint paper, discuss the draft German Darknet-Penal Code and give their future perspectives on this issue. They also mention some crimes committed in darknet and discuss criminal responsibility for crimes committed in this way. In Germany, the background of the legislator's attempts to determine whether the Criminal Code should be adapted to this situation because of crimes that have begun to be digitized has also been debated. It is a pleasure to publish an article on this subject, which is of great importance in today's world where digitalization is increasing.

Víctor Gómez Martín's article deals with the criminal responsibility of Compliance Officer in the light of several important decisions. In this context, the article provides an interesting perspective on Compliance, which does not have an exact equivalent in Turkish law and provides the reader with information on this issue. Thanks to this article published in our issue, we hope that the issue of Compliance, which is an interdisciplinary issue, will be discussed in more detail in our country.

Gökhan Güneysu has produced a unique and comprehensive study on the relationship between politics and criminal law in which he also reflects on the historical nature of International Criminal Law, partially based on characteristics of the Henry Wirz trial conducted in the aftermath of the American Civil War. In this judgement, where important decisions were made in terms of international law and post-war trials, there are many issues that need to be considered regarding the principles of criminal law. The article, which draws attention to this phenomenon, also carries importance due to providing an assessment point for similar judgements in the international arena.

Raquel Borges' article discusses the regulations adopted in EU law for the protection of victims of gender-based violence and European judicial cooperation. Furthermore, the article emphasizes the importance of judicial cooperation between the European Union countries in the implementation of protection measures. In this context, based on the example of protection measures, the importance of mutual recognition between the member states of the European Union, which have different legal systems, has been demonstrated.

In the qualitative research study written by Ayşe Dolunay Sarıca and Umut Haydar Coşkun, use of Forensic Interview Rooms in sexual abuse cases were evaluated within the framework of the opinions of judges, lawyers, Family Court specialists and victims of these crimes. Taking preventive and supportive measures regarding victims of sexual abuse is currently considered as an important public service. Accordingly, since global practices have recently taken their place in the Turkish Judicial System, it gives us great pride that such a study has been made in terms of their implementation in Turkey.

Gülen Soyaslan, the author of the last article in this issue, examines the reasons for limiting the rights of the suspect in the context of terrorism offenses by giving examples from comparative law. In addition, in the article which can be described as a comparative criminal procedure law study, the author makes some suggestions regarding this issue in terms of Turkish law. This article, which also contains the international human rights dimension, will be able to guide readers in the correct implementation of the regulations in the legislation regarding the issue of taking statements in terrorism crimes.

Hoping that this issue provides a valuable contribution and benefit to our readers, we would like to thank our respectable writers who honored our journal with their works, our respectable reviewers who made a valuable contribution with their views, and everyone else who played a part in the preparation of this issue.

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# What Makes a Crime Serious? Testing Warr's Model of Offence Seriousness

## *Bir Suçu Ağır Yapan Nedir? Warr'un Suç Ağırlığı Modelinin Bir Testi*

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**ABSTRACT**

Warr (1989) proposed that the perceptions of seriousness of different criminal offences are a function of perceptions of harmfulness caused by a crime (consequences of the crime), and perceived wrongfulness of a crime (normative evaluations regarding the crime). The study reported in this paper tested this model and examined the perceptions of seriousness of different offences in a sample of university students in Turkey. It was found that the degree of consensus regarding offence seriousness was much higher for offences judged as more serious. It was further found, when using wrongfulness and harmfulness assessments, that offences clustered into three larger groups: offences that present threat/risk of physical harm/death, property offences, and "minor" offences. Further, Warr's model was tested on both the offence and the individual level of analysis. The findings suggest that the model indeed holds, however relative strength of harmfulness and wrongfulness, as predictors of crime seriousness, are different in Turkey, compared to findings from the USA and Westernest European countries. On an individual level, it was found that harmfulness was a stronger predictor than wrongfulness in a much larger number of offences, and that on the level of the offence, harmfulness was as strong a predictor of seriousness as wrongfulness.

**Keywords:** Crime seriousness, criminal victimization, norm violation, offences, violence perceptions

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## 1. Introduction

Classification of crime by seriousness is fundamental to how criminal policy, and criminal law as its tool, is constructed today. The just desserts and the retributive approaches to criminal sanctions require longer sentences, due to proportionality principle, for more serious crimes. Such crimes are considered to present a more serious threat to public safety and to cause greater harm to the society and therefore are seen as needing more urgent and extensive intervention when it comes to prevention and policy (Miethe, 1982; Rose & Prell, 1955; Rossi, Waite, Bose, & Berk, 1974; Cullen, Link, Travis, & Wozniak, 1985).

Proportionality of punishment to the crime is considered one of the fundamental principles of penal law in Turkey. This principle has been embodied into the law, with Art. 3(1) of the Turkish Criminal Code which states that "The offender is to be given a sentence […] that is proportionate to the seriousness of the offences committed". The Turkish Criminal Code specifies a range of possible sentences for each offence. This determines a starting point for calculating the sentence in any particular case, with different factors, identified in the Criminal Code in Articles 61-63, being used in calculating the sentence on case-by-case basis. Consequently, while the proportionality is far from being the sole determinant of the sentencing decisions in Turkish criminal justice system, it can be concluded that the principle of proportionality utilizing offence seriousness is a basic pillar of the Turkish penal law's punitive structure.[1]

However, how exactly sentence ranges specified in the Turkish Criminal Code were determined, or how one can be sure that they are actually proportionate to the seriousness of the offence, is not obvious. Even further, what "seriousness" is and what determines it is unclear. It is often presumed that the punishments prescribed in the penal code are in fact proportionate to the seriousness of crimes, and that in individual instances the judges are able to determine what exact sentence is proportional to the seriousness of crime in that particular instance. However, when the Turkish Criminal Code was written and adopted, there was no real discussion regarding this issue, in either the political or academic realm. In other words, what crimes are more or less serious, and therefore which crimes deserve more or less serious punishment is not based on any particular systematic analysis, other than perhaps legal precedent, tradition, and what appears to be common sense. But, is there really a "common" sense regarding crime

1 See Üzülmez (2006) and Taneri (2006) for discussion of this topic.

seriousness, reflected as general agreement regarding seriousness levels of different crimes? This question of how to quantify the seriousness of crime, along with the question of which characteristics of an offence make it more or less serious, is a broad subject addressed by the research discussed in this paper.

The proportionality of punishment is not the only reason why understanding and ability to measure (and therefore quantify) seriousness is important. Another area where the ability to quantify the seriousness of offences would be of great use is the identification of crime trends. Crime trends are often identified by looking at frequencies of different offenses (usually a subset of so called "index crimes", such as burglary, robbery, theft, assault, sexual assault, etc.), but the fact that not all crimes are "equal" in terms of their individual contribution to the size of the safety problem presents an issue: Crimes that are perceived as more serious contribute more to our perception of the extent of the crime problem. Hence, a large number of less serious crimes may be perceived as less of a problem than a smaller number of crimes that are perceived as more serious. Developing a way to quantify the contribution of each type of offense to the crime problem in a way that is more sophisticated than the mere frequency count, would allow governments to follow and track the size of crime problem in greater detail (Burton, Finn, Livingston, Scully, Bales, & Padgett, 2004; Kwan, Ip, & Kwan, 2000; Sebba, 1980). Hence, for example, a trend that involves a drop in homicide numbers accompanied by an identical increase in the number of simple thefts would not reflect as a change if measured by simple frequencies. However, if one was to quantify the seriousness of offences, then the trend could reflect this quantification, thus detecting what in fact could be an increase in the size of a crime problem. While some research results suggest that such an approach to measuring crime trends may not be particularly useful, Stylianou has argued that studying how increases in perceived seriousness of particular offences contribute to the public's overall assessments of crime problem can be of great use (2003, p. 49).

One of the first attempts to define and measure crime seriousness was by Sellin and Wolfgang (1964). Since, criminologists have worked to further improve their method, based on the framework that defines the issue as a question of individual judgment (Carlson & Williams, 1993; Fishman, Kraus, & Cohen, 1986; O'Connell & Wheelan, 1996). Over time, in criminological research the idea that *offence seriousness* is not an intrinsic or objective quality of the criminal offence itself, but rather a reflection of a *judgment* regarding crime by regular citizens has become an accepted norm. Which offence is more and which is less serious, therefore, can only be quantified by asking

common citizens to rate, rank, or compare different offenses by how "serious" they judge them to be. From this point, the research has developed asking two distinct questions: 1) what characteristics of an offence lead it to be perceived as more/less serious; 2) what is behind individual variability in offence seriousness assessment.

Two main issues that research had focused on are, on one hand, the degree of consensus regarding crime seriousness judgments both within societies, as well as cross-culturally (Lesieur & Lehman, 1975; Cullen, Link, & Polanzi, 1982; Parton, Hansel, & Stratton, 1991; Levi & Jones, 1985; Fishman, Kraus, & Cohen, 1986; Kwan & Kwan, 2000; Herzog & Einat, 2016). While research shows that there is a substantive degree of consensus regarding the seriousness of the most and the least serious crimes, there is somewhat less agreement when it comes to crimes which fall in the midrange (Cullen, Link, Travis, & Wozniak, 1985). Large research projects, such as that conducted by the U.S. Bureau of Justice Statistics in 1985, which covered over 200 different offenses and included 50.000 participants have attempted to address this issue (Wolfgang, Figlio, Tracy, & Singer, 1985). Long rank list of different crimes by seriousness have been generated, and index values (the seriousness scores) resulting have in fact been put into use in some jurisdictions as a tool of crime measurement or trend quantification (Burton et al., 2004). Methodological studies on the other hand have explored different methods of developing crime seriousness ranking or scores (index values), in an attempt to develop a more robust tool for this type of research.

It should be noted that the criminological literature appears to have taken the concept of crime seriousness at its face value, and there has been little focus on deconstructions of the construct itself (Stylianou, 2003; Walker, 1978). For example, Rossi, Waite, Bose and Berk (1974, p.231) admit to neither specifying what they mean by seriousness, nor asking study participants what they understand by the term *seriousness*. Evans and Scott (1984) asked participants to assign penalties, which were assessed by their severity, to offences, thereby defining offence seriousness through punishment perceived as deserved. A similar approach was used by Skovron, Scott and Rao (1987), in a comparative study of crime seriousness in the United States, India and Kuwait.

One of the first more structured attempts to understand what seriousness assessments entails was by Fishman et al. (1986). In their study they had found that personal injury and criminal intent were the two components of seriousness assessments, accounting for 78% of variance in seriousness scores. They had also established that these two dimensions were independent (not correlated), while both were separately positively

correlated with seriousness, further supporting their argument that seriousness is a two-dimensional construct.

Warr (1989) proposed that judgments of crime seriousness are a combination of harmfulness and wrongfulness judgements. His findings, however, suggested that the degree to which harmfulness and wrongfulness contributed to the perceived crime seriousness varied by types of offence. In particular, he found that for violent offences, harmfulness was a stronger predictor of perceived seriousness of the crime, while for property offences, wrongfulness was the stronger predictor. O'Connell and Whelan (1996) have discussed seriousness assessments in terms of "badness" and "individual impact" dimensions. They had found that "badness" accounted for 42,3% while "individual impact" for 10,4% of the variance in seriousness assessments.

These research findings indicate that perceptions of crime seriousness are framed by what can be summarized as two dimensions: The consequences of the act, and the moral wrongfulness of the act, which also is the basic premise of Warr's model. In other words, Warr conceptualized crime seriousness as a reflection of both normative evaluations regarding moral gravity of the offence, and consequential characteristics of a crime (factual assessment of consequences for the victim).

Empirical tests of this two-dimensional model have provided considerable empirical support (O'Connell & Wheelan, 1996; Rosenmerkel, 2001; Alter, Kernochan, & Darley, 2007; Fishman, Kraus & Cohen, 1986; Adriaenssen, Paoli, Karstedt, Visschers, Greenfield, & Pleysier, 2018), allowing it to become the dominant way of conceptualizing crime seriousness. And yet even the original study by Warr had reported that for some groups, and for some offences, the two-dimensional model may not be a good fit. For example, religiosity was found to be associated with less differentiation in wrongfulness assessments, meaning that for those for whom moral values are strongly set by religion crime seriousness may be a one-dimensional concept, defined primarily by harmfulness (Warr, 1989). Findings also suggest that for some offences (such as common street crimes) seriousness is closely associated with wrongfulness, while for others (such as white collar offenses) it is closely associated with harmfulness (Rosenmerkel, 2001), suggesting that the construct of seriousness may rely on different set of evaluations for different types of offenses. In fact, a number of studies (Adriaenssen et al., 2018; Alter et al., 2007; O'Connell & Wheelan, 1996) have found wrongfulness to be a stronger predictor of offence seriousness, concluding that consequentialism is the less dominant approach to assessing the seriousness of crime.

When it comes to the degree to which there is an agreement among individuals and groups regarding how serious different offences are, studies indicate that there is a rather strong consensus regarding seriousness of offences both within as well as across cultures (Stylianou, 2003). Whether the same level of agreement can be found for judgments of harmfulness and wrongfulness, and their relative contribution to the perceived seriousness, has not been tested as extensively in a cross-cultural context. So far, studies testing Warr's model were conducted in the USA (Warr, 1989; Rosenmerkel, 2001), Ireland (O'Connell & Whelan, 1996), and Belgium (Adrianssen, Paoli, Karstedt, Visschers, Greenfield, & Pleysier, 2018), and the common result in all these studies is that overall perceived wrongfulness is a stronger predictor of the offence seriousness than harmfulness is. In a study that explored the relationship between harmfulness and wrongfulness of an offense and proposed sentence severity (Alter, Kernochan, & Darley, 2007) it was similarly found that wrongfulness predicted severity of a "deserved" sentence better than harmfulness. However, results also suggest that dominance of wrongfulness as predictor of perceived crime seriousness is not absolute and varies by the type of offence. Thus for example, Warr found wrongfulness to be the sole predictor of crime seriousness for property related offences, while harmfulness was twice as strong a predictor as wrongfulness for offences that are violent in nature or present a risk to life (1989, p. 809), and Rosenmerkel found that for white collar crimes harmfulness was a stronger predictor of seriousness assessments (2001, p. 322). In study by Andrianssen et al. (2018), while for different offences the predictive strength of wrongfulness and harmfulness was different from offence to offence, for none of the offences was harmfulness a stronger predictor than wrongfulness (2018, p. 16-17).

The purpose of this study is to contribute to the discussion of crime seriousness from a cross-cultural viewpoint, by studying the issue with a Turkish sample. Consensus regarding crime seriousness has already been established in a cross-cultural setting (Stylianou, 2003), including in majority Muslim societies (Skovros, Scott, & Rao, 1987), which suggests that there is a general agreement regarding which crimes are perceived as more and which as less serious across different societies and cultures. Evans and Scott (1984), however, also found that what they labeled as "moral offences" to be perceived as more serious in a Kuwait sample compared to the sample from the USA. This outcome, however, was concluded to be the function of religious fundamentalism, rather than cultural values or the religion per se, thus not so much cultural difference, as a matter on individual variability related to the degree of religiousness. While Curry (1996) had found that conservative religious beliefs were

associated with less discrimination regarding wrongfulness, Adriaenssen et al. (2019) found that conservatism was associated with perceiving offences as more serious, while the similar effect was not as consistent for religiosity. These findings suggest that examinations of the Warr's model in different cultural settings might lead to findings that suggests that the model is not in fact universal, but is rather shaped by religious beliefs, degree of conservatism of the population, and other cultural and social variables which could potentially vary from country to country, culture to culture. So far Warr's model of offence seriousness has been tested only in a small number of cultures (USA, Ireland, and Belgium-Flanders) that were not that dissimilar from one another, and not at all in a majority Muslim society yet. Hence the goal of this study is to provide results from yet another culture regarding the degree of consensus regarding perceptions of the seriousness of crime, and to test Warr's model of crime seriousness in a different cultural setting. In particular, the consensus regarding crime seriousness, and wrongfulness and harmfulness perceptions were studied, as well as whether the wrongfulness is the stronger predictor of crime seriousness assessments, as has been found in studies conducted so far.

## 2. Method

Items used in the Warr's 1989 study were translated to Turkish by two translators independently. Translations were then compared, and problematic items were reviewed and consolidated. The final version of the translation of the items is in Annex I.

Students registered at a privately-owned university in Istanbul were informed via BlackBoard announcement page of a possibility to participate in the study, during the Spring semester of 2019. Participation was voluntary, and while some were offered course credit in exchange for participation, some were not. In order to participate students needed to click on a link, that led them to an on-line questionnaire, at their own time.

In the on-line questionnaire, a short introduction to the study and the consent form were followed by questions related to age, gender, field and year of study. Following these questions, the same procedure was followed for the three stages of the survey, each asking participants to assess listed offences based on a different criterion: seriousness, wrongfulness, and finally harmfulness.

First, the participants were provided with an explanation of the task. Instruction were very similar to those used in Warr's study but adapted for on-line modality of the questionnaire. The instruction text can be found in Annex II. Following this instruction,

on the next page a multiple-choice question was asking the participant to confirm the criteria that they are asked to use when assessing the offences (this question is presented in Annex III). If the answer provided was wrong, a page popped up informing the participant that their answer was wrong, and restating again the instruction (these additional instructions can be seen in Annex IV).[2] This was followed by a page that listed all offences at the same time, and the participants were able to click on a value 0-10 for each offence. While the order of items was the same as that used in the Warr study, participants were able to see all offences at the same time, and choose values in any order they want, and also change their choices, before submitting their answers. This procedure was followed for each of the three assessment criteria, and the same order of assessment was used for all participants: First seriousness, followed by wrongfulness, and finally harmfulness. Data obtained were downloaded and analyzed using SPSS software.

Original items 7, 8, 14, 15, 17, 20, 22, and 28 refer to an identity of the offender (a teenager, a father, a parent, etc.), while other items do not. Translation into Turkish makes this difference in item structure even more apparent, as grammatical structure of those items is different. In order to test whether providing *some* information regarding the identity of the offender has an influence on the assessments of the offences, an alternative version of the questionnaire was developed as well, in which offender characteristics were removed all together from the items. Those alternative versions can be seen in the Table 1. Each participant only got one version of the items.

**Table 1. Alternative version of the items, in English and in Turkish**

| Original Item No | Adapted offence description | Turkish translation |
|---|---|---|
| 7 | Hitting an old woman in the street | Sokakta yaşlı bir kadına vurmak |
| 8 | Sexually abusing own teenage daughter | Kızını cinsel olarak istismar etmek |
| 14 | Overcharging $60 on auto repairs | Oto tamiri faturasını 600 TL değerinde şişirmek |
| 15 | Beating own child with fists | Çocuğunu yumruklayarak dövmek |
| 17 | Beating up a classmate in highschool | Lisede sınıf arkadaşını dövmek |
| 20 | Running hands over a woman on a bus | Kadını otobüste ellerle taciz etmek |
| 22 | Hitting one's wife during an argument | Tartışma sırasında karına vurmak |
| 28 | Forcing one's girlfriend into sex | Kız arkadaşını cinsel ilişkiye zorlamak |

2 Less than 6% of participants answered any of those three questions wrong, indicating that participants were paying attention to the instructions and were aware which criteria they were expected to use in each step when assessing offences.

## 3. Participants

149 participants took the original survey, while 161 participant took the survey with alternative items, totaling 310 participants. It took them on average 12 minutes to complete the survey. A total of 258 participants provided answers to all the questions (items) in the survey. Average age was 22,03 (SD=3,58), 68,7% were female, and 67,3% of students were in law programs (undergraduate or graduate). Participants were not asked to provide information regarding their religious beliefs. However, according to findings from World Values Survey, 99% of individuals in Turkey self-identify as Muslim (question v144) and 83,5% identify as "religious person" (question v147) (Inglehart, Haerpfer, Moreno, Welzel, Kizilova, Diez-Medrano, Lagos, Norris, Ponarin & Puranen et al., 2014), meaning that it is safe to assume that the sample in this study was predominantly Muslim.

## 4. Results

### 4.1. Assessing Alternative Versions of Items

In order to test whether the wordings used in the original and the alternative versions of the items resulted in differences in assessments, independent sample T-test was applied to individual items, for all three assessment criteria separately. When seriousness assessments were compared, significant difference between means was found only for item 17 (original item X = 6,91; SD = 2,77; alternative item X = 4,58; SD = 2,86; t (308) = -7,89, p < 0,000). For wrongfulness assessments, the results were similar, with item 17 being the only one with statistical significant difference between the means of the two versions of the item (original item X = 8,13; SD = 2,24; alternative item X = 6,37; SD = 3,32; t (275) = -5,06, p < 0,000). For harmfulness assessments, in addition to item 17 (original item X = 7,98; SD = 2,44; alternative item X = 5,96; SD = 3,18; t (256) = -5,69, p<0,000), a statistically significant difference between the means of the two versions of the item was found for the item 28 as well (original item X = 8,84; SD = 1,94; alternative item X = 9,26; SD = 1,44; t (256) = 2,00, p < 0,05). Due to the high number of the T tests performed, it was assessed that the difference between means related to harmfulness assessments for the item 28 was likely due to chance. Since the difference between assessment means for item 17 was consistent for all three types of assessment, this item was excluded from further analysis, while assessments for other items were combined into a single sample, which was used for further analysis.

### 4.2. Offence as Unit of Analysis

Figure 1 shows means seriousness assessments from this study for along with the means from Warr's 1989 study, for comparison purposes[3]. For most offences, mean seriousness assessments were similar, and the means in the two studies were highly correlated (Pearson's $r = 0,94$; $p < 0,001$). Items in which the difference between the means is more substantial are in marked in the chart.

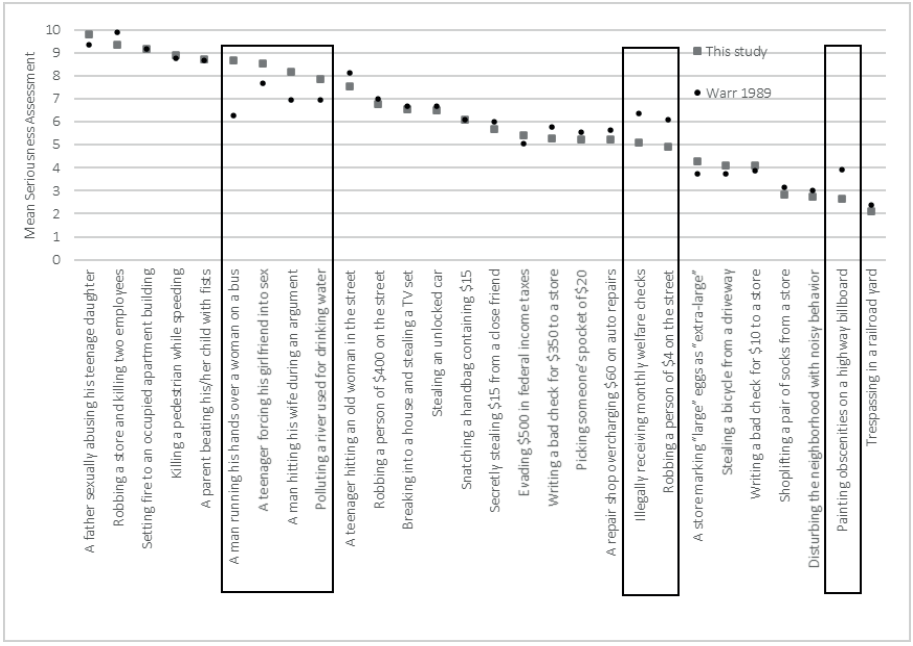


**Figure 1. Mean seriousness assessments in this and Warr's (1989) study**

Figure 2 shows means and standard deviations for seriousness, wrongfulness, and harmfulness assessments. Offences that involve violence and/or threat to life and bodily harm have been assessed as the most serious/wrongful/hurtful, followed by offences related to different types of theft and other property damage, and finally followed by what can be called public order offences and minor property related crimes. With the decrease in the seriousness assessment, the gap between the assessment of seriousness and wrongfulness increases.

3 Items for which monetary value was different in the Turkish version are not shown.

This chart demonstrates an inverse relationship between the means of perceived seriousness, wrongfulness, and harmfulness of offences, and the standard deviations, which are an indicator of agreement/consensus (Miethe, 1982). This suggests a high level of agreement when it comes to offences assessed as more serious, and much less agreement when it comes to offences that are assessed as less serious. As the perceived seriousness, harmfulness, or wrongfulness goes down, the level of consensus decreases, which is reflected in increased standard deviation values. In fact when means were correlated with standard deviations, for all three types of assessment the correlation was found to be statistically significant and negative (for seriousness Pearson's $r = -0,77$, $p < 0,01$; for wrongfulness Pearson's $r = -0,92$, $p < 0,01$; for harmfulness Pearson's $r = -0,84$; $p < 0,01$).

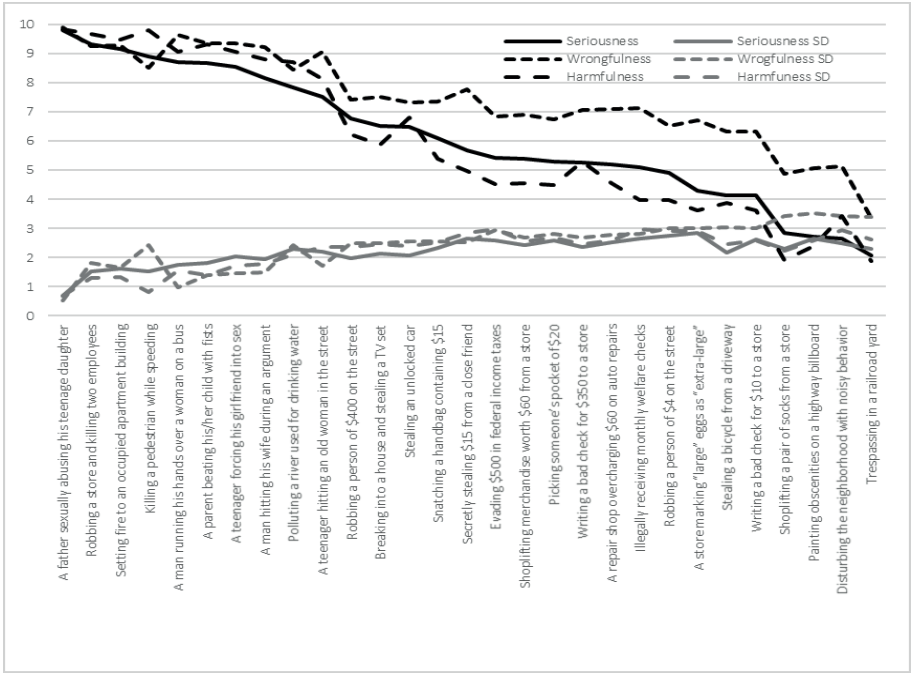


**Figure 2. Means and standard deviations for seriousness, wrongfulness, and harmfulness assessments**

### 4.3. Testing Warr's Model

Figure 3 shows harmfulness and wrongfulness means in a two-dimensional plot, similar to Warr's Figure 1 (1989, p. 803). While the regression equation is similar to that found by Warr (in this study WRG = 4,00 + 0,57 * HRM; in Warr's study it was WRG = 3,50 + 0,62 * HRM), clustering of the offences is different.

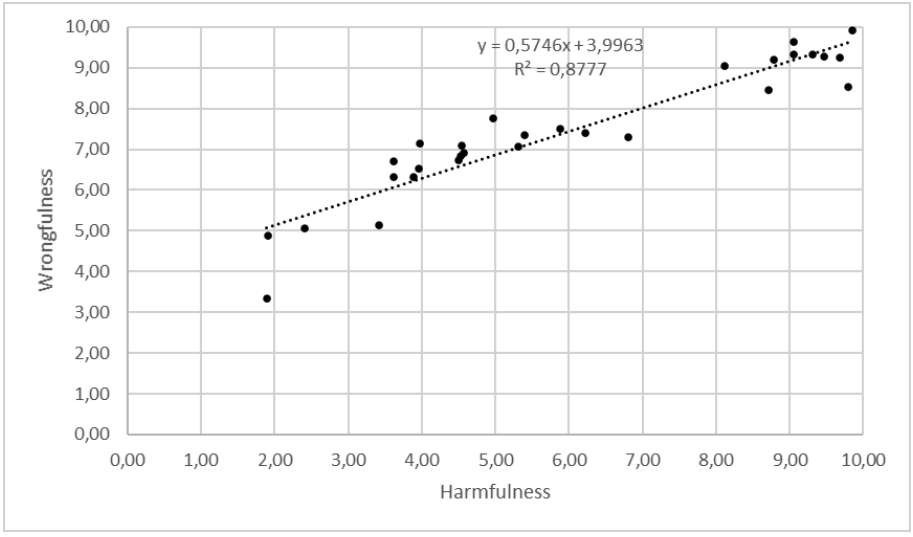


**Figure 3. Harmfulness and wrongfulness assessment means (each dot represents different offence)**

Figure 4 shows differences between wrongfulness and harmfulness mean assessments in this study and the Warr's study. As can be seen from this chart, in this study most offences were assessed as more wrongful than harmful, while in Warr's study there were more offences with higher harmfulness assessment, and the difference between harmfulness and wrongfulness assessments were overall smaller in Warr's study. Means of absolute value of differences between wrongfulness and harmfulness assessment in this study was 1,60, while in Warr's study it was 0,47, which suggest much larger difference between wrongfulness and meaningfulness assessment in this sample.

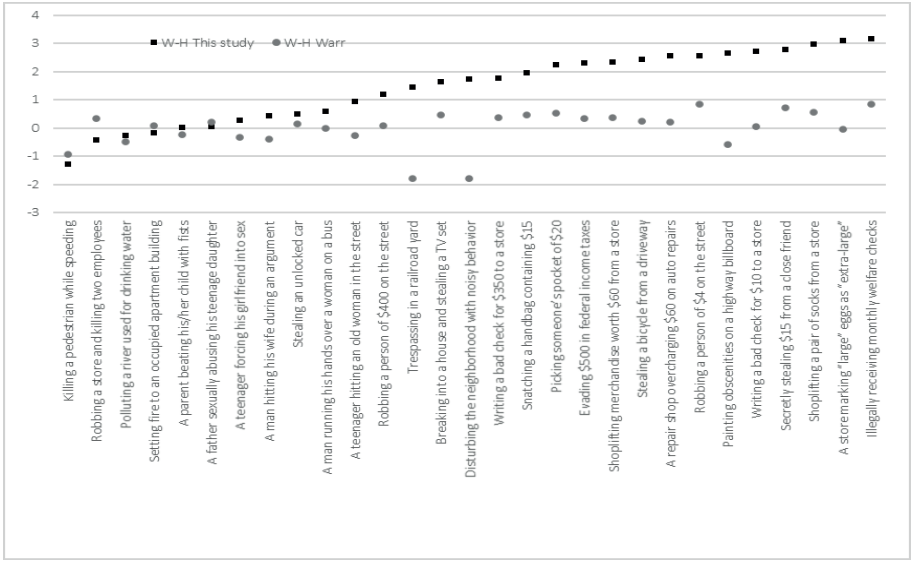


**Figure 4. Difference between the means of wrongfulness and harmfulness assessments, in this study and the Warr's (1989) study (negative value indicates higher harmfulness than wrongfulness mean)**

Differences between means of wrongfulness and harmfulness assessments found in this study (using absolute values) were plotted with mean seriousness assessments in the Figure 5. There is a clear negative relationship ($R^2 = 0,63$) between the two variables. This indicates that as assessments of seriousness increase, the agreement between harmfulness and wrongfulness increases as well, resulting in smaller difference between two assessments. In other words, offences perceived as more serious are more likely to be perceived as equally harmful and wrongful. The differentiation between the two types of assessment is more pronounced with offences that are seen as less serious.

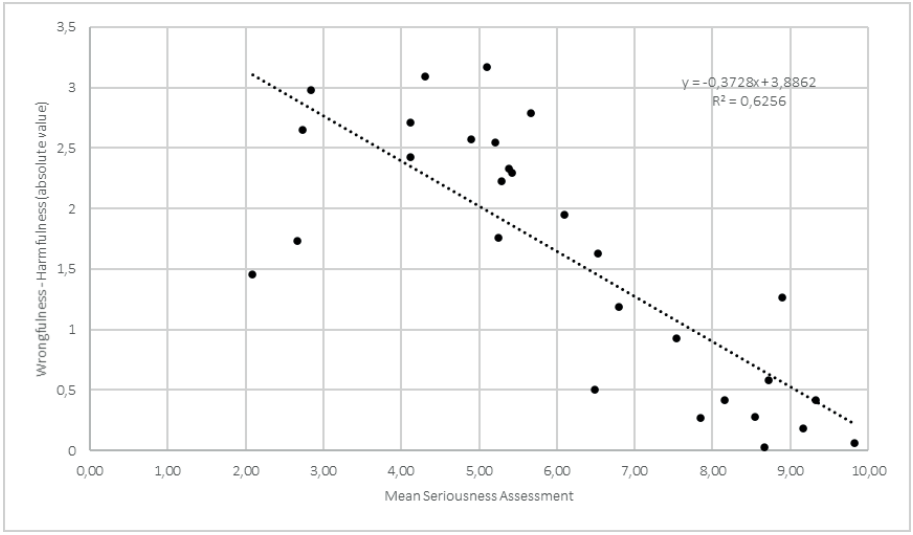


**Figure 5. Relationship between seriousness assessments and the difference between wrongfulness and harmfulness assessments (absolute values)**

Clustering of variables in this study can be seen in the Figure 6, which shown results of hierarchical cluster analysis using Ward's method (1963) using wrongfulness and harmfulness.

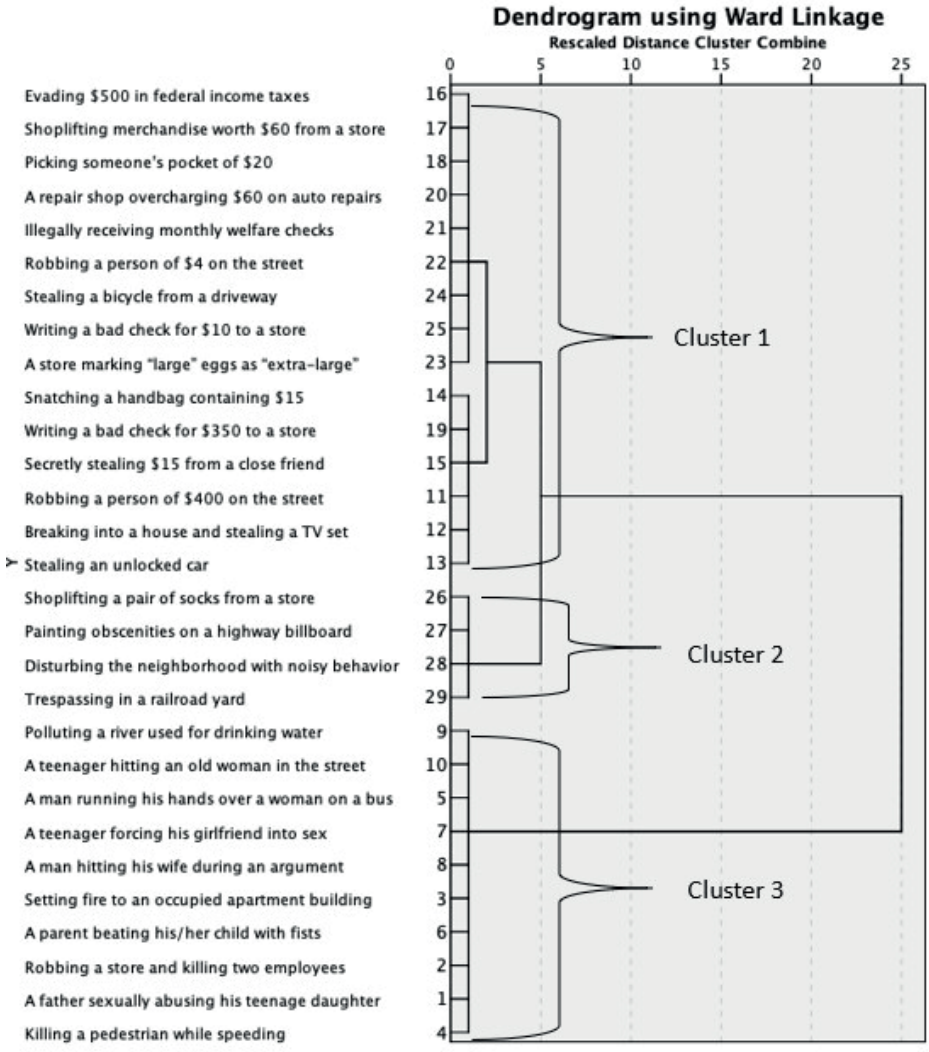


**Figure 6. Results of hierarchical cluster analysis applied to harmfulness and wrongfulness means for offences, showing 4, 3 and 2 cluster solutions**

When compared to clusters identified by Warr, while there is some overlap, categories are not identical. The main difference is that in this study there is no differentiation between what Warr had identified as Categories II and IV. Offences from those two Categories are all included into Cluster 3 here, which can be called "offences related to bodily injury/

death". Warr had separated those offences into Categories II and IV based on the difference between wrongfulness and harmfulness assessment, with Category II including those offences where the difference was positive (assessed as more wrong than harmful), and Category IV including those offences where the difference was negative (assessed as more harmful than wrong). In this study even though for some offences in Cluster 3 there was a negative difference between wrongfulness and harmfulness (meaning that they were assessed as more harmful than wrong), this did not result in a separate cluster.

Further, offences from Warr's Category I (property offences) are part of two sub-clusters in a four cluster solution (one including "More" and the other "Less" serious property offences). In a three-cluster solution these two clusters converge into a single Cluster 2 that almost fully overlaps with Warr's Category I.

Finally, Warr had named Category III "public offences". In this study, Cluster 2 includes all those offences, in addition to "shoplifting a pair of socks" item. This could mean this cluster has more to do with offences being perceived as minor, rather than as "public".

The two cluster solution separates variables into two basic categories: Those that involve threat/risk of physical harm/death, and the others.

Regression analysis (results shown in Table 2) applied to variables as cases suggests that wrongfulness and harmfulness do contribute equally to seriousness assessments, and harmfulness is somewhat stronger predictor of seriousness than wrongfulness. When the analysis is repeated for Cluster 3 offences only (threat/risk of physical harm/death offences), the difference is even more pronounced, and harmfulness is more than twice as strong predictor of seriousness as wrongfulness is. In Warr's study, harmfulness was also found to be a strong predictor of seriousness assessments for Category IV (which includes most, but not all offences in Cluster 3), but wrongfulness was not a significant predictor.

**Table 2. Models predicting seriousness for different clusters of offences (unstandardized beta coefficients used in the formula)**

| | |
|---|---|
| Simple additive model for all offences | |
| SER = -0,95 + 0,53 * WRG$^{***}$ + 0,52 * HRM$^{***}$<br>Standardized beta coefficients: Wrg 0,39 Hrm 0,62 | Adjusted $R^2$=0,97$^{***}$ |
| Simple additive model for Cluster 3 offences (bodily harm/life injury/risk) offences | |
| SER = -5,98 + 0,52 * WRG$^{***}$ + 1,07 * HRM$^{**}$<br>Standardized beta coefficients: Wrg 0,34 Hrm 0,85 | Adjusted $R^2$=0,97$^{***}$ |
| Simple additive model for Cluster 1 (property) offences | |
| SER = -1,88 + 0,63 * WRG$^{*}$ + 0,59 * HRM$^{***}$<br>Standardized beta coefficients: Wrg 0,32 Hrm 0,68 | Adjusted $R^2$=0,88$^{***}$ |
| $^{***}$p<0,001; $^{**}$p<0,01; $^{*}$p<0,05 | |

For property offences, the model is somewhat weaker (even though still very strong), and harmfulness is a much stronger predictor (standardized beta) of seriousness assessments than wrongfulness. This is in stark contrast with Warr's results, where wrongfulness was found to be almost an exclusive predictor of seriousness assessments for property offences.

To summarize, in this study harmfulness and wrongfulness assessments were found to be strong predictors of seriousness assessments, regardless of the type of crime[4], yet harmfulness was a stronger predictor of seriousness than wrongfulness. This was especially pronounced with Cluster 3 (offences related to threat/risk of physical harm/death) offences.

### 4.4. Individual Variability

In the previous pages, results of analysis that used offence as a unit of analysis were shown. Here results of analysis for each offence separately will be presented as well, in order to determine whether findings that were found will also hold with individuals as the unit of analysis.

Strong correlation between seriousness and wrongfulness was found for all offences, with association ranging from r = 0,48 for "A man running his hands over a woman on a bus" to r = 0,71 for "Setting fire to occupied building". "Robbing a store and killing two employees" was an outlier with correlation of r = 0 ,28, which was still significant, but not as strong. This is likely due to very high level of agreement when it comes to this offence, meaning that there is little variance, and as a result it correlated not as strongly. Similarly, correlation between seriousness and harmfulness were all statistically significant as well and rather strong, ranging from r = 0,50 for "Stealing unlocked car" to r = 0,70 for "Writing a bad check". Outlier results of these analyses were "A father sexually abusing his teenage daughter" (r = 0,36), "Robbing a store and killing two employees" (r = 0,35), and "Killing a pedestrian while speeding" (r = 0,22), all of which were nevertheless statistically significant.

In order to test whether Warr's model holds on individual level as well, regression analyses were performed for each offence, with harmfulness and wrongfulness as independent variables, and seriousness assessment as a dependent variable. Those results are shown in Table 3. All models were significant (with $p < 0,001$) with adjusted $R^2$ values ranging from 0,16 ("Robbing a store and killing two employees") to 0,56

4 Due to a small number of offences/cases (only four), regression was not performed using Cluster 2 offences.

("Setting fire to an occupied building"), and with coefficients for both harmfulness and wrongfulness being highly significant for most offences. In order to explore the relative strength of harmfulness and wrongfulness as predictors of seriousness assessments, the difference between beta coefficients of the two types of assessments were plotted in Figure 7. This figure clearly illustrates that once again our findings differ from Warr's. In that study in only five offences harmfulness was stronger predictor of seriousness than wrongfulness, and in three additional offences the beta coefficients were equal. In this study there is an even split, with harmfulness being stronger predictor than wrongfulness in 14 offences (offences on the right). This is a clear indicator that in population that this sample was derived from harmfulness plays a more prominent role in assessments of seriousness, and is not a secondary predictor.

**Table 3. Results of regression of Seriousness on Harmfulness (HRM) and Wrongfulness (WRG) for each offense**

| Offence | Adj. $R^2$ | WRG Beta | HRM Beta |
|---|---|---|---|
| Robbing a store and killing two employees | 0,16 | 0,21 | 0,30 |
| A father sexually abusing his teenage daughter | 0,25 | 0,43 | 0,11† |
| Stealing a bicycle from a driveway | 0,35 | 0,37 | 0,32 |
| Stealing an unlocked car | 0,37 | 0,42 | 0,26 |
| Breaking into a house and stealing a TV set | 0,38 | 0,41 | 0,30 |
| Killing a pedestrian while speeding | 0,38 | 0,59 | 0,12* |
| Writing a bad check for $20 to a store | 0,38 | 0,37 | 0,35 |
| Secretly stealing $15 from a close friend | 0,38 | 0,31 | 0,41 |
| A teenager hitting an old woman in the street | 0,38 | 0,36 | 0,35 |
| Shoplifting a pair of socks from a store | 0,39 | 0,44 | 0,28 |
| Robbing a person of $400 on the street | 0,41 | 0,29 | 0,43 |
| Painting obscenities on a highway billboard | 0,42 | 0,40 | 0,37 |
| Robbing a person of $4 on the street | 0,43 | 0,31 | 0,43 |
| Illegally receiving monthly welfare checks | 0,44 | 0,42 | 0,36 |
| Snatching a handbag containing $15 | 0,44 | 0,28 | 0,47 |
| A parent beating his/her child with fists | 0,45 | 0,57 | 0,15** |
| Trespassing in a railroad yard | 0,45 | 0,36 | 0,39 |
| A man running his hands over a woman on a bus | 0,45 | 0,20 | 0,54 |
| A man hitting his wife during an argument | 0,45 | 0,36 | 0,38 |
| Evading $500 in federal income taxes | 0,46 | 0,44 | 0,33 |
| A repair shop overcharging $60 on auto repairs | 0,48 | 0,31 | 0,46 |
| Polluting a river used for drinking water | 0,49 | 0,43 | 0,36 |
| Picking someone's pocket of $20 | 0,50 | 0,39 | 0,43 |
| Disturbing the neighborhood with noisy behavior | 0,50 | 0,30 | 0,49 |
| A teenager forcing his girlfriend into sex | 0,50 | 0,32 | 0,43 |
| Shoplifting merchandise worth $60 from a store | 0,51 | 0,34 | 0,47 |
| Writing a bad check for $350 to a store | 0,53 | 0,27 | 0,53 |

| | | | |
|---|---|---|---|
| A store marking "large" eggs as "extra-large" | 0,55 | 0,37 | 0,49 |
| Setting fire to an occupied apartment building | 0,56 | 0,58 | 0,27 |
| All models are significant with p<0,001; All coefficients are standardized, significant at p<0,001, unless where noted otherwise; † p>0,05; * p<0,05; ** p<0,01 | | | |

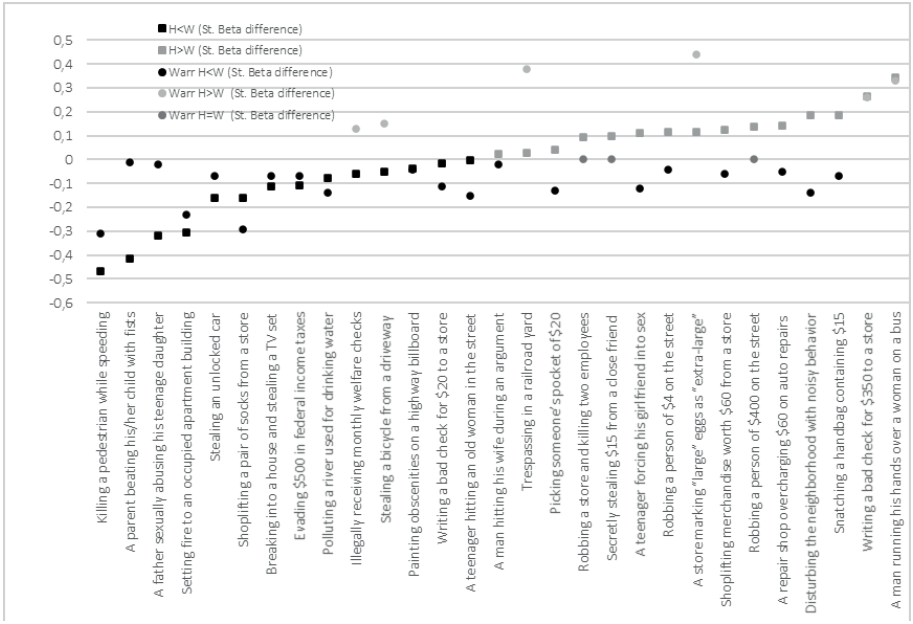


**Figure 7. Difference between standard beta coefficients for harmfulness and wrongfulness in this study and Warr's study**

For clarity, main research questions and relevant findings are summarized in Table 4.

**Table 4. Main research questions and summary of findings**

| | |
|---|---|
| How seriousness assessments in this study compare with those from Warr's study? | High correlation between the two studies. Seriousness assessment means similar for most offences, exceptions noted. |
| What is the level of consensus within the sample regarding seriousness, wrongfulness and harmfulness of offences? | High level of consensus for offences assessed as serious; much lower (high SDs) for offences assessed as less serious (significant negative correlation between means and SDs) |

| | |
|---|---|
| How harmfulness and wrongfulness assessments in this study compare with those from Warr's study? | In this study, most offences assessed as more wrong than harmful, with larger difference between two assessment.<br>Higher level of similarity between seriousness and wrongfulness assessments for offences judged as more serious. |
| How did offences cluster? | Three main clusters emerged: violent/physical harm offences, property crimes (with two subclusters: "more" and "less" serious), and minor offences. |
| Do wrongfulness and harmfulness predict seriousness assessment (does Warr's model hold)? | Yes. However, harmfulness much stronger predictor of seriousness than wrongfulness for both violent and property offences (in contrast to findings from other countries). |
| On individual level, does two-dimensional model (Warr's model) hold? | Yes, for most offences. Still, harmfulness found to be the prominent (rather than secondary) predictor (in contrast to findings from other countries) |

## 5. Discussion and Conclusion

By assessing alternative version of items, it was found that minor changes in language did not make much difference when it comes to how offences are assessed. The questions of how such information influences assessment has been discused before. Wolfgang et al. (1985) had found that offences that involved identical criminal act (stabbing) and identical outcomes (death) were rated differently depending on the gender of the offender and the victim. However, the case in which the gender was not known was rated more similarly to the one with male offender and female victim, suggesting that even when information about the offender and the victim is not provided the assessments are not made in a vacuum. Lynch and Danner (1993) had found that a number of characteristics of the event, including the gender of the victim and the offender, as well their age, have an effect on the seriousness ratings. When such information is not provided, people base their assessments regarding seriousness of offences on stereotypical representation of these offences that they have (Parton, Hansel, & Stratton, 1991), which means that such assessments are never really made in an abstract. In other words, even if the item stated "a person is sexually harassed on a bus", it will likely be assessed as "a woman is sexually harassed on a bus by a man", based on ideas that people have about how such offences happen in reality, true or not. Hence, whether it is specified that "a man" has sexually harassed a woman or not becomes irrelevant, as the crime of "sexual harassment" will likely be assumed to be committed by a man against a woman, and assessed as such. Consequently, the presence or the lack of specific information regarding the victim or offender's gender

may not make much difference, unless if the information provided is in contrast with the stereotype ("a woman sexually harassed a man on the bus").

Similar argument can be made for most alternative items that were tested in this study. The fact that the "offender" in the offence was not clearly defined does not mean that participant did not derive who that offender could be (a parent, a man, etc.). This does not mean however that some other alternative versions would not illicit a different response. For example, if the item regarding hitting an old woman specified gender or age of the offender, that could potentially lead to different assessments. In this particular research we did not test whether an offender/victim different from stereotypical one would lead to different assessments, and thus this remains to be explored in future research.

Comparison between results of this study and Warr's with regard to how different offences are assessed in terms of their seriousness once again confirms that there is a high degree of consensus regarding crime seriousness between cultures, for most offences, with some exceptions noted. Where there were differences, those could be attributed to a number of factors: cultural differences, change over time, sampling or measurement error. In this particular study, seriousness of sexual harassment, sexual assault, and domestic violence were all assessed as more serious than what was the case in Warr's study. Collectively these three offences all entail violence against women. It would be optimistic to argue that among the Turkish population violence against women is perceived in a more negative way, and that assessments are due to higher levels of sensitivity regarding such violence in Turkey. While violence against women has been a topic of heated discussion over the last decade, and awareness has certainly been raised, higher seriousness assessments could just as likely be due to the characteristics of this particular sample. In this study sample was drawn from young, high SES, urban, and educated population, which does not represent the Turkish population in general, or even a university student population in particular. Variables such as age (O'Connell & Wheelan, 1996) and poverty (Levi & Jones, 1985) have already been demonstrated to be associated with the judgments of seriousness. Further, it must be noted that over the last 30 years, awareness regarding violence against women and sensitivity towards it has improved globally, and if the Warr's study was repeated today with similar sample in the USA, it would not be surprising if the offences against women were rated as more serious than in 1989.

However there are also basis to entertain the possibility that the difference is actually culture based. Evans and Scott (1984) in their research had found that sexual offences

(such as forcible rape and forced prostitution) were assessed as more serious in Kuwait, compared to the USA (p. 48). Given that Kuwait is a predominantly Muslim country, this could be relevant for our findings as well. Perhaps this points to a religion-based sensitivity to such offences. But the difference between the two countries was more pronounced with acts such as prostitution, adultery, and homosexuality, suggesting that the difference in the judgments of seriousness between the USA and Kuwait samples in relation to rape and forced prostitution was more likely to be associated with perceived immorality related to the *sexual* dimension of those offences, rather than the *violence against the women* dimension. This explanation is further supported by the findings that in non-sexual offences that entailed violence against women (such as killing or stabbing a wife), there was no difference between the two samples. Data from the World Values Survey 2010-2014 suggest that, in fact, Turkey is more similar to the USA, then to Kuwait, when it comes to attitudes towards domestic violence, with the mean assessment from the USA and Turkey being very similar and suggesting more negative attitudes than those found in Kuwait (Inglehart, Haerpfer, Moreno, Welzel, Kizilova, Diez-Medrano, Lagos, Norris, Ponarin & Puranen et al., 2014). Nevertheless, this remains a point that needs to be explored in the future, with both a more nationally representative sample in Turkey, and with more contemporary data from other countries with different religious and cultural backgrounds.

When it comes to within sample consensus, levels of consensus regarding seriousness, harmfulness, and wrongfulness of offences were not identical across all types of offences. Degree of consensus in offences that were assessed as very serious/harmful/wrongful was very high, and very low in offences at the opposite end of the spectrum. In other words, assessments and degree of agreement are inversely related. Similarly, for offences that were assessed as more serious, assessments of harmfulness and wrongfulness assessment were more similar as well (means were similar). In other words, not only was there more agreement about how serious/harmful/wrongful these offences are, they were also assessed as more similar in terms of their wrongfulness and harmfulness. It is possible to speculate that for serious offences, there is little distinction of severity between harmfulness and wrongfulness. Such offences (in this category were ones that involved violence, physical harm, risk to life and similar) are perhaps simply seen as "awful", using a sort of moral intuition (Haidt, 2001) instead of engaging into separate assessments of wrong and harm of the act. One could possibly argue that only offences that are seen as both very harmful and very wrong are therefore perceived as serious. However, Warr's two-dimensional model does not require this

unison of assessment. Theoretically, one could have an offence that is perceived as very wrong but less harmful, and still be assessed as rather serious (for example assed as 10 on wrongfulness, 6 on harmfulness, and 8 on seriousness). In this study, however, there were no offences at the "very serious" end of the spectrum with that kind of difference between the harmfulness and the wrongfulness assessment (Figure 4). In other words, serious offences are perceived as both wrong and harmful, and never as dominantly harmful or dominantly wrongful. Manipulating level of wrongfulness (through manipulation of intent) while keeping the harm identical would be an interesting way to explore whether there can be very serious crimes that are perceived as less wrong while equally harmful. It is already established (Sebba, 1980) that presence of intent leads to higher crime seriousness assessments. How this influences assessments of wrongfulness and harmfulness of an offence has not been researched yet.

With property related offences, there was more difference between harmfulness and wrongfulness assessments (Figure 2), and harmfulness assessment were more similar to seriousness assessments than wrongfulness assessments were. In other words, there was more differentiation between wrongfulness and harmfulness in offences that are perceived as less serious, and perhaps this is why they are seen as such.

These findings were also reflected in the results of the regression analysis with offence as the unit of analysis. First to reiterate that Warr's model has been supported by the findings in this study, both on the offence as well as on the individual level of analysis, and both harmfulness and wrongfulness were found to be reliable predictors of seriousness assessment for almost all offences. However, in this study the two predictors were not equal and harmfulness was a stronger predictor of seriousness regardless of the type of offence. The difference between the predictive power of the two dimensions was biggest with Cluster 3 offences, which are also the most serious offences. These findings are in stark contrast with the findings of recent research conducted in Belgium, where wrongfulness was a stronger predictor of seriousness for all types of offences (Adriaenssen, Paoli, Karstedt, Vissechers, Greenfield, & Peysier, 2018). At this point it is hard to assess what is behind this clear difference in dominating component between the two countries. Once again, it is highly likely that data obtained from a national sample would paint a different picture, and the findings reported here are characteristic to young, urban, educated population, that is perhaps more in tune with the concept of victimization and social harm caused by the crime. But it could also be an issue of differing cultural values.

While this study provides further support for Warr's model of components of crime seriousness, the questions that it raises are significant. While harmfulness and wrongfulness are good predictors or seriousness, exploring what on individual level predicts them is the next step that will need to be taken. This is closely related to the question of consensus. Among offenses assessed as very serious, the consensus levels were high, and it is unlikely that any demographic or attitudinal variables would have make much difference. On the other hand, standard deviations of seriousness assessment of offences assessed as less serious were so high that they beg for an explanation: What shapes perceptions of seriousness of offences that are not simply "awful"? Such high variability in seriousness assessments among individuals suggests that individual level explanations need to be employed.

Higher conservation values and religiosity were found to be positively associated with judgments of seriousness (Adrianssen, Karsted, Paoli, & Visschers, 2019), and it was argued that both are a reflection of valuing order. Age, gender, and socioeconomic status were found to be somewhat unreliable predictors of seriousness, harmfulness and wrongfulness assessment, but for some offences they did produce an effect. Based on these findings there are two clear line of research that need to be pursued in order to further contribute to our understanding regarding what shapes perception of crime severity: first one is in relation to characteristics of the offences, and the second one is in relation to individual differences. First, it is important to try to study separately the effect of harmfulness and wrongfulness on seriousness perceptions, by manipulating them separately and examining how this manipulation influences seriousness assessments. This will truly show whether these two dimensions are independent of one another, and perhaps demonstrate that for some crimes they are simply seen as one and the same and people do not really engage in any higher-level reasoning when making those assessments. The second line of research would need to focus on identifying individual characteristics that influence how people perceive crimes, by focusing on both attitudinal as well as demographic characteristics, in order to improve our understanding regarding what lies behind large individual difference in offences perceived as somewhat less serious. All this must be done for different categories of offences separately, as both previous as well as our research findings appear to suggest that different categories of crime are not assessed using the same mental calculus. Finally, the study must be expanded into other countries, in order to obtain more data points that will allow to better cross-cultural comparisons.

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# Annex

**Annex I. Original item description, and translations to Turkish that were used in this study**

| Original item no | Offence description (original item) | Item no in this study | Turkish translation |
|---|---|---|---|
| 1 | Robbing a store and killing two employees | 1 | Dükkan soyup, iki çalışanı öldürmek |
| 2 | Stealing a bicycle from a driveway | 2 | Evin önünden bisiklet çalmak |
| 3 | Shoplifting a pair of socks from a store | 3 | Mağazadan bir çift çorap çalmak |
| 4 | Robbing a person of $400 on the street | 4 | Sokakta birinden 4.000 TL gasp etmek[5]. |
| 5 | Polluting a river used for drinking water | 5 | İçme suyu için kullanılan bir nehri kirletmek |
| 6 | Breaking into a house and stealing a TV set | 6 | Zorla birinin evine girip televizyon setini çalmak |
| 7 | A teenager hitting an old woman in the street | 7 | Ergenlik çağındaki gencin sokakta yaşlı bir kadına vurması |
| 8 | A father sexually abusing his teenage daughter | 8 | Bir babanın ergen yaştaki kızını cinsel olarak istismar etmesi |
| 9 | Stealing an unlocked car | 9 | Kilitlenmemiş bir arabayı çalmak |
| 10 | Evading $500 in federal income taxes | 10 | 5.000 TL'lik gelir vergisi kaçırmak. |

5 To adapt values of items stolen to Turkey while also taking into account purchasing power parity, we used Big Mac index (The Economist https://www.economist.com/news/2020/01/15/the-big-mac-index). In 1989 in USA, when original study by Warr was conducted, Big Mac was 2.02$. So for example, item 4 in which it is stated that 400$ was stolen, we calculated that the value of 400$ would be equivalent to the price of 200 Big Macs. In 2019 Big Mac in Turkey was priced at 18.99 TL, so amount of 3798 TL was equivalent to 400$ in 1989 in USA in terms of PPP. In order to round the amount, 4000 TL was used in the questionnaire. Same calculation was used for all items that include monetary value, and the amount was rounded up.

| | | | |
|---|---|---|---|
| 11 | Killing a pedestrian while speeding | 11 | Hız yaparken bir yayayı öldürmek |
| 12 | Writing a bad check for $20 to a store | 12 | 200 TL değerinde karşılıksız çek yazmak. |
| 13 | Secretly stealing $15 from a close friend | 13 | Yakın arkadaştan gizlice 300 TL çalmak |
| 14 | A repair shop overcharging $60 on auto repairs | 14 | Bir tamirhanenin faturayı 600 TL değerinde şişirmesi |
| 15 | A parent beating his/her child with fists | 15 | Bir ebeveynin çocuğunu yumruklayarak dövmesi |
| 16 | Setting fire to an occupied apartment building | 16 | Bir apartmanı, içinde insanlar varken kundaklamak |
| 17 | Ten high school boys beating up a classmate | 17 | On liseli erkeğin bir sınıf arkadaşlarını dövmesi |
| 18 | Robbing a person of $4 on the street | 18 | Sokakta birinden 40TL gasp etmek. |
| 19 | Illegally receiving monthly welfare checks | 19 | Kanuna aykırı bir şekilde sosyal yardım maaşı almak |
| 20 | A man running his hands over a woman on a bus | 20 | Bir adamın bir kadını otobüste elleriyle taciz etmesi |
| 21 | Snatching a handbag containing $15 | 21 | İçinde 750 TL olan bir çantayı kapıp kaçmak |
| 22 | A man hitting his wife during an argument | 22 | Tartışma sırasında adamın eşine vurması |
| 23 | A store marking “large” eggs as “extra-large” | 23 | Marketin “büyük boy” yumurtaları “ekstra büyük” olarak pazarlaması |

| | | | |
|---|---|---|---|
| 24 | Disturbing the neighborhood with noisy behavior | 24 | Gürültü yaparak komşuları rahatsız etmek |
| 25 | Writing a bad check for $350 to a store | 25 | 3500 TL değerinde karşılıksız çek yazmak |
| 26 | Trespassing in a railroad yard | 26 | Tren garına izinsiz olarak girmek |
| 27 | Picking someone's pocket of $20 | 27 | Yankesicilik yaparak birinin cebinden 200 TL çalmak |
| 28 | A teenager forcing his girlfriend into sex | 28 | Ergenlik çağındaki gencin kız arkadaşını cinsel ilişkiye zorlaması |
| 30[6] | Painting obscenities on a highway billboard | 29 | Otobanın kenarındaki reklam panosunun üstüne müstehcen şeyleri çizmek |
| 31 | Shoplifting merchandise worth $60 from a store[7] | 30 | Dükkandan 600 TL değerinde mal çalmak |

## Annex II. Instruction presented to participants prior to presenting items for assessment of the offences

***For seriousness assessment*:** "Suçun birçok çeşidi vardır. Bazıları çok ağır sayılırken, bazıları çok ağır sayılmaz. Sonraki adımda değişik türde suçların bir listesini göreceksiniz. Biz, suçlardan hangisinin ne kadar ağır olduğu konusundaki fikirlerinizi merak ediyoruz.

Bir suçun hiç ağır olmadığını düşünüyorsanız, "0" işaretleyiniz.

Bir suçun en ağır olanlardan olduğunu düşünüyorsanız, o zaman "10" işaretleyiniz.

Bir suçun hiç ağır olmayan ile en ağır olanlar arasında bir yerde olduğunu düşünüyorsanız, o zaman 0 ve 10 arasında suçun ağırlığını en iyi temsil ettiğini düşündüğünüz sayıyı işaretleyiniz.

6 Original item 29 was not used in this study, as it refers to parking meters which at this time in Turkey do not exist, and it would have been a preposterous question.

7 Original items was "Shoplifting merchandise worth 600 from a store", however due to a typo in a survey a Turkish version item referred to "600TL", which in effect would have been equivalent to $60.

Unutmayın ki suçların ağırlığı bir şahsi görüş meselesidir ve biz sizin şahsi görüşünüzü merak ediyoruz."

***For wrongfulness assessment*:** "Şimdi, bir sonraki adımda her suç türü için, bir kişinin bu suçu işlemesinin sizin görüşünüzde ahlaken ne kadar yanlış olduğunu belirtiniz.

Eğer bir suçu işlemenin ahlaki açıdan hiç yanlış olmadığını düşünüyorsanız, "0" işaretleyiniz.

Eğer bir suçu işlemenin ahlaki açıdan çok yanlış olduğunu düşünüyorsanız, "10" işaretleyiniz.

Eğer değerlendirmenizde arada kaldıysanız, bir suçu işlemenin ahlaken ne kadar yanlış olduğu konusundaki düşüncenize denk düşen sayıyı işaretleyiniz."

***For harmfulness assessment:*** "Son olarak listedeki suçların, mağdurlarına ne kadar zarar verdikleri, mağdurları ne kadar yaraladıkları hakkındaki düşüncelerinizi öğrenmek istiyoruz.

Eğer bir suçun mağdura pek de zarar vermediğini, onu yaralamadığını düşünüyorsanız, "0" işaretleyiniz.

Eğer bir suçun mağdura çok zarar veren veya onu çok yaralayan bir suç olduğunu düşünüyorsanız, "10" işaretleyiniz.

Eğer değerlendirmenizde arada kaldıysanız, bir suçun mağdur açısından ne kadar zarar veren bir suç olduğu konusundaki düşüncenize denk düşen sayıyı işaretleyiniz."

**Annex III. Multiple choice question used to test whether the participant was aware of the criterion that needed to be used when assessing the items (same questions was used in all three stages of the survey)**

"Bu aşamada suçları neye göre değerlendirmenizi istemiştik?

- Suçun ağırlığına göre
- Suçun ahlaki yanlışlığına göre
- Suçun niteliğine göre
- Suçun yarattığı zarara göre"

## Annex IV. Instruction provided to those participate who provided the wrong answer the question in Annex III

**For *seriousness* assessment stage of the survey:** "Hayır. Suçlardan hangisinin ne kadar ağır olduğu konusundaki fikirlerinizi merak ediyoruz. Bir suçun hiç ağır olmadığını düşünüyorsanız, "0" işaretleyiniz. Bir suçun en ağır olanlardan olduğunu düşünüyorsanız, o zaman "10" işaretleyiniz. Bir suçun hiç ağır olmayan ile en ağır olanlar arasında bir yerde olduğunu düşünüyorsanız, o zaman 0 ve 10 arasında suçun ağırlığını en iyi temsil ettiğini düşündüğünüz sayıyı işaretleyiniz. Unutmayın ki suçların ağırlığı bir şahsi görüş meselesidir ve biz sizin şahsi görüşünüzü merak ediyoruz."

**For *wrongfulness* assessment stage of the survey:** "Hayır. Bu aşamada, her suç türü için, bir kişinin bu suçu işlemesinin sizin görüşünüzde ahlaken ne kadar yanlış olduğunu merak ediyoruz. Eğer bir suçu işlemenin ahlaki açıdan hiç yanlış olmadığını düşünüyorsanız, "0" işaretleyiniz. Eğer bir suçu işlemenin ahlaki açıdan çok yanlış olduğunu düşünüyorsanız, "10" işaretleyiniz. Eğer değerlendirmenizde arada kaldıysanız, bir suçu işlemenin ahlaken ne kadar yanlış olduğu konusundaki düşüncenize denk düşen sayıyı işaretleyiniz."

**For *harmfulness* assessment stage of the survey:** "Hayır. Son olarak listedeki suçların, mağdurlarına ne kadar zarar verdikleri, mağdurları ne kadar yaraladıkları hakkındaki düşüncelerinizi öğrenmek istiyoruz. Eğer bir suçun mağdura pek de zarar vermediğini, onu yaralamadığını düşünüyorsanız, "0" işaretleyiniz. Eğer bir suçun mağdura çok zarar veren veya onu çok yaralayan bir suç olduğunu düşünüyorsanız, "10" işaretleyiniz. Eğer değerlendirmenizde arada kaldıysanız, bir suçun mağdur açısından ne kadar zarar veren bir suç olduğu konusundaki düşüncenize denk düşen sayıyı işaretleyiniz."

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# The New German Darknet-Criminal Law-Draft – Darkening by Restricting Individual Rights–

## *Alman Yeni Darknet Ceza Kanunu Tasarısı: Bireysel Hakları Kısıtlayarak Karartma*

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**ABSTRACT**
The paper discusses against the background of the current initiative of the German legislator whether criminal law needs to be adapted at all, simply because criminals are going digital. Currently in Germany, the introduction of a new crime law which punishes those, who – illegally and without the possible supervision of the law – are trafficking in goods, or are providing the opportunity for others to do so via the clear-, the deep-, or the darknet. The German legislator with his current draft is simply replying to investigative needs. That is not to be underrated, however, it is not sufficient to introduce another criminal offence by simply preparing the scenery and abstractly endangering the legally protected interest as sufficient to set out punishment.
**Keywords:** Darknet, individual rights, criminal law, displacement of criminal law, predating criminal liability, internet, internet provider, illicit trafficking in drugs, illicit trafficking in guns, illicit trafficking in child pornography

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## 1. Initiating the Issue: Is the Darknet a Current Risk to Individual Rights?

Without question, the *darknet* has become a major focus of users as well as the public within the past decade. Journalists, whistleblowers, oppositionists, criminals, as well as prosecuting authorities and common men and women have realized the many different potentials of the darknet and are using it to their advantage. In Germany, a number of high-profile cases advanced its publicity, even if only with negative connotation – indeed, an ambiguous "*dark*": The weapon involved in Munich's shooting rampage of 2016[1] had been purchased via the darknet platform "*Deutschland im Deep Web*". The regional court in Karlsruhe sentenced the platform operator[2] to six years imprisonment. In 2019, four men were found guilty in Limburg for using the darknet to create a child pornography platform "*Elysium*"[3] through which they were publishing materials showing severe forms of sexual child abuse and child pornography. In April 2019, the German Federal Bureau for Criminal Investigation closed down the world-wide second largest trading platform in the darknet "*Wall Street Market*".[4] When last in operation, 63.000 offers for selling drugs, stolen data, counterfeit identification papers, and credit cards were listed, counting about 5,400 sellers and 1,150,000 customers with a total sales volume of about 40 Mio. Euro. The arrested operators earned a sales commission between 2 to 6% of the sales price. Already in 2015, the Manhattan Federal Court had sentenced the so called "*Dread Pirate Roberts*" to life imprisonment for operating "*Silk Road*", a hidden service within the *Tor*-net designed to enable its users to anonymously buy and sell illegal drugs and other unlawful goods.[5] Such cases are raising the question whether criminal law should contain specific provisions punishing actions in the darknet.

1 LG München-I, Judgement of 19.1.2018 – 12 KLs 111 Js 239798/16.

2 The term "operator" is used for the person, who actually administrates the platform. He/she may also provide the service, but can also simply be administrating. The term "provider" is used, if focusing only at the service offered (provided), regularly that person will own the service.

3 LG Limburg, Judgement of 7.3.2019 – 1 KLs 3 Js 7309/18.

4 See press release, office for prosecution Frankfurt, 'Festnahme der mutmaßlichen Verantwortlichen des weltweit zweitgrößten illegalen Online-Marktplatzes im Darknet "Wall Street Market" – Presseeinladung' (3 May 2019) <www.bka.de/DE/Presse/Listenseite_Pressemitteilungen/2019/Presse2019/190503_WallStreetMarket.html> accessed 19 March 2020.

5 United States Department of Justice, 'Ross Ulbricht, A/K/A "Dread Pirate Roberts," Sentenced In Manhattan Federal Court To Life In Prison' (29 May 2015) <www.justice.gov/usao-sdny/pr/ross-ulbricht-aka-dread-pirate-roberts-sentenced-manhattan-federal-court-life-prison> accessed 19 March 2020.

In 2017, the German Federal Government agreed to further develop its 2015-IT-Security Law; in its coalition agreement, it especially emphasized the regulation of the darknet.[6] Two draft laws have found their way through the legal process and one of them has been introduced to parliament.[7] The second one, devised by the federal ministry of the interior, has yet to be formally introduced; there may be another version coming from the Federal ministry of justice in the near future. In a nutshell, these drafts suggest a new § 126a *German*-StGB to punish actions in the darknet and – according to one of the drafts – other limited access web pages. The new law is aimed at closing gaps within German criminal law for any kind of darknet activities, more so any kind of illicit internet activity. That has been heavily discussed in Germany ever since its prepublication at *netzpolitik.org*.[8] That there is no need for such a law is already revealed by a short insight into the darknet and possible criminal actions (II.), by examining the German draft laws (III.) and then focusing on the allegedly lacking criminality (IV.). The analysis, however, revealed the many obstacles of a specific "darknet" – or even "deep web" – criminal offence ranging from predating criminal responsibility to risking its constitutionality (V.). In the end (VI.), a digitalized future society should hand out punishment only as the last resort (*ultima ratio*) and based upon certain actions (*not based on the offender*). Otherwise, by regulating the anonymous communication of anybody within the darknet we risk our most important desire: personal freedom.

## 2. The Darknet

### 2.1. Defining what the darknet is

A general definition of the so-called darknet, in many places synonymously but wrongly referred to as "deep web" does not yet exist. Generally, the world wide web can be fielded into three separate parts: its "clear-net", its "deep-web", and its "darknet". The "clear net", also "surface web" or "visible web" embraces all parts of the web which are accessible without limitation by regular internet browsers and indexed by common search engines.[9] In contrast, the "deep web", also called "hidden

6 Coalition agreement between CDU, CSU and SPD of 12 March 2018 for the 19th electoral term, pg. 44, 125; esp. 128.

7 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508.

8 Andre Meister and Anna Biselli, 'IT-Sicherheitsgesetz 2.0: Wir veröffentlichen den Entwurf, der das BSI zur Hackerbehörde machen soll' <https://netzpolitik.org/2019/it-sicherheitsgesetz-2-0-wir-veroeffentlichen-den-entwurf-der-das-bsi-zur-hackerbehoerde-machen-soll/#2019-03-27_BMI_Referentenentwurf_IT-Sicherheitsgesetz-2> accessed 19 March 2020.

9 Browsers *like* firefox, chrome, internet explorer etc.; search engines *like* google, bing, startpage etc.

web" or "invisible web" is not indexed. Especially webpages with limited access, like personal pages within certain social networks (be it facebook, instagram, reddit or else), are part of the "deep web". The "darknet"[10], also "dark web", finally refers to those parts of the internet which can only be accessed through certain "gates", using specific software like – most famous – the *Tor*-browser ("the onion router")[11], "I2P" or "freenet"[12]. The user's software builds a road of encrypted connections through relays (servers) in the network. Each relay only knows where other relay data is coming from and which relay the data is to be transmitted. The idea is similar to using a twisty, hard-to-follow route in order to throw off any followers — and then periodically erasing the footprints. Instead of taking a direct route from source to destination, data packets on the "*Tor*"-network take a hidden pathway through several relays that cover the tracks of the user. No observer at any single point can tell where the data came from or where it is going to.[13] In short: The user gains anonymity. Furthermore, the user can install so called "hidden services" inside the network, which are visible for other users of the network. It allows for connecting users anonymously at certain network-contact-points, ending with "onion" in the case of the *"Tor"*-network.[14] It is obvious that most illegal content is found here. However, also many "ordinary" web projects have added a parallel "*.onion*"-address.[15] The anonymity and hidden services can work for better or worse, such as using the network for illicitly trafficking in goods, for journalistic or other research, blog writing activities, or whistleblowing.[16]

10 For the terminology see: Peter Biddle and others, 'The Darknet and the Future of Content Distribution' ACM Workshop on Digital Rights Management (18 November 2002) <https://crypto.stanford.edu/DRM2002/prog.html> accessed 19 March 2020.

11 <https://2019.www.torproject.org/about/overview.html.en> accessed 19 March 2020. User numbers here are very high (compared to others), see Daniel Moore and Thomas Rid, 'Cryptopolitik and the Darknet' (2016) 58 (1) Survival 7, 15. The German draft laws only refer to "tor", see Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508, 1; as well as Bundesratsdrucksache (Federal Council Printed matter) of 1 March 2019 – 33/1/19, 3.

12 Sabine Vogt, 'Das Darknet – Rauschgift, Waffen, Falschgeld, Ausweise – das digitale „Kaufhaus" der Kriminellen?' [2017] Die Kriminalpolizei 4; M Balduzzi and V Ciancaglini, 'Cybercrime in the Deep Web' Black Hat EU (2015) 1f; Stefan Mey, *Darknet – Waffen, Drogen, Whistleblower* (2nd edn, CH Beck 2018) 11ff.

13 <https://2019.www.torproject.org/about/overview.html.en> accessed 19 March 2020.

14 Moore and Rid (n 12) 15f.

15 Like facebook, the Guardian, the New York Times, the CCC, the news agency "AP" or "heise online", see only Stefan Mey, '"Tor" in eine andere Welt? Begriffe, Technologien und Widersprüche des Darknets' [2017] (46-47) APuZ 4, 6f.

16 Daniel Moßbrucker, 'Netz der Dissidenten – Die helle Seite im Darknet' [2017] (46-47) APuZ 16ff; Meropi Tzanetakis, 'Drogenhandel im Darknet – Gesellschaftliche Auswirkungen von Kryptomärkten' [2017] (46-47) APuZ 41ff; Balduzzi and Ciancaglini (n 13).

Yet again, it must be emphasized that most of the darknet platforms and clear web platforms, like *amazon* or *ebay*, resemble each other. Both work with ratings, fiduciary relationships, refunds and reimbursement systems, thumbnails, and design options. Platform operators mostly function as trustees and hosts in transactions, and profit from transaction fees and revenue sharing. (Digital) crypto currencies, like bitcoin[17], guarantee payment options and (at least) support anonymity. The markets of illicit pornography and filesharing are often based on barter trading.[18]

### 2.2. Darknet in numbers and criminal actions

Clearly stated, the darknet offers a suitable surrounding to commit crimes. Yet until today, most crimes were committed on the clear web. The widespread perception that the deep web including the darknet embraces the predominant part of the internet is simply wrong, at least today. Contrary to the disclaimer of the "Bright Planet"-white paper (2000)[19], regularly internet search engines today do not only read-out stored data of public webpages with firmly defined content, but also access social network webpages and link data. In other words, the further development of *googling* made much of the internet visible today.

Rather it seems we are fascinated by the unknown – by the "dark" – while, spoken in absolute terms, it has gained marginal relevance at most. Exact figures are missing, of course. The darknet is quite anonymous.[20] From the brief enquiry *darknet* in 2016 we have learned, at least, that by that time the German Federal Bureau of Criminal Investigation (BKA) had listed 50 different *platforms* for trafficking in illicit drugs, money laundering, arms trafficking, and other illicit services.[21] Further statistical material is mostly missing. Apart from the *Intelliagg Report Deeplight* 2016[22] listing 30.000 pages within the tor-network, which is an infinitesimal figure compared to the 1.6 billion pages indicated in the clear net,[23] and the London Kings College-Study

17 Bitcoins are accepted as an instrument of payment; § 1 Abs. 11 S. 1 Nr. 7 Alt. 2 KWG, see hereto BaFin, Virtuelle Währungen (Virtual Cureny [VC]), 04/2016, 1.

18 See: Mey, *Darknet* (n 13) 41ff; as well with many examples and screenshots Balduzzi and Ciancaglini (n 13); Vogt (n 13) 5f; Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 –19/9508, 9f.

19 Mey, *Darknet* (n 13) 13f.

20 Moore and Rid (n 12) 7.

21 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 29 August 2016 – 18/9487, 2ff.

22 Intelliagg, *Deeplight: Shining a Light on the Dark Web. An Intelliagg Report* (ONYX 2016) 5 <https://onyxcomms.com/wp-content/uploads/2017/01/intelliagg-deeplight-report.pdf> accessed 19 March 2020.

23 Intelliagg (n 23) 5.

2016[24], analyzing 2.723 pages in "*Tor*", we still know almost nothing. According to the *Tor*-project user statistics, today about two million. individuals are using *"Tor*", amongst them about 170.000 Germans.[25] After Russia, The United States, and Iran, Germany reached a 4th place ranking using "*Tor*".[26] Turkey, meanwhile, has been trying to block usage of "*Tor*" since 2016, in the interest of state security, with, as it is the nature of the complex and multilayered software, limited success.[27] However, in total only 3-6% of "Tor" users use hidden services only to be found in "*Tor"*.[28] According to the *London Kings College*-Study, 57% of the analyzed (2.723) pages were qualified to contain illicit services[29]: 15,5% related to illicit drugs trafficking, 12% to financial violations and illicit financial services and purchases, 4.4% to child pornography, 2.6% to other illicit content, and 1.5% to illicit arms trafficking.[30] The *Intelliagg Report Deeplight,* which analyzed 30.000 pages, determined 52% of the pages with illegal content. Of those 29% were filesharing services, 28%[31] contained leaked data, 12% illicit financial services (fraud), 4% illicit drug trafficking, 1% illegal pornography, and 0.3% illicit arms trafficking.[32]

Finally, darknet legal cases differ within their operation to "real-life" cases with consequences for criminal procedures. Due to anonymity, evidence is difficult to obtain. Yet again, prosecutorial authorities allege that successfully investigated participants of illicit trafficking or illicit service cases simply close their traffic and restart on another platform.

## 3. German Draft Laws Sanctioning Illicit Trading within the Sark- and Deep Net

The need for a specific darknet criminal offense is argued with such prosecutorial distinction as – offenders change platforms yet and again, evidence is unlikely to be obtained. However, crimes of illicit drug trafficking, child pornography, illicit arms

24 Moore and Rid (n 12) 16.

25 <https://metrics.torproject.org/userstats-relay-table.html> accessed 19 March 2020.

26 <https://metrics.torproject.org/userstats-relay-table.html> accessed 19 March 2020.

27 'Turkey blocks access to Tor anonymizing network' (19 December 2016) <https://www.bbc.com/news/technology-38365564> accessed 19 March 2020.

28 Moore and Rid (n 12) 16.

29 Moore and Rid (n 12) 20ff.

30 Moore and Rid (n 12) 21.

31 Only according to non-authorized information.

32 Intelliagg (n 23) 9f.

trafficking, spreading of spam, spyware and malware, counterfeiting money and identification papers, as well as forms of „Cybercrime-as-a-service“[33]call for investigation and prosecution.[34] The German Federal Bureau of Criminal Investigation (BKA) is completing a list of crimes to be investigated to include trafficking with stolen goods, providing hacking tools, offering CBRN-materials[35] or instructions to produce those.[36] Compared to the numbers, the (German) draft law-reasoning mostly reflects the darknet "reality". However, in fact, the majority of illicit cases concern filesharing and leaked data: 29%+28%=57% according to the *Intelliagg Report*. Therefore, the *draft laws* are wrong to focus on illicit drug trafficking as the main activity to be prosecuted.[37]

The current *two* German draft laws, one introduced to the parliament already[38] and its follow-up-version,[39] are aimed at closing gaps within German criminal law for any kind of darknet activities, basically through introducing a brand-new crime of "Providing Services to be used for committing crimes" in a new § 126a *German*-StGB.

Draft-law (1) suggests a punishment with imprisonment of up to three years or a fine, for whoever provides any internet-based service, where access is limited via technical precautions and where its purpose and activity are aimed at promoting or realizing favorable conditions or concrete possibilities to commit specified crimes. Punishability is limited to promoting or providing chances of illicit

- trading with medicinal products (§ 95 Subsec. 1 Medicinal Products Act, AMG),
- drugs trafficking (§§ 29, 29a, 30, 30a Drugs Act, BTMG),
- commodity trafficking (§ 19 Commodity Surveillance Act, GÜG),
- arms trafficking (§ 52 Gun Law, WaffG),
- trading with any explosives (§ 40 Explosives Act, SprengG),

33 Cybercrime as a service means providing illicit services in cyber space, see: Bundeskriminalamt (Federal Office for Criminal Investigation Germany), *Cybercrime Bundeslagebild 2017* (BKA 2017) 24.

34 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 –19/9508, 1 f; Bundesratsdrucksache (Federal Council Printed matter) of 1 March 2019 – 33/1/19, 3.

35 Chemical, biological, radiological or nuclear materials.

36 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 29 August 2016 – 18/9487, 2; see also, at least partly, in: Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508, 13 f.

37 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508, 13.

38 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508.

39 See above (A.).

- trading with nuclear weapons and weapons of war (§ 19 War Weapons Control Act, KrWaffKontrG), *and*
- from the Criminal Code: counterfeiting money, debit cards, cheques, promissory notes and blank Eurocheque forms (§§ 146, 152a, 152b) or circulating such (§ 147), including preparatory acts (§ 149), distributing, acquisitioning and possessing of child pornography (§ 184b), data espionage (§ 202a), phishing (§ 202b) and preparatory acts to it (§ 202c), computer fraud (§ 263a), preparing to tamper with official identity documents (§ 275), acquisitioning of false official identity documents (§ 276), data tampering (§ 303a) and computer sabotage (§ 303b).

While punishment shall be limited to terms of committed criminal acts in principle (Subsec. 2), at the same time punishment is increased to whomever is providing such services as a regular source of income (Subsec. 3).[40] That, unquestionably, misses that whoever is providing an internet-based service with limited access to public and on purpose to promoting favorable conditions or possibilities to act criminally, will regularly do so to realizing an income.

Germany also seeks to apply its criminal law for the future, whenever "Services to be used for committing crimes" (§ 126a *German* draft law) are provided, be it nationally or simply showing a domestic nexus (passive personality principle, § 5 *German*-StGB). The seizure of mail (§ 99 *German*-StPO) shall be completed with seizure of digitals, wiretapping (§ 100a *German*-StPO) shall be admitted also when investigating the new providing services-crime.

All in all, the draft law is set against the background that classical German offenses – forming a criminal organization (§ 129 *German*-StGB) – and criminal responsibilities – perpetration and participation (§§ 25-27 *German*-StGB) – do not meet the needs of prosecuting modern forms of internet-based criminality. Simply, they are of no help prosecuting the anonymous, ever changing virtual appearances, offenders.[41] Any investigation in how far operators and providers of internet-based services participate in trafficking drugs, arms, documents, money, or other goods seems difficult if not impossible: evidence is needed on the chain of causation. The German legislator is also claiming that operators and providers do not only participate, they actively act. By providing the internet-based service they set a factual footing for a growing 'underground

40 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 –19/9508, 7f.

41 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 –19/9508, 2.

economy'.[42] Thus, according to the German legislator, public safety is at high risk, while the current laws and regulations do not allow for sufficient criminal prosecution.

Draft law (2) even stretches the public safety-argument further, suggesting that *any presentation* of internet-based services which may promote, support, or may be used for the commission of crime, shall be sufficient to be punished with imprisonment of up to *five (not three)* years or a fine, unless the offense is subject to a more severe punishment under other provisions (subsidiarity clause). Mostly seen as being too far-reaching,[43] the second draft concretizes a few certain issues, like *increasing* punishment also when committed in gangs, like *excluding* from punishment when presenting the service remains being of marginal importance, or when the presentation of services only aims at fulfilling lawful official and vocational duties.[44] Germany is wrapping up a security package that is very questionable overall:

## 4. Lacking Criminal Responsibility and Criminal Law within Darknet

Indeed, a specific darknet-criminal offense *only* should be introduced, if any of the illicit darknet actions – described above– leave an unreasonable gap in criminal liability. That, so far, is only asserted,[45] however, it needs to be analyzed. Otherwise, one is using a sledgehammer to crack a nut. In this inquiry, we will disassemble the criminal liability according to the actor's perpetration (I.) and participation (II.) in "cyber-actions".

### 4.1. Darknet *functioning* as illicit service provider

As the new German draft laws rightly mentions, one *may* not *physically* "kill another person" by using the internet, but it can *provide* the space and/or means for others to do so. Since very few provisions exist which merely punish the providing of opportunities to illicit actions, it seems that there indeed is an unreasonable gap in criminal liability. But, is that true?

A short analyzes of illicit drug trafficking (1.), illicit arms trafficking (2.), and illicit trading in child pornography (3.) – the three main fields, where the German legislator

42 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508, 10.

43 Federal Council plenary protocol (BR-PlPr.) 975, 91ff.

44 That is including duties to give testimony in court (§ 53 *German*-StPO): <https://netzpolitik.org/2019/it-sicherheitsgesetz-2-0-wir-veroeffentlichen-den-entwurf-der-das-bsi-zur-hackerbehoerde-machen-soll/#2019-03-27_BMI_Referentenentwurf_IT-Sicherheitsgesetz-2> accessed 19 March 2020, see also Bundesratsdrucksache (Federal Council Printed matter) of 1 March 2019 – 33/1/19.

45 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508, 3, 10, 11; Bundesratsdrucksache (Federal Council Printed matter) of 1 March 2019 – 33/1/19, 26; *Biesenbach* (speaking for NRW concerning the draft law), in Federal Council plenary protocol (BR-PlPr.) 974, 18.

thought that unreasonable gaps in criminal liability exist –, reveals, there is no need to legislate:

(a) Illicit drug trafficking

§ 29 Subsec. 1 No. 10 German Narcotics Act (BtMG) punishes under the heading "illegal trafficking and smuggling" with imprisonment of up to five years or with a fine, whoever provides the possibility for another person to buy, distribute, vindicate, or possess illegal drugs. Whomever publicly or self-interested is notified about such opportunities or entices another to make use of them is punished as well (granting access). Clearly spoken, providing the opportunity for illicit drugs trafficking is already punishable in Germany today, no matter if committed by means of the internet or otherwise. The new draft law acknowledges this by simply including a subsidiarity clause (§ 126a Subsec. 1 s. 1 *German* draft law).[46]

*"Providing the opportunity"* according to the Narcotics Act, first of all, means to realize, to promote, or to alleviate favorable environmental conditions or concrete possibilities to obtain or to sell drugs.[47] That does include every offender-activity, be it eliminating obstacles or setting up a drug store (as long as the provider does not start selling the drugs him/herself, which is punishable according to § 29 Subsec. 1 No. 1 BtMG already). At first glance, the "providing"-situation corresponds with the typical usage of darknet platforms: one service provider *provides services* through a platform, or is at least operated by such an individual, which is *used* by others for illicit trafficking in drugs. The operator him/herself does not sell or buy any drugs, but profits from transaction fees and revenue sharing. Typically, such platforms, like "silk road", are intentionally installed to trade in illegal drugs; to obtain the evidence for criminal prosecution should be easy, once the perpetrators are identified.

*"Granting access"* according to the Narcotics Act – compared to providing the opportunity – embraces as criminally relevant action already any "passive" holding in readiness[48] with which potential buyers as well as sellers obtain opportunities to illicitly trafficking

46 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508, 11.

47 BGH Judgement of 21.4.1982 - 2 StR 710/81, published in NStZ 1982, 335; Stefanie Kaluba, '§ 29 BtMG' in Wolfgang Bohnen and Detlev Schmidt (eds), *BeckOK BtMG* (6th edn, CH Beck 2020) margin number 701; Jörn Patzak, '§ 29 BtMG' in Harald Hans Körner, Jörn Patzak and Mathias Volkmer (eds), *Betäubungsmittelgesetz* (9th edn, CH Beck 2019) pt 20, margin number 13; Peter Kotz and Mustafa T Oğlakcıoğlu, '§ 29 BtMG' in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB*, vol 6 (3rd edn, CH Beck 2017) margin number 1440ff.

48 Usually in offering favorable opportunities from someone's own area of business and responsibility, see BayObLG Judgement of 27.5.2003 - 4 St RR 47/2003, published in NStZ-RR 2003, 310.

with drugs.[49] Punishable for *granting access* is, e.g., who is lending his/her own car to be used to sell or buy drugs.[50] Applied to the Darknet this would make anyone operating and administrating an internet platform, also one installed by another, punishable for granting access to it, if such a platform were to allow others access to illicit drug trafficking. A distinction between both actions, indeed, seems redundant[51]: The platform operator will regularly either be *providing the opportunity* or *granting access*. Obtaining the evidence against the provider shall be easy in both variations as soon as the access-limited platform allows for illicit drugs trafficking through it.

As a result, the current German draft laws neither require further evidence taking nor to expand criminal liability. In fact, § 29 Subsec. 1 No. 10 Narcotics Act (BtMG) is already far-reaching: Even in a very restrictive reading, any granted mean to realize, to promote, simply alleviating favorable conditions or concrete possibilities remains punishable.[52] Structurally, all such acts of participation (to the contracting parties of a drug deal) are independently incriminated acts of perpetration.[53] *Providing* and *Granting* (acc. to § 29 Subsec. 1 No. 10 BtMG) often also means to participating within the drug dealer's selling or buying according to § 29 Subsec. 1 No. 1 Narcotics Act (BtMG).[54] Merely, the standard of proof for providing and granting is so low that any evidence of operating or administrating a surrounding is sufficient for punishment, if it only supports the act of illicit trafficking in drugs. Neither evidence on the predicate offense nor on the concrete participatory act is required. According to the Narcotics Act that includes providing or granting surrounding as a crime even for unpunished personal drug use. The punishment according to § 29 Subsec. 1 No. 10 Narcotics Act (BtMG) is, indeed, one of the much criticized German examples where the legislator is expanding the substantive criminal law and punishing already *only* endangering the legal interest *simply* in order to lower the (procedural) standard of proof and to avoid obstacles in evidence taking.[55]

At least, the good news is that the current darknet draft offenses do not go beyond the already far-reaching criminality of the Narcotics Act, as it is related to illicit drug

49 Patzak (n 48) pt 20, margin number 14.

50 Example as of Kotz and Oğlakcıoğlu (n 48) margin number 1446.

51 Already: BayObLG 30. 7. 1982 - RReg. 4 St 140/82, published in BayObLGSt 1982, 100.

52 Kotz and Oğlakcıoğlu (n 48) margin number 1447.

53 Likewise Luís Greco, 'Strafbarkeit des Unterhaltens einer Handels- und Diskussionsplattform insbesondere im sog. Darknet' (2019) 14 ZIS 435, 440.

54 No. 10 comes along with a defined less onerous burden of proof, ruled out by way of substantive criminal law.

55 Patzak (n 48) pt 20, margin number 5ff.

trafficking via platforms. The drafts punish for *providing the opportunity* likewise the Narcotics Act (§ 29 Subsec. 1 No. 10 BtMG). Thus, the subsidiarity clause of the draft offense will apply in all drug offense cases via internet platforms. An unreasonable lack of criminal liability is not in sight. The ultima ratio limitation to criminal law is already at high risk with the Narcotics Act. The drafts only underline that.

(b) illicit arms trafficking

Already in 2016 and 2017, the conference of the *German* "Länder" ministers of Judiciary were requesting the amendment of Germany's Gun Law (*Waffengesetz, WaffG*) in order to also punish illicitly trafficking in arms via the darknet.[56] Requests, unquestionably, correspond with publicly discussed cases of arms procurement via the Internet, like in the Munich shooting rampage 2016. The need for a new crime is not to be approved.

In § 52 Subsec. 1 No. 1 of the current *German*-WaffG punishes with imprisonment of six month to five years, whoever buys, possesses, cedes, bears, passes, takes on, produces, processes, restores, or *trades* with any kind of weapon.[57] In § 52 Subsec. 1 No. 2c *German*-WaffG in addition punishes, whoever without permission[58] produces, processes, restores, or *trades* with guns (firearms). Illicit gun trafficking, finally, is legally defined as whoever professionally or self-employed as part of an economic enterprise buys, sells, keeps for sale, or accepts orders of guns and other weapons and *who serves for those transactions as a contact person* (§ 1 Subsec. 4 *German*-WaffG, attachment 1, Sec. 2 No. 9). Within the darknet, the "*trading*"-element becomes interesting certainly. Likewise, as illicitly trafficking with drugs, the operator of the platform does not necessarily buy or sell guns and weapons, but rather he/she provides opportunities, limits, or grants access for others. He/she at least functions as a contact person. That is punishable according to *German* law as soon as the operator functions as a *procurator*; if he/she acts like a *broker*. That requires proof that the contact person, here the operator, involved him/herself in a way that allowed the parties (seller and

56 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508, 2 f; Herbstkonferenz der Justizministerinnen und Justizminister, *Beschluss der Ministerinnen und Minister* (Berlin, 17 November 2016) <www.justiz.nrw.de/JM/jumiko/beschluesse/2016/Herbstkonferenz-2016/top_ii_8_-_effektivitaet_strafrechtlicher_ermittlungen_in_getarnten_computernetzwerken__sog_darknet_herbstkonferenz.pdf> accessed 19 March 2020.

57 § 52 Subsec. 1 No. 1, 2c) WaffG (Gun Act) in corr. with § 2 Subsec. 1 or 3, attachment No. 2 par. 1 No. 1.1 or 1.3.4.

58 Acc. to § 2 Subsec. 2, Attachment No. 2, par. 2, subpar. 1, S. 1; § 21 Subsec. 1 S. 1 or § 21a WaffG (Gun Act).

buyer) to enter a contract.[59] In other words, simply providing access to a specific platform which may be used to traffic guns will not meet the requirements.[60] The operator of a flea market is *not* seen as a procurator.[61] Only operating a flea market or a darknet platform, does not yet mean to render a service of procuration for *illicit gun trading*. The operator of the platform "*Deutschland im Deep Web*", who provided the space to buy the "Amok"-gun later used in Munich, could only be held responsible for participating in the sell (§ 27 *German*-StGB), not for committing illicit gun trafficking (§ 52 *German*-WaffG) himself.[62]

The currently suggested darknet draft law reaches beyond: providers and operators of a platform, which offer the opportunity to trade guns and weapons, will be punishable as a *perpetrator*. Further, conducting trading *as a regular source of income* (Gewerbsmäßigkeit) will no longer be a mandatory element of a crime, but only an aggravating circumstance resulting in higher punishment. Consequently, the subsidiarity clause of the draft law will not apply in illicit gun trafficking cases, not even in the rare case of professionally *procuring* a gun sell. The draft law either reaches beyond the punishability of the current law or beyond its punishment range. Whether participating action shall be prosecuted as perpetrating remains questionable (see C.II.).

(c) Illicit trafficking in child pornography

Illicit trafficking in child pornography is punishable in Germany, addressing anyone who is disseminating, publicly displaying, presenting, or otherwise granting access of any kind of child pornography (§ 184b Subsec. 1 No. 1 *German*-StGB). Committed via using the darknet, again, the interpretation of '*granting access to*' – in other words: otherwise making accessible – child pornography becomes crucial. It requires that child pornography is made accessible to a number and individuality indefinite and uncontrollable group of people no matter, if they take notice.[63] The operator of a specific

59 Bernd Heinrich, '§ 1 WaffG' in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB*, vol 8 (3rd edn, CH Beck 2018) margin number 201; Ulrike Pauckstadt-Maihold and Hans-Joachim Lutz, '§ 1 WaffG' in Peter Häberle (ed), *Erbs/Kohlhaas Strafrechtliche Nebengesetze*, vol 4 (CH Beck January 2020) margin number 32.

60 Heinrich, '§ 1 WaffG' (n 60) margin number 201.

61 Hereto, as well as generally to procuration using platforms: Holger Dreyer and Thomas Haskamp, 'Die Vermittlungstätigkeit von Plattformen' (2017) 6 ZVertriebsR 359ff.

62 See: LG Karlsruhe, Judgement of 19.12.2018 – 4 KLs 608 Js 19580/17, published in BeckRS 2018, 40013.

63 Jörg Eisele, '§ 184b StGB' in Albin Eser and others (eds), *Schönke/Schröder Strafgesetzbuch Kommentar* (30th edn, CH Beck 2019) margin number 24; Tatjana Hörnle, '§ 184b StGB' in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB*, vol 3 (3rd edn, CH Beck 2017) margin number 24, comfortably allowing the proof in practice.

(darknet) platform, which is used to *barter* child pornography, fulfills the elements of the crime as soon as he/she *involves* him/herself into the barter trade. Not yet involved is, whomever only provides and moderates the platform itself.[64] However, oftentimes the operator of such a platform will be held liable for *promoting* (in other words: advertising) child pornography, since oftentimes child pornography videos are praised on such internet portals.[65] Yet unsettled is that the operator does not have all child pornography files at his/her disposal, while clearly he/she has the power to delete them. All in all, under current German criminal law, the platform operator can already be held responsible for *promoting* child pornography and, at least, for participating in the trading. The draft laws simply allege[66] further gaps and the need of a specific darknet criminal offence for offering child pornography via internet.

(d) Criminal liability within other areas – where are the gaps?

For the record, forms of illicit data trading, trading with identification as well as with credit cards via limited access platforms of the internet – remember that this is, in fact, the major use of the darknet – seems to be only partly captured with the current criminal law (§§ 202c, 202d *German*-StGB, § 42 *German*-BDSG). Illicit data trading is punishable according to the Federal Data Protection Act (§ 42 I, II BDSG).[67] Again it remains questionable if the platform operator is *granting access* to certain data/file exchanges, if he/she does not have files at his/her disposal but is only moderating the communication possibilities. The crimes of data phishing and data fencing do not include simply providing or granting access to files, without any causal connection to file storage or to materially benefiting from it.[68] Yet, the operator of a platform will usually know the data sources or be materially benefiting from fencing them, when

64 Majority opinion, while being not yet clear in detail: BGH 2 StR 151/11 – 18.1.2012 – only states that it does not matter, whether the operator actually accesses or grants access to a certain file with further references of the court to Sabine König, *Kinderpornographie im Internet* (Dr. Kovac 2004) margin number 227; Walter Perron and Jörg Eisele, '§ 184b StGB' in Albin Eser and others (eds), *Schönke/Schröder Strafgesetzbuch Kommentar* (28th edn, CH Beck 2010) margin number 6. The High Court decision does not include a statement on the punishability of granting access as such; otherwise: Theo Ziegler, '§ 184b StGB' in Bernd von Heintschel-Heinegg (ed), *BeckOK-StGB* (45th edn, CH Beck 2020) margin number 12.

65 Jörg Eisele, '§ 184 StGB' in Albin Eser and others (eds), *Schönke/Schröder Strafgesetzbuch Kommentar* (30th edn, CH Beck 2019) margin number 45a.

66 See: Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508, 1, 9 ff.

67 Only if committed as a regular source of income and with the intent to materially benefit is a qualifying circumstance in § 42 I BDSG.

68 Christoph Safferling and Christian Rückert, 'Das Strafrecht und die Underground Economy' [2018] (291) Analysen und Argumente 1, 12.

granting access to files. Lacking such evidence, providing the platform at least fulfills the criteria of participating in phishing and fencing data. That holds also true for cases of illicit trading with malware. Using such malware is typically punishable as a specific form of data tampering or computer sabotage (§§ 303a, 303b *German*-StGB). Trading with malware nevertheless typically fulfills the requirements of participation. A gap of criminal liability is not in sight.[69]

### 4.2. Darknet as a platform to participate in illegal action

To the contrary, the German legislator claims that criminal liability for participating in criminally relevant actions of others via providing a limited-access-platform faces tremendous evidentiary issues. Participation is supposed to be unverifiable.[70] Moreover, *Safferling/Rückert*[71] as well as *Bachmann/Arslan*[72] suggest that the internet-service provider and operator only participate neutrally in actions by third parties. And if providing a platform remains a neutral act, which may, but does not have to, be used for illicit trafficking in drugs, arms, identities, files, or pornography, then indeed, provider and operator do not participate in criminal actions, when granting access.

When looked at in detail, one can distinguish three different liability-scenarios:

(1) The provider/operator installed or administrates a specific darknet-platform as a discussion forum in which individuals can remain anonymous.

(2) The provider/operator installed or administrates a specific darknet-platform only to allow certain users, those whom they granted access, to use it as a forum for any kind of illicit trading and trafficking. *That may be the standard case*.

(3) The provider/operator installed or administrates the platform like in (2). One of its users is using a traded item – a gun, drug, child pornography – and commits a crime, like a murder or rape.

From (1) to (3) the question is whether the internet provider/operator is – or should be – criminally liable for providing the platform.

(a) The anonymous discussion on darknet platforms

69 Likewise Greco (n 54) 448, 450.

70 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508, 2, 9 ff., 10.

71 Safferling and Rückert (n 69) 11.

72 Mario Bachmann and Nergiz Arslan, '"Darknet" – Handelsplätze für kriminelle Waren und Dienstleistungen: Ein Fall für den Strafgesetzgeber?' (2019) 6 NZWiSt 241, 243f.

Merely installing or administrating a darknet forum, platform, or likewise surrounding, even if it can only be accessed under certain, limited conditions, remains a neutral act as long as the opened forum is meant to allow anonymous discussions only. The German platform "*Deutschland im Deep Web*", where the Munich Amok gun was bought, was thought to be such a discussion forum. It was not in the intention of its operator that users were *mis-using* the platform by trafficking arms. The regional court Karlsruhe stated that allowing anonymous, unsupervised communication to various legally permissible themes was paramount to users and operators, not promoting or initiating criminal action.[73] On the one hand, unsupervised communication is to be constitutionally protected (Art. 5 German Constitution) allows the freedom of expression). On the other hand, it cannot be denied that installing or administrating any internet-based, limited-access-platform, which allows for anonymous communication, is likely to also be *mis*used for illicit criminal purposes. Therefore, providing such service can be seen as a non-neutral, but true act of participation (service as a crime).[74] Such extensive interpretation would incriminate any darknet platform operator and provider. It would outlaw the darknet as such. Probably disproportionally interfering with individual rights, providers and operators would be limited in their freedom of profession, setting up a platform allowing for unsupervised communication (Art. 12 German Constitution). Operators as well as users would be limited in their freedom of expressing unsupervised, unhampered communication free from repression[75] in time and place[76] (Art. 5 German Constitution). Moreover, operators and users would be limited in their freedom to gather and assemble, also through an anonymous platform (Art. 8 German Constitution).[77] Restrictions, however, need to be proportional. Criminal law shall only be applied, if rights of others cannot be secured otherwise (*ultima*

73 LG Karlsruhe 19.12.2018 - 4 KLs 608 Js 19580/17, published in BeckRS 2018, 40013 Rn. 291.

74 Katharina Beckemper, 'Strafbare Beihilfe durch alltägliche Geschäftsvorgänge' (2001) 23 Jura 163 ff; Bernd Heinrich, *Strafrecht Allgemeiner Teil* (6th edn, Kohlhammer 2019) margin number 1331.

75 Moßbrucker (n 17) 16ff.

76 BVerfG 10.10.1995 –1 BvR 1476/91, 1 BvR 1980/91, 1 BvR 102/92, 1 BvR 221/92, BVerfGE 93, 266 (289); see also Bernd Holznagel, 'Die Zukunft der Mediengrundrechte in Zeiten der Konvergenz' (2011) 14 MMR 1ff.

77 Volker Epping, *Grundrechte* (8th edn, Springer 2019) margin number 35; yet, whether Art. 8 can be applied for online-scenarios is critical, hereto Sebastian Hoffmanns, 'Die "Lufthansa-Blockade" 2001 – eine (strafbare) Online-Demonstration?' (2012) 7 ZIS 409ff.

*ratio*).[78] Thus, it is questionable if providing a platform for anonymous communication is using a permissible chance (*erlaubtes Risiko*) for which the operator cannot be held accountable (*Zurechnungsausschluss*).[79]

In *German* case law a restriction of criminal liability for participating in third party crimes[80] distinguishes two cases[81]: Criminally liable is (1), who *knows* (dolus directus 2. grade) if the principle offender, be it the seller, buyer, or trader, solely intends to illicitly trade or traffic using the platform. Criminally liable is (2), who *realizes the risk* when the principle offender may be using the platform for illicit trading or trafficking with goods, but who is also promoting and supporting the willing principle offender nonetheless (*dolus eventualis*). According to the High Court Criminal Section (BGH St),[82] it is evident that concrete firm evidence exists which make the criminally relevant action highly likely.[83] That means that the operator of any darknet platform, be it "*Deutschland im Deep Web*", is criminally liable as soon as he/she installs or administrates "suspicious" subcategories, like "guns", "arms", or "drugs". Whoever creates such subcategories or allows them, supports illicit trafficking.

That the remaining cases are free of criminal punishment, however, simply points to areas where anonymous and unsupervised communication is to be protected by the law, even if the commission of crimes is at risk: The operator of a platform, be it in the clear, deep, or dark net, who only moderates but does not support. Installing a platform means to participate objectively but may lack the intent to do so. Whoever later realizes that his/her platform is misused for criminal purposes, cannot be held responsible for

78 Hereto, see only Matthias Jahn and Dominik Brodowski, 'Das Ultima Ratio-Prinzip als strafverfassungsrechtliche Vorgabe zur Frage der Entbehrlichkeit von Straftatbeständen' (2017) 129 ZStW 363, 366ff; Liane Wörner, 'Straf*(rechts)*würdigkeit, -bedürftigkeit, -tauglichkeit und Schutzfähigkeit – zur Ordnung eines >>phänomenalen<< Argumentationsstraußes –' in Milan Kuhli and Martin Asholt (eds), *Strafbegründung und Strafeinschränkung als Argumentationsmuster* (Nomos 2017) 97, 110ff; Klaus Ferdinand Gärditz, 'Demokratizität des Strafrechts und Ultima Ratio-Grundsatz' (2016) 71 JZ 641, 644ff; Urs Kindhäuser, 'Straf-Recht und ultima-ratio-Prinzip' (2017) 129 ZStW 382ff; Albin Eser, 'Reform der Tötungsdelikte: zum Abschlussbericht der amtlichen Expertengruppe. Zugleich im Gedenken an Günter Heine' in Walter Gropp and others (eds), *Strafrecht als ultima ratio: Gießener Gedächtnisschrift für Günter Heine* (Mohr Siebeck 2016) 69ff.

79 See with further references: Rudolf Rengier, *Strafrecht Allgemeiner Teil* (11th edn, CH Beck 2019) para 45, margin number 106.

80 Mainly on a base of subjectively driven interpretation: BGHSt 46, 107 (112); BGH NStZ 2017, 337 (338).

81 Acc. the theory of participation in Germany, see only Claus Roxin, *Strafrecht Allgemeiner Teil*, vol 2 (CH Beck 2003) para 26, margin number 218ff, 247ff.

82 BGH 19.12.2017 − 1 StR 56/17, published in NStZ 2018, 328 (329).

83 At all: Rengier (n 80) para 45, margin number 109ff.

(intentionally participating in) already conducted misuse.[84] While installing and providing a platform may include risks of its misuse, providers and operators also cannot be forced by criminal law to monitor that no such risk has been realized. That would mean that any social media platform provider/operator would be obliged to delete any – only possibly – criminally relevant content, in contrary to European Union law. A variety and diversity of expressed opinions would be suppressed.[85]

(b) Darknet as a means to allow illicit trading and trafficking

Installing or administrating a darknet platform as a means to intentionally allow illicit trafficking is the standard case that also the *German* legislator had in mind. Here, any discussion of "neutral" participation misses the point. Whoever installs, administrates, or moderates a limited access-platform as one of several purposes to allow, promote, or otherwise support its use for illicit trading or trafficking in data, drugs, arms, or any other criminal activity, is criminally liable for participating in those crimes.[86] An additional "darknet criminal offence" is not necessary.

(c) Committing crimes with "goods" obtained at the darknet

According to *German* criminal law the provider/operator of a limited access-internet-based service can only be held responsible for crimes committed with illicit items bought, if he/she at least willingly considered that providing or administrating the platform was promoting illicit trafficking in such items and that someone would use it to commit a crime. In the Munich Amok scenario, the Court in Karlsruhe was not able to prove that the platform operator, despite realizing the risk of illicit trafficking, concretely considered that the Amok-offender would use the gun, bought at "*Deutschland im Deep Web*", to murder numerous individuals.[87] However, the operator could be –

84 A *dolus subsequence* theory is not accepted, see only Wolfgang Joecks, '§ 27 StGB' in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB*, vol 1 (3rd edn, CH Beck 2017) margin number 97.

85 Hereto only Thomas Bode, 'Das Providerprivileg aus §§ 7, 10 TMG als gesetzliche Regelung der Beihilfe durch "neutrale" Handlungen' (2015) 127 ZStW 937ff; Tobias Ceffinato, 'Die strafrechtliche Verantwortlichkeit von Internetplattformbetreibern' (2017) 57 JuS 403ff.

86 Likewise Greco (n 54) 442f, 446.

87 LG Karlsruhe Judgement of 19.12.2018 - 4 KLs 608 Js 19580/17, published in BeckRS 2018, 40013 Rn. 341ff.; hereto: Rengier (n 80) para 45, margin number 115 ff. Notwithstanding, the operator can also not been held responsible for *omitting to delete illegal contents from the platform* as a cause of the murder, because the operator's key responsibility ("Schwerpunkt der Vorwerfbarkeit", Rengier (n 80) para 45, margin number 10) is to provide the infrastructure for other to illicitly trade and traffic goods, which are then used to commit crimes; not in first place to delete illegal content from the platform, likewise Ceffinato (n 86) 408.

and was – found guilty for negligent manslaughter through providing the infrastructure to illicit arms trafficking.[88]

### 4.3. Conclusions

The providers and operators of (darknet) platforms are giving floor to different forms of illicit trading or trafficking with illegal goods by facilitating anonymous and unsupervised communications – be it knowingly and willingly, be it unknowingly and without intent. The provider/operator is criminally responsible for causing that risk. According to German criminal law, providing the opportunity or granting access to illicitly buy or sell drugs, arms or child pornography is punishable.[89] In addition, the provider/operator is criminally responsible for participating in selling or buying, if he/she was at least willingly considers that illicit misuse is taking place.[90] However, the provider cannot be made responsible for simply setting up an anonymous, unsupervised communication platform.[91] In that very case the provider must at least know that misuse is taking place and must have the power to delete contents in order to avoid further misuse.[92]

Any new offence punishing the provider/operator of limited access internet platforms, as suggested by the German legislator, will either punish what is already criminal, or only be reducing the burden of procedural proof taking to hold at least someone responsible.

## 5. Obstacles of Specific Darknet Criminal Offence

Observation (III.) and critical proof of the *German* draft offense (IV.) leaves some space for criticism in general. Speaking in keywords, the usage of new technologies is challenging the prosecution of crimes and may result in ineffectiveness of traditional investigative measures (1.). If the demand of investigative needs is replied by introducing a new criminal offence, which allows the taking of evidence, then interferences with constitutional rights may reach beyond those of investigative measures. Criminal liability is predated, the legally protected interest remains vague (2.). The law misses its own objective.

88 Hereto: Christian Fahl, 'Die Strafbarkeit des Verkaufens von Waffen im Darknet wegen fahrlässiger Tötung' (2018) 58 JuS 531ff; LG Karlsruhe Judgement of 19.12.2018 – 4 KLs 608 Js 19580/17, published in BeckRS 2018 40013; in detail see Greco (n 54) 435ff.

89 See above: §§ 29 BtMG, 52 WaffG, 184b StGB.

90 Acc. also Greco (n 54) 447, 450; likewise Mark A Zöller, 'Strafbarkeit und Strafverfolgung des Betreibers internetbasierter Handelsplattformen für illegale Waren und Dienstleistungen' (2019) 4 KriPoZ 274, 280.

91 Also: Zöller (n 91) 280.

92 Likewise Zöller (n 91) 280.

### 5.1. Procedural challenges

Clearly, technical specifics of the darknet include certain obstacles for criminal investigations, which have to be addressed:

First, the traditional most effective technical surveillance is ineffectual. If by using a specific software, access is limited and discussions are anonymous and unsupervised by intention, technical surveillance cannot meet its aim. Not knowing, where to find the illicit good nor whom is trafficking or communicating, means not to know whom or what to wiretap.[93] Operators use nicknames, virtual marketplaces change appearances all the time, access is limited, files and communications are encrypted. Criminals use communication platforms yet unknown to investigators. Within the "real world scenario", such obstacles often are overcome by vesting "undercover investigators" (§ 110a *German*-StPO). Within the virtual world of the world wide web, explicitly of the darknet, that is not so easy. Not only does suspicion with sufficient factual indications have to be shown in order to vest an undercover investigator but they need a long term "legend" to operate within the network. That often requires proven participation in such crimes,[94] like producing and uploading child pornography. In order to avoid that, investigators are taking over already existing, widely recognized accounts.[95] However, German procedural law does not offer any privileges: a term of imprisonment cannot be reduced for handing over an existing account to police,[96] but only recognized as positive behavior.

Second, investigating within the virtual world of the internet, be it clear, deep, or dark, means to investigate internationally. Communicating, trading, and trafficking *online* does not pay attention to switching between different providers nor state borders. Criminally relevant action usually crosses borders. Investigating such crimes generally means to cooperate worldwide. A purely national investigation is often doomed to failure.[97] Joint international investigation teams (§ 93 IRG) therefore gain importance.[98] However, so far, such opportunities remain unused.

93 Zöller (n 91) 275.

94 Hereto: Christoph Safferling, 'Keuschheitsproben und Verdeckte Ermittler im Darknet' (2018) 96 DRiZ 206f.

95 Zöller (n 91) 276; Christian Rath, 'Das Darknet ist kein justizfreier Raum' (2016) 94 DRiZ 292, 293; Saleh R Ihwas, '"Die digitale Unterwelt" – Strafprozessuale Ermittlungsmöglichkeiten im Darknet' (2018) 7 WiJ 138, 146; Benjamin Krause, 'Ermittlungen im Darknet' (2018) 71 NJW 678, 680.

96 Likewise Zöller (n 91) 276 with further references.

97 Zöller (n 91) 277.

98 See only case wall street market, hereto Zöller (n 91) 277.

Finally, interfaces between the virtual world and real life are not yet effectively used for investigation. It must not be forgotten that at some point the virtually traded or trafficked drug, arms, or identity will leave its virtual space and be shipped to its final destination. Criminals often use a faked identity to ship mail.[99] However, transition into "real life" allows for observing, taking, and analyzing DNA.[100] At the same time, investigations within different platforms and social networks promise success, because suspected persons frequently use pseudonyms, profiles, pictures, descriptions of products, or email-addresses not only once but in different clear-, deep- and darknet contexts.[101] Investigators are more often applying "open-source-intelligence", that is they search for hints in publicly available sources.[102]

### 5.2. "Pre-crime"-Scenario

Instead of focusing on further developing procedural methods, recent criminal policy (in Germany and elsewhere) prefers changing the substantive criminal law by either introducing new or expanding existing criminal liability. This change, however, results in degenerating the legally protected interest to an often unclear, more general description. Increasingly, the concept of criminal law as one of protecting legal interests is questioned.[103] The principle of certainty is at risk if it is paid attention to at all. Stressing its function of restoring peace and justice, such criminal law is turned into one preventing crime instead of going after crime. Likewise, the current drafts state that internet-based trading and trafficking creates a specific danger to public safety and order and a suggestion to incriminate the cause of that risk as such.[104] But clearly speaking, the interest of public safety and order essentially is in the interest of police. It is the police, who are shielding the public from certain risk and danger. In other

99 Rath (n 96) 293; Helmut Fünfsinn, Georg Ungefuk and Benjamin Krause, 'Das Darknet aus Sicht der Strafverfolgungsbehörden' [2017] Kriminalistik 440, 443; Ihwas (n 96) 147; Krause (n 96) 680.

100 Zöller (n 91) 277; Rath (n 96) 293.

101 Hereto: Otto Hostettler, 'Hilflose Ermittler' [2017] (46-47) APuZ 10, 14f.

102 Martin Göppner, 'Das Darknet – Bedrohung und Herausforderung für die Polizei?' [2018] Kriminalistik 623, 625f.

103 Matthias Bäcker and Sebastian Golla, 'Strafrecht in der Finsternis: Zu dem Vorhaben eines „Darknet-Tatbestands"' (*VerfBlog*, 21 March 2019) <https://verfassungsblog.de/strafrecht-in-der-finsternis-zu-dem-vorhaben-eines-darknet-tatbestands/> accessed 19 March 2020; Sabine Swoboda, 'Die Lehre vom Rechtsgut und ihre Alternative' (2010) 122 ZStW 24ff; eg for § 217 StGB: Albin Eser and Detlev Sternberg-Lieben, '§ 217 StGB' in Albin Eser and others (eds), *Schönke/Schröder Strafgesetzbuch Kommentar* (30th edn, CH Beck 2019) margin number 2ff; see also in a fundamental approach Ivo Appel, *Verfassung und Strafe* (Duncker & Humboldt 1998) 59 ff; Ivo Appel, 'Rechtsgüterschutz durch Strafrecht? – Anmerkungen aus verfassungsrechtlicher Sicht' (1999) 82 KritV 278ff.

104 Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508, 11.

words, punishing individuals for causing public risks – also within the world wide web – necessarily results in preventive criminal law. Criminal investigation then consequently takes over police tasks, collecting evidence while preventing danger to the public. Those effects are already well known, widely researched, and criticized.[105] Yet, a concept differentiating between preventive police and investigative work or constitutionalizing the substantive criminal law is missing.[106]

Not enough attention is paid to the aspect that (only) the specific use of certain platforms does not endanger *public* safety and order. The darknet is, as such, not publicly available. The user has to know how to access and use it. The Darknet is everything *but* a public drugs/arms (or any other criminal action) transshipment point. One simply cannot *google* his/her online drug- or arms- or datafile-store but has to make use of a search engine within a limited access area like *torch* to look for such an opportunity. Clearly, that does not endanger the public. The darknet is accessed by a comparably small number of users only (see A.II.), it remains marginal.

Thus, preventive criminal law, punishing a provider and operator of limited access platforms for installing, providing, or administrating pages, which grant access to possibilities of illicit trafficking in goods, *aims at closing down those platforms*. At the same time, that risks the possibilities of anonymous communication, thus is limiting the right of expression. In practice, closing down platforms has been proven to be ineffective already: Minutes after closing down one platform one will find all protagonists at another such channel.[107] Such criminal law clearly misses its own objective.

105 See only, instead of all and with further references: Greco (n 54) 435ff; Zöller (n 91) 274ff; Arndt Sinn, 'Vorverlagerung der Strafbarkeit – Begriff, Ursachen und Regelungstechniken' in Arndt Sinn, Walter Gropp and Ferenc Nagy (eds), *Grenzen der Vorverlagerung in einem Tatstrafrecht* (V&R unipress 2011) 14ff; Roland Hefendehl (ed), *Grenzenlose Vorverlagerung des Strafrechts?* (BWV 2003) 10ff; Roland Hefendehl, Andrew von Hirsch, Wolfgang Wohlers (eds), *Die Rechtsgutstheorie* (Nomos 2010) with discussions from Winfried Hassemer (57ff), Detlev Sternberg-Lieben (65ff), Otto Lagodny (83ff), Martin Böse (89ff), Bernd Schünemann (133ff) and others. With focus on the terrorism debate see also Liane Wörner, 'Expanding Criminal Laws by Predating Criminal Responsibility - Punishing Planning and Organizing Terrorist Attacks as a Means to Optimize Effectiveness of Fighting Against Terrorism' (2012) 13 German Law Journal 1037, 1044ff including further references.

106 Although to remarkable discussions, see Dominik Brodowski, *Verdeckte technische Überwachungsmaßnahmen im Polizei- und Strafverfahrensrecht* (Mohr Siebeck 2016) 253ff, 483ff when discussing the traditional German distinction between preventive and repressive policework and investigation also in light of European Union law; see also Otto Lagodny, *Strafrecht vor den Schranken der Grundrechte* (Mohr Siebeck 1996) 22ff; Otto Lagodny, 'Fallstricke der Strafrechtsvergleichung am Beispiel der deutschen Rechtsgutslehre' (2016) 11 ZIS 672ff; Klaus Tiedemann and others (eds), *Die Verfassung moderner Strafrechtspflege* (Nomos 2016) with papers from Christoph Burchard, Tatjana Hörnle, Matthias Jahn, Dominik Brodowski and others.

107 "*Deutschland im Deep Web*" is now to be found at "germanyruvvy2tcw.onion". The German legislator realized this as an issue, Bundestagsdrucksache (Parliament Papers of the German Bundestag) of 17 April 2020 – 19/9508, 9. However, consequences are not drawn from here.

## 6. Future Perspectives: Criminal Law within the Digitalized Society - Conclusions

We are about to sell our constitutional criminal law to the dark side. Punishing any provider or operator of darknet platforms for causing or promoting risks of misusing anonymous, unsupervised platform communications for illegal actions will also prohibit rightful darknet actions. Dissidents, opposition members, whistleblowers, and journalists[108] will lose an important possibility to communicate. Now and in the future, we will not be able to answer the question, if the darknet provider/operator actually knew how the platform was used and intentionally supported or promoted it. However, decreasing the burden of proof from investigating concrete participation in a crime down to causing risk of using (darknet) platforms to commit crimes, as a means to abstain from concrete investigation within the clear-, deep-, and darknet. It means risky action is sufficient for punishment; in other words: we do not know, whether an operator or provider committed or supported crimes, we simply punish. I hope that this remains a dystopia for literature and the film industry only, like in *Juli Zeh's* famous *corpus delicti*.[109]

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# The Criminal Liability of the Compliance Officer: An Approach Through Several Hard Cases

## *La Responsabilidad Penal del Compliance Officer: Una Aproximación a Través de Algunos Casos Difíciles*

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**ABSTRACT**

There is broad consensus in the academic legal opinion that **traditional theories on perpetration and participation** are **insufficient** to determine criminal liability **in complex organisational structures**, in particular in the business sector. Corporate activity rarely takes place through the implementation of naturalistic actions; it is more often a matter of adopting agreements reached by management bodies. Consequently, when determining perpetration, the decisive element is displaced from actual commission to the **taking of strategic decisions**, or even **failure to avoid** the criminal conduct committed by a third party. In this context, it is hardly surprising that particular relevance falls upon the attribution of liability for **commission by omission**. This would also be motivated by **reasons of a practical nature**: without evidence of actual commission of the offence, it would doubtlessly be easier to attest that the crime committed by someone lower down in the hierarchy had taken place in the sphere of competence of a hierarchical superior (administrator or senior manager) who, though able to prevent it, failed to do so. Based on this twofold premise, this paper sets out to reflect upon one of the new corporate subjects arising out of the reforms introduced by Organic Laws 5/2010 and 1/2015 in the field of criminal liability of legal persons and crime prevention models (corporate criminal compliance): the **compliance officer**.

**Keywords:** Compliance officer, criminal compliance programs, economic criminal law, delegation, duties of supervision, surveillance and control

**ABSTRACT (versión española)**

Existe consenso doctrinal en torno a la idea de que las **teorías tradicionales de la autoría y la participación** devienen **insuficientes** para la determinación de la responsabilidad penal **en estructuras organizativas complejas**, en particular en el ámbito empresarial. Con carácter general, el desarrollo de la actividad propia de la corporación no tiene lugar a través de la implementación de acciones naturalísticas, sino por medio de la adopción de acuerdos por parte de los órganos de dirección. En consecuencia, el elemento decisivo para la determinación de la autoría se desplaza de la ejecución material a la **toma de decisiones estratégicas** o, incluso, a la **no evitación** de la ejecución de la conducta típica por parte de un tercero. En este contexto, no es de extrañar que cobre particular relevancia la atribución de responsabilidad en **comisión por omisión**. Ello también obedecerá a **razones de naturaleza práctica**: en defecto de prueba de la ejecución material del delito resultará sin duda más sencillo acreditar que el hecho delictivo cometido por un inferior jerárquico habría tenido lugar en la esfera de competencia del superior (administrador o alto directivo) que, habiendo podido evitarlo, no lo hizo. Partiendo de esta doble premisa, el objeto de las líneas que siguen es reflexionar sobre uno de los nuevos sujetos corporativos a propósito de las reformas operadas por las LLOO 5/2010 y 1/2015 en materia de responsabilidad penal de personas jurídicas y modelos de prevención de delitos (compliance penal): el ***compliance officer*** o **encargado de cumplimiento**.

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## 1. The Compliance Officer: A Brief Presentation

Article 31 bis, paragraph 2 of the Spanish Criminal Code provides that: *"If the offence was committed by the persons referred to in letter a) of the previous sub-section, the legal person shall be exempt from liability if the following requirements are met: (...); 2nd: The supervision of the performance and compliance of the prevention model introduced has been entrusted to a body of the legal person with independent powers of initiative and control or which has been legally entrusted with the task of supervising the efficiency of the internal controls of the legal person".* Other than this generic reference, there is no legal text regulating the figure of the compliance officer. Neither the professional profile, nor the structure, nor the duties or position in the company of this person is governed by legislation.[1]

Given the situation, it should come as no surprise that Spanish companies are implementing the compliance body in very different ways. Some choose to appoint an individual, internal or external compliance officer. Others make a distinction between compliance body and compliance officer. The former would take the form of an Ethics Committee, while the functions of the latter would be physically assumed by the company's legal department. Various companies have implemented yet another system through the constitution of a Compliance Committee. This body is coordinated by the compliance officer and made up of members from the Legal and Human Resources departments, while also receiving support from the Internal Audit and Strategic Planning departments. In all of these models, the compliance officer is characterised by an essentially legal profile, which on occasions may entail evident conflicts of interest.

Some companies establish the compliance officer as a member of senior management, with **executive powers**, in other words, authority and organisational competencies in company activity. In such cases the post-holder's hierarchical position must be high

1 This circumstance is highlighted in Ricardo Robles "El responsable de cumplimiento - 'compliance officer´ - ante el Derecho penal", in Jesús Silva (Dir.) / Raquel Montaner (Coord.), Criminalidad de empresa y compliance. Prevención y reacciones corporativas (2013), 320; Jacobo Dopico, "Posición de garante del *compliance officer* por infracción del "deber de control: una aproximación tópica", in Santiago Mir / Mirentxu Corcoy / Víctor Gómez (Dirs.) / Juan Carlos Hortal / Vicente Valiente (Coords.), Responsabilidad de la empresa y Compliance. Programas de prevención, detección y reacción penal (2014), 518; Juan Antonio Lascuraín, "Salvar al oficial Ryan (sobre la responsabilidad penal del oficial de cumplimiento)", in Santiago Mir / Mirentxu Corcoy / Víctor Gómez (Dirs.) / Juan Carlos Hortal / Vicente Valiente (Coords.) Responsabilidad de la empresa y Compliance. Programas de prevención, detección y reacción penal (2014), 303; Raquel Montaner, "El Criminal compliance desde la perspectiva de la delegación de funciones", in Ramón Ragués / Ricardo Robles (Dirs.), Delito y empresa. Estudios sobre la teoría del delito aplicada al Derecho penal económico-empresarial, (2018), 69; Alejandro Turienzo, Principios de imputación en las relaciones horizontales. A propósito del órgano colegiado de cumplimiento (unpublished original), 2.

enough for him or her to seek and receive full collaboration from other members of the organisation. It is therefore understandable that, in comparative terms, the position of compliance officer is often deemed equivalent to one of senior or, to a lesser extent, middle management. In these circumstances, the compliance officer who could prevent an offence of which they have knowledge – for example, by correcting the wrongful act being committed by an employee or directly dismissing the individual – but fails to do so, could be considered co-perpetrator of the crime committed by the material author.

In this competency model, regardless of whether he or she forms part of senior or middle management (deputy or assistant to senior management), the compliance officer must be considered a delegate, in the strictest sense, of the Board of Directors. By virtue of such delegation, the post-holder becomes the principal guarantor and the administration body the secondary guarantor, with mere duties of oversight.[2]

Nonetheless, it will be most often the case that the compliance officer will be given **informative** or **advisory** functions in the framework of an area of competence usually dependent on the financial or administration department. It is with good reason that the figure of the compliance officer is generally considered compatible with other already existing positions with competences in the field of control, such as that of the data protection officer (DPO). In this case, liability for non-prevention of an offence will correspond with that of an accessory, provided the breach of his or her professional duties facilitates commission of the crime.

## 2. Criminal Liability Of The Compliance Officer: A Case Study

### 2.1. Premises

Compliance officers may be held liable as the perpetrator of an offence committed by another which they have not prevented, provided their position is one of guarantor. To occupy such a position, it will be necessary that the officer in question is a **delegate of the company in relation to a duty of guarantee** of same.[3] If, as is usual, he or she cannot be considered guarantor, either because the company is not in that position in relation to the particular offence, or because he or she is not a delegate of that company, the compliance officer may still be held criminally liable as an accessory to a corporate

2 Jacobo Dopico (n 1), 516; José Antonio Lascuraín, "Fundamento y límites del deber de garantía del empresario", en Luís Arroyo (Dir.), Hacia un Derecho penal económico europeo. Jornadas en honor del Profesor Klaus Tiedemann (1995), 218 ff.; Eduardo Demetrio, Responsabilidad penal por omisión del empresario (2009), 107 ff.

3 Juan Antonio Lascuraín (n 1), 325 f.

crime if the breach of his or her duties enabled the crime to be committed.[4] In any case, to make the compliance officer accountable for commission by omission, the risk of engagement in an offence that was not prevented must belong to the type of risks whose oversight commitment was previously explicitly and specifically adopted by the post-holder. As a general rule, it will also be necessary for a member of the company to commit a crime with intent (*dolus eventualis*) and for the compliance officer's acts of omission to be intentional, as a good deal of offences committed in the context of company activity cannot be categorised in Spanish Criminal Code (CC) under the heading of negligence.[5]

Criminally relevant conduct of the compliance officer would usually consist in the omission of actions that would **avoid the crime being committed**, inactivity when faced with indications or suspicion of an offence and non-transmission of relevant information to company management. An example of the latter would be blocking the complaint lodged against a company member regarding the possible commission of a crime.[6] Nonetheless, eventual criminal liability of the compliance officer will require that the referred crime **has not yet been committed**.[7] If it has already been perpetrated, the compliance officer could, purely hypothetically, answer to the offence of **breach of the duty to report crimes**. However, such possibility would be flatly rejected, because Art. 408 CC punishes the *"**authority or public officer** who, failing in the obligations of his office, were to intentionally cease to promote persecution of the offences that he or his officers obtain knowledge of"*. The special legal duty whose breach would constitute an offence would link the authority or public officer to the State, without any possibility of extending it to the compliance officer, beyond the commitment the latter has assumed with his or her company.[8] In the case of private individuals, failure to report can only be

4 Juan Antonio Lascuraín (n 1), 326.

5 Carolina Bolea, "Delegación de funciones. deberes de control y vigilancia", in Mirentxu Corcoy / Víctor Gómez (Dirs.), Manual de Derecho penal económico y de empresa, PG y PE (adaptado a las LLOO 1/2015 y 2/2015 de Reforma del Código Penal). Doctrina y jurisprudencia con casos solucionados, II (2015), 73.

6 Ricardo Robles (n 1), 325; Mateo Germán Bermejo / Omar Palermo, "La intervención delictiva del *compliance officer*", in Lothar Kuhlen / Juan Pablo Montiel / Iñigo Ortiz de Urbina (Dirs.), Compliance y teoría del delito (2013), 197; Jacobo Dopico (n 1), 525 f.; *Ídem* "Presupuestos básicos de la responsabilidad penal del «compliance officer» tras la reforma penal de 2015", in Frago Amada (Dir.), Actualidad Compliance (2018) 225 f.

7 Ricardo Robles (n 1), 325 f.

8 Jacobo Dopico (n 1), 531 f.

criminal when it is not **preventing certain crimes** (Art. 450.1 CC).[9] Accordingly, the only criminal liability that can be imputed to the compliance officer who fails to submit a complaint for a crime already committed is that of **covering up** the offence (Art. 451 CC) or **receiving stolen goods** (Art 298.1 CC).[10]

Another situation involving the hypothetical criminal liability of compliance officers would be determined by the specific **range of criminal risks** they explicitly **assume**.[11] In this context, it is worth remembering that delegation to the compliance officer of oversight of all the risks inherent in the company's activity is not common practice. Only certain risks are transferred, in particular **fraudulent offences** (fraud, misappropriation, criminal bankruptcy, tax evasion and Social Security fraud, etc.), and **crimes of corruption** (bribery, influence peddling, corruption between private individuals, etc.).[12] Safeguarding against other risks, such as those relating to money laundering, the environment and safety at work are usually delegated to specialised services or departments. It is the people that make up these services, rather than those of the company's general compliance body, who will be liable for not preventing risks connected with these sectorial fields of competences that materialise in criminal damage to criminal legal goods.[13]

Finally, as the person responsible for the oversight and control of the crime prevention model, the compliance officer's duty to the company ends with his or her **effective fulfilment** of that role. Once the company has been informed of an indication that a crime will possibly be committed, and given the usual supposition that executive powers have not been assigned to the compliance officer, the compliance body is not obliged to adopt other measures (for example, set in motion an internal investigation

9 Ricardo Robles (n 1), 325; Raquel Montaner (n 1), 84; *idem*, "El *compliance officer* y el Código penal", in Jorge Navarro (Dir.) / Raquel Montaner (Coord.), El compliance officer, ¿un profesional en riesgo?, (2018), 32. In a similar vein in the context of German legislation, Jürgen Bürkle, "Grenzen der strafrechtlichen Garantenstellung des Compliance-Officers", *CCZ* 1/2010, 10 f.; Werner Beulke, "Der „Compliance Officer" als Aufsichtsgarant? Überlegungen zu einer neuen Erscheinungsform der Geschäftsherrenhaftung", in Festschrift für Klaus Geppert zum 70. Geburtstag am 10. März (2001), 23 ff.; Thomas Rönnau / Frédéric Schneider, "Der Compliance-Beauftragte als strafrechtlicher Garant", ZWH; Vol. 2, (2010); Nadja Raus / Martin Lützeler, "Berichtspflicht des Compliance Officers – zwischen interner Eskalation und externer Anzeige", *CCZ* 3/2012, 97. Alejandro Turienzo (n 1), 16, reaches identical conclusions in relation to cases of absence of complaint *ad intra* by the sectorial compliance officer with respect to the offence committed by another sectorial compliance officer in the framework of the sphere of competences of the latter, of which the former may have had knowledge.

10 About this possibility, Raquel Montaner (n 9), 32 f.

11 Mateo Germán Bermejo / Omar Palermo (n 6), 188.

12 Ricardo Robles (n 1), 325.

13 Ricardo Robles (n 1), 326; Jacobo Dopico (n 1), 527.

or order dismissal of the person suspected of the offence) to prevent the crime from being or continuing to be committed.[14] In this event the compliance officer has been assigned such executive authority –which would, we insist, be exceptional– and is presented with rational indications of criminality in the company, failure to initiate an internal investigation with the intention of not obstructing commission of the crime would be considered participation by omission in an offence committed by another.[15] This would also apply in the case of preprogrammed or routine investigations provided, of course, that the compliance officer has been made aware of the commission of an offence by a third party.[16]

Once informed by the compliance officer, the administration body, or other department which should receive the information in accordance with the crime prevention model, fail to implement the corrective actions proposed, precisely what the compliance officer should do next is somewhat unclear. In systems like that of Germany, in which the channelling of reports of infringements in the company must be carried out through the Ombudsman or *Vertrauensanwalt*, or the Italian structure in which the compliance body is represented by the *organismo di vigilanza*, the compliance officer must file a report on the matter with these organisations to remain free from all liability. The only exception to this approach would be, given the case, the general duty to report certain offences if they have not yet been committed. However, it is doubtful that such duties could be easily extrapolated to the Spanish system.[17]

### 2.2. Liability of the compliance officer for ordinary offences

#### *a) A few methodological premises*

In those circumstances in which criminal liability may be attributed to the compliance officer for an ordinary offence it is necessary to ask whether such liability should be considered as perpetration or participation.[18] Logically, the answer to this question will depend on the criteria deemed preferable to determine perpetration in criminal law.[19]

14 Ricardo Robles (n 1), 326.

15 Jacobo Dopico (n 1), 529.

16 Jacobo Dopico (n 1), 529.

17 Jesús Silva, "Bases de la responsabilidad penal de los administradores de sociedades mercantiles", in *Fundamentos del Derecho penal de la empresa* (2013), 199; *Ídem*, "Deberes de vigilancia y *Compliance* empresarial", in Lothar Kuhlen / Juan Pablo Montiel / Iñigo Ortiz (Dirs.) (n 6), 104. In a similar sense Jacobo Dopico (n 6), 231.

18 Clara Blanc, La responsabilidad penal del Compliance officer (2017), 371 ff.

19 Ricardo Robles (n 1), 327.

The perspective of the **theory of control over the act** and, more specifically, control over the organisation, considers that the person who has control over the risks inherent in the business activity has control over the business as a whole. This control extends to all levels of the organisation and, thus, to the company management. The compliance officer would form part of the group of individuals who, being able to intervene in the offence, would do so without control over the act, in other words, from the position of accessory that results from participating in a crime. In this context it could, at most, be argued that the compliance officer has **potential** control over the act, which is obviously insufficient for an accusation of perpetration. However, for those offences that may be conceived as **culpable breach of duty**, only in the case where the duty to prevent crimes in the company falls upon the compliance officer could he or she be considered perpetrator of the crime that was not avoided. As previously stated, this scenario is highly unlikely, as it would mean granting the compliance officer executive powers within the company which as a general rule such positions never have.[20] Of these two notions of perpetration, this research considers the **first** to be preferable.

It should also be remembered that, excepting the infrequent cases in which breach of the duties assigned to the compliance officer materialises as the **active commission** of an offence, possible criminal liability of this agent would usually be explained as **by omission**. The traditional notion defended in its day by Armin Kaufmann and predominantly followed thereafter by academic legal opinion holds that there are two possible material sources of the positions of guarantor: existence of a function of protection of the legal good and the concurrence of a duty of control of a source of danger.[21] Of these two sources of the guarantor's position, in the area of crimes committed in the context of a legal person the prevailing academic legal opinion usually considers – as previously noted – that company management occupies the position of guarantor. That body is therefore obliged to organise the different levels of the business to ensure crimes are not committed in the company, based on the second of Kaufmann's material sources of the guarantor: the **duty of control of a source of danger**. According to this notion, the source of danger would be represented by the legal person itself and the duty of control of same would fall upon the members of the company management, in other words, the Board of Directors. In this context, the position of the compliance officer would be merely complementary to that of the administration body, and thus

20 Ricardo Robles (n 1), 327.

21 Armin Kaufmann, Die Dogmatik der Unterlassungsdelikte (1959), passim.

any possible criminal liability should also be relegated to that which corresponds to accessory to a crime.[22]

***b) Groups of cases***

In the light of these general premises, most of the cases in which possible liability of the compliance officer for acting in the sphere of competence of the employer or administrator would be related to the hypothetical **offence of breach of the duty to inform the company's senior management**.[23] In this context, distinctions must be drawn between **four assumptions of fact.**

*1)* A first group of cases would be represented by those in which, contrary to his or her assigned responsibilities, the compliance officer does not supervise the compliance status of a company department. Certain regulatory infringements would be occurring in this department which, if not corrected in time, would lead to an offence being committed, fraud for example, which would result in criminal liability of the legal person.[24] In such a case, it might be considered a risk situation in which it could be said that senior management had a specific duty as guarantor to avoid the harmful outcomes that could ensue and that, consequently, proper intervention by the compliance officer would constitute a relevant element in control of the situation. In this event, criminal liability on the part of the compliance officer could be deemed to exist, in general, for participation by omission in the unreported offence.[25] The compliance officer should also answer as participant by omission if the information omitted were to refer to a criminal activity committed by a subordinate and thus company management would be unable to know about it or adequately exercise the corresponding responsibilities of oversight and control.[26] In the exceptional circumstance that the compliance officer had recognised executive powers which would enable him or her to avoid commission of the offences, there could be some argument in favour of joint perpetration of the crime between its material author and the compliance officer with whom agreement has been reached not to prevent its commission.[27]

22 Juan Antonio Lascuraín (n 1), 325.
23 Raquel Montaner (n 9), 30.
24 Raquel Montaner (n 9), 30.
25 Raquel Montaner (n 9), 30 f.
26 Ricardo Robles (n 1), 329.
27 Mateo Germán Bermejo / Omar Palermo (n 6), 199.

*2)* In those cases in which the compliance officer fails to duly provide management with information about indications of a risk situation in the company, senior executives will usually be able to obtain such information **by other means**.[28] Naturally, this will depend upon how the crime prevention model is designed in each company,[29] or more precisely, how the function of the compliance officer is perceived in the specific model in question. In particular, this would refer to the value of the information the compliance officer can contribute for the proper development of the business activity. This relevance will clearly be greater if the compliance officer is established as the sole source of knowledge about the level of regulatory compliance in the company, than if management has other possible channels of oversight and information.[30] In the latter case, senior managers should answer as accessories to the offence through commission by omission, and the compliance officer or members of the collegial compliance body, as necessary collaborators or accomplices.[31] This would not be considered **criminal perpetration**, as could be the case of a hierarchical superior who allows his department's targets to be met through the use of criminal conduct, since the specific employee who commits the offence is not someone who works under the supervision and orders of the person responsible for compliance.[32]

*3)* Though undoubtedly less frequent, the case could arise in which a compliance officer takes advantage of company management by providing false information, thus ensuring that it too fails to prevent the crime being committed. In these circumstances, the compliance officer could be considered **an accessory** by using company management, who would have operated as an instrument which acted without criminal intent.[33]

*4)* Finally, situations can also be imagined in which the administrator tasks the compliance officer with developing and implementing a corruption prevention programme and, rather than fulfil this task, the latter decides to postpone the start-up of the programme. Such postponement would be until a certain financial operation is

28 Ricardo Robles (n 1), 328; Raquel Montaner (n 1), 83, who eventually however is more inclined towards impunity ("[the] compliance officer is a figure who has no independence for the purposes of deciding how to resolve a detected failure to comply with the regulations in the company activity. In this sense (…) the most coherent solution would be to discard his criminal liability, including that of accessory, for the failure to prevent the crimes committed from the company"), with the exception of cases of "intentional adaptation to the criminal conduct of a third party" (86).

29 Mateo Germán Bermejo / Omar Palermo (n 6), 181.

30 Ricardo Robles (n 1), 329. In an identical sense Raquel Montaner (n 1), 82; *idem* (n 5), 30 f.

31 Juan Antonio Lascuraín (n 1), 325.

32 Jacobo Dopico (n 1), 527 f.

33 Ricardo Robles (n 1), 328; Raquel Montaner (n 1), 83.

concluded involving the payment of bribes of which the compliance office is fully aware, the aim being to ensure the operation does not fail. In such a case, if the function of prevention and investigation of corruption offences (and particularly oversight of the actions of others) had been assumed by the compliance officer and no other channels of information existed which might enable prevention of the crime by those with direct competences to do so, Bolea considers that said compliance officer should answer as an **accessory** to the crime of corruption, with the administrator exempt from punishment. This should be the outcome, provided there was no breach of residual duties of oversight which would include the obligation to detect the corruption risk situation.[34]

### 2.3. Liability of the *compliance officer* in special offences

With regard to special offences, it may be the case that the compliance officer occupies the position of *extraneus* [extraneous person, unrelated to the crime]. This would occur, for instance, when a corporate crime is committed for which only the *de facto* or *de jure* company administrator can answer as perpetrator, and the compliance officer forms no part of the Board of Directors and cannot be considered the *de facto* administrator.

Academic opinion on corporate law considers that this will include all others who have exercised such functions on behalf of the company, provided this fact can be duly accredited, or those who present some form of irregularity in their legal situation due to an unaccepted, unregistered or expired defective appointment.[35] Criminal law doctrine holds that the *de facto* administrator is anyone who, alone or with others, adopts and imposes the management decisions of a company and, specifically, those expressed in the statutory definitions of a crime. In other words, "whoever is *de facto* in charge, or governs from the shadows".[36] In these cases, even though the compliance officer falsely informs company management or fails to provide it with the corresponding information about the investigation of a possible offence, thus causing non-prevention of the commission of the crime which is also committed by the company management, said compliance officer cannot be held accountable as an accessory. In this regard, remember that if special offences are characterised by anything it is precisely by who,

34 Carolina Bolea (n 5), 72 f.

35 Silvia Fernández, El administrador de hecho y de derecho. Aproximación a los delitos con restricciones en sede de autoría (2007) passim.

36 Silvia Fernández (n 34). In jurisprudence see, for example, the Spanish Supreme Court ruling STS 816/06, 26-7, FJ 2º.

through being *extraneus*, cannot be the direct perpetrator of the criminal offence an accessory or co-perpetrator.[37]

If the actual commission of the special offence is carried out by an *extraneus*, omission by the compliance officer of actions intended to prevent the crime would, like any possible participatory conduct, be atypical, as would the basic fact that he or she were an accessory. This possible loophole of criminal liability could be resolved if it were to be regarded, as is the case in one sector of academic opinion, that at least some of these offences would not, in fact, be special, but common "by reason of position", and that in same the compliance officer would occupy the position required by the crime of perpetration (for example, that of *de facto* administrator in corporate crimes).[38] However, this point of view could be considered questionable for at least two reasons. Firstly, it is doubtful that the solution of the compliance officer as *de facto* administrator is respectful with the principle of legality and consequently does not incur in the *in malam partem* analogy [ill will or intention]. Secondly, questions could even be raised about the premise, according to which so-called "crimes by reason of position" would be common crimes, as it would probably be more correct to consider them special, with all the dogmatic consequences that may be extracted from this type of offences.[39]

## 3. In Conclusion: The Need for a Protocol of Organisation and Operation of the Compliance Officer

It must be concluded that the compliance officer should solely answer for any failure to prevent those risks for which responsibility has been specifically transferred from company management to the compliance body. In accordance with that, any crime prevention model that seeks to be effective should include a **protocol that regulates the organisation and operation of the compliance officer**. This protocol should address the role of leadership, assignment of responsibilities and allocation of resources that correspond to the administration body in the general development of the crime prevention model. It should also define the structure, functions and composition, where applicable, of the Audit, Ethics and Control Committee. With regard to the compliance body in its strictest sense, the protocol must establish the principle of that body's independence, its structure and, finally, the extent of the oversight function of its

37 Ricardo Robles (n 1), 330.

38 Ricardo Robles (n 1), 330.

39 In this sense, see Víctor Gómez, "Delitos de posición y delitos con elementos de autoría meramente tipificadores. Nuevas bases para una distinción necesaria", RECPC 14-01 (2012), p. 21 ff.

operation that would correspond to the administration body. The protocol will also be responsible for defining the professional profile, duties and responsibilities of the compliance officer.[40]

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40 Anna Núñez, "El *compliance officer* y la empresa", in Jorge Navarro (Dir.) / Raquel Montaner (Coord.) (in 9), (2018) 190 ff. A complete model of the regulatory protocol of the organisation and functioning of the compliance body with details of its content may be seen in Jesús Silva, / Ramón Ragués / Víctor Gómez / Raquel Montaner / Beatriz Goena / Anna Núñez, Modelo de prevención de delitos Molins & Silva Defensa penal, (2017) 192 ff.

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# Aksayan Adalet: Amerikan İç Savaşı Sonrası Gerçekleştirilen Henry Wirz Yargılaması

## *Justice Gone Wrong: Henry Wirz Trial following the American Civil War*

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**ÖZ**

Bu çalışma esas itibariyle bir uluslararası ceza hukuku tarihi çalışmasıdır. Çalışmada, Amerikan İç Savaşı sonrası gerçekleştirilen Wirz Yargılaması ele alınmaktadır. Yargılama, bir iç savaş sonrası uluslararası hukuktan kaynaklanan yükümlülüklerin yerine getirilmemesi nedeniyle oluşan cezai sorumluluk ile yakından ilgilidir. Aynı şekilde yargılama ile muharip imtiyazının savaş suçlarına teşmil edilemeyeceği de açıkça kabul edilmiştir. Bununla beraber yargılama süreci güvenilir olmaktan çok uzaktır. Ağır bir toplumsal baskı ve öfke altında gerçekleştirilen yargılama, hukukilik kisvesine bürünmüş bir intikam alma mekanizmasına indirgenmiş gibidir. Maddi gerçekliğin aranması amacından uzaklaşılmış, yargılama, esasen bir takım siyasal hedeflerin gerçekleştirilmesine hizmet etmiştir. İktidarı elinde bulunduranlar, özellikle de Bakan Stanton, duruşmaya direkt olarak müdahale etmiştir. Bu ise ceza hukuku açısındanmaddi gerçekliğe ulaşılması amacına katkı sağlamayan bir durum yaratmıştır. Yargılama sonucunda Wirz suçlu bulunmuş ve idam edilmiştir. Daha ağır şartların hüküm sürdüğü Salisbury Kampı'na ilişkin ve aşağı yukarı aynı zamanlarda gerçekleştirilmiş Gee davası'nda ise benzeri bir hüküm inşa edilmemiş ve Gee beraat etmiştir. Bu ise bir siyaset aracı olarak ceza hukukunun kullanılmasının yarattığı kötü sonuçlara işaret etmektedir. Bu nedenlerle Wirz Davası uluslararası ceza hukuku çalışanlar için önemini hala korumakta olan önemli bir tecrübedir.

**Anahtar Kelimeler:** Uluslararası ceza hukuku tarihi, Amerikan iç savaşı, Henry Wirz yargılaması, John H. Gee yargılaması

**ABSTRACT**

This paper aims to probe into the Henry Wirz trial that took place after the cessation of hostilities in the American Civil War. The trial is mainly about the criminal responsibility arising out of the violation of legal responsibilities emanating from international law in a civil war setting. In the same vein, during the trial the idea that the combatant privilege cannot be extended to cover war crimes was explicitly acknowledged. However, the trial was far from being a legally sound process. It was a thinly veiled attempt to avenge, owing much to and being under enormous societal pressure. This caused the trial to stray away from the ultimate objective of criminal procedure, which was unearthing the facts. This mistake was not repeated in a subsequent trial in which John H. Gee was the accused party, who, however, was acquitted. At the end of the trial Henry Wirz was found guilty and executed. All in all, this whole experience underlines the inevitably harmful consequences of misusing criminal law to political ends, which makes the Wirz Case still relevant for students of international criminal law.

**Keywords:** The history of international criminal law, American civil war, Henry Wirz trial, John H. Gee trial

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## EXTENDED ABSTRACT

Following the cessation of hostilities in the American Civil War, Henry Wirz, who fought on the side of the Confederacy was blamed for committing war crimes during his stint as commander of the notorious Andersonville Prisoners of War Camp in Georgia. Wirz, a Swiss-American, defended himself, making use of defenses like superior orders inter alia but his defense was dismissed almost as a whole by the military commission entrusted with the task of running the trial.

The Camp administered by Wirz was constructed before he assumed the position of commander. It was originally meant for far fewer numbers of prisoners than it accommodated during the war. The sudden increase can be ascribed to the conscious efforts on behalf of the North, who thought it proper to clamp down the Confederate war machine by hitting it where it was the most vulnerable, i.e. the lack of men and other resources. This is the main reason that the then functioning system exchange of prisoners collapsed, which in turn made lives harder in the camps, whether they were in the North or the South. This ruthless calculation caused thousands to perish in both groups of camps and prisons. However, this measure and other scorched-earth practices brought the Confederacy to its knees, forcing it to accept the Appomattox Surrender Agreement. As its title readily suggests, this was not an agreement or treaty of peace but it did create a legal position reminiscent of a truce. This legal appraisal is the main legal argument for the authority of those Military Commissions that oversaw the few trials following the end of the hostilities.

Wirz was at home after the signing of the Appomattox Agreement and probably trying to come to grips with the war memories, when he contacted the US Army. This letter of his caused the authorities to concentrate their own efforts on Wirz and his deeds during the war with a view to hiding their own share of guilt in the plight of the soldiers of the North in southern prisoner of war camps, which was a very thorny issue right after the war and could have easily cost those decision-makers their political careers. There were actually two distinct tendencies in Washington. The first one was very eager to see a big conspiracy on behalf of the Confederacy to murder prisoners of war in a systemic and cruel way. This alleged conspiracy included the very top brass of the Confederacy and Wirz was just a functionary of the elite power-that-be. However, cognizant of his own contribution in the misery of Northern soldiers held captive in the hands of the Confederacy, Stanton needed a scape-goat urgently. Wirz, a poor outsider originally from Switzerland, provided him with an opportunity to alleviate,

at least in part, the probable public rage that was to emerge, following a full disclosure of the horrid conditions in the field and their real causes, i.e. a political decision in the capital ignoring the urgent needs of its own soldiers.

Wirz failed to defend himself. He was poor. In addition, he was already a much demonized figure in American public opinion, although it could have been easily unearthed that he was trying to improve the living standards reigning in Andersonville. He was found guilty and executed by hanging. Not long after, another Confederate officer was put on trial for similar allegations and acquitted. This can only be understood in light of the fact that public opinion had found its sinner and its wrath was assuaged.

The Wirz Case offers some crucial insights into how a criminal trial should be administered, so that mistakes committed then may now be avoided. It still draws attention from students of international criminal law.

## 1. Giriş

Amerikan İç Savaşı'nın bitmesini takip eden günlerde ayrılıkçılık ve bölünme tehlikesini büyük kayıplar ve fedakârlıklarla dahi olsa bertaraf etmiş olan Birleşik Devletler, Başkan Lincoln'ın suikasta kurban gitmesi ile sarsılmış; bir anlamda, zaferin sembol ismini çok çabuk kaybetmiştir (Kieser, 1968: s. 47). Bu gelişme savaş sırasında zaten sınanmış olan toplumda büyük bir öfkeye neden olmuştur.

Bu gelişmelerden çok uzakta, savaş sonrası yenilmiş bir ordunun eski bir subayı olan Binbaşı Henry Wirz evine dönmüş ve savaşın yaralarını iyileştirmeye başlamıştır. Wirz'in son görevi bir esir kampını idare etmek olmuştur. Wirz bu kampa dair belgeleri büyük bir titizlikle korumuş ve savaş sonrası konu hakkında ABD ordusuna bir dilekçe ile bilgi vermiştir (LaForce, 1988: s. 5). Bu dilekçe kendisinin sonunu hazırlamıştır. Meselenin siyasi bir yanının olması kuvvetle muhtemeldir. Bir takım siyasi kaygılara sahip olan ABD Savunma Bakanlığı yetkilileri Wirz'in yargılanması gerektiğini düşünmüşler ve konu hakkında hazırlıklara girişmişlerdir. Wirz'in bu niyetlerden en ufak bir haberi bulunmamaktaydı. O kadar ki kendisini enterne etmeye gelen askerleri evine davet etmiş, mütevazı yemeğini onlarla paylaşmıştır (LaForce, 1988: s. 5). Wirz kendi yazdığı dilekçe ile bir anlamda kendini ihbar etmiş sayılmıştır ve kendisi hakkında bir soruşturma olduğundan da habersiz bir şekilde ailesinden ayrılmıştır. Wirz Vakası, savaş sonrası baskın olması muhtemel intikamcı bir havanın yargılamanın sıhhati konusunda şüpheler yaratması noktasında öğretici bir tecrübedir (Bonner, 1947: s. 128). Duruşma safhasında uluslararası kurallara dayanan iddia makamı, bu vakayı Uluslararası Hukuk ve Uluslararası Ceza Hukuku öğrencileri için özellikle önemli bir örnek olay haline getirmiştir. Dikkat çekici bir diğer nokta da amirin emri bağlamındaki çalışmalarda Wirz Yargılamasının, yüzeysel de olsa, atıfta bulunulan davalardan olmasıdır.

## 2. Amerikan İç Savaşının Altyapısına Dair

Hukukun liberal veya pozitivist değerlendirmesinin neticesinde ortaya çıkan ve özünde yalnızca bir hukuk tezinin diğeriyle çatışması olarak görülen kuralların ve süreçlerin altında aslında ekonomik mahiyette bir çelişmeyi görebilmek gerekir. Bu yaklaşımın en güncel ifadelerinden birinin de hatırlattığı üzere (Güneysu, 2019: s. 836):

"Hukuki analizin tarihsel şartları bertaraf ederek yalnızca hükümlerin içeriklerinin analizine hasredilmesi, hiç şüphesiz ki kısır bir anlamlandırmaya neden olacaktır. Bu nedenle hukukla ilgili gelişmelerin siyasal-tarihsel gelişmelerden bağımsız olarak analiz edilmemesi gerekmektedir. Marxist anlayışın da işaret ettiği üzere (Yalvaç,

2017: s. 166; Alexeyev 1990: s. 53–70): '(B)ütün din ve hukuk dizgeleri, tarihte beliren bütün kurumsal görüşler, ancak o çağın maddi yaşam koşulları anlaşılmışsa ve bunlar maddi koşulların sonucu olarak görülüyorsa, anlaşılabilirler. İnsanların toplumsal varlıkları, bilinçlerini etkiler'. Hemen her hukuksal gelişmede söz konusu olduğu üzere, bu meselenin de içinde bulunduğu bir şartlar bütünü bulunmaktadır. Güç ilişkileri, Uluslararası Hukuk'ta kristalize olmaktadır (Özdemir, 2011: s. 15)."

Aksine bir yaklaşım hukuku bir aksesuar bilime (Begleitswissenschaft) indirger ve gelişmelerin nedenlerinin gözden kaçırılmasına neden olur (Thiele, 2020: s. 7).

Abraham Lincoln'un ABD Başkanı olarak seçildiği 1860'a kadar bu makamda oturmuş olan kişiler köleliğe karşı olmayan hatta bazıları için konuşursak bizzat köle sahibi olan kişilerdi (Schraffenberger, 2011). Ayrıca, köle sahipleri Senato'da ve Amerikan Yüksek Mahkemesi'nde önemli bir ağırlığa sahipti (Schraffenberger, 2011). Kuzey'de kölelik söz konusu değilken, Güney eyaletlerinde uygulanmaya devam etmekteydi. Bununla beraber, Kuzey Güney'de de zamanla bu uygulamadan vazgeçileceğine inanmaktaydı. Ancak evdeki hesap çarşıya uymamış; İngiltere'deki Sanayi Devrimi'nin de etkisiyle Güney tarafından üretilen pamuk için büyük bir talep oluşmuştu (Schraffenberger, 2011). Bu da kölelik kurumunun korunmasına ve hatta desteklenmesine neden olmuştur. Güneyliler köleliğin özünde iyi bir kurum olduğu ve hatta toplumun dayanması gereken önemli kurumları arasında köleliğin de bulunması gerektiği görüşündeydiler (Rundle, 1964: s. 118). Karl Marx da örneğin, görünüşteki savaş nedenleri ne olursa olsun, savaşın esas nedeninin kölelik kurumuna dair farklı yaklaşımlar olduğu düşüncesindedir (Marx ve Engels, 2003: s. 74; Rundle, 1964: s. 118). Marx'a göre; köleliğin savaşın esas nedeni olmasının yanı sıra, köleliğin karlılığının arttırılması yeni toprakların kazanılmasına da bağlıdır. İşte bunun farkında olan Güney'in yayılmacılık yanlısı olması da savaşın bir diğer nedenidir (Rundle, 1964: s. 119). Potyemkin ve diğerlerinin de ifade ettiği üzere bu yayılmacı politikaya olan ihtiyaç İç Savaş öncesi zaten ABD'de mevcuttur ve ABD diplomasisi üzerinde de belirleyici bir etkisi olagelmiştir (Potyemkin vd. 2015: s. 471). Florida'nın, Teksas'ın tamamen ve Meksika'nın da bazı bölgelerinin ele geçirilmesinin temelinde hep bu eğilim rol oynamıştır (Potyemkin vd. 2015: s. 471). Ancak doğaları gereği, kölelik ve endüstriyel kapitalizmin sürekli bir düzen ve birlikteliği sağlaması mümkün olamayacağından savaş kaçınılmaz bir hale gelmiştir (Potyemkin vd. 2015: s. 471).

Güneyli politik elitlerin çoğunluğu toprak sahiplerinden oluşmaktadır ve bunlar köleleri olan varlıklı kişilerdir (Bonner, 1947: s. 129). Bu sınıfın savaş sonrasında kısa ve orta

vadede siyasal anlamda etkinliğe kavuşması gayet yerinde bir tahmin olarak görülmelidir. Belki de bu nedenle savaş sonrası Kuzey'in değer atfettiği önemli politika önceliklerinden bir tanesi de bu sınıfın tasfiyesi olmuştur (Bonner, 1947: s. 129). Böylelikle Kuzey'e güçlü bir alternatif siyasal akım sunan ve devlet idare etme tecrübesine de sahip sınıf ve üretim türütasfiye edilerek gelecekte Kuzey için tehdit olmasının önüne geçilmek istenmiştir (Bonner, 1947: s. 129). Bu kapsamlı tasfiye hedefi, Henry Wirz'in yargılanması sürecinde kendisini bütün bu yargılama safahatına damgasını vuran saik olarak belli etmiştir.

## 3. Henry Wirz; Hayatı ve İç Savaş Tecrübesi

Henry Hartmann Wirz 1823 yılında İsviçre'nin Zürih kentinde doğmuştur (Iverson, 2015: s. 103; Winkler, 2011: s. 1). İsviçre'de babasının yanında çalışan Henry Wirz, hukuka aykırı işlem ve eylemlerinden dolayı cezalandırılmıştır. Kötüleşen sağlığı nedeniyle, almış olduğu hapis cezası Zürih Kantonu'ndan 12 yıllığına sürgün edilme cezasına dönüştürülmüştür. Şansını ilk başta Rusya'da deneyen Wirz sonrasında ABD'ye göç etmiştir. ABD'de doktorların yanında çalışmış ve tıp alanında tecrübe kazanmıştır. Bununla beraber, resmi bir tıp eğitiminden geçmediğinden bulabildiği tek "hekimlik" işi köle çiftliklerinde olmuştur (Iverson, 2015, s. 104). 1861 yılında Amerikan İç Savaşı'nın başlaması üzerine Wirz 16 Temmuz 1861 tarihinde 4. Louisiana Alayı'na katılmıştır (Iverson, 2015, s. 104; Kieser, 1968, s. 49; Winkler, 2011, s. 2). Gösterdiği yararlılıklar nedeniyle kısa zamanda amirlerinin dikkatini çeken Wirz terfi almış ve çavuş rütbesine yükselmiştir (Kieser, 1968, s. 49). Wirz'in terfiinde, esir Kuzeyli askerlerin listesinin hazırlanmasındaki kişisel çabası ve başarısını fark eden General Winder rol oynamıştır. Wirz, Seven Pines Muharebesi'nde artık harbe katılmasını imkânsız kılacak kadar ağır bir şekilde yaralanmıştır (Kieser, 1968, s. 49; Laforce, 1988: s. 4; Winkler, 2011,s. 2). Bu gelişmeden kısa bir süre sonra Wirz yüzbaşı olmuş ve artık savaşma kapasitesi de kalmadığından esir askerlerle ilgili işlerde görevlendirilmeye devam etmiştir (Winkler, 2011, s. 4). Tedavi amaçlı olarak bir süreliğine Avrupa'ya gönderilen Wirz, 1864 senesinde ABD'ye dönmüş ve Andersonville'de kumandan olarak görevlendirilmiştir (Laska ve Smith, 1975: s. 86).

## 4. Andersonville Esir Kampı Kumandanı Olarak Henry Wirz

Andersonville'deki esir kampının kumandanlığını üstlenen Wirz bu görevini Savaş'ın sonuna kadar sürdürmüştür. Appomattox Teslim (Surrender) Anlaşması çarpışmaların Kuzey'in üstünlüğü ile sona erdiğini ortaya koymuştur. Bununla beraber Kuzey'in

kendi zaferini doyasıya kutlamasının önüne Lincoln Suikastı geçmiştir. Suikast sonrası kamuoyu iç savaş ile ilgili büyük bir öfkeye kapılmıştır. Özellikle Savunma Bakanı Stanton bu gelişme sonrası çok büyük yetkilere sahip olmuş ve bundan yararlanmıştır. Stanton aşağıda detaylıca anlatılacak hususların yanı sıra, Lincoln Suikastı'nın yarattığı öfke nedeniyle de bu suikast ile Güneyli politikacılar ve komutanlar arasında bir ilişki aranmasına çaba sarf etmiştir. Eğer bu suikastın emrinin bir şekilde Güneyli karar-alıcılar tarafından verildiği ispatlanabilseydi, bu elbette hem bu kişilerin idam edilmesi anlamına gelecekti hem de toplumdaki anlık oluşan hıncın da tatmin edilmesine neden olacaktı. Bununla beraber, böyle bir bağ kurulamamıştır. Wirz Yargılaması tam da bu havadaki ABD için bir anlamda kurtarıcı etki gösterecektir.

Andersonville'de savaş esirleri için bir kamp kurulması birçok nedenden dolayı mantıklı bir tercih olarak görülmelidir (LaForce, 1988: s. 4). İnşaat yapımında kullanılacak kereste bölgede boldur. Yine, kamp tren yoluna çok yakın bir mesafededir. Bu da esirlerin nakli ve gerektiğinde değiş-tokuşunu kolaylaştıracak bir unsurdur. Aynı şekilde bölgenin havası temizdir ve tatlı su kaynakları da mevcuttur (LaForce, 1988: s. 4; Winkler, 2011: s. 5). Kampın, ilk planlandığı şekliyle, 10.000 savaş esirini barındırması planlanmış ve buna göre hazırlık yapılmıştır. Bununla beraber, yaşanan olaylar sonucunda kamp bu rakamdan çok daha fala esirin gönderildiği bir yer haline dönüşmüştür. Bu gelişmeler sonucunda kampta genel olarak yaşam şartları kötüleşecek ve can kayıpları gözlemlenmeye başlayacaktır. Burada ifade etmeliyiz ki bu can kayıplarının tüm sorumluluğu Güneyli idarecilere çıkartılmamalıdır. O kadar ki bazı ABD politikaları ve uygulamaları sonucunda Güney tarafının eli kolu bağlanmış; çaresizlik içinde bu ölümlere şahitlik etmek durumunda kalınmıştır.

Kuzey'in bu uygulamaları arasında evvelemirde esir değiş-tokuşundan vazgeçilmesi sayılmalıdır. Belli bir süre kamplarda kalacak olan esirlerin, sonrasında kendi taraflarına dönmüş olması her iki tarafta da esir sistemlerini yürüten subayların elini rahatlatan bir uygulama iken bu uygulamadan Kuzey tarafı vazgeçmiştir (Laska ve Smith, 1975: s. 79). Buradaki mantık basittir. Güney'i sıkıştırmaya başlayan Kuzey, insan devşirme sorunu yaşayan Güney'e esirlerin dönmesi halinde Güney'in savaşma kapasitesinin uzun süre devam edeceğini öngörmüştür. Bunun üzerine, iyi işleyen bu sistemden vazgeçilmiştir. Böylelikle Güney tarafında bir personel sorununun baş göstermesi beklenmiştir. Ancak, bu tercihin sonuçları Güney'in elinde olan Kuzey askerleri için de bir felaket olmuştur. Kamplarda, önceden öngörülemeyecek sayıda insan barınmaya başlamış; bu da her türlü altyapı veya hazırlığın yetersiz kalmasına neden olmuştur.

Savaş esirlerinin takasına ilişkin acımasız planını uygulayan Kuzey ilaveten *scorched-earth* (toprak yakma) taktiklerini anımsatırcasına, Güney'de mevcut mahsul ve tarlaları da hedef almıştır. Bunun dolaysız sonucu beslenme problemlerinin Güney'de baş göstermesidir. Bundan elbette savaş esirleri de fazlasıyla etkilenmişlerdir. Andersonville'de de bu problem yaşanmıştır. Wirz'in lehinde olarak ifade etmeliyiz ki söz konusu esir kampında savaş esirleri ile Güney'in görevli askerleri aynı kumanyaları yemişler, bu konuda herhangi bir ayrımcılığa uğranılmamıştır. Yani, Wirz ve diğer Güneyli subaylar kendi askerlerine tuttukları savaş esirleri ile aynı yemeği vermişlerdir (LaForce, 1988: s. 4). Böylesi bir uygulama sonradan iddia edilen zalim bir toplu yok etme planına uygun düşmeyen bir tavır olarak görülmelidir. Gerçekten böyle bir kast olmuş olsaydı, hiç şüphesiz Güneyli karar alıcılar kendi personelinin durumunu iyileştirecek tedbirler almaktan kaçınmazlardı. Ancak böyle bir uygulama gözlemlenmediği gibi, somut olarak eşit muamelenin mevcudiyetinden bahsetmek mümkün görünmektedir.

Kuzey'in benzer bir başka acımasız uygulaması ilaçları savaş malzemesi saymasıdır (Kieser, 1968: s. 54; LaForce, 1988: s. 5). İnsani olarak aktarılmasına müsaade edilmesi gereken, insan sağlığını, çevreyi ve hijyene ilişkin şartları da olumsuz etkileyen bu karar sonrası Kuzey, Güney'in ilaçlarına el koymaya başlamış ve hayatı herkes için daha da zorlaştırmıştır.

Kuzey ayrıca tren yollarına sıklıkla sabotaj yapmış ve tren ile yapılan insan ve malzeme nakline engel olmayı başarmıştır. Andersonville'i esasen çok değerli kılan konumu bu sabotajlar sonrası değersizleşmiştir (Winkler, 2011: s. 5). Kamp kolay kolay yardım alamaz olmuştur. Tüm bunlara rağmen, savaşın sonunda başına geleceklerden habersiz bir şekilde Yüzbaşı Henry Wirz Andersonville'i esirler için daha yaşanılır bir hale getirmeye çaba sarf etmiştir.

Hızla artan ve belli bir zamanda 30.000'leri aşan esir sayısı, barınak ve diğer ihtiyaçları acil birer problem haline döndürmüştür. Bunun üzerine Wirz, kampı orijinal halinden daha geniş bir hale getirmeyi hedeflemiş ve bunu da başarmıştır (Winkler, 2011, s. 5). Ancak, Wirz'in elindeki imkânlar problemin vahametine uygun tedbirler almasına engel olmuştur.

Wirz'in elindeki görevli personel sayısı azdır. Beslenme problemleri görevli askerler arasında da ölümlere neden olmuştur. Bu ise kamptaki disiplini bozmuştur. Bu bozulan disiplin kampta savaş esirlerinin birbirlerinin malını ve canını hedeflemeye başlamasına

sebep olmuştur. Suç hızla artarken, esir askerler arasında çetelerin kurulduğu gözlenmiştir. Bunların arasında en acımasızı ve en güçlüsü *Raiders* adıyla bilinen çete olmuştur (Laska ve Smith, 1975: s. 89). Bizzat Kuzeyli esirlerin başvurması üzerine Wirz olaya müdahil olmuş ve bu çeteye karşı tedbirler almıştır (LaForce, 1988: s. 5). Kamp içinde diğer Kuzeyli askerlere karşı çok sayıda suç işlemiş olan çetenin, Kuzeyli askerler ile işbirliği içinde çökertilmesini takiben çete üyeleri Kuzeyli askerler tarafından yargılanmış ve idama mahkûm edilmişlerdir. Görüldüğü üzere Wirz burada bir subaya yakışır bir tavır sergilemiş ve kolaylıkla benimseyebileceği ve içinde bulunduğu şartlar ışığında anlaşılır da bulunulabilecek bir ilgisizliğe kendisini kaptırmamıştır. Hâlbuki aksi bir tavır sergilemesi, her ne kadar görevini suistimal etmiş olması durumunu yaratacaksa da Wirz'in bir anlamda elini rahatlatacak bir hareket tarzı olarak görülmelidir. Wirz'in bu çabası yaptığı işteki adanmışlığını ve azmini ortaya koymaktadır. Aynı şekilde, Wirz'in savaş örf ve adetlerine uyma konusunda da en azından çaba sarf ettiği söylenebilir.

Wirz'in Kuzeyli askerler hakkında yaptığı, yapmaya çalıştığı sadece sayılanlardan ibaret değildir. Wirz gittikçe kötüleşen şartların farkındadır ve bunun sonuçlarını da hissetmekte, gelecekte alacağı hali de öngörmektedir. Bunun üzerine, Kuzeyli askerlerin de taleplerine uyarak, kendi emri altındaki bu esirlerden dört kişilik bir heyet teşkil edilmesine izin vermiştir (LaForce, 1988: s. 8). Bu heyet Washington'a giderek içinde bulundukları kötü şartları kendi komutanlarına anlatmış veya en azından anlatmayı hedeflemiştir. Bu heyet hedeflediği görüşmeleri yapmakta zorlanmış, ulaşabildikleri üst düzey karar alıcı ve uygulayıcılardan ise bekledikleri samimiyeti görememiştir. Bu hayal kırıklığı sonrasında heyet, önceden verilmiş olan "geri dönme" sözüne uyarak Kamp'a geri dönmüştür (LaForce, 1988: s. 9). İşte bu hadise özellikle Kuzey Savunma Bakanı Stanton'ın ortaya çıkmasından çok korktuğu bir sırra dönüşmüştür. Stanton, memleketleri için savaştıklarını zanneden Kuzeyli askerlerin savaş esnasında aslında aile ve özgürlüklerine kavuşabileceklerinin ve fakat bunun bizzat kendi komutanları tarafından bu askerlere çok görüldüğünün ABD kamuoyuna açıklanamayacağının farkındadır. İşte bu nedenle üzgün ve kızgın insanların önüne atılacak kurbanlara ihtiyaç duyulmuştur.

Amerikan İç Savaşı, personel zayiatının çok yüksek olduğu bir savaştır. Her savaş gibi bu da toplumu zorlamış ve dramların yaşanmasına neden olmuştur. Oluşan bu basıncın bir yere kanalize edilmesi Stanton'a mantıklı görünmüş olmalıdır. Bununla beraber, seçilecek kurbanın elbette bir kurban olarak değil, bir canavar olarak lanse edilmesi elzemdir. Böylelikle bir nefret objesi yaratılacak ve uğranılan kayıplar ile Lincoln'ün

öldürülmesinin hesabı aynı anda bu "canavar görünümlü kurban"dan sorulacaktır. Wirz bu canavar olmuş ve intikam isteyen kamuoyunun önüne acıma olmaksızın atılmıştır. Wirz süreçte yapayalnız kalmış ve karşısında bulduğu fırtınaya pek de direnememiştir. Gerçi direnememesi için ABD de her türlü tedbiri almıştır. Aşağıda örnekleriyle sunulacağı üzere, Wirz'in yargılaması tamamen bir "infaz" olarak görülmelidir, her safhasında hukuk ihlalleri vuku bulmuştur. Wirz'in lehine ifade vermek isteyen Kuzeyli askerlerin önemli bir kısmının bir şekilde engellenmesi söz konusu olmuş; Felix de la Baume gibi yalancı tanık marifetine de başvurulmuştur.

Wirz'in lehinde tanıklık yapmak isteyen çok sayıda Kuzey askerinden birisi Wirz'in bizzat kaçarken yakaladığı askerdir. Wirz bu şahsa herhangi bir ceza vermediği gibi, kendisinin doyurulmasını emretmiş ve uzunca bir süre söz konusu asker ile şahsen ilgilenmiştir. Görüldüğü üzere Wirz, savaş örf ve adet kurallarına uymaya çalışmış bir askerdir. Ancak hukuki bir *gözbağcılık* ile haksız yere şeytanlaştırılmıştır.

## 5. Savaş Sonrası Gelişmeler ve Yargılama Safhaları

İlgili literatürde az bahsedilen bir husus da Wirz'in savaşın son zamanlarında binbaşı rütbesine terfi etmiş olmasıdır (LaForce, 1988: s. 4). Bununla beraber Wirz'e dair eserlerde kendisi ağırlıklı olarak yüzbaşı olarak zikredilmektedir. İç Savaş'ın sona ermesi üzerine Binbaşı Henry Wirz evine dönmüştür. Çatışmaların bitmesi sonrası çizilmeye başlanan şeytani imajdan rahatsız olan Wirz, kendi bölgesinde idareyi yüklenmiş olan Kuzeyli General Wilson'a bir mektup ile başvurur (LaForce, 1988: s. 5). Bu mektuba göre Wirz yönettiği kamptaki eksikliklerden sorumlu tutulamaz, çünkü söz konusu eksikliklerin kontrolü ve sorumluluğu Wirz'i fazlasıyla aşmaktadır (Laforce, 1988: s. 5). Hâlbuki o ana kadar Wirz ismi hakkında herhangi bir hazırlık çalışması yapılmış değildir. Ancak bu mektup sonrası General Wilson, Wirz'in tutuklanması için bir grup askeri Wirz'in ikametgâhına gönderir. Gelen Kuzeyli askerleri evinde ağırlayan Wirz, bu şahısların esas niyetinden haberdar değildir ve onlarla beraber akşam yemeği yer. Sonrasında evini terk eden Wirz bir daha ailesini göremeyecektir (LaForce, 1988: s. 5).

Bir anlamda Wirz bilmeden eski düşmanlarına yardım etmiştir. İşin içyüzü ise aslında olabildiğince siyasidir. Esir değişimi konusunda başarısız olan, daha doğrusu esir mübadelesini çeşitli nedenlerle reddeden Bakan Stanton, sonrasında oluşabilecek tepkilerden ve doğacak siyasi sorumluluktan korktuğu için Wirz'e atılı veya daha doğru ifadeyle atılacak olan suçlar bahanesiyle, Wirz'in bir şekilde kurban edilmesini kendi menfaatine uygun görmüştür (Kieser, 1968: s. 52).

Bu yargılamayı politik hedefleri için kullanmak isteyen Stanton'ın aradığı ihtiraslı hukukçu ise Chipman olmuştur (Laska ve Smith, 1975: s. 89). Bununla beraber Chipman, Wirz'i Güney'in tüm üst idaresi ile ilişkilendirmek hesabındadır (Kieser, 1968: 52; Laska ve Smith, 1975: s. 89). Chipman'ın özellikle eklemek istediği isim Jefferson Davis'tir. Stanton ise bu en üst düzeyde görev yapmış Güneyli isimlerin silinmesini bizzat sağlamıştır (Laska ve Smith, 1975: s. 101; Mettraux 2010: s. 1066). Kaydetmek gerekir ki yargılama sırasında Chipman esir mübadelesi uygulamasının çökmesinin konuşulması ve tartışılmasını kasten engelleyecek manevralarda bulunarak, kendisine bu itibarlı görevi bahşeden Stanton'ı da korumayı başarmıştır (Zaharoff, 2019: s. 44).

Wirz hakkında iki suçlama vardır. Bunlardan ilki, kendi emrindeki kampta bulunan savaş esirlerinin savaş kural ve geleneklerine aykırı biçimde ölmelerini sağlamak için gizli bir komplonun içinde yer almaktır. İkinci suçlama ise Wirz'in savaş esirlerini öldürmesi veya bunların öldürülmelerini emretmesidir.

### 5.1. Savaş Esirlerini Öldürmeye Yönelik Komplonun İçinde Yer Alma Suçu

Bu suçlamaya göre Wirz, Jefferson Davis ve Robert E. Lee gibi önemli Güney siyasetçileri ve askerleri ile bir plan geliştirmiştir (LaForce, 1988: s. 6). Bu planın amacı bahsedildiği üzere, savaş esirlerini öldürmeye elverişli bir ortamın hazırlanmasıdır. Bununla beraber davada bu en üst düzey idarecilerden açıkça bahsedilmemiştir. Wirz'in, General Winder, Joseph H. White, R. Stevenson ile isimleri bilinmeyen ancak ABD'ye karşı kalkışma hali içinde bulunan kişilerle gizli bir anlaşma (conspiracy) içinde olduğu ve buna göre davrandığı ileri sürülmüştür (Zaharoff, 2019: s. 5). Wirz'in ve diğerlerinin; Kuzeyli askerleri kötü niyetli, kasten ve haince öldürmek ve yaralamak için eylemlerde bulunduğu iddia edilmiştir (United States v. Wirz, 1865: s. 46). İddia makamına göre burada nihai olarak amaçlanan Amerika Birleşik Devletleri Ordusu'nu zayıflatmaktır. İddianameye göre bu atılı suçu teşkil eden eylemler, savaş hukuk ve yapılagelişinin ihlali niteliğindedir (United States v. Wirz, 1865: s. 46).

Wirz, bu suçlamanın konusunu "şeytani bir tuzak" (a hellish plot) olarak nitelendirmiş ancak böylesi bir planın parçası olmadığını, böylesi bir tuzaktan haberdar olmadığını ifade etmiştir (United States v. Wirz, 1865: s. 51). Bu gizli tertipten haberi olan bir tane bile tanığın söz konusu olmadığını ifade eden Wirz, aynı şekilde bu yok etme programına ilişkin resmi yazışma ve belgelerde bir tane bile delil olmadığını vurgulamıştır (United States v. Wirz, 1865: s. 51).

Wirz'e göre bu suçlama hakkında iddia makamının da önemli şüpheleri söz konusu olmalıdır, çünkü daha önce isimleri zikredilen tüm üst düzey Güneyli siyasiler ve komutanlar bulunan safhada tamamen unutulmuş görünmektedir. Ortada gerçekten bu mahiyette bir plan olmuş olsaydı, bu şahısların da eklenmesi elbette galip Kuzey'in işine gelirdi. Wirz, savunmasına göre düşük rütbeli bir subay olarak yalnızca amirlerinin emirlerini yerine getirmektedir. Buna göre, varlığı şüpheli de olsa, olası bir yok etme komplosununesas hazırlayıcılarının kastlarının sorumlusu olarak Wirz'in münhasıran suçlanması yanlıştır (United States v. Wirz, 1865: s. 51). Eğer sorumluluğu varsa, Wirz kendi konumunun ve eylemlerinin gerektirdiği kadarıyla cezalandırılmalıdır (United States v. Wirz, 1865: s. 52).

Herhangi somut bir delilin yokluğuna rağmen Askeri Mahkeme Wirz'i suçlu bulmuştur. Mahkeme'ye göre Andersonville'de kalan ve toplamda 45.000 civarı sayısı olan savaş esirlerinin öldürülmesi amacıyla Wirz ve diğerleri bir komploiçerisinde bulunmuşlar ve buna uygun bir şekilde hareket ederek savaş hukukuna ait kuralları çiğnemişlerdir (United States v. Wirz, 1865: s. 55).

### 5.2. Savaş Esirlerinin Öldürülmesi Suçu

İkinci suçlama ise Wirz'in 13 savaş esirini şahsen öldürmesi yahut askerlerine öldürtmesidir (LaForce, 1988: s. 6; Winkler, 2011, s. 14). Bununla beraber, bahsedilen vakaların hemen hepsinde fiilin mağduru olduğu ve katledildiği ileri sürülen askerlerin isimlerine ulaşılabilmiş değildir. İlginç bir şekilde Wirz'e öldürme suçu atılmakta ancak katledilen savaş esirlerinin isimleri zikredilmemektedir. Bunun iki istisnası vardır. Chickamauga lakabıyla bilinen askerin ve ilaveten "William Stewart" adlı askerin öldürülmeleri. Wirz yapmış olduğu savunmada bu olaylardan ilkinin gerçek bir olay olduğunu kabul etmektedir. Ancak Wirz'e göre Chickamauga'nın öldürülmesinde kendisinin suçlanacak bir kast ve eylemi söz konusu değildir. Wirz, "William Stewart" hadisesinin ise gerçek olmadığını; kampın nispeten iyi tutulan kayıtlarında bu isimde bir askerin bulunmadığını ifade etmiştir (United States v. Wirz, 1865: s. 53). Dolayısıyla mağdurların ismen belli olduğu düşünülen iki hadiseden bir tanesi de gerçekte hiç var olmamış bir savaş esirine ilişkindir.

Chickamauga hadisesi ise Wirz'in aktardığına göre Chickamauga'nın disiplinsiz davranışları nedeniyle gerçekleşmiş talihsiz bir olaydır. Wirz'e göre Chickamauga kampın dış sınırlarına ulaşmış ve orada görevli nöbetçileri davranışlarıyla rahatsız etmiş ve ölmek istediğini açıkça beyan etmiştir (United States v. Wirz, 1865: s. 52).

Durumdan haberdar edilen Wirz, söz konusu askere kendi için ayrılan yaşam alanına dönmesini emreder. Bu esnada ölme isteğini tekrar eden askeri Wirz kendi silahını çekerek korkutmuştur (United States v. Wirz, 1865: s. 52). Silahın kendisine doğrulttuğunu gören asker de kaçarak olay yerinden uzaklaşmıştır. Wirz'e göre bu hadiseden sonra herhangi bir ihlalde bulunulması artık mümkün olamayacağından, söz konusu askerin bir daha rahatsızlık yaratması halinde vurulması emredilmiştir. Bu emirden çok kısa bir süre sonra bir silah sesiyle irkilen Wirz, Chickamauga'nın nöbet tutan askerler tarafından vurulduğunu öğrenmiştir (United States v. Wirz, 1865: s. 52). Wirz'e göre Chickamauga kamp disiplin kurallarını ihlal ettiği için vurulmuştur (United States v. Wirz, 1865: s. 52). Bu kural yalnızca Andersonville'de değil, Güney'deki tüm kamplarda uygulanan bir kuraldır ve kamplardaki disiplinin sağlanması için de gereklidir (United States v. Wirz, 1865: s. 52–53). Ancak esasen Wirz söz konusu askerin kurallara uyacağı kabulünden hareket etmiş ve son vur emrini bir caydırıcı unsur olarak vermiştir. Öldürme kastının varlığı bu olayda şüphelidir.

Amerikan İç Savaşı'nın ağır insancıl problemlere neden olduğu aşikârdır. Bu gerçeğin çok belirginleştiği bir konu savaş esirlerinin durumudur. Bu durum hiç şüphe yok ki çok kötüdür, ancak bu yalnızca Güney'deki esir kampları için geçerli değildir. Kuzey'in saldırgan ve insancıl sonuçları hiç dikkat almayan politikaları elbette Güney'i zayıflatmıştır. Bununla beraber, savaş esirleri arasında görülen can kaybı arasında bölgesel olarak çok büyük farklar mevcut değildir. Kuzey'in elinde bulunan savaş esirlerinin %12'si hayatını kaybetmişken; bu oran yoksulluktan kırılan Güney'de ise %15 olmuştur (Kieser, 1968: s. 54; Winkler, 2011: s. 4). Ortada kapsamlı bir yok etme komplosunun olmadığı bu sayılardan da anlaşılabilecek bir husustur (Zaharoff, 2019: s. 10)

### 5.3. Wirz Yargılaması ve John H. Gee Yargılaması: Bir Karşılaştırma

Henry Wirz'in maruz kaldığı suçlamaların benzeri Güneyli Komutan John H. Gee için de ileri sürülmüştür (Zaharoff, 2019: s. 53). Salisbury Hapishanesi'nin komutanlığını üstlenen ve yürüten Gee, Wirz'ten farklı olarak toprak sahibi, varlıklı bir Amerikan ailesine doğmuştur (Mettraux, 2010: s. 1059). Gee İç Savaş içinde ve daha öncesinde askeri harekâtlara katılmış ve yararlılıklar göstermiş bir hekimdir (Williams, 1961: s. 238–239). İç Savaş devam ederken Binbaşı rütbesine terfi ettirilen Gee'nin 1864 senesinde ilk olarak muharip bir birimin başına geçmesi söz konusu olmuşsa da kendisi bu görevlendirmeyi reddetmiştir (Williams, 1961: s. 239). Bunun üzerine Salisbury Esir Kampı'nın kumandanı olarak atanmıştır. Salisbury'deki şartlar da tıpkı Andersonville gibi çok kötüleşmiştir. Bunda Kuzey'in esir mübadelesini reddeden tavrı önemli bir rol oynamıştır. Eylül'de

Kampın idaresini üstlenen Gee çok kısa bir zaman zarfında kampta bulunan esir sayısının 2500'den 10000'e yükseldiğini görmüştür (Williams, 1961: s. 239). Soğuk havalarda yere kazılmış çukurlarda hayatlarını idame etmek zorunda bırakılan ve sağlıksız şartlarda yemek ve su ihtiyaçlarını giderebilen çok sayıda mahkûm hayatını kaybetmiştir (Zaharoff, 2019: s. 55). Hatta Salisbury'deki ölüm oranının güneydeki ve kuzeydeki benzerleri arasında en yükseği olduğu ifade edilmektedir. Buna göre, Salisbury'de bulunan savaş esirlerinin %25'i hayatlarını kaybetmişlerdir (Zaharoff, 2019: s. 55). Bazı esir ve mahkûmlar ise kaçmaya çalışırken öldürülmüşlerdir (Mettraux, 2010: s. 1060).

Gee, savaş sonrası hapishanedeki şartların çok kötü olması ve bazı esirlerin öldürülmesinden yargılanmıştır. Wirz'in yaşadığı şekilde engellemeler olmadan savunmasını yapan, örneğin bilgisine danışılmasını istediği tanıkların hepsinin dinlenmesine izin verilen Gee, dava sonunda suçsuz bulunmuştur. Kararı veren askeri mahkeme Gee'den ziyade daha yüksek makamlara sahip Güneyli sorumluların suçlu olduğunu ifade etmiştir (Mettraux, 2010: s. 1065). Mahkemeye göre; savaş hukuk ve gelenekleri Gee tarafından değil, bu üst düzey amirler tarafından ihlal edilmiştir. Gee ise en fazla idarede zafiyet göstermiş ve insanlığın vicdanına uygun davranmakta başarısız olmuştur (Mettraux, 2010: s. 1065). Güneyli amirlerin savaş hukuk ve yapılagelişi kurallarını ihlal ettiğini mahkeme ifade etmiştir ancak Gee'nin amirleriyle herhangi bir gizli anlaşma (conspiracy) içine girmesine dair kovuşturma yapmaktan açıkça imtina etmiştir (Zaharoff, 2019: s. 53). Buradan anlaşılan, genel olarak bir dizayn içinde savaş esirlerinin öldürülmesi planlarının varlığı konusunda çok ısrarcı olunmamıştır. Mahkeme'ye göre çok yüksek sayıdaki esir ölümlerinin nedeni işlevsiz hale gelmiş olan Konfederasyon taşıma sistemi ve askeri bürokrasisidir (Zaharoff, 2019: s. 55) ve bu başarısızlıktan dolayı Gee'nin sorumlu tutulması mümkün değildir. Mahkeme Gee'nin bu nedenlerle beraatine hükmetmiştir (Williams, 1961: s. 243–244). Görüldüğü üzere, Wirz'in savunması geç de olsa onaylanmıştır. Ancak Wirz için elbette artık çok geç olmuştur.

Gee Davası'nda, Wirz Davası'na oranla çok daha adil bir yargılama sürecine şahitlik edilmiştir (Mettraux, 2010: s. 1066). Sonuçta, Wirz Davası'na benzeşen bir olaydan tamamen farklı mahiyette bir hükme ulaşılmıştır.

## 6. Wirz Davasının Uluslararası Hukuk Açısından Değerlendirilmesi ve Önemi

Birinci Dünya Savaşı sonrası yargılamaların ilham kaynakları arasında Wirz Davası da sayılmıştır. Bunun sebebi de bu yargılamanın, kaydedilen tüm eksikliklerine rağmen, kendisinden önce kabul edilmiş bir uygulamanın reddedildiği bir yargılama olmasıdır.

İleride değinileceği üzere bu dava ile savaş sonrası cezasızlık hali (*impunity*) açıkça reddedilmiştir. Bu halin savaş suçlarına teşmil edilmeyeceğini kuvvetli bir şekilde ifade edilmiştir. Bir başka önemli husus da yargılama sırasında, Uluslararası Hukuk'a açıkça atıfta bulunulmasıdır (Mettraux, 2010: s. 1062). İddia makamı adına konuşan Albay Chipman bu hususta şunları söylemiştir (Mettraux, 2010: s. 1062):

"Milletler forumunda daha yüksek bir hukuk bulunmaktadır. Bu, milletlerin yürürlüğe soktuğu her türlü davranış kuralından üstün olan ve bunlar tarafından etkisizleştirilemeyen veya değiştirilemeyen bir hukuktur. Hükumetlerin (içeride) hakları ne olursa olsun, bunların vatandaşlarının devletler yüce heyeti (the great tribunal of nations) tarafından düzenlenenleri dışında bir yetki veya kontrole ihtiyacı bulunmamaktadır. O zaman biz de savaş esirlerine ilişkin vazifeler için uluslararası koda dönüp bakacağız ki burada en saf ahlak, en yüksek adalet anlayışı köşe-taşlarını oluşturmaktadır"

Önemle hatırlatılmalıdır ki Uluslararası Hukuk'un savaşa ilişkin kuralları iç savaş bağlamında uygulama bulmuştur. Bu da önemli bir diğer konudur. Lieber Kuralları adıyla bilinen Kurallar uygulamaya yön vermiştir ki bu düzenlemenin kaynağının da o dönemin savaş hukuku ve yapılagelişi olduğu bilinmektedir.

Bir diğer önemli mesele amirin emri savunmasının reddedilmiş olmasıdır (Demirel, 2012: s. 170). Wirz, yukarıda da ifade edildiği üzere, olup olmadığından habersiz olduğu bir komplonunicrasına bilmeden katkı sağlamış olsa dahi, neticede düşük rütbeli bir asker olduğu savını ileri sürmüştür. Savcılık makamı bu savunmanın kabul edilemez olduğunu askeri mahkemeye kabul ettirmiş görünmektedir. İddia makamına göre, her ne kadar Wirz aksini iddia etse de Andersonville'deki olaylar Wirz'in direkt amiri General Winder'ın bölgeye atanmasından daha önce başlamıştır (United States v. Wirz, 1865: 54). Savcı Chipman'a göre suçlulardan daha kıdemli olanının vefatı nedeniyle yargılanamıyor olması, daha ast konumdakinin cezasızlığına neden olmamalıdır (Demirel, 2012: s. 170–171; Tezcan, Erdem ve Önok, 2015: s. 400; United States v. Wirz, 1865: s. 55).

Askeri mahkemenin ulaştığı bu sonucun günümüz Uluslararası Ceza Hukuku açısından da *prima facie* doğru olduğu ileri sürülebilir. Uluslararası Ceza Mahkemesi'nin kurucu metni olan Roma Statüsü (Rome Statute of the International Criminal Court) amirin emri konusunda şu düzenlemeyi içermektedir (Kaya, 2013: s. 436):

"1. Mahkeme'nin yargı yetkisine giren bir suçun, bir hükümet veya askeri veya sivil bir üst makam emrine uyan bir şahıs tarafından işlenmiş olması, aşağıdaki haller dışında, şahsı cezai sorumluluktan kurtaramaz:

(a) Şahsın hükümet veya söz konusu üst makamın emirlerine uyması kanuni bir zorunluluk ise;

(b) Şahsın emrin kanunsuz olduğunu bilmemesi halinde; ve

(c) Emrin açıkça kanunsuz olmaması halinde."

Hiç şüphe yok ki atılı suçları işlediğinin tespiti halinde Henry Wirz'in cezalandırılması şarttır. Kendisi de kıdemli sayılabilecek bir subay olan Wirz'in bu suçların işlenmesini amirlerinden emir olarak alması halinde bunların savaşa dair kuralların ihlali oluşturacağını bilmesi hayatın olağan akışına çok daha uygundur. Bu nedenle, hukuki anakronizm pahasına ifade edilmelidir ki amirin emri savunmasının Wirz'in menfaatine olarak ileri sürülmesi mümkün değildir. En azından, olayın günümüzde geçmesi halinde uygulanan hukukun ulaşacağı sonuç bu olacaktır. Olayın geçtiği tarih de dikkate alınırsa, altta yatan saik ne olursa olsun, Askeri Komisyon'un ilerici bir tavır sergilediği ileri sürülebilir.

Wirz Yargılamasında; savaşan imtiyazının savaş sonrasına da yaygınlaştırılması ile oluşan mutlak suçsuzluk halinin savaş suçları konusuna teşmil edilmemiş olduğunu görmekteyiz. Burada kast edilen, Wirz Yargılamasının kendisinden önce gelen ve genel uygulama olarak kendisini kabul ettirmiş olan cezasızlık halini reddeden bir yaklaşımı pratik olarak somutlaştırmasıdır. Savaş kurallarına uygun olarak hareket etmiş ve bu kurallar kapsamında düşman personele zarar vermiş olmak bir suç değildir. Bununla beraber, kuralları çiğneyen mahiyetteki davranışlardan doğacak sorumluluk tarihsel olarak devletlere atfedilmiştir. Savaş suçları konusunda şahısların cezai sorumlulukları o zamana değin nadiren ileri sürülmüştür. Genel olarak bu tip hukuk ihlallerinden devletlerin sorumluluğunun doğduğu kabul edilmiş, böylelikle de suç işlemiş şahıslar lehine bir korunaklı alan yaratılmıştır. Fakat Wirz Yargılaması ile Appomattox Teslim Anlaşması'ndaki sorumsuzluk halinin "savaş kural ve yapılagelişinin" ihlallerini kapsamadığı açıkça benimsenmiştir. Bu, sorunlarla dolu yargılamanın olumlu olarak değerlendirilmesi gereken en önemli yönlerindendir.

Bununla beraber, bu yargılama ile belirli politik hedeflere ulaşılması için ceza hukukunun kullanılması adil olmayan sonuçlar yaratmaktadır. Toplumsal baskıya yargılama makamı, en başta kendi bağımsızlık ve tarafsızlığını muhafaza etmek maksadıyla, direnç göstermelidir. Ancak Wirz Davası'nda bu direnç gösterilememiştir. Kamuoyunun açıkça bir intikam ihtiyacı ve öfke histerisi söz konusudur (Zaharoff, 2019: s. 10) ve bu kamusal baskı yargılamanın işleyişine ve nihai çıktısına da yansımıştır. İç Savaş sonrası ABD'de mevcut olan bu hali Hesseltine bir savaş psikolojisi olarak betimlemiştir

(Hesseltine, 1930: 172; Zaharoff, 2019: s. 10). Bu tanımlamaya göre "taraflardan birinin davası ile kendi kişiliğini özdeşleştirmiş olanlar diğer tarafın savunucularından nefret etme" ve onları şeytanlaştırarak kendi aşırı-bağımlı durumlarını bir şekilde meşrulaştırma eğilimi göstermektedir (Zaharoff, 2019: s. 10). Bu psikolojik hal, ABD siyasal kadroları ile medyasının başarılı işbirliği ile bir araya gelince Wirz bir "intikam hırsının" direkt kurbanına dönüşmüştür (Bonner, 1947: s. 128; Zaharoff, 2019: s. 10).

Bu tecrübenin de bizlere gösterdiği üzere, savaş sonrası yapılacak her türlü cezai mahiyetteki yargılamada sosyo-psikolojik durumun olumsuz etkilerinden mümkün olduğu nispette izole bir sürecin yaratılmasına dikkat edilmelidir. Wirz'ten kısa bir zaman sonra gerçekleştirilen Gee Yargılaması'nda örneğin, Salisbury'deki ölüm oranının yüksekliğine rağmen Gee ceza almamıştır. Wirz'in bu anlamda şanssızlığı kamuoyu baskısının en hissedilir olduğu anda yargılanması olmuştur.

Burada önemli bir başka mesele de yargılamanın gerçekleştirildiği makamdır. Wirz yeni kurulmuş olan askeri özellikli bir komisyonda yargılanmıştır. Amerikan İç Savaşı boyunca Askeri Mahkemeler (Military Commissions) 2000 civarı yargılama gerçekleştirmiştir (Vagts, 2008: s. 239). Ancak bunlar daha ziyade savaşan imtiyazına sahip olmayan ajanlar gibi sivil şahıslara ilişkindir (Vagts, 2008: s. 239). Bu durumun, yani bir asker olan Wirz'in bu mahkemelerce yargılanmasının Anayasa'ya aykırılığı Wirz'in vekilleri tarafından ileri sürülmüştür. Ancak bu Anayasa'ya aykırılık itirazı reddedilmiştir.

Çatışmaları sona erdiren Appomattox Teslim Anlaşması'nda kapsayıcı bir ifade kullanılmış ve Güney tarafından çarpışan askerlerin rahatsız edilmeden evlerine dönme hakkı kabul edilmiştir. Bunun bir anlamda af niteliğinde olduğu ileri sürülmüşse de Mahkeme bu tezi reddetmiştir. Bir kere bu reddedişte Komisyon'un özellikle savaş suçları konusundaki ilerici ve kanaatimizce de –en azından politik olarak- doğru tavrını görmekteyiz. Ancak burada esas olarak Appomattox Anlaşması'nın hukuki mahiyeti önemlidir. Bu Anlaşma bir barış anlaşması değildir. Bu nedenle savaş halini de ortadan kaldırıcı bir hukuki etkiden yoksundur. Anlaşma bir ateşkes ve teslim anlaşmasıdır. ABD makamları da buna uygun davranarak hukuken savaş halinin devam ettiği kabulüyle eylem ve işlemlerde bulunmuştur. Anlaşmanın yapılması müzakerelerindeki Generaller Grant ve Lee'nin de o günkü konuşmaları kendilerinin tarafları adına bir barış anlaşması yapma yetkisine sahip olmadıklarını açıkça ortaya koymaktadır (Downs, 2015: s. 1). Barışı nihai olarak sağlama işinin siyasal aktörlerde olduğu konusunda Grant ve Lee anlaşmış görünmektedirler (Downs, 2015: s.1). Dolayısıyla askeri mahkemelerin yetkisi konusunda ABD makamlarında herhangi bir kafa karışıklığı oluşmamıştır.

İşlenmiş olduğu iddia edilen suçların faillerinin yargılanmasının özünü veya ruhunu yansıtan ve her zaman korunması için çaba sarf edilmesi gereken bir ilkeye işaret etmek gerekirse, bu ilkenin adil yargılanma olarak belirlenmesi çok da yanlış görülmemelidir (Jawad, 2015: s. 165). Wirz Davası, adil yargılama ilkesinin zedelendiği durumlarda cezalandırmanın işlevinin bir öç almaya dönüşmesinin bir an meselesi olduğuna kuvvetli bir delil teşkil etmektedir. Jawad'ın da (2015: s. 165) vurguladığı üzere, ulusal makamların bu ilkeye riayet konusunda güven vermediği veya direkt olarak bu ilkeyi ihlal ettiği durumlarda, bir uluslararası ceza sürecinin gerekliliği çok daha iyi anlaşılmaktadır. Adil yargılanmanın sağlanmasına katkı sağlayacak müesseselerin yaratılması ve işletilmesi büyük önemi haizdir. Bu önem kendisini Wirz ve Gee Yargılamaları'nın çıktılarında kendisini kristalize etmektedir. Askeri Mahkeme, içinde bulunduğu toplumun baskısı ve siyaset mekanizmasının müdahalesi ile Wirz'in lehine tanıklık yapacak şahısları sindirmişken, Gee'nin müdafileri buna benzer bir tecrübe yaşamamıştır. İlaveten, Gee'nin savunmasında çok daha fazla sayıda resmi Konfederasyon belgesine ulaşmak mümkün kılınmıştır. Bu ise, Gee'nin fiillerinden ziyade, genel olarak Konfederasyon altyapısının çökmesinin ve diğer sistemik eksikliklerin Salisbury'deki faciaya neden olduğunun ikna edici şekilde ispat edilebilmesine imkân sağlamıştır (Zaharoff, 2019: s. 55). Dolayısıyla, hakikatin aranmasında müdafilerin de bilgi ve belgeye ulaşmalarının sağlanmasının kritik önemi ortaya çıkmıştır. Bu önem Uluslararası Ceza Mahkemesi Statüsü'nün hazırlanması sürecinde dikkatten kaçmamıştır. Bugün savunmanın da en azından Uluslararası Ceza Mahkemesi önündeki yargılamalarda kapsamlı olarak düzenlenmiş hakları mevcuttur (Aksar, 2003: s. 40-65). Hiç şüphesiz, tarihsel tecrübeler bu hakların tanınması ve güvence altına alınmasında önemli rol oynamıştır.

Yukarıda ifade edildiği gibi, Wirz Davası'nın kanaatimizce çok sayıda önemli gelişmenin öncülüğünü yapması söz konusudur. Cezasızlık halini reddetmesi, amirin emri savunmasını otomatik olarak kabul etmemesi (Lemnitzer, 2018: s. 115) bunlar arasında sayılmalıdır. Bununla beraber yargılama sürecine sıklıkla gerçekleştirilen siyasi mahiyetteki müdahaleler yargılamanın doktrinde ağırlıklı olarak başarısız bir tecrübe olarak tanımlanmasına ve hatırlanmasına neden olmuştur.

## 7. Sonuç Yerine

Henry Wirz hile ile alıkonulmuş; ailesinin yanından, kendisi hakkında yürütülen soruşturmaya dair bilgilendirilmeden alınmıştır. Yargılama aşamasında savunma makamına hiç şans verilmemiştir. Wirz'in lehinde konuşması söz konusu olacak bütün tanıklar bir

şekilde engellenmiştir. Tanıklıkta bulunan bazı kişilere sonrası için vaatlerde bulunulmuş ve hatta yalan beyanda bulunan bir tanesi, tanıklığının hemen ardından, ABD İçişleri Bakanlığı'nda göreve dahi başlatılmıştır. Bu kişi Felix de la Baume'dir (Laska ve Smith, 1975: s. 119). Kendisini Lafayette'nin akrabası olarak tanıtan ve duruşmada Wirz'i ağır bir şekilde suçlayan de la Baume'nin aslında bir asker kaçağı olduğu sonradan ortaya çıkacaktır (Laska ve Smith, 1975: s. 129). Gerçek adı Felix Oeser olan bu şahıs, asker kaçağı olduğunun öğrenilmesi üzerine görevinden uzaklaştırılmıştır (LaForce, 1988: s. 8). Aynı şekilde tanıklığına başvurulan kimselerin "ABD'ye olan sadakatleri" iddia makamınca açıkça tehditkâr bir tonda sorgulama konusu yapılmış, bu şekilde aslında Wirz lehinde konuşmaya istekli olan tanıklar sindirilmiştir.

Netice itibariyle Wirz idam edilmiştir. Ancak Wirz'e yapılan haksızlıkların, yürütülen kampanyaların hiç biri Gee Davası ve kararında gerçekleşmemiştir. Bunun muhtemel sebeplerinden birisi Wirz'in İsviçre kökenli bir Amerikalı olmasıdır. Wirz'in "yabancı" olmasının etkisine dair öğretide de fikir birliği oluşmuş görünmektedir (Kieser, 1968: s. 58). Aynı şekilde, Gee belli bir sınıfı ve ekonomik gücü temsil eden bir kişiliktir. Bu da onun Wirz kadar yalnız ve çaresiz bırakılmamasına neden olmuştur. Neticede Gee doğuştan bir ABD'lidir; Wirz ise sonradan vatandaşlığı almış bir İsviçreli! Ama bundan daha önemli bir etkiyi içinde bulunulan toplumun öfkesinin yarattığı aşikârdır.

Ulusal veya uluslararası özellikte olsun, pozitif ceza hukukuna bağlı olarak ve bunun çerçevesi içinde gerçekleştirilmesi gereken ceza yargılaması politikaya kurban edilmemeli, özellikle de zamanın baskın siyasal ve sosyo-psikolojik etkilerinden mümkün olan oranda uzak kalmayı başararak, belli bir soğukkanlılıkla maddi gerçekliği aramaya devam etmelidir. Ancak bunların hiç birisine bu olay bağlamında rastlanılmamaktadır. Wirz'in maruz kaldığı muamele, hukukun belli amaçlarla kullanılmasının önünde çoğu zaman engel bulunmayabileceğini öğretmektedir. Hukuku bir araç olarak kullanmanın önünün açılmasında yahut doğası gereği bunun zaten kaçınılmaz olduğu durumlarda medyada çizilen şeytan imajının kolaylaştırıcı ve hatta hukuku belli bir amaca göre uygulayanlar üzerinde meşrulaştırıcı bir etkisi olmuştur. Gee'den farklı olarak Wirz Davası büyük infial yaratmıştır. Bu infial de bir New York gazetesinin ifadesi ile "Tanrı'ya şükür Amerikalı olmayan" (Kieser, 1968: s. 59) Wirz'in, bir takım usulî ve maddî haklardan yararlanması gereken bir sanık konumundan her hal ve şartta cezalandırılması gereken bir şeytana dönüştürülmesine yol açmıştır. Wirz'in en büyük talihsizliği hiç şüphesiz yalnızca savaştan çok kısa bir süre sonra yargılanmasıdır. Bununla beraber, tüm bu mücadelenin ve sonrasındaki yargılamaların, temelde yatan üretim süreçlerine dair farklı fikirlerden kaynaklandığı da gözden kaçmamalıdır.

**Hakem Değerlendirmesi:** Dış bağımsız.
**Çıkar Çatışması:** Yazar çıkar çatışması bildirmemiştir.
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# European Judicial Cooperation and Protection of Gender-Based Violence Victims, Fact or Fiction?*

## *Avrupa Adli İşbirliği ve Cinsiyete Dayalı Şiddet Mağdurlarının Korunması, Gerçek mi Kurgu mu?*

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*This article exposes some of the conclusions of my Doctoral Thesis defended on December 13th 2019. Throughout this article I use both the first person in singular and the first person in plural. This differentiation has been made in order to distinguish between my personal opinion and the ideas explained in my PhD. Consequently, almost all the conclusions will be in plural.

**ABSTRACT**
Judicial cooperation between EU member States shows us the limits of the EU. These limits are not only encountered by the European legislator; national legislators and judges encounter them too. The existence of different legal systems complicates mutual recognition. The difficulties during the creation process of the Directive 2011/99/EU on the European Protection Order show us how much the EU needs to be built still. During the negotiations there was a real political will and the member States had the necessary sensitivity to propose the creation of protection measures at a European level. What failed was the lack of previous harmonization which exceedingly complicates mutual recognition and the refusal from the member States to let go of their last redoubt of national sovereignty. Gender-based violence victims find an additional problem: the non-existence of a gender concept in the EU. We must ask ourselves if we are building the EU in a proper way. Throughout this article we will discuss the creation of a European Criminal Law with gender-based violence victims as an example. At the end we propose several measures in order to fight against ignorance and fear towards using mutual recognition instruments.
**Keywords:** European protection measures, judicial cooperation, criminal law

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## 1. Introduction

The main objective of this investigation is to analyze the protection offered to victims of gender violence throughout the European Union (EU). Freedom of movement and the right to be safe are essential human rights, which enable criminal, civil and administrative law to protect the quality of human life and to seek for a better future for the present and next generations. Nevertheless, this protection cannot be effective without a real mutual recognition (real mutual recognition implies that there is mutual trust between States) within the EU.[1] In the following pages, I present the global context that provides the basis for the current dissertation and the main objectives that are pursued, together with the structure and methodology followed to conduct the research. Throughout this article I am going to focus on the limitations of European Union Criminal Law by carrying out a two-level study that involves national Spanish law and European law. However, most of these limitations can be easily found by other national legislators due to the fact that the main problem is the lack of harmonization.

## 2. Background and Ojectives

Protection orders are meant to protect a person against an act that may endanger their life, physical or psychological integrity, personal liberty, sexual integrity or dignity. The aim is to avoid contact between the offender and the victim.[2] This kind of protection measures can be adopted as part of civil and criminal proceedings depending on the European Country in which the procedure is taking place. This is the reason why we have: 1) Directive 99/2011/UE on the European Protection Order (EPO) and 2) Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters (EPM). **Most EU countries, including Spain, have** civil protection measures in place.[3] This raises an issue that needs to be solved: the effectiveness in mutual recognition of civil and criminal protection measures. This question is connected with the use and abuse of criminal law[4] that we have been facing in recent years. It is necessary to think deeply about how, when and under which circumstances we have to use criminal law.

1 Francisco Javier Garrido Carrillo and Valentina Faggiani, 'La armonización de los derechos procesales en la UE' (2013) 16 Revista General de Derecho Constitucional 2.

2 Suzan Van Der Aa, Johanna Niemi, Lorena Sosa, Ana Ferreira and Anna Baldry, 'Mapping the legislation and assessing the impact of Protection Orders in the European member States' http://poems-project.com/wp-content/uploads/2015/04/Intervict-Poems-digi-1.pdf 5.

3 Ibid 5.

4 Silvia Barona Vilar, 'Justicia penal desde la globalización y la postmodernidad hasta la neomodernidad' (2018) 27 Rev. Boliv. de Derecho 36.

In a border-free EU there are many situations in which individuals in need of protection require specific attention at EU level. A fact that complicates this investigation is the lack of a protection measure database in the EU. This situation leads to the fact that we can only analyze the utility of transnational protection measures by analyzing gender violence victims which already have a protection order and foreign nationality. The day in which these victims have to return to their original countries they will lack protection. There are several reasons for them to return and they can be temporary (visiting a family member) or definitive (a new job). For example, out of the 9,530 protection orders issued in Spain in the first three months of 2019, 32.3% concerned non-Spanish citizens. This raises the critical question of this investigation: If someone that is currently benefiting from protective measures issued in one member State decides to travel or reside in another member State, how can she/he be ensured that those measures are valid and enforced outside the member State of origin? This is only possible with a good implementation of Directive 99/2011/UE on the European Protection Order and Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters**,** from which we will be able to ensure that those measures are valid.

We have to take into account that the European Protection Order is a legal instrument of judicial cooperation. As a mechanism of judicial cooperation, the European Protection Order has to be interpreted together with other instruments of judicial cooperation: Council Framework Decision 2009/829/JHA, Council Framework Decision 2008/947/JHA and Regulation (EU) 606/2013. On the one hand, both Council Framework Decisions involve situations in which the aggressor is the one that moves to another Country. On the other hand, Regulation (EU) 606/2013 deals with the cases in which the protection measure is civil rather than criminal. Furthermore, as a mechanism for victim protection, compensation for its shortcomings should be completed through the application and the implementation of Directive 29/2012/EU (Victim's Directive). Therefore, the European Protection Order Directive should be interpreted together with the Victim's Directive to fully guarantee victims' procedural rights in criminal proceedings and to improve their protection.

The three protection measures included in Directive 99/2011/EU and in Regulation (EU) 606/2013 are found in the national legislation of all the member States. These are: to not communicate with the victim, to be banned from visiting certain places and to keep a safe distance from the victim and her/his family or friends. Their inclusion in the Directive and the Regulation seeks to establish a minimum standard of protection

for victims, without modifying the internal legislation of the member States.[5] The Directive was supposed to lead to an approximation of this diversity. Actually, the different national systems for the protection of victims are maintained. This is why we have to ask ourselves: Are we on the right track with the Directive 99/2011/EU or are we just losing time? Is the instrument of the European Protection Order actually useful or is it only a false promise of protection to the victims? In the second case scenario, we must find a solution studying both European legislation and our national legislation.

The little use of protection measures confirms our starting question: European protection measures are not working because the EU is far from what it was supposed to be (there is no real trust between States as seen in the Puigdemont Case). We must ask ourselves if we have built the EU in a proper way. This raises new questions that I will try to answer during this research: is it possible to use the principle of mutual recognition without a higher harmonization amongst the different member States? Do we really want to build an EU without internal borders? Can we continue approaching legislation without previous harmonization of substantive law? Do our legal practitioners know the instruments of mutual recognition? Do our judges feel like European judges?[6]

This lack of harmonization leads to another problem: the lack of a concept of gender violence victims at a European level.[7] Only when we study this element can we realize the importance of the sociological and the juridical factor working together. Only by contextualizing the national and supra national reality can we understand the reasons why each State has its own concept of gender violence. Statistic data and official reports are key elements in order to raise awareness of the problem of gender violence. A critical eye to official figures and its cost shows the need to create protection measures at a European level. According to Fundamental Right Agency (FRA) data, one out of three European women -33%- has suffered physical or sexual violence since they were 15 years old. This proportion is lowered to nearly one out of four European women -22%- if we only consider violence suffered by the partner or ex-partner. One out of three European women -32%- has suffered psychological mistreatment from her partner

5 Manuel José García Rodríguez, 'Aplicación de la Orden Europea de Protección a las víctimas en el sistema de justicia penal español a través de la ley de reconocimiento mutuo de resoluciones penales en la Unión Europea' (2015) 37 Revista General de Derecho Procesal 7-8.

6 E J E Van De Watering, 'Criminal Protection Orders: Effective legal remedies or False promises to victims? An explorative research on the effectiveness of criminal protection orders' (2013) 52-54.

7 Víctor Merino, 'La concepción de la violencia de género en los ordenamientos de los Estados Miembros' in Teresa Freixes and Laura Román (dirs.), Neus Oliveras and Raquel Vañó (coords.), *La Orden Europea de Protección. Su aplicación a las víctimas de Violencia de Género* (Tecnos 2015) 46.

or ex-partner. Another fact to bear in mind is the global cost of gender violence.[8] According to a survey from the Spanish government called "*El impacto de la violencia de género en España: una valoración de sus costes en 2016,*" in 2006 each European citizen paid between 20 and 60 euros in order to provide different social services to gender violence victims. Five years later, the total cost of gender violence within the EU was 288 billion euros (1,8% Gross Domestic Product).[9]

Despite all of these initial difficulties, I firmly believe that protection measures are essential if we want to continue building Europe. Furthermore, protecting citizens against particulars that may endanger their integrity or life is a positive State obligation. If the State does not protect us, it could be a failure of its obligations to protect us.[10] European protection measures are totally necessary instruments if we want to create a real Space of Freedom, Security and Justice. Victims will only be free to move around the EU if we guarantee their right to feel secure. Moreover, only real Justice (where real implies that the Justice is inclusive and without bias or prejudice) can guarantee Freedom and security. As a consequence, in these pages I acknowledge the need for cooperation between different European States as the only way to fight against crime in a globalized society.

## 3. Methodology

The methodology followed for the development of this investigation is based on traditional doctrinal research, which involves the review of doctrine, legislation, jurisprudence and statistic data in order to analyze the current situation of a particular legal instrument and construct an argument which is consistent within the discipline in order to develop proposals to improve protection measures within the EU. Therefore, the sources used to carry out the current research can be classified into the following groups: scientific literature, official reports, legislation and jurisprudence. The importance of each varies according to the different fields of study and stages of the research: gender and domestic violence victims, State positive obligations and protection measures in Spain and in the EU.

8 Violencia de género contra las mujeres: una encuesta a escala de la UE. Resumen de las conclusiones. (2014) FRA. European Union Agency for Fundamental Rights 17.

9 Elena Mañas Alcón, Luis Felipe Rivera Galicia, María Teresa Gallo Rivera, Oscar Montes Pineda, Carmen Figueroa Navarro and Pablo Pietro Sánchez, *El impacto de la violencia de género en España: una valoración de sus costes en 2016* (2019) Ministerio de la Presidencia, Relaciones con las Cortes e Igualdad 44.

10 Opuz v. Turkey núm. 33401/02 (ECHR, 9 June 2009); Elena de Luis García, 'El Derecho a una investigación efectiva en la jurisprudencia del TEDH' (2019) 27 Rev. Boliv. de Derecho 497.

In reference to the first part, looking at the emergence and expansion of women's and children's rights to a life without violence the research has focused mainly on the analysis of national and international legal tools, official reports and the most recent jurisprudence of Spanish and European Courts. The information gathered from these sources has been completed where possible with national and international literature. Regarding the second part of the study, related to the protection measures for victims in the EU, the point of departure has been the analysis of scientific literature regarding the emergence and expansion of a criminal European law. Therefore, the research has involved the review of general literature about the construction of the EU and the most important mutual recognition instruments for the protection of victims.

## 4. Structure

The current research is built around two main pillars: 1) gender and domestic violence victims and 2) the positive obligation of the States to protect them within the EU (the first part of the research). With the prior premises made, we can focus on the practical part of protecting our victims: using protection instruments such as the European Protection Order (the second part of the research)

The first part refers to gender and domestic violence victims and the positive obligation of States to protect them. The link between both these concepts is risk. Gender Violence victim's risk is specific to these victims and differs from the risk which victims from other crimes suffer. In this part it is necessary to study the reasons that make this risk specific. One of the main reasons is the affectivity relationship that exists between the victims and the aggressors. As a result, these victims are not able to assess the risk which they are exposed to objectively because there are sentimental feelings involved. During the discussion in this part I support the idea that gender and domestic violence victims are the only ones to love their aggressor.[11] This issue makes the judicial procedure even more complicated and offers an advantage to the aggressor, as he or

11 Miguel Lorente Acosta, 'Violencia contra las mujeres: peligrosidad y valoración del riesgo' (2002) 19 Revista Europea de Derechos Fundamentales 186; Suzan Van Der Aa, 'Protection Orders in the European Member States: Where do we stand and where do we go from here?' (2011) European Journal on Criminal Policy and Research, núm, 18, 184; Dolores Calvo, *What is the Problem of Gender? Mainstreaming Gender in Migration and Development Policies in the European Union,* University of Gothenburg (2013) 20-28; Richard J Gelles, *Intimate Violence in Families*, (SAGE publications, 1997) 36.

she knows the victim's routines, which increases risk even more.[12] The latest judgements from the Spanish courts support this theory.[13] The second factor to increase the risk of our victims is silence, the accomplice from civil society and the State. The doctrine about positive obligations of the State was created to fight against this accomplice silence.[14] The State has the obligation to protect its victims and if it fails to do so it should answer to the damage inflicted to them (Istanbul Convention, CEDAW).[15]

The second part of the investigation consists in a discussion about the EPO as an instrument for protection against risk for the victims. It goes without saying that States are facing real difficulties to fight crime in an individual way. Consequently, a united European fight against crime is needed.[16] Then I study the instrument of the EPO and its procedure of adoption, going as far as criticizing the possible reasons why it is not working as intended (data on the poor application of the Directive can be found at the end of the article).[17]

Finally, once the previously explained issues have been addressed, three proposals are presented in relation to the premise already pointed out, which posits that if a person has already been protected within one EU member State, in a border-free EU, those measures should be valid and enforced outside the member State of origin.

12 "Violence against women is the greatest Human Right scandal of our time. From birth to death, in times of peace as well as war, women face discrimination and violence at the hands of the State, the community and the family. Violence against women is not confined to any particular political or economy system but is prevalent in every society in the world and cuts across boundaries of wealth, race and culture". Ingrid Vledder, 'It's in our hands. Stop violence against women' in Ingrid Westendorp, Ria Wolleswinkel, (eds.), *Violence in the domestic sphere* (Intersentia, 2005) 7; Beth Sipe, Evelyn Hall, *I am not your victim. Anatomy of domestic violence* (SAGE publications, 2014) 257.

13 Judgement Spanish Supreme Court 342/2018, 10-7-2018 (TOL 6.670.815); Judgement Spanish Supreme Court 542/2018, 12-11-2018 (TOL 6.921.780); Judgement Spanish Supreme Court 282/2018, 13-6-2018 (TOL 6.639.816); Judgement Spanish Supreme Court 398/2019, 14-2-2019 (ECLI:ES:TS:2019:398).

14 Laura Román, 'Violencia de género, Unión Europea y protección de las víctimas' in Teresa Freixes and Laura Román (dirs.), Neus Oliveras and Raquel Vañó (coords.), *La Orden Europea de Protección. Su aplicación a las víctimas de Violencia de Género* (Tecnos 2015) 25-26.

15 Carmen Tomás-Valiente Lanuza, 'Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH' (2016) Indret 5.

16 M. Isabel González Cano, 'Justicia penal e integración europea: hacia nuevos modelos de cooperación judicial penal' in Katixa Etxebarría Estankona, Ixusco Ordeñana Gezuraga and Goixeder Otauza Zabala (dirs.), *Justicia con ojos de mujer. Cuestiones procesales controvertidas* (Tirant Lo Blanch 2018) 783.

17 María Morgades Cortés, 'La Orden Europea de Protección como instrumento tuitivo de las víctimas de violencia de género' (2014) 3 CEEJ 107; Maoly Carrasquero Cepeda, 'Orden Europea de Protección: Un paso adelante en la protección de las víctimas' (2014) 2 CEJJ 113; Paula Sánchez Martín, 'La Orden de Protección Europea' in Elena Martínez García, (dir.), Juan Carlos Vegas Aguilar (coord.), *La Prevención y Erradicación de la Violencia de Género. Un estudio multidisciplinar y forense* (Aranzadi 2012 481-506; Ana María Rubio Encimas 'Parte V: La Orden Europea de Protección (Título VI LRM) Capítulo II: Cuestiones prácticas relativas a la Orden Europea de Protección' in Coral Arangüeña Fanego, Montserrat de Hoyos Sancho and Carmen Rodriguez Mendel-Nieto (dir. and coord.) *Reconocimiento Mutuo de Resoluciones Penales en la Unión Europea. Análisis teórico-práctico de la Ley 23/2014, de 20 de noviembre* (Aranzadi 2015) 303-319.

### 4.1. The construction of Europe through judicial cooperation in matters of protection of victims of gender-based violence: Where do we stand now?

General Recommendation num. 19 CEDAW states that *"Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation"*. The Istanbul Convention positions itself in the same way. Both rules establish that the State could incur responsibility for the criminal actions committed inside its territory in the case of not fulfilling due diligence obligations.[18] Jurisprudence is little by little including gender perspective and State responsibility for not fulfilling the obligation to protect.[19]

### 4.2. The change in paradigm of the gender violence phenomenon treatment. Contextualizing is giving concepts power

We can observe a change in how several States treat violence against women and children within the home. After having performed a study involving Spanish judicial and social reality as well as the treatment received by the gender factor in the EU, we can say that gender violence has become a public and State matter. Aggressions within the home are no longer treated as private matters. A turn back or a minimization of the disvalue related to these conducts is currently not possible in the European ambit. The ECtHR (European Court of Human Rights) recognizes Criminal Law as an instrument required for the protection of some Human Rights.[20] The Spanish Organic Act 1/2004 pronounced itself in the same way 16 years ago.

The issue is that changes are slow and it is naive to think that society is going to change at the stroke of the OSG (Official State Gazette) or OJEU (Official Journal of the European Union). What we need to change is not only the legislation but also the society. It has been necessary to invest in education and in sensitization campaigns[21] in order to make

18 . Morgades (n18) 93-94.

19 As a sample I decided to write about the protection of gender and domestic violence victims in order to argue about the judicial cooperation within the EU because there is no single definition of what a gender-violence or domestic-violence victim is. This situation complicates the criminal judicial cooperation much more.

20 X and Y v. The Netherlands num. 8978/80 (ECHR, 26 March 1985); Francesco Viganò, 'Sobre las obligaciones de tutela penal de los derechos fundamentales en la jurisprudencia del TEDH', in Santiago Mir Puig and Mirentxu Corcoy Bidasolo (dirs.), Víctor Gómez Martín (coord.), *Garantías constitucionales y derecho penal europeo* (Marcial Pons 2012) 311-312.

21 Elena Martínez García, 'La igualdad y la violencia de género: elementos para la reflexión en España y en Europa' in José Hurtado Pozo (dir.) Luz Cynthia Silva Ticllacuri (coord.) *Género y Derecho Penal* (Instituto Pacífico 2017) 279-318.

European society, and Spanish society in particular, aware of the problem. Only by fully comprehending the systematic violation of Human Rights of certain collectives (women and children within them) that has been committed for centuries can we understand the judicial measures that have been adopted for the fight against this scourge.

We are optimistic because the ECtHR each time shows itself to be more favorable towards: 1) judging with gender perspective and 2) referring to the need of using Criminal Law to sanction severe attacks against fundamental character rights. The Cases Rumor (2014)[22] and Talpis (2017)[23] provide a good account for the change in paradigm that we can see in the diverse European societies during the past few years.

The Strasbourg Court went from considering gender violence between partners as 1) a private matter if the violence does not reach a point in which the State is obliged to investigate (especially if the victim resumes a cordial relationship with the aggressor voluntarily, by exchanging emails or if the victim takes back what was alleged in the declaration in order not to incriminate the (ex) partner), to 2) treating it like a Human Rights violation. The Court advised that these cases can never be treated as an issue between the two partners, but instead that they must involve the State's obligation to investigate what is happening inside the homes, if there is a presumption of a Criminal offence. This change occurred with only a three-year difference between both cases. Society is changing little by little. We can see that the ECtHR has begun to show a greater sensibility towards the high number of women that are gender violence victims in the hands of their partners. Moreover, it places immigrant women in particular as a vulnerable group.

In Spain, our Supreme Court is also showing a recent sensibility towards victims of gender violence within the home. It recognizes that they possess several characteristics which prevent Procedural Law from always working accordingly due to the "atypical" procedural behavior of gender violence victims.[24] Furthermore, it makes specific reference to underage victims of this kind of violence, which are in many cases witnesses and "invisible" victims of the aggressions.[25]

22 Rumor v. Italy num. 72964/10 (ECHR, 27 May 2014).

23 Talpis v. Italy num. 41237/14 (ECHR 2 March 2017).

24 Judgement Spanish Supreme Court 247/2018, 24-5-2018 (TOL 6.630.740); Judgement Spanish Supreme Court num. 282/2018, 13-6-2018 (TOL 6.639.816).

25 John W. Fantuzzo, Wanda Mohr and Megan J. K. Noone, 'Making the Invisible Victims of Violence Against Women Visible Through University/Community Partnerships' in Robert A. Geffner, Peter G. Jaffe and Marlies Sudermann (eds.), *Children exposed to domestic violence. Current Issues in Research, Intervention, Prevention and Policy Development* (HMTP, 2000) 30.

If we take a look at the data from the Macroencuesta 2015,[26] which is the most recent publication, we can observe that the main reasons why women are not registering complaints are that they minimize the severity of the situation -44.6 %-, fear the possible retaliation or reprisal of the aggressor -26.6 %-, and due to shame or embarrassment. Regarding complaint withdrawal, the main reasons are that the aggressor promised that the aggressor would change -29.3 %-, fear -28.7 %-, the thought that the victim could change the aggressor -28.6 %- and because the aggressor was the father of the victim's children -24.9 %-. We need to end the fear that the victims have and guarantee the full effectiveness of their right to live free of violence.

### 4.3. The (ab)use of Criminal Law for the education and awareness of society

We are seeing how Criminal Law has been expanding slowly but surely to assume functions that do not belong to it.[27] The preventive and communicative effect that Criminal Law has, which is useful and required, does not have the ability to solve the problem of gender violence and neither was it created to do so.[28] We can understand the decision of the Spanish legislator which is stated in the Organic Act 1/2004. The Spanish legislator considered that the transformation of society's habits and values should have been done by the judicial system through the use of Criminal Law. This was probably one of the greatest achievements of the Organic Act 1/2004. The implementation of Criminal Law is the most overwhelming gesture that can be shown towards society. The State sends a message implying that these violations of Human Rights are inadmissible within its boundaries, contrary to the continuous inaction before the creation of the Organic Act 1/2004, which neglected to pay the required attention to the systematic violation of women and children's rights.[29]

In the same way, since the X and Y Case, the ECtHR has affirmed in an unequivocal way that ECHR member States must protect some Human Rights through the use of Criminal Law. The lack of use of the *ius puniendi* would bring with itself the violation of the obligation of the States to respect Human Rights inside their territory.[30] Even

26 http://www.violenciagenero.igualdad.gob.es/violenciaEnCifras/estudios/colecciones/pdf/Libro_22_Macroencuesta2015.pdf

27 Barona (n5) 36. Patricia Laurenzo Copello, 'La violencia de Género en la Ley Integral: Valoración político-criminal' (2005) Revista Electrónica de Ciencia Penal y Criminológica 22.

28 Roberto Bergalli and Encarna Bodelón González, 'La cuestión de las mujeres y el derecho penal simbólico' (1992) 9 Anuario de Filosofía del Derecho 47.

29 Martínez (n22) 159.

30 X and Y v. The Netherlands num. 8978/80 (ECHR, 26 March 1985)

though Human Rights are susceptible to being protected by Criminal Law (Substantive and Procedural) they cannot lose sight of their essential purpose which serves as a limit to the *ius puniendi* of the State.[31] In this sense, even though we show ourselves favorable to the use of Criminal Law for the punishment of certain attacks on Fundamental Rights which had been not punished previously, due to the fact that they were not given the disvalue that they deserved (for example: rape during marriage), we have to insist one more time that society will change through education. The Organic Act 1/2004 was created with the hope of it disappearing one day when gender-based discrimination in turn disappears. The day in which gender equality becomes real and effective will not require the imposition of more burdensome sanctions towards aggressions committed by men rather than by women. It will be unconstitutional for frontally attacking the principle of equality of article 14 Spanish Constitution.

Having to resort to Criminal Law should be evaluated with resistance, without losing sight of Criminal Law having to be the *ultima ratio* and we cannot deposit on it the obligation to educate and make society more aware of the issue. During the last few years we have been living through a "wave of fascination" for Criminal Law which is being used to please the citizens.[32] Even though it might seem like gender violence victims (in a broad sense) are not part of this punitive populism of the last few years, an in-depth analysis proves otherwise. Society does not give the gender violence problem the importance it requires, but wakes up when it faces atrocious acts and demands exemplary sentences for the aggressors.[33] It does not stop to think that the aggressor is part of a system that discriminates against women and that measures such as permanent reviewable prison are not going to guarantee the gender violence victims' safety, due to the fact that when the judicial machinery of the Criminal procedure starts up, it will already be too late. The aim is not to focus and generalize fear to the enemy but to end with the fear of becoming a victim. In order to do this, we need to guarantee in a real and effective manner the victims' rights. Only by doing this can we end the policy of fear that seems to have established itself during the past few years amongst our society.

31 De Luis (n10) 511.

32 Francesco Viganò, 'La arbitrariedad del no punir. Sobre las obligaciones de tutela penal de los derechos fundamentales' (2014) *Polít. Crim,* 436.

33 Silvia Barona Vilar, *Proceso penal desde la historia. Desde su origen hasta la sociedad global del miedo* (Tirant Lo Blanch, Valencia, 2017) 516.

### 4.4. The will to create a transnational protection and obstacles during its parliamentary process

Throughout this research it has been shown that legislative protection measures restricted to a national level are not enough in an increasingly globalized world. It is for this reason that the creation of the European Protection Order implies an advance in the protection of all kinds of victims in the Area of Freedom, Security and Justice. The EPO Directive was created after a proposal made when Spain assumed the Council Presidency of the EU, by using the mechanism of ordinary legislative procedure regulated in article 289 EUFT (European Union Fundamental Treaty). This being introduced as an advance might have been the cause for the own instrument's loss of essence.

At the beginning the Spanish Presidency wanted to create the EPO in the image and likeness of the Spanish Protection Order, so it was proposed with the support of several Member States. During the negotiations they needed to please the rest of the member States in order to create the EPO, so it ended up becoming a restraining order according to Spanish Law.[34] An instrument for the protection of gender violence victims could not be created as it had to be extended to include the victims of all types of crimes. One more time, the fight against gender violence was relegated to second place. [35] The concept of gender violence victims that the different States have is of vital importance in order to understand the instrument of the EPO Directive. The EPO Directive was supposed to be a protection order created in image and likeness of the Spanish protection order for the protection of gender violence victims in relation to the concepts established in the LO 1/2014 (LOVG). This concept of gender violence victim differs from the concepts that the rest of the member States offer, complicating even further its adoption. It is only possible to understand the aims of the EPO Directive by keeping in mind the concept of gender violence victim established by the LOVG.

The creation of this instrument was a political issue which led to the Commission and the alliance Council/European Parliament measuring their strengths. The Commission,

34 The Spanish Protection Order was created in 2003 (Act 27/2003). In the Spanish legislation the difference between a protection order and a restraining order is that protection orders also include civil and social measures. Furthermore, the protection order is exclusive to gender and domestic violence victims. The Spanish restraining order only includes three criminal measures which are the same ones that we can find in the DEPO.

35 Elena Martínez García, 'La orden Europea de Protección en el marco de la nueva ley de reconocimiento mutuo de resoluciones penales en la Unión Europea' in Elena Martínez García (dir.), Juan Carlos Vegas Aguilar (coord.), *La Orden de Protección Europea. Protección de víctimas de violencia de género y cooperación judicial penal en Europa* (Tirant Lo Blanch 2015) 42-43.

which is guardian of the treaties, indicated that the EPO Directive could only have criminal measures and that the criminal and civil natures of the different national protection orders of the member States would fall short of its ambitious original objectives. The Council/European Parliament wanted to move on forward. This led to the protection of victims, ending with the double regulation we have nowadays. On the one hand, a criminal instrument created by the Council/European Parliament is very distant to what the Spanish Presidency pretended it to be. On the other hand, the Commission created a civil instrument with the same three measures used to create the criminal instrument but with a much more automatic mutual recognition. Since its founding,the Commission has recognized the convenience of being the regulator of both civil and criminal instruments independently, due to their different legal basis. In order for them both to be a single instrument, the treaties would have had to be modified. The Parliament and the Council did not see it in this way and defended themselves, saying that there was enough judicial basis for the creation of the EPO Directive. [36]

The reality is that during this titanic fight they lost sight of the really important matter: the necessity of protecting victims. Finally, the EPO Directive was promulgated with just three criminal measures and it was supposedly based on mutual recognition, but there were so many problems with its adoption that the victim might prefer to start a new procedure in the destination State. [37] It was here when the Directive lost all of its essence. In reality it is not an automatic instrument of mutual recognition. Moreover, the Act 23/2014 has reduced even further, if possible, the automatic recognition by imperatively establishing the judicial hearing of the person causing the danger, in order to issue an EPO and the possibility to appeal. [38] The EPM Regulation opts instead for a more direct recognition based on civil judicial cooperation. This in addition to the Framework Decision 2008/947/JAI and Framework Decision 2009/829/JAI make the situation even more complex for the victims and for judicial actors. The moment the instruments of the EPO Directive and the EPM Regulation start to be used, we will observe that there is not only the possibility of getting confused between them, but also the possibility of confusing them with other pieces of European legislation. In

36 Neus Oliveras Jané, 'La Directiva 2011/99/UE sobre la orden europea de protección' in Teresa Freixes and Laura Román (dirs.), Neus Oliveras and Raquel Vañó (coords.), *La Orden Europea de Protección. Su aplicación a las víctimas de Violencia de Género* (Tecnos 2015) 36-37

37 Suzan Van Der Aa and Jannemieke Ouwerkerk, 'The European Protection Order: No Time to Waste or a Waste of Time?' (2011) 19 European Journal of Crime, Criminal Law and Criminal Justice 271.

38 Luis Gómez Amigo, 'La Orden Europea de Protección y su aplicación en España' (2017) 43 Revista General de Derecho Procesal, 21.

conclusion, an amalgam of rules that were supposedly meant to be "fast and simple"exceedingly complicate the protection of the victims.

We observe that the political will exists and member States had the necessary sensitivity to propose the creation of a European Order for the protection of victims at a European level. What failed was the lack of previous harmonization, which exceedingly complicates mutual recognition, and the refusal from the member States to let go of their last redoubt of national sovereignty. The difficulties during the creation process of the EPO show us how much the European Union needs to be built still. There is not any Criminal European Law and we are far from achieving it. Over a long period of time the EU has only had monetary interests. The necessity of creating a Criminal European Law emerged after Globalization, when we realized that crime has no borders. However, we observe that there are still misgivings from the States that involve accepting that their legislator is a subordinate legislator to the European legislator in some matters. As a result, we have a model in crisis where the measures to adopt end up being very different from what they were supposed to be. The EPO is only one of lots of examples of how lack of harmonization and trust complicate the effective application of the mutual recognition principle.

### 4.5. The pragmatism of the transnational civil protection

Spanish legislators did well in placing protection orders as criminal measures in 2003. The aim was to send a clear message of social reprobation to the citizens. Times have changed in comparison with seventeen years ago and nowadays, at least on paper or in theory, we cannot imagine a turn back or minimization of the disvalue related to these actions. That is the reason why we could open the debate about the possibility of civil protection measures.

The comparative study between EU member States shows us that almost all EU member States use civil protection measures. The fact that the EMP Regulation does not ask for double incrimination gives it a much more automatic mutual recognition than the EPO Directive recognition. [39] Regarding the EPO, European legislators considered that maybe, the executing State does not have a similar protection measure for the specific case. Therefore, the EPO provides a margin of discretion to the State: according to their national law they can adopt a measure as similar as possible to the original one in the issuing State. The civil certificate works in a different way. The member

39 Van Der Aa, Niemi, Sosa, Ferreira, Baldry (n3) 211-212.

State is obliged to recognize the measure without intermediary procedures. In other words, the only action that the executing member State can do is the automatic recognition. Even in the case that the executing member State does not offer that protection measure based on the same facts, it is still obliged to recognize the prohibitions included in the protection order from the other member State according to article 13.3 REMP and Recital (18) REPM.

Moreover, proof standards are different between criminal and civil procedures. In criminal procedures the fact must be proved "beyond any reasonable doubt".[40] However, in civil procedures it has to be more likely than unlikely. The reason for using a civil protection measure is a practical one. States such as Germany or Austria opted for a civil system. Therefore, they can protect gender and domestic violence victims in a fast and immediate way. However, in Spain we prefer the political message implying that the fight against gender and domestic violence is a criminal issue and must be prosecuted in a criminal procedure.

Even though we do not have notice of EPO being refused due to double incrimination, the reality is that it cannot be claimed as a ground of refusal within the Regulation EPM. Consequently, even though as a jurist I could prefer the use of criminal protection orders, due to the fact that they typify acts with the disvalue that they deserved, pragmatism makes the civil way more effective. This situation shows that gender violence victims in Europe have an easier achievement of the recognition of a civil protection measure rather than a criminal protection measure.

## 5. Proposals

The *leitmotiv* during this investigation has been the requirement to keep building an EU where judicial cooperation is real and effective. I am aware that nowadays it is naive to think about the creation of a European Criminal Code. The creation of a European Criminal Code does not present technical problems. The problems are political, due to the complication that requires all the States to give up their different legislative histories in order to create common juridical categories. Procedural law is harmonizing legislation little by little. As long as we keep using the different mutual

40 Even though precautionary measures do not need to be proved "beyond any reasonable doubt" it is easier to achieve a protection precautionary measure in a civil procedure than in a criminal procedure. For example, if an act cannot be considered a Crime, the Criminal Procedure is going to end and therefore the precautionary measure will disappear. It is possible for this act to include a disvalue and it can involve a greater real risk of revictimization. However, in order to achieve a criminal protection measure a previous crime must exist.

recognition instruments we will approach the different legal systems to each other. I firmly believe that EU member States can learn from each other in order to improve our different legislations and offer a more real and effective protection to our victims. Therefore, I present three proposals in order to improve the use and effectivity of European Protection Measures:

### 5.1. The creation of a European register of protection measures

Recital (32) DEPO indicates that, *"in order to facilitate the evaluation of the application of this Directive, Member States should communicate to the Commission relevant data related to the application of national procedures on the European protection order, at least with regard to the number of European protection orders requested, issued and/or recognised. In this respect, other types of data, such as, for example, the types of crimes concerned, would also be useful".* Article 22 DEPO also refers to the creation of a State database.

Member States ought to have transposed the DEPO 11 of January of 2015. Five years after this transposition we still do not have any databases. Furthermore, the EPM Regulation does not even refer to the convenience of the creation of these databases. Being able to fully understand the utility of these instruments without databases has been complicated. It also complicates the correct evaluation of the problem scope and prevents an effective response from being done. We do not know the exact number of EPO issued, but we can presume that there are few, due to the lack of knowledge of the instrument. I propose the mandatory creation of State databases of protection orders issued and recognized. All these data should be also registered in a European Database. These databases must be updated frequently for the information to be useful. As an example of good practice, we have the Spanish State: using CENDOJ (Center of Judicial Documentation from the CGPJ) we can know the number of protection orders issued by Spanish courts. However, I believe that this measure is not enough and that the Ministry of Justice should create a database in order to account for the EPO executed and issued by Spanish courts.

### 5.2. The training of legal practitioners in order to fight against ignorance and fear to use mutual recognition instruments

The starting point is a simple premise: we do not use the instruments that we do not know. The biggest problem that we find when we study the instrument of EPO is the

generalized ignorance from the legal practitioners.[41] We cannot assess the wisdom or error of the EPO Directive because it is an unknown instrument. We must commit to training and informing our practitioners about European mutual recognition instruments in general and the EPO in particular. The University of Valencia, in collaboration with CGPJ and the Rovira i Virgili University, prepared a training course on the EPO for Judges. This training is part of the State positive obligations from the States (article 15 Istanbul Convention). Within this course, successful experiences were explained. One Judge who had issued several EPO said that he knew the instrument due to he had learned about it at the Judicial School. This anecdote allows us to be optimistic regarding the increase in use of EPO in the future. The moment the legal practitioners know this instrument, the moment they realize how useful it is and start to use it. Nevertheless, I would like to state that it is not an easy instrument to use, due to the fact that it does not exclude the possibility of confusion with Framework Decision 2008/947/JAI, Framework Decision 2009/829/JAI and Regulation (EU) 606/2013.

Even though in theory the different mutual recognition instruments are delimited, it is foreseeable that in practice, these instruments will collide at some point. The moment they collide we will have an important task of interpretation and application. This will allow us to detect the discrepancies and failures that this complex system has. The reality is that we have at least five different instruments that can interact or collide. Nowadays we are, the different member States, the ones called to cooperate for the application to be real and effective. We need a real will to continue building the EU.

National Judges must also act as European judges and lose the fear to use mutual recognition instruments. We observe that the Judicial School is making an effort to include matters related with mutual recognition in the training of future judges. Moreover, I acknowledge that the new generations of Judges are building the EU using instruments like the EPO. These small gestures will approach the different legislations little by little. There is always margin for improvement and the different European member States can learn one from one another in order to improve our different legislations and offer a more real and effective protection to our victims in general, and gender violence victims in particular. All these projects show us how much the European Union needs to be built, but even still we are on the right track.

41 Javier Hernández García, 'Notas sobre la Directiva 2011/99, reguladora de la orden europea de protección' in Elena Martínez García (dir), Raquel Borges Blázquez and Elisa Simó Soler (coords.), *La construcción de Europa a través de la cooperación judicial en materia de protección de víctimas de violencia de género* (Tirant Lo Blanch 2019) 44.

### 5.3. By way of a proposal *lege ferenda.* A civil provisional protective measure

We could raise the possibility of using civil protection orders to fight against the least severe cases in order to create a more real ASJF through the use of harmonization of the different legislations. Civil protection orders could be used for less severe unlawful acts: those which do not require the use of Criminal law, but if we do not stop them on time they will end being criminal offences in the future. For instance, in a contentious divorce we observe behaviors that, even though in that moment are not considered a criminal offense, will probably end up being considered as such if we do not stop them on time. In other words, forestall the unlawful act and prevent it from happening, instead of protecting the victim when it has already occurred. In this example there is no gender violence, just problems due to the separation. These problems are not crimes, but we can see some behaviors that will turn into toxic ones and later into crimes.

My argument is to try to prevent criminal measures before they are required, but they should never be avoided in cases where they are really required. We should bear in mind that the most serious acts must be investigated in a criminal procedure and punished if they can be proved beyond a reasonable doubt. Using this measure, we are not advancing Criminal Law to one step before, but preventing it from appearing. This civil advice not only benefits the victim, but also the possible future aggressor: none of them will have to suffer the consequences of the commission of a criminal offence. The three measures that we can find in Directive EPO and Regulation EPM do exist in our civil legislation (article158 Civil Spanish Code).[42]

I am aware that this proposal raises new questions that will have to be solved by future investigation. One difficulty is finding the competent court or procedure to adopt a provisional civil measure. Nevertheless, we think that harmonization of legislations regarding protection orders would facilitate mutual recognition between different EU member States. Even more, the essence of the EU is to give up to our particularities in order to create, little by little, a supranational European law to facilitate European citizens to move around the AFSJ with the guarantee that the protection from a member State will still be effective in the member State where the person is going to move.

42 Katixa Etxebarría Estankona, 'El reglamento (UE) 606/2013 relativo al reconocimiento mutuo de medidas de protección en materia civil. Algunas cuestiones sobre su aplicación', in Katixa Etxebarría Estankona, Ixusco Ordeñana Gezuraga and Goixeder Otauza Zabala (dirs.), *Justicia con ojos de mujer. Cuestiones procesales controvertidas* (Tirant Lo Blanch 2018) 395.

I propose a comparative study with foreign civil protection systems such as the German, Austrian or Italian systems, in order to approach ourselves towards other legal systems and make mutual recognition and cooperation easier. We would try to assess the effectivity of civil and criminal protection measures using five variables: 1) grounds for issuing a protection measure, 2) proportion of protection orders issued, 3) proportion of protection orders violated, 4) consequences of the violation of protection orders, 5) victim satisfaction with the protection measure and sense of security. After performing this study, we consider that we could evaluate the effectivity and convenience of using or not civil protection measures.

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# Cinsel İstismar Olgularında Adli Görüşme Odalarının Kullanımı: Hâkim, Avukat, Uzman ve Mağdur Görüşleri

## *Use of Forensic Interview Rooms in Sexual Abuse Lawsuits: The Views of Judges, Lawyers, Specialists and Victims*

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*Teşekkür: Adalet Bakanlığı'nın ses ve görüntü kaydına izin vermemesi sebebiyle görüşmelere yardımcı olarak katılım sağlayan Yeliz Coşkun.

**ÖZ**

Günümüzde cinsel istismar mağdurlarıyla ilgili koruyucu ve destekleyici önlemler almak önemli bir kamu görevi olarak değerlendirilmeye başlanmış, bu doğrultuda dünya genelinde gündeme gelen Adli Görüşme Odası (AGO) uygulamaları, son dönemlerde Türk Adli Sistemi içerisinde de yerini almıştır. AGO'nun, dava süreçlerini ve başta mağdurlar olmak üzere, süreci deneyimleyen hâkimleri, avukatları ve aile mahkemesi uzmanlarını ne şekilde etkilediğine ilişkin yerli alanyazına gereksinim vardır. Dolayısıyla bu araştırmada, çocuğa yönelik cinsel istismar davalarında AGO uygulamalarının hâkim, avukat, aile mahkemesi uzmanı ve mağdur görüşleri çerçevesinde değerlendirilmesi amaçlanmıştır. Nitel olarak desenlenen araştırma, İzmir Adliyesi'ne yansımış çocuğa yönelik cinsel istismar davalarında görev alan 10 hâkim, 10 avukat ve 10 aile mahkemesi uzmanı ile 10 mağdur çocuk/ergenle gerçekleştirilmiştir. Dört katılımcı grup için araştırmacılar tarafından geliştirilen yarı-yapılandırılmış görüşme formları kullanılarak yürütülen niteliksel çalışmada toplanan veriler, araştırmacılar tarafından içerik analiziyle analiz edilmiştir. Bulgular, dört katılımcı grubun AGO uygulamasını gerekli ve yararlı bulduğunu göstermiştir. Bunun yanında bazı hâkim, avukat ve aile mahkemesi uzmanları doğrudanlık ilkesini öne sürmüş ve belirli koşulların sağlandığı takdirde mağdur çocukların mahkemede dinlenmesinin de gerekli olduğunu ifade etmişlerdir. Hâkimler, avukatlar ve uzmanlar ayrıca teknik sorunların süreci olumsuz etkilediğini de belirtmişlerdir.
**Anahtar Kelimeler:** Cinsel istismar, çocuk, adli görüşme odası

**ABSTRACT**

Recent trends show that establishing protective and supportive policies for victims of sexual abuse became an important public issue, leading to a worldwide use of Forensic Interview Rooms (FIR), which has recently come up within the Turkish Judicial System. There seems to be a lack of evidence regarding the impact of FIR on sexual abuse cases as well as the victims, the judges, the lawyers and the family court specialists. Therefore, this study aimed at investigating the impact of FIR in child sexual abuse cases from the eyes of judges, lawyers, family court specialists and child victims. This qualitative study was conducted with 10 judges, 10 lawyers and 10 family court specialists serving in child sexual abuse cases in the Izmir Judicial Court, and 10 child victims. Data were gathered via semi-structured interviews developed by the authors and analyzed using content analysis. According to the results, the four groups of participants found FIR necessary and beneficial. However some of the judges, lawyers and specialists, on the basis of the principle of directness, claimed children should be heard in court as long as the necessary conditions are met. Judges, lawyers and specialists also brought up the negative impact of technical problems on the lawsuits.
**Keywords:** Sexual abuse, child, forensic interview room

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## EXTENDED ABSTRACT

Beginning in the 1990s, sexual abuse has begun to be a critical issue around the World due to its negative physical and emotional impact on the victims and related others. Since then, establishing protective and supportive policies for (especially child) victims of sexual abuse became a major public issue, leading to a worldwide use of Forensic Interview Rooms (FIR) in taking a child's statement in child sexual abuse cases. The Turkish Judicial System has also recently taken an important step in using FIR in such cases.

FIR was developed as an alternative and secure setting to take children's statements in cases where it might be threatening for the child to be in the court room. FIR is a unit in the court house including a waiting room, an interview room with a closed circuit TV system and play and related materials, and an observation room where the recording takes place and related personnel can observe the child interview. The family court specialist conducts the interviews with the child victim individually in the interview room while the judge can make direct contact with the specialist through an earphone in order to ask case related questions to the victim. The pedagogical background of the specialist assists him/her in rewording the questions to the child so as to avoid additional emotional damage.

As outlined above, FIR creates a child friendly environment where the child will not have to go through any pressure, and probably give his/her statement more reliably compared to the court room. Despite its positive effects on the child and the case, we do not have enough evidence to justify this new procedure, and there seems to be a need to understand what FIR has brought for related parties, including judges, lawyers, family court specialists and child victims of sexual abuse. Therefore, this study aimed at investigating the impact of FIR in child sexual abuse cases through the eyes of judges, lawyers, family court specialists and child victims.

The participants of this qualitative study included 10 judges, 10 lawyers and 10 family court specialists serving in child sexual abuse cases seen in the Izmir Judicial Court, and 10 child victims. Four semi-structured interview forms were developed by the authors for each group of participants. The face and content validity of the forms were tested by two experts in the field (two experts for each form, making up a total of five experts). Individual interviews were conducted by the second author in the court house. All data were analyzed independently by the two authors via content analysis. Any discrepancies were resolved through a 2-hour discussion.

Results from the four groups generally showed that FIR was a necessary and beneficial procedure for child victims of sexual abuse. Despite these positive attitudes, some of the judges and lawyers stressed the importance of the principle of directness, and believed that, under optimal circumstances, children should be heard directly by the judge in the court room. It should be noted however that, FIR with its camera and earphone system, can be said to hinder the principle of directness in minimal terms, since the judge can follow the child's mimics and gestures while asking all his/her questions to the specialist. This stick to old habits exhibited by the judges was believed to eventually change with the spread of FIR practices across the nation.

According to the lawyers, the tendency of the judges to stick with the principle of directness resulted in declining lawyer requests for FIR. However, FIR procedures should be a legal requirement independent of judge preference in order for all victims to be treated equally in lawsuits. This may be achieved through legal sanctions and developing inservice training programs for judges. It may also be noted that, lawyers as well as judges should be provided with inservice training regarding FIR procedures in order to increase their FIR requests in child sexual abuse cases. Family court specialists on the other hand, had positive attitudes towards FIR compared to judges and lawyers, believing that they were more able to practice their profession within a better planned schedule.

Another important finding from the study was the technical problems and lack of materials put forward by the court personnel. Most of the participants complained about the communication breakdowns between the judge and the specialist due to frequent line cut-offs during the interviews. The participants also brought up the lack of toys and materials in FIR. They claimed that children should be kept busy with developmentally appropriate toys and materials while waiting for the interview or that a specialist needs to make the child feel comfortable and safe during the interview. These issues were thought to be hindering factors for some of the participants' resistance to FIR. Last but not least, the child participants all reported that FIR was very beneficial for them during the trials.

Taken together, the child's best interest was concidered important by the court personnel while some change in attitudes, tendencies and technical issues is urgently needed to make FIR a common practice in Turkish courts.

## 1. Giriş

Çocukların güvenli bir ortamda yetişme ve gelişme hakları, toplumsal kurallar ve anayasal boyutta bir temel hak olarak tanımlanmasına karşın, bu hak zaman zaman çocukların etkileşim içerisinde oldukları bireyler tarafından ihlal edilebilmekte ve cinsel istismar eylemi gerçekleşebilmektedir (Masilo, 2018). Gerçekleşen cinsel istismar öyküsü ise, genellikle anneler olmak üzere bazı aile üyelerinde çocuğu koruyamadıklarına yönelik bir suçluluk duygusunu ortaya çıkarabilmekte, çocuğun çevresinde olumsuz bir ortamın oluşmasına neden olabilmektedir (Azzopardi, Alaggia ve Fallon, 2018).

Cinsel istismar, kısa ve uzun vadede mağduru fiziksel ve psikolojik olarak etkileyen bir sorun olmasına, mağdurun çevresindeki pek çok kişiyi de etkilemesine karşın (Azzopardi ve diğerleri, 2018; Pilgrim, 2017; Scoglio, Kraus, Saczynski, Jooma ve Molnar, 2019), 1990'lı yıllara kadar Amerika Birleşik Devletleri ve Batı Avrupa ülkelerinde akademik ya da toplumsal açıdan gereken önemin verilmediği bir alan olarak karşımıza çıkmaktadır (Blakemore, Herbert, Arney ve Parkinson, 2017; Rellini, 2014; Renzoive, 2018). Nitekim pek çok araştırma, cinsel istismarın mağdur üzerinde yarattığı psikiyatrik durumlara işaret etmekte ve söz konusu ağır durumlar arasında travma sonrası stres bozukluğu, davranış bozuklukları, depresyon, madde kullanım bozukluğu ve kişilik bozuklukları gelmektedir (Pérez-Fuentes, Olfson ve diğerleri, 2013; Renzoive, 2017; Taner, Çetin, Işık ve İşeri, 2015).

Günümüzde cinsel istismara yönelik bakış açısı değişmiş, cinsel istismar mağdurları ile ilgili koruyucu ve destekleyici önlemler almak ve mağdura süreç boyunca güvende olduğunu hissettirmek bir kamu görevi olarak değerlendirilmeye başlanmıştır (Tetteh ve Markwei, 2018; Tweedlie ve Vincent, 2019). Bu değişimde, cinsel istismar öykülerinin medyada sıkça yer almasıyla oluşan kamuoyu talepleri de önemli rol oynamıştır. Ne var ki mağdurlara ait fotoğraf, video gibi özel yaşama ait içeriklerin medyada uygun olmayan şekillerde sergilenmesi, mağdurların örselenmesine yol açmış ve bu olumsuz tablo cinsel istismar mağduru pek çok bireyin yardım talebinden kaçınmasına neden olmuştur (Hornor ve Zero, 2018; Popović, 2018). Cinsel istismar davalarında ayrıca, uzun yargılama süreci ve tıbbi muayenenin herhangi bir bulgu vermemesi gibi faktörler mağdurların suçluluk duymalarına neden olmakta, bu gibi durumlar kendini savunmasız hisseden diğer cinsel istismar mağdurlarının yardım talebinde bulunmamalarının diğer nedenleri arasında sayılmaktadır (Joki-Erkkilä, Niemi ve Ellonen, 2018; Tetteh ve Markwei, 2018).

Toplumsal değişimler ve talepler nedeniyle pek çok disiplin cinsel istismarı ve cinsel istismar mağdurlarını biyolojik, psikolojik, nörolojik, davranışsal ve sosyolojik açıdan ele almaya çalışmış, bu çabayla birlikte yeni paradigmalar ortaya çıkmıştır (Azzopardi ve diğerleri, 2018). Özellikle hukuk alanında yeni bir bakış açısı gelişerek *çocuğun üstün yararı ilkesi* gündeme gelmiş ve her koşulda uygulanması öngörülmüştür. Çocuğun üstün yararı, çocukların etkilenebileceği tüm karar ve işlemlerde çocuğun maddi manevi yararının öncelikle gözetilmesi olarak tanımlanabilir. Türkiye'nin de taraf olduğu Lanzarote Sözleşmesi'nde, çocukların üstün yararı ilkesi temel alınmış, önleyici ve koruyucu düzenlemelerin önemi, mağdur çocuk ve ailesine yardım edilmesi, çocuklara koruyucu cinsel eğitim verilmesi, adli süreçlerin çocuk dostu yöntemlerle düzenlenmesinin önemi vurgulanmıştır. Bu doğrultuda düzenlenen uygulamalar arasında adli görüşme uygulaması yer almaktadır. Adli görüşme, mağdurun korunması ve örselenmemesi yaklaşımına dayanarak adli yargılamada mağdurun stres yaşamadan beyanını sağlıklı bir şekilde verebilmesi ihtiyacından doğmuştur (Bracewell, 2018; Krause-Parello, Thames, Ray ve Kolassa, 2018). Başta okul öncesi çocuklar olmak üzere tüm yaş gruplarındaki cinsel istismar mağdurlarının ifadesini almakta zorlandığını ifade eden hâkimler ve savcılar bu uygulamanın yaygınlaşmasında büyük rol oynamıştır (Ernberg, Magnusson ve Landström, 2018).

Dünya genelinde uzmanların adli görüşme odalarında (AGO) cinsel istismar mağdurlarıyla görüşme gerçekleştirmeleri yaygın bir uygulamadır. Bu uzmanlar, mağdurla bir ön görüşme yaparak öncelikle onunla güvene dayalı bir etkileşim geliştirmekle, ona kendini güvende olduğunu hissettirmekle, bunun sonrasında mağdurun ihtiyaçlarını belirleyip gerekli yönlendirmeleri yapmakla ve son aşamada cinsel istismar öyküsü ile ilgili bilgi toplamakla yükümlüdür (Krause-Parello ve diğerleri, 2018). Uzmanların ayrıca bu görüşmeler esnasında, mağdurun psiko-sosyal gelişimine olabildiğince zarar vermeme gayretinde olmaları esastır (Demirel ve Atalar, 2017). Söz konusu girişimi sistematik bir düzeye taşımak amacıyla yurt dışında birtakım görüşme protokolleri gündeme getirilmiştir. Bunlar arasında NICHD (National Institute of Child Health and Human Development Protocol – Ulusal Çocuk Sağlığı ve İnsan Gelişimi Enstitüsü Protokolü) (Lamb, Orbach, Hershkowitz, Esplin ve Horowitz, 2007) ve RATAC (Rapport, Anatomy, Identification, Touch Inquiry, Abuse Scenario, Closure – Güven, Anatomi, İsimlendirme, Dokunmayı Sorgulama, İstismar Senaryosu, İfşa Etme) (Anderson, Ellefson, Lashley ve Miller, 2009) gelmektedir. Her iki protokolde, çocukla gerçekleştirilecek olan görüşmede güven oluşturmadan olayın çocuk tarafından açıklanmasına kadar olan adımlar tanımlanmakta ve görüşmecilerin bu adımları harfiyen

takip etmeleri beklenmektedir. Toth (2011), mağdur çocuklara istismarla ilgili soruların doğrudan sorulmasından ziyade, NICHD ve RATAC gibi protokollerin kullanımının daha etkili olduğunu ve benzer sistematik bilgi toplama süreçlerinin geliştirilmesi gerektiğini savunan yazarlar arasındadır. Amerika Birleşik Devletleri'nde Çocuk Savunma Merkezleri'nde (Child Advocacy Center) yürütülen sistematik adli görüşmeler sonrasında çocuğa tıbbi ve diğer koruyucu hizmetlerin de sunulması girişimleri mevcuttur (Cross, Jones, Walsh, Simone ve Kolko, 2007). Bu tür hizmet modelinin çocuklar ve dava üzerinde olumlu etkiler yarattığına dair çalışmalara rastlamak mümkündür (örneğin, Cronch, Viljoen ve Hansen, 2006).

Türkiye'de adli görüşmelerin yasal çerçevede belirli bir standarda oturtulma çabası, Adalet Bakanlığı, İçişleri Bakanlığı, Millî Eğitim Bakanlığı, Aile ve Sosyal Politikalar Bakanlığı ve üniversitelerin çocuk birimlerinin bir yıl süren koordineli çalışmalarının sonucunda 2010 yılından itibaren adliye saraylarından bağımsız yapılar olmak koşuluyla Çocuk İzlem Merkezleri (ÇİM) kurulması ile gündeme gelmiştir. ÇİMler cinsel istismar mağduru çocukların ikincil örselenmelerinin önüne geçmek ve istismar olgusuyla ilgili hızlı ve kapsamlı bilgi edinmek amacıyla, ABD'de olduğu gibi (Cronch ve diğerleri, 2006, Cross ve diğerleri, 2007), adli, tıbbi ve sosyal bilimler alanlarında yetişmiş uzmanların multidisipliner çalışmalarıyla süreci yürüten merkezlerdir (Acehan, Bilen ve diğerleri, 2013; Aydemir ve Yurtkulu, 2012; Bağ ve Alşen, 2016; Bilginer ve Çalışkan, 2018). Nisan 2019 itibariyle Türkiye'de 35 ilde toplam 38 Çocuk İzlem Merkezi bulunmaktadır (Sağlık Bakanlığı, 2019). ÇİM alanyazını, genel olarak bu merkezlerin multidisipliner yapılarının ve 7/24 hizmet vermelerinin, olgularla ilgili hızlı ve güvenilir bilgilere ulaşılmasında etkili olduğunu ileri sürmekte, ancak söz konusu görüşlerin bilimsel bulgulardan ziyade araştırmacıların kişisel deneyimlerine dayandığı görülmektedir (Acehan, Bilen ve diğerleri, 2013; Aydemir ve Yurtkulu, 2012; Bağ ve Alşen, 2016; Bilginer ve Çalışkan, 2018). Bununla birlikte aynı çalışmalar, ÇİM'in bulunmadığı illerde, cinsel istismar mağduru çocukların mahkeme salonlarında dinlenmesi uygulamasının süregittiğini, hatta ÇİM'in olduğu bazı illerde bazı hâkimlerin çocukları mahkeme salonunda ikinci kez dinlemeyi talep ettiklerini vurgulamaktadırlar (Acehan, Bilen ve diğerleri, 2013; Aydemir ve Yurtkulu, 2012; Bağ ve Alşen, 2016; Bilginer ve Çalışkan, 2018).

ÇİMlerin çeşitli illerde kurulması ve işletilmesinin yanı sıra, Adalet Bakanlığı Nisan 2017'den başlatılmak üzere, adliye saraylarındaki duruşma salonlarında dinlenen çocuklar ile ilgili yeni bir adım atmıştır. Bu yeni adımla, Adalet Bakanlığı'nın 2015-

2019 Stratejik Planı'nda yer alan *"Çocuk adalet sisteminde çocuğun etkin korunması için gerekli önlemlerin alınması ve kurumlar arası işbirliğinin güçlendirilmesi", "Çocuklara yönelik adli süreçlerde özel önlemlerin etkin hâle getirilmesi", "Aile içi şiddetle mücadelede koruma ve soruşturmanın etkinliğinin artırılması"* amacına uygun olarak, adliye saraylarının içinde Mağdur Hakları Daire Başkanlığı'na bağlı Adli Görüşme Odaları kurulmaya başlanmıştır. Bu kararlarla eş zamanlı olarak 23 ilde ve 26 adliyede faaliyete geçen AGOlarda, hâlihazırda Aile ve Çocuk Mahkemesi'nde görev yapmakta olan pedagoglar, psikologlar ve sosyal hizmet uzmanları görevlendirilmişlerdir. Mart 2019 itibariyle 49 ilde 59 AGO'nun kurulduğu bildirilmektedir (Ermağan-Çağlar ve Türk, 2019; Mağdur Hakları Daire Başkanlığı, 2019). Şunu belirtmek gerekir ki, AGOların kurulmasındaki amaç ÇİMlere alternatif oluşturmaktan ziyade, birlikte çalışarak çocuklara ve ailelerine uygun bir hizmet modeli sunmaktır. ÇİM Sağlık Bakanlığı koordinasyonuyla hastanelerin içinde yalnızca çocuk cinsel istismar mağdurlarına yönelik ve yalnızca kovuşturma aşamasında hizmet sunmaktayken, AGO Adalet Bakanlığı koordinasyonunda adliyeler içerisinde tüm kırılgan gruplara yönelik soruşturma ve kovuşturmalar ile aile mahkemeleri tarafından kullanılabilmektedir (Adalet Bakanlığı Ceza İşleri Müdürlüğü Mağdur Hakları Daire Başkanlığı, 2017).

AGO, görüşme yapılacak kişinin bekleyebileceği ve gerektiğinde avukatıyla görüşebileceği bir bekleme odası, ses ve/veya görüntü kaydının alınabileceği görüşme odası ve adli görüşmeyi takip edecek hâkim, savcı, avukat, adli görüşme odası koordinatörü ve ilgili diğerlerinin bulunacağı gözlem odasından oluşmaktadır. Öncelikli olarak cinsel suç ve aile içi şiddet mağduru çocuklar için kurulmuş bu odalarda, çocukların beyanlarını duruşma salonunda karşılaşabilecekleri olumsuz koşullardan kaynaklanabilecek ikincil bir örselenme yaşamadan vermeleri hedeflenmektedir. İfade alımı sırasında görüşme odasında yalnızca uzman ve çocuk bulunmakta, hâkimler ve savcılar gözlem odasından ya da duruşma salonundan bu odaları izleyebilmekte, gerektiğinde mikrofon ve kulaklık aracılığıyla uzman ile iletişim kurarak mağdura sorular yöneltebilmektedirler. AGOlar'ın ayrıca her yaş grubundaki çocuklar ve ergenlere uygun fiziksel düzenlemeleri de içermesi gerekmektedir (Ermağan-Çağlar ve Türk, 2019; Mağdur Hakları Daire Başkanlığı, 2017).

Büyük olasılıkla yeni bir uygulama olmasından dolayı, AGO'ların cinsel istismar mağdurları ve davaların gidişatı üzerindeki sonuçlarına ilişkin yurtiçi alanyazına rastlamak güçtür. Ermağan-Çağlar ve Türk'ün (2019) güncel bir çalışmaları ise,

Türkiye genelinde AGO görüşmelerinin standardize edilmesi yönünde NICHD Protololü'nü önermeleri bakımından önemli bir çalışma olarak kabul edilebilir. Nitekim yazarlar bu çalışmalarında, AGO görüşmelerinin standart bir protokol çerçevesinde geçerliğinin sağlanması, bir diğer deyişle çocuklardan doğru bilgilerin alınarak gereksiz hükümlerin ya da salıverilmelerin engellenmesi yönünde etkili bir çabayı gündeme getirmişlerdir.

AGO uygulamaları yoluyla geçerli ve güvenilir bilgi elde etmek için süreci birebir ve yoğun olarak deneyimleyen tüm tarafların (mağdurlar, uzmanlar, hâkimler, avukatlar) boylamsal olarak izlenmesi kuşkusuz ki çok değerli bir çaba olacaktır. Ne var ki, cinsel istismar gibi hassas bir konuda atılan AGO adımının etkilerine dair bilgilere daha kısa sürede ulaşmanın, bir diğer deyişle kesitsel bir araştırma gerçekleştirmenin kritik olduğu düşünülmektedir. Bu aşamada, AGO uygulamasını deneyimlemiş ilgili tüm tarafların görüşlerini almak uygun gibi görünmektedir. Dolayısıyla bu araştırmanın amacını, AGO sürecini deneyimlemiş cinsel istismar mağdurlarının, hâkimlerin, avukatların ve uzmanların, AGO uygulamasına ilişkin görüşlerinin belirlenmesi oluşturmuştur.

## 2. Yöntem

Bu araştırmada, bir konuda yoğun deneyimleri olan bireylerin o konuya ilişkin görüşlerini derinlemesine inceleme olanağı sağlayan ve nitel araştırma modellerinden biri olan temel nitel araştırma deseni tercih edilmiştir (Glesne ve Peshkin, 1992; Huberman ve Miles, 1998; Yıldırım ve Şimşek, 2013). Temel nitel araştırmalarda araştırmacı, katılımcıların bir konuya ilişkin kişisel deneyimlerini nasıl değerlendirdiklerine ve anlam yüklediklerine odaklanır (Glesne ve Peshkin, 1992; Merriam, 2013). Veriler gözlem, görüşme ya da belgelere ulaşma yoluyla toplanmakta ve verinin uygunluğuna göre tekrar eden örüntülerin kategorize edilmesi ve temalar altında adlandırılması söz konusudur (Glesne ve Peshkin, 1992; Merriam, 2013; Somekh, 2006).

### 2.1. Çalışma Grupları

Araştırmanın çalışma grubu, İzmir Adliyesi Ağır Ceza Mahkemeleri'nde görev yapan 10 hâkim, İzmir Barosu'na kayıtlı olan 10 avukat, adli görüşmeci olarak görev yapan 10 uzman ve 10 cinsel istismar mağduru çocuk olmak üzere toplam 40 kişiden oluşmaktadır. Hâkim, avukat ve uzmanların demografik özellikleri Tablo 1'de özetlenmiştir.

**Tablo 1. Hâkimler, avukatlar ve aile mahkemesi uzmanlarının demografik özellikleri**

| | | Hâkim* | Avukat* | Aile mahkemesi uzmanı* |
|---|---|---|---|---|
| Yaş | 26-35<br>36-45<br>46 - … | 1<br>4<br>5 | 3<br>6<br>1 | 5<br>4<br>1 |
| Cinsiyet | Erkek | 6 | 3 | 5 |
| | Kadın | 4 | 7 | 5 |
| Görev Süresi (yıl) | 0-5 | - | 2 | 2 |
| | 6-10 | 3 | 6 | 5 |
| | 11-20 | 7 | 2 | 3 |
| AGO eğitimi | Alındı | - | 3 | 10 |
| | Alınmadı | 10 | 7 | - |

* n=10

Tablo 1 genel olarak incelendiğinde, hâkimlerin yaş ve görev süresi olarak avukat ve uzmanlardan üstün oldukları ve üç grupta da cinsiyet dağılımlarının eşit ya da eşite yakın olduğunu söylemek mümkündür. Tablo 2'de, katılımcı cinsel istismar mağdurlarına ilişkin bilgiler yer almaktadır.

**Tablo 2. Cinsel istismar mağdurlarına ilişkin bilgiler**

| Katılımcı | Yaş | Cinsiyet | Dosya kapsamı |
|---|---|---|---|
| 1 | 12 | E | Çocuğun nitelikli cinsel istismarı,<br>Kişiyi hürriyetinden yoksun kılma |
| 2 | 11 | K | Çocuğun nitelikli cinsel istismarı,<br>Tehdit |
| 3 | 13 | K | Çocuğun nitelikli cinsel istismarı |
| 4 | 14 | K | Çocuğun nitelikli cinsel istismarı |
| 5 | 9 | E | Çocuğun nitelikli cinsel istismarı,<br>Kişiyi hürriyetinden yoksun kılma |
| 6 | 14 | E | Çocuğun nitelikli cinsel istismarı |
| 7 | 8 | K | Çocuğun nitelikli cinsel istismarı |
| 8 | 11 | K | Çocuğun nitelikli cinsel istismarı |
| 9 | 10 | K | Çocuğun nitelikli cinsel istismarı |
| 10 | 12 | K | Çocuğun nitelikli cinsel istismarı |

Tablo 2'de yer alan bilgiler özetlenecek olursa, mağdurların 8-14 yaşlar arasında oldukları ve cinsiyet dağılımının kız lehine olduğu (%70) görülmektedir.

### 2.2. Veri Toplama Araçları

Araştırmadan elde edilen veriler, araştırmacılar tarafından geliştirilen Hâkim, Avukat, Uzman ve Mağdur Görüşme Formları ile toplanmıştır. Katılımcıların yaş, cinsiyet ve görevdeki süre gibi demografik bilgileri, görüşmelerin başında katılımcılara sorularak her görüşme formunun üst bölümüne eklenen ilgili kutucuklara yazılarak elde edilmiştir.

**Hâkim görüşme formu:** Yarı yapılandırılmış sorulardan oluşan form ilk olarak ağır ceza mahkemelerinde çalışan bir hâkim ile psikolojik danışmanlık ve rehberlik alanında doktora eğitimini tamamlamış bir aile mahkemesi uzmanı tarafından yüz ve kapsam geçerliği bakımından değerlendirilmiş ve geribildirimler doğrultusunda formun beş soruluk son hali elde edilmiştir. Form bu haliyle, ağır ceza mahkemesi geçmişi olan bir hâkimle denenmiş, formda herhangi bir sorun gözlenmemiştir.

**Avukat görüşme formu:** Beş sorudan oluşan bu form, ilk aşamada İzmir Barosu'na kayıtlı ve aile mahkemesinde yoğun çalışan bir avukata ve psikolojik danışmanlık alanında doktorasını tamamlayan bir aile mahkemesi uzmanına gönderilmiş ve bu uzmanlar tarafından yüz ve kapsam geçerliği boyutlarında değerlendirilmiştir. Geribildirimler ışığında revize edilen form, aile mahkemesinde sıklıkla dosyası bulunan bir avukat ile pilot uygulamaya tabi tutulmuş ve ikinci bir gözden geçirmeyle son haline kavuşmuştur.

**Uzman görüşme formu:** Araştırmacılar tarafından oluşturulan bu beş soruluk görüşme formunun ilk hali, psikolojik danışmanlık ve rehberlik alanında doktor öğretim üyesi olan bir akademisyene ve psikolojik danışmanlık alanında doktora eğitimini tamamlayan bir adli görüşmeciye gönderilerek yüz ve kapsam geçerliği bakımından sınanmıştır. Geribildirimler doğrultusunda ikinci kez düzenlenen formun adli görüşmeciyle gerçekleştirilen pilot uygulaması sonrasında forma son hali verilmiştir.

**Mağdur görüşme formu:** Yine araştırmacılar tarafından oluşturulan bu görüşme formunun ilk hali, psikolojik danışmanlık alanında doktor öğretim üyesi olan bir akademisyene ve adli tıp alanında doktora eğitimini tamamlamış bir adli görüşmeciye gönderilerek yüz ve kapsam geçerliği bakımından sınanmıştır. Geribildirimler doğrultusunda düzenlenen bu form, bir cinsel istismar mağduru ile pilot uygulama ile değerlendirilmiş ve forma son hali verilmiştir. Form toplamda beş sorudan oluşmaktadır.

### 2.3. Süreç ve Verilerin Analizi

T.C. Adalet Bakanlığı Mağdur Hakları Daire Başkanlığı ile Hâkimler ve Savcılar Kurulu'ndan gerekli izinlerin alınmasıyla birlikte katılımcılara telefon yoluyla ulaşılarak kendileriyle görüşme talep edilmiş ve katılım onayı alınan 10 hâkim, 10 avukat, 10 adli görüşmeci ve 10 mağdur ile (n=40) 2019 Şubat ayı içerisinde birinci araştırmacı tarafından yüz yüze bireysel görüşmeler gerçekleştirilmiştir. Görüşme esnasında Hâkimler ve Savcılar Kurulu talepleri doğrultusunda ses ve görüntü kaydı alınamamış, veri kaybını olabildiğince önlemek amacıyla görüşmelerde yardımcı görüşmeci olarak İzmir

Adliyesi'nde Pedagog olarak görev yapan bir uzman bulunmuştur. Her iki görüşmeci, katılımcıların yanıtlarını görüşme esnasında not almış ve görüşmeler sonrasında iki grup not karşılaştırılarak, verilerin geçerliği ve güvenirliği sağlanmaya çalışılmıştır. Tüm görüşmeler İzmir Adliyesi'nde katılımcıların kişisel çalışma odalarında gerçekleştirilmiştir.

Görüşmelerin tamamlanmasıyla birlikte veriler Betimsel Veri İndeksi formatına uygun olarak Word 2003 dosyasına aktarılmış ve iki araştırmacı tarafından bağımsız olarak analiz edilmiştir. Veriler, görüşmecilerin tuttukları görüşme notlarının birleştirilmesi sonucunda elde edilen metinden oluşmaktadır. Katılımcıların kimlik bilgilerinin gizli tutulması amacıyla Betimsel Veri İndeksi'ne aktarılan verilerde tüm katılımcılar için kodlar kullanılmıştır (örneğin H6, görüşülen altıncı hâkimi ifade etmiştir). Betimsel veri indeksi, katılımcılarla gerçekleştirilen görüşmelerde görüşmecilerin aldığı notların herhangi bir değişikliğe uğramadan aktarıldığı, notlardan elde edilen görüşlerin/olası kodların yazıldığı ve ek yorumların not edildiği üç sütundan oluşmaktadır.

Elde edilen veriler herhangi ses ya da görüntü formatında kayıt altına alınamadığından ve ikinci bir veri kaynağı kullanılamadığından, katılımcıların her soruya verdikleri yanıtlar bazında içerik analizi tekniğiyle analiz edilmiştir. Araştırmacılar bu aşamada, verileri detaylı okuyup Betimsel Veri İndeksi'nde yer alan ilgili sütunlara görüşlerini yazmışlardır. Görüşler daha sonra iki araştırmacı tarafından bağımsız olarak kategoriler haline getirilmiş ve iki grup bulgu, *görüş birliği / görüş birliği + görüş ayrılığı X 100* formülü kullanılarak gözlemciler arası güvenirlik hesaplamasına tabi tutulmuştur. %81,48 olarak hesaplanan bu katsayı ile bulguların güvenilir olduğu sonucuna varılmıştır (Huberman ve Miles, 1998). Görüş ayrılıkları iki araştırmacı tarafından gerçekleştirilen iki saatlik bir toplantıda ele alınmış ve görüş birliği oluşturulmuştur. Ayrıca her iki araştırmacı da, verilerin tema oluşturmak için uygun olmadığına kanaat getirmişler ve bulguları kategori ve frekanslar üzerinden raporlamayı uygun görmüşlerdir.

## 3. Bulgular

Dört grup katılımcıdan elde edilen bulgular, her grup ayrı başlıklar altında incelenmiştir. Bulgulara ilişkin verilen doğrudan alıntılar, herhangi bir değişiklik yapılmadan, görüşmeci notlarında olduğu şekliyle aktarılmıştır. Katılımcıların bazı sorulara birden fazla yanıt vermelerinden dolayı, görüş sayısı katılımcı sayısından yüksek çıkmıştır.

**Hâkimlerden Elde Edilen Bulgular:** Hâkimler beş soruya yönelik toplam 59 görüş bildirmişlerdir. Tablo 3'te, yanıt kategorileri ve frekansları yer almaktadır.

**Tablo 3. Hâkimlerden elde edilen bulgular**

| Kategori | Görüşler | n |
|---|---|---|
| AGO'dan yararlanma | 18 yaş altındakileri dinliyorum. | 5 |
| | 15 yaş altındakileri dinliyorum. | 3 |
| | AGO'yu tercih etmiyorum. | 2 |
| AGO'nun çocuklar üzerindeki etkileri | AGO'da kendilerini rahat hissediyorlar. | 10 |
| | AGO'da kendilerini güvende hissediyorlar. | 3 |
| AGO'yla ilgili genel değerlendirme | AGO çocukların üstün yararını gözeten doğru bir uygulama. | 10 |
| | AGO zaman alıcı bir uygulama. | 9 |
| | Teknik aksaklıklar süreci güçleştiriyor. | 6 |
| | AGO'nun doğrudanlığı etkilemesi değerlendirmeleri güçleştiriyor. | 3 |
| AGO uygulamalarına ilişkin öneriler | Teknik aksaklıklar giderilmeli. | 6 |
| | Bekleme odasında yaşa uygun materyaller bulundurulmalı. | 2 |
| Toplam görüş | | 59 |

**Soru 1. AGO uygulaması ile ilgili ne düşünüyorsunuz?** Hâkimlerin tamamı AGOların cinsel istismar mağduru çocukların üstün yararı bakımından iyi ve doğru bir uygulama olduğunu belirtmiş, beş hâkim ise bu görüşlere ek olarak AGOların doğrudanlık ya da yüz yüzelik ilkesine ters düşmesi nedeniyle değerlendirmeleri güçleştirebilen bir uygulama olduğunu ifade etmişledir. Buna ilişkin olarak H5, *"Mağdurun beyanının farklı bir yerdeyken alınması bence güzel bir uygulama. ... Fakat izlemek ve görmek arasında fark var. Mağdur bizi görmemeli, tamam ama bizim de onu görmemiz gerekiyor. Sonuçta ciddi bir suç var ve elimizdeki tek şey o çocuğun beyanı. Biz gene de heyet olarak çocuğu düşünerek, duruşma salonunda beyan almıyoruz. Sonuçta çocuğu düşünmek zorundayız."* sözleriyle bir taraftan mağdurların üstün yararını savunurken diğer taraftan doğrudanlık gibi adalet sistemi için önemli gördüğü bir ilkeyi gündeme getirmiştir. H6 ise, mağdurun üstün yararını ön planda tuttuğunu şu sözlerle açıklamıştır: *"Benim açımdan çok iyi bir uygulama oldu. ... Kendimi daha iyi hissediyorum. Sanığın mağduru görmesi ve aynı ortamda bulunmaları doğru bir uygulama değildi. Mağdurlar bu şekilde kendisini rahatlıkla ifade edebiliyor. Daha güvenli bir ortamda olduğunu ve zarar görmeyeceğini biliyor."*

**Soru 2. AGO'dan hangi çocukların dinlenmesi sırasında yararlanıyorsunuz? Hangi durumlarda yararlanmıyorsunuz?** Hâkimlerin beşi 18 yaş altı, hâkimlerin üçü ise yalnızca 15 yaş altı mağdurların beyanlarında AGO'dan yararlandıklarını belirtirken, iki hâkim AGO'yu kullanmayı tercih etmediklerini ifade etmişlerdir. Örneğin H9, *"Biz şimdiye kadar mağdurlarla ilgili bir sorun yaşamadık. Avukatlardan ya da taraflardan da bir talep gelmedi. Randevu alma, bağlanma ve mağdurla doğrudan iletişim kurma ile ilgili sorunlar olduğu için adli görüşme odasını kullanmama kararı*

*aldık."* sözleriyle, AGO'yu kullanmama gerekçeleri arasında teknik sorunları ve tarafların herhangi bir talebinin olmamasını göstermiştir.

**Soru 3. Sizce AGO uygulamaları duruşmaların gidişatını nasıl etkiledi?** Hâkimler genel olarak AGO'nun eski uygulamaya kıyasla zaman alıcı olduğunu belirtirken (n=9), altı hâkim buna gerekçe olarak ses-görüntü-bağlantı aksaklıklarını göstermişlerdir. Söz konusu güçlüklerin yanında, H3'ün çocuğun üstün yararını şu ilginç sözlerle dile getirmesi dikkate değerdir: *"Evet, bunu inkâr edemem. Adli görüşme odası, mağduru dinleme zamanını uzattı ama biz burada mağdur için bulunmuyor muyuz? Onun orada bazen güldüğünü duyuyorum. Kaç yıldır hâkimim. Burada gülen mağdur görmedim. Çocuğun üstün yararı tam olarak bu."*

**Soru 4. Sizce AGO'nun mağdurlara yönelik nasıl bir etkisi oldu?** Hâkimlerin, tamamı çocukların AGO'da kendilerini daha rahat hissettiklerini beyan ederken, üç hâkim çocukların o ortamda kendilerini güvende hissettiklerini de eklemişlerdir. H7, *"Ekran çok küçük. Jest ve mimik göremiyoruz. Gene de çocukların daha rahat oldukları fark ediliyor. Görüşen arkadaşlarımız daha iyi iletişime geçiyor. Burada gergin bir ortam var. Taraflar, kürsü, sanık, seyirciler, kâtipler, giren ve çıkanlar… Orada daha rahat olmaları kadar doğal bir şey yok"* sözleriyle mağdur çocukların AGO uygulamasından yarar sağladıklarını açıklarken, aynı zamanda aile mahkemesi uzmanlarının da bu süreçteki etkili uygulamalarına dikkat çekmiştir.

**Soru 5. AGO ile ilgili önerileriniz nelerdir?** Hâkimlerin önerileri genel olarak AGO'nun teknik özellikleriyle ilgili öneriler vermişlerdir. Altı hâkim bağlantı için bekleme ve bağlantı sonrası ses-görüntü kalitesinin iyileştirilmesini talep ederken, ikisi odada her yaş grubuna uygun materyalin bulundurulması gerektiğini vurgulamıştır. Örneğin H8, AGO'daki materyal eksikliklerini *"Biz hangi yaşta mağdur alsak, karşımızda aynı ortam oluyor. Her yaş grubu çocuk farklı. Bir de çocukların bireysel özellikleri farklı. Onlar için farklı şeyler gerekmez mi? Alan uzmanı değilim ama gerekir bence."* ifadesiyle açıklarken aynı zamanda bireysel farklılıklara olan duyarlılığını ortaya koymuştur. Tablo 3'te, hâkimlerden elde edilen tüm bulgulara ilişkin frekans dağılımları sunulmuştur.

**Aile Mahkemesi Uzmanlarından Elde Edilen Bulgular.** Aile mahkemesi uzmanlarından elde edilen toplam 51 yanıtın açıklamaları ve frekansları Tablo 4'te yer almaktadır.

**Tablo 4. Aile mahkemesi uzmanlarından elde edilen bulgular**

| Kategori | Görüşler | n |
|---|---|---|
| AGO'dan elde edilen kişisel yararlar | Daha planlı/programlı çalışabiliyorum.<br>Mesleğimi daha nitelikli yürütebiliyorum. | 6<br>4 |
| AGO'nun çocuklar üzerindeki etkileri | Sanıkla karşılaşmamaya bağlı olarak çocuğu ikincil örselenmelerden koruyor.<br>Çocuk kendini daha rahat ifade edebiliyor. | 10<br>8 |
| AGO uygulamasının dezavantajları | İş yükünü artırıyor. | 7 |
| AGO uygulamalarına ilişkin öneriler | AGO sayıları artırılmalı.<br>Kablosuz kulaklık temin edilmeli.<br>Çocuklar için materyal sağlanmalı.<br>Hâkimlere hizmet içi eğitim sağlanmalı. | 6<br>4<br>4<br>2 |
| Toplam görüş | | 51 |

**Soru 1. AGO uygulaması ile ilgili ne düşünüyorsunuz?** Uzmanların tamamı, çocuk mağdurları ikincil herhangi bir örselenmeden koruduğu gerekçesiyle etkili bir uygulama olduğunu savunmuşlardır. U2, bu görüşü şu sözlerle ifade etmiştir:

*"Eski uygulama çok kötü bir uygulamaydı. Çocuk duruşma salonunda sanık ile aynı ortamda duruyordu. Ailesinin ve sanığın beyanını dinliyordu. Sonra ben talepte bulunuyordum ve heyet kabul ederse, duruşma salonu boşaltılıyordu. Bence bu çocuk için çok önemli bir değişiklik oldu. İkincil mağduriyetlerin oluşmaması lazım".*

Uzmanların ikinci ve üçüncü sorulara verdikleri yanıtlar birbiriyle bağlantılı olduğundan, bu soruların bulguları bir arada verilmiştir.

**Soru 2. AGOların kurulmasıyla birlikte sizin görev ve sorumluluklarınızda neler değişti? Soru 3. Bu değişiklikler sizi ne şekilde etkiledi? Memnun olduğunuz ve olmadığınız yönler nelerdir?** Bu sorulara ilişkin farklı görüşler arasında AGO'nun iş yükünü artırması (n=7) şeklindeki olumsuz yanıtların yanında, mesleği daha nitelikli yürütebilme (n=4) ve randevu sisteminin oturmasıyla birlikte daha planlı çalışabilme (n=6) gibi olumlu yanıtlar da dikkat çekmiştir. U1 ve U10'la görüşmelerde elde edilen ve aşağıda yer alan görüşler, iş yükünün artmasına karşın mesleki doyumun daha ön planda görüldüğünü ispatlar niteliktedir:

*"Eskiye göre sorumluluğumuz arttı. Eskiden sadece duruşma salonunda çocuğun yanında bulunuyorduk. Şu an ifadeyi almakla sorumluyuz. Bu bana kendimi daha iyi hissettiriyor. Mesleki açıdan daha fazla keyif alıyorum." (U1)*

*"Bizim açımızdan oldukça olumlu oldu. Biz eskiden sadece beyanda bulunuyorduk çocukla ilgili. Şu an ise daha aktifiz. Çocukların odadan olumlu ayrılması, beni de sevindiriyor. Farklı disiplinlerin bakış açısını yansıtan bir şey bu. Bence oldukça iyi oldu herkes için." (U10)*

**Soru 4. Sizce AGO'nun mağdurlara yönelik nasıl bir etkisi oldu?** Tüm katılımcı uzmanlar, birinci soruya verdikleri yanıtlara paralel olarak, bu soruda da olumlu görüş bildirmişlerdir. Dokuz uzman mağdurların sanıkla yüz yüze gelmek istemediklerini, AGO sayesinde duygusal olarak daha az oranda örselendiklerini, sekizi ise çocukların AGO'da kendilerini daha iyi ifade ettiklerini gözlediklerini açıklamışlardır. U9 AGO'nun mağdur çocuklar üzerindeki koruyucu etkilerini, *"Çocuklar sanık ile karşılamak istemiyor. O yüzden adli görüşme odaları iyi bir uygulama. Burada onları koruyan bir yapı var."* sözleriyle ifade etmiştir.

**Soru 5. AGO ile ilgili önerileriniz nelerdir?** Uzmanlar da, hâkimlerde olduğu gibi, AGO'da yaşanan teknik aksaklıkların giderilmesi yönünde öneriler getirmişlerdir. Altı uzman, adliyede yalnızca bir AGO olmasından ve bağlantının geç kurulmasından kaynaklı olarak mağdurların ifade vermek için uzun süre beklemek durumunda kaldıklarından AGO sayılarının artırılmasına yönelik çalışmalar yapılmasını önermişlerdir. Dört uzman ise duruşma salonu ile AGO arasındaki bağlantıyı kolaylaştıracak kablosuz kulaklık ve çocuklara yönelik materyal temini gibi fiziksel düzenlemelere dikkat çekmişlerdir. Ayrıca iki uzman hâkimlere yönelik bir adli görüşme eğitiminin sağlanması gereğini beyan etmiştir. Hâkimlerin AGO uygulamasıyla ilgili bilgi düzeyini sorgulayan U3, buna yönelik şu sözleri sarf etmiştir: *"Hâkimler henüz adli görüşme odasını tam kavrayamadılar. Randevuyu erken alıyorlar ama duruşmaya yeri geliyor, 5 saat sonra başlıyorlar. O arada çocuk adli görüşme odasında mı beklemeli, yoksa ailesiyle duruşma salonu koridorunda mı? Bizim çocukları 5 saat bekletebilecek bir ortamımız yok. Bir mağduru 5 saat bekletmek de bence doğru değil."*

**Avukatlardan Elde Edilen Bulgular:** Katılımcı avukatlardan toplam 68 görüş elde edilmiştir. Bu görüşler ve her kategoriye ilişkin frekans dağılımları Tablo 5'te görülmektedir.

**Tablo 5. Avukatlardan elde edilen bulgular**

| Kategori | Görüşler | n |
|---|---|---|
| AGO'dan yararlanma | AGO talebinde bulunmuyorum. | 7 |
| | AGO talep ediyorum ancak reddediliyor. | 2 |
| | AGO talebinde bulundum ve kabul edildi. | 1 |
| AGO'nun çocuklar üzerindeki etkileri | Çocuklar kendini güvende hissediyor. | 7 |
| | Çocuklar kendilerini rahat ifade edebiliyorlar. | 6 |
| AGO'yla ilgili genel değerlendirme | Çocuğun üstün yararını gözeten başarılı bir uygulama | 10 |
| | AGO duruşma süreçlerini olumsuz anlamda etkilemedi. | 7 |
| | Teknik aksaklıklar var. | 3 |
| AGO uygulamalarına ilişkin öneriler | AGO 18 yaşın altındakilere uygulanmalı. | 6 |
| | Teknik aksaklıklar giderilmeli. | 5 |
| | Çocuklar için materyal sağlanmalı. | 5 |
| | AGOlar adliye dışında olmalı. | 3 |
| | AGO 15 yaşın altındakilere uygulanmalı. | 2 |
| | AGO tüm yaşlar için uygulanmalı. | 2 |
| | Uzmanlar ve hâkimlere hizmet içi eğitim sağlanmalı. | 2 |
| Toplam görüş | | 68 |

**Soru 1. AGO uygulaması ile ilgili ne düşünüyorsunuz?** Avukatların tamamı, hâkim ve uzmanların da görüşleriyle benzer şekilde, AGO uygulamasının mağdurun üstün yararına hizmet eden başarılı bir uygulama olduğunu ifade ederken, altı avukat 18 takvim yaşının, ikisi ise 15 takvim yaşının temel alınması gerektiğini, diğer ikisi de yaş farkı gözetilmeksizin tüm cinsel istismar mağdurlarının AGO'da dinlenmesi gerektiğini beyan etmiştir. A8'in şu sözleri, 18 yaş üzeri mağdurların da AGO'da dinlenmeleri gereğini ortaya koymaktadır: *"Adli görüşme odaları çok yerinde bir uygulama oldu. Mağdurun fazladan zarar görmesini engelledi. Yalnız benim girdiğim dosyada beş mağdur vardı. Dördü 18 yaşın altındaydı. Onlar adli görüşme odasında dinlendi. Diğer mağdur 18 yaşın ay farkıyla üzerindeydi. O duruşma salonunda dinlendi. Onun adına üzücü bir durum oldu. 18 yaş üstü mağdurlar da bence orada dinlenmeli".*

**Soru 2. Çocuk beyanlarının AGO'da alınmasına ilişkin talepte ya da itirazda bulunuyor musunuz?** Avukatların tamamı, üstlendikleri davalarda AGO kullanımına itirazda bulunmadıklarını, bunun yanında davalarda AGO talebinde de bulunmadıklarını (n=7) belirtmişlerdir. Ayrıca iki avukat AGO talebinde bulunduğunu, ancak bu talebin mahkeme heyetince reddedildiğini açıklamıştır. On katılımcı arasından yalnızca bir avukatın AGO talebinin yerine getirilmesi de ilginç bulgular arasında yer almıştır. A3, AGO talebinin reddedilmesine ilişkin deneyimini ve bundan AGO kullanımı lehine çıkarttığı sonucu şu şekilde dile getirmiştir: *"Ben bir ilçe adliyesinde adli görüşme odasının kullanılmasını istedim. Adli görüşme odasına sistem üzerinden bağlanabileceklerini söyledim. Mahkeme uygun görmedi. Aynı durumu İzmir Adliyesi'nde de yaşadım. Yüz yüzelik ilkesi gereği*

*duruşma salonunda dinlenmesi kararı alındı. Bence adli görüşme odası kullanımı zorunlu olmalı.”*. A6 ise, hizmet içi eğitimin uygulamada getirebileceği yararları şöyle açıklamıştır: *“Ben bir baro eğitiminde adli görüşme odalarını öğrendim. Sonra bir duruşma sırasında talepte bulundum. Heyet kullandı. Bence çok da yararlı bir uygulama oldu.”*

**Soru 3. Sizce AGO uygulamaları duruşmaların gidişatını nasıl etkiledi?** Avukatlar genel olarak AGO’nun duruşma sürecinde ciddi bir farklılığa yol açmadığı konusunda görüş bildirirken (n=7), üç avukat, hâkim ve uzman görüşleriyle paralel olarak ses-görüntü ve bağlanma gibi teknik aksaklıkların süreci uzattığından yakınmışlardır. Teknik aksaklıkların yarattığı olumsuzluklara yönelik olarak A2 şu bildirimde bulunmuştur: *“Genel gidişatı aslında etkiliyor. Bağlantı oluyor, olmuyor. Bekliyoruz. Sonra tam bir doğrudanlık olmadığı için, heyet anlamak için tekrar tekrar soruyor. Evet, çocuğun üstün yararı söz konusu ama böyle de bir boyutu var.”*

**Soru 4. Sizce AGO’nun mağdurlara yönelik nasıl bir etkisi oldu?** Avukatlar da, hâkim ve uzmanların görüşlerine benzer şekilde AGO’nun mağdurların kendilerini güvende hissetmelerine (n=7) ve kendilerini rahat ifade edebilmelerine (n=6) hizmet ettiğini öne sürmüşlerdir. A4’in şu ifadeleri, mağdurların üstün yararını gözettiğine dair bir kanıt oluşturmaktadır: *“Adliye ortamı insanın kendisini güvende hissetmemesine neden oluyor. Ben en azından adli görüşme odasında güvende olduklarını görebiliyorum. Bu beni mutlu ediyor. Onların rahat olması önemli bence.”*

**Soru 5. AGO ile ilgili önerileriniz nelerdir?** Avukatların AGO uygulamasıyla ilgili önerileri, odaya sağlanması gereken materyaller ve teknik aksaklıkların giderilmesi yönünde diğer katılımcıların önerileriyle örtüşmektedir. Bununla birlikte üç avukatın, AGO’ların adliye dışında olması gerektiğine ilişkin önerileri ilginçtir. Katılımcılar buna gerekçe olarak, mağdur çocukların adliye gibi gerginlik verici ortamlardan uzak tutulmalarının iyi olabileceğini göstermişlerdir. Son olarak iki avukat, uzmanların ve hâkimlerin AGO eğitimi almaları gereğine değinmişlerdir. A7 buna ilişkin olarak *“Uzmanlar için de hâkimler için de yeni bir uygulama. Ben iyi bir eğitim almaları gerektiğini düşünüyorum. Hâkimler teknik özelliklere pek hâkim değil. Uzmanlarla koordinasyon kuramıyorlar bazen.”* yorumunu getirmiştir.

## Mağdur Çocuklardan Elde Edilen Bulgular

Çocuk katılımcılar, ifade verecekleri ortam olarak mahkeme salonu ile AGO’yu karşılaştırdıkları toplam 50 görüş bildirmişler ve bu görüşlerin AGO lehine olduğu belirlenmiştir. Görüş kategorileri ve frekansları Tablo 6’da sunulmuştur.

**Tablo 6. Mağdur çocuklardan elde edilen bulgular**

| Kategori | Görüşler | n |
|---|---|---|
| Mahkeme salonunda ifade vermeye yönelik görüşler | Mahkeme salonunda ifade vermek istemiyorum.<br>Adliyeye ifade vermek için gelirken çok gerildim.<br>İfademin AGO'da alınacağını öğrendim ve orayı merak ettim. | 10<br>7<br>2 |
| AGO uygulamasıyla ilgili olumlu görüşler | İfademin AGO'da alınmasını isterim.<br>AGO'da kendimi rahat hissettim.<br>Ortamda farklı kişiler olmadığı için rahat ifade verdim.<br>Kendimi güvende hissettim.<br>Uzman kişinin yaklaşımları hoşuma gitti. | 10<br>8<br>5<br>4<br>4 |
| Toplam görüş | | 50 |

**Soru 1. Adliyeye gelirken kendini nasıl hissetmiştin?** Mağdurların bu soruya verdikleri yanıtların tümünün olumsuz duygulanımı içerdiğini söylemek mümkündür. Yedi katılımcı, beyanının AGO yerine duruşma salonunda alınacağını düşündüğü için kendisini kötü hissettiğini beyan ederken, iki katılımcı beyanının AGO'da alınacağını bildiğini ve o ortamı merak ederek geldiğini beyan etmiştir. M3, bu süreçteki gerginliğini ve sonrasında AGO'da olmaktan duyduğu memnuniyeti şu sözlerle dile getirmiştir: *"Ben adliyeye gelirken, duruşma salonuna gideceğimi, o kişinin (sanığın) da orada olacağını sanıyordum. 2 aydır düşünüyordum. Buraya gelmek daha iyi oldu. Mutluyum."*

**Soru 2. AGO'da bulunmak nasıl bir duyguydu?** Mağdurların bu soruya ilişkin yanıtlarının olumlu olduğu gözlenmiştir. Sekiz katılımcı AGO'da kendini rahatlamış, dördü ise güvende hissettiğini belirtmiştir.

**Soru 3. Beyanın duruşma salonunda alınacak olsaydı, ne hissederdin?** Tüm katılımcılar duruşma salonuna gitmeyi tercih etmediklerini beyan etmişlerdir. Bir katılımcı, duruşma salonunda karşılaşacağı kalabalıktan ve özellikle de sanıkla aynı ortamda olmaktan duyacağı üzüntüyü şöyle ifade etmiştir: *"Ben oraya asla gitmek istemezdim. Ailem, insanlar, hâkimler ve o adam (sanık)… Orada olsaydım muhtemelen üzülürdüm."* (M4).

**Soru 4. AGO'da hoşuna giden ve seni rahatsız eden şeyler nelerdi?** Katılımcıların bu soruya yönelik olumlu görüşleri, diğerlerinin olmadığı bir ortamda ifade vermenin getirdiği rahatlık (n=5) ve adli görüşmecinin olumlu yaklaşımları (n=4) etrafında toplanmıştır. Beş katılımcı ise ifade vermek için beklemek durumunda kalmalarından yakınmışlardır.M7, AGO'nun olumlu ve olumsuz getirilerini şu şekilde özetlemiştir: *"Burada beklemek… Sabah geldim ve şu an akşam. Daha az bekleyebilirdim. Görüşme iyiydi ama. Abla (Adli görüşmeci) benimle hep ilgilendi. Hep nasıl olduğumu sordu."*

**Soru 5. Sence AGO genel olarak nasıl bir uygulama?** Tüm katılımcı çocuklar, AGO'nun kendileri için doğru bir uygulama olduğuna dair görüş bildirmişlerdir.

## 4. Tartışma

Türkiye'deki cinsel istismar mağdurları için uygulamaya konan AGO uygulamasına yönelik yürüttüğümüz ve bir anlamda bu konuda öncü kabul edilebilecek bu araştırma, durumu farklı açılardan değerlendirebilmek amacıyla AGO süreciyle birebir bağlantılı olan hâkim, avukat, aile mahkemesi uzmanı ve mağdur gibi çoklu veri kaynaklarına başvurarak gerçekleştirilmiştir. Araştırmada dikkat çeken ilk sonuç, tüm katılımcılar tarafından AGO'nun mağdurlar açısından ikincil mağduriyetlerin önlenmesini sağlayan ve mağdurun beyanda bulunmasını kolaylaştıran bir uygulama olarak değerlendirilmesidir. Söz konusu ortak görüşler, genel yaşam içerisinde çocuk ve insan hakları, adli sistem içerisinde ise Adalet Bakanlığı'nın 2015-2019 Stratejik Planı'nda yer alan *Çocuklara yönelik adli süreçlerde özel önlemlerin etkin hâle getirilmesi* ilkesi (Ermağan-Çağlar ve Türk, 2019; Mağdur Hakları Daire Başkanlığı, 2017) bağlamlarında yüz güldürücü gelişmelerin varlığını düşündürmektedir.

### 4.1. Hâkimlerin Penceresinden AGO Değerlendirmeleri

AGO uygulamasına ilişkin katılımcı görüşlerinin olumlu olmasının yanında, uygulamaların düşünce ya da tutumlarla her daim paralel ilerlemesi söz konusu olmayabilmektedir ve nitekim bulgular, uygulamaların katılımcıların tutumlarından farklı seyredebildiğini göstermiştir. Bu konuyla ilgili tartışmaya, *çocuğun üstün yararı* kavramını temel alarak girmek uygun gibi görünmektedir. Bulgularda da açık olarak görülebileceği gibi, hemen tüm katılımcılar AGO'nun çocuk için olumlu ve olması gereken bir uygulama olduğuna dair görüş birliği sergilemişlerdir. Bununla birlikte, özellikle hâkimlerin doğrudanlık ilkesini oldukça önemsedikleri, AGO'nun bu ilkeyi belirli oranda ihlal ettiğini belirtmeleri ve bununla doğru orantılı olarak bazılarının duruşmalarda AGO uygulamasından yararlanmayabildikleri görülmektedir. Bu durumda, AGO uygulamasının doğrudanlık ilkesini ne derece etkilediğini değerlendirmek gerekir. *Doğrudanlık* ya da diğer adıyla *yüz yüzelik,* yazılı beyan yerine kişisel ifadenin daha anlaşılır sonuçlar doğuracağını, ilgili kişilerin yargılamayla ilgili doğrudan bilgilendirilebileceğini, ifade veren bireyin görüş ve taleplerini açıkça ifade edebileceğini ve mahkemenin daha hızlı ve pratik bir şekilde bilgiye ulaşacağını öne süren bir ilkedir (Arslan, 2012). AGO uygulaması bu doğrultuda incelenecek olursa, pedagojik altyapısı olan aile mahkemesi uzmanları mağdurlara hakları ve dosya kapsamı hakkında bilgi vermekte, mağdurların olası sorularını uygun şekilde

yanıtlamakta ve onların duygu ve düşüncelerini mümkün olduğunca az örselenerek ifade etmelerini sağlamaktadırlar. Bu görüşme sürecinde duruşma hâkimleri de teknoloji yardımıyla odaya dâhil olup uzman aracılığıyla sorularını doğrudan iletebilmekte, mağdurun olası sorularını yanıtlayabilmekte ve kapalı devre televizyon sistemi yoluyla doğrudan gözlem yapabilmektedirler. Dolayısıyla AGO uygulamasında hâkimler ve avukatlar, mağdura tüm sorularını iletebilirler ve duruşma salonuyla aradaki tek fark, soruyu ileten kişinin bir aile mahkemesi uzmanı olmasıdır (Şamar, 2018). Bu açıdan bakıldığında, AGO'nun doğrudanlık ilkesini ciddi boyutta ihlal etmediğini söylemek mümkündür.

Uzun yıllardır devam eden cinsel istismar mağdurlarının hâkimler tarafından duruşma salonunda dinlenmesi uygulamasından AGO uygulamasına geçişin bazı hâkimler tarafından kaygı verici olması belirli ölçüde anlaşılır bir durum olarak kabul edilebilir. Öncelikle mesleki alışkanlıklar söz konusudur ve hâkimlerin henüz yaygınlaşma aşamasında olan AGO uygulamalarına uyum sağlamaları gerekecektir. Uyum sağlama sürelerini olabildiğince kısaltmamın yolu ise, hâkimlere bu alanda hizmet içi eğitim sağlamaktan geçmektedir. Hâkimlerin kaygılarını haklı çıkarabilecek ikinci bir husus ise, adil sistemdeki dosya yoğunluğunun ve kamu davalarının ivedilikle çözülmesine ilişkin taleplerin hâkimler üzerinde baskı yaratıyor olmasıdır. Dolayısıyla AGO'nun önemli yararlarının yanında uygulamaya istendik şekilde geçirilememesinin tek başına hâkim tutumlarıyla açıklanması, tabloyu eksik görmemize neden olacaktır ve bu nedenle diğer katılımcılardan elde edilen sonuçları da incelemek gerekmektedir.

### 4.2. Avukatların Penceresinden AGO Değerlendirmeleri

Katılımcı avukatlar, cinsel istismar davalarında çocuğun üstün yararını gözettiklerini ancak uygulamalarında AGO'dan sık yararlanmadıklarını, dolayısıyla da (hâkimlerle benzer şekilde), tutumları ve davranışları arasında çelişkiler olduğunu ortaya koymuşlardır. Bu noktada, bazı avukatların AGO taleplerinin geri çevrildiğine dair açıklamaları akılda tutulmalıdır ve bu durum, avukatların üstün yarar ilkesini gözetiyor olsalar dahi, bir anlamda uygulamadan mahrum bırakıldıklarını göstermektedir. Bulgulara dönülecek olursa, 10 katılımcıdan yalnızca üçünün AGO talebinde bulunduğu görülmektedir ki bunun düşük bir oran olduğu söylenebilir. Avukatlar arasında AGO taleplerinin artırılması gereği ortadadır ve bunu sağlamanın en etkili yollarından birinin hizmet içi eğitim olduğu düşünülmektedir. Bulgular bölümünde de yer aldığı gibi, A6, hizmet içi eğitim sonrasında bir davada AGO talep ettiğini ve sürecin verimli olduğunu açıklamıştı. Tek bir örnek olmakla birlikte, bu katılımcının deneyiminin, hizmet içi eğitimin etkililiğine dair önemli bir beyan olduğu düşünülebilir.

Kuşkusuz ki, yalnızca bir ilde niteliksel bir araştırma yöntemi çerçevesinde gerçekleştirilen bu çalışmadan yola çıkarak, avukatların AGO taleplerine yönelik bir genelleme yapmak doğru olmayacaktır ancak bu bulgu, Türkiye'deki diğer illerde de durumun benzer olup olmadığı konusunda soru işaretleri uyandırmaktadır. Diğer illerde yapılacak araştırmalarda benzer bir durumla karşılaşılacak olunursa, avukatların ülke genelinde AGO uygulamalarına ilişkin bilinçlendirilmeleri çalışmaları kaçınılmaz görünmektedir. Dolayısıyla hâkimlerle birlikte avukatların da hizmet içi eğitim olanaklarından yararlandırılmaları gereği ortaya çıkmaktadır.

Araştırma sorularıyla doğrudan ilgili olmamakla birlikte, avukatların görüşmelerde gündeme getirdikleri ilginç bir konu, AGO kullanımı ve mağdur yaşı ilişkisi olmuştur. Avukatların, AGO'nun hangi yaş grubu için uygun olduğuna dair görüşleri 15 yaş altı, 18 yaş altı ve tüm yaşlar için uygulanması gibi farklı görüşleri içermiştir. 18 yaş altı, kuram ve uygulamada çocukluk çağı olarak kabul edilen yaş dönemini (Papalia ve Wendkos-Olds, 1992; Vasta, Haith ve Miller, 1992) ve Çocuk Koruma Kanunu'nda yer alan yaş aralığını ifade etmesi, yaş sınırlaması olmaması görüşü ise genel bağlamda insan haklarını gözetmesi bakımından anlaşılır görüşlerdir. Burada dikkat çeken nokta, 15 yaşın iki katılımcı tarafından AGO'dan yararlanma sınırı olarak belirtilmesidir ki bu yaş gelişimsel bir dönüm noktasına denk gelmemekte ve yasal bir boyuta dayandırılamamaktadır. Araştırmacılar bu konuda gerçekleştirdikleri alanyazın taramasında herhangi bir sonuca ulaşamamışlar ve konuyu alandaki bir uzmana danışmaya karar vermişlerdir. Bu doğrultuda 05.04.2019 tarihinde ikinci araştırmacı tarafından bir Yargıtay hâkimiyle telefon yoluyla iletişime geçilmiştir. Yargıtay hâkimi, araştırmacıların görüşleriyle benzer şekilde, 18 yaş sınırının Çocuk Koruma Kanunu ölçütleri dâhilinde anlamlı bir görüşü içerebildiğini, 15 yaş sınırının ise büyük olasılıkla şikâyetçi olma durumunun hâkimler tarafından bireylere sorulabildiği yaş olmasından dolayı avukatlar tarafından sınır olarak kabul edildiğini açıklamıştır (*Telefonla iletişim*, 5.4.2019). Yargıtay hâkiminin söz konusu görüşünün gerçeği yansıttığını varsayacak olursak, 15 yaşın, ergenlerin örseleyici olaylardan olumsuz etkilenmemeye başladıkları yaş olduğuna dair dünya genelinde herhangi bir bilimsel araştırma olmadığına dikkat çekmek isteriz. Dolayısıyla avukatların, gelişim dönemlerindeki bireylerin, bir diğer deyişle çocuk ve ergenlerin örseleyici olaylar karşısındaki duygusal etkilenimlerini dikkate almaları ve bu doğrultuda tutum değişikliğine gitmeleri konusunda bilinçlendirilmeleri gereği ortaya çıkmaktadır.

### 4.3. Aile Mahkemesi Uzmanlarının Penceresinden AGO Değerlendirmeleri

Aile mahkemesi uzmanları açısından bakıldığında, uzmanlar iş yüklerinin artmasının yanında, AGO uygulamasının iş doyumlarını belirli ölçüde artırdığını da vurgulamışlardır. İş doyumu ve çalışan verimliliği arasındaki doğrudan ilişki dikkate alındığında, AGO'nun uzmanlar tarafından etkili bir şekilde yürütülmekte olduğu ya da en azından yürütülmeye çalışıldığı varsayılabilir. Ne var ki, etkili uygulamalar sistematiklik gerektirmekte, bir diğer deyişle bir uzmanın aynı uygulamaları diğer uzmanlarla benzer şekilde belirli bir sistematik süreç bünyesinde yürütmesi gerekmektedir. Türkiye'de AGO görüşmelerini yürüten uzmanlar için öneri kılavuzları olmasına karşın, uzmanların belirli bir görüşme protokolü eğitimi almadıkları bilinmektedir. Oysa adli görüşmelerin ortak bir protokol çerçevesinde yürütülmesi, mağdurlardan alınan ifadelerin güvenilirliğini artıracak ve *çocuğun üstün yararı* ilkesini gözetecek şekilde uzmanlar için bir yol haritası oluşturacaktır. Buna ilişkin olarak Ermağan-Çağlar ve Türk (2019), Bulgaristan, Endonezya, İsveç ve daha pek çok ülkede kullanılan NICHD Protololü'nü önerdikleri çalışmalarında, protokolün uzmanların her aşamada çocuk mağdurları örselemeden doğru bilgileri alabilecekleri sistematik bir görüşme formatını tanıtmışlardır. Toth'un (2011) da belirttiği gibi, bu ya da benzeri protokollerin adli sistemlere dâhil edilmesi çok yönlü yararlara işaret etmektedir ve Türk Adli Sistemi'nde de benzer uygulamaların aile mahkemesi uzmanlarının mesleki yeterliklerine eklenmesiyle, AGO uygulamalarının daha etkili işlemesi söz konusu olacaktır.

### 4.4. Cinsel İstismar Mağduru Çocukların Penceresinden AGO Değerlendirmeleri

Cinsel istismar mağduru katılımcı çocuklardan elde edilen bulgular, AGO'nun kendileri için oldukça yararlı bir uygulama olduğu yönünde sonuçlara işaret etmiştir. Bu sonuca, katılımcıların tümü beyanlarının bir uzman tarafından alınmasının yoğun kaygılarını azalttığını ve AGO ortamında kendilerini rahat hissettiklerini belirtmelerinden ulaşmak mümkündür. Kaygının azalması ise, çocuk için ikincil bir örselenmesinin önüne geçmektedir. Kaygının çocuklar ve ergenler üzerindeki ciddi etkilerini, 2016'daki bir gazete haberinde görmek mümkündür. Habere göre, araştırmanın yürütüldüğü İzmir'de bir cinsel istismar mağduru çocuk, sanık ile yüzleşeceği duruşma günü öncesi heyecandan kalp krizi geçirerek yaşamını yitirmiştir (Yıldırım, 2016). Bu ve benzeri sonuçların olabildiğince engellenmesi adına, AGO uygulamasının yaygınlaşması ve cinsel istismar davalarında zorunlu hale getirilmesi doğru olacaktır. Çocuğun üstün yararı ilkesini gözetmekle birlikte, uzmanın da cinsel istismar olayıyla ilgili daha sağlıklı bilgilere ulaşılmasını kolaylaştıran bir uygulama olmasından dolayı (Cronch ve diğerleri, 2006;

Cross ve diğerleri, 2007; Ermağan-Çağlar ve Türk, 2019), AGO'nun adaletin sağlanmasını kolaylaştırabileceği de bu noktada vurgulanmalıdır.

### 4.5. AGO Uygulamaları ve Yasal Mevzuat

AGOların yakın geçmişte açılmasına, bunun yanında yeterli ölçüde hizmet içi eğitimlerin gerçekleştirilmemiş olmasına karşın, görüşme yapılan sekiz mahkemenin adli görüşme odası uygulamasını kullanması yüz güldürücü, iki mahkemenin cinsel istismar mağdurlarını duruşma salonunda dinlemeyi sürdürmesi ise aynı ölçüde düşündürücüdür. Burada ilgili yasal düzenlemelerden söz etmek gerekecektir. Çocukların duruşma salonunda dinlenmesi uygulamasında, mağdurun nasıl dinleneceği ile ilgili herhangi bir yönetmelik ya da yasal düzenleme bulunmamaktadır. Cinsel istismar mağduru duruşma salonunda dinlenirken, "*Sanık ortamda olacak mı?", "Cinsel istismar mağdurunun ailesi duruşma salonunda olacak mı?", "Duruşmayı takip eden seyirciler olacak mı?", "Duruşmada bulunan uzmanın görev ve sorumlulukları nelerdir?"* gibi soruların belirli bir yanıtı bulunmamakta, uygulamanın nasıl olacağı tamamıyla mahkeme heyetinin tercihine bırakılmaktadır. Ne var ki, cinsel istismar mağduruyla ilgili gerekli tedbirlerin tam olarak yerine getirilmediği ve/veya sürecin hâkimlerin inisiyatiflerine bırakıldığı bir ortamda çocuğun üstün yararından da söz edilemeyeceği açıktır. Yine bu konuyla ilişkili olarak, bazı katılımcı hâkimlerin, AGO uygulamasına yönelik avukatlardan ya da ailelerden herhangi bir talebin gelmediğini ifade etmeleri de, yasal sürecin belirsizliğinin yanında, ilgili kişilerin de AGO ile ilgili bilgi yetersizliklerini ortaya koymaktadır. Müşteri taleplerinin yaşamın her alandaki uygulamaları değiştirme gücü günümüzde su götürmez bir gerçektir ve benzer taleplerin aileler ve avukatlar tarafından da adli süreçlerde gündeme getirilmesine yönelik bilinçlendirme çalışmalarının başlatılması gereği ortadadır.

### 4.6. AGO Uygulamalarında Karşılaşılan Güçlükler ve Çözüm Önerileri

Tüm katılımcı gruplarda AGO'nun yararlarına ilişkin dile getirilenlerin yanında, hâkimler, avukatlar ve aile mahkemesi uzmanlarının belirttikleri teknik sorunlar da, bu araştırmanın önemli bulguları arasındadır. Teknik aksaklıklar, bazı durumlarda bir uygulamanın tercih edilmemesinde başlı başına bir gerekçe olabilmektedir. Bu araştırmada her ne kadar AGO'nun yeterince kullanılmaması hâkim ve avukatların mesleki alışkanlıkları ve hizmet içi eğitimlerin yetersizliğine dayandırılmış olsa da, teknik sorunların da AGO uygulamasının önüne geçen kritik bir gerekçe olabileceği düşünülmektedir. Nitekim duruşma salonu ile AGO arasındaki iletişimin aksaması duruşma süresini uzatacak ve hâkimin mağdurun yanıtlarına sağlıklı şekilde ulaşmasını engelleyecek ya da odadaki materyal yetersizliği

uzmanın sağlıklı değerlendirme yapmasını ve mağdura ulaşmasını güçleştirecektir. Böyle bir durumda da, AGO'nun etkili bir uygulama olacağını iddia etmek güçtür. Dolayısıyla katılımcıların belirttikleri teknik sorunların çözüme kavuşturulması için gerekli alt yapının bir an önce oluşturulması kritik olup, söz konusu düzenlemelerin aynı zamanda yasal boyutta da bir zorunluluk teşkil ettiği (Ermağan-Çağlar ve Türk, 2019; Mağdur Hakları Daire Başkanlığı, 2017) akıldan çıkarılmamalıdır.

## 5. Son Notlar

Bu araştırma, hâkimler, avukatlar, aile mahkemesi uzmanları ve cinsel istismar mağduru çocukların, çocuğa yönelik cinsel istismar davalarında AGO uygulamasının gerekli ve yerinde bir yaklaşım olduğunu düşündüklerini ortaya koymuştur. Türkiye'de henüz emekleme aşamasında olan bu uygulamanın bazı açılardan geliştirilmesi gerektiği de, yine katılımcı görüşlerinden elde edilen önemli bir sonuçtur. Öncelikle, hâkimlerin, avukatların ve aile mahkemesi uzmanlarının süreçteki sorumluluklarını etkili şekilde yerine getirebilmeleri için kendilerine hizmet içi eğitimlerin sağlanması gereği dikkat çekmiştir. Teknik yetersizlikler ise, sürecin etkili işleyebilmesi adına bir an önce ele alınması gereken etmen olarak ortaya çıkmıştır. Hizmet içi eğitimler, görevlerin teknik boyutlarını yerine getirmek için bilgilendirmenin yanında, üç meslek grubunun da iletişimini ve işbirliğini artırıcı bir sorumluluğu da almalıdır, nitekim katılımcılardan elde edilen bazı bulgular, tarafların birbirlerinin görev ve sorumluluklarına dair yeterli bilgi sahibi olmadıkları yönündedir.

AGO uygulamalarının iyileştirilmesiyle birlikte, ülke genelinde yaygınlaştırma çalışmalarının yürütülmesi de bir o kadar önemli görünmektedir. Yaygınlaşma, farklı illerdeki çocuk mağdurların eşit düzeyde uygun muameleyi görmelerini sağlayacak ve toplumda da bu uygulamaya ilişkin farkındalığı artırarak yaygınlaşmasını daha da hızlandıracaktır. Bu aynı zamanda, uygulamanın hâkim inisiyatifinden çıkarılarak ülke genelinde zorunlu hale getirilmesine de önayak olabilecektir. Elbette bu yaygınlaştırma sürecinde, AGO'nun etkililiğine dair bilimsel araştırmaların yürütülmesi de uygulamanın giderek iyileştirilmesinde kilit bir etmen olacaktır.

**Hakem Değerlendirmesi:** Dış bağımsız.
**Çıkar Çatışması:** Yazarlar çıkar çatışması bildirmemiştir.
**Finansal Destek:** Yazarlar bu çalışma için finansal destek almadığını beyan etmiştir.

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# Limiting Procedural Rights During Police Interrogation in Terror Crimes: A Comparative Analysis of European and U.S. Laws and Suggestions to Turkish Law

## *Terör Suçlarında Polisin İfade Alması Sırasında Şüpheli Haklarının Sınırlandırılması: Avrupa ve ABD Hukuklarının Karşılaştırmalı Analizi ve Türk Hukukuna Öneriler*

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**ABSTRACT**

This article aims to contribute to Turkish counterterrorism law through a comparative law analysis on procedural rights in police interrogation. It compares the scope and roots of the right to counsel, the right to silence and the right to be notified of these rights in the U.S., the European Court of Human Rights (ECtHR) judgments and Turkey. Particularly, it scrutinizes the conditions under which these rights can be restricted in emergency circumstances and in cases when unscrupulous defense counsel aims to obstruct justice or further terrorism by abusing their communication with a terror suspect. Firstly, the article proposes that Turkey should establish a public safety exception to the right to counsel and the right to be informed of procedural rights when there is an urgent need to protect the life, liberty and bodily integrity of individuals. Secondly, it addresses a common problem stated by senior Turkish counterterrorism officials in interviews: defense counsel may be engaged with the terrorist organization of a suspect, coerce him to give a statement in a particular way, or facilitate information exchange. The article recommends that Turkey should enact an amendment allowing the replacement of unethical defense counsel with another lawyer through a magistrate judge order.

**Keywords:** The right to counsel, the right to be notified of procedural rights, public safety exception, the exclusion of defense counsel

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## 1. Introduction

Procedural rights serve as the protectors of individual self-esteem and autonomy as well as safeguards against the coercive nature of police questioning. They are significant for assuring a fair trial and the proper administration of justice. The procedural rights of suspects in custodial police interrogation are the right to counsel, the right to silence, and the right to be notified of these rights. This article explains the scope, legal groundings and limitation of these rights in the U.S. and European Court of Human Rights (ECtHR) jurisdictions as well as Turkey. Particularly, it scrutinizes the circumstances under which these rights can be restricted in terror cases to promote Turkey's counterterrorism efforts. It makes two proposals to Turkish law based on comparative law analyses as well as on interviews with Turkish counterterrorism officials.

The comparative law analyses are based on the U.S. Supreme Court and ECtHR judgments as well as on German law. Interviews were conducted by the author with Turkish security officials as well as judges and prosecutors with experience in terror cases. Eight counterterrorism officials, including four senior counterterrorism officers and two prosecutors and judges with considerable experience in terror cases, were interviewed in 2017 in Ankara.[1] Their opinions were utilized as supporting arguments for the study.

The article is built upon two proposals to Turkish law. First, it proposes a public safety exception to the right to counsel and the right to be informed of procedural rights. According to Turkish law, the police are required to warn a suspect of his procedural rights. It is mandatory to provide counsel during custodial interrogation if the minimum statutory punishment of a crime is five years of imprisonment. A statement obtained without the presence of lawyer in custodial interrogation cannot be used as primary evidence in court if the defendant objects (Ceza Muhakemesi Kanunu [C.M.K.], 2004, art. 148-4, 150-3). Failure to remind procedural rights and provide defense counsel, with no exception, would result in a statement being regarded as illegally obtained and excluded at trial. However, there may be cases in which the police's primary purpose is not to obtain evidence for trial but to address a danger to public. Turkish law disregards the emergency circumstances in which the lives, liberty and bodily integrity of individuals can be under threat and that the police may need to interrogate suspects only to counter an imminent threat rather than to obtain evidence. In such

1 The names of the interviewees are on file with the author, and will not be provided in this paper for confidentiality reasons.

cases, it might be too late to prevent a substantial danger to public by the time warnings are read and counsel provided. The U.S. Supreme Court and ECtHR observed this need and generated an exception that allowed the temporary deprivation of procedural warnings and the right to counsel in cases of an urgent public safety threat. The article suggests the Turkish legal system to establish a similar exception for the purpose of more effective counterterrorism.

Second, the article addresses a common complaint stated by senior Turkish counterterrorism officials in interviews: unethical defense counsel may act to promote a terrorist organization or obstruct the administration of justice. Under Turkish counterterrorism officials' experience, some lawyers take part in the same terrorist organization with a terror suspect, and coerce him to give his statement in a particular way, or facilitate the exchange of information between a terrorist organization and a suspect or between suspects. The article acknowledges that these allegations may stem from personal bias against the lawyers of terror suspects. Nevertheless, it takes these claims seriously and thinks over potential measures the law should take if defense counsel misuse their legal power.

Turkish law prohibits defense counsel from defending a suspect who is accused of establishing an organization to commit crimes, or establishing, directing or membership in an armed organization, or of terror crimes in every stage of criminal proceedings, if there is a prosecution against the counsel for these offenses. A ban can be imposed via a judicial order for a year and can be extended two times for six months. The banning order can be issued only for the crime that is the subject of an accusation ([C.M.K.], 2004, art. 151-3, 4). The existing rule precludes lawyers who are tried for certain crimes from defending suspects/defendants accused of similar crimes. Yet, it does not address the cases when defense counsel acts to obstruct justice or hinder counterterrorism efforts through abusing his communication with his client during police interrogation, without any criminal proceedings underway against him. The current rule does not allow the immediate exclusion of unethical defense counsel from police interrogation, and requires an ongoing prosecution to be formed. However, any attempt to block the administration of justice or to advance terrorist activities should be thwarted right away in police interrogation in order to protect the integrity of an investigation and to prevent the frustration of counterterrorism efforts.

The article suggests that Turkey should enact a law that allows the immediate exclusion of a defense lawyer from police interrogation via a magistrate judge order *(Sulh Ceza*

*Hakimi emri)* when there is reasonable suspicion (under the professional experience of the police and public prosecutor) that the lawyer; 1) participates in the same criminal activity, or is engaged in the same terrorist organization with his client, or 2) abuses his communication with his client to commit crimes or to protect the terrorist organization and its structure, or to jeopardize the security of a prison. Another lawyer should be appointed by a magistrate judge *(Sulh Ceza Hakimi)* in place of the excluded counsel.

## 2. Procedural Rights in Police Interrogation in the U.S. and ECtHR Jurisdictions

In democratic countries, individuals are granted with certain procedural rights that are designed to ensure fairness and to prevent arbitrary government action in police interrogation. These rights are the right to counsel, the right to silence, and the right to be informed of these procedural rights, including that anything said can and will be used against the individual in court and that a lawyer will be appointed to him if he is indigent (*Miranda v. Arizona*, 1966; *Ibrahim and Others v. the United Kingdom*, 2016, paras. 270-273; LaFave, Israel, King & Kerr, 2015, pp. 784-785). This section explains the U.S. and European understandings of these common rights, and discusses whether developments in the U.S. law affected the European perspective.

According to the U.S. law, the right to counsel, the right to silence, and the right to be notified of defense rights in police interrogation derive from the Fifth Amendment's privilege against self-incrimination.[2] The Fifth Amendment to the U.S. Constitution states that no one "shall be compelled in any criminal case to be a witness against himself". The landmark case of *Miranda v. Arizona* held that the privilege was applicable

2 In *Escobedo v. Illinois*, the U.S. Supreme Court first decided that the right to counsel before the initiation of the formal charging stemmed from the Sixth Amendment right to counsel (*Escobedo v. Illinois*, 1964). But the Court changed course in *Moran v. Burbine* and ruled that the Sixth Amendment right to counsel was applicable only after the initiation of adversary proceedings. That is to say, the Sixth Amendment right to counsel is no longer the applicable rule in police interrogation when a suspect is not yet formally charged by a court. Rather, the Fifth Amendment privilege against self-incrimination governs the right to counsel in custodial interrogation (Saltzburg & Capra, 2014, pp. 853-855). The purpose of the right to counsel in pre-charge detention is "to guarantee full effectuation of the privilege against self-incrimination" (*Moran v. Burbine*, 1986).

to the "inherently compelling" in-custody police questioning.[3] The privilege against self-incrimination is a measure to determine the proper scope of government power over its citizens. The privilege thereby demands respect for dignity and integrity of citizens as well as for their free will (*Miranda v. Arizona,* 1966, p. 460). The right to counsel and the right to be informed of these rights do not explicitly exist in the U.S. Constitution. They instead were created by the U.S. Supreme Court as necessary safeguards for the operation of the privilege against self-incrimination (*Moran v. Burbine*, 1986, pp. 429-473; Saltzburg & Capra, 2014, pp. 853-855).

The European Convention on Human Rights (ECHR), somewhat differently, does not explicitly contain the privilege against self-incrimination, the right to silence, or the right to be informed of procedural rights. It only provides the right to counsel in the text of its Article 6-3-c. Yet, although they are not explicitly written in the Convention, the case law of the ECtHR suggests that the privilege against self-incrimination and the right to silence as well as the right to be informed of procedural rights all derive from the right to a fair trial of Article 6.

The ECHR Article 6-3 states that:

Everyone **charged with** a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance

3 Miranda warnings are required in custodial interrogation cases. A person is deemed to be in custody when he is "deprived of his freedom of action in any significant way" (*Miranda v. Arizona,* 1966, pp. 461, 467, 477). *See* also *Orozco v. Texas* and *Beckwith v. United States*. A custodial interrogation refers to the "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" (*Miranda v. Arizona,* 1966, p. 444).
*Rhone Island v. Innis* decision extended the scope of an interrogation from Miranda's express questioning to include the functional equivalent of an express questioning. That is, under *Rhone Island v. Innis*, "'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect". This determination should be based "primarily upon the perceptions of the suspect, rather than the intent of the police" (*Rhode Island v. Innis,* 1980, pp. 300-301). *See* also *Arizona v. Mauro* (1987).

and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

According to the ECtHR, a suspect is entitled to these rights at the very beginning of the charging of a criminal offense. Under the Court's most recent case law, "a 'criminal charge' exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him" *(Ibrahim and Others v. the United Kingdom,* 2016, para. 249; *Deweer v. Belgium,* 1980*,* paras. 42-46; *Eckle v. Germany,* 1982; *McFarlane v. Ireland,* 2010). The right to a fair trial thus is effective not only in trial but also in pre-trial proceedings such as during the police interrogation of a charged suspect.

The privilege against self-incrimination, the right to silence, and the right to be informed of the right to counsel and silence are regarded as the byproducts of as well as the means of effectively fulfilling the right to a fair trial (*Salduz v. Turkey*, 2008, para. 53). In more detail, the ECtHR interpreted the right not to incriminate oneself and the right to silence as internationally recognized standards that "lie at the heart of a fair procedure under Article 6" (*Saunders v. the United Kingdom*, 1996, para. 68). In *Saunders v. the United Kingdom*, the Court determined that the right to silence and the right not to incriminate oneself *"*lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (art. 6)." In terms of the right to be notified of procedural rights, the Court ruled that in order for the right to silence and the right to a lawyer be practical and effective rather than theoretical and illusory, a suspect must be made aware of his rights (*Dvorski v. Croatia,* 2016, para. 82; *Salduz v. Turkey,* 2008, para. 51). Further, the right to be notified of procedural rights was inherent in the existence of the privilege against self-incrimination, the right to silence and the right to counsel (*Ibrahim and Others v. the United Kingdom*, 2016, para. 272).

Since Europe and the U.S. accord similar procedural rights to suspects in police interrogation, one might wonder whether the American *Miranda* rule has been exported to the ECtHR jurisprudence. There is no clear-cut answer to this question. This is because the *Miranda* case is not utilized as the foundational basis for ECtHR's rulings

(Weisselberg, 2017, p. 1285). Yet, when the ECtHR's relevant judgments are compared with that of the U.S. Supreme Court, there is evidence that European judges have been influenced by the U.S. law.[4] That is not to say that ECtHR judges reached the same conclusion as the U.S. Supreme Court in every single case. Their opinions sometimes differ in the same issues arising from these procedural rights.[5] But the European Court does refer to American law as a relevant comparison. In *Ibrahim and Others v. the United Kingdom*, for example, the ECtHR compared the European approach with other countries such as the U.S. and Canada. *Ibrahim* is the only case the Court explicitly touched upon the *Miranda* decision. Further, it can also be assumed that ECtHR judges are familiar with the U.S. law especially because of their distinguished legal background with knowledge of foreign legal developments, including the U.S. (Weisselberg, 2017, pp. 1284-1285). All these factors demonstrate that although defense rights in a police interrogation are not exported from the U.S. to Europe, there is evidence that U.S. Supreme Court judgments influenced the European approach at a certain level.

## 3. Turkish Law, Its Gaps, and Suggestions Based on Comparative Law and Interviews

Turkish law requires mandatory counsel in cases when the minimum statutory punishment is at least five years of imprisonment. Since terror crimes (except terrorist propaganda) require at least five years of incarceration, the presence of counsel during interrogation and trial stages is mandatory in most of the terror cases. The law also requires that, regardless of the minimum incarceration period, a statement obtained in police interrogation without the presence of counsel may not be used as primary evidence in court unless the defendant confirms. This rule creates an incentive for the police to provide counsel no matter how serious a crime is just to make sure that a statement be considered as evidence at trial. Thus, we may conclude that there is an implied mandatory counsel for all criminal cases ([C.M.K.], 2004, art. 148-4, 150-3; Yenisey & Nuhoğlu, 2015, p. 201; Centel & Zafer, 2013, p. 173; Soyaslan, 2016, pp. 184-185).

4 For example, the ECtHR in *Pishchalnikov* was influenced by the U.S. Supreme Court's *Edwards* decision (*Pishchalnikov v. Russia*, 2009; *Edwards v. Arizona*, 1981).

5 Such as in the cases of ECtHR's *Dvorski* and the U.S. Supreme Court's *Burbine*. In the former case, the ECtHR ruled that the police had to inform the suspect of the fact that his family hired another lawyer for him, and the lack of this knowledge deprived the suspect of informed choice of a lawyer and defense rights. In the latter case, however, the U.S. Supreme Court ruled that the police did not have the obligation to inform the applicant of the presence of a lawyer in the stationhouse (*Dvorski v. Croatia,* 2016; *Moran v. Burbine,* 1986, pp. 429-430). For more information, *see* Weisselberg, 2017, p. 1262.

A terror suspect thus cannot be deprived of his mandatory right to counsel during investigation and trial stages, with one exception: the right to counsel can be restricted for 24 hours by a judicial order issued upon request of a public prosecutor. Yet, even in that case, the police cannot interrogate the suspect ([C.M.K.], 2004, art. 154-2). In most of the terror crimes, any police interrogation without the presence of counsel is strictly prohibited in Turkish law. The number of counsels is limited to three in all cases during police interrogation, and in terror cases during trial ([C.M.K.], 2004, art. 149-2; Yenisey, 2015, p. 581; Yenisey & Nuhoğlu, 2015, p. 198; Centel & Zafer, 2013, p. 177).

Under Turkish law, the police are required to warn suspects of the right to counsel, the right to silence, the right to inform relatives about detention, and of the right to demonstrate the evidence in favor of him to clear any suspicion against him. These rights are required to be reminded at the beginning of the police's and prosecutor's interrogation as well as at trial stages. Both the U.S. Supreme Court and the ECtHR have developed a public safety exception that allows unwarned custodial interrogation when necessary to address an urgent public safety interest (*New York v. Quarles*, 1984; *Salduz v. Turkey,* 2008, para. 55; *Ibrahim and Others v. the United Kingdom,* 2016, para. 259). But no such exception exists in Turkey. Thus, unwarned statements, even in the cases of imminent danger, are inadmissible in Turkish courts (T.C. Anayasası [AY], 1982, art. 38-6; [C.M.K.], 2004, art. 147-1-c, d, e, f, 289-1-i; Öztürk et al, 2015, p. 398; Centel & Zafer, 2013, pp. 215-217; Soyaslan, 2016, pp. 345-349; Yenisey, 2015, pp. 489-493; Yenisey & Nuhoğlu, 2015, pp. 619-623).

This paper proposes two types of amendments to Turkish law: 1) A public safety exception to the right to counsel and the right to be informed of procedural rights, and 2) The exclusion of defense lawyers in certain limited circumstances. While the former suggestion fills a legal hole in the Turkish system when compared to ECtHR and U.S. jurisdictions, the latter is developed as a legal solution to a problem stated by the interviewed counterterrorism officials. First, the public safety exception should be adopted that would allow unwarned custodial interrogation, outside the presence of counsel, in cases when there is an urgent need to protect the life and bodily integrity of third persons. That is, in exceptional cases when there is "an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person", there is a sufficient and compelling reason to dispense with warnings and counsel (*Ibrahim and Others v. the United Kingdom,* 2016, paras. 210, 259, 300).

Second, the exclusion of defense lawyers is proposed to counter the issue of unscrupulous counsel, whose aim is to obstruct the administration of justice by either coercing terrorism suspects to remain silent or facilitating an exchange of information between a terrorist organization and a terror suspect, or between suspects. The parts below examine the two proposals of the public safety exception and the exclusion of defense lawyers, and provide some relevant information on foreign laws when necessary.

### 3.1. A Public Safety Exception to the Right to Counsel and the Right to Be Informed of Procedural Rights

This part initially explains the U.S. and European laws with regard to procedural rights in emergency conditions, which allow the temporary restrictions on the right to counsel and the right to be informed of procedural rights in these situations. Emergency conditions refer to cases when there is an urgent public safety need to protect the life, liberty and physical integrity of the public. Then, it describes the relevant Turkish law and makes suggestions to improve the current law.

#### 3.1.1. The United States

The U.S. Supreme Court established a public safety exception to *Miranda* rights in *New York v. Quarles*. Under the public safety exception, *Miranda* rights need not be provided to a suspect when information must be obtained to protect against an imminent threat to the safety of others. The evidence obtained therefrom thus would not be regarded as illegally obtained and would be admissible.

In *Quarles*, a police officer did not caution an arrestee when he detained him and immediately asked the whereabouts of a gun after seeing the empty holster on the suspect. The suspect pointed him to the gun. The U.S. Supreme Court determined that un-Mirandized statements obtained to prevent a danger to public were admissible at trial. The Court ruled that the police "were confronted with immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket". More strikingly, the Court emphasized that the primary reason for added *Miranda* protections in the expense of fewer convictions was to effectuate the Fifth Amendment privilege against self-incrimination. The *Miranda* Court bore the burden of fewer convictions to protect the privilege against self-incrimination. In this case, however, the cost would be more than a simple failure to obtain evidence useful to build a case against Quarles for his conviction. The cost would be substantial danger to the public,

thus changing the balance between individual and public interests that the *Miranda* Court had struck (*New York v. Quarles*, 1984, pp. 652, 657).

### 3.1.2. The European Court of Human Rights

The ECtHR permits temporary restrictions on the exercise of the right to counsel and the right to be informed of the right to silence in cases when there are compelling reasons such as a threat against public safety (*Ibrahim and Others v. the United Kingdom,* 2016*,* para. 259; *Salduz v. Turkey,* 2008, para. 55; *Borg v. Malta*, 2016). Compelling reasons thus would justify any failure to inform the suspect of his rights during interrogation. Similar to the U.S. Supreme Court's *Quarles* decision establishing a public safety exception to Miranda warnings, ECtHR also established a "compelling reasons" exception to the exercise of the right to counsel via the *Salduz* and *Ibrahim* cases, and the right to be informed of the right to silence via the *Ibrahim* case. Turkey also should establish an exception to Miranda rights in exceptional cases of urgent public interest, when it would be lawful for the police to question a person without warnings and without a lawyer present.

In *Salduz v. Turkey,* a minor was taken into custody for taking part in an illegal demonstration that praise the leader of the PKK and suspending an illegal placard from a bridge. He was later found guilty of aiding and abetting the PKK. The minor was not provided with a lawyer during police interrogation. The Court held that there had been a violation of Article 6 § 3 (c) (the right to legal assistance of one's own choosing) together with Article 6 § 1 (the right to a fair hearing) of the Convention, given the absence of a lawyer for the minor's defense during police custody (*Salduz v. Turkey,* paras. 57-63, 77). The Court further stated that the right to access to a lawyer could be denied only when there were "compelling reasons" for a restriction. Such denial nevertheless could not unduly prejudice the right to a fair trial under Article 6. The important part of the decision is as follows:

In order for the right to a fair trial to remain sufficiently "practical and effective", … access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that **there are compelling reasons to restrict this right.** Even where **compelling reasons may exceptionally justify denial of access to a lawyer**, **such restriction** – whatever its justification – **must not unduly prejudice the rights of the accused under Article 6**. The rights of the defense will in principle be irretrievably prejudiced

when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (*Salduz v. Turkey,* 2008, para. 55).

*Ibrahim and Others v. the United Kingdom* is a leading and relatively new decision holding that in cases of danger to public safety or if urgencies of the situation require, it is lawful to temporarily restrict the exercise of the right to counsel and the right to be informed of the right to silence. Compelling reasons exist when there is "an urgent need to avert serious adverse consequences for life, liberty or physical integrity" of the public (*Ibrahim and Others v. the United Kingdom,* 2016*,* paras. 276, 298).

In *Ibrahim*, the Court specifically evaluated whether safety interviews with a terror suspect can be conducted without counsel present in the interrogation room for the purposes of obtaining information that would preserve and secure public safety. The purpose of a safety interview is to determine the whereabouts of other known accomplices, identities and unknown accomplices involved in the commission, preparation and instigation of acts of terrorism, and the presence of other explosive devices or materials likely to cause danger. Safety interviews are conducted in cases when delaying an interview would involve "immediate risk of harm to persons or serious loss of, or damage to, property", or "the alerting of other persons suspected of committing a terrorist offence but not yet arrested" (*Ibrahim and Others v. the United Kingdom,* 2016*,* paras. 28, 40, 43).

The *Ibrahim* case involved four applicants who were suspected of detonating four bombs which failed to explode on the London transportation system on 21 July 2005. Three of them were immediate suspects of a terror investigation involving a detonation of a bomb which failed to explode. The fourth applicant was initially a witness but subsequently became a suspect for sheltering one of the main perpetrators. The first three applicants received warnings and were then interviewed by the police (safety interviews) without counsel present. The fourth applicant was questioned first as a witness, and then as a suspect after he made self-incriminating statements. Yet, he was not reminded of his rights and was not provided with counsel when he began incriminating himself during questioning as a witness.

The ECtHR discussed whether compelling reasons would justify the lack of counsel in the first three applicants' case, and the lack of counsel and of any notification of his procedural rights (regarding privilege against self-incrimination) in the fourth applicant's case (*Ibrahim and Others v. the United Kingdom,* 2016*,* paras. 271, 295, 299, 303).

Regarding the first three applicants' questioning, the Court ruled that there was "an urgent need to avert serious adverse consequences for life, liberty or physical integrity" of the public. Since a similar type of an attack in the transportation facilities of London killed more than fifty people two weeks earlier, the police had sufficient reason to think that London was subjected to a wave of terror attacks, and that there were other accomplices to the current attempt or that other explosive devices were planted somewhere else. Hence, the Court ruled that compelling reasons to protect the public from further suicide attacks justified the temporary deprivation of the right to counsel. Regarding the fourth applicant, who was initially questioned as a witness but then as a suspect, the Court was not satisfied under the circumstances of the case that there were compelling reasons to deprive him his right to counsel as well as procedural warnings (*Ibrahim and Others v. the United Kingdom,* 2016*,* paras. 14-57, 276, 300).[6] In sum, the gist of the *Ibrahim* case is the determination that the temporary restriction of the right to counsel and the right to be notified of procedural rights would be lawful if compelling, safety-based reasons exist (Barkhuysen et al., 2018).

### 3.1.3. A Suggestion to the Turkish System

The examination of the U.S. and ECtHR jurisdictions revealed that a public safety exception to the right to counsel and the right to be informed of procedural rights was lacking in the Turkish system. Turkish law may also recognize a public safety exception via a judgment by the Constitutional Court or a statutory amendment to the Criminal Procedure Code.

First, Turkey is a party to the European Convention, and ECtHR judgments are binding for Turkish authorities.[7] It may be that when a national law provides a higher protection

6 It is worth noting that the Court cited the U.S. Supreme Court's *Miranda* and *Quarles* judgments to support its compelling reasons exception (*Ibrahim and Others v. the United Kingdom,* 2016, paras. 229, 230, 259).

7 Turkey had been one of the founding members of the Council of Europe that was established in 1948 after World War II (MFA, 2011; CoE, 2020b). It ratified many human rights conventions and protocols signed under the Council of Europe, one of which is the European Convention on Human Rights. The European Convention on Human Rights was signed in Rome in 1950, and entered into force in 1953 (CoE, 2019a). It was ratified by the Turkish Parliament and entered into force in 1954 (CoE, 2020a). The Council established the European Court of Human Rights to ensure the proper application of the European Convention and its additional protocols (CoE, 2019a). Turkey recognized the right of individual petition to the European Court of Human Rights in 1987, and accepted the Court's compulsory jurisdiction in 1990 (PACE, 1992; Ekinci & Sağlam, 2015, p. 2). For more information regarding the Council of Europe, the ECHR, and its Court, *see* (CoE, 2019b; MFA, 2011).
The European Court of Human Rights judgments are binding for Turkish courts under Article 46 of the Convention and the Turkish Constitution Article 90. First, Article 46 states that ECtHR judgments have binding force over member states, one of which is Turkey. Second, Article 90 of the Turkish Constitution states that international agreements on human rights norms would prevail over statutes if any contradiction exists.

than ECHR, the lower standards of the ECtHR's case law is not binding for a contracting state and cannot be applied to the prejudice of defendants. Nevertheless, Turkish Constitutional Court may well recognize the compelling reasons exception of *Salduz* and *Ibrahim* and incorporate it into the Turkish system through a judgment if a similar issue comes before the Court.[8]

Second, an amendment to the Turkish Criminal Procedure Code may recognize un-Mirandized statements and statements obtained without the presence of counsel as admissible if obtained under emergency conditions. This may raise constitutionality issues under Article 38-6 of the Constitution, which prohibits the use of illegally obtained findings as evidence. If the legislator establishes a public safety exception to procedural rights, obtaining statements in urgent circumstances without procedural warnings or counsel present would be lawful. These statements and other derivative evidence would not be considered as illegally obtained. Therefore, the public safety exception would be constitutional.

The balancing test between the privilege against self-incrimination and the heightened state interest in protecting the lives, liberty and physical integrity of third persons weighs in favor of the latter social interest. This outcome is the reason to establish a public safety exception to the privilege against self-incrimination which demonstrates itself through the right to counsel, the right to silence, and the right to be notified of these rights. The right to counsel and the right to be notified of procedural rights thus should be limited in exceptional emergency conditions when the protection of the life, liberty and physical integrity of innocents justifies the practice.

8 For example, *Quarles* decision was utilized as a supporting argument in the *dissenting* opinion of a Turkish High Court of Appeals (*Yargıtay*) judgment. The Turkish High Court of Appeals (*Yargıtay*) discussed whether the lack of Miranda warnings during trial proceedings, as required by [C.M.K.] art. 147 (then art. 135), constituted a reason for *vacate and remand decision* even when a defendant was acquitted by a trial court. According to the *majority* opinion, procedural rules were of primary importance and incompliance with them would result in a *vacate and remand decision,* even though the defendant was acquitted. The *dissenting* opinion, however, argued that if the violation of a procedural rule did not affect the judicial outcome, the trial court decision must not be vacated and remanded. The dissent defended a balancing test that weighs opposing interests and utilized the U.S. Supreme Court's *Quarles* decision as a supporting argument (C.G.K. 24.10.1995 E.1995/6-238 K. 1995/305).
The judgment shows that Turkish High Courts may resort to the high court decisions of other countries to shape and improve Turkish law, regardless of whether they are binding. That is, the Constitutional Court may justifiably make use of ECtHR judgments ---at least as supplementary sources, in order to generate a compelling reasons (or public safety) exception to procedural rights.

### 3.2. The Exclusion of Defense Counsel

The presence of counsel is necessary during police interrogation for three reasons: First, it clears the doubts of coercion or inhuman treatment by the police. Second, the police make sure with a lawyer's presence that warnings are given about procedural rights. Third, it ensures the voluntariness of a statement. Having said that, an interviewed security official, a public prosecutor and a judge claim that it is possible for defense counsel to have a relationship with a terrorist organization that goes beyond client defense. According to these interviewees, there have been occasions when defense lawyers act to obstruct justice and hinder effective counterterrorism efforts. Examples include coercing their clients to remain silent, or facilitating the exchange of information between a terrorist organization and a suspect or between suspects. For instance, in PKK cases, young militants generally admit to talk to the police regarding terrorist activities. Yet, the lawyer sent by the PKK to defend a young militant threatens him with his or his family members' lives and coerces him to not to give any statement to security officials. Moreover, in some cases, a lawyer is associated with a terrorist organization and defends many terror suspects at the same time. This creates the risk that a suspect's statement will be transferred to other suspects to ensure consistent statements, which might lead to fabricated but uniform stories obstructing justice (See also HRW, 2019, p. 32). These attempts not only impede the administration of justice but also preserve and promote a terrorist organization.

Defense lawyers, on the other hand, claim that they face intense pressure from the police, public prosecutors and courts. According to the Human Rights Watch (HRW), many lawyers are charged with membership in a terrorist organization or terrorist propaganda without compelling evidence, just because they defend terror suspects or expressed views in support of a terrorist organization in social media or phone conversations. Moreover, the police and public prosecutors retaliate against lawyers for defending suspects who sue police officers, for arguing with them, or documenting human rights violations by the police (HRW, 2019, pp. 22-49). According to a pro-lawyer report, since 2016's coup attempt, more than 1500 lawyers have been prosecuted, 605 lawyers were arrested and 345 were convicted of membership in a terrorist organization or terrorist propaganda (The Arrested Lawyers Initiative & CNF, pp. 7-8).

Regardless of whether these allegations and numbers are completely accurate, it is evident that the trustworthiness of defense counsel is under question. The interviews with counterterrorism officials and the conviction rate suggest that some lawyers may

actually be engaged in the activity of a terrorist organization, even though there may be arbitrary investigations and prosecutions in some cases. Some lawyers may be dedicated to the ideology of a terrorist organization and may provide legal support for its illegal activities, while others may defend a terror suspect for the sake of the right to counsel and professional responsibility. In any case, the state must take necessary precautions to prevent any attempt to obstruct the administration of justice or counterterrorism efforts.

The solution to counter these problems in the Turkish system is not to deprive a terror suspect from legal advice. It is to ensure that a lawyer is not engaged in the criminal activity of an accused, does not threaten a suspect, and does not facilitate information exchange. For this reason, lawyers who are suspected of; 1) engaging in the same criminal activity with an accused, or 2) coercing a suspect, or 3) facilitating information exchange between an organization and a suspect or between suspects, or 4) aiming to obstruct justice or hinder counterterrorism efforts in other ways, should be excluded from the proceedings in the Turkish system. Turkish law needs an enactment allowing the exclusion of defense lawyers in these four circumstances. The exclusion should be made via a magistrate judge order upon a showing of reasonable suspicion.

This part first analyzes German law which authorizes the exclusion of defense counsel in cases of attempts to obstruct justice. Then, it focuses on a possible amendment to Turkish law that would follow the German model, and scrutinizes whether the proposal passes the constitutionality muster and satisfies the ECtHR standards.

### 3.2.1. The Exclusion of Defense Counsel under German Law

The German Criminal Procedure Code Article 138a permits the exclusion of defense counsel from proceedings in cases when counsel aims to obstruct justice. The article states that:

"(1) Defense counsel shall be excluded from participation in proceedings if he is strongly suspected, or suspected to a degree justifying the opening of the main proceedings,

1. of being involved in the offence which constitutes the subject of investigation,
2. of abusing communication with an accused who is not at liberty for the purpose of committing criminal offences or substantially endangering the security of a penal institution, or

3. of having committed an offence which in the event of the conviction of the accused would constitute accessoryship after the fact, obstruction of justice or handling stolen goods.

(2) Defense counsel shall also be excluded from participation in proceedings the subject of which is a criminal offence pursuant to section 129a, also in conjunction with section 129b subsection (1) of the Criminal Code, if certain facts substantiate the suspicion that he has committed or is committing one of the acts designated in subsection (1), numbers 1 and 2." (Strafprozeßordnung [StPO], 1987, § 138a-1, 2)

The exclusion of defense counsel is allowed in every stage of proceedings both in regular crimes (138a-1) and terror crimes (138a-2, 129a that refers to terror offenses under German Criminal Code). While strong suspicion or suspicion "to a degree justifying the opening of the main proceedings" is required for regular crimes, a simple level of suspicion is enough for the exclusion of lawyers in terror cases. In terror cases, the Code only requires that certain facts support the suspicion that a lawyer; 1) is involved in the criminal activity of the accused, or 2) abuses his communication with the accused in order to commit criminal offences or endanger the security of a penal institution ([StPO], 1987, § 138a-1, 2; Oehmichen, 2009, pp. 243, 252).[9]

### 3.2.2. An Amendment to Turkish Law

According to the Turkish Criminal Procedure Code Article 151-3&4, defense counsel can be prohibited via a judicial order from defending a terror suspect, defendant or a convict, if there is an ongoing prosecution against him for establishing an organization to commit crimes, establishing, directing or membership in an armed organization, or for terror crimes (Centel & Zafer, 2013, p. 191; Soyaslan, 2016, pp. 188-189; [C.M.K.],

9 Germany adopted two more new laws as a reaction to; 1) the large number of defense lawyers who seemed to obstruct the trial, and 2) the fact that the defense of several accused persons by the same lawyer seemed to facilitate information exchange between those accused. According to these enactments, the defense counsel chosen by a defendant were limited to three, and lawyers could no longer defend more than one person accused of the same deed ([StPO], 1987 § 137-1). The German Federal Constitutional Court later regarded this limitation as constitutional, finding that it did not conflict with the right to an effective defense or the right to a fair trial. The Court reiterated that the purpose of the limitation was "to impede the accused from delaying the proceedings by using several defense lawyers, so that it served the objective to ensure a due procedure and to maintain the functioning of the criminal justice system as required by the rule of law". The right to a fair trial can be exercised with up to three defense counsels, even in "extraordinary heavy and protracted proceedings" (Oehmichen, 2009, p. 244).
Turkey also limited the number of lawyers to three in the adjudication of terror crimes in 2016 ([C.M.K.], 2004, art. 149-2).
In addition, the Turkish Advocacy Code obliges lawyers to refrain from defending persons with conflicting interests in the same case (Avukatlık Kanunu [A.K.], 1969, art. 38-1-b).

2004, art. 151-3; Türk Ceza Kanunu [T.C.K.], 2004, art. 220, 314). The judicial order can be issued upon request of a public prosecutor, and will only be issued for the crime that is the subject of the accusation. The initial ban is for a year, but it can be extended for six months, two times, depending on the circumstances of the offense. The ban may be contested by the banned lawyer. It automatically gets lifted, if; 1) the lawyer's objection is found reasonable by the court, or 2) the lawyer is not convicted at the trial stage ([C.M.K.], 2004, art. 151-4).

Turkish law allows the exclusion of a defense lawyer only in a case when the lawyer himself is under prosecution for certain crimes. The current statutory rule does not focus on the fact that a defense lawyer may be furthering the criminal activity of the accused without an ongoing prosecution of the lawyer, or the fact that a defense lawyer might be facilitating the exchange of information between the accused and his terrorist organization or between suspects. The rationale of the current statute is to prevent lawyers who are prosecuted for particular serious crimes from defending suspects accused of similar offenses. A prosecution is thus the condition of such an exclusion. However, the limitation fails to include the instant exclusion of a lawyer from police interrogation when there is a reasonable basis that he is engaged in the activity of a terrorist organization or misused his relationship with his client.

Turkish law needs an amendment similar to German law, in order to assure that any attempts to block the administration of justice or to further terrorism, at the hands of defense counsel, are thwarted. A defense lawyer who aims to obstruct justice through abusing his communication with a terror suspect or to secretly assist a terrorist organization under the name of defending his client, should be immediately prevented from frustrating trial fairness and counterterrorism efforts. The state should not wait for a prosecution to be initiated, as the police would need to act swiftly to counter any efforts that dishonor proper investigation and effective counterterrorism. When a lawyer is excluded, another lawyer should be appointed in his place, and the police interrogation must cease until the newly appointed lawyer arrives at the interrogation room. Otherwise, evidence obtained through an interrogation made in the absence of the new lawyer would be inadmissible at trial.

The magistrate judge on duty at the time of police interrogation can be authorized to issue the orders of exclusion. This proceeding must be conducted *ex parte* as it may involve confidential intelligence information indicating the abuse of relationship as well as membership. Access to intelligence information by a lawyer may disclose

intelligence gathering activities as well as intelligence sources. The exclusion order should be automatically revoked unless a prosecution has been initiated for the lawyer within one year after exclusion.

The suitable level of cause in enactment should be determined under a balancing test. Under the balancing test, the appropriate level of cause is to be set by comparing conflicting individual rights and state interests. The individual interest in this particular case is the right to counsel of one's choice. While choice is important, the right to a fair trial would not be substantially infringed by the appointment of another lawyer, as the suspect would be represented by and be given the assistance of a lawyer during interrogation. So long as the appointed lawyer is not prejudiced against the suspect and protects the suspect's interests, there would not be a significant individual rights infringement --- that is to say, the right to counsel of choice must give way to the state interest in protecting against terrorism. Since there is a lesser intrusion on individual rights, as opposed to the considerable state interest in this case, the use of a simple level of suspicion should suffice. Reasonable suspicion (in the U.S. sense) that derives from the professional experience of the police and prosecutors should be enough for excluding lawyers from interrogation.

Further, preventive counterterrorism measures like the proposed law (i.e. preventive electronic surveillance) usually require reasonable suspicion as their purpose is to eliminate any threats to national security, namely to prevent future terror attacks (Polis Vazife ve Salahiyet Kanunu [P.V.S.K.], 1934, Supp. art. 7-2; Jandarma Teşkilat, Görev ve Yetkileri Kanunu [J.T.K.], 1983, Supp. art. 5-1; Devlet İstihbarat Hizmetleri ve Milli İstihbarat Teşkilatı Kanunu [M.I.T.K.], 1983, art. 6-2). Thus, reasonable suspicion may be a suitable standard also for excluding lawyers for preventive purposes.

The concrete evidence necessary for the establishment of the probable cause standard could be a hard burden on authorities. This is because it might be difficult to obtain concrete evidence right away at the very instance of interrogation. Thus, the article recommends that when the police and public prosecutor suspect under their experience and knowledge that the lawyer aims to obstruct justice and hinder counterterrorism efforts, he should be replaced with another lawyer via a magistrate judge order.[10] More specifically, a prospective enactment may rule that a defense lawyer might be excluded from police interrogation if there is a basic level of suspicion (reasonable suspicion)

10 The City Bar Association must provide a list of lawyers available on a certain date and time, and the magistrate should appoint a lawyer from the list.

under the professional experience of the police and public prosecutor that the lawyer;

1. participates in the same criminal activity or is engaged with the terrorist organization of an accused, or
2. abuses his communication with his client to commit crimes or to protect the terrorist organization and its structure, or to jeopardize the security of a prison.

This amendment potentially has many advantages: First, it would contribute to the realization of justice by preventing the fabrication of false but consistent statements by terror suspects. Second, it would prevent a terrorist organization's lawyer from protecting the leader cadre as well as the structure of the organization in the guise of defending a suspect. Third, it would help authorities to better spot the hierarchy, organizational structure and future plans of an organization thanks to more effective police interrogation. And fourth, it might also hamper any efforts to kidnap a terror suspect from a prison facility like a stationhouse, by limiting the physical interaction between an organization's lawyer and a terror suspect.

### 3.2.3. Constitutionality Analysis

The constitutionality of the proposed law may be challenged before the Constitutional Court under Article 36-1 (the right to a fair trial) of the Turkish Constitution. In that case, the Court will make an analysis considering the proportionality principle deriving from Article 2 (the state of law) and Article 13 (Restriction of fundamental rights and freedoms). The proportionality involves four elements "proper purpose (legitimate aim)", "suitability (rational connection)", "necessity" and "proportionality in the narrow sense (balancing test)" (AYM 14.6.2017 E: 2017/24 K: 2017/112; AYM 24.7.2019 E: 2018/73 K: 2019/65; AYM 27.12.2018 E: 2018/153 K: 2018/119; AYM 07.09.2016 E: 2016/124 K: 2016/155; AYM 01.11.2017 E: 2017/142 K: 2017/150; Tanör & Yüzbaşıoğlu, 2001, pp. 151-152; Gözler, 2000, pp. 258-260; Metin, 2002, pp. 209-245).

First, the proper purpose element requires an overriding interest to justify any human rights intrusion. These interests may be the protection of others' rights, or public interests such as national security, public order, public health and the protection of minors. The exclusion of defense lawyers aims to protect the integrity and proper functioning of the criminal justice system, prevent the interruption of counterterrorism measures, and ensure an effective defense and a fair trial for the suspect. Thus, it would serve the purposes of national security, public order and protection of human rights.

Second, suitability demands that there is a rational connection between means chosen and the proper purpose. The limiting law should realistically be able to realize the desired result. The exclusion of an unethical lawyer from police interrogation and the appointment of another lawyer in his place would ensure that the suspect gives a statement under his free will, his defense rights are not disregarded, and any attempts to interfere with counterterrorism are thwarted (Barak, 2012, pp. 245, 255-256, 268-269, 303, 305; Klatt & Meister, 2012, p. 8; Schlink, 2012, pp. 722-725).

Third, the necessity requires that the least restrictive measure is used to realize the desired result. If there are various suitable alternatives that may equally advance the proper purpose, the less restrictive option must be preferred (Barak, 2012, pp. 317, 323; Klatt & Meister, 2012, p. 8). Disciplinary sanctions or criminal prosecutions against unethical lawyers might be considered as potential alternatives. Yet, these measures involve more limitations than the exclusion, as they would have long term effects on the legal career of a lawyer. Further, these measures would hardly bring about the desired effect, which is the immediate halt to any attempts to obstruct justice and disrupt the fight against terrorism. The replacement of unethical lawyers with another lawyer thereby appears to be the most suitable and the least restrictive alternative.

Fourth, the proportionality in the narrow sense (the balancing test) balances the benefits gained by the restricting measure and the harm directed at an individual right. The balancing test weighs the social importance of a restricted individual right against the social importance of the legitimate aim advanced by the intrusion (Barak, 2012, pp. 340, 349; Klatt & Meister, 2012, p. 8). On the one hand, the exclusion of unethical defense counsel infringes on the right to counsel of one's choice and the right to a fair trial ([C.M.K.], 2004, art. 149-150; [AY], 1982, art. 36). The right to counsel has paramount importance in assuring the voluntariness of a statement during custodial interrogation and contributing to the fairness of a trial. Turkey has a long history of police coercion during interrogation, and the right to counsel operates as an indispensable safeguard against arbitrariness (HRW, 2000). Hence, Turkish law cannot dispense with the very safeguard of the right to counsel. In this particular case, the right to counsel is not completely eliminated by the proposed measure since an interrogation will be ceased immediately after the exclusion and the suspect will be able to consult with another lawyer during all criminal proceedings. Thus, the measure does not do away with the right to counsel but instead promotes the effective exercise of the right to counsel and contributes to the realization of the right to a fair trial.

On the other hand, the proposed measure protects the integrity of the criminal justice system by ensuring that suspects are not coerced by unethical lawyers during police interrogation and that the substituting lawyer provides an effective defense. It also prevents information exchange between a suspect and a terrorist organization or suspects, contributing to counterterrorism efforts. Since there is a limited intrusion on the right to counsel as opposed to the considerable public interest in the proper administration of justice and national security, there is a fair balance between the benefits and harms of the measure.

The proposed law reasonably satisfies all components of the proportionality standard, namely the proper purpose, suitability, necessity, and the balancing test. Therefore, the intrusion on the right to a fair trial (Article 36) would pass the constitutionality muster under Articles 2 and 13, if the Constitutional Court made a similar analysis.

### 3.2.4. The Proposal's Compatibility with Relevant ECtHR Judgments

The European Convention on Human Rights requires in Article 6-The Right to a Fair Trial/3-c that everyone charged with a criminal offense has the right "to defend himself in person or through legal assistance of his own choosing". The relevant issue in this proposal is whether the exclusion of selected counsel and the appointment of new counsel by a magistrate judge violates Article 6.

The ECtHR has ruled in many cases that the right of an accused to be defended by counsel of "his own choosing" is not absolute. The defendant's wishes can be overridden "when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice" (*Croissant v. Germany*, 1992, para. 29; *Martin v. Estonia*, 2013, para. 90; *Meftah and others v. France*, 2002, para 45; *Dvorski v. Croatia*, 2016, para. 79, 82). Therefore, the right to counsel of one's own choosing can be restricted if the interests of justice demand that the accused is defended by court-appointed counsel.

With regard to the current proposal, the issue before us is whether any efforts of obstruction of justice by selected counsel would amount to "sufficient grounds" to conclude that it is "necessary in the interests of justice" to disregard the right to counsel of one's choice. In order to address this issue, the precedents of the Court should be assessed carefully. The Court ruled that there were sufficient grounds to disregard an accused's wishes in cases when;

a) a lawyer did not have the qualifications of a licensed advocate, ruling that such qualifications were required to ensure "the efficient defense of a person" and "the smooth operation of the justice system" (*Zagorodniy v. Ukraine*, 2011, para. 53; *Meftah and others v. France*, 2002, para. 45),

b) the defendant requested to be defended by his mother and sister, and the Court ruled that they were not qualified as professional advocates and would not have been able to "ensure efficient defense in compliance with the procedure" (*Mayzit v. Russia*, 2005, para. 68),

c) the defendant requested his uncle to be his representative even though he was already represented by an advocate of his choosing (*Popov v. Russia*, 2006, para. 174),

d) there was a conflict of interest between suspects/defendants represented by the same counsel (*Croissant* v. *Germany*, 1992, para 30; *Martin v. Estonia*, 2013, para. 90),

e) the adequate representation of a suspect required the appointment of different counsel, considering the length, size and the complexity of a case, and the possession of certain qualifications needed for a case (*Croissant* v. *Germany*, 1992, para. 28).

In sum, the Court finds that there are sufficient grounds in the interests of justice to appoint a lawyer against a suspect's (or defendant's) wish in cases when; 1) a suspect's interests in trial fairness and an effective defense required so, or 2) the representation by a selected lawyer would contradict with professional responsibility and ethical rules.[11]

My proposal requires court-appointed counsel in cases when there is reasonable suspicion that a lawyer representing a terror suspect is associated with the same terrorist organization, or facilitates information exchange between the suspect and terrorist organization or between terror suspects. The proposal serves many functions. First, it ensures that a suspect is defended by a lawyer who puts his client's interests first rather than the interests of a terrorist organization or another suspect. Second, it furthers counterterrorism and security efforts of the state by hampering information exchange

11 The U.S. law recognizes the right to counsel of one's own choice as a constitutional right under the Sixth Amendment. Similar to the ECtHR, the U.S. Supreme Court generated some exceptions to the constitutional right to counsel. A person cannot be represented by the counsel of his choice in cases when a) there is a conflict of interest between two defendants, b) an advocate is not the member of the Bar, c) he cannot afford the representation by an attorney, d) the attorney declines to represent the client for other reasons (*Wheat v. United States*, 1988, pp. 159-160). The right to counsel of one's choice is thus not absolute, and is subject to a balancing test between competing interests.
It is likely that the U.S. Supreme Court deems it constitutional to exclude the defense counsel who are engaged in terrorism, if a similar counterterrorism need as in Turkey emerges in the U.S. Therefore, counterterrorism needs would override the right to counsel of one's choice under the U.S. balancing test as well.

between arrested members and the leader cadre of a terrorist organization. Third, it assures that a lawyer who violates advocacy principles does not take part in criminal proceedings, and thereby protects the integrity of a criminal justice system. The proposal for these reasons is in compliance with the rationale developed by the Court, and would meet the relevant and sufficient grounds in the interests of justice standard.

## 4. Conclusion

This article has asserted that Turkey's counterterrorism efforts may be promoted, if Turkish law recognizes a public safety exception to procedural warnings in police interrogation, and excludes the defense counsel that aim to further terrorism or obstruct justice at the very instance of interrogation.

The former proposal implies that Turkish courts should abandon their shallow understanding of the warning requirement, and should instead make a profound balancing analysis between individual and social interests at stake. They must acknowledge that the warning requirement is not absolute, and emergency circumstances may justify abandoning the rule for a short period of time. The U.S. Supreme Court and ECtHR judgments may lead the way in public safety/compelling reasons exception. Turkish law may follow them through a Constitutional Court judgment revisiting the precedents on the right to a fair trial and illegally obtained evidence, or a legislation that amends the Criminal Procedure Code accordingly.

The latter proposal implies that in cases when a state needs to take a swift action to protect the administration of justice and counterterrorism efforts, its determination could be honored via a judicial decision based on reasonable suspicion. This is the case with dishonest and unethical lawyers who aim to coerce a suspect or facilitate information exchange between a terrorist organization and a suspect or between suspects. An exclusion order may be issued by a magistrate judge to frustrate such attempts. This suggestion reflects society's expectation of virtue and professional responsibility from lawyers.

The proposals involve restrictions that may bring about serious infringements on the right to a fair trial if state agents disregard necessary safeguards. Law enforcement officials must bear in mind that the public safety exception is valid only in exceptional emergency circumstances, in which other people's life, liberty and physical integrity will be jeopardized if the police wait to read procedural warnings or call for a lawyer. Immediately after an urgent need is over, the suspect must be reminded of his procedural

rights and a lawyer must be provided in his defense. In addition, officials must demonstrate a reasonable basis, supported by intelligence information and their professional experience, to file a request for an exclusion order. Any claims based on personal bias would be unacceptable. In case a lawyer is excluded, no interrogation should be conducted until a court-appointed lawyer arrives at the interrogation room.

It's one thing to make a law, it's another thing to apply it justly. The fair and proper application of these laws depends on a system that is comprised of virtuous and high minded professionals who regard the principle of the rule of law as the supreme value. Therefore, if Turkey intends to adopt the proposed rules, it may have to restructure the government bureaucracy.

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## YAZARLARA BİLGİ

### TANIM

Ceza Hukuku ve Kriminoloji Dergisi (Journal of Penal Law and Criminology), açık erişimli, hakemli, Haziran ve Aralık aylarında olmak üzere yılda iki defa yayınlanan bilimsel bir dergidir. Ceza Hukuku ve Kriminoloji Dergisi, İstanbul Üniversitesi Hukuk Fakültesi Ceza Hukuku ve Kriminoloji Araştırma ve Uygulama Merkezi'nin bir yayınıdır.

### AMAÇ ve KAPSAM

Ceza Hukuku ve Kriminoloji Dergisi (Journal of Penal Law and Criminology), öncelikle ceza hukuku ve kriminoloji alanlarına odaklanan, suç ve suçlulukla ilişkili konularda yazılan makalelere açık olan bir dergidir. Ceza Hukuku ve Kriminoloji Dergisi, yüksek kalitede içerikle bu alanlara katkıda bulunan ve bilgi paylaşımı sağlayan uluslararası bir platform sunmayı amaçlar. Dergide, Türkçe makalelerin yanı sıra İngilizce, Almanca, Fransızca, İspanyolca ve İtalyanca makalelere de yer verilir. Derginin hedef kitlesini akademisyenler, araştırmacılar, profesyoneller, öğrenciler ve ilgili mesleki, akademik kurum ve kuruluşlar oluşturur.

### EDİTORYAL POLİTİKALAR VE HAKEM SÜRECİ

#### Yayın Politikası

Dergiye yayınlanmak üzere gönderilen makalelerin içeriği, derginin amaç ve kapsamı ile uyumlu olmalıdır. Dergide, orijinal araştırma niteliğindeki yazıların yayınlanmasına öncelik verilmektedir.

#### Genel İlkeler

Ceza Hukuku ve Kriminoloji Dergisi'nde daha önce yayınlanmamış ya da yayınlanmak üzere başka bir dergide halen değerlendirmede olmayan ve her bir yazar tarafından onaylanan makaleler değerlendirilmek üzere kabul edilir.

On değerlendirmeyi gecen yazılar iThenticate intihal tarama programından gecirilir. İntihal incelemesinden sonra, uygun makaleler Editor tarafından orijinaliteleri, metodolojileri, makalede ele alınan konunun onemi ve derginin kapsamına uygunluğu acısından değerlendirilir.

Bilimsel toplantılarda sunulan özet bildiriler, makalede belirtilmesi koşulu ile kaynak olarak kabul edilir. Gönderilen makale biçimsel esaslara uygun ise editör, çift taraflı kör hakem değerlendirmesi için gelen yazıyı yurtiçinden ve/veya yurtdışından üç hakeme sunar, çeviri yazıyı ise bir hakeme gönderir.

Makale yayınlanmak üzere Ceza Hukuku ve Kriminoloji Dergisi'ne gönderildikten sonra

yazarlardan hiçbirinin ismi, tüm yazarların yazılı izni olmadan yazar listesinden silinemez ve yeni bir isim, yazar olarak eklenemez, yazar sırası değiştirilemez.

Yayına kabul edilmeyen makale, resim ve fotoğraflar yazarlara geri gönderilmez. Yayınlanan yazı ve resimlerin tüm hakları Ceza Hukuku ve Kriminoloji Dergisi'ne aittir.

**Yazarların Sorumluluğu**

Makalelerin bilimsel ve etik kurallara uygunluğu yazarların sorumluluğundadır. Yazar, makalenin orijinal olduğu, daha önce başka bir yerde yayınlanmadığı ve başka bir yerde, başka bir dilde yayınlanmak üzere değerlendirmede olmadığı konusunda teminat sağlamalıdır. Uygulamadaki telif kanunları ve anlaşmaları gözetilmelidir. Telife bağlı materyaller (örneğin tablolar, şekiller veya büyük alıntılar) gerekli izin ve teşekkürle kullanılmalıdır. Başka yazarların, katkıda bulunanların çalışmaları ya da yararlanılan kaynaklar uygun biçimde kullanılmalı ve referanslarda belirtilmelidir.

Gönderilen makalede tüm yazarların akademik ve bilimsel olarak doğrudan katkısı olmalıdır. Bu bağlamda "yazar" yayınlanan bir araştırmanın kavramsallaştırılmasına ve dizaynına, verilerin elde edilmesine, analizine ya da yorumlanmasına belirgin katkı yapan, yazının yazılması ya da bunun içerik açısından eleştirel biçimde gözden geçirilmesinde görev yapan kişi olarak görülür. Yazar olabilmenin diğer koşulu ise, makaledeki çalışmayı planlamak veya icra etmek ve/veya revize etmektir. Fon sağlanması, veri toplanması ya da araştırma grubunun genel süpervizörlüğü tek başına yazarlık hakkı kazandırmaz. Yazar olarak gösterilen tüm kişiler, sayılan tüm ölçütleri karşılamalı ve yukarıdaki ölçütleri karşılayan her kişi, yazar olarak gösterilmelidir. Yazarların isim sıralaması ortak verilen bir karar olmalıdır. Tüm yazarlar, yazar sıralamasını Telif Hakkı Anlaşması Formunda imzalı olarak belirtmek zorundadırlar.

Yazarlık için yeterli ölçütleri karşılamayan, ancak çalışmaya katkısı olan tüm kişiler, "teşekkür/bilgiler" kısmında sıralanmalıdır. Bunlara sadece teknik destek sağlayan, yazıma yardımcı olan ya da sadece genel bir destek sağlayan, finansal ve materyal desteği sunan kişiler örnek olarak gösterilebilir.

Bütün yazarlar, araştırmanın sonuçlarını ya da bilimsel değerlendirmeyi etkileyebilme potansiyeli olan finansal ilişkiler, çıkar çatışması ve çıkar rekabetini beyan etmelidirler. Bir yazar kendi yayınlanmış yazısında belirgin bir hata ya da yanlışlık tespit ederse, bu yanlışlıklara ilişkin düzeltme ya da geri çekme için editör ile hemen temasa geçme ve işbirliği yapma sorumluluğunu taşır.

**Editör ile Hakem Sorumlulukları ve Değerlendirme Süreci**

Editör; makaleleri, yazarların etnik kökeninden, cinsiyetinden, cinsel yöneliminden, uyruğundan, dini inancından, siyasi ve felsefi düşüncesinden bağımsız olarak değerlendirir. Ayrıca

editör, yayına gönderilen makalelerin adil bir şekilde çift taraflı kör hakem değerlendirmesinden geçmelerini sağlar. Gönderilen makalelere ilişkin tüm bilginin, makale yayınlanana kadar gizli kalacağını garanti eder. Hakemden gelen rapor doğrultusunda yazının yayınlanmasına, yazardan rapor çerçevesinde düzeltme istenmesine ya da yazının geri çevrilmesine karar verir ve yazarı durumdan en kısa sürede haberdar eder. Editör, içerik ve yayının toplam kalitesinden sorumludur. Ayrıca editör, gerektiğinde hata sayfası yayınlamalı ya da düzeltme yapmalıdır.

Editör; yazarlar, editörler ve hakemler arasında çatışmaya izin vermez. Hakem atama konusunda tam yetkiye sahiptir ve dergide yayınlanacak makalelerle ilgili nihai kararı vermekle yükümlüdür.

Hakemler; makaleleri, yazarların etnik kökeninden, cinsiyetinden, cinsel yöneliminden, uyruğundan, dini inancından, siyasi ve felsefi düşüncesinden bağımsız olarak değerlendirirler. Araştırmayla ilgili, yazarlarla ve/veya araştırmanın finansal destekçileriyle çıkar çatışmaları olmamalıdır. Değerlendirmelerinin sonucunda tarafsız bir yargıya varmalıdırlar. Hakemler, yazarların atıfta bulunmadığı konuyla ilgili yayınlanmış çalışmaları tespit etmelidirler. Gönderilmiş yazılara ilişkin tüm bilgilerin gizli tutulmasını sağlamalı ve yazar tarafından herhangi bir telif hakkının ihlal edildiğini ve intihal yapıldığını fark ederlerse editöre raporlamalıdırlar. Hakem, makale konusu hakkında kendini vasıflı hissetmiyor ya da zamanında geri dönüş sağlayamayacağını düşünüyorsa, editöre bu durumu derhal bildirmeli ve editörden hakem sürecine kendisini dahil etmemesini istemelidir.

Değerlendirme sürecinde editör, hakemlere gözden geçirme için gönderilen makalelerin, yazarların özel mülkü olduğunu ve bunun imtiyazlı bir iletişim olduğunu açıkça belirtir. Hakemler ve yayın kurulu üyeleri, başka kişilerle makaleleri tartışamazlar. Hakemlerin kendileri için makalelerin kopyalarını çıkarmalarına izin verilmez. Ayrıca hakemler, editörün izni olmadan makaleleri başkasına veremezler. Yazarın ve editörün izni olmadan hakemlerin gözden geçirmeleri basılamaz ve açıklanamaz. Hakemlerin kimliğinin gizli kalmasına özen gösterilmelidir. Bazı durumlarda editörün kararıyla, ilgili hakemlerin makaleye ait yorumları aynı makaleyi yorumlayan diğer hakemlere gönderilerek hakemlerin bu süreçte aydınlatılması sağlanabilir.

## AÇIK ERİŞİM İLKESİ

Ceza Hukuku ve Kriminoloji Dergisi (Journal of Penal Law and Criminology), tüm içeriği okura ya da okurun dahil olduğu kuruma ücretsiz olarak sunulur. Okurlar, ticari amaç haricinde, yayıncı ya da yazardan izin almadan dergi makalelerinin tam metnini okuyabilir, indirebilir, kopyalayabilir, arayabilir ve link sağlayabilir. Bu durum, BOAI açık erişim tanımıyla uyumludur.

## YAZARLARA BİLGİ



### YAYIN ETİĞİ

#### İlke ve Standartlar

Ceza Hukuku ve Kriminoloji Dergisi (Journal of Penal Law and Criminology), yayın etiğinde en yüksek standartlara bağlıdır ve Committee on Publication Ethics (COPE), Directory of Open Access Journals (DOAJ), Open Access Scholarly Publishers Association (OASPA) ve World Association of Medical Editors (WAME) tarafından yayınlanan etik yayıncılık ilkelerini benimser; Principles of Transparency and Best Practice in Scholarly Publishing başlığı altında ifade edilen ilkeler için adres: https://publicationethics.org/resources/guidelines-new/principles-transparency-and-best-practice-scholarly-publishing.

Gönderilen tüm makaleler orijinal, yayınlanmamış ve başka bir dergide değerlendirme sürecinde olmamalıdır. Her bir makale, editörlerden biri ve en az iki hakem tarafından çift taraflı kör hakem değerlendirmesinden geçirilir. İntihal, duplikasyon, sahte yazarlık, araştrma/veri fabrikasyonu, makale dilimleme, dilimleyerek yayın, telif hakları ihlali ve çıkar çatışmasının gizlenmesi, etik dışı davranışlar olarak kabul edilir.

Kabul edilen etik standartlara uygun olmayan tüm makaleler yayından çıkarılır. Buna yayından sonra tespit edilen olası kuraldışı uygunsuzluklar içeren makaleler de dahildir.

### YAZILARIN HAZIRLANMASI

1. Makale gönderimi online olarak, http://jplc.istanbul.edu.tr üzerinden yapılmalıdır.
2. Gönderilen yazılar, yazının yayınlanmak üzere gönderildiğini ifade eden, makale türünü belirten ve makaleyle ilgili bilgileri içeren (bkz: Son Kontrol Listesi) bir mektup; yazının elektronik formunu içeren Microsoft Word 2003 ve üzerindeki versiyonları ile yazılmış elektronik dosya ve tüm yazarların imzaladığı Telif Hakkı Anlaşması Formu eklenerek gönderilmelidir.
3. Yayınlanmak üzere gönderilen makale ile birlikte yazar bilgilerini içeren kapak sayfası gönderilmelidir. Kapak sayfasında, makalenin başlığı, yazar veya yazarların bağlı bulundukları kurum ve unvanları, kendilerine ulaşılabilecek adresler, cep, iş ve faks numaraları ve e-posta adresleri yer almalıdır (bkz. Son Kontrol Listesi).

4. Dergide, hakem denetiminden geçen çalışmalar dışında, karar incelemesi, kitap incelemesi, mevzuat değerlendirmesi ve bilgilendirici notlara da yer verilir. Bu nitelikteki yazıların kabulü veya geri çevrilmesi, Editörler ve Yayın Kurulu tarafından yapılır.
5. Gönderilen yazılarla ilgili tüm yazışmalar ilk yazarla yapılır.
6. Yazarların dergiye gönderdikleri çalışmaların derginin kurallarına uygun olduğu kabul edilir. Bilimsel araştırma ve etik kurallarına uyulmadığı veya olağanın üzerinde yazım yanlışlarının tespit edildiği yazılar, Editörler ve Yayın Kurulu tarafından geri çevrilir.
7. Gönderilen çalışmaların yazı karakteri Times New Roman ve yazı büyüklüğü-14 punto olması gereken bölüm başlıkları ve 10 punto olması gereken dipnotlar dışında- 12 punto olması gerekir. Satır aralıklarının da 1.5 değerinde olması gerekir. Yararlanılan kaynaklara ilişkin dipnotlar sayfa altında yer almalıdır.
8. Yazar/yazarların adları çalışmanın başlığının hemen altında sağa bitişik şekilde verilmelidir. Ayrıca yıldız dipnot şeklinde (*) yazarın unvanı, kurumu ve e-posta adresi ve telefonu sayfanın en altında dipnotta belirtilmelidir.
9. Çalışmaların başlıca şu unsurları içermesi gerekmektedir: Türkçe Başlık, Türkçe öz ve anahtar kelimeler; İngilizce başlık, İngilizce öz ve anahtar kelimeler; İngilizce genişletilmiş özet, ana metin bölümleri, son notlar ve kaynaklar.
10. Giriş bölümünden önce 100-200 sözcük arasında çalışmanın kapsamını, amacını, ulaşılan sonuçları ve kullanılan yöntemi kaydeden Türkçe ve İngilizce öz ile 600-800 kelimelik İngilizce genişletilmiş özet yer almalıdır. Çalışmanın İngilizce başlığı İngilizce özün üzerinde yer almalıdır. İngilizce ve Türkçe özlerin altında çalışmanın içeriğini temsil eden 3 İngilizce, 3 Türkçe anahtar kelime yer almalıdır.
11. Araştırma yazılarında sorunsalın betimlendiği ve çalışmanın öneminin belirtildiği GİRİŞ bölümünü “Amaç ve Yöntem”, “Bulgular”, “Tartışma ve Sonuç”, ”Son Notlar” “Kaynaklar” ve “Tablolar ve Şekiller” gibi bölümler takip etmelidir. Derleme ve yorum yazıları için ise, çalışmanın öneminin belirtildiği, sorunsal ve amacın somutlaştırıldığı “Giriş” bölümünün ardından diğer bölümler gelmeli ve çalışma “Tartışma ve Sonuç”, ”Son Notlar”, “Kaynaklar” ve “Tablolar ve Şekiller” şeklinde bitirilmelidir.
12. Çalışmanın sonunda, kullanılan kaynakların yazar soyadına göre alfabetik sıraya dizildiği kaynakçaya yer verilmelidir. Ayrıca eserde kullanılan kaynaklar dipnotunda veya metin içerisinde kısa olarak yer almalıdır.
13. Eserlerin tablo veya grafik içermesi durumunda ayrı bir excel dosyası ile ham verilerin eserle birlikte gönderilmesi zorunludur. Çalışmalarda tablo, grafik ve şekil gibi göstergeler ancak çalışmanın takip edilebilmesi açısından gereklilik arz ettiği durumlarda, numaralandırılarak, tanımlayıcı bir başlık ile birlikte verilmelidir.

14. Kurallar dâhilinde dergimize yayınlanmak üzere gönderilen çalışmaların her türlü sorumluluğu ve çalışmada geçen görüşler yazar/yazarlarına aittir.
15. Hakem raporları doğrultusunda yazarlardan, metin üzerinde bazı düzeltmeler yapmaları istenebilir.
16. Dergiye gönderilen çalışmalar yayınlansın veya yayınlanmasın geri gönderilmez.

**KAYNAKLAR**

Derleme yazıları, okuyucular için bir konudaki kaynaklara ulaşmayı kolaylaştıran bir araç olsa da, her zaman orijinal çalışmayı doğru olarak yansıtmaz. Bu yüzden mümkün olduğunca yazarlar orijinal çalışmaları kaynak göstermelidir. Öte yandan, bir konuda çok fazla sayıda orijinal çalışmanın kaynak gösterilmesi yer israfına neden olabilir. Birkaç anahtar orijinal çalışmanın kaynak gösterilmesi genelde uzun listelerle aynı işi görür. Ayrıca günümüzde kaynaklar elektronik versiyonlara eklenebilmekte ve okuyucular elektronik literatür taramalarıyla yayınlara kolaylıkla ulaşabilmektedir.

Kabul edilmiş ancak henüz sayıya dahil edilmemiş makaleler Early View olarak yayınlanır ve bu makalelere atıflar "advance online publication" şeklinde verilmelidir. Genel bir kaynaktan elde edilemeyecek temel bir konu olmadıkça "kişisel iletişimlere" atıfta bulunulmamalıdır. Eğer atıfta bulunulursa parantez içinde iletişim kurulan kişinin adı ve iletişimin tarihi belirtilmelidir. Bilimsel makaleler için yazarlar bu kaynaktan yazılı izin ve iletişimin doğruluğunu gösterir belge almalıdır. Kaynakların doğruluğundan yazar(lar) sorumludur. Tüm kaynaklar metinde belirtilmelidir. Kaynaklar alfabetik olarak sıralanmalıdır.

**Referans Stilli ve Formatı**

Ceza Hukuku ve Kriminoloji Dergisi, makalelerinde referans sistemi olarak OSCOLA veya APA 6 kullanımını benimser. OSCOLA (Oxford Standard for the Citation of Legal Authorities), Oxford Üniversitesi tarafından yayınlanmış bir sistemdir. Ayrıntılı bilgi ve örnekler için: https://www.law.ox.ac.uk/research-subject-groups/publications/oscola.

American Psychological Association tarafından yayınlanan APA 6 hakkında ayrıntılı bilgi için: http://www.apastyle.org/

**APA 6 Referans Stili Örnekleri**

**Metin İçinde Kaynak Gösterme**

Kaynaklar metinde parantez içinde yazarların soyadı ve yayın tarihi yazılarak belirtilmelidir. Birden fazla kaynak gösterilecekse kaynaklar arasında (;) işareti kullanılmalıdır. Kaynaklar alfabetik olarak sıralanmalıdır.

**Örnekler:**

***Birden fazla kaynak;***

(Esin ve ark., 2002; Karasar 1995)

***Tek yazarlı kaynak;***

(Akyolcu, 2007)

***İki yazarlı kaynak;***

(Sayıner ve Demirci 2007, s. 72)

***Üç, dört ve beş yazarlı kaynak;***

Metin içinde ilk kullanımda: (Ailen, Ciambrune ve Welch 2000, s. 12–13) Metin içinde tekrarlayan kullanımlarda: (Ailen ve ark., 2000)

***Altı ve daha çok yazarlı kaynak;***

(Çavdar ve ark., 2003)

**Kaynaklar Bölümünde Kaynak Gösterme**

Kullanılan tüm kaynaklar metnin sonunda ayrı bir bölüm halinde yazar soyadlarına göre alfabetik olarak numaralandırılmadan verilmelidir.

**Kaynak yazımı ile ilgili örnekler aşağıda verilmiştir.**

**Kitap**

***a) Türkçe Kitap***

Karasar, N. (1995). *Araştırmalarda rapor hazırlama* (8.bs). Ankara: 3A Eğitim Danışmanlık Ltd.

***b) Türkçeye Çevrilmiş Kitap***

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***e) İngilizce Kitap***

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***h) Yayımcının ve Yazarın Kurum Olduğu Yayın***

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Van Brunt, D. (1997). *Networked consumer health information systems* (Doctoral dissertation). Available from ProQuest Dissertations and Theses. (UMI No. 9943436)

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***h) Düzenli Olarak Online Yayımlanan Bildiriler***

Herculano-Houzel, S., Collins, C. E., Wong, P., Kaas, J. H., & Lent, R. (2008). The basic nonuniformity of the cerebral cortex. *Proceedings of the National Academy of Sciences, 105,* 12593-12598. http://dx.doi.org/10.1073/pnas.0805417105

***i) Kitap Şeklinde Yayımlanan Bildiriler***

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**Diğer Kaynaklar**

***a) Gazete Yazısı***

Toker, Ç. (2015, 26 Haziran). 'Unutma' notları. *Cumhuriyet,* s. 13.

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***c) Web Page/Blog Post***

Bordwell, D. (2013, June 18). David Koepp: Making the world movie-sized [Web log post]. Retrieved from http://www.davidbordwell.net/blog/page/27/

***d) Online Ansiklopedi/Sözlük***

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Marcoux, A. (2008). Business ethics. In E. N. Zalta (Ed.), *The Stanford encyclopedia of philosophy*. Retrieved from http://plato.stanford.edu/entries/ethics-business/

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*Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 1 AC 884.

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Page v Smith [1996] AC 155 (HL).

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*Callery v Gray* [2001] EWCA Civ 1117, [2001] 1 WLR 2112 [42], [45].

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If citing a particular judge:

*Arscott v The Coal Authority* [2004] EWCA Civ 892, [2005] Env LR 6 [27] (Laws LJ).

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Act of Supremacy 1558.

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*Balogh v Hungary* App no 47940/99 (ECHR, 20 July 2004).

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Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) 268.

Gareth Jones, *Goff and Jones: The Law of Restitution* (1st supp, 7th edn, Sweet & Maxwell 2009).

K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998).

***Contributions to edited books***

Francis Rose, 'The Evolution of the Species' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks (OUP 2006).*

***Encyclopedias***

*Halsbury's Laws* (5th edn, 2010) vol 57, para 53.

***Journal articles***

Paul Craig, 'Theory, "Pure Theory" and Values in Public Law' [2005] PL 440.

When pinpointing, put a comma between the first page of the article and the page pinpoint.

JAG Griffith, 'The Common Law and the Political Constitution'(2001) 117 LQR 42, 64.

***Online journals***

Graham Greenleaf, 'The Global Development of Free Access to Legal Information' (2010) 1(1) EJLT < http://ejlt.org//article/view/17 > accessed 27 July 2010.

***Command papers and Law Commission reports***

Department for International Development, *Eliminating World Poverty: Building our Common Future* (White Paper, Cm 7656, 2009) ch 5.

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Sarah Cole, 'Virtual Friend Fires Employee' (*Naked Law*, 1 May 2009) <www.nakedlaw.com/2009/05/index.html> accessed 19 November 2009.

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***h) Book with the same organization as author and publisher***

American Psychological Association. (2009). *Publication manual of the American psychological association* (6th ed.). Washington, DC: Author.

**Article**

***a) Turkish Article***

Mutlu, B., & Savaşer, S. (2007). Çocuğu ameliyat sonrası yoğun bakımda olan ebeveynlerde stres nedenleri ve azaltma girişimleri [Source and intervention reduction of stress for parents whose children are in intensive care unit after surgery]. *Istanbul University Florence Nightingale Journal of Nursing, 15*(60), 179–182.

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***c) Journal Article with DOI and More Than Seven Authors***

Lal, H., Cunningham, A. L., Godeaux, O., Chlibek, R., Diez-Domingo, J., Hwang, S.-J. ... Heineman, T. C. (2015). Efficacy of an adjuvanted herpes zoster subunit vaccine in older adults. *New England Journal of Medicine, 372,* 2087–2096. http://dx.doi.org/10.1056/NEJMoa1501184

***d) Journal Article from Web, without DOI***

Sidani, S. (2003). Enhancing the evaluation of nursing care effectiveness. *Canadian Journal of Nursing Research, 35*(3), 26-38. Retrieved from http://cjnr.mcgill.ca

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***f) Advance Online Publication***

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Henry, W. A., III. (1990, April 9). Making the grade in today's schools. *Time, 135,* 28–31.

**Doctoral Dissertation, Master's Thesis, Presentation, Proceeding**

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Van Brunt, D. (1997). *Networked consumer health information systems* (Doctoral dissertation). Available from ProQuest Dissertations and Theses database. (UMI No. 9943436)

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Yaylalı-Yıldız, B. (2014). *University campuses as places of potential publicness: Exploring the politicals, social and cultural practices in Ege University* (Doctoral dissertation). Retrieved from Retrieved from: http://library.iyte.edu.tr/tr/hizli-erisim/iyte-tez-portali

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Tonta, Y. A. (1992). *An analysis of search failures in online library catalogs* (Doctoral dissertation, University of California, Berkeley). Retrieved from http://yunus.hacettepe.edu.tr/~tonta/yayinlar /phd/ickapak.html

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***e) Symposium Contribution***

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***f) Conference Paper Abstract Retrieved Online***

Liu, S. (2005, May). *Defending against business crises with the help of intelligent agent based early warning solutions.* Paper presented at the Seventh International Conference on Enterprise Information Systems, Miami, FL. Abstract retrieved from http://www.iceis.org/iceis2005/abstracts_2005.htm

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***h) Proceeding in Book Form***

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***i) Paper Presentation***

Nguyen, C. A. (2012, August). *Humor and deception in advertising: When laughter may not be the best medicine.* Paper presented at the meeting of the American Psychological Association, Orlando, FL.

**Other Sources**

***a) Newspaper Article***

Browne, R. (2010, March 21). This brainless patient is no dummy. *Sydney Morning Herald, 45.*

***b) Newspaper Article with no Author***

New drug appears to sharply cut risk of death from heart failure.(1993, July 15). *The Washington Post,* p. A12.

***c) Web Page/Blog Post***

Bordwell, D. (2013, June 18). David Koepp: Making the world movie-sized [Web log post]. Retrieved from http://www.davidbordwell.net/blog/page/27/

***d) Online Encyclopedia/Dictionary***

Ignition. (1989). In *Oxford English online dictionary* (2nd ed.). Retrieved from http://dictionary.oed.com

Marcoux, A. (2008). Business ethics. In E. N. Zalta (Ed.). *The Stanford encyclopedia of philosophy.* Retrieved from http://plato.stanford.edu/entries/ethics-business/

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*Arscott v The Coal Authority* [2004] EWCA Civ 892, [2005] Env LR 6 [27] (Laws LJ).

***Statutes and statutory instruments***

Act of Supremacy 1558.

Human Rights Act 1998, s 15(1)(b).

Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166.

***EU legislation and cases***

Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

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Case C–176/03 *Commission v Council* [2005] ECR I–7879, paras 47–48.

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*Omojudi v UK* (2009) 51 EHRR 10.

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Gareth Jones, *Goff and Jones: The Law of Restitution* (1st supp, 7th edn, Sweet & Maxwell 2009).

K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998).

***Contributions to edited books***

Francis Rose, 'The Evolution of the Species' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks (OUP 2006).*

***Encyclopedias***

*Halsbury's Laws* (5th edn, 2010) vol 57, para 53.

***Journal articles***

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JAG Griffith, 'The Common Law and the Political Constitution'(2001) 117 LQR 42, 64.

***Online journals***

Graham Greenleaf, 'The Global Development of Free Access to Legal Information' (2010) 1(1) EJLT < http://ejlt.org//article/view/17 > accessed 27 July 2010.

***Command papers and Law Commission reports***

Department for International Development, *Eliminating World Poverty: Building our Common Future* (White Paper, Cm 7656, 2009) ch 5.

Law Commission, *Reforming Bribery* (Law Com No 313, 2008) paras 3.12–3.17.

***Websites and blogs***

Sarah Cole, 'Virtual Friend Fires Employee' (*Naked Law*, 1 May 2009) <www.nakedlaw.com/2009/05/index.html> accessed 19 November 2009.

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