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A CRITICAL OVERVIEW OF THE TURKISH CIVIL CODE IN THE CONTEXT OF GENDER EQUALITY*

Cinsiyet Eşitliği Bakımından Türk Medeni Kanunu'na Eleştirel Bir Bakış

Tuğçem SEÇER**

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All talk of women's right is moonshine.
Women have every right.
They have only to exercise them.
Victoria Woodhull

ABSTRACT

In terms of the Turkish Civil Code, equal rights are granted to men and women. However, it should not be assumed that there has been equality since the beginning of civil law. Turkish women were able to approach equality through long struggles, but they still could not totally reach it. So much so that the obligation of married women to take the husbands' surname, the obligation of a waiting period only for the women to remarry, and provisions regarding marital property can clearly indicate that equality between men and women is still not achieved. An egalitarian legal system can only be achieved by guaranteeing equality for men and women. However, it is not appropriate to consider a concept of equality one-dimensional. In legal terms, equality refers to treating everyone equally under the law. However, when comparing the social, economic, and cultural circumstances of men and women, absolute legal equality may not always guarantee equality. To ensure equality for men and women in this context, the regulations of the Turkish Civil Code should be updated. On the contrary, the provisions introduced to protect women's rights, including positive discrimination, should be preserved.

Keywords: Equality, gender-based discrimination, surname, waiting period, alimony.

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* There is no requirement of Ethics Committee Approval for this study.
This study is based on the author's oral presentation submitted in July 2023 to the International Symposium of "*Combating Gender Based Violence"* at Lille France.

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ÖZET

Türk Medeni Kanunu'nda kadın ve erkeğe eşit haklar tanındığı belirtilir. Ancak anılan bu eşitliğin medeni hukukun başlangıcından beri süregeldiği düşünülmemelidir. Türk kadını uzun mücadeleler sonucunda eşitliğe yaklaşabilmiş, ancak yine de tam anlamıyla ulaşamamıştır. Öyle ki, evli bir kadının kocasının soyadını alma zorunluluğu, sadece kadının yeniden evlenebilmesi için bekleme süresini geçirme zorunluluğu, evlilik mallarına ve nafakaya ilişkin hükümler kadın-erkek eşitliğinin hala sağlanamadığının açık göstergesidir. Ancak kadın ve erkek eşitliğinin tam olarak sağlanabilmesiyle eşitlikçi bir hukuki düzenlemeye ulaşılabilmesi mümkün olur. Yalnız bu noktada, eşitlik kavramı tek yönlü olarak değerlendirilmemelidir. Hukuki anlamda eşitlik bireylerin kanun önünde ayrım yapılmaksızın değerlendirilmesidir. Ancak mutlak hukuki eşitlik, kadın ve erkeğin sosyal, ekonomik ve kültürel durumları değerlendirildiğinde her zaman adaleti sağlamayabilir. Bu çerçevede, Türk Medeni Kanunu'nun hükümlerinin kadın ve erkek eşitliğini sağlayacak şekilde yenilenmesi gerekmektedir. Buna karşın, yapılacak düzenlemelerde kadın haklarının korunması amacıyla getirilen ve pozitif ayrımcılık içeren hükümler korunmalıdır.

Anahtar Kelimeler: Eşitlik, cinsiyet temelli ayrımcılık, soyadı, iddet müddeti, nafaka

INTRODUCTION

Turkish Civil Code no. 743, which came into force in 1926, included the first provisions for realizing gender equality in the history of Turkish civil law, especially compared to Mecelle and Hukuk-ı Aile Kararnamesi[1]. Before Turkish Civil Code no. 743, there was a civil code of the Ottoman Empire (Mecelle)[2] and a family code of the Ottoman Empire (Hukuk-ı Aile Kararnamesi)[3] based

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[1] For further information regarding Hukuk-ı Aile Kararnamesi; Orhan Çeker, *Osmanlı Hukuk-ı Aile Kararnâmesi* (Mehir Vakfı Yayınları No:3, Konya 2016); Ebru Kayabaş, *Osmanlı Devleti'nde Tanzimat Dönemi İtibarıyla Aile Hukukunun Gelişimi -Hukuk-ı Aile Kararnamesi-*, (Filiz Kitabevi, İstanbul 2009); Belkıs Konan, *Hukuk-ı Aile Kararnamesi'nde Kadının Hukuki Durumu ile İlgili Düzenlemeler*, II. Türk Hukuku Tarihi Kongresi Bildirileri Cilt I, ed. Fethi Gedikli, (Oniki Levha Yayıncılık, İstanbul 2016).

[2] For further information regarding Mecelle; Mücahit Ceylan, "Mecelle-i Ahkâm-ı Adliyye'nin Hazırlanışı, Uygulanması ve Kapsamı", Adalet Dergisi, 66 (2021) 709-720; Cihan Karahasanoğlu Osmanağaoğlu, "Mecelle-i Ahkam-ı Adliyye'nin Yürürlüğe Girişi ve Türk Hukuk Tarihi Bakımından Önemi", Osmanlı Tarihi Araştırma ve Uygulama Merkezi Dergisi, 29 (2011) 93-124; Ekrem Buğra Ekinci, "Mecelle Hakkında Değerlendirmeler", Adalet Dergisi, 62-63 (2019) 335-356.

[3] Administrative and economic developments caused social transformations in Ottoman society. For instance, as more women joined employment instead of their husbands, who went off to war, the family structure began to evolve. The feminist movement gained strength with women's compulsory participation in economic and social life. Thus, a family code to regulate family relations was needed. Kayabaş, 16-17.

on Islamic regulations in force.[4] The family code remained in force for a very short period due to the need to adopt secular and modern laws.[5] Also afterward with the introduction of the Turkish Civil Code no. 743, the Mecelle which was inadequate to regulate family law[6], was repealed.[7]

Like these Codes, the law dated 1926 has lost its validity over time. As a result of the developments in society on the equality of women and men, new regulations were needed.[8] Within this framework, the Law of 1926 was revoked and replaced by the Turkish Civil Code dated 2001[9], which is currently in force. The Turkish Civil Code adopted the idea that men and women are equal.[10] Though the Turkish Civil Code's provisions have started to fall short of guaranteeing equality between men and women, the transformation has not yet occurred.

It should be stated that the equality of men and women is separately and clearly regulated in Article 10 of the Turkish Constitution; therefore, all other legal regulations must also ensure equality. Besides, the Republic of Türkiye has become a part of many international human rights documents, such as the Universal Declaration of Human Rights, the European Convention on Human Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women. The international documents concerning women's rights in Turkish civil law are essential. In the following paragraphs, it will be seen that judicial decisions based on international conventions have achieved many developments regarding women's rights. Apart from the international documents, in terms of the Turkish Civil Code, it is stated that equal rights are granted to men and women. Lately, however, some provisions have been introduced to ensure equality between women and men, which have removed the positive

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4 For further information regarding the history of the Civil Code; Selim Kaneti, "A General Review of the New Turkish Civil Code Project", İÜHFM 52/1-4 (1987) 336-344; Selahattin Sulhi Tekinay, *Türk Aile Hukuku*, (4th Edition, Fakülteler Matbaası, İstanbul 1982) 2-3.

5 Çeker, 11.

6 In the Ottoman legal system, family law disputes were in the scope of the Syariah Court. Therefore, family law was not included within the Civil Code, Mecelle. Additionally, the codification of family law was complicated by the sectarian divisions (Hanafi, Sunni, Shafi'i, etc.) that existed in society then. Mecelle is significant as a codification endeavor even if it includes no family law provisions and has made the conditions conducive to a family code. Kayabaş, 31.

7 Karahasanoğlu, 116; Ekinci, 344.

8 Cengiz Koçhisarlıoğlu, "Aile Hukuku'nda Eşlerin Eşitliği", Ankara Üniversitesi Hukuk Fakültesi Dergisi, 40/1 (1988) 252-253.

9 Official Gazette Number: 24607, Date: 08.12.2001.

10 Since Article 8 of the Turkish Civil Code states that *"every person is entitled to a vested right",* this could be interpreted as gender equality must be ensured in the scope of the Turkish Civil Code. Aydı Zevkliler, *Medeni Hukuk,* (Dicle Üniversitesi Hukuk Fakültesi Yayınları No:5, Diyarbakır 1986) 489.

discrimination in favor of women. And some provisions have become inadequate over time. The subject of this study is the evaluation of some precedent provisions of the Civil Code, which aims to ensure equality between men and women.

I. ARTICLES THAT CREATE INEQUALITY IN WORDS AND SPIRIT

This study will examine opinions, thoughts, and solutions regarding four example articles—the surname of women, personal status of the divorced woman, waiting period, and alimony—that cause inequality in the Turkish Civil Code. It is necessary to state that many other articles, provisions, or regulations create unjust situations; nevertheless, examining these would greatly expand the study's boundaries.

A. Surname of Women

Some concepts should be considered by the spirit of its own time. Surname is a concept that develops with the recognition of women's rights. However, a contradiction may occur between modernization movements and culture during these developments. While the legal system was rapidly modernizing, society may not have kept up with this speed.

Türkiye has been experiencing this contradiction regarding the surname regulations. So, this topic has been unresolved in Turkish law for a long time and has not been concluded yet.[11] In fact, for now, there is no regulation regarding women's surnames because the Constitutional Court of the Republic of Türkiye has annulled the article of the Turkish Civil Code.[12]

Women's surname after marriage was regulated in the Turkish Civil Code nr. 4721.[13] According to Article 187, *"A woman takes her husband's surname upon marriage; however, she can also use her previous surname before her husband's surname with a written application to the marriage officer or later to the civil registry office."* As can be seen, in accordance with the letter of the provision, there was a mandatory regulation. That it was impossible for women to use only their maiden name after marriage. Stated differently, the legal framework recognizes the husband's last name as the family name.[14] While men could use

[11] Not all issues connected to gender inequality are legal. It is a social and psychological issue as well. Because of this, achieving legal equality between genders requires that spouses are treated equally on an economic, social, and psychological level. Koçhisarlıoğlu, 269-270.

[12] AYM T.22.02.2023, 2022/155E and 2023/38K. For the full-text <*https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2023-38-nrm.pdf*> accessed 01 March 2024.

[13] For the English translation of the code please follow the link <*https://rm.coe.int/turkish-civil-code-family-law-book/1680a3bcd4*> accessed 01 March 2024.

[14] Serkan Ayan, "Anayasa Mahkemesi Kararları ve Çocuklar ile Kadının Soyadına İlişkin Değişiklik Tasarısı Taslağı Işığında Soyadının İlk Kez Edinilmesi Kendiliğinden Değişmesi ve Değiştirilmesi", Gazi Üniversitesi Hukuk Fakültesi Dergisi, XVI (2012) 19-90; Hakan

their own surname after marriage, not giving this right to women was a clear gender-based discrimination.[15]

The women's status in the marriage union is no longer the same. They have gained independence and have equal rights and obligations in the family.[16] So, it has been accepted as de lege ferenda that women shall be licensed to choose their surname.[17] However, when there was still no effort to make new legal regulations, and the exercise of this right is subject to the obligation to file a lawsuit, it is contrary to gender equality.

Thus, in practice, women proved that the provision creates discrimination by filing a lawsuit and hence used their maiden surnames without their husbands' surnames. The courts agreed that there was an inequality in this provision, but filing a lawsuit was time-consuming and money-consuming. Unfortunately, case law could not provide sufficient legal protection on its own. Meanwhile, many individual applications have been made to the European Court of Human Rights and the Constitutional Court of Türkiye.

The Constitutional Court of Türkiye stated in its early decisions that it doesn't constitute discrimination or violation that women cannot continue to use only their maiden name after marriage.[18] In its rejection decision, the Constitutional Court did not mention the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, to which Türkiye is a party. However, it was clearly emphasized in the dissenting opinion that the provisions of the said convention and Turkish Constitution Article 10 include equality between men and women and that these regulations should be considered.[19]

Atasoy, "Evli Kadının Soyadı Sorunu 'Anayasal' mı 'Bireysel' mi?", Uyuşmazlık Mahkemesi Dergisi, 5 (2015) 131-170.; Hayrunnisa Özdemir, "Türk ve İsviçre Medeni Hukukunda Ad Üzerindeki Hak ve Korunması", Ankara Üniversitesi Hukuk Fakültesi Dergisi, 57 (2008) 561-598; Mustafa Dural, Tufan Öğüz and Mustafa Alper Gümüş, *Türk Özel Hukuku Cilt III Aile Hukuku*, (17th Edition, Filiz Kitabevi, İstanbul 2022).

[15] The opposite viewpoint claims that it would be against public order for women to use their last names. On the other hand, it also states that explaining the situation to others will be challenging if a child has a different last name than his/her parents. Turgut Akıntürk and Derya Ateş, *Aile Hukuku İkinci Cilt* (22nd Edition Beta Yayıncılık, İstanbul 2020) 118.

[16] Koçhisarlıoğlu, 266.

[17] Nevin Ünal Özkorkut, "Kadının Vazgeçilebilir Kişilik Hakkı: Soyadı- Kadının Soyadı Üzerindeki Hakkının Türkiye'deki Tarihsel Gelişimi" I. Türk Hukuk Tarihi Kongresi Bildirileri V.1 (2014) 23-30.

[18] AYM T.29.9.1998, E.1997/61 and K.1998/59. <*https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/1998-59-nrm.pdf*> accessed 01 March 2024.

[19] Ünal Özkorkut, 29; Seda Çakırca, "Evli Kadının Soyadına İlişkin Güncel Gelişmelerin Değerlendirilmesi", İÜHFM, LXX/2 (2012) 149; Hamide Tacir, "Evli Kadının Kendi Soyadını Kullanması Konusunda Anayasa Mahkemesinin Yaklaşımının Temel Hak ve Özgürlükler Bakımından Değerlendirilmesi", Kadir Has Üniversitesi Hukuk Fakültesi Dergisi, 5/1 (2017) 54.

The first Turkish application[20] to the European Court of Human Rights regarding this issue belongs to Ayten Ünal Tekeli.[21] The Court found that the prohibition of using only a maiden name after marriage was contrary to Article 14 of the ECHR. The Court also stated that there cannot be an objective and logical justification, such as family unity, for this discriminatory provision.[22] Despite the violation decisions of the European Court of Human Rights, the Constitutional Court of Türkiye has continued to reject the cases regarding the annulment of Article 187 of the Civil Code Nr. 4721 for a long time.[23]

Finally, in 2023, the Constitutional Court of Türkiye decided to annul Article 187 because of all the developments mentioned above and the women's fight.[24] The Court stated that there is no reasonable and objective justification for the provision preventing women from using their maiden name alone after marriage since the fact that men and women bear a common surname is not a mandatory element that protects family ties. As of now, our Civil Code contains no laws governing women's surnames after marriage. Thus, it is anticipated that there will be a new, equal regulation on women's surnames. In conclusion, the name is a legal right for both men and women. This right cannot be restricted unequally. Therefore, more equitable regulation should be made instead of the repealed form of Article 187.[25]

B. Personal Status of Divorced Women

The issue of the women's surname has not ended with Article 187. According to Turkish Civil Law, the surname of divorced women is another problem. According to article 173; *"In case of divorce, the woman protects her status gained by marriage; however, she takes her surname again before her marriage.*

[20] The first application to the European Court of Human Rights was Burghartz v. Switzerland <*https://hudoc.echr.coe.int*> accessed 01 March 2024.

[21] Ünal Tekeli v. Turkey, 29865/96 <*https://hudoc.echr.coe.int*> accessed 01 March 2024.

[22] Tuncer Güneş v. Turkey, 26268/08 <*https://hudoc.echr.coe.int*> accessed 01 March 2024.

[23] AYM T.10.03.2011, E.2009/85 and K.2011/49. For the full-text <*https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2011-49-nrm.pdf*> accessed 01 March 2024.

[24] AYM T.22.02.2023, 2022/155E and 2023/38K. For the full-text <*https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2023-38-nrm.pdf*> accessed 01 March 2024.

[25] Tuğçem Seçer, "Eşlerin Soyadı ve Kanun Metni Önerisi" İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi, 9/1 (2024) 284-285; Tuğçem Seçer, "Çocuğun Soyadı" Yargıtay Dergisi, 49/3 (2023) 599-634; Damla Özden Çelt, "TMK M. 187'nin İptali Kararının Çocuğun Soyadına Olası Etkileri ve Olması Gereken Hukuk Bağlamında Bir Öneri", Akdeniz Üniversitesi Hukuk Fakültesi Dergisi, II (2024) 1065-1095; Seda Baş, Sezgin Baş, "Anayasa Mahkemesi'nin TMK M. 187 Hükmüne İlişkin İptal Kararından Sonra Evlenen Kadının Soyadı", Kırıkkale Hukuk Mecmuası, 4/2 (2024) 493-526; Mustafa Şahin, "Anayasa Mahkemesi'nin İptal Kararı Ardından Türk Hukukunda Evli Kadının ve Çocuğun Soyadı" TBB Dergisi 170/36 (2024) 1-38.

If the woman was a widow before marriage, she can ask the judge to be allowed to bear her celibate name. If it is proven that the woman has an interest in using the surname of her husband and that it will not harm the husband, the judge allows her to bear her husband's surname upon her request." As it's seen, as a rule, divorced women keep the status that they gained by marriage. However, while concepts like citizenship and majority are ensured, even though the surname is also a personal status right, it's not protected.[26]

After the dissolution of marriage, women must retake their maiden name. The law provides no simple choice for the woman who takes her husband's surname after marriage.[27] The women may file a law case to keep their husband's surname after marriage when some legal conditions are provided.[28] These provisions make women beg for the husband's surname after marriage.[29] The judge will only accept the case if the women are interested in using the surname and if this use will not harm the husband's interest. Surname is an essential element of personality. Regardless of how it is gotten, it becomes part of the personality. For this reason, it violates the personality rights of women who took their husband's surname not voluntarily but because of a legal regulation that forces them to leave the surname after the marriage union has ended.[30]

Also, according to Article 173, when the legal conditions that the women provide to keep their husband's surname after marriage change, the ex-husband may request an annulment of the court's permission. In other words, the ex-husband may claim from the court to prevent his ex-wife from using his surname.[31]

Meanwhile, an application has been made to the Constitutional Court of Türkiye. In the application, it was alleged that only the men are entitled to request the annulment of the decision allowing the women to use their divorced husband's surname, which is contrary to equality under Article 10 of the Turkish

26 Tekinay, 301; İpek Sağlam, Turkish Family Law, (Oniki Levha Yayınları, İstanbul 2019) 178.

27 Sağlam, 178.

28 Sağlam, 179-180; Ömer Uğur Gençcan, *Boşanma Hukuku*, (10th Edition Yetkin Yayınları, Ankara 2021) 1217-1218; Burcu Bahar Çataloğlu B. B and Seldağ Güneş Peschke, "30.09.2015 tarihli HGK Kararı ve Sonrası Evli Kadının Soyadına İlişkin Bir Değerlendirme", AÜHF Dergisi, 69/2 (2020) 407.

29 Kumru Kılıçoğlu Yılmaz, "Kadının Bitmeyen Soyadı Sorunu" Ankara Barosu Dergisi, 4 (2014) 590.

30 Burcu Bahar Çataloğlu, Seldağ Güneş Peschke, "30.09.2015 tarihli HGK Kararı ve Sonrası Evli Kadının Soyadına İlişkin Bir Değerlendirme", AÜHF Dergisi, 69/2 (2020) 408; Saibe Oktay Özdemir, "Soyadı ile İlgili İsviçre Medeni Kanunu'nda 2013 Yılında Yürürlüğe Giren Değişiklikler ile Türk Hukukundaki Durumun Karşılaştırılması" Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 22 (2016) 2019; İffet Didem Suna, "Kadının Soyadı" Konya Barosu Dergisi, 1/1 (2021) 34-38.

31 Sağlam, 180.

Constitution. Because it is argued that women must wait for their divorced husbands to file a case if the circumstances alter. In this instance, restricting the women's ability to file a lawsuit contradicts the ideas of legal equality and the right to legal remedies. In this decision, the Constitutional Court of Türkiye stated that this article doesn't constitute any discrimination or violation.

In its rejection decision, the Constitutional Court mentioned that although it is stated in the application that only the men can request the annulment of the court's permission decision, the purpose of the regulation is not to prevent the divorced women's right to sue, but to allow the men, who will be directly affected by the change of women's conditions. Furthermore, there is no mandatory regulation to express that the man can only submit the action. Women permitted to use their ex-husband's surname may also ask for this permission to be withdrawn if the situation changes or there is no longer a justified reason. Therefore, Article 173 does not contradict the principle of equality under Article 10 of the Turkish Constitution.[32]

Although the Constitutional Court of Türkiye has rejected the application, this decision does not change the fact that the article creates gender inequality. The issue here is not the recognition of the right to file a lawsuit for women or men but to give women the freedom to protect their personal status after divorce. As beforementioned, the widowed women shall return to their widow's surname upon remarriage and divorce. On the other hand, this regulation aims to allow women to bear the same surname as their children from the divorced husband.[33] But in today's world, women may, for example, want to be recognized with their ex-husbands' surname just because of their academic publications.[34] Nonetheless, prohibiting the women's right to use their maiden name to offer protection is incorrect.

Furthermore, the legal procedure is not over even when the women file a lawsuit to be granted permission to use their ex-husband's surname because women do not have this so-called privilege forever. If the circumstances change, for example, if the women get married, the men can ask the court to annul this decision. In other words, the women must live with the risk of losing their surname repeatedly.[35] Therefore, Turkish Civil Code Article 173 should be annulled without the need for an updated regulation. An update or replacement won't be necessary because, as beforementioned, Article 187 has been repealed and a more liberal provision has been expected to take place.

32 AYM T.01.03.2012, 2011/51E and 2012/32K. For the full-text <*https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2012-32-nrm.pdf*> accessed 01 March 2024.

33 Gençcan, 1217.

34 Sağlam, 179; Y2HD T.19.03.2009, E.2007/19005 and K.2009/5094.

35 Ahmet M. Kılıçoğlu, *Aile Hukuku,* (4th Edition Turhan Kitabevi, Ankara 2019) 126.

C. Waiting period for Women after Dissolution of Marriage

Türkiye is a secular country, according to the mandate of the 1982 Constitution Article 2, so the Constitution neither recognizes an official religion nor promotes any. However, religion plays a leading role in family relationships beyond a shadow of a doubt.[36] Especially in Türkiye, most of the society believes in Islam. Therefore, it has a great influence on people's lives. So, there is a complex relationship between religion and society, and religious orders may structure the legal regulations somehow.[37]

The period that the women must wait after the dissolution of marriage before remarrying someone else is called *"iddet", "iddah"* or *"waiting period"*.[38] Islam puts significant importance on the waiting period. According to Islam, iddah is a legal and religious duty.[39] Iddah strongly expects to provide multiple benefits. First, it's a protection for the maintenance of true bloodline. Second, it motivates women to respect and be loyal to their ex- or dead husbands.[40] Third, it creates time for couples to think about remarriage.[41] And the last, it prevents couples from having indiscreet affairs.[42]

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36 *"Throughout history and across faiths and cultures, religion has led to both good and evil, to familial joy and familial sorrow."* David C. Dollahite, Loren D. Marks, Hilary Dalton, "Why religion helps and harms families: A conceptual model of a system of dualities at the nexus of faith and family life" Journal of Family Theory & Review, 10/1 (2018) 219.

37 Annette Mahoney, Kenneth I. Pargament, Aaron Murray-Swank, Nichole Murray-Swank, "Religion, and the Sanctification of Family Relationships" Review of Religious Research, 44/3 (2003) 220; Ahmet Rıfat Geçioğlu, Ertuğrul Döner, "İslâm'da Evlilik ve Aile Bağlamında Günümüzde Tartışılan Konular Üzerine Psiko-Sosyal Bir Değerlendirme" ÇÜİFD, 19/2 (2019) 79.

38 Tekinay, 300; Zevkliler, 627; Akıntürk/Ateş, 291; Halil Cin, *İslam ve Osmanlı Hukukunda Evlenme* (Second Edition, Selçuk Üniversitesi Basım Evi, Konya 1988); Fatih Karataş, "İslam Hukukunda İddet" Şırnak Üniversitesi İlahiyat Fakültesi Dergisi, 4/8 (2013) 162; İpek Yücer Aktürk, "Kadınlara Özgü Bekleme Süresi ve Sınırlı Evlenme Yasağı Sorunu", Başkent Üniversitesi Hukuk Fakültesi Dergisi, 9/2 (2023) 195-208.

39 Sunuwati Siti Irham, Yunus Rahmawati, "Gender Equality in Islamic Family Law: Should Men Take Iddah (Waiting Period After Divorce)?" Russian Law Journal, 11/3 (2023) 1132; Karataş (n.25), 162-164.

40 Not only Islam, but many people from different beliefs also think that ties to one's family have a direct spiritual connection. So, family relationships are so frequently seen as holy. Mahoney et al. (n.24), 222-223; For detailed information regarding religions and family relationships, see Carle Zimmerman, "Family and Religion" Social Science, 48/4 (1973) 203-215.

41 The waiting period may lead couples to re-think about divorce, in other words, it may discourage them from dissolution of marriage. Crystal Wong Ho-Po, "Can't Wait Any Longer? The Effects of Shorter Waiting Periods on Divorce and Remarriage" American Law and Economics Review, 23/2 (2021) 255.

42 Sinta Pomahiya, Nur M. Kasim, Dolot Alhasni Bakung, "Legal Consequences of Marriage During Iddah Period Based on Compilation Islamic Law" Estudiente Law Journal, 4/3 (2022) 717; Karataş (n.25), 164-165.

Most Islamic States regulate the iddah period in their family laws.[43] This period is generally applied only to women.[44] On the other hand, the iddah period is sometimes adopted for men. For example, men should not marry ex-wives' sisters or aunts during the waiting period. If the men divorce one of the four wives, shall not marry in the waiting period for this wife. If the men divorce a freewoman, shall not marry a slave woman in the waiting period for his ex-wife.[45] But, it must be considered that the Islamic rules have come to the patriarchal structured society. Hence, these rules are generally in favor of men, and in this connection, they create a contradiction with today's women's rights.[46]

As mentioned above, before the Turkish Civil Code nr.743, there was a family code of the Ottoman Empire (Hukuk-ı Aile Kararnamesi) which was based on Islamic regulations in force. Since iddah is a legal and religious duty according to Islam, the family code of the Ottoman Empire has regulated this religious duty on a legal basis.[47]

The Turkish Civil Code nr.743 Article 95 has also adopted this regulation. According to the article, *"A woman who becomes a widow because of the death of her husband or divorce, or whose marriage has been declared null and void, may not remarry until three hundred days have passed. This period ends with childbirth. The judge may shorten this period if it is not possible for the woman to conceive or if the spouses wish to marry each other again."* However, the waiting period regarding religious basis differs from this regulation.[48] The most major evidence of that conclusion is that according to the Turkish Civil Code if the women marry again within the waiting period, the marriage will still be valid.[49] In addition, women are allowed to engage but not marry during the

43 For example, according to Indonesian Marriage Law *"If the marriage is broken up due to divorce, then the waiting period for women who are still menstruating is set at three sacred times with a minimum of 90 days and women who are not menstruating is set at 90 days."* Pomahiya et al. (n.29), 716.

44 Since only women are capable of becoming pregnant, the idea of iddah is exclusively related to sex. Rahmawati et al. (n.26), 1133.

45 Cin, 122; This waiting period for men is comparable to the penal waiting period defined by Turkish Civil Code nr.743 Article 122. However this regulation is annulled in 1988.

46 Geçioğlu/Döner (n.24), 607.

47 Yılmaz Yurtseven, "1917 Tarihli Hukuk-ı Aile Kararnamesi ve Osmanlı Aile Hukukuna Getirdiği Yenilikler", Selçuk Üniversitesi Hukuk Fakültesi Dergisi, 11 (2003) 248; Seda Gayretli Aydın, "Kadın ve Kanuni Bekleme Süresi", TBB Dergisi, 136 (2018) 267; Konan, 348-349; Kayabaş, 93-94; Yücer Aktürk, 196.

48 For instance, in Islam, this period varied depending on whether the woman was a slave or free. Cin, 119-122.

49 At the same time, the registrar who does not refuse the marriage application and perform the marriage ceremony has no legal or criminal liability. Yücer Aktürk, 200.

waiting period.[50]

This rule has also continued to be accepted by the Turkish Civil Code nr.4721. According to Turkish Civil Code Article 132, "*If the marriage has ended, the woman cannot marry until three hundred days have passed from the end of the marriage. The time is over with breeding. In cases where it is understood that the woman is not pregnant from her previous marriage or if the spouses whose marriage has ended want to marry each other again, the court removes this period."*[51] Unlike Islamic *"iddah",* according to the Turkish Civil Code nr. 4721 *"the waiting period"* is not related to religious duties.[52] Turkish Civil Code regulates the waiting period to protect maintaining a true bloodline.[53]

In this connection, the Turkish Civil Code forbids women from remarrying during the waiting period; however, if the marriage is established in some way, this marriage cannot be declared null and void any longer. Besides, when the woman proves before the court that she is not pregnant, may remarry anytime.[54] This article doesn't give any restrictions for men regarding the dissolution of marriage but does not allow women to marry within 300 days.[55] In other words, no obstacles or delay periods prevent the men from marrying again.[56] As it is seen, if a woman wants to marry someone other than her divorced husband during this duration called a waiting period, she needs to prove that she is not medically pregnant by applying to the court.

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50 Esat Arsebük, *Medeni Hukuk Cilt II*, (Recep Ulusoğlu Basımevi, Ankara 1940) 620.

51 This article is regulated in parallel with the former Article 103 of the Swiss Civil Code. However, the Federal Law dated 26.06.1998 repealed Article 103 of the Swiss Civil Code.

52 The waiting period exists not just for countries whose religion is Islam, but also it exists in secular or non-Islamic countries. Hatam Soltani, Naser Ebrahimi Boukani, Alireza Lotfi, Kamel Kiani, Fatemeh Mozafari, "The Effect of Scientific Progress on Waiting Period Legal Law" Cumhuriyet Üniversitesi Fen Edebiyat Fakültesi Fen Bilimleri Dergisi, 36/3 (2015) 3161.

53 Zevkliler, 627; Gayretli Aydın, 271; Arsebük, 618-619; Şeyma Nalbant Ülger, "İslam Hukuku ve Türk Medenî Kanunu'nda İddet" Kocatepe İslami İlimler Dergisi, 5/2 (2022) 609; Sera Reyhani Yüksel, "Kadın ve Erkeğin Eşit Haklara Sahip Olması İlkesinin Aile Hukuku Alanında Uygulanması" TBB Dergisi, 145 (2019) 405.

54 Iddah must be more than just sex. Considering that this idea offers a married couple the opportunity to heal their relationship and marriage, some Islamic beliefs state that men ought to observe the iddah period as well. To be able to marry again, they must wait for his wife's iddah time to end. Rahmawati et al. (n.26), 1136-1137.

55 In some states the waiting period may be applied to both men and women. For example, the waiting period for divorce is another type of waiting period that can be seen in the United States of America. However, this type of waiting period still creates a double standard for women. Because women usually have an age concern when they remarry, on the other hand, men generally remarry younger women. Ho-Po (n.43), 262.

56 Arsebük, 618; Sağlam, 177; Reyhani Yüksel (Aile Hukuku Alanında Uygulanması), 406.

On the ground of this double standard, Nurcan Bayraktar filed a case before the European Court of Human Rights.[57] Nurcan Bayraktar stated that Article 132 of the Turkish Civil Code constitutes discrimination based on gender and is therefore contrary to the Turkish Constitution, International Human Rights Agreements, the European Convention on Human Rights, and other International Agreements and Conventions in which Türkiye is a party. Applicant Nurcan Bayraktar first brought an application to the Court of First Instance, then the Court of Cassation, and finally to the Constitutional Court. The Court of First Instance, the family court, stated in its decision that women and men are not equal biologically. The court noted that it should not be missed out that the ability to give birth is a unique characteristic of women. Hence, this article doesn't constitute gender-based discrimination and violation of human rights. The Court of Cassation also approved this decision, and the Constitutional Court rejected the plaintiff's application due to ratione materiae. For her, the last resort was the European Court of Human Rights, so she took the case there.

European Court of Human Rights decided in favor of plaintiff Nurcan Bayraktar and accepted the violation of rights due to articles 8[58], 12[59], and 14[60] of the European Convention on Human Rights.[61] The Court concludes that imposing a three-hundred-day waiting period on divorced women due to the possible pregnancy, unless the women prove through medical examination that they are not pregnant, is considered direct gender-based discrimination and cannot be justified through the aim of paternity.[62]

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[57] Nurcan Bayraktar v. Türkiye, 27094/20 <https://hudoc.echr.coe.int/> accessed 01 March 2024.

[58] Article 8 regulates the right to respect for private and family life. According to this *article "1. Everyone has the right to respect his private and family life, his home, and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is following the law and is necessary for a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others."*

[59] Article 12 regulates the right to marry. According to this *article, "Men and women of marriageable age have the right to marry and to find a family, according to the national laws governing the exercise of this right."*

[60] Article 14 regulates the prohibition of discrimination. According to this *article, "The enjoyment of the rights and freedoms outlined in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

[61] For the full-text *<https://www.echr.coe.int/documents/d/echr/convention>* accessed 01 March 2024.

[62] There is an important annotation in this decision which states that the *"European Court of Human Rights must speak truth and fairly on the issues regarding equality between men*

As we all know, marriages usually end long before the court decides to divorce. Again, when the court process is prolonged[63], the parties may couple with someone else. In addition, although couples pledge loyalty to each other, they may have other partnerships or sexual intercourse with another person during marriage. Hence, when a woman becomes pregnant during or after a short time from marriage, the assumption that the child is from the divorced husband cannot taken account for any legal or administrative decision. For example, nowadays, a significant number of families are based on different types of unions other than civil marriage, such as a civil union or common-law union, and many children are even born outside of marriage or because of anonymous sperm donation.[64]

In conclusion, marriage, divorce, and remarriage are legal rights for both men and women. These rights cannot be restricted in an unequal manner, and the waiting period is a form of gender injustice. Therefore, the Turkish Civil Code Article 132 should be annulled immediately.

D. Alimony

Alimony is financial support that a court orders to give their spouse during separation or after divorce.[65] The aim of alimony is the belief that the spouse's duty to support one another should continue after divorce.[66] According to Article 175 of the Turkish Civil Code, *"The party who will fall into poverty due to divorce may request alimony indefinitely, in proportion to his/her financial strength, for his/her livelihood, provided that the fault is not more severe."* As seen from the provision, alimony is gender-neutral according to the Turkish Civil Code, which may seem equal.[67] However, this provision should be considered, along with some important facts about Turkish society's social and cultural understanding.[68] Because the Civil Code may enact laws contradicting gender equality to protect

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and women. Court must speak truthfully; because these issues are important and must speak fairly; because the Court also undertakes a very important pedagogical function."

63 A divorce case lasted approximately three years in Türkiye. See <https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/29032023141410adalet_ist-2022cal%C4%B1sma100kapakl%C4%B1.pdf > accessed 01 March 2024.

64 See; Nurcan Bayraktar v. Türkiye, 27094/20 <https://hudoc.echr.coe.int/> accessed 01 March 2024.

65 Mecit Demir, *Türk Medeni Hukuk Öğreti ve Uygulamasında Yoksulluk Nafakası* (Seçkin Yayıncılık, Ankara 2018) 18-19; Hüseyin Hatemi, *Aile Hukuku* (9th Edition On İki Levha Yayınları, İstanbul 2021) 137; Emin Başaklar, Nafaka Davaları, (Halkevleri Kültür Vakfı Basımevi, Ankara 1974) 87.

66 Dural, Öğüz and Gümüş, 157; Demir, 40.

67 Dural, Öğüz and Gümüş, 158; Demir, 61-62.

68 Sinan Sami Akkurt, "TMK m. 175 Hükmünün Yoksulluk Nafakasının Süresine İlişkin Yaklaşımının Hukuki Yorum Yöntemleri Çerçevesinde Tahlili" Anadolu Üniversitesi Hukuk Fakültesi Dergisi, 10/1 (2024) 1-18.

the weaker party against social realities.[69]

Even today, it cannot be claimed that women reach absolute freedom and equality. Such an obvious norm is that they still cannot get equal pay for equal work.[70] According to The Universal Declaration of Human Rights Article 23, *"Everyone, without any discrimination, has the right to equal pay for equal work."*[71]

Although women's rights advocates fight to improve women's legal, educational, economic, and socio-political status, many economically inactive women remain in Türkiye.[72] These women are depending on their husbands' income. So, after divorce, they generally have no job and no income other than alimony. Therefore, in the Turkish law system, alimony is a concept that men generally pay after divorce. Besides, many women work at a job and do the housework without any help. However, when the court calculates the financial income of each spouse for alimony or marital property, the housework doesn't count as financial income or support.[73] Even though there has been much invisible labor that women have done during the marriage.[74] Additionally, in Turkish culture, women and men do not receive equal pay for equal work, and in some regions, married women are not allowed to work traditionally.[75]

According to men's advocates, women can be said to have two sources of income given the regime of acquired property participation (economic

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69 Zevkliler, 489.

70 See the report <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_650553.pdf> accessed 01 March 2024.

71 <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 10 March 2024.

72 See the reports <https://ceidizler.ceid.org.tr/dosya/turkiyedetoplumsal-cinsiyetesitliginiizlemeraporu20212022pdf.pdf>; <https://vatandas.jandarma.gov.tr/KYSOP/uzaktan_egitim/Documents/1%20TCE.pdf>; <https://read.oecd-ilibrary.org/social-issues-migration-health/the-pursuit-of-gender-equality_9789264281318-en#page2> accessed 10 March 2024.

73 Gillian Douglas, "Women in English Family Law: When Is Equality Equity?" Singapore Journal of Legal Studies, Special Issue (2011) 25-26.

74 Domestic labor includes many elements, such as cleaning, cooking, laundry, dishwashing, ironing, childcare, and emotional support for children and husbands. In modern society, the concept of work is considered to be labor in exchange for wages. For this reason, these works of women, which cover almost half of the day, are not recognized as labor. Since unpaid domestic labor is considered the natural responsibility of women, it is not considered in divorce proceedings. Ayşe Aydın Şafak, *Feminist Bir Bakışla Türk Aile Hukukunda Kadın Bedeni* (On İki Levha Yayınları, İstanbul 2014) 52-54.

75 Akkurt, 3; Semra Yılmaz, "Türkiye'de Kadınların Çalışma Hayatındaki Yeri ve Sosyal Güvenlik Hukuku Düzenlemeleri" Sosyal Çalışma Dergisi, 2/2 (2018) 63-80; Saniye Dedeoğlu, "Eşitlik mi, Ayrımcılık mı? Türkiye de Sosyal Devlet, Cinsiyet Eşitliği Politikaları ve Kadın İstihdamı" Çalışma ve Toplum Dergisi, 21/2 (2009) 41-54.

partnership) and the indefinite alimony arrangement. Therefore, when one of the parties receives an equal share of the marital estate, this may be considered a source of income for imposing support responsibilities.[76] Lately, there has been a big debate regarding Article 175 of the Turkish Civil Code about whether the government should regulate "alimony with a deadline" rather than "indefinite alimony" 77 because men think that indefinite alimony violates rights.[78]

Article 144 of the repealed Civil Code nr.743 regulated that alimony can be granted for one year after marriage.[79] This limitation was criticized at that time as women could fall into an economically difficult situation if the alimony was granted for a year. Thus, the regulation regarding alimony should have been indefinite.[80] On the other hand, it's important to acknowledge that social and economic structure developments have lessened the differences between men and women.[81]

This discussion has also been subjected to the Constitutional Court of Türkiye. The applicant claimed that the phrase "indefinitely" in Article 175 of the Turkish Civil Code, obligates one spouse with a lifelong financial duty in favor of the other. Therefore, this article contradicts the principle of equality under Article 10 of the Turkish Constitution. In this decision, the Constitutional Court of Türkiye stated that this article doesn't constitute any discrimination or violation. In its rejection decision, the Constitutional Court mentioned that if the conditions are completed, the spouse must provide alimony indefinitely to the other spouse who falls into poverty because of the divorce. This requirement comes from the principle of the social state and from the spouse's duty to support one another, which should continue after divorce.[82]

In this scope, for the first time, an alimony restricted to two years was awarded by the First Instance Court, a family court, because the marriage took a short time, the spouses had no kids, and they would never see each other again. However, the Court of Cassation has reversed this decision and stated that

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76 Laura W. Morgan "Double Dipping: A Good Theory Gone Bad [notes]" Journal of the American Academy of Matrimonial Lawyers, 25/1 (2012) 139-140.

77 Dural, Öğüz and Gümüş; 159*;* See <*https://www.ntv.com.tr/turkiye/adalet-bakani-tunctan-suresiz-nafaka-aciklamasi,VDMPO1Gyikux1IpnJr3xww; https://medyascope.tv/2023/10/11/yeniden-refah-partisi-nafaka-teklifini-tbmm-baskanligina-sundu/*> accessed 01 March 2024.

78 Dilek Keleş, "Toplumsal Cinsiyet Karşıtı Hareketlerin Bir Örneği Olarak "Süresiz Nafaka Mağdurları Platformu" Akdeniz Kadın Çalışmaları ve Toplumsal Cinsiyet Dergisi, VI/2 (2023) 517-544; Demir, 65-67.

79 Arsebük, 794-795; Hatemi, 137; Başaklar, 87.

80 Zevkliler, 630; Dural, Öğüz and Gümüş; 160.

81 Tekinay, 309; Hatemi, 140.

82 AYM T.17.05.2012, 2011/136E and 2012/72K. For the full-text <*https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2012-72-nrm.pdf*> accessed 01 March 2024.

indefinite alimony may be awarded when one of the spouses cannot maintain the standard of living[83] for the parties after the divorce. Moreover, the law does not restrict alimony with time limitations. Since the law stipulates that the alimony should be *"indefinite",* limiting the alimony to a certain period by relying on the power of discretion would constitute a clear violation of the law.[84]

The indefinite alimony has also been subjected to the Constitutional Court of Türkiye.[85] The application claims that one of the spouses is under a lifelong financial obligation in favor of the other after the divorce due to indefinite alimony. It's also submitted that the indefinite alimony withholds the spouse's remarriage opportunity. However, the Court decided that the indefinite alimony cannot considered as a tool for unjust enrichment. According to the Turkish Civil Code, women may only ask for alimony if they cannot maintain their daily life on their own income. The Court also stated that alimony ends automatically in case of re-marriage of the alimony creditor or death of one of the parties. Besides, alimony also ends automatically when the alimony creditor lives with somebody else or starts to produce higher income than the other party and when he/she lives a dishonorable life or the alimony obligator completely loses his/her ability to pay. In conclusion, the Court decided that indefinite alimony does not create any violation of rights because the main aspect of this concept is to support the spouse who will fall into poverty due to divorce to sustain minimum living needs.[86]

On the other hand, in the repealed provision of Turkish Civil Code no.743, a woman's economic situation must have been well-off for a man to ask for alimony.[87] However, this provision was issued because it contradicts the principle

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83 According to the Court of Cassation standard of living *"should be assessed by evaluating the economic conditions of the day, the social and economic situation of the parties and their lifestyles."* YHGK, T. 25.11.2009, E. 2009/2-500 and K. 2009/557. For the full-text <*https://karararama.yargitay.gov.tr/*> accessed 01 March 2024.

84 Y2HD, T. 12.12.2017, E.2016/8859 and K.2017/14407. For the full-text <*https://karararama.yargitay.gov.tr/*> accessed 01 March 2024.

85 AYM, T.17.05.2012, E.2011/136 and K.2012/72. For the full-text <https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2012-72-nrm.pdf> accessed 01 March 2024.

86 Some authors criticize this approach. According to this criticism, courts must follow some criteria (age, marriage duration, child, etc.) regarding indefinite alimony. Because they generally decide in favor of women without any further examination. Courts must act neutral regarding indefinite alimony decisions. Seda Baş, Nisa Özcan, "Yoksulluk Nafakasında Süre Sorununun Anayasal ve Medeni Hukuk Boyutuyla Tartışılması ve Bir Öneri Olarak Boşanma Tazminatı" Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi Dergisi, 4/1 (2022) 350-351.

87 According to Article 144/2 *"The spouse who will fall into poverty due to divorce may request alimony from the other spouse indefinitely in proportion to his/her financial capacity, if his/her fault is not more severe. However, for the husband to request alimony from the wife, the wife must be in a state of affluence."*

of equality between women and men. Nevertheless, after the legal modification of the Civil Code, men and women become subjected to equal conditions regarding the obligation to pay alimony. This regulation, which seems prima facie fair, cannot ensure equality when evaluated with social facts.[88]

From this point of view, it becomes significant to discuss how the idea of equality presents itself as positive discrimination. Since women are often treated unfairly in society, they need more protection in some fields. One of the areas where women most need positive discrimination[89] is in the institution of the family. It may be discussed that women and men should be equal before the laws to ensure justice. However, justice does not always rise from commutative justice *(Justitia Commutative)*. Even if equality is one of the foundations of the concept of justice, this concept should also include providing more to needy individuals.[90]

The idea that absolute equality in a regulation does not have the same effect on women and men implies that the focus should be on the rule of law's consequences and effects. This is called substantive equality. Substantive equality focuses, in particular, on compensating for past discrimination in the present. So, it is insufficient to adopt regulations while ignoring social consequences such as women's poverty and financial dependence on men created in time.[91]

So, treating everyone equally does not always ensure justice. It is necessary to treat those who are equal equally and those who differ differently. In this circumstance, it's just that the women can be given more rights and protection than the men.[92] Besides, according to the Constitution of the Republic of Türkiye Article 10, "*Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. Measures taken for this purpose shall not be interpreted as contrary to the principle of equality."*

According to the traditional marriage understanding, the wife makes numerous initial sacrifices that are valuable solely to her husband, such as childcare, household duties, or emotional support. These investments would be only made in exchange for a long-term commitment. In other words, a logical negotiator

88 Sera Reyhani Yüksel, "Türk Medeni Kanunu Bakımından Kadın-Erkek Eşitliği" Gazi Üniversitesi Hukuk Fakültesi Dergisi, XVIII (2014) 195.

89 Positive discrimination at work is another field that is regulated in the Turkish laws, Devrim Ulucan, "Eşitlik İlkesi ve Pozitif Ayrımcılık" Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 15/Özel Sayı (2014) 372-378.

90 *"Treating everyone equally may itself disrupt equality."* A. Can Tuncay, "Adalet Nedir?" Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi, 171-172/13 (2018) 229-231.

91 Aydın Şafak, 37-42.

92 Bihterin Dinçkol, "Kadın-Erkek Eşitliği İçin Pozitif Ayrımcılık" İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, 8/4 (2005) 103-104.

could only make these expenditures in exchange for a long-term commitment.[93] In this scope, seeing marriage as an investment, especially in today's conditions, would be unfortunate.

While spouses typically originate from identical socioeconomic backgrounds, their earning capacities differ. Because men often make more money than women do. True equality in terms of income to the marriage cannot be achieved even when men and women have identical salaries since the woman still must fulfill her marital responsibilities. Besides, women must generally abandon many career opportunities to meet their marital obligations.[94] No woman should invest all her being in an emotional relationship that may not work out.[95] Even if the court orders the man to pay alimony to the woman, her economic well-being will be reduced after the marriage since her income is less.[96]

Leaving men under the obligation to pay alimony to their divorced wives throughout their lives can be seen as very unequal. However, as mentioned above, the article regarding alimony is gender-neutral in the Turkish Civil Code. For this reason, the women are also under the same obligation. However, in the real world, as women cannot achieve the same economic and social conditions as men, they generally may have the role of alimony creditor. So, the law should find a solution to ensure equality for both genders.

In this scope, the Turkish Civil Code may rule out the possibility of indefinite alimony. In this case, the court may decide without eliminating the positive discrimination granted to women, but at the same time, by adopting an egalitarian attitude towards men. So, the court can decide by focusing on the specific status of the marriage, such as the division of duties during the marriage, the duration of the marriage, the standard of living during the marriage, the age and health of the spouses, the income and assets of the spouses, the extent and duration of child care still required of the spouses, the vocational training and career

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93 Ellman's theory starts with the idea that, to the extent that they make less money than their spouses, women should focus on household tasks. Ira Mark Ellman, "The Theory of Alimony" California Law Review, 77 (1989) 42; Given the conditions at the time, the theory might hold water since women's involvement in business was extremely restricted at that period. But in today's economic world, women should be just as powerful as men. As a result, it is unrealistic to expect women to focus mostly on housework when men are employed.

94 Ellman (n.52), 46.

95 The amount of alimony awarded by the courts is enough that it prevents the alimony creditor from maintaining a life worthy of human dignity, and it is frequently uncollected because of the alimony obligor's illegal actions. For the full-text <*https://www.barobirlik.org.tr/Haberler/tubakkom-suresiz-nafaka-iddialari-hukuki-gercegi-yansitmamaktadir-84000*> accessed 01 March 2024.

96 The author proposed the restitution mechanism as a solution. June Carbone, "Economics, feminism, and the reinvention of alimony: A reply to Ira Ellman" Vanderbilt Law Review, 43/5 (1990) 1496.

prospects of the spouses and the likely cost of reintegration into working life and ensure the most equal decision for both parties.[97]

CONCLUSION

Equal rights are promised to men and women in the Turkish Civil Code. This study focuses on analyzing several precedent-setting clauses of the Turkish Civil Code that are supposed to ensure gender equality. From this point, this study examines the provisions of the law that have recently been subjected to judicial decisions of the High Courts of Türkiye and the European Court of Human Rights.

Firstly, the surname of women is such a concept that has developed with the recognition of women's rights. Despite this, it is an issue that has not been resolved for years. Notwithstanding the annulment decision of the Constitutional Court of Türkiye, the parliament has still not made the necessary regulation. Also, from the judicial reform package, the draft law on the new regulation to be made instead of the annulled provision is almost the same as the abrogated regulation. Despite adverse events, the new regulation must eliminate discrimination and ensure equality by giving freedom to use their surname to women because women should be given equal choices with men regarding civil rights.

Second, another point to be mentioned is that it is insufficient to revise only the annulled provision, Article 187. Because there are more provisions regarding the surname in the Turkish Civil Code, for example, along with the amendment of the provision on the woman's surname, Article 173 should also be annulled without needing an updated regulation. Because, as mentioned, this provision still creates discrimination against women. Hence, it would be more appropriate to reexamine the provisions of the Civil Code down to the ground before making regulations on the surname.

Third, the waiting period is a concept that is impossible to be accepted in the frame of gender equality. This article is regulated in parallel with the former Article 103 of the Swiss Civil Code, which was repealed in 1998. In Turkish law, imposing a three-hundred-day waiting period on divorced women due to the possible pregnancy, unless the women prove through medical examination that they are not pregnant, creates direct gender-based discrimination and cannot be justified through the aim of paternity or bloodline. The waiting period is a form of gender injustice. Therefore, Turkish Civil Code Article 132 should be annulled immediately without other replacement legislation.

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[97] Dural, Öğüz and Gümüş, 160; For example, Hatemi suggests that the overall wealth of the other spouse will be calculated proportionately and that the marital settlement for divorce may be determined based on this calculation. Hatemi, 140.

It may be discussed that women and men should be equal before the laws to ensure justice. However, justice does not always rise from commutative justice. Although the concept of justice is based on equality, it ought to involve providing more to those in need. In other words, it is necessary to treat those who are equal equally and those who differ differently. So, injustice is arising from this point. On the other hand, it is not appropriate to claim that there is no inequality in terms of indefinite alimony from men's aspect. So, the law should find a solution to ensure equality for both genders.

Article 125 of the Swiss Civil Code may enlighten Turkish legislators on this. According to this regulation, when a spouse cannot reasonably be expected to provide for his or her maintenance, the other spouse must make a suitable contribution. In deciding whether such a contribution is to be made and, if so, in what amount and for how long, some factors are stated in the provision. These are the division of duties during the marriage, the duration of the marriage, the standard of living during the marriage, the age and health of the spouses, the income and assets of the spouses, the extent and duration of child care still required of the spouses, the vocational training and career prospects of the spouses and the likely cost of reintegration into working life and expectancy of federal old age and survivor's insurance benefits and of occupational or other private or state pensions, including the expected proceeds of any division of withdrawal benefits.

Similar provisions in the Turkish Civil Code may rule out the possibility of indefinite alimony. In this case, the court may decide without eliminating the positive discrimination granted to the woman but at the same time by adopting an egalitarian attitude towards the man. So, the court can decide by focusing on the specific status of the marriage and spouses and ensuring an equal decision for both parties.

In sum, the surname of women, personal status of the divorced woman, waiting period, and alimony were only four examples of inequalities in the Civil Code as in practice. For example, even if divorces are due to domestic violence, the provisions of the Civil Code allow the courts to tend to equate the faults of the husband and wife in order not to rule compensation in favor of women. Again, the Civil Code's provision, which states that the peace and benefit of marriage should be considered in the choice of profession, is interpreted by the court only against women's choice of profession in practice. It's also well known that men typically disclose low incomes during court proceedings, and tragically, our system makes it simple to submit paperwork that misrepresents the truth. As it's known, men are obligated under religious rules to uphold the family's financial standing. Men emphasize religious values while discussing women's surnames or waiting periods. But again, as it comes to alimony, they're addressing equality. This double standard needs to end. Furthermore, women must truly be treated equally, not just legally.

In conclusion, Turkish women actively pursue the equality outlined in the Civil Code. For equality to be maintained and for Turkish women to receive the respect they are promised, equality must be guaranteed in both the letter and the spirit of the Turkish Civil Code.

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THE ONGOING MARITIME DISPUTES IN THE EASTERN MEDITERRANEAN SEA AND THE ROLE OF MEIS ISLAND*

Doğu Akdeniz'de Süregelen Deniz Alanı Uyuşmazlıkları ve Meis Adası'nın Rolü

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Abstract

In this study, the disputes related to the maritime areas developing around the Eastern Mediterranean are evaluated from the perspectives of Greece, Turkey, the Greek Cypriot Administration of Southern Cyprus (GCASC), and the Turkish Republic of Northern Cyprus (TRNC). The conflicts over the rules to be applied for the delimitation of maritime zones arise from competing interests among states to use marine resources more. International law stipulates that disputes concerning maritime zones, especially in areas with geographical restrictions, should be resolved through negotiations and agreements within the framework of "equitable principles". Undoubtedly, the conflicting claims of states over the maritime zones and the different interpretations of delimitation rules have added a new dimension to the disputes that have been ongoing for years between Turkey, Greece, the GCASC, and the TRNC. Due to mutual demonstrations of power by the states, the region is currently under high tension. The article examines the international judicial decisions related to islands' maritime zone rights to highlight the need for a comprehensive and fair resolution to prevent potential military conflicts in the region.

Keywords: Eastern Mediterranean, Delimitation, Maritime Zones, Equitable Principles, Meis Island.

Özet

Bu çalışmada Doğu Akdeniz çevresinde gelişen deniz alanları ile ilgili anlaşmazlıklar Yunanistan, Türkiye, Güney Kıbrıs Rum Yönetimi (GKRY) ve Kuzey Kıbrıs

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Türk Cumhuriyeti (KKTC) perspektiflerinden değerlendirilmiştir. Deniz yetki alanlarının sınırlandırılmasında uygulanacak kurallara ilişkin anlaşmazlıklar, devletlerin deniz kaynaklarını daha fazla kullanma isteğinden kaynaklanmaktadır. Uluslararası hukuk, deniz alanlarına, özellikle de coğrafi kısıtlamalara sahip deniz alanlarına ilişkin uyuşmazlıkların, "hakkaniyet ilkeleri" çerçevesinde müzakere ve anlaşmalar yoluyla çözülmesini öngörmektedir. Şüphesiz ki, deniz yetki alanları konusunda devletlerin çatışan iddiaları ve sınırlandırma kurallarının yine devletler tarafından farklı yorumlanması, Türkiye, Yunanistan, GKRY ve KKTC arasında yıllardır devam eden anlaşmazlıklara yeni bir boyut kazandırmıştır. Devletlerin karşılıklı güç gösterileri nedeniyle bölgede güncel olarak yüksek gerilim yaşanmaktadır. Makale, adaların deniz alanı haklarına ilişkin uluslararası yargı kararlarını inceleyerek bölgedeki olası askeri çatışmaların önlenmesi için kapsamlı ve adil bir çözüme duyulan ihtiyacın altını çizmektedir.

Anahtar Kelimeler: Doğu Akdeniz, Sınırlandırma, Deniz Alanları, Hakkaniyet İlkeleri, Meis Adası

INTRODUCTION

Throughout history, states have shown excessive interest in and made numerous claims to maritime zones. Compared to other regions, the Eastern Mediterranean has always been a region of critical geopolitical, geostrategic, and geoeconomic importance. Various empires, such as the Venetian, Lusignan, Roman, Ottoman, and British, have ruled the region in different periods. Particularly after World War I, sharing the areas bordering the Mediterranean and establishing new states became a cornerstone and the developments in international law and the claims of regional states in maritime areas in the 20th century triggered new disputes.

Today, the scope of international law of the sea is determined by the rules of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and customary rules. In this context, the exclusive economic zone (EEZ) and the continental shelf exist, where, coastal states have sovereign rights regarding economic activities beyond the 12 nautical miles (nm) territorial waters and the 24 nm contiguous zone.

When the Mediterranean region is examined; the number of states, geographical limitations, and historical and political tensions between neighboring states pose difficulties regarding the delimitation of maritime areas. Specifically, the dispute between Greece and Turkey regarding the Aegean Sea Continental Shelf and the events that occurred in Cyprus between the Turkish Cypriot and Greek Cypriot Communities since 1960s, are the main reasons for the unsolved situation until today. The existence of natural resources in the area claimed as the continental shelf by the GCASC has brought another dimension to these disputes. The dispute over the Eastern Mediterranean, developed with mutual showdowns between the states, continues within the framework of the claims

made through Meis Island between the GCASC- Greece and Turkey –TRNC. In this article, the *status quo* in the Eastern Mediterranean is examined with claims concerning the Island of Meis and the applicable principles of international law.

I. DEVELOPMENT OF MARITIME ZONE DISPUTES IN THE EASTERN MEDITERRANEAN

The Eastern Mediterranean has been crucial to geopolitics throughout history due to its advantageous geographical position. As well as being a geostrategic location, the region emerged as a new geoeconomic zone demonstrating its impact on state-to state political relations and the struggle for dominance following the discovery of hydrocarbon resources.[1] The desire of the states to explore and exploit new energy sources and to introduce additional concepts to territorial waters and offshore applications to benefit more from marine resources is the main reason for the formation of the current disputes in the Eastern Mediterranean.[2] Following the exploration of energy sources, the conflict among the states regarding maritime sovereignty became more apparent, and subsequently, international groupings formed in the region as a result of various agreements.[3]

Currently, apart from the maritime zones that devise part of the state's territory, there are also "international maritime zones" in which coastal states have certain "sovereign rights" that enable the states to further use marine resources. The contiguous zone, the fishery zone, the continental shelf, and the EEZ are the areas that fall under this category.[4] UNCLOS 1982 provides details of the rights and authority conferred on coastal states over each maritime zone. Amid these areas, the continental shelf "comprises the seabed and subsoil of the submarine areas that extend throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nm where the outer edge of the continental margin does not extend up to that distance."[5] Article 76 of the UNCLOS 1982 clarifies that states may use two different methods in establishing the continental shelf. Nevertheless, it is worth noting that the relevant article does not address the delimitation of "overlapping entitlements" among neighboring states but rather addresses "the entitlement to and the

[1] Levent Kırval and Arda Özkan , "The Delimitation Dispute of the Maritime Jurisdiction Areas in the Eastern Mediterranean: Turkish Perspective Based on the Equitable Principles" (2021) 52 Turkish Yearbook of International Relations 85, 87.

[2] Hüseyin Tamer Hava, "Doğu Akdeniz'deki Doğal Gaz Rezervlerinin Ekonomik ve Güvenlik Boyutuyla Türkiye Açısından Değerlendirmesi" (2020) 16 Güvenlik Stratejileri Dergisi 675, 677.

[3] Kırval and Özkan (n 1) 87.

[4] Hüseyin Pazarcı, *Uluslararası Hukuk* (20th edn, Turhan Kitabevi 2021) 294.

[5] 1982 United Nations Convention on Law of the Sea (UNCLOS), Article 76.

establishment of the outer limits of the continental shelf." [6] In this context, it is required to draw attention to the difference between "maritime boundary" and "maritime limit". By following the principles of international law, a state may establish its maritime limits (delineation) and reveal the maritime areas over which it may exercise relevant jurisdiction. On the other hand, "a maritime boundary" represents the apportionment of the maritime area with respect to another state (delimitation).[7]

Every coastal state has a warrant for "a 200 nm continental shelf" under Article 76 of the UNCLOS 1982, as far as geography permits, without requiring any proclamation, effective occupation, or evidence of the geomorphology of the seabed.[8] Coastal states own exclusive sovereign rights to "explore and exploit the seabed and subsoil non-living resources, as well as living organisms that belong to sedentary species" in the relevant submarine area.[9] Nevertheless, a coastal state may claim for "a continental shelf beyond 200 nm" if it meets the complex geoscientific requirements outlined in the Convention on the condition that "the outer limit shall not exceed 350 nm from the baselines which the breadth of the territorial sea is measured." In this regard, the coastal state is required to provide information to "the Commission on the Limits of the Continental Shelf" regarding the delineation beyond 200 nm.[10] In light of this, it is appropriate to note that the legal notion of the continental shelf is based around the idea that "the land dominates the sea." [11]

The idea of the EEZ was brought about by the fact that certain states' needs are unable to be satisfied by the continental shelf.[12] Unlike the Continental Shelf, the establishment of the EEZ is based on the declaration of the coastal state and grants the coastal state "the freedom to explore and exploit living and non-living natural resources, to conduct marine scientific research, to build facilities on the sea, to lay submarine cables and oil pipelines for an extension of 200 nm".[13] The EEZ is distinguished by a hybrid character that results from finding a balance between freedom of navigation and the coastal state's jurisdiction

6 Bjarni Már Magnusson, *The Continental Shelf Beyond 200 Nautical Miles* (Brill 2015) 18.

7 Ki Beom Lee, "The Demise of Equitable Principles and the Rise of Relevant Circumstances in Maritime Boundary Delimitation" (PhD Thesis, University of Edinburgh 2012) 2.

8 Vladimir Jares, "The Continental Shelf Beyond 200 Nautical Miles" (2009) 42 Vanderbilt Journal of Transnational Law 1265,1272.

9 UNCLOS, Article 77

10 Magnusson (n 6)2.

11 ibid 14.

12 Selami Kuran, *Uluslararası Deniz Hukuku* (Beta 2016) 267.

13 ibid 266.

and rights.[14] In comparison to the internal and territorial waters over which the nations exercise full sovereignty, these maritime jurisdiction areas are envisaged to be quite wide. Even though all countries are equal under international law, it is also possible that a marine zone including two or more states does not have the geographical breadth necessary to grant each state the 200 nm extension permitted by the Conventions and customary international law.[15]

A. The Mediterranean: "A Semi-Enclosed Sea"

The Eastern Mediterranean is encompassed by the coasts of Turkey, Greece, Syria, Lebanon, Israel, Palestine, Egypt, the TRNC, and the Republic of Cyprus[16], which neither Turkey nor the TRNC recognises as a state but rather as the GCASC.[17] Since the region is not geographically expedient to provide a 200 nm distance continental shelf to each riparian country by considering the latter method mentioned in Article 76 of UNCLOS 1982 to establish a continental shelf, it can be argued that the unresolved Cyprus dispute constitutes only one aspect of the maritime disputes among the aforementioned countries and Greece.[18]

In regions with geographical restrictions to determine the continental shelf, the first solution envisaged by UNCLOS 1982 is the conclusion of delimitation agreements among states based on international law rules to attain an "equitable solution" by considering geographical restrictions.[19] The significance of the implementation of "equitable principles" in the delimitation of maritime zones is also emphasized by the International Court of Justice (ICJ) in the North Sea Continental Shelf Case, which can be defined as a landmark case for the resolution of disputes among states regarding maritime boundaries.[20] In this regard, factors such as the geographical characteristics of the region, security, borders of neighboring countries, and energy resources should be examined.

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[14] Umborto Leanza and Maria Christina Caracciolo, "The Exclusive Economic Zone" in David Attard (ed), The IMLI Manual on International Maritime Law Volume I: The Law of the Sea (Oxford University Press 2014) 184.

[15] Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* (Martinus Nijhoff Publishers 2005) 47.

[16] Kuran (n 12) 267.

[17] Mustafa Erçakıca, "Doğu Akdeniz'de Yaşanan Güncel Gelişmelerin Kıbrıs Sorunu ve Uluslararası Deniz Hukuku Çerçevesinde Değerlendirilmesi" (2021) 16 Erciyes Üniversitesi Hukuk Fakültesi Dergisi 301,304.

[18] Berk Hasan Özdem, "Examination of the Overlapping Claims of Turkey and the Greek Cypriot Administration of Southern Cyprus on the Maritime Areas to the West of the Island of Cyprus" (2019) 77 İstanbul Hukuk Mecmuası 953,954.

[19] UNCLOS, Article 74, 83.

[20] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969, p.3, International Court of Justice (ICJ), 20 February 1969.

In view of the current situation, the region has gained value in terms of global actors due to the energy resources found. Aside from the coastal states Russia, the USA, NATO, the UK and the European Union (hereafter the "EU") have entered into the competition to get the largest share of the resources in the region.[21]

B. The Dispute Between the GCASC and Turkey, and the Rights of the Turkish Cypriot Community

From the perspective of Turkey, the geographical restriction emerged as a "dispute" when the GCASC established its EEZ within the Eastern Mediterranean, disregarding the presence of both Turkey and the TRNC in the region. Indeed, to establish the boundaries of the EEZ, the GCASC concluded agreements with coastal states, including Egypt, Lebanon, and Israel.Through these developments, it could be observed that Turkey and the TRNC were isolated by the coalition of the GCASC, Greece, Israel, and Egypt. [22] The GCASC's operations continued despite the note verbale submitted by Turkey declaring its rights and demonstrating its view that the agreements concluded ignoring Turkey's presence in the region were null and void. Turkey refused the sovereignty of the GCASC over the continental shelf in the Eastern Mediterranean in a letter delivered to the UN as Turkey does not agree with the application of the "median line" technique for the relevant delimitation.[23]

Turkey claims that the rights of Turkey and, the rights of the Turkish Cypriot Community residing on the northern side of Cyprus have both been violated by the GCASC through this conduct. As a result, the Continental Shelf Delimitation Agreement was concluded among Turkey and the TRNC in 2011. The boundaries were delimited between the two countries according to international law principles.[24]

Undoubtedly, the divided situation in Cyprus further complicates any issue regarding the island.[25] In this context, the Republic of Cyprus's attempts to carry out exploring and drilling operations within the EEZ it established, sparked debate about the Turkish Cypriot community's actual level of participation in state institutions, given that they could not have done so since the start of the 1963–1964 crisis.[26] It should be noted that The Treaty concerning the establishment

21 Betül Algür, "Kıbrıs ve Doğu Akdeniz'deki Son Uluslararası Gelişmeler Işığında Değişen Türkiye, ABD ve NATO Politikalar" (2020) 2 Anadolu Strateji Dergisi 55, 56.

22 Kırval and Özkan (n 19) 88.

23 Papadakis Demetris, "Fresh Challenge by Turkey to the Sovereignty of the Republic of Cyprus and Greece" (2016) <https://www.europarl.europa.eu/doceo/document/E-8-2016-007740_EN.html> accessed November 2, 2023.

24 Kuran (n 12) 268.

25 Erçakıca (n 17) 303.

26 Ioannis N Grigoriadis, "Eastern Mediterranean in Uncharted Waters" (Michaël Tanchum ed, Konrad Adenauer Stiftung 2021) 40.

of the Republic of Cyprus (UK, Greece, Turkey, Cyprus) concluded in 1960 and the additional protocols indicate that Turkish Cypriots will also take an effective role in the governance of the Republic of Cyprus.[27]

The TRNC's claims about maritime jurisdiction have often been challenged by factors such as the lack of international recognition as a consequence of UN Security Council Resolutions 541 and 550, indicating that the establishment of the TRNC would not be legally recognised by other States. Furthermore, the Republic of Cyprus is a Member State of the European Union and solely represented by the GCASC, which is also a fact that reduces the influence of the TRNC in the region.[28] Following agreements with Egypt, Lebanon, and Israel, the GCASC, acting as the Republic of Cyprus, declared that it was prepared to profit from the 2011 exploration of the Aphrodite natural gas deposit.

However,the Cyprus issue remained a significant barrier to the "monetization" of natural gas since Turkish Cypriots were not effectively involved in the Republic of Cyprus' "decision-making process", which calls the legitimacy of these activities into question. Due to this circumstance, on behalf of the TRNC, Turkey also organized explorations in the marine area in question.[29]

Turkey defends its rights and those of the Turkish Cypriot Community as a guarantor power under the Treaty of Guarantee 1960.[30] In 2019, Turkish exploration and drilling ships were sent to the area, which is also claimed by the GCASC as its EEZ, and in response the EU imposed sanctions against Turkey as it deemed these activities to violate the sovereignty of the island. The EU Council renewed its restrictive measures which include "an asset freeze for listed persons and entities and EU citizens and companies are forbidden from making funds or economic resources available to those listed. In addition, a travel ban to/through the EU applies to listed persons." until November 30, 2024. Presently, two officials from the Turkish Petroleum Corporation (TPAO) are listed for these restrictive measures.[31] Even though the rights of the coastal state on the continental shelf are not based on any "express proclamation", Turkey established the outer limits of its continental shelf in the Eastern Mediterranean region with a letter dated March 18, 2019, delivered to the UN General Assembly. Turkey

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27 Treaty No. 5476. United Kingdom of Great Britain and Northern Ireland, Greece and Turkey, and Cyprus, Additional Protocol I, Additional Protocol II.

28 Algür (n 21) 56.

29 Grigoriadis (n 26) 43.

30 Treaty No. 5476. United Kingdom of Great Britain and Northern Ireland, Greece and Turkey and Cyprus.

31 European Council, "Unauthorised Drilling Activities in the Eastern Mediterranean: Council Prolongs Restrictive Measures" <https://www.consilium.europa.eu/en/press/press-releases/2023/11/09/unauthorised-drilling-activities-in-the-eastern-mediterranean-council-prolongs-restrictive-measures> accessed November 3, 2023

highlighted "The Continental Shelf Delimitation Agreement" concluded with the TRNC by relying on the fact that there is no single authority in Cyprus to represent both Turkish Cypriot and Greek Cypriot communities within the same letter.[32] Turkey still has not declared an EEZ. While a continental shelf is a right for all countries, the EEZ is subject to declaration.

C. The Maritime Disputes Between Greece - Turkey and Meis Island-Related Claim

Among the GCASC's policy in the area, Greece also maintains a policy in which it asserts rights in the Eastern Mediterranean through the islands it dominates, which it cannot actually make through its mainland. By relying on this argument, Greece claims that the Aegean Sea islands could provide their own EEZ, enabling them to explore 200 nm of the Mediterranean Sea.

Criticising the Eastern Mediterranean axis alone will not be sufficient to explain the Greece and Turkey's maritime disputes. To explain the basis of these claims, it is essential to mention the disputes among Greece and Turkey throughout the Aegean Sea, which include "the continental shelf, extension of the territorial sea of islands, air space, disputed islands, islets, and rocks concerning their status and the demilitarized obligation."[33]

Greece asserts that each island has the continental shelf, by setting forth the 1958 UN Convention on the Continental Shelf and the UNCLOS 1982. However, Turkey is not a party to the conventions and therefore these instruments are not legally binding on Turkey.[34] Furthermore, considering Article 46 of the UNCLOS 1982, Greece cannot declare itself as an "archipelagic state". In Article 46, an "archipelagic state" is defined as a state that is formed of one or more archipelagos. A state which has at least a part of its territory on the mainland of a continent is not an archipelagic state.[35] Although its territory encompasses a group of islands, Greece is not considered to be an archipelagic state.

The Island of Meis, which was ceded to Greece as an extension of the Dodecanese islands with the Treaty of Paris in 1947, is a small island with a population of 500, located approximately 330 nm from Piraeus and only 1.25 nm from the Turkish coast.[36] The island's role in the Eastern Mediterranean

[32] Letter dated 18 March 2019 from the Permanent Representative of Turkey to the United Nations addressed to the United Nations Secretary-General

[33] Yusuf Avar and Yu Chou Lin, "Aegean Disputes Between Turkey and Greece: Turkish and Greek Claims and Motivations in the Framework of Legal and Political Perspectives" (2019) 1 International Journal of Politics and Security 57, 59.

[34] ibid 60.

[35] UNCLOS, Article 46.

[36] Christian Schaller, "Hardly Predictable and Yet an Equitable Solution: Delimitation by Judicial Process as an Option for Greece and Turkey in the Eastern Mediterranean" (2022)

maritime zone issue emerged from the claims of Greece, which are viewed as entirely contrary to international law. Greece asserts that the islands under its sovereignty have an unconditional and exceptional continental shelf. By giving full authority to the islands in the Eastern Mediterranean regarding limitations of the boundaries, Greece demands that the continental shelf and the EEZ limitations to be determined according to the principle of "equidistance" between the mainland and the islands. Greece's theses on maritime jurisdiction areas are shaped around "the principle of territorial integrity" and are based on the view that, as a continental country, Greece should be evaluated as a whole with the islands that it dominates. In this respect, Greece claims that the boundaries should be drawn with the median line principle by relying on Crete, Rhodes, and Meis.

Greece interprets Article 1 of the UN Convention on the Continental Shelf 1958 as requiring a delimitation without distinction between continents and islands. Under Article 6, the limitation of the continental shelf must be determined by an interstate agreement. If no agreement is reached on the limitation of the continental shelf, "the principle of equidistance" should be applied starting from the nearest point of the baselines where the width of the state's territorial waters begins to be measured. Since Turkey is not a party to this treaty, it is not obliged to make an "equidistance" limitation arising from this Convention. [37] At this point, it must be clarified that the concept of the maritime zones now exists both in treaty and customary law. However, not every provision in a treaty may develop into customary law. The detailed rules regulating the governing of the maritime zones are not a component of customary law.[38]

As a second basis for its continental shelf claim through Meis Island, Greece refers to Article 121 of the UNCLOS 1982. [39] While Article 121 of UNCLOS determines "the regime of the islands", it refers to the fact that islands suitable for human habitation can have territorial waters, contiguous zones, EEZs, and continental shelves, just like the mainland, and that the limitations will be made in accordance with the provisions of the convention applicable to other land territories. [40] The Greek government does not address two issues in the making of these claims. First, the fact that Turkey is not a party to UNCLOS 1982. A treaty does not grant "rights and obligations" to a non-party state without that state's assent, by Article 34 of the Vienna Convention on the Law of Treaties, many of

35 Leiden Journal of International Law 549,550.

37 Eren Alper Yılmaz, "Doğu Akdeniz'deki Gelişmeler Doğrultusunda Türk Dış Politikası'nın Dünü ve Bugünü" (2020) 12 Karadeniz Uluslararası Bilimsel Dergi 27,37.

38 Martin Dixon , *Textbook on International Law* (Oxford University Press 2013) 30.

39 Maria Gavouneli, "Whose Sea? A Greek International Law Perspective on the Greek-Turkish Disputes" <https://www.institutmontaigne.org/en/expressions/whose-sea-greek-international-law-perspective-greek-turkish-disputes,> accessed November 3, 2023.

40 UNCLOS, Article 121

whose principles are currently accepted as customary law.[41] The second issue relates to Articles 74 and 83 of UNCLOS. The aforementioned articles clarify that the issue of delimitation of the continental shelf and the EEZ between states whose coasts are "adjacent or opposite" each other will be resolved through agreements in an equitable manner, preserving "equitable principles".[42]

Although the Island of Meis is legally under the sovereignty of Greece, it is defined as the island located on the "opposite side" due to its close proximity to Turkey.[43] "Equity" is the main issue to be considered in the continental shelf and the EEZ delimitations in terms of international law. Since the principle of "equity" does not mean "equality", the request for a delimitation by recognizing full authority to Meis Island, which has a surface area of 10 km, would squeeze Turkey, which possesses the longest coast in the region, into a narrow sea area. The situation in question is in total contradiction with the equitable principles.[44] The issue related to the extension of the continental shelf of Meis Island to Cyprus, together with the attempt to give complete delimitation authority to the island, will pose significant challenges in terms of the maritime zones of the TRNC.[45]

Another basis for Greece's claims about Meis is "the Seville Map" prepared by scholars from the University of Seville in the early 2000s. It is claimed that this map was prepared at the request of the EU to resolve the dispute among Turkey, Greece, and Cyprus concerning maritime zones in the Eastern Mediterranean. The prepared map draws the continental shelf of Greece in line with the islands' borders, completely ignoring the proximity of these islands to the Turkish mainland. The Seville Map takes Meis as the median line and, according to the boundaries envisaged, the continental shelf of Greece begins from the Island of Meis and extends southwards to the middle of the Mediterranean.[46] The specified borders are such that they will close Turkey to the coasts of Antalya and the Gulf of Iskenderun. Therefore, the borders determined on the Seville map are completely contrary to the principles of equity, proportionality, geographical

41 1969 Vienna Convention on Law of Treaties, Article 34.

42 UNCLOS, Article 74 - 83

43 Gökhan Ak, "Meis, Karaada, ve Fener Adası'nın Doğu Akdeniz Deniz Yetki Alanları Sorununa Muhtemel Etkileri" (2015) 11 Uluslararası Hukuk ve Politika 123, 135.

44 İlkay Türkeş , "Doğu Akdeniz'de Uyuşmazlık Teşkil Eden Deniz Alanlarında Gerçekleştirilen Hidrokarbon ve Doğalgaz Çalışmalarının Kıbrıs Sorunu'na Yansıması Ile Soruna Getirdiği Yeni Dinamikler" (2020) 4 Euro Politika Dergisi 86, 99.

45 Derya Okatan, "Prof. Hüseyin Pazarcı: Akdeniz'de Durumumuz Çok Iyi Değil" (Artı Gerçek, September 13, 2020) <https://artigercek.com/haberler/prof-huseyin-pazarci-akdeniz-de-durumumuz-cok-iyi-degil> accessed November 5, 2023.

46 BBC News, "Sevilla Haritası: Yunanistan'ın Tezini Dayandırdığı, ABD'nin 'Hukuki Önemi Yok' Dediği Harita" (BBC News Türkçe, September 22, 2020) <https://www.bbc.com/turkce/haberler-dunya-54244760> accessed November 6, 2023.

superiority, and non-encroachment. This map envisages to confine Turkey to an area of 41.000 km2. However, it has no legally binding force. Following the regional tensions, it was also announced by the EU officials that the map was not prepared by the EU. In this statement, the officials confirmed that the external reports created by the institutions cannot be considered official documents of the EU, and these reports do not carry any legal or political value.[47]

The Mediterranean hydrocarbon resources have added another dimension to the foregoing Aegean Sea, Cyprus, and the minority issues between the two states.[48] The process, beginning with geographical limitations, continues with mutual showdowns between states and continuously raises rumors of war.[49] Following "the Continental Shelf Delimitation Agreement", signed with the TRNC, Turkey signed an agreement with Libya in 2019, which disrupted the balance in the region. In the "Memorandum of Understanding between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on delimitation of the maritime jurisdiction areas in the Mediterranean", Turkey highlighted the principle of equitable sharing and has concretely demonstrated the maritime zone that it claims in the region.[50] The Greek islands' EEZ claims were not taken into consideration in this agreement.[51] Following this, the boundaries established by the memorandum between Turkey and Libya were disregarded by the agreement concluded between Greece and Egypt in 2020, and this led to a new source of stress in the region.[52]

Due to the unilateral actions of Greece and the GCASC, Turkey has adopted a military-based de facto protection strategy in the region. Following 2015, the activities of ships violating Turkey's jurisdictional rights were stopped with the exercises carried out within the scope of the Blue Homeland Operation.

II. GENERAL OVERVIEW

Through the memorandum concluded with Libya, Turkey has concretely demonstrated its continental shelf by considering the criteria of equity and geography and has shown that it is in favor of the concluding agreements by

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47 Euronews, "AB'den 'Sevilla Haritası' Açıklaması: Böyle Bir Harita Hazırlatmadık" (September 4, 2020) <https://tr.euronews.com/2020/09/04/ab-den-sevilla-haritas-ac-klamas-boyle-bir-harita-haz-rlatmad-k> accessed November 6, 2023.

48 Edanur Yıldız, "The Conflict Between Greece and Turkey in the Mediterranean Sea, (International Maritime Law Study) " (2020) 36 Jurnal Hukum Unissula 126, 127.

49 Kuran (n 12) 268.

50 Algür (n 21) 62.

51 Grigoriadis (n26) 40.

52 Walid Fahmy, "The Conundrum of Delimitation of Maritime Boundaries in the Eastern Mediterranean: The Greece-Egypt Agreement in the Face of Turkey-Libya Agreement" (2020) 3 Pro Justitia 109,110.

prioritizing the rules of international law. [53] Theses developed in the Eastern Mediterranean by Greece are progressing parallel to the GCASC. The only obstacle to the desire to conclude an agreement between the two countries is Turkey's territory. To date, the GCASC has continued all its activities regarding maritime zones as the Republic of Cyprus, acting on behalf of the entire island and ignoring the rights of the Turkish Cypriot community.

While TRNC is trying to be excluded from maritime jurisdiction areas as an internationally unrecognised state, it must be noted that "recognition" is not a requirement to become a state according to international law. The most widely known formulation of the basic standards for "statehood" is laid down by " the Montevideo Convention on the Rights and Duties of States 1993". The prerequisites for statehood are given in Article 1 of the convention as; a defined territory, permanent population, government, and capacity to enter into relations with other states.[54] However, despite the divergent opinions on TRNC regarding the "capacity to enter into relations with other states" criterion due to the embargo being applied, "recognition" is not listed as a requirement for statehood by the Montevideo Convention. The lack of international recognition of the TRNC does not alter the reality of the TRNC being a state and its position concerning the areas in which it has sovereign and competent rights. It also sets forth the limitations regarding maritime zones within the scope of the agreement it concluded with Turkey.[55]

The claim regarding maritime delimitation through the Island of Meis envisages the determination of a common EEZ between the GCASC and Greece citing the geographical location of Meis and its continental shelf extending to Cyprus. This policy carried out by Greece and the GCASC in the Eastern Mediterranean involves serious disputes regarding the maritime zones of the TRNC as well as Turkey. Turkey's view on Meis Island is that rights should be granted only in terms of territorial waters, and within the framework of "equitable principles", Meis Island cannot establish a maritime zone in the Eastern Mediterranean region with the impact on Turkey's continental shelf. Another suggestion Turkey has made regarding the possible continental shelf of the Island of Meis is that its continental shelf shall be determined in the high sea only towards the west, in a way that does not violate Turkey's continental shelf. Indeed, to find an appropriate and equitable solution to such a limitation in terms of international law, Greece should also sign a delimitation agreement with the TRNC which

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53 Türkeş (n 44) 16-17.

54 Marshall Goldman, "Turkey, Cyprus, and the Turkish Republic of Northern Cyprus" (SSRN, May 18, 2016) <https://ssrn.com/abstract=2781735> accessed November 7, 2023.

55 Türkeş (n 44)18.

seems unlikely in the near future.[56]

Upon examination of the current situation, it can be observed that Greece's thesis of restricting the maritime jurisdiction of Turkey over the Island of Meis has been weakened as a result of the agreements it has concluded with different states. Greece's argument for granting full authority to the islands concerning maritime jurisdictions has become self-contradictory following the maritime jurisdiction delimitation agreement it signed with Egypt (which Turkey described as null and void as Greece and Egypt do not have a maritime boundary) to eliminate the agreement between Turkey and Libya. While Greece argues that both the text and the map in the Greece-Egypt agreement specify that "the islands have been considered in the maritime boundary delimitation". [57] Turkey claims that through this agreement, Greece has documented that it has renounced some of its claims regarding Rhodes and all of its claims over Meis. However, Greece continues to aspire to assert its claim about Meis Island against Turkey, which it could not assert against other states.[58] By signing a maritime delimitation agreement with the GCASC, Greece aims to prevent a possible Turkey–Egypt agreement in order to revive its claims through Meis. In this respect, such a delimitation is not acceptable for Turkey, TRNC, and Egypt.

An agreement between the GCASC and Greece through the Island of Meis would constitute an arrangement that would restrict Turkey's continental shelf to a narrow area while eliminating the TRNC in terms of maritime zones. The current activities of Turkey reflect the refusal to allow such a delimitation agreement and indicate that such an agreement may lead to a military conflict. The seismic survey operations in the region carried out by the state-owned TPAO are frequently accompanied by Turkish Naval Forces. A Greek and a Turkish frigate clashed in the waters between Crete and Cyprus in August 2020. The incident occurred while the Greek frigate maneuvered close to the Turkish research and survey vessel Oruç Reis, which had been sent to areas where both Greece and Turkey claimed their continental shelf. In the months following, the Oruç Reis carried out the postponed seismic survey in an extensive region, including areas near Meis.[59]

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56 Hüseyin Pazarcı, "Deniz Hukuku Işığında Doğu Akdeniz Meselesi Konulu Çevrimiçi Panel"https://tv.yasar.edu.tr/deniz-hukuku-isiginda-dogu-akdeniz-meselesi-paneli; accessed November 8, 2023.

57 Constantinos Yiallourides, "Part I: Some Observations on the Agreement between Greece and Egypt on the Delimitation of the Exclusive Economic Zone" <https://www.ejiltalk.org/18969-2/> accessed November 9, 2023.

58 Serkan Demirtaş , "Turkey Says Greek-Egypt Deal Endorses Turkish Thesis over Maritime Rights" <https://www.hurriyetdailynews.com/turkey-says-greek-egypt-deal-endorses-turkish-thesis-over-maritime-rights-157250> accessed November 9, 2023.

59 Schaller (n 36) 550.

III. JUDICIAL DECISIONS

Despite the fact that islands have a right to a continental shelf under the 1982 UNCLOS, this is not maintained as an absolute rule. Considering the theses put forward by Greece, the Island of Meis shall create a maritime jurisdiction that is four thousand times its geographical size, which is a claim that is incompatible with international law. To evaluate this situation, it is necessary to take into account the decisions made by international judicial bodies in similar cases.

A. The UK and Northern Ireland, v. The French Republic

The Channel Islands, (which are classified as Crown Dependencies rather than forming a part of the UK), are located close to the French mainland (islands on the opposite side/distant islands). Although both the UK and France agreed to conclude an agreement based on “an equidistance line” to delimit the eastern part of the English Channel as a whole and a section of the Western part, France objected to the UK’s request to consider the Channel Islands and delimit the continental shelves following the principle of equidistance and expressed its opinion that the continental shelf right of the islands could not exceed 3 miles. In this opinion, France stated that a limitation based on equidistance would narrow France’s continental shelf in favour of the UK and that the request was completely “disproportionate” to the size of the islands and the length of their coasts. The dispute between the two countries concluded in 1977 with the decision of the International Arbitration Court. In its decision, the Court highlighted that “the boundary should be drawn at a distance of 12 nm from the established baselines of the territorial sea of the Channel Islands”, and did not consider the islands regarding the delimitation of the continental shelf boundary. [60]

B. Bangladesh v. Myanmar

The Island of Saint Martins caused a dispute between Myanmar and Bangladesh in determining maritime zones with its geographical location directly adjacent to Myanmar. While the International Court of Law of the Sea conferred full authority to the island in determining the territorial waters, it did not allow Bangladesh to use the island as a base point to make delimitations within the framework of “the principle of equidistance” in terms of the EEZ and continental shelf, taking the “equitable principles” into consideration.[61]

C. Nicaragua v. Colombia

In its decision on the maritime delimitation dispute between Nicaragua and Colombia, which it resolved in 2012, the ICJ made an important distinction

60 Reports Of Internatıonal Arbitral Awards, Delimitation Of The Continental Shelf Between The United Kingdom Of Great Britain And Northern Ireland, And The French Republic, Volume XVIII,1978, 56-58.

61 North Sea Continental Shelf, Judgment, I.C.J. Reports,1969, 53-56.

between mainlands and islands. The ICJ stated that the islands and mainlands cannot be considered equal in status and that the geography of the mainland has superiority over the islands. The decision in question specifically stated that islands located far from their mainland and on the opposite side should have a limited maritime zone. In its decision, the Court considered the principle of "proportionality", which stipulates that there should be a reasonable ratio between the given maritime zone and coastal lengths, and the principle of "non-encroachment" which specifies that the front of the mainland should not be blocked by the islands of other states. As a result, the ICJ significantly limited the influence of the Colombian islands and granted a significant maritime zone to the Nicaraguan mainland.[62]

D. Canada v. France

The "distant island" issue was also raised through the dispute between France and Canada on Saint-Pierre and Miquelon islands. In this case, France asserted that the islands should also have their own continental shelf and it would be appropriate to make the delimitation by applying the equidistance principle between the Canadian coast and the islands. On the other hand, Canada claimed that the islands in question are physically situated on the Canadian continental shelf area and cannot establish their own continental shelf. In Canada's argument, France could only have 12 nm territorial water around the islands.

The Court of Arbitration granted France a unique zone in 1992, consisting of an "equidistant line" between the French islands and Newfoundland, a 24 nm bulge on the west, and a narrow 188 nm corridor south of the islands, allowing access to its EEZ from international waters. The drawn borders resemble the shape of a mushroom.[63] The Saint-Pierre and Miquelon Islands decision is highly unusual in that it grants the islands EEZ in international waters while establishing boundaries in a manner that does not impact Canada's EEZ. Due to the absence of neighboring territories in the Atlantic Ocean, the location of the islands in this instance was of course an obvious opportunity to enjoy a sizable EEZ. This technique may only be applied in situations where there is no other territory across the high sea.

In this instance, Greece might attempt to draw borders across Creete Island or in the shape of a 'mushroom' to the north. However, when the situation is viewed through the consideration of the high seas and the proportionality principle, the length of the coastline of Meis Island is not equal to that of Turkey, also Cyprus

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[62] Yunus Emre Açıkgönül, "Nikaragua/Kolombiya Kararı Işığında Doğu Akdeniz'deki Deniz Yetki Alanlarının Sınırlandırılması" (2014) 6 Ortadoğu Analiz Dergisi 68, 69.

[63] Charles Cole , "St. Pierre and Miquelon Maritime Boundary Case and the Relevance of Ancient Treaties" (1994) 31 Canadian Yearbook of International Law/Annuaire Canadien De Droit International 265, 281.

is only 166nm away from Meis, so another delimitation must be made in this area with Cyprus. Meis Island is therefore not eligible to have a similar EEZ as the Saint-Pierre and Miquelon islands.[64]

These exemplary cases regarding similar disputes reveal that Turkey's Eastern Mediterranean policy is compatible with international law and international court decisions. The principles supported by international judicial bodies completely reject the maritime jurisdiction policy, which Greece and the GCASC are trying to implement through the Island of Meis.

IV. CONCLUSION

The dispute over the Eastern Mediterranean, developed with mutual showdowns between the states, continues within the framework of the claims made through the island of Meis between the Greece- the GCASC and Turkey - TRNC, which are also parties to the Cyprus issue.

The Seville Map has served as a foundation for a common policy pursued by Greece and the GCASC to extend the Cyprus issue into maritime zones. By submitting diplomatic notes and taking proactive measures in the region, Turkey is striving to protect both its own sovereign rights and the rights of the Turkish Cypriot Community.

In its decisions concerning maritime zones, the GCASC currently acting as the sole administrator of the Republic of Cyprus, is urged to consider the conditions stipulated in the founding agreements emphasizing the participation of Turkish Cypriots in the administration. Adherence to these conditions is essential, as the actions taken by the GCASC will become questionable in the context of potential future agreements involving the Turkish Cypriots.

Considering the international legal precedent, it is not possible for an island like Meis, given its proximity to the mainland of Turkey, to establish maritime zones compatible with Greece's theses. Considering the length of the Turkish coastline and the size of the island of Meis, such a limitation is seen to be in contradiction with the customary rules accepted by international jurisprudence such as proportionality, geographical superiority, and non-encroachment. According to the examined outcome of case decisions, the most feasible approach would be to focus solely on limiting territorial waters between Turkey and the island of Meis.

In this respect, another possibility arises for a delimitation in the high seas between the island of Meis and Cyprus in case Greece signs a delimitation agreement with the TRNC, ensuring that the defined boundaries do not interfere

[64] Hüseyin Pazarcı, "Deniz Hukuku Işığında Doğu Akdeniz Meselesi Konulu Çevrimiçi Panel" <https://tv.yasar.edu.tr/deniz-hukuku-isiginda-dogu-akdeniz-meselesi-paneli> accessed November 8, 2023.

with Turkey's continental shelf. However, the TRNC is an internationally unrecognised country and, from a political point of view, this has prevented it from concluding delimitation agreements with other states outside of Turkey to date.

Maritime disputes in the Eastern Mediterranean require diplomatic dialogue between the parties, adherence to equitable principles and a comprehensive solution to promote regional cooperation.In the present stage, the competition and geopolitical interests focusing on hydrocarbon resources complicate this process.

The failure to pursue dialogue and agreements will continue to increase tensions in the region due to undefined maritime borders and conflicts over access to energy resources. The risk of a military conflict will increase, which could lead to a confrontation between naval forces in the region.

The regional tensions will also have a negative impact on international relations and may lead to a decline in cooperation, trade and diplomatic relations as the international community has already begun to apply sanctions over the events. In future, these sanctions may include economic restrictions, reduced trade and international isolation.

In the absence of a consensus pertaining to the assertions concerning the island of Meis, Turkey shall continue to conclude delimitation agreements with other coastal States, as it has done in the Turkey–Libya Memorandum, and strengthen its hand with concrete data against any dispute. In this regard, the current violation of international law principles in the region has actually paved the way for Turkey to take the necessary steps within the framework of the "reciprocity" principle.

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LIABILITY OF THE PHARMACEUTICAL MANUFACTURER IN PRIVATE LAW ACCORDING TO LAW NO. 7223*

7223 Sayılı Kanunu Uyarınca İlaç Üreticisinin Özel Hukuk Sorumluluğu

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Abstract

This essay explores the development of legal frameworks governing pharmaceutical liability in Turkey, tracing the evolution from historical approaches to contemporary regulations. The paper especially focuses on the Law no. 7223 on Product Safety and Technical Regulations that came into force in 2021 which imposes strict liability on manufacturers through Article 6. The article's official rational states that it was enacted according with the EU Directive No. 85/374. The Directive consists of 19 introductory paragraphs followed by 22 articles exclusively related to the liability of defective products. In contrast, Law No. 7223 regulates product liability through only two articles (Article 6 and 21). As strict liability was long-awaited, even the enactment of those two articles were applauded. Considering the intricate nature and unique dynamics of the pharmaceutical industry, the situation is more complex for pharmaceutical manufacturers who are also liable under these provisions. This article focuses on the conditions of strict liability imposed on all manufacturers, including pharmaceutical manufactures under Law No. 7223, and evaluates these conditions specifically in the context of pharmaceutical manufacturers.

Key Words: pharmaceutical manufacturer's liability, strict liability, tort liability, non-conforming medication, causal link.

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* There is no requirement of Ethics Committee Approval for this study.

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Özet

Çalışmada, Türkiye'de ilaç sorumluluğunu düzenleyen yasal çerçeve, tarihi yaklaşımlar ve çağdaş düzenlemelerle birlikte aktarılmaya çalışılmıştır. Özellikle de, 2021 yılında yürürlüğe giren 7223 sayılı Ürün Güvenliği ve Teknik Düzenlemeler Kanunu'nun 6. maddesi ile üreticilere kusursuz sorumluluk getiren düzenlemeye odaklanılmaktadır. Maddenin resmi gerekçesinde, Avrupa Birliği'nin 85/374 sayılı Direktifi doğrultusunda hazırlandığı belirtilmiştir. Direktif, başlangıç kısmındaki 19 giriş paragrafının ardından sadece ayıplı ürün sorumluluğunu düzenleyen 22 maddeden oluşmaktadır. Buna karşılık, 7223 sayılı Kanun, iki madde (madde 6 ve 21) ile ürün sorumluluğunu düzenlemektedir. Üretilen ürünler dolayısıyla, üreticiye kusursuz sorumluluk getiren bir düzenleme, uzun zamandır beklendiğinden, bu iki maddenin yürürlüğe girmesi bile memnuniyetle karşılanmıştır. Aynı iki hüküm kapsamında sorumlu olan ilaç üreticileri için ise, ilaç sektörünün karışık dinamikleri dikkate alındığında, durum, biraz daha karmaşıktır. Bu makale, 7223 sayılı Kanun'un ilaç üreticilerini de kapsayacak şekilde tüm üreticiler açısından getirilen kusursuz sorumluluğun koşullarına odaklanmakta ve bu koşulları ilaç üreticileri açısından değerlendirmektedir.

Anahtar Kelime: İlaç üreticisinin sorumluluğu, kusursuz sorumluluk, haksız fiil sorumluluğu, uygunsuz ilaç, illiyet bağı.

INTRODUCTION: Historical Development with Comparative Perspective

Pharmaceutical manufacturer's liability varies significantly across jurisdictions, reflecting different legal frameworks, regulatory rules, and judicial practices. The issue has generally been addressed within the framework of general product liability, with only a few countries implementing specific regulations for pharmaceutical manufacturers. For example, in the United States, there are no special Federal Laws for either general product liability or liability for pharmaceuticals. Product liability, in general, is largely governed by judicial precedents and by state laws, though there are common principles such as negligence strict liability and breach of warranty, across jurisdictions of the States[1].

Around Europe, we could say that the final straw occurred around 1960s with medications such as 'thalidomide,' which was used by pregnant women to prevent nausea but caused birth defects, and 'DES,' which was used by pregnant women to prevent miscarriages but led to cancer in babies born[2]. These

1 Emre Güktekin, *İlaç Üreticisinin Hukuki Sorumluluğu* (Master thesis, Yalova Üniversitesi 2021)71 <https://tez.yok.gov.tr/UlusalTezMerkezi/ > accessed 26 July 2024; Tuba Akçura Karaman, *Üreticinin Ayıplı Ürününün Sebep Olduğu Zararlar Nedeniyle Üçüncü Kişilere Karşı Sorumluluğu* (Vedat Kitapçılık, 2008) 23-29.

2 Andrew Grubb and Geraint Howells (eds.), *The Law of Product Liability* (1st edn, Lexis Nexis Butterworths 2000) 9; Akçura Karaman (n1) 201; İlyas Sağlam '7223 sayılı Ürün Güvenliği ve Teknik Düzenlemeler Kanunu'na Göre Üreticinin Sorumluluğu' (Phd thesis, Akdeniz

defective products serve as examples and have triggered the implementation of regulations regarding the liability of manufacturers in many countries. Over time, it is recognized that strict liability and special laws are essential components of these frameworks, holding manufacturers accountable for defective products and fostering a safer industry.

European Product Liability Directive (85/374/EEC)[3] establishes a framework for strict liability for defective products, including pharmaceuticals. Under this directive, a manufacturer is liable for damage caused by a defect in their product, regardless of whether there was negligence. The directive covers personal injury and property damage. This strict liability framework ensures that consumers across the EU have consistent protections and that manufacturers are held to high safety standards. The principles of the European Product Liability Directive (85/374/EEC) have been widely adopted and adapted into national laws across EU member states, non-EU European countries such as Turkey and Switzerland, and nations aligning with EU standards. While the exact application of these principles may vary, the overall philosophy of the Directive plays a significant role in shaping national regulations for product liability. Additionally, some countries like Germany and Switzerland have gone beyond the protection provided by the Directive and have implemented specific regulations for pharmaceutical manufacturers[4].

I. TOWARDS STRICT LIABILITY OF MANUFACTURERS IN TURKEY AND THE CURRENT STATE OF PHARMACEUTICAL MANUFACTURES AMONG OTHER MANUFACTURERS

Before the enactment of special laws in Turkey, product liability was primarily subject to general tort and contractual liability principles. Especially in tort cases, it was very difficult for the injured party to prove conditions of liability such as negligence of the manufacturer and the defect in the product. Aware of these challenges, courts began alleviating the burden of proof in many areas in favor of the plaintiff[5].

Üniversitesi 2023) 83 <https://tez.yok.gov.tr/UlusalTezMerkezi/ > accessed 26 July 2024; Duygu Dincioğlu, 'Alman İlaç Kanunu'na Göre İlaç Üreticisinin Hukuki Sorumluluğunun Alman Hukukundaki Diğer Temel Özel Hukuk Sorumluluk Türleri ile Karşılaştırmalı Olarak İncelenmesi' (2024) 58 Türkiye Adalet Akademisi Dergisi 417, 422.

3 Council Directive 85/374/EEC of 7 August 1985 on Product Liability Directive [1985] OJ L210.

4 The German Pharmaceuticals Act (Arzneimittelgesetz, AMG) of 12 January 2005 BGBl. I S 3394 <https://www.gesetze-im-internet.de/englisch_prodhaftg/index.html> accessed 26 July 2024; Switzerland's Federal Act on Product Liability (LRFP) of 18 June1993 RO 1883 3122 <https://www.fedlex.admin.ch/eli/cc/1993/3122_3122_3122/fr> accessed 26 July 2024.

5 See Supreme Court, 4th CC, 1994/6256, 1995/2596, 27.3.1995 <https://www.lexpera.com.tr> accessed 26 July 2024.

The 1990s and 2000s marked a significant shift in Turkish law, with a growing recognition of the need for specialized regulations to address the complex production processes and the consumer protection. This period saw the introduction of laws and regulations that aligned closely with international standards, particularly those of the European Union.

Mainly in the context of significant revisions to the Turkish Code of Obligations (TCO), the Turkish Parliament enacted Law No. 6098, which introduced a general provision on strict liability (Article 71) for all manufacturers and enterprises. This means that the liability is not contingent upon proving negligence or fault but is based on the inherent risks associated with their activities. This reform marks a pivotal shift in how risk and liability are addressed across various industries in Turkey. Pharmaceutical manufacturers could fall under this provision if their activities are deemed to pose significant risks[6].

Additionally, Turkish legislator has also attempted to incorporate the product liability regime accepted by the EU Directive 85/374 into consumer legislation. A provision was added to the clause on the seller's liability for defects in Consumer Protection Law No. 4077, stating that the manufacturer would also be jointly and severally liable along with the seller[7]. Furthermore, Regulation on Liability for Damages Caused by Defective Goods[8] was enacted, closely mirroring the Directive and adopting strict liability for manufacturers in Article 6. However, introducing strict liability through a Regulation faced significant criticism for being legally inappropriate[9]. To date, no court decisions have relied on this regulation's strict liability provision.

Consequently, Turkish legislator addressed product liability towards third parties by adding few provisions to Law no. 7223 on Product Safety and Technical

6 To this aspect see Serdar Nart, 'Endikasyon Dışı İlaç Tedavisinde Hekimin ve İlaç Üreticisinin Hukuki Sorumluluğu', (2017) 19 Dokuz Eylül Ünivesitesi Hukuk Fakültesi Dergisi, Commemoration to Prof. Dr. Şeref Ertaş, 772; Hakan Hakeri, *İlaç Hukuku*, (2nd edn, Astana yayınları 2018) 173; Gültekin (n1) 24.

7 Law No. 4822 of 6 March 2003 amending the Article 4/3 of Consumer Protection Law No. 4077. This provision has been retained unchanged in the new Consumer Protection Law No. 6502 with Art. 11/2.

8 OG 25137/13.01.2003.

9 See Ayşe Havutçu, *Türk Hukukunda Örtülü Bir Boşluk: Üreticinin Sorumluluğu* (Seçkin 2005) 117 etc.; Damla Özden Çelt, 'Ürün Sorumluluğunda Yaşanan Güncel Gelişme: 7223 Sayılı Ürün Güvenliği ve Teknik Düzenlemeler Kanunu' (2021) 7 (1), Anadolu Üniversitesi Hukuk Fakültesi Dergisi, 75; Gökçe Kurtulan Güner and Yeşim M. Atamer, 'Ürün Güvenliği ve Teknik Düzenlemeler Kanunu ile İmalatçının Sorumluluğu Konusu Türk Hukuku Açısından Çözülmüş müdür?' in Y. M. Atamer and B. Baysal (eds), Ürün Sorumluluğu, Sorumluluk Hukuku Konferansları I, (Oniki levha Yayıncılık 2022), 5; Sağlam (n 2) 43; Akçura Karaman (n 1), 144-147.

Regulations which applies to all products, including pharmaceuticals[10]. As detailed below, Article 6 of Law No. 7223 introduces strict liability for manufacturers. However, the law offers only general provisions, lacking specific regulations for pharmaceutical manufacturer. This approach fails to fully meet the needs of both pharmaceutical manufacturers and consumers, highlighting the ongoing need for specialized regulation.

II. THE SCOPE OF LAW NO. 7223 ON PRODUCT SAFETY AND TECHNICAL REGULATIONS

Law No. 7223 on Product Safety and Technical Regulations[11], establishes a comprehensive framework for product safety in Turkey. It revises existing regulations and introducing new rules to address emerging issues, aligning with contemporary standards. Among its provisions Article 6 is key, establishing strict liability for manufacturers, importers for damages caused by defective products. Before examining the elements of the liability introduced, it is useful to look at what products are covered and who the liable parties are.

A. Definition Of Product: Are Pharmaceuticals Included?

Law No. 7223 broadens product liability provisions to cover a wide range of products. Article 3(s) defines "product" as "*any substance, preparation, or goods* (*her türlü madde, müstahzar veya eşya*)". The term "müstahzar" (translated as preparation) is often associated with pharmaceuticals in Turkish legislation. For example, in Regulation on the Evaluation of Bioavailability and Bioequivalence of Pharmaceutical Preparations defines "müstahzar" as "*a drug manufactured in a specific pharmaceutical form according to a specific formulation, both in research/development and production dimensions* (Article 4/1)." On the other hand, the Turkish Language Institution (TDK) indicates that "müstahzar" can also refer to any product made ready for use. While the law does not specify which meaning applies, as rightfully accepted in the doctrine[12], the definition in Article 3 (s) covers pharmaceuticals as it includes all types of goods (*eşya*). The term "eşya" used in the definition can even extend to immovable property[13].

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10 Regarding the discussions on the introduction of strict liability through Article 5 of the previously repealed Law No. 4703, which required manufacturers to place safe products on the market, see Havutçu (n9) 117; Çelt (n9) 75; Akçura Karaman (n 1), 144-147.

11 OG 31066/12.03.2020.

12 Çelt (n 9) 90; Sağlam (n 2) 80; Gültekin (n1)55; Atamer and Kurtulan Güner (n9), 553.

13 To this aspect and for further critics see Yeşim Atamer and Gökçe Kurtulan Güner, 'Ürün Güvenliği ve Teknik Düzenlemeler Kanunu ile İmalatçının Sorumluğu Konusu Türk Hukuku Açısından Çözülmüş müdür? (2021)14(70) Anakara Üniversitesi Hukuk Fakültesi Dergisi 543, 553 <https://dergipark.org.tr/tr/pub/auhfd/issue/62472/900613#article_cite> accessed 7 September 2024.

Considering the legislator's aim to align with Directive 85/374, as noted in the article's explanatory notes[14], including pharmaceuticals within the product definition alines with this goal. Article 2 of the Directive defines "product" as all movables, excluding primary agricultural products and game. This includes pharmaceuticals, as confirmed by paragraph 13 of the Directive's explanatory notes[15], which states that the Directive does not prevent the application of the special liability systems for pharmaceuticals in member states. Therefore, claims related to defected pharmaceuticals can be pursued under the Directive or through national special liability systems.

B. Persons liable for the damages

Law No. 7223 states that manufacturers or importers are responsible for the products they place on the market that cause harm (Article 6/1).

A manufacturer is defined in Article 3(g) as the natural or legal person who manufactures the product or has it designed or manufactured and offers it to the market under their own name or trademark. As seen from this provision, not only the person who manufactures the product but also the person who simply places their brand on the product without manufacturing it is considered a manufacturer. This includes the common practice of outsourcing production and selling products under one's own brand. Under this provision, even a company that does not manufacture the product but markets it under its brand is held liable as a manufacturer.

Importers are defined under Article 3(ğ) as the natural or legal person who imports the product and offers it to the market. Given the challenges for injured parties to file lawsuits against foreign manufacturers, importers who bring products into Turkey are also held liable as if they were the manufacturer. This responsibility extends even to the state in the cases where the state is the importer. For example, in the case of COVID-19 vaccines imported by the state, the state could be held liable as the importer[16].

Even though the law does not explicitly state this, it is accepted that liability for damages applies not only to final products but also to those who manufacture or import intermediate products[17]. Excluding importers of intermediate products from liability would undermine the protective purpose of the law. Indeed, an examination of the Turkish Statistical Institute's Foreign Trade Statistics reveals that the largest share of imported goods is intermediate products[18]. The law also

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14 <https://www5.tbmm.gov.tr/sirasayi/donem27/yil01/ss173.pdf> accessed 5 September 2024.

15 <https://eur-lex.europa.eu/eli/dir/1985/374/oj> accessed 8 September 2024.

16 Atamer and Kurtulan Güner (n14) 549, footnote 26..

17 To this aspect see Atamer and Kurtulan Güner (n14) 549; Havutçu (n 9) 91.

18 <https://data.tuik.gov.tr/Bulten/Index?p=Dis-Ticaret-Istatistikleri-Ocak-2024-53534> accessed

states that if more than one manufacturer or importer is responsible for the harm, they shall be held jointly and severally liable (Article 6/3). This includes situations where the final product is produced by different manufacturers or imported by different importers, and in our view, it also applies to manufacturers and importers of intermediate products, who will likewise be jointly and severally liable for any harm caused[19]. For instance, if multiple manufacturers are involved in producing a pharmaceutical (e.g., those making intermediate components, packaging, or caps), each would be jointly and severally liable. Joint and several liability can also arise when multiple drugs are used, and interactions between them cause harm[20]. The rules governing joint and several liability are outlined in Articles 61 and 62 of the Turkish Code of Obligations (TCO). The injured party may sue any one or all of the jointly and severally liable parties and can recover the full amount of damages from one of them. In such a case, the party that paid the compensation can seek recourse against the other responsible parties.

If the manufacturer or importer cannot be identified, the distributor is considered secondarily liable (Article 11/3). If the manufacturer, authorized representative, or importer cannot be determined, the distributor must provide their information. Failure to do so within 10 days results in the distributor being held liable for damages as if he was the manufacturer. Article 3(ç) defines "distributor" broadly, including anyone in the supply chain, such as sellers[21]. This regulation aims to prevent the distribution of products whose manufacturer cannot be identified[22].

III. THE CONDITIONS OF THE LIABILITY

Article 6 states that the manufacturer will be liable if the injured party proves the damage suffered and the causal link between the damage and the non-conforming product[23]. The elements of liability can be listed as "existence of a non-conforming product", "damage", and "causal link between the product and the damage". Since the manufacturer's fault is not mentioned, this points to a liability without fault, known as strict liability. Therefore, the legal nature of the liability should be examined before addressing the other elements.

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8 September 2024.

[19] To this aspect see Atamer and Kurtulan Güner (n14) 549; Gültekin (n1), s. 82.

[20] Gültekin (n1), s. 82.

[21] Candan Yasan Tepetaş, *İmalatçının Sorumluluğu ve Uygulanacak Hukuk* (Oniki Levha 2021) 94; Atamer and Kurtulan Güner (n14) 550, footnote 37.

[22] Yasan Tepetaş (n 21) 94; Atamer and Kurtulan Güner (n14) 550, footnote 37.

[23] Sirmen states that the law does not regulate who bears the burden of proof for the "non-conformity", that there is a gap in this regard, and that this gap could be filled by requiring the suffering party to prove the defect, in parallel with Article 4 of the EU Directive 85/374 (Lale Sirmen, "Ürün Sorumluluğu' in Tufan Öğüz, and K Öz (eds), Sorumluluk Hukuku Sempozyumu Bildiri Kitabı (Filiz Kitapevi, 2022) 63, 77.

A. Legal Nature: Strict liability

Strict liability is an exception to the general rule, which typically requires a law to explicitly state when a person can be liable for damage without fault. Law No. 7223 does not clearly state that it imposes strict liability, leading to potential uncertainty about its legal nature. However, the legislature's intention during the drafting process is crucial. As mentioned earlier, the explanatory notes[24] for Article 6 of the law indicate that the liability provisions were aligned with Directive 85/374/EEC which follows a strict liability regime. In other words, the legislature aimed to adopt the liability regime accepted by the Directive. It is explicitly stated in the second explanatory paragraph of the Directive that strict liability is imposed[25]. Ideally, this concept should have been explicitly mentioned, at least in preamble of the Law No. 7223, to avoid debates in legal doctrine. Nevertheless, based on Article 1 of the Turkish Civil Code, which emphasizes that the essence and wording of the law should align, it can be inferred that Article 6 of Law No. 7223 indeed introduces strict liability, consistent with the legislature's intent and the article's rationale[26].

Furthermore, Article 6/2 of Law No. 7223 specifies that to claim compensation, the injured party only needs to prove the causal link between the defect and the damage. This also indicates that the liability is strict, as the injured party is not required to prove the manufacturer's fault. Strict liability focuses on the cause-and-effect relationship, where the cause of liability is an event specified by law. In this case, Article 6/2 identifies the "defect in the product" as the event triggering liability, meaning the defect must cause the damage. The law emphasizes the connection between the defect and the damage, rather than any fault on the part of the manufacturer. Liability arises simply because the damage was caused by a defective product, not due to any fault conducted by the manufacturer.

B. Non-conforming Product

Law No. 7223 uses the term "non-conforming" rather than the terms "defective" or "unsafe", which are used in the source Directive 85/374/EEC. According to

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24 <https://www5.tbmm.gov.tr/sirasayi/donem27/yil01/ss173.pdf> accessed 5 September 2024.

25 <https://eur-lex.europa.eu/eli/dir/1985/374/oj> accessed 8 September 2024.

26 Atamer and Kurtulan Güner (n14) 560; Sağlam (n 2) 186-188; Tuba Akçura Karaman, '7223 sayılı Ürün Güvenliği ve Teknik Düzenlemeler Kanunu'nun 6. Maddesi ile Düzenlenen Ürün Sorumluluğuna "uygunsuzluk" ve "zarar" Unsurları Açısından Eleştirel Bir Bakış' (2023) 18 (199) Terazi Hukuk Dergisi 78; Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler II.* (16th edn, Vedat Kitapçılık 2021) 244; Erhan Kanışlı, 'Ürün Güvenliği ve Teknik Düzenlemeler Kanunu (ÜGTFK) Uyarınca Üreticinin Sorumluluğu', (2020) 78 (3) İstanbul Hukuk Mecmuası 1443; Akın Ünal ve Afir Kalkan, "Türk Hukukunda Ürün Sorumluluğu Üzerine Olan ve Olması Gereken Hukuka Dair Genel Düşünceler" *Türk Adalet Akademisi Dergisi* 39 (2019) 45.

Article 1 of the Directive, the manufacturer is liable for damages caused by a defect in his product and Article 6 of the Directive states that the product is defective when it fails to provide the safety that a person is entitled to expect. The choice to use "non-conformity" in Turkish law, despite it not being mentioned in the source Directive, has been rightfully criticized in Turkish doctrine[27]. As will explained below, the term non-conformity is a broader concept that also includes being unsafe. Even a violation of technical regulations that are not related to human safety can render a product non-conforming. For example, if the technical regulations limits motor power for energy-saving purposes, but manufacturer produces a product with slightly higher power, the product might still be safe but non-compliant. If this more powerful vacuum cleaner damages carpets or flooring, the manufacturer could be held strictly liable under Article 6 of Law No. 7223. In contrast, the , the Directive focuses on holding manufacturers strictly liable only for unsafe products. Therefore, the concept of non-conformity in Law No. 7223 is broader than the concept of unsafe products in the Directive, expanding the scope of strict liability for manufacturers in Turkey.

"Non-conformity" is defined in subparagraph (r) of Article 3, the definitions article of Law No. 7223, as "*the state of a product not conforming to the relevant technical regulation* or *general product safety regulations*." As understood from the definition, a product must be manufactured in accordance with both technical regulations and general product safety regulations. If it violates even one of these, its "conformity" will be in question. Therefore, while the licensing of a pharmaceutical indicates compliance with technical regulations, this alone is not sufficient to ensure that the pharmaceutical is deemed confirming; it must also comply with general product safety legislation.

In Turkey, pharmaceutical manufacturers are required to obtain a marketing license before releasing a drug into the market (Article 5/1, Regulation on the Licensing of Human Medicinal Products, RLHMP[28]). This licensing is granted by the Turkish Medicines and Medical Devices Agency (Türkiye İlaç ve Tıbbi Cihaz Kurumu TİTCK) under the Ministrery of Health to ensure the drug's safety, efficacy, and quality. The procedures followed by TITCK in licensing a medicinal product is outlined in the RLHMP[29]. Therefore, the inspection of

[27] Sirmen (n23) 5; Atamer ve Kurtulan Güner (n 16) 563, 564. For further evaluations on the subject see Akçura Karaman (n 3), 90; Sağlam (n 3) 105, 107-109.

[28] OG11.12.2021/31686.

[29] See Başak Tayşi Bilgili, İlaçların (Beşeri Tıbbi Ürünlerin) Ruhsatlandırılması, Markalarının Oluşturulması, Korunması ve Kısıtlanması, (Galatasaray Üniversitesi Sosyal Bilimler Yüksek Lisans Tezi 2019) 35, 36; Fülurya Yusufoğlu Bilgin and Sıtkı Anlam Altay "İlaç Ruhsatının Askıya Alınmasında Bilimsel Verilere Dayanma Zorunluluğu" in S A Altay and A Ayoğlu and F Yusufoğlu Bilgin (eds), Prof. Ercüment Erdem'e Armağan C.I (Onikilevha 2023) 1480, 1481.

whether a drug is produced in accordance with technical regulations in Turkey, as stated in Art. 3 (r) of the Law No. 7223, is conducted by TİTCK. TİTCK also evaluates complaints, and feedback from patients and healthcare professionals regarding the marketed drugs[30]. These processes are carried out regularly and comprehensively to protect public health and ensure drug safety.

It should be noted that all pharmaceuticals must be licensed, and unlicensed pharmaceuticals are exception[31]. Art. 5 of the RLHMP stipulates that no medicinal product may be placed on the market without a license from TİTCK. An unlicensed pharmaceutical is considered both a violation of the RLHMP and an unsafe product under Art. 5 of the Law no. 7223, leading to liability under Art. 6 of Law No. 7223. Conversely, if a licensed pharmaceutical causes harm, it will be inspected to ensure that it meets all requirements specified in the license and technical specifications. A product failing such an inspection would be deemed non-confirming. Even if the product passes all the inspections and complies with technical regulations, it does not necessarily mean the product is confirming as per the Law no. 7223. The product should also meet the expected safety and risk-free requirements of the General Product Safety Regulation, as explained below.

Compliance with the technical regulations is mandatory but not sufficient. In addition, Article 3(r) of the Law No. 7223 requires that the drug complies with the 'general product safety regulation.' It is not specified in Law No. 7223 what is meant by the 'general product safety regulation.' Upon reviewing the relevant legislation[32], it is understood that the term 'general product safety legislation' refers to the 'General Product Safety Regulation" which was published in the OG in 2021[33]. Article 4(d) of the said Regulation defines safe product as, *"a product that, under normal and reasonably foreseeable conditions, does not pose a risk or poses minimal risk specific to the use of the product, including requirements for its introduction to service, installation, and maintenance where applicable, and that is considered to provide a high level of protection for human health and safety when the following elements are taken into account;..."*

The definition of a safe product provided in Article 4(d) of the Regulation is complex and includes four criteria for evaluating safety. It is unclear how these criteria apply at different stages of product safety evaluation. To clarify, it is helpful to refer to Article 2/1(b) of the EU Directive on General Product Safety No. 2001/95 which is the bases of the Art. 4(d) of the Turkish Regulation[34].

30 Gültekin (n1) 39.

31 Further information on licensing see Tayşi Bilgili (n 29)15.

32 see Article 4g of the Framework Regulation on the Market Surveillance and Inspection of Products, OG 31537/10.07. 2021.

33 General Product Safety Regulation, OG 31420/11.03.2021. Also see Sağlam (n 2) 105.

34 Article 15 of the Regulation explicitly states that the source is EU Directive No. 2001/95.

According to Article 2/1(b) of the Directive 2001/95[35], a product is considered safe if it meets two fundamental criteria. Firstly, the product must either be completely non-hazardous or hazardous to an acceptable degree. This assessment should consider the product's "reasonably foreseeable use", including its lifespan, installation, and maintenance. These conditions, though phrased differently, are similar to those in Article 4(d) of the General Product Safety Regulation. For example, a product must be safe throughout its usage period. If a painkiller is used past its expiration date and causes harm, it is deemed "user error", not an issue of product safety. The 'reasonably foreseeable use' means that the product should be safe for all anticipated and socially accepted uses[36]. Manufacturers must foresee potential hazards and provide adequate warnings. If a product is used in an unforeseeable manner and causes harm, it does not necessarily mean the product is unsafe. For example, if someone overdoses on and suffers harm, the manufacturer is not liable if the usage was not foreseeable. Additionally, a product that causes harm does not automatically means it is unsafe. For example, cancer drugs, despite severe side effects, are considered safe if their long-term benefits outweigh the risks.

The second criteria require the product to provide "a high level of protection for the safety and health of individuals". This involves evaluating several factors, including instructions on usage, maintenance, disposal, and interactions with other products. Thus, if a product is deemed to provide 'a high level of protection for the safety and health of individuals' based on these four criteria and similar criteria, then the product is considered safe.

Moreover, Article 2/1(b) of the Directive no. 2001/95 specifies that the mere possibility of producing a lower risk product does not render a product dangerous. This provision is also reflected in Article 5/3 of the Product Safety Regulation. It clarifies that the presence of safer alternatives or lower-risk products does not automatically classify a product as unsafe. However, this does not imply that manufacturers can produce unsafe products. They are expected to adopt appropriate technology and practice to ensure their products are safe. While manufacturers are not obligated to use the most advanced or expensive technologies, they must implement adequate measures to ensure safety. This principle was affirmed by Turkish Supreme Court in a 1995 decision[37], predating the relevant legislation.

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35 European Directive of 15 January 2002 on general product safety, OJL 11 < https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0095> accessed 26 June 2024

36 See also Yvan Markovits, 'La Directive C.E.E. Du 25 Juillet 1985 Sur La Responsabilité Du Fait Des Produits Défectueux', [1990] Revue internationale de droit comparé 210.

37 Supreme Court, 4th CC, 1994/6256, 1995/2596, 27.31995. <https://www.lexpera.com.tr/ictihat/> accessed 26 July 2024.

C. Damage

To claim compensation from the manufacturer under Article 6 of Law No. 7223, the injured party must demonstrate that they have suffered damage caused by a non-conforming product. This damage can effect either individuals or property. Article 6/1 of Law No. 7223 states that the manufacturer or importer is liable for any such damage. Article 6/5 of the Law also specifies that compensation amounts, both material and immaterial, will be calculated according to the Turkish Code of Obligations (TCO).

The reference to the TCO, is intended to guide the calculations amounts, as outlined in Articles 51 and following. Although Law No. 7223 refers only to the TCO's provisions on compensation amounts, the general principles of the TCO can also be used to determine the scope of the damage to individuals or property. Therefore, in the absence of specific regulations in Law No. 7223, the scope of damage and compensation amounts should be determined based on the TCO's general provisions on tort liability (Articles 50-59).

If the injured party cannot fully prove the extent of the damage, the court will determine the amount based on Article 50/II of the TCO. The judge will assess the damage fairly, considering the course of events and the measures taken by the injured party. Additionally, the Law no. 7223 includes provisions for the judge to consider when calculating damages (Article 21/4), which will be reviewed in the section below discussing exemptions.

Article 6/1 of Law No. 7223 allows claims for "damage to individuals and property" without limiting the rights under general provisions[38]. To clarify, Article 6/5 explicitly references the TCO's provisions on non-pecuniary damage.

1. Damage to Individual

Article 6 of Law No. 7223 mentions that, damages suffered by individuals will be compensated; however, it does not clarify what is included in the scope of these damages. To address this gap, it would be appropriate to interpret the reference to the TCO in Article 6/5 of Law No. 7223 broadly, and to resolve the issue according to the provisions of the TCO. This matter is regulated by Articles 53, 54, 55, and 56 of the TCO

Material damage resulting from death and injury is referred to as damage suffered by an individual[39]. TCO provides a dual assessment based on whether the death was caused or not. Accordingly, if a non-conforming product causes the death of an individual, compensation can be sought for funeral expenses;

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[38] Erhan Kanışlı, 'Ürün Sorumluluğunda Zarar' in Yeşim Atamer and Başak Baysal (eds.), Ürün Sorumluluğu Sorumluluk Hukuku Konferansları I (Onikilevha Yayıncılık 2022) 178, 184.

[39] Fikret Eren, *Borçlar Hukuku Genel Hükümler* (27th edn, Yetkin Yayınları 2022) N. 1642, 607; Oğuzman and Öz (n25) N. 277; Kanışlı (n 38) 180.

if death does not occur immediately, compensation can be claimed for medical expenses and for material damage arising from the inability to work until death (TCO Art. 53). It should be also noted that, Supreme Court, does not favor the reduction request of the defendant on medical expenses[40]. If a person merely falls ill due to a non-conforming medication, they can claim compensation from the manufacturer and importer for loss of earnings and medical expenses related to the period of illness (TCO Art. 54). Additionally, compensation for loss of earning capacity or the impact on the individual's economic future due to bodily harm can also be compensated[41].

The judge determines the maximum amount of compensation, which should not exceed the damage suffered. The Judge shall determine the scope of compensation, taking into account the requirements of the situation, particularly the severity of the fault (Art. 51/1TCO)[42].

Article 52 of the TCO outlines the circumstances under which the amount of compensation can be reduced. According to this provision, if the injured party has consented to the act causing the damage, contributed to the occurrence or aggravation of the damage, or worsened the situation of the liable party, the judge may reduce the compensation or eliminate it entirely. This is referred to as contributory negligence, where the injured party's actions cause or worsens the damage. If the main cause of the damage is the injured party's fault, this may not just reduce the liability but may also completely eliminate it[43]. As will be explained below[44], if the injured party's fault is deemed the primary cause of the damage, the causal link between the perpetrator's act and the damage is considered to be broken[45]. For example, if A lightly injures B, and B covers the wound with a contaminated cloth, causing an infection that leads to B's death, B's action of using the contaminated cloth breaks the causal link between A's

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40 Supreme Court, 4th CC, 604/2504, 30.03.1985: "For the protection of the human legal personality, which includes life and health that one cannot be even waived, the requirement to receive treatment in places and by individuals who are more careful and skilled should not be a reason for a reduction in compensation claims. It is contrary to procedure and law for the court to base treatment expenses on the tariffs of official institutions." <https://www.hukukturk.com/yargitay-kararlari?EsasNo1=1985&EsasNo2=604&KararNo1=1985&KararNo2=2504&Merci=4060> accessed 30 May 2023.

41 Eren (n 39) N. 1635, 606; Oğuzman and Öz (n 25) 100, 101.

42 It is accepted that the injured party can claim compensation for excessive damages by analogy with TCO Art. 122 (Oğuzman and Öz (n 25) N. 264; Rana Nur Sidim, *İlaç Üreticisinin Hukuki Sorumluluğu* (Master thesis, Uludağ Üniversitesi 2023) 72 <https://tez.yok.gov.tr/UlusalTezMerkezi/ > accessed 26 July 2024

43 Oğuzman and Öz (n 25) N. 376, 377..

44 See below "interruption of the causal link" especially context related to fn 75.

45 Oğuzman and Öz (n 25) N. 278, 379.

act and the damage. This principle, set out in Article 52 of the TCO, is further expanded, in Article 21/4 of Law No. 7223, allowing for a broader scope of reductions[46]. The fault of not only the injured party but also any third party under the injured party's responsibility may lead to a reduction or complete elimination of the manufacturer's liability. For example, if a non-conforming drug is prescribed to A to be taken with meals but A's daughter continues to give on an empty stomach, and A subsequently suffers from a stomach ulcer, an investigation might reveal that the drug was non-conforming due to the presence of an unapproved ingredient. However, A's daughter's administration of the drug on an empty stomach increased the risk and triggered the ulcer. In such a case, the judge might reduce or completely eliminate the compensation due to A's daughter's incorrect administration (Article 21/4)

As mentioned Article 51/1 of the TCO states that the judge shall determine the scope of compensation based on the "*requirements of the situation*". The phrase is interpreted to include unforeseen events, extraordinary income of the injured party or harm suffered by the perpetrator[47]. Among these factors, unforeseeable events are particularly significant for pharmaceutical manufacturers. An unforeseen event is one that is independent of the responsible party's actions[48]. For example, if A lightly injures B and B subsequently dies due to an infection contracted in the hospital, the infection would be considered an unforeseen event. Inherent predispositions, such as hemophilia, diabetes, heart disease, or allergies also play a significant role. Although these conditions do not involve any fault or behavior from the injured party, they may necessitate a reduction in compensation based on equity[49]. For instance, a slap to a person with a defect in their skull bones or a slight stab to a hemophiliac might result in severe harm or death. With the perpetrator remains responsible, the court may reduce the compensation to account for the injured party's predisposition.

Norms protecting the right to life generally do not distinguish based on the injured party's inherent predisposition. However, Art. 51/1 of the TCO allows for equitable reduction in compensation. The Supreme Court[50] has supported this view indicating that while inherent predisposition may partially contribute to damage, it justifies a reduction in compensation. This reduction is usually less than the extend of the inherent predisposition's contribution. For example, compensation might be reduced by one-quarter or one-fifth.

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46 See context related to fn 75.

47 Oğuzman and Öz (n25) N. 364 sq.; Eren (n 39) N. 2413.

48 Eren (n 39) N. 2414; Oğuzman and Öz (n25) N. 397..

49 Sidim (n42) 72 ; Eren (n 39) N. 2416.

50 Supreme Court, 4th CC, 6092/8184, 05.11.1984; Supreme Court General Assembly of Civil Law, 481/4-508, 24.06.1964 <https://www.lexpera.com.tr/ictihat/> accessed 26 July 2024.

If the harm suffered by the victim, is caused by the negligent behavior of both the perpetrator and a third party, this situation does not, as a rule, eliminate the perpetrator's liability but rather creates joint liability among the responsible parties. In this case, the perpetrator has the right to recourse against the third party according to the provisions of Articles 61-62 of the TCO. Additionally, the negligent behavior of the third party is also considered among the *requirements of the situation* mentioned in Article 51 of the TCO, that judge shall consider in determining the compensation.

The side effects of medications can vary in severity, and the same medication can cause different harm in different individuals. Additionally, the harm may occur either while the medication is being used or later on. The judge can only decide on the compensation for the harm that has already occurred. However, it is possible to file a lawsuit for harm that occurs after the decision has been made, with the right to claim additional compensation reserved[51]. Furthermore, as regulated in Article 75 of the TCO, if the extent of bodily harm cannot be fully determined at the time of decision-making, the judge may retain the authority to modify the compensation ruling within two years starting from the finalization of the decision.

The amount of compensation for bodily harm is determined based on the date of the judgment. However, while it is considered that the date of the judgment should be taken into account, Supreme Court rulings indicate that the date of the occurrence of the damage is the basis. Interest begins to accrue from the moment the damage occurs. Interest is applied to the amount of damage determined as per the date of the occurrence until the judgment is issued[52].

Additionally, it is necessary to address the issue of compensation for loss of support. Article 53 of the TCO stipulates that the relatives of the deceased may also claim compensation for material damages on the grounds of loss of support. In this context, the relatives of the deceased are also allowed to claim compensation for loss of support from the manufacturer. However, whether compensation for loss of support can be claimed without fault in cases of strict liability is a matter of debate in the doctrine, though it is generally accepted that fault should not be required[53]. Since the Law No. 7223 does not explicitly provide for the possibility of claiming compensation for loss of support from the manufacturer, the discussions we have mentioned under the TCO will also be relevant to product liability.

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51 Eren (n 39) N. 2283, 2284.

52 Eren (n 39) N. 2283, 2284; Oğuzman and Öz (n 25) 88 ; Sidim (n 42) 74.

53 Atamer ve Kurtulan Güner (n 14) 567. The authors have noted that the German product liability law explicitly states that compensation can be claimed without the need to prove fault in this matter.

Article 16 of the Directive No. 85/374, allows member states to set an upper limit on the total compensation that the manufacturer must pay for death and bodily injury caused by the same defect, provided it is not less than 70 million euros[54]. The Law No. 7233 chose not to impose an upper limit in this regard.

2. Non-pecuniary Damage

Article 6/5 of Law No. 7223 stipulates that the amount of material and non-pecuniary compensation shall be determined according to the provisions of the TCO. This implies that non-pecuniary compensation can be claimed from the manufacturer.

Non-pecuniary damage refers to the involuntary reduction in a person's well-being due to violations against their personality[55]. Unlike material damage, non-pecuniary damage does not result in a decrease in assets and cannot be measured in monetary terms. However, in the absence of a better remedy, compensation for this damage is usually determined by awarding a sum of money. Within the framework of the current legislation, Article 58 of TCO is the primary provision that allows for claiming non-pecuniary compensation in cases of infringement of personal rights. TCO Article 58 serves as a general liability rule protecting personal rights, including social and emotional values[56]. On the other hand, TCO Article 56, which is a specific provision, regulates compensation for non-pecuniary damages arising from violations of physical personality values such as the right to life and bodily integrity. If the conditions stipulated in these articles are met, it is possible to claim non-pecuniary compensation from the manufacturer. A relevant Supreme Court decision[57] awarded non-pecuniary compensation to a plaintiff for the distress and depression caused by a heart condition and other side effects resulting from a prescribed medication. The plaintiff, who has been prescribed a muscle relaxant, subsequently developed a heart that forced him to quit his profession as a pilot.

Although TCO provisions do not explicitly mention the element of fault, it is generally accepted that non-pecuniary compensation is based on the principle of fault since it falls within the scope of tort liability[58]. Given that

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[54] See Markovits (n 36) 237 N. 379; Catherine Weniger, *La Responsabilité du fait des produits pour les dommages causés à un tiers au sein de la Communauté Européenne* (Librairie Droz 1994) 127, 128.

[55] Oğuzman and Öz (n 25) 267 et sq., N. 715; Eren (n 39) N. 2432 et sq.; Henri Deschenaux and Pierre Tercier, *La Responsabilité Civile* (Staempfli 1982) 258.

[56] Eren (n 39), N. 2434; Oğuzman and Öz (n 25) 266, 267.

[57] Supreme Court, 13th CC, 2017/8553, 2019/7812, 26.6.2019<https://www.lexpera.com.tr/ictihat/> accessed 26 July 2024.

[58] As to the claim for non-pecuniary damages being based on the principle of fault: Supreme Court of Appeals 4th CC, 11.7.2002, 2001/12708, 2002/8915 <https://www.kazanci.com.tr> accessed

Law No. 7223 imposes strict liability on manufacturers and importers, the question arises whether it is necessary to prove the fault of the manufacturer or importer for the injured party to claim non-pecuniary compensation under this legislation. Article 6/5 of Law No. 7223 states that the amount of material and non-pecuniary compensation will be determined according to the provisions of the TCO. However, this does not clarify whether the compensation is based on fault. To better understand this, we can refer the source Directive. Article 9/2 of the Directive 85/374 leaves the matter of non-pecuniary compensation to the national laws of the member states, due to its special nature[59]. This approach has been criticized for creating an imbalance in competition among companies in different member states[60]. In our opinion, accepting that the manufacturer is strictly liable also for non-pecuniary damages under Law No. 7223 would serve the protective purpose intended by law.

Since Article 6/5 of Law No. 7223 mentions non-pecuniary damages together with material damages without making a distinction and states that both will be subject to the provisions of the TCO, we believe that non-pecuniary damages can also be claimed without the need to prove fault[61]. Indeed, both the doctrine and the Supreme Court predominantly accept that in cases of strict liability, the responsible person will also be liable for non-pecuniary damages without the need to prove fault, provided that all the conditions required for strict liability are met[62].

3. Damage to Property

Article 6 of Law No. 7223 states that if a product damages property, the manufacturer or importer is obliged to remedy this damage. The damage to

26 July 2024. For further information see Oğuzman and Öz (n 25) 282, 283; Eren (n 39) N. 2483.

[59] See also preliminary paragraph 9 of the EU Directive no 85/374. Also see J.S. Christopher Hodges, *Product Liability European Laws and Practice* (Sweet & Maxwell 1993) 56.

[60] Markovits (n 36), 238 N. 380. Markovits has stated that in France, those who suffer non-pecuniary damage are protected, and the fault of the harm-doer is not required, whereas in Germany, non-pecuniary damages are not compensated outside of fault liability. As a result of the Directive leaving the application of non-pecuniary damages to national discretion, French manufacturers will be required to pay more non-pecuniary compensation compared to German manufacturers.

[61] To this aspect Kanışlı (n 38) 188.

[62] Pierre Tercier, *Le nouveau droit de la personalité* (Schulthess, 1984) 266 ; Selahattin Sulhi Tekinay and Sermet Akman and Haluk Burcuoğlu and Atilla Altop. *Tekinay Borçlar Hukuku Genel Hükümler* (Filiz Kitapevi 1993) 688, 689; Atamer ve Kurtulan Güner (n 14) 567; Kanışlı (n38) 1441; Oğuzman ve Öz (n 25) 145, N. 430; Eren (n 39) N. 2483. See Supreme Court General Assembly decision (22.6.1966, 7/7) that neither the employer's nor the employee's fault is a condition for holding the employer liable for non-pecuniary damages under TCO 56. (OG 12360/28.07.1966 <www.resmigazete.gov.tr> accessed 4 January 2023.

property means the loss of value in other possessions caused by the non-conforming product, resulting from the harm or destruction it causes[63]. For example, if a faulty electrical component in a water heater causes a fire, compensation can be claimed from the manufacturer or importer for the harm or destruction to other items in the house. Such a damage would occur rarely in the case of a non-conforming medication to damage. For instance, an excessive amount of acid in the medication might damage the medicine cabinet and other medicines stored alongside it. Thus, such property damage caused by a non-confirming medication also falls within the manufacturer's liability.

It is worth mentioning that price paid for a non-conforming medication do not fall under the manufacturer or importer's liability. The claims for the refund of the amount paid for the product should be made within the scope of the seller's contractual liability[64].

Lastly, it is also useful to note that the EU Directive 85/374 restricts compensation for property damage by both defining the damaged property as a consumer good and setting a minimum limit of 500 euros for the amount of damage (Art 9b). Article 6 of Law No. 7223 does not require the damaged property to be a consumer good or set a minimum limit for the amount of damage[65]. Unlike EU regulations, under Law No. 7223, all damages caused by non-conforming products to any property can be subject to compensation.

D. Causal Link

1. In General

To hold the manufacturer liable, there must be a causal link between the 'damage' and the 'non-conformity'. In fault-base liability, the link is typically between the manufacturer's conduct and the damage. However, under Art 6 of Law no. 7223, the causal link is required specifically required between the non-conforming product and the damage. As examined above, this indicates that the law introduces strict liability.

The burden of proof for the existence of the causal link rests on the injured party (Art. 6/2). For instance, a person whose illness has worsened must prove that was caused by the non-conformity of the medication used, which can be challenging and often requires technical examinations. Various means, such as epidemiological studies, may be used to prove an appropriate causal link. However, the results of such studies alone are not sufficient to definitively

[63] Eren (n 39) N. 1643; Kanışlı (n 38) 180.

[64] Bilge Öztan, *İmalatçının Sorumluluğu* (Turhan Kitapevi 1982) 22; Gilles Petitpierre. *La Responsabilité du fait des Produits* (Librairie de l'Université Georg 1972) 34, 35.

[65] Sirmen (n 23) 79.

establish a causal connection between the damage and the medication's non-conformity. While these studies may reveal the relationship between the disease and the medication, the causal link must be assessed separately.

Article 4 of Directive 85/374 similarly requires the victim to prove the causal link between the product and the damage. This requirement for the plaintiff to prove the causal link has been criticized as an unfairly heavy burden. Acknowledging the difficulty of such proof, the European Commission, in its 1999 publication 'Green Paper'[66], proposed that if the can victim prove both the damage and the defect, it should be presumed that the causal link exists. In line with doctrinal views, we also believe it would be appropriate to extent the same ease to victims seeking compensation from the manufacturer under Law No. 7223[67].

Proving the causal link between the non-conforming product and the damage becomes even more challenging in the presence of multiple causes. Generally, multiple causes can present themselves in three different ways[68].

The first scenario is "common causality". In common causality, none of the causes alone is sufficient to produce the harm result, but when combined, they lead to damage. For instance, if a non-conforming medication becomes even more dangerous and causes a person's death because it was not stored at the required temperature in the warehouse of one of the wholesalers in the distribution chain, this is a case of common causality. In this example, neither the non-conformity in the medication nor the poor storage conditions alone are sufficient to produce a lethal effect, but when these two independent causes come together, they lead to such a result. Similarly, if using a single medication would not have caused any harm, but the use of multiple medications together leads to illness, the concept of common causality among the manufacturers of the medications would apply.

The second scenario is "competing causality", where each cause simultaneously is sufficient to produce the harmful result. Returning to our previous example, this would be the case if both the non-conformity in the medication and the deterioration caused by improper storage were each independently sufficient to produce the lethal result. The causality between these two causes and the damage is in a competing position.

The final scenario is "alternative causality", where only one of the multiple causes has actually produced the harmful result, but it cannot be determined which cause it was. An example of this situation is when there are multiple importers of a non-conforming medication or when the same medication is manufactured

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66 COM (1999) 28.7.1999, 396 final, 19 <www.europa.eu.int> accessed 26 June 2024.

67 To this aspect see Gültekin(n 1) 59; Celt (n9) 98; Akçura Karaman (n1) 215.

68 Eren (n 39) N. 1702 et sq.; Oğuzman and Öz (n 25) 56, 57; Akçura Karaman (n 1) 273.

by different producers. In this case, a single medication has caused the damage, and the primary responsible party is the person who produced or imported the product; however, it cannot be determined which manufacturer produced the product or which importer brought it into the country. In cases of "common causality" and "competing causality", all the causes are considered jointly and severally liable[69]. However, in alternative causality, there is essentially only one responsible party, but there is not enough evidence to determine who that is. Consequently, it is accepted that in such cases, no one can be held liable[70].

In the field of pharmaceutical manufacturer liability, the issue of "alternative causality" frequently arises, especially when a medication produced abroad is imported into the country by multiple importers. As mentioned, in cases of alternative causality where the responsible party cannot be identified, it is typically accepted that no one should be held liable. Since exonerating the manufacturer or importers from liability would mean that the victim bears the full extent of the damage, this solution does not seem fair[71]. Therefore, we believe the European Commission's 1999 report proposal, which suggests that if the victim proves that the product is defective and that damage has occurred, the causal link should be presumed, is quite appropriate[72]. In this scenario, each manufacturer can only avoid liability by proving that the product causing the damage was not their own product.

2. Interruption of the Causal Link

Interruption of the causal link occurs when an intervening cause emerges before the initial action has fully realized its effects. This cause pushes the original action to the background and renders it no longer suitable for liability. Interruption causes are classified as force majeure, fault of the victim, or fault

69 Eren (n 39) N. 1709; Oğuzman and Öz (n 25) 57; Akçura Karaman (n 1) 273; Haluk Tandoğan, *Türk Mes'uliyet Hukuku* (Ajans-Türk Matbaası 1961) 83, 85.

70 Eren (n 39) N. 1714; Oğuzman and Öz (n 25) 57; Tandoğan (n 67) 86; Tekinay and Akman and Burcuoğlu and Altop (n 61) 570. Those authors also argue that when the various causes are not completely independent and form a continuity, all individuals involved should be held jointly liable. A classic example is a fight involving five people where a fatal punch cannot be attributed to a specific person. In such cases, everyone involved is considered jointly liable. This is supported by the 1977 decision of the 4th Civil Chamber of the Supreme Court (19.9.1977, 7150/8449), which states that in cases of alternative causation with an appearance of unity, jointly liable applies under Article 50 of the TCO <https://www.kazanci.com.tr> accessed 26 July 2024.

71 Guillod and Leuba, suggests using a method that considers the market share of the liable parties when determining the existence of the causal link (Oliver Guillod and Audrey Leuba, 'Causalité alternative et responsabilité du fait des produits: un pour tout, tous pour un' (3-4) 2(1994) Revue européenne de droit privé, 455).

72 To this aspect see Gültekin(n 1) 59; Celt (n9) 98; Akçura Karaman (n1) 215.

of a third party[73]. Each situation should be briefly examined.

Force majeure refers to an event that is significantly stronger than an unforeseen circumstance, occurring outside the liable party's control and objectively unavoidable[74]. For example, if a person injured by a non-confirming medication dies from being struck by lightning while being taken to the hospital, this is considered force majeure. Despite the non-confirming medication having caused a serious injury, the person's death due to lightning interrupts the causal link between the non-confirming pharmaceutical and the harm.

Another cause that interrupts the causal link is the fault of the victim, which is also important for the manufacturer's liability. Here, even though the defect in the product could normally cause the damage, the victim's fault in their actions makes the defect secondary and becomes the primary cause of the harm. For example, if a victim consumes a defective medication with the intention of suicide, the manufacturer's responsibility is affected. Even if the medication had met technical specifications, consuming the entire package would still lead to death. Such situations commonly occur when the victim does not follow the medication instructions.

For the victim's fault to interrupt the causal link, it must be significant enough to overshadow the initial cause and become the sole adequate cause of the harm. If the victim's fault only contributes to the damage alongside other causes, as explained above this is referred as contributory negligence[75] and the liable party will not be exempt from liability, but this will be considered in reducing the compensation amount (Art. 52 of TCO)[76]. This is especially relevant for user errors. As a general rule, if the victim's misuse of a non-confirming medication worsens the damage (for example taking overdose), it should only result in a reduction in the compensation amount, not an exemption from liability. However, if the user's fault is the sole adequate cause of the harm, then it can be said to interrupt the causal link. As in the case of swallowing all the pills in the container with the intent to commit suicide. It should also be noted that "fault of the victim" includes not only the victim's actions but also operational risks attributable to the victim and the behavior of the victim's assistants[77]. This

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73 Eren (n 39) N. 1729; Tandoğan (n 67) 79-82; Deschenaux and Tercier (n 54) 62; Franz Werro, 'La responsabilité objective du fait des produits est-elle stricte?' in C. Chappuis ve B. Winiger, Responsabilités objectives, Journée de la responsabilité civile 2002 (Schulthess Editions Romandes 2003) 57.

74 Tandoğan (n 67) 328; Eren (n 39) N. 1730. Eren (N. 1731), states that while force majeure always breaks the causal link, an unforeseen circumstance may not always break the causal link on its own.

75 See above "Damage to Individual" especially the context related to fn. 43.

76 To this aspect see Werro (n 70) 57.

77 Eren (n 39) N. 1748.

issue is clearly addressed in Article 21/4 of Law No. 7223.

Third cause of interruption is the fault of a third party. If the fault of third party is of such a degree that interrupts the causal link between the perpetrator's behavior and the damage, in general it is accepted that, the perpetrator will not be ordered to pay compensation[78]. However, in strict liability cases, the interruption by fault of the third party is not favored, and mostly, the exemption is prevented by law[79]. For example, Swiss aviation law prevents the plane's owner company from exempting liability by claiming that the plane was high jacked by a third party[80]. To that aspect Law No. 7223, Article 21/3 establishes that regardless of the severity of the third party's fault, the manufacturer cannot be exempt from liability. The article states that if the damage arises from both a non-conformity in the product and an act or omission of a third party, it does not reduce the manufacturer's or importer's liability for compensation but allows the manufacturer to seek recourse against the third party. On the other hand, if the fault of third party is the sole cause of the damage and no causality link could be established with the non-corming medication, the manifacturer would not be liable.

IV. EXEMPTIONS FROM LIABILITY

Article 21/2 of Law No. 7223 outlines three specific situations in which a manufacturer can be exempt from liability for compensation. The first is proving that the manufacturer did not introduce the product into the market. The second situation involves proving that the non-conformity in the product is not due to the manufacturing process but rather due to intervention by a distributor, a third party, or the user. The third situation involves proving that the defect in the product arose due to complying with technical regulations or other mandatory technical rules. If any of these three situations are proven, the manufacturer is exempt from liability for compensation as regulated in Article 6 of Law No. 7223 (Article 21/3).

The primary condition for being held liable under the law is that the product must have been placed on the market. The manufacturer cannot be held liable under Law No. 7223 if the product has not been placed on the market. For instance, if an employee of the manufacturer takes and uses the product while still in the factory, the manufacturer would not be held liable in this case. Additionally, if the product has not been placed on the market by the manufacturer but has been stolen from the factory and placed on the market by malicious third parties, the manufacturer can avoid liability by proving this.

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78 Eren (n 39) N. 1752, 1753.

79 Werro (n 70) N. 1752.

80 Eren (n 39) N. 1752.

It should be noted that determining when the product was placed on the market is important in terms of the manufacturer's potential to avoid liability. The law only refers to the product being placed on the market and does not mention its commercial use. In this case, the use of the product on patients in hospitals, universities, etc., before it is put up for sale, should also be considered as placing it on the market. Such non-commercial placement on the market, if done by the manufacturer, is sufficient to establish the beginning of liability[81]. Determining the moment when the product was placed on the market lays the groundwork for the manufacturer to avoid liability by proving that the product was not defected when it was released on the market, as explained below, through the second possibility.

Article 21/2b states that if the manufacturer proves that the non-conformity in the product is not due to the manufacturing process but rather due to intervention by a distributor, a third party, or the user. For example, if a properly manufactured medication was not stored in the cold chain by the distributor, this exemption would apply. As mentioned above if the manufacturer can prove that the product was confirming when it was placed on the market, this will also exempt them from liability. In this case, it would be understood that the defect occurred after the product was released. It should be noted that, for this exemption to be valid, the medication must be properly produced. If the medication is also non-conforming when placed in the market, then the manufacturer would not be exempt from liability; the manufacturer would only have the right to seek recourse against the other responsible parties (Art. 21/3 Law No. 7223).

The third exemption regulated in the Law involves proving that the defect in the product arose due to complying with technical regulations or other mandatory technical rules (Article 21/2c). The provision that allows the manufacturer to be exempted from liability by proving that the defect in the product is due to compliance with technical regulations is rightly criticized in the doctrine[82]. Firstly, the technical regulations referred to in Law No. 7223 are minimum standards. Adhering to these minimum standards does not mean that the manufacturer has taken the necessary measures required by science and technology or that the product is safe. The doctrine rightly points out that legal regulations related to products cannot keep pace with scientific advancements and fail to meet the justified safety expectations of consumers.

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81 As to this aspect see Akçura Karaman (n1) 342.

82 As to this aspect see Atamer and Kurtulan Güner (n14) 575; Akçura Karaman (n1) 342; Fulya Erlüle, Avrupa Topluluğu Konsey Yönergesi Çerçevesinde Yapımcının Sorumluluğu (Phd Thesis, Marmara Üniversitesi Sosyal Bilimler Enstitüsü 1992) 170.

V. STATUTE OF LIMITATIONS

Liability in tort is regulated under Article 72 of the TCO with two different statute of limitations as 2 and 10 years. The 2-year period starts from when the victim learns about the damage and the identity of the wrongdoer. For an incurred loss, the maximum period is 10 years from the date of the tortious act (TCO, art. 72). Article 6/6 of the Law no. 7223 sets statute of limitations periods for manufacturers as 3 to 10 years.

The 3-year period begins when the victim learns about the damage and the liable party which is one year longer than the general tort liability (Art. 6/6). Directive 85/374 establishes a similar 3-year period, but starting from when the damage, defect and identity of the responsible party are known, also nothing that mere possibility of knowledge is deemed sufficient. Since Art. 6/6 does not mention possibility of knowledge it must be interpreted as actual knowledge[83]. The absence of explanation in the preamble of the article leaves unclear whether the Turkish legislator's deviation from the Directive was intentional and what the aim might me.

The 10-year period in Article 6/6 of Law No. 7223, while similar to the general tort liability, has different starting points: it begins from the occurrence of the damage whereas general tort liability starts from the tortious act. Directive 85/374 also provides 10-year limitation period, but it starts from the date product is placed on the market. The Turkish law's start date can create uncertainty for manufacturers. The Turkish legislator opting for a longer period to offer broader protection to injured party. Rightful criticism of Article 6/6 focuses on its lack of legal security and difficulties in providing defects over time[84]. Some argues[85] the period should start from the product's market placement. However, we think it's reasonable to start the period from when the damage is discovered, since medication-related harm can appear much later[86]. This approach allows for a 3-year limitations period if the harm and responsible party are identified within 10 years, but holds the pharmaceutical company accountable for long term effects.

A 2019 Supreme Court decision[87] illustrates how Turkish courts may favor the injured party. In this case, a medication prescribed in 2004 led to health issues for the plaintiff. He only filed a claim in 2008, arguing he did not connect his condition to the medication until then. The manufacturer contended that the medication was recalled from the market in 2004 and that the claim should be

83 Atamer and Kurtulan Güner (n14) 581.

84 Atamer and Kurtulan Güner (n14) 581.

85 Kanışlı (n25) 1453.

86 Sidim (n 42) 89.

87 Supreme Court 13th CC, 2017/8553, 2019/7812, 26.6.2019 <https://www.lexpera.com.tr/ictihat/> accessed 26 July 2024.

barred by the 2-year statute of limitation in Article 72 of the TCO. The court initially, sided with the manufacturer but the Supreme Court overturned this, ruling that the burden of proof was on the manufacturer to show the plaintiff knew of the harm before 2008.

The decision highlights a trend towards easing the burden on plaintiffs, a practice we support given the challenges faced under Law No. 7223.

CONCLUSION

In Turkish law, the liability of pharmaceutical manufacturers for the damages caused by their medications is governed by the same general provisions applicable to all manufacturers under Law No. 7223. This law primarily focuses on administrative inspections and penalties to ensure technical compliance and public health safety, but it lacks specific provisions addressing the unique aspects of pharmaceutical liability. The inclusion of a few articles (Articles 6 and 21) addressing liability for all manufacturers within such a technically oriented law is insufficient to meet the needs of neither manufacturers nor consumers. Given the complex nature of the healthcare sector, it is clear that treating pharmaceutical manufacturers the same as other manufacturers is inadequate. Countries such as Germany, Switzerland and France have implemented specific legislation for this sector, which would be beneficial for public health in Turkey as well. It is clear that these laws will also serve as a reference for legislative developments in Turkey.

Recently, we have sadly followed numerous news reports on the side effects of vaccines and other medications produced and used globally during the COVID-19 pandemic and the lawsuits filed in this regard. It is evident that the strict liability provision introduced in favor of the injured party by Law No. 7223 will not serve its purpose effectively, considering the burden of proof placed on the injured party by the law. According to Law, the plaintiff is obliged to prove the non-conformity of the product and the causal link between the non-conformity and the damage. Determining the non-conformity of the medication means, assessing whether it was produced in accordance with its technical specifications, which is an unfair burden to place on the patient using the medication. It would be more just and realistic to require the pharmaceutical manufacturer to prove that the product was produced according to technical specifications and that it is safe. Additionally, placing the burden of proving the causal link between the non-conformity and the damage on the plaintiff further complicates the compensation claim. Considering that doctors often prescribe multiple medications during an illness, it would be more appropriate to require the manufacturer, rather than the patient, to prove which medication caused the damage. Indeed, the party capable of knowing the side effects of the medication and employing a technical team is not the injured party but the defendant manufacturer.

Finally, it should be noted that although the law aimed to impose strict liability on manufactures, this strict liability is considerably weakened by various defenses available them. Especially, Article 21/2c which allows manufacturers to avoid liability by showing that the product's non-conformity resulted from compliance with technical regulations, has been rightly criticized. This is because legal and technical regulations often lag behind scientific advances and may not fully address the safety expectations of consumers.

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A DECOLONIAL ANALYSIS OF ISRAEL'S ACTIONS IN THE OCCUPIED PALESTINIAN TERRITORIES*

İsrail'in İşgal Altındaki Filistin Bölgesindeki Eylemlerinin Dekolonyol Perspektiften Analizi

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Abstract

The events following the October 7, 2023, attack by Hamas on Israeli and foreign civilians have unfolded into what many view as a case of genocide and war crimes committed by Israel against the Palestinians. Initially, the international community broadly supported Israel's right to self-defense against Hamas' terrorism. However, Israel's following actions have raised significant concerns. This paper argues that Israel's response reflects colonial mentalities, where Palestinians are perceived not as equals with legitimate claims and rights but as subjects to be controlled. This colonial mindset is evident in aggressive military strategies and policies prioritising Israeli security over Palestinian well-being. Despite extensive academic discussion and global condemnation of Israel's policies in the Occupied Palestinian Territories over the past seventy years, this analysis examines explicitly Israel's actions and the rhetoric of senior Israeli officials following the October 7th attack. By focusing on these recent events, the paper explores how colonial strategies are employed in the current context, providing a decolonial perspective on the Israel-Palestine conflict.

Keywords: Palestine, occupied Palestine territory, Israel, genocide, war crimes, decolonialism

Özet

7 Ekim 2023'te İsrailli ve yabancı sivillere yönelik Hamas saldırısının ardından gelişen olaylar, geniş bir kamuoyu tarafından İsrail'in Filistinlilere karşı işlediği bir soykırım ve savaş suçları vakası olarak kabul

* There is no requirement of Ethics Committee Approval for this study.

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edilmektedir. Başlangıçta, uluslararası toplum geniş ölçüde İsrail'in Hamas terörizmine karşı kendini savunma hakkını desteklemiştir. Ancak, İsrail'in sonraki eylemleri uluslararası hukukun ihlal edildiği üzerine ciddi endişelere yol açmıştır. Bu makale, İsrail'in tepkisinin kolonyal bir zihin yapısını yansıttığını ve Filistinlilerin eşit haklara sahip meşru talepleri olan bireyler olarak değil, kontrol edilmesi gereken tebaalar olarak görüldüğünü savunmaktadır. Bu kolonyal zihniyet, agresif askeri stratejiler ve İsrail güvenliğini Filistinlilerin refahının önüne koyan politikalarla kendini göstermektedir. İsrail'in İşgal Altındaki Filistin Topraklarındaki politikaları son yetmiş yıl boyunca geniş akademik tartışmalara ve küresel kınamalara konu olmuşken, bu analiz özellikle 7 Ekim saldırısının ardından İsrail'in eylemlerine ve üst düzey İsrailli yetkililerin söylemlerine odaklanmaktadır. Bu makale, mevcut bağlamda sömürge stratejilerinin nasıl uygulandığını inceleyerek, İsrail-Filistin çatışmasına dekolonyal bir perspektiften bakmayı amaçlamaktadır.

Anahtar Kelimeler: Filistin, işgal altındaki Filistin bölgesi, İsrail, soykırım, savaş suçu, dekolonyalizm

INTRODUCTION

Humanity has been witnessing a textbook case of genocide and war crimes committed by Israel against the Palestinians after Hamas' attack on 7 October 2023,[1] targeting Israeli and foreign civilians. In the first few days after the attack, most countries declared their support for Israel against Hamas' terrorism, recognising its right to self-defence.[2] However, Israel's 'self-defence' has shifted to acts of genocide and war crimes.[3]

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[1] According to Israeli sources, "in the October 7 massacre in which more than 1,200 people, including babies, women and the elderly, were brutally murdered." The Government of Israel, Press Release, 'Israel condemns Belize decision to suspend diplomatic relations' (15 November 2023) <www.gov.il/en/departments/news/israel-condemns-belize-decision-to-suspend-diplomatic-relations-15-nov-2023> accessed 20 November 2023.

[2] The vast majority of the international community has condemned Hamas. One needs attention, though; the Palestinian President Mahmud Abbas criticised Hamas on its actions and noted that its actions served Israel. See Filistin Devlet Başkanı Abbas: Hamas'ın tutumu, İsrail'in planlarına hizmet ediyor (*Independent Türkçe* 16 May 2024) <https://www.indyturk.com/node/723026/d%C3%BCnya/filistin-devlet-ba%C5%9Fkan%C4%B1-abbas-hamas%C4%B1n-tutumu-i%CC%87srailin-planlar%C4%B1na-hizmet-ediyor> (accessed on 3 October 2024).

[3] It needs attention that some countries continue to support Israel. For example, the UN General Assembly voted for a draft resolution to condemn Israel for its actions in the occupied territories. The vote resulted in 145 in favour, 18 abstentions, and 7 against (Canada, Hungary, Israel, Marshall Islands, Federated States of Micronesia, Nauru, and the United States of America). Moreover, the first attempt to adopt a resolution for humanitarian pauses at the UN Security Council failed due to the USA veto. After an international public cry over explicit mass human rights violations by Israel, the second attempt resulted in success, adopting a resolution with the abstentions of the United Kingdom, the United States of America,

This piece argues that Israel's actions against the Palestinians after the October 7th attack comprise colonial mentalities and reflexes. This means that the strategies and behaviours exhibited by Israel in response to the attack are seen as reminiscent of those used by colonial powers historically. The argument implies that underlying these actions is a mindset that sees the Palestinians as subjects to be controlled rather than as equals with legitimate claims and rights. This mindset can manifest in various ways, including aggressive military strategies, stringent security measures, and policies prioritising the controlling power's security and interests over the rights and well-being of the local population.

Although Israel's policies in the Occupied Palestinian Territories (OPT)[4] have been widely discussed by academics and condemned by many over the past seven decades, this piece will specifically focus on Israel's actions and the semantics of senior Israeli officials after the October 7th attack. Whilst former colonial countries have grappled with global decolonisation efforts, Israel remains a focal point in discussions as a settler colonial state. Such colonial mentalities and reflexes can be observed within particular colonial technologies. This piece aims to analyse colonial strategies employed by Israel after the October 7th attack, shedding light on the intricate dynamics of the Israel-Palestine conflict from a decolonial standpoint.

I. Colonialism and Coloniality

Colonialism is a historical phenomenon that refers to the domination of Third World countries by First World countries. The colonial system involved economic, political, and cultural domination in addition to creating colonies in other territories.[5] James Mahoney describes colonialism as 'the colonizing state's patrimony over the occupied territory… the state's proven ability to implant

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and the Russian Federation. See UNGA, 78th Session, 'Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan' (A/78/554) 01 November 2023; UN News, 'Israel-Gaza crisis: US vetoes Security Council resolution' (18 October 2023) <https://news.un.org/en/story/2023/10/1142507> (accessed 15 November 2023); UNSC, Resolution 2712 (2023) (15 November 2023) (S/RES/2712). Besides the UN, Germany's unconditional support to Israel and justification of its actions have been criticised. It begs the question: is Germany's support a result of the guilt of Holocaust? Also see Hans von der Burchard, 'Germany has 'psychology of guilt' when it comes to Holocaust, Israel, Erdoğan says' (*Politico,* 17 November 2023) <https://www.politico.eu/article/erdogan-and-scholz-clash-over-israel-hamas-war/> (accessed 20 November 2023).

4 The Occupation of Palestinian Territories started after the 1967 armed conflict, and it covers the former British mandate areas, i.e., the West Bank and the Gaza Strip. See International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, paras. 73-74.

5 Jörn Axel Kämmerer, 'Colonialism' in Anne Peters (ed) *Max Planck Encyclopedia of International Law* (Oxford University Press) (last updated on Jan 2018) <www.opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e690?rskey=JDQkGe&result=1&prd=MPIL> (accessed on 13.06.2023).

settlers, maintain governance structures, and extract resources'.[6] These standard definitions describe external or classic colonialism. However, a definition of settler colonialism is needed to understand the case of Israel better.

Settler colonialism diverges from external or classic colonialism because of its permanence, which causes divergent narratives and social structures in the colonised society.[7] Settler colonialists do not aim to subjugate or integrate the indigenous population, as classic colonialists would, but seek to separate them from settlers, both territorially and socially, while the indigenous peoples attempted to resist such efforts.[8]

Apart from colonialism, coloniality ought to be addressed to better understand Israel's colonial practices; it refers to the continuation of colonial mentalities, psychologies, and worldviews in the cultural, social, and political power relations among First—and Third-World countries.[9] Coloniality is a phenomenon that the First World created; it involves building and managing the Other through the totality of knowledge they generated.[10] It means the culture, history, and knowledge of the Colonizers, or simply Western or European, ended up in their hegemony. For example, while human rights values can be described as universal values, they were written from a Eurocentric perspective and European values.[11] In short, while colonialism is accepted as a historical phenomenon, coloniality means that the ongoing effects of colonialism can be traced in today's world.

II. Colonial Technologies and the Israeli practices in the Occupied Palestinian Territories

The formal end of colonialism did not result in the end of colonial relations.[12]

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[6] James Mahoney, *Colonialism and Postcolonial Development: Spanish America in Comparative Perspective* (Cambridge University Press 2012) 2.

[7] Ibid., 50-53; Augustine Park, 'Settler Colonialism, Decolonization and Radicalizing Transitional Justice' (2020) 14 International Journal of Transitional Justice 260, 262.

[8] Jürgen Osterhammel, *Colonialism: A Theoretical Overview* (1st edn, Shelley Frisch tr, Markus Wiener Publishers 2005) 6.

[9] Sabelo J. Ndlovu-Gatsheni, *Coloniality of Power in Postcolonial Africa: Myths of Decolonization* (Council for the Development of Social Science Research in Africa 2013) 8; Anibal Quijano, 'Coloniality of Power, Eurocentrism, and Latin America' (2000) 1(3) Nepantla: Views from South 533, 534.

[10] Ibid., 197. Quijano explains the totality of knowledge, 'the Europeans generated a new temporal perspective of history and relocated the colonized population, along with their respective histories and cultures, in the past of a historical trajectory whose culmination was Europe'.

[11] José-Manuel Barreto, 'A Universal History of Infamy: Human Rights, Eurocentrism, and Modernity as Crisis' in Prabhakar Singh and Benoît Mayer (eds) *Critical International Law* (1st edn, Oxford University Press 2014) 143 et seq.

[12] Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34 European Journal of International Law 7, 9; Lorenzo Veracini, *Colonialism: A Global History* (1st edn, Routledge 2023) 5.

Traces of colonialism can still be observed in today's law, judiciary, and countries' practices. During the colonial era, colonial countries employed certain technologies to oppress the colonised nations through international law. The term 'technology' is borrowed from Antony Anghie. It implies that colonisers used international law as a tool to civilise the Other.[13] In other words, colonial technology refers to the common knowledge and methods employed by colonizers during the colonial era. These methods were based on the era's scientific beliefs, including concepts like racial hierarchy and the saviour logic, which were used to justify their colonization efforts. These technologies involve (1) exclusion, (2) double standards/entrenching inequality in the law, (3) labelling/othering, (4) cultural/racial hierarchies, (5) saviour logic, (6) paternalism, and (7) coercion.[14] An explanation of these colonial technologies and examples of the same utilised by the Israeli authorities, whose policies involve coloniality in the OPT, will be provided respectively.

The first technology is the exclusion of the Other. Inclusion and exclusion constitute a crucial feature of colonialism; the exclusion of the Other is based on various grounds, such as religion, race, culture, and/or lack of a proper government. For example, the 19th-century Scottish international lawyer James Lorimer discussed the partial recognition of semi-barbarous States such as the Ottoman Empire, Japan, and China and noted that 'Even when diplomatic relations have been established between [civilised and semi-barbarous States], the recognition of semi-barbarous State by a civilised State does not extend to its municipal law'.[15] To justify their actions against colonised peoples, colonisers had to express the difference and exclude the Other from the realm of international law.[16] For instance, the IDF spokesperson Nadav Shoshani says that the IDF's mission is to protect civilians.[17] Based on the Geneva Conventions, civilian means anyone who is not a member of the armed forces and does not take part in hostilities in times of war. However, on the night of May 26th, 2024, the IDF

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13 Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (1st edn, Cambridge University Press 2005) 106-107.

14 Professor Carsten Stahn provided this list of colonial technologies during a discussion. See Carsten Stahn, *Confronting Colonial Objects: Histories, Legalities, and Access to Culture* (Oxford University Press 2023).

15 James Lorimer, *Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities (Vol I)* (William Blackwood and Sons 1883) 216 et seq. See 'Communities possessing the marks of states imperfectly are in some cases admitted to the privilege of being subject to international law, in so far as they are capable of being brought within the scope of its operation'. William Edward Hall, *International Law* (Oxford University Press 1880) 19.

16 Anghie, *Imperialism* (n 13) 26-30.

17 See, IDF Official X/Twitter account, posted on 26.05.2024 at 2.23 pm, <www.x.com/IDF/status/1794811724606165455> (accessed on 26.05.2024).

bombed a camp for displaced people in Rafah, which resulted in the deaths of at least 45 civilians, including women and children.[18] This practice is a clear example of the exclusion of Palestinian civilians from the general meaning of civilians, who need to be protected during the war times.

The second technology involves the use of double standards and entrenching inequality in the law. Colonisers frequently employed such practices. An incident from the Palestinian conflict can be the discharge of two Israeli soldiers after the IDF's attack on the World Central Kitchen's vehicles, which resulted in the deaths of seven aid workers.[19] While the Palestinians face harsh punishments in case of any violent acts against Israeli soldiers or civilians, Israeli soldiers are only discharged from the service and reprimanded. This constitutes a clear example of how the law applies to double standards. From another perspective, civilians killed in this attack were from various countries, including Australia, Canada, the USA, and the UK, which led to the discharge of two soldiers, while the deaths of thousands of Palestinian civilians may result in impunity domestically.[20] The reference is missing here.

The third technology relates to labelling and othering, which was popularly exercised as a justification to legitimise the actions of colonisers. It was implemented in various aspects of colonial governance. For instance, José de Acosta, a Salamanca theologian, categorised non-European peoples based on their levels of development and thereby rationalised the spreading of Christianity to the 'most remote' and 'less civilised peoples.'[21] Labelling/othering can be observed in Israeli practices as well. Since Hamas conducted the October 7th attack, Israeli officials have explicitly labelled the Palestinians as terrorists, evil, etc.[22] A clear example is Israeli Prime Minister Benjamín Netanyahu's post on X/Twitter, where he referred to the conflict as a 'struggle between the children of light and the children of darkness'.[23] After the international community's

[18] Thomas Mackintosh and David Gritten, 'Dozens reported killed in Israeli strike on Rafah' (*BBC News* 27.05.2024) <www.bbc.com/news/articles/c0kkqkngnedo> (accessed on 27.05.2024).

[19] IDF Announcement, (05.04.2024) <https://perma.cc/TC9M-FPC5> (accessed on 24.05.2024).

[20] Ron Kampeas, 'Israeli military fires 2 officers in the wake of World Central Kitchen killings (*Pittsburg Jewish Chronicles* 5 April 2024) <https://jewishchronicle.timesofisrael.com/israeli-military-fires-2-officers-in-the-wake-of-world-central-kitchen-killings/> (accessed on 03 October 2024).

[21] José de Acosta, *Of the Natural and Moral Histories of the Indies* (Clements R. Markham, ed., Clements R. Markham, tr., first published 1880, Cambridge University Press 2010) Book IV, 186-187.

[22] See Benjamin Netanyahu's Official X/Twitter account, posted on 22 May 2024 at 5:02 pm <https://perma.cc/6DY7-NBVX> (accessed on 25.05.2024).

[23] Sonam Sheth, 'Netanyahu deleted a post on X about a struggle against 'children of darkness' around the time of a tragic hospital explosion in Gaza' (*Insider,* 17 November 2023) <www.

negative reactions to the Israeli Prime Minister's words and his labelling of the Palestinians as the 'children of darkness,' in addition to Israel's attack on a Gazan hospital, resulting in the deaths of innocent civilians, including children, the X/Twitter post was eventually deleted. Another example of Israel's use of labelling is countries and individuals who condemn Israel's actions in the OPT as being terrorist supporters. For instance, the Israeli Ministry of Foreign Affairs (MFA) condemned Bolivia's decision to cut diplomatic relations after Israel's genocidal actions against the Palestinians.[24] Moreover, the Israeli MFA noted, 'by taking this step, the Bolivian government is aligning itself with the Hamas terrorist organization'. In light of the above, Israel has actively been employing labelling and othering to dehumanise the Palestinians and to justify their genocidal actions.

The fourth technology is the use of cultural and racial hierarchies. The idea of 'race' means 'a supposedly different biological structure that placed some in a natural situation of inferiority to the Others'.[25] While races do not exist biologically, Sally Haslanger notes, 'social races do exist'.[26] According to Quijano, 'the idea of race, in its modern meaning, does not have a known history before the colonisation of America'.[27] The creation of 'race' is driven by the ideology of racism rather than being a result of the existence of substantial racial differences.[28] Cultural and racial hierarchies represented fundamental aspects of colonialism for justifying colonisers' actions to exploit lands and people of Colonized nations. In the consideration of cultural/racial hierarchies in this context, this can be seen in the words of Emmanuel Nahshon, Deputy Director General for Public Diplomacy at the Israeli MFA. He posted on his official social media account, 'The [attack] is to be understood in the perspective of a *War of Civilizations*. The liberal and democratic West is under attack by *an unholy alliance of Islamists*

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businessinsider.com/netanyahu-deleted-children-of-darkness-post-gaza-hospital-attack-2023-10?international=true&r=US&IR=T> (accessed 08 November 2023).

24 Israeli MFA, Press Release, 'Israel condemns Bolivia's support of terrorism and its submission to the Iranian regime, which attest to the values the government of Bolivia represents'. (31 November 2023) <https://www.gov.il/en/departments/news/mfa-spokesperson-announcement--31-oct-2023> (accessed 20 November 2023).

25 Quijano, Coloniality (n 9) 533.

26 Sally Haslanger, 'Tracing the Sociopolitical Reality of Race' in Joshua Glasgow, Sally Haslanger, Chike Jeffers, Quayshawn Spencer (eds) *What Is Race? Four Philosophical Views* (Oxford University Press 2019) 8, 20.

27 Quijano, Coloniality (n 12) 534.

28 Danielle Juteau-Lee, 'Introduction: (Re)constructing the Categories of 'Race' and 'Sex': The Work of a Precursor' in Colette Guillaumin (ed) *Racism, Sexism, Power and Ideology* (Routledge 1995) 1, 6.

and extreme leftists…'[29] This is an example of positioning cultures in different hierarchies; while he positions the Western culture as superior, the Other has been demonised and positioned as inferior to the West.

The fifth technology is the saviour logic, which was created for the continuation of the global racial hierarchy.[30] It was based on the understanding that Colonisers were superior and that their geography formed the centre of the universe. It branded the Colonised as inferior, backward, and in need of a saviour on their assumed path towards 'civilisation' and development.[31] This ideology was an outcome of a Western linear understanding of development.[32] It was rooted in the Enlightenment period. As Makau wu Mutua has noted, it was structured through Eurocentric universalism and Christianity's missionary enthusiasm.[33] It can also be traced back to early modern international law materials, such as the Covenant of the League of Nations.[34] This logic was inter alia reflected in the US Supreme Court's *Johnson v. McIntosh* judgment (21 U.S. 543 (1823)). The Court noted, 'The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity in exchange for unlimited independence'.[35] Saviour logic cannot be detected in Israel's policies and actions due to Israel's predominantly genocidal intention and nature of its actions.

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29 Emmanuel Nahshon, his official X/Twitter account, a tweet posted on 18.11.2023 at 10.27 <https://twitter.com/EmmanuelNahshon/status/1725807844371394909> (accessed 20 November 2023). (emphasis added)

30 Makau wu Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 Harvard International Law Journal 201, 207.

31 Ibid., 213, 233.

32 Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography' (1998-1999) 1 Third World Legal Studies 1,17.

33 Mutua, Savages (n 30) 233.

34 Article 22(1) of the Covenant notes, "To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modem world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant."

35 US Supreme Court, *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. 543 (1823). Kashyap refers to the US Supreme Court as the 'courts of conqueror' due to its decision in the mentioned judgment and she summarizes the judgment as follows, 'the seminal U.S. Supreme Court case in which the Court ruled that Indigenous peoples can have no absolute title over property, and instead that title goes to the discovering conqueror.' Monika Batra Kashyap, 'Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System' (2019) 46 Fordham Urban Law Journal 548, 559.

The sixth technology is the concept of paternalism, which is based on the control of other individuals.[36] It formed an active part of colonial relations. In the context of formal or external colonialism, paternalism was frequently employed as part of a 'civilisation mission'. Nandy highlights a link between the change in the description of childhood in the Western countries during the 17th century and how they started the civilisation mission towards the colonised territories.[37] The early description of childhood, which was accepted as a 'happy, blissful prototype of beatific angels,' shifted to 'an inferior version of maturity, less productive and ethical, and badly contaminated by the playful, irresponsible and spontaneous aspects of human nature'. In other words, children were seen as people who needed to be saved.[38] The Colonisers implemented the same logic in their relationships with indigenous peoples. An example from this context can be from the spokesperson of the Israeli PM office, Tal Heinrich, who notes that 'Israel has taken unprecedented steps in the history of urban modern warfare to protect civilians in Gaza and provide them with humanitarian aid (572,300 tons).'[39] While she ignores that civilians need this humanitarian aid because of Israel's endless military attacks, she clearly claims that the state of Israel has been taking care of the Palestinian civilians in Gaza, which she describes as unprecedented. Another example can be Israel's offer and transfer of incubators to the Shifa Hospital in Gaza after an international public cry over babies who died due to a lack of energy sources to power the incubators.[40]

Lastly, coercion was an eminent feature of colonial practices. As Lorenzo Veracini notes, colonialism was founded on violence, and colonial relationships could not have been created without violence.[41] The implementation of coercion can be traced back to John Westlake, who noted, 'to proceed by agreement is always desirable and generally possible, though too often force is the first means

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36 Michael N. Barnett, 'Introduction: International Paternalism: Framing the Debate' in Michael N. Barnett (ed), *Paternalism Beyond Borders* (Cambridge University Press 2016) 4.

37 Ashis Nandy, *The Intimate Enemy: Loss and Recovery of Self Under Colonialism* (Oxford University Press 1983) 14-15; Rajagopal (n 32) 8-9.

38 Ibid., Nandy, 14; Ranjan Bandyopadhyay & Vrushali Patil, ''The white woman's burden' – the racialized, gendered politics of volunteer tourism' (2017) 19(4) Tourism Geographies 644, 648.

39 Tal Heinrich's official X/Twitter account, posted on 21 May 2024 at 1:11 pm, <https://x.com/TalHeinrich/status/1792981485944811979> (accessed on 28.05.2024).

40 Israel's official X/Twitter account, a tweet posted on 14 November 2023 at 17.55 <https://twitter.com/Israel/status/1724289934956036568> (accessed on 20.11.2023); Yuliya Talmazan & Chantal Da Silva, 'As outrage grows over fate of babies in Gaza hospital, Israel offers incubators and fuel' (*NBC News,* 14 November 2023) <www.nbcnews.com/news/world/israel-offers-incubators-fuel-gaza-hospital-outrage-grows-rcna125053> (accessed 20 November 2023).

41 Veracini, *Colonialism* (n 12) 1.

employed against the indigenous population'.[42] In the colonial era, coercion was understood as physical violence over the indigenous peoples; however, there has been a shift in the usage from military power to economic and political power in the practice of First World countries. In considering the coercion exerted by Israel after the 7 October attack by Hamas, Israel claims that it employs its right to 'self-defence' to justify its attacks against the Palestinians. Many experts have labelled these attacks as genocidal.[43] While the Israeli Heritage Minister Eliyahu notes, 'dropping a nuclear bomb on the Gaza Strip is an option',[44] human rights experts claim that Israel has dropped more than 25,000 tons of explosives on the Gaza Strip, equivalent to two nuclear bombs.[45] As mentioned previously, within six weeks of the Israel-Hamas war, 14,854 Palestinians, including 6,150 children and over 4,000 women, were killed by the Israeli forces,[46] which represents the inhumane brutality of the war and the severity of the physical coercion conducted by Israel. Apart from these examples, the Rafah attack on May 26th, 2024, can be considered coercion, too. The Palestinian civilians left their houses to be safe in camps, where they were bombed. This can be regarded as another policy to coerce Palestinians to leave their homes and lands for a second Nakba.

Conclusion

In conclusion, Israel, as a settler colonial State, employs colonial technologies in its practices against the Palestinians in the OPT. As shown through the examples above, these practices can be observed in the semantics of high-level

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42 John Westlake, *International Law: Part I Peace* (Cambridge University Press 1910) 123.

43 See In his letter to the High Commissioner Volker Türk, Craig Mokhiber, Director of the New York Office of the High Commissioner for Human Rights, has noted that 'This is a text-book case of genocide. The European, ethno-nationalist, settler colonial project in Palestine has entered its final phase, toward the expedited destruction of the last remnants of indigenous Palestinian life in Palestine.' OHCHR Press Release, 'Gaza: UN experts call on international community to prevent genocide against the Palestinian people' (16 November 2023) <https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against> (accessed 19 November 2023); Opinio Juris, 'Public Statement: Scholars Warn of Potential Genocide in Gaza' (18 October 2023) <https://opiniojuris.org/2023/10/18/public-statement-scholars-warn-of-potential-genocide-in-gaza/> (accessed 25 October 2023).

44 Ikram Kouachi, 'Israeli minister says dropping 'nuclear bomb' on Gaza is 'option'' (*Anadolu Agency,* 05 November 2023) <https://www.aa.com.tr/en/middle-east/israeli-minister-says-dropping-nuclear-bomb-on-gaza-is-option-/3044272> (accessed 13 November 2023).

45 Euro-Med Monitor, 'Israel hits Gaza Strip with the equivalent of two nuclear bombs' (02 November 2023) <https://euromedmonitor.org/en/article/5908/Israel-hit-Gaza-Strip-with-the-equivalent-of-two-nuclear-bombs> (accessed 13 November 2023).

46 Muhammed Sabry, 'Gaza death toll from Israeli attacks tops 14,800' (23 November 2023) *Anadolu Agency* <https://www.aa.com.tr/en/middle-east/gaza-death-toll-from-israeli-attacks-tops-14-800/3063063> (accessed on 25 November 2023).

officials, such as labelling the Palestinians as the 'children of darkness' by Prime Minister Netanyahu or coercion as physical violence, such as dropping bombs equivalent to two atomic bombs since the beginning of the Israel-Hamas War. Moreover, these colonial technologies have been employed to justify Israel's actions against the Palestinians, such as dehumanising them as 'children of darkness' or claiming to free 'queer Palestinians from Hamas'. Nevertheless, after the 7 October attack, Israel's policies against the Palestinians have become more ruthless and explicit. While humanity has become a witness to these mass atrocities, countries should step in to halt Israel's actions before it is too late. First World countries have been failing again, as they did in the Bosnian Genocide. Countries should not repeat the failure to protect civilians due to their political agendas or the guilt of past atrocities.

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EVALUATION OF PSYCHIATRIC DISORDERS CAUSED BY CORONAVIRUS DISEASE IN TERMS OF CRIMINAL LIABILITY FROM THE PERSPECTIVES OF TURKISH AND GERMAN CRIMINAL LAW[*]

Türk ve Alman Ceza Hukuku Perspektifinden Koronavirüs Hastalığının Sebep Olduğu Psikiyatrik Bozuklukların Ceza Sorumluluğu Açısından Değerlendirilmesi

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ABSTRACT

It is important to reveal the scope of criminal responsibility from the perspective of the psychiatric impact of COVID-19 pandemic on individuals. Moreover, drugs used in the treatment of coronavirus may have psychiatric side effects, and these drugs also have the capacity to interact with psychiatric drugs and cause negative outcomes. Although this is no longer a specific consequence of the coronavirus (it could also be the result of another serious illness), it is generally caused by it. In this study, whether the psychiatric cases in question can be evaluated within the scope of mental illness regulated in article 32 of the Turkish Penal Code (TPC) and transitory reasons regulated in article 34 of the TPC will be discussed. The effect of negligence of the person in catching the coronavirus on the applicability

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of article 34 will also be examined regarding transitory reasons. It will be discussed that psychiatric conditions caused by coronavirus may be a reason that removes or reduces culpability regarding criminal responsibility. Finally, a short comparative legal look at German criminal law is thrown, which in § 20 StGB also regulates the state of incapacity due to illness and in § 21 StGB the reduced criminal responsibility.

Keywords: COVID-19, psychiatry, criminal liability, situations removing or reducing culpability, Turkish Criminal Law, German Criminal Law, coronaphobia.

ÖZET

COVID-19 pandemisinin kişiler üzerindeki psikiyatrik etkisi açısından cezai sorumluluğun kapsamının ortaya konulması önem arz etmektedir. Bunun yanında koronavirüs tedavisinde kullanılan ilaçların psikiyatrik yan etkileri söz konusu olabileceği gibi bu ilaçlar psikiyatrik ilaçlarla etkileşime geçip olumsuz sonuçlar doğurabilme kapasitesine de sahiptir. Bu koronavirüsün spesifik bir sonucu olmasa da (başka bir ciddi hastalığın sonucu da olabilir), genellikle buna neden olabilmektedir. Bu çalışmada söz konusu psikiyatrik vakaların Türk Ceza Kanunu'nun 32. maddesinde düzenlenen akıl hastalığı ile aynı kanunun 34. maddesinde düzenlenen geçici nedenler kapsamında değerlendirilebilirliği tartışılacaktır. İlaveten geçici nedenler bakımından kişinin koronavirüs hastalığına yakalanmasındaki taksirinin 34. maddenin uygulanabilirliğine etkisi araştırılacaktır. Nihayetinde koronavirüs hastalığının sebep olduğu psikiyatrik durumların ceza sorumluluğu bakımından kusurluluğu kaldıran veya azaltan bir neden olup olamayacağı hususu tartışılacaktır. Son olarak, StGB § 20'de akıl hastalığı nedeniyle kişinin kusursuzluğunu ve § 21 StGB'de azaltılmış cezai sorumluluğu düzenleyen Alman ceza hukukuna karşılaştırmalı olarak kısaca değinilecektir.

Anahtar Kelimeler: COVID-19, psikiyatri, ceza sorumluluğu, kusurluluğu kaldıran veya azaltan haller, Türk Ceza Hukuku, Alman Ceza Hukuku, koronafobi.

INTRODUCTION

A pandemic is not just a medical phenomenon; It deeply affects individuals and society and causes anxiety and stress.[1] Throughout the history of mankind, respiratory pandemics has given rise to increase in the numbers of psychiatric and neuropsychiatric cases.[2] For example, Spanish Flu seems to cause psychiatric symptoms such as mania, depression, paranoia, obsessive compulsive disorder

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1 Bilal Javed and others, 'The Coronavirus (COVID-19) Pandemic's Impact on Mental Health' [2020] 35(5) International Journal of Health Planning and Management 993. Gözde Erkin, 'Akıl Hastalıkları Kavramına Genel Bakış ve Covid-19', [2020] 5 (8), İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi 11.

2 İhsan Okur and Ömer Faruk Demirel, 'COVID-19 ve Psikiyatrik Bozukluklar', [2020] 3(1), Medical Research Reports Review, 87.

and hyperactivity as a result of some neurological complications.[3] Further, there are some research on links between post-Spanish Flu influenza and schizophrenia, and these disease outbreaks also increase the risk of neuropsychiatric dysfunctions and adult psychosis.[4]

Moreover, there are also side effects of psychiatric drugs and their interactions with antiviral agents used for COVID-19, as well as their pharmacokinetic and pharmacodynamic properties and side effects.[5] Therefore, these interactions may result in mental diseases (or illnesses) or transitory reasons that cannot be characterised as mental diseases.

I. MENTAL DISEASES IN TURKISH CRIMINAL LAW

Mental disease is regulated under the title of "Reasons Removing or Reducing Criminal Liability" in Article 32 of the TPC. In this context, mental disease has the capacity to eliminate punishability as a cause that affects people's culpability. As a matter of fact, *"in terms of a criminal law that adopts the principle of moral responsibility and needs moralization"*, TPC Art. 32 is an accurate regulation.[6]

TPC did not define the concept of mental disease in the mentioned article, leaving this determination to the science of psychiatry.[7] In this context, the effects of the ability to perceive and direct behaviours are accepted by the science of psychiatry, and the conditions that cause a pathological condition in mental activity and ability can be considered as mental disease.[8] It is also not possible to predetermine mental disease in terms of criminal law.[9]

In the TPC, there is no presumption regarding the situation that removes the culpability in terms of mental illness. [10] For this reason, it is necessary to reveal the connection of the act of crime with the mentally ill perpetrator in each concrete case. It should be investigated whether mental illness affects the

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[3] Sarah Chyette and Jeffrey L. Cummings, 'Encephalitis Lethargica: Lessons for Contemporary Neuropsychiatry'. [1995] 7(2) The Journal of Neuropsychiatry and Clinical Neurosciences 125 (Cited by Okur/Demirel, p. 87).

[4] Okur and Demirel (n 2) 87.

[5] Mehran Zarghami, 'Psychiatric Aspects of Coronavirus (2019-nCoV) Infection' [2020] 14(1), Iranian Journal of Psychiatry and Behavioral Sciences 2; For detailed information on the extent of these side effects and psychiatric effects, see. Okur/Demirel (n 2) 92 ff.

[6] Nevzat Toroslu and Haluk Toroslu, *Ceza Hukuku Genel Kısım,* (Savaş Yayınları, 2019) 414.

[7] Ibid.

[8] Sulhi Dönmezer and Sahir Erman, *Nazarî ve Tatbikî Ceza Hukuku* (Vol 2, 14th edn, Der Yayınları, 2019) 417.

[9] Veli Özer Özbek and Others, *Türk Ceza Hukuku Genel Hükümler (*14th edn, Seçkin Yayınları, 2023) 380.

[10] Toroslu and Toroslu (n 6) 414.

perpetrator's ability to understand and his/her will.[11] However, for the acceptance of mental illness, it is not required that both the abilities of understanding and willingness are affected.[12] As a matter of fact, in the provision 32/1 of TPC, it regulates the point by *"A penalty shall not be imposed on a person who, due to mental disorder, cannot comprehend the legal meaning and consequences of the act he has committed, or if, in respect of such act, his ability to control his own behaviour was significantly diminished. However, security measures shall be imposed for such persons."* A reduced penalty will be given to a person who has *"decreased ability to direct his/her behaviour"* in relation to the act he/she has committed, although not to the extent specified in the provision (TPC art.32/2). Here, the legislator regulates the reduced ability to direct person's behaviour; however, it does not take into account the reduced ability to perceive the legal meaning and consequences of the act. For this reason, within the scope of mental illness, the perpetrator, who has reduced perceptive ability to the degree stipulated in TPC art. 32/2, will have to be punished with a full penalty. [13]

The distinction between complete and partial mental illness stipulated in the TPC numbered 765 has been abandoned in the TPC numbered 5237, and only having a mental illness does not necessitate the evaluation of the person as complete or partial mentally ill. [14] Rather than making this distinction, it is important how the mental illness affects the concrete act, regardless of the nature and degree of the mental illness, while the person commits the criminal act, and the relationship of the mental illness to the ability to perceive and direct the behaviour at the time of the act should be examined.[15] In this context, the responsibility for this effect will be the subject of evaluation between TPC art. 32/1 and 32/2.

II. THE EFFECT OF MENTAL DISEASES CAUSED BY CORONAVIRUS ON CRIMINAL LIABILITY

The existence of mental diseases caused directly or indirectly by coronavirus and whether these will completely eliminate the ability to culpability is a subject

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11 Ibid, Özbek and others (n 9) 380-381.

12 Toroslu and Toroslu (n 6) 414.

13 For an opinion that such a distinction will not lead to a fair result, see. Toroslu and Toroslu (n 6) 415-416.

14 Dönmezer and Erman (n 8) 422; On the distinction between complete mental illness and partial mental illness, see., Ayhan Önder, *Ceza Hukuku Dersleri*, (Filiz Yayınları 1992) 285. Mehmet Emre Yıldız, Ceza Hukukunda Akıl Hastalığının Kusur Yeteneğine Etkisi ve Akıl Hastalarına *Özgü* Güvenlik Tedbirleri, (Adalet Yayınevi, 2020), 120-125. For a view that due to the fact that the distinction was not adopted with the TPC numbered 5237, TPC art.32 would be considered complete mental illness, see. Hamide Zafer, *Ceza Hukuku Genel Hükümler (TCK m.1-75),* (8th edn,Beta Yayıncılık 2021) 452.

15 Dönmezer and Erman (n 8) 426.

within the field of forensic medicine. [16] It has been reported that there are some cases related to the relationship between coronavirus and schizophrenia in studies conducted in this field.[17] Anxiety, fear, panic and obsessive compulsive disorders have also increased due to social isolation and quarantine measures[18].[19] In this context, cases in which the diagnosis of coronavirus could be associated with mental illnesses were encountered in patients without a previous psychiatric history.[20] An increase has been observed in diseases such as post-traumatic stress disorders, based on the stress that health workers has been exposed to.[21] Various potential pandemic stressors for healthcare workers have been identified in the current pandemic as follows: contact with COVID-19 patients, working in high-risk areas, social isolation, watching news about COVID-19, worrying about personal health. [22] Depending on these factors, it has been observed that there is an increase in diseases such as anxiety, depression, and burnout syndrome in healthcare workers.[23]

Dementia has even been associated with the coronavirus.[24] For example, the behaviour of the perpetrator infected under the influence of coronavirus-based mental illness within the scope of transmitting the virus to others may be evaluated within the scope of TPC art. 32.

After determining the mental illness triggered by coronavirus or caused directly or indirectly, the most important issue is that it is necessary to reveal whether the mentally ill person acts due to this disease while committing a

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16 Dönmezer and Erman (n 8) 422.

17 For details see. Okur and Demirel (n 2) 91 ff.

18 World Health Organisation, 'Mental Health and Covid-19' <https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/publications-and-technical-guidance/mental-health-and-covid-19 > accessed 04 July 2023.

19 Okur and Demirel (n 2) 91, Erkin (n 1) 9 ff.

20 Maxim Taquet and others, 'Bidirectional associations between COVID-19 and psychiatric disorder: retrospective cohort studies of 62 354 COVID-19 cases in the USA' [2020] The Lancet Psychiatry 131 <http://dx.doi.org/10.1016/s2215-0366(20)30462-4> accessed 28 September 2024.

21 Julian Hannemann and others, 'The impact of the COVID-19 pandemic on the mental health of medical staff considering the interplay of pandemic burden and psychosocial resources—A rapid systematic review' (2022) 17(2) PLOS One 2-3 <http://dx.doi.org/10.1371/journal.pone.0264290> accessed 28 September 2024.

22 Ibid. For details see. Osea Giuntella and others, 'Lifestyle and mental health disruptions during COVID-19' (2021) 118(9) Proceedings of the National Academy of Sciences 4-5<http://dx.doi.org/10.1073/pnas.2016632118> accessed 28 September 2024.

23 Hannemann and others (n 21) 24.

24 Yu-Hui Liu and others, 'One-Year Trajectory of Cognitive Changes in Older Survivors of COVID-19 in Wuhan, China' [2022] 79(5) JAMA Neurology 516 <http://dx.doi.org/10.1001/jamaneurol.2022.0461> accessed 28 September 2024.

crime.[25] What needs to be done here is to keep the defendant under stationary mental examination.[26] If strong indications of suspicion are present, which tend to show that the suspect or the defendant committed the criminal conduct; then in order to clarify whether the suspect or the defendant is mentally ill, and if so, the duration of the illness, and whether this affected his actions, the Judge of the Peace in Criminal Matters during the investigation phase, and the trial court during the prosecution phase may order the suspect or the defendant to be stationed in a public medical centre upon the proposal of the expert, after hearing both the public prosecutor and the defence counsel (Turkish Penal Procedure Code, TPPC art. 74/1). [27] Measures of security are imposed on persons who commit

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[25] For a similar decision, see *"According to the report of ... Training and Research Hospital dated 27/10/2015 included in the file; According to the medical board report of the ... Hospital, in which it was stated that there was no circumstance that reduced the defendant's criminal capacity, but the defendant's defence counsel submitted an appeal to the court after the decision date, stating that the defendant was mentally ill and was related to this in the annex of the petition; regarding the theft allegedly committed by the defendant on 06/05/2015 in the face of the statement that the criminal responsibility has decreased in accordance with the article32/2 of the TPC; in accordance with Article 32 of the TPC No. 5237, by examining all the reports in the file on whether the defendant had mental illness and criminal capacity in a way that would completely remove or significantly reduce his ability to perceive the legal meaning and consequences of the act and to direct his behaviour due to a mental illness or weakness at the time of committing the crime, and after obtaining a report from the related Specialization Department of the Forensic Medicine Institute by eliminating the contradiction between the reports, it was necessary to make a judgment after the result of the report the by evaluating the legal situation of the defendant. By not doing this, it is necessitated to make decision of reversal."* (Ct. of Cass. (the Court of Cassation), 6th CC. (Criminal Chamber), F. (File no) 2020/10775, D. (Decision no) 2021/12118, 23.06.2021.

[26] For a similar decision, see "In the defence that the defendant killed his/her mother as a result of falling into depression and losing himself/herself; In order to dispel the doubt about the mental health of the defendant, the defendant should be referred to the Istanbul Forensic Medicine Institute with the case file, and s/he should be taken under observation in the Specialization Department of Observation…"(Ct. of Cass., 1st CC., F. 2011/4148, D. 2011/5979, 17.10.2011). İsmail Malkoç, *Açıklamalı Türk Ceza Kanunu* (1st edn, Yazarın Kendi Yayını/Author's Own Publishing, 2013) 518.

[27] *"According to the report of ... University Hospital dated 27/01/2011 attached to the defendant's appeal petition; In the face of the reporting of "depression, anxiety dissociative disorder, it is recommended to follow the patient once a month by the psychiatry clinic for (6) months"; It is a necessity to evaluate of the legal situation of the defendant, after taking a report by following the procedure in accordance with Article 74 of the TPPC, in order to determine whether the defendant was mentally ill at a level that would affect the crime committed, whether his/her illness had the ability to perceive the legal meaning and consequences of the acts committed, or whether s/he had the ability to direct her/his behaviour in relation to these acts…."* Ct. of Cass., 3rd CC., F. 2013/7332, D. 2014/5563, 17.02.2014; For similar judgements, see. Ct. of Cass., 1st CC., F. 2011/4707, D. 2012/3793, 10.05.2012; Ct. of Cass., 4th CC., F. 2013/9811, D. 2014/32842, 13.11.2014.

crimes under mental illness for the purpose of protection and treatment(TPC art. 32/1, 57).[28]

The last point to be evaluated in this context is the need to reveal whether the coronavirus-related mental illness affects culpability in terms of each type of crimes. If these diseases are not functionally related to the act committed, then it cannot be said that they affect the person's culpability. For example, while a panic attack or seizure caused by the COVID-19 cannot be considered as culpable in actions such as injuring the person around him or damaging the property, the same conclusion cannot be reached in terms of the acts of fraud or theft. [29]

III. TRANSITORY REASONS IN TURKISH CRIMINAL LAW

According to art.34 of TPC, any person who is, because of a transitory reason, unable to comprehend the legal meaning and consequences of an act he has committed, or whose ability to control his behaviour regarding such act was significantly diminished, shall not be subject to a penalty. As a matter of fact, in the case of committing a crime under a transitory reason, it is not possible to mention about dangerousness.[30]

The lawmaker regulates the existence of transitory reasons as a condition affecting the culpability but does not reveal its scope. The scope of transitory reasons can be determined by investigating the reasons that prevent the emergence of the psychic link between the perpetrator and his behaviour and the reasons that prevents the volitionality[31] of the behaviour in this way.

Transitory reasons are the reasons which do not reach the level of mental illness, do not create a permanent and lasting effect on the person; however, they partially or completely eliminate the ability of people to culpability in terms of concrete events.[32] Although these causes are temporary, they cannot

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[28] Zafer (n 14) 451; For an example of a decision on the determination of criminal liability in the event of an offense of defamation under mental illness, see. Ct. of Cass., 4th CC., F. 2013/32707, D. 2014/36761, 22.12.2014.

[29] For similar thoughts, see. Mahmut Koca and İlhan Üzülmez, *Türk Ceza Hukuku Genel Hükümler*, (16th edn, Seçkin Yayınları, 2023) 328-329.

[30] Serdar Talas, *Ceza Hukukunda Kusur İlkesi Bağlamında Nedeninde Serbest Hareket (actio libera in causa) Kavramı ve Geçici Nedenlerin Ceza Sorumluluğuna Etkisi,* (Yayımlanmamış Doktora Tezi, İstanbul Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı, 2011) 171; Ayşe Özge Atalay, *Ceza Hukukunda Actiones Liberae in Causa Kuramı*, (On İki Levha Yayıncılık, 2019) 73 ff.

[31] Justification of the Article, <www.cezabb.gov.tr> accessed 04 August 2021; Toroslu and Toroslu (n 6) 418.

[32] Mehmet Emin Artuk and Others, *Ceza Hukuku Genel Hükümler*, (14th edn, Adalet Yayınları, 2020) 627; Malkoç (n 26) 516; Dönmezer and Erman (n 8) 431; Önder (n 14) 287; Zafer (n 14) 455-456.

be determined or predicted regarding of where, when, how and to what extent they will occur.[33]

In order for transitory reasons to be mentioned in themselves of the perpetrator, these reasons must not have arisen from the will of the perpetrator.[34] As a matter of fact, TPC art. 34/1 regulates the involuntary effect of alcohol or drugs, which is a kind of transitory reasons. Due to this reason, full punishment will be given to anyone who commits a crime under the influence of a transitory reason voluntarily caused by the perpetrator.

Systemic diseases that affect the perception ability of the person are also evaluated within the scope of transitory reasons.[35] Diabetes and post-pregnancy psychosis are shown as examples within the justification of the article. The damage caused by coronavirus on people can also cause psychiatric neurosis or psychosis. As a matter of fact, this situation is similar to the examples given in the justification of the article. After all, the fact that people affected by the coronavirus disease are under psychosis is not continuous, but it has the capacity to directly affect the person's perception ability.

The regulation in art.34/1 of TPC, *"…unable to comprehend the legal meaning and consequences of an act he has committed, or whose ability to control his behaviour regarding such act was significantly diminished…",* looks alike with the provision for mental diseases.[36] A person is not punished for transitory reasons, however, in case of mental illness which is not as serious as it is mentioned by art. 32/1 of TPC, it can be punished reduced and security measures can be applied. For transitory reasons, no security measures are regulated. As a matter of fact, regulating these measures is pointless, since the person who commits a crime under transitory reasons cannot be considered as dangerous.[37] However, within the scope of this similarity, if psychosis and similar psychiatric disorders caused by coronavirus disease, which can be considered as a transitory reason, reach the level of mental illness, TPC art. 32 should be applied.

IV. THE EFFECT OF TRANSITORY REASONS CAUSED BY CORONAVIRUS ON CRIMINAL LIABILITY

In order to determine what situations will constitute a transitory reason within the scope of coronavirus, it is necessary to examine the judgements first. In a judgement by the Turkish Court of Cassation (Yargıtay)[38], it is stated *"the*

[33] Koca and Üzülmez (n 29) 331; Malkoç (n 26) 516.

[34] Toroslu and Toroslu (n 6) 418.

[35] Justification of TPC Art. 34 (n 31); Malkoç (n 26) 516.

[36] Artuk and others (n 32) 628.

[37] Koca and Üzülmez (n 29) 332.

[38] Ct. of Cass. GACC. (General Assembly of Criminal Chambers of Court of Cassation),

angry character and the aggressive nature, which increases their tendency to crime, seen in people with epilepsy... whether or not it is a "transitory reason" should be clarified first by asking the Council of Forensic Medicine, which is the effective authority in this matter and after this issue has been clarified by the Council, decision should be made according to the result." Based on this decision, one may argue that the coronavirus disease may cause angry character and aggressive attitudes. Although coronavirus cannot be considered as a central nervous system disease like epilepsy, it has also been observed that this virus causes neuropsychiatric cases.[39]

Major psychological problems such as generalized anxiety disorder and panic attacks, aggressive or obsessive behaviours that cause the patient's maladjustment, depression and sleep disorder are common psychological reactions within the scope of coronavirus.[40] Coronaphobia, a new term in the psychiatric literature, refers to the extreme fear of being infected by the coronavirus.[41] Being infected with influenza, having a close environment with this deadly virus, and intense fear of being infected, uncertainty about being infected, and media misdirections are important predictors of post-traumatic stress.[42] For example, the existence of a transitory reason can be mentioned if a person with coronaphobia pushes the people around themselves with the effect of their psychic state and causes injury to people, or, if a person insults people who sneeze unprotected under the influence of this phobia, a transitory reason may be thought.

With the information pollution and the media's misdirection about the coronavirus, a new term has come to the fore: *infodemic.* An infodemic can be defined as a lot of information that contains false or misleading information in digital and physical media during a disease outbreak.[43] It causes confusion,

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F. 1983/1-416, D. 1984/79, 27.02.1984. <https://www.turkhukuksitesi.com/showthread.php?t=18229> accessed 28 September 2024

39 Likewise, transitory reasons may come to the fore in physiological disorders. For example, a disease with a high fever can be considered as a transitory cause. Zafer (n 14) 455-456.; Önder (n 14) 288). As the coronavirus is a disease with high fever, TPC art. 34 may be thought to be applied for.

40 Zarghami (n 5) 1; For detailed information on the effects of the pandemic on the behaviour of children, adults, people with disabilities and healthcare professionals, see. Javed and others (n 1) 993-995. For detailed information on forensic psychiatric analyses of cases evaluated as a transitory reasons within the scope of Article 34/1 of TPC, see; Muhammed Emin Boylu and Others, 'Türk Ceza Kanunu "Madde 34/1" Kapsamında "Geçici Bir Neden" Olarak Değerlendirilen Vakaların Adli Psikiyatrik Açıdan İncelenmesi'[2023] 37(2) J For Med, 67 ff.

41 Ibid.

42 Ibid.

43 World Health Organisation, 'Infodemic' <https://www.who.int/health-topics/infodemic#tab=tab_1> accessed 28 September 2024.

which can harm health, and creates distrust of health authorities and undermines the public health struggle. With the widespread use of social media and the internet, information can spread faster. This can help to fill information gaps faster, but it can also increase harmful messages.[44] There is no doubt that this chaotic situation may cause transitory reasons that cause the person's perception ability to deteriorate.

The most important issue that should be evaluated within the scope of transitory reasons is the will of the person in the emergence of the transitory reason. Whether the emergence of the reasons is willingly by a person in the context of transitory reasons other than alcohol or drugs is not stated in the Code.[45] According to the general acceptance in the doctrine, in order to talk about the transitory reasons, the person must not have any culpability even to the degree of negligence in the emergence of this situation even though the Code does not state that the perpetrator should have culpability in the emergence of the reasons.[46] As a matter of fact, this is a requirement of the theory of *actio liberae in causa*.[47] This theory prevents the perpetrator who causes the transitory reason knowingly and willingly or in violation of the objective duty of care, from benefiting from the penalty reduction within the scope of this transitory reason.[48] Moreover, the principle of *nemo auditur propriam turpitudinem allegans*, which has not lost its validity since Roman law, also requires this.[49]

The main issue here is to determine whether people who commit crimes within the scope of transitory reasons caused by coronavirus can benefit from impunity within the scope of transitory reasons. This is the issue of how to determine and evaluate whether the person is negligent in the emergence of transitory reasons caused by coronavirus. To determine this, the present writers believe that the culpability of the person getting the coronavirus disease should be revealed. If the person is negligent in catching the coronavirus and in the emergence of the transitory reasons caused by this disease, s/he will not be able to benefit from impunity within the scope of the transitory reasons, in accordance with the theory of *actio liberae in causa* and the principle of *nemo auditur propriam turpitudinem allegans*. If a person has acted against the obligation of duty of

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44 Ibid ; Sebastián García-Saisó and others, 'The COVID-19 Infodemic' (2021) 45 Revista Panamericana de Salud Pública 1, <http://dx.doi.org/10.26633/rpsp.2021.56> accessed 28 September 2024.

45 Zafer (n 14) 455.

46 Dönmezer and Erman (n 8) 431; Malkoç (n 26) 515; Artuk and others (n 32) 629; Koca and Üzülmez (n 29) 332; Atalay (n 30) 75.

47 Artuk and others (n 32) 629.

48 Zafer (n 14) 456.

49 For similar judgements, see. Ct. of Cass. GACC. (General Assembly of Criminal Chambers of Court of Cassation), F. 2014/830, D.2016/185, 12.4.2016.

care in the context of not being caught in the coranavirus, in this case, TPC art. 34/1 should not be applied. However, the determination of the negligence of the person within the scope of contracting the coronavirus disease, that s/he acts in violation of the obligation of objective care, appears as an important problem.

As for the present writers, the source of the obligation of the duty of care within the scope of the negligence of the person in this regard should be investigated. In fact, the duty of care forms the core of the theory of negligence.[50] In addition, once this point has been established, the value of predictability within the scope of the duty of care should also be revealed.

In the determination of negligent based upon the culpability; first, whether the perpetrator has the ability to be culpable should be investigated. After that, whether the obligation of duty of care, which is objectively in existence, can be expected from the perpetrator should be investigated by taking into account the perpetrator's personal abilities.[51] Secondly, the source of the objective duty of care should be investigated. It is not possible to make a specific list of the rules that must be followed in order to be considered as fulfilling the obligation of the duty of care in a concrete case.[52] Some of these may be written rules, some of them are specific violations of rules required by social life, the ordinary flow of life, and general life experiences.[53] These rules may be as follows; criminal codes or other codes, regulations, circulars, or rules related to risks or newly discovered, newly known substances.[54] In this context, circulars issued within the scope of coronavirus measures can be considered as the scope of the duty of care. The impact of the pandemic on the country's agenda and the prevalence of these measures throughout the country can be considered as a criterion for people to act in accordance with these obligations. However, detecting and proving the negligence or culpability of a person, which causes the person to be in a transitory reason by coronavirus, poses as an important problem. The present writers' recommendation is that people act against the measures that can be considered as the scope of the objective duty of care, and even not wearing masks despite having the opportunity to get masks, may be accepted as an evaluation criterion that they acted negligently in catching this virus. However, in terms of this obligation, it should be investigated whether infected by the coronavirus has a direct effect on the transitory reasons. Applying indirect reasons

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50 Bernd Heinrich, *Ceza Hukuku Genel Kısım II- (Taksir – İhmali Suçlar – İştirak – İçtima – Hata – Alternatif Tipiklik),* (Yener Ünver tr, Adalet Yayınları, 2015) 87.

51 Nil Melek Gültekin Diken, *Ceza Hukukunda Taksire Dayalı Sorumluluk*, (Yayımlanmamış Doktora Tezi, Marmara Üniversitesi Sosyal Bilimler Enstitüsü, 2018) 265.

52 Gültekin Diken (n 51) 91.

53 Gültekin Diken (n 51) 91-92.

54 Gültekin Diken (n 51) 92.

and making weakly related evaluations while determining the culpability of persons within the scope of transitory reasons will not be compatible with the structure of criminal responsibility.

Another issue that should be evaluated within the scope of negligence is how the responsibility will be determined if the result would have occurred even if the person had shown all the necessary care and attention but if it is unavoidable to get this disease despite all the care of the person and a transitory reason occurred because of it. As a rule, even if the person showed all the necessary care and attention, if it can be objectively demonstrated that the harmful result will occur, negligent liability cannot be mentioned.[55] Moreover, holding people liable for a result that cannot be prevented would be a practice that is incompatible with the basic principles of criminal law. [56]

V. COMPARATIVE PERSPECTIVE ON GERMAN CRIMINAL LAW

German criminal law – like Turkish criminal law – contains a provision in § 20 of the German Criminal Code that abolishes the criminal's criminal responsibility due to mental disorders that have an illness value: "*Whoever, at the time of the commission of the offence, is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound disturbance of consciousness or intellectual disability or any other serious mental disorder is deemed to act without guilt"*. "Pathological mental disorders" or "other mental disorders" (e.g. borderline disorders, neuroses or post-traumatic stress disorders) as a result of an infection with the corona virus are quite conceivable. Coronaphobia can also reach such a severity in individual cases that a pathological mental disorder can be assumed.

In § 21 German Criminal Code, on the other hand, the "reduced criminal responsibility" can only have a mitigating effect: *"If the offender's capacity to appreciate the unlawfulness of the act or to act in accordance with any such appreciation is substantially diminished at the time of the commission of the offense due to one of the reasons indicated in § 20, the penalty may be mitigated [...]"*. All reasons mentioned in § 20 German Criminal Code come into consideration here: "pathological mental disorder" or the "other mental disorder", if they don`t reach the level of § 20 German Criminal Code.

In German criminal law, too, it must be determined on a case-by-case basis, i.e. related to the offence, whether the requirements of § 20 or § 21 of the German Criminal Code are met. In each individual case, the pathological disorder must lead to the perpetrator being either unable to see that the act was wrong or being

55 Önder (n 14) 322.

56 Ibid.

unable to act on the basis of this insight. In this respect, incapacity is legally not a permanent condition, it only causes the exclusion of guilt with regard to a very specific act.[57]

In German criminal law, too, it is disputed whether the intentional or negligent induction of one's own incapacity may be taken into account in accordance with the legal concept of *actio libera in causa* and whether an appeal to one's own (reduced) incapacity is excluded. Especially in the case of self-inflicted drunkenness (also caused by negligence), the courts tend to deny the perpetrator an appeal to § 21 of the German Criminal Code. However, one should not be able to go that far for someone who negligently caused their own corona infection (with subsequent serious consequences), e.g. by refusing a vaccination or not wearing a mask. Although the subsequent infection with the virus may have been foreseeable, the subsequent (severe) mental disorder and certainly not the resulting illness could have been foreseen.

CONCLUSION

Revealing the scope of criminal responsibility from the perspective of the psychiatric impact of the COVID-19 pandemic on individuals is important. The coronavirus may negatively affect people's lives in a psychiatric sense. These effects can be listed as anxiety, minor or major depression, post-traumatic stress disorders, obsessive compulsive disorders, dementia and even schizophrenia.

Determining the scope of criminal responsibility of individuals in cases of criminal acts due to the effect of psychiatric cases appears as an important problem. At this point, it is an important issue that the mentioned psychiatric cases can be evaluated within the scope of mental illness regulated in article 32 of the TPC and transitory reasons regulated in article 34 of the same law. The same applies with regard to German law with regard to the provisions of §§ 20, 21 German Criminal Code. The Counsel of Forensic Medicine is the institute to examine to what extent coronavirus has affected the person.

When a crime is committed under the psychiatric effect caused by the coronavirus, the person should be under observation to reveal whether the crime was committed due to the effect. When it is determined that the crime has been committed due to mental illness, security measures will be imposed on the person for the purpose of protection and treatment. (TPC art. 32/1, 57).

Persons may commit crimes because of transitory reasons that do not reach the level of mental illness, do not show a pathological effect, and are caused by coronavirus disease. In terms of transitory reasons, the existence of negligence in catching the coronavirus disease affects the applicability of Article 34 of the

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57 Karl Lackner and Kristian Kühl and Martin Heger, *Strafgesetzbuch Kommentar,* (30th ed., C.H. Beck, 2023) § 20 marginal no 16.

TPC. If the person has acted negligently in catching the coronavirus disease, he will not be able to benefit from impunity in the context of transitory reasons.

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MULTIPLE DERIVATIVE CLAIMS AND POTENTIAL DEFENDANTS WITHIN THE FRAMEWORK OF UK LAW*

Birleşik Krallık Hukuku Çerçevesinde
Çoklu Türev Davalar ve Muhtemel Davalılar

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ABSTRACT

Shareholders are not permitted by law to bring a claim on behalf of the company. Such an action can only be carried out by the company itself through its board of directors. However, in practice, there may be difficulties in bringing an action against wrongdoers on behalf of the company. When the wrongdoers are directors, and are therefore in a position to decide whether to bring an action on the company's behalf, the board of directors may avoid initiating proceedings against the wrongdoers.

This legal framework was considered by the courts to cause injustice, and therefore, over time, the right to bring a claim against wrongdoers on behalf of the company, known as a 'derivative claim,' was granted to shareholders. Subsequently, another type of derivative claim, called a 'multiple derivative claim,' was created by common law. Multiple derivative actions are brought in relation to corporate groups. These actions can be initiated by a member of a parent company on behalf of a direct or indirect subsidiary where the corporate group is under the control of the wrongdoer. Additionally, it aims to preserve the integrity of business administration by deterring directors from engaging in misconduct.

Key Words: Multiple derivative claims, parent company, board of directors, civil liability.

ÖZET

Dünyada genel olarak şirket paysahipleri, kanunen şirket adına dava açma yetkisine sahip değildir. Bu tür bir dava, yalnızca şirketin yönetim kurulu aracılığıyla

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* There is no requirement of Ethics Committee Approval for this study.

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şirket tarafından açılabilmektedir. Ancak pratikte, şirket adına bu tip davaların açılmasında zorluklar yaşanabilmektedir. Şirket aleyhine olarak zarar doğurucu haksız fiilde bulunan kişiler yönetim kurulu üyeleri olduğunda ve bu nedenle aynı kişiler şirket adına dava açılıp açılmayacağına da karar verebilecek bir konumda olduklarında, yönetim kurulu söz konusu haksız fiilde bulunanlara karşı dava başlatmaktan kaçınabilmektedir.

Bu yasal çerçevenin adaletsizliğe yol açtığı değerlendirilmiş ve bu nedenle zamanla, 'türev dava' olarak bilinen, şirket aleyhine haksız fiilde bulunanlara karşı şirket adına dava açma hakkı paysahiplerine de verilmiştir. Ardından, teamül hukuku ile 'çoklu türev dava' adı verilen bir başka türev dava türü oluşturulmuştur. Çoklu türev davalar, şirket toplulukları ile ilgili olarak açılmaktadır. Bu davalar, şirket aleyhine haksız fiilde bulunanın kontrolündeki bir şirketler topluluğu söz konusu olduğunda, bir ana şirketin paysahibi tarafından, doğrudan ya da dolaylı bir bağlı ortaklık adına açılabilmektedir. Bu davalar, yöneticiler üzerinde caydırıcı etkiye sahip olup, işletme yönetiminin dürüstlüğünü korumayı da amaçlamaktadır.

Anahtar Kelimeler: Çoklu türev davalar, ana şirket, yönetim kurulu, hukuki sorumluluk.

INTRODUCTION

Under the general principles of company law accepted worldwide today, a company as a legal entity has a separate legal personality and thus can sue on its behalf to protect its rights, can claim damages and can be sued directly against it for its breaches.[1] In this respect, as a general rule, it is not allowed by the law to file a claim by shareholders on behalf of company. This legal action can only be taken by the company itself through the board of directors which is authorised to manage the company.[2] In other words, it is the company itself being able to claim damages arising from wrongdoings against the wrongdoers. However, in practice there might be some circumstances which include difficulties in bringing action against wrongdoers. For instance, where the wrongdoers are currently directors and are therefore also in a position to decide whether to bring an action on behalf of the company to claim compensation for wrongdoing or in other similar situations where relationships and interests are decisive, the board of directors might avoid lodging proceedings against wrongdoers on the company's behalf.[3]

This legal framework was considered to cause injustice by the courts and therefore over time, right to claim against wrongdoers on behalf of the company which

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1 Alan Dignam and John Lowry, *Company Law* (11th edn, OUP Oxford 2020) 178

2 Andrew Keay, 'Assessing and rethinking the statutory scheme for derivative actions under the Companies Act 2006'(2016) Journal of Corporate Law Studies, 16 1, 39,39

3 ibid 39.

is called 'derivative claim' or 'derivative action' were granted to shareholders.[4] In other words, derivative actions can be regarded as a legal remedy granted to shareholders to recover the company's loss where the board of directors takes no step against wrongdoers. Also, this remedy grants shareholders power and authority to ensure integrity and lawfulness of the directors' conduct.

Subsequently, the other type of derivative claim named 'multiple derivative claim' is created by common law. It is also called 'common law derivative claims' and is brought in respect of corporate groups.[5] These claims can be brought by a member of parent company on behalf of direct or indirect subsidiary for director's breach of duty owed to direct or indirect subsidiary, where the corporate group is in wrongdoer's control.[6]

As discussed below multiple derivative claims can be brought against the directors of the subsidiary like ordinary derivative actions. It can also be brought against former directors and "de facto directors". Also most importantly, multiple derivative actions can be filed against "shadow directors". Shadow directors, apart from de jure directors, are those who can control the company's activities and therefore should be held liable for corporate actions in certain cases. Undoubtedly, the persons who can bring multiple derivative actions and the persons against whom multiple derivative actions can be brought depend on the applicable law. In other words, the applicable law should be determined and then examined to see the appropriateness of multiple derivative actions.

This essay critically discusses and tries to answer the research questions of whether in common law countries and especially in the UK, multiple derivative actions are allowed to be brought for the breach of duties towards the company by directors, and if so, whether shareholders can file a multiple derivative claims against shadow directors.

This article proceeds as follows:

Section 2 examines the general legal framework for derivative claims and in this context addresses the concept 'derivative claims' and the types of derivative claims. Section 3 deals with multiple derivative claims in corporate groups including the aim of these actions and looks for the answer of the question 'against whom can multiple derivative actions be brought?' Section 4 examines the issue of applicable law in multiple derivative actions regarding transnational corporate groups, emphasizing the importance of choice of law in terms of availability of multiple derivative actions. Section 5 concisely summarizes the conclusions reached.

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4 ibid 40. See S. H. Goo, 'Multiple Derivative Action and Common Law Derivative Action Revisited: A Tale of Two Jurisdictions' (2010) Journal of Corporate Law Studies 10 1 255, 258

5 Dignam and Lowry (n 1) 186.

6 Keay (n 2) 47; Dignam and Lowry (n 1) 186.

A. General Framework for Derivative Claims

1. The Concept 'Derivative Claims'

It is generally accepted worldwide that under company law, a company has separate legal personality and thus can bring an action on its behalf to protect its rights and also can be sued directly against it for its wrongdoings.[7] In this respect, normally, it is not allowed by a company law to bring a claim by shareholders on behalf of the company. This could only be carried out by the company itself through the board of directors which is authorised to manage the company under the relevant law.[8] In other words it is the company itself being able to claim damages resulting from wrongdoings against the wrongdoers. This principle has been known as 'proper claimant rule' for a long time.[9] However, in practice there might be some obstacles to bringing an action against wrongdoers. Where the wrongdoers are directors and are therefore also in a position to decide whether to bring an action on behalf of the damaged company, or where the wrongdoers are at the same time controlling shareholders of the company, or where personal relationships and interests are decisive in this regard, the board of directors might choose not to initiate proceedings against the wrongdoers on the damaged company's behalf.[10]

This legal status was considered by the courts to produce injustice, and therefore, over time, the legal right to claim against wrongdoers on behalf of the company, called a 'derivative claim' or 'derivative action', was granted to shareholders in the UK and other common law countries.[11] This should not be confused with the shareholders' personal claims. When a shareholder's right, such as the payment of a dividend, is infringed by the board of directors, the shareholder can sue the wrongdoers directly, because in this case, the damage is suffered by the shareholder, not the company.[12]

It should also be noted that every loss incurred by a shareholder doesn't constitute shareholder loss. According to the 'no reflective loss' principle arising from *Prudential Assurance v Newman Industries*[13], decline in the value of shares or in dividends resulting from a loss incurred by the company arising from a wrongdoing is inseparable from the damage incurred by the company

7 Dignam and Lowry (n 1) 178.

8 Keay (n 2) 39.

9 Dignam and Lowry (n 1) 179.

10 Keay (n 2) 39.

11 Keay (n 2) 40.

12 Dignam and Lowry (n 1) 181.

13 *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204

and, therefore, is not recoverable by shareholders.[14] In such cases, one of the actions that shareholders can take is to bring a derivative action on the company's behalf against the wrongdoer, such as a director, for an act or omission involving negligence, breach of duty, or breach of trust by the directors. Any proceeds arising from the claim brought by the shareholder will belong to the company due to the 'proper claimant rule'.[15]

To sum up, derivative actions can be regarded as a legal remedy granted to shareholders to recover the company's loss, based on the possibility that the board of directors may take no action against wrongdoers. Also this remedy grants shareholders power and authority to ensure integrity and lawfulness of the directors' conduct. In other words, it has a deterrent function on the management, which can enforce the fiduciary duties of directors, penalize violations, and recover the company's losses.[16]

2. Types of Derivative Claims

Today, derivative claims are divided into two groups in terms of the source of claims as 'statutory derivative claims' and 'common law derivative claims'. Statutory derivative claims, as the name implies, are provided in statutes. For instance, in the UK, statutory derivative claims are provided between section 260 and 269 of Companies Act 2006.[17] In section 260 of Companies Act 2006 derivative claims are defined as proceedings initiated by a shareholder of the wronged company in respect of a cause of action vested in the company, seeking relief on behalf of the company. There is a similar provision in section 265 which applies to proceedings in Scotland.

The other type of derivative claim, known as a 'multiple derivative claim', is created by common law. These claims arise in relation to corporate groups and are also referred to as 'common law derivative claims'.[18] Multiple derivative claim is defined as a derivative claim that can be brought by a member of a

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14 See *Sevilleja (Respondent) v Marex Financial Ltd (Appellant)* [2020] UKSC 31 On appeal from [2018] EWCA Civ 146 [9]

15 Antony Corsi and Nicola Birney, 'Shareholder claims and the "no reflective loss" rule' (*Norton Rose Fulbright,* December 2018)<https://www.nortonrosefulbright.com/en-gb/knowledge/publications/0688bcea/shareholder-claims-and-the-no-reflective-loss-rule> accessed 9 September 2024.

16 John C. Coffee Jr. and Donald E. Schwartz, 'The Survival of the Derivative Suit: An Explanation and a Proposal for Legislative Reform' (1981) 81 Columbia Law Review 261, 302.

17 The concept 'derivative claim' was originally derived from common law principles. See Andrew Smith and Leontia McArdle, 'How do you obtain permission to bring a derivative action?' <https://www.dlapiper.com/en/uk/insights/publications/2020/02/saatchi-v-gajjar-and-another-2019-3472-ewhc-ch-and-derivative-actions/> accessed 9 September 2024.

18 Dignam and Lowry (n 1) 186.

parent company on behalf of the direct or the indirect subsidiary for a breach of duty owed to a direct or indirect subsidiary, where the corporate group is in wrongdoer's control.[19] According to *Universal Project v. Fort Gilkicker* decision, multiple derivative actions, like the 'ordinary derivative actions', are 'designed to serve the interests of justice in appropriate cases calling for the identification of an exception to the rule in *Foss v Harbottle'*[20] which establishes the general principle that the only person/entity having right to pursue a claim on behalf of a company is the company itself.[21] Briefly, in this decision, the Court ruled that even though there is not statutory provision in Companies Act 2006, multiple derivative actions are considered acceptable to protect the minority rights where the corporate group is under the control of wrongdoers. In *Abouraya v Sigmund* decision, the Court endorsed the *Universal Project v. Fort Gilkicker* decision in terms of reasoning and conclusions regarding multiple derivative actions.[22]

B. Multiple Derivative Claims in Corporate Groups

1. Aim and Scope

Multiple derivative action was created in common law and still exists, even though statutory provisions in Companies Act 2006 do not expressly include it. In *R (Rottman) v Commissioner of Police for the Metropolis* Case the Court held that '*it is a well-established principle that a rule of the common law is not extinguished by a statute unless the statute makes this clear by express provision or by clear implication*.'[23] In *Universal Project v. Fort Gilkicker* decision the Court states that *'the 2006 Act did not do away with the multiple derivative action. ... As a matter of language, section 260 applied Chapter 1 of Part 11 only to that part of the old common law device thus labelled, leaving other instances of its application unaffected*.'[24]

Multiple derivative actions aim to abolish the potential injustice and grant a remedy to shareholders of holding company where the wrongdoers are in control of the corporate group.[25] Also it aims to ensure the integrity of business

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19 *Universal Project Management Services Limited v. (1) Fort Gilkicker Limited (2) Mr Ian Pearce (3) Fort Gilkicker Properties Limited* [2013] EWHC 348 (Ch) para 26; Keay (n 2) 47; Dignam and Lowry (n 1) 186.

20 *Foss v Harbottle* (1843) 2 Hare 461; *Universal Project v. Fort Gilkicker,* para 26.

21 *Foss v Harbottle* (1843) 2 Hare 461

22 *Waleed Abouraya v. (1) Ms Anja Sigmund (2) Triangle Metals & Minerals Trading Limited (3) Triangle Metals & Minerals Limited* [2014] EWHC 277 (Ch) para 14.

23 *R (Rottman) v Commissioner of Police for the Metropolis* [2002] 2 AC 692 para 75

24 *Universal Project v. Fort Gilkicker,* para 44, 45.

25 *Universal Project v. Fort Gilkicker,* para 44; See Keay (n 2) 40

administration by deterring the directors from engaging in misconduct.[26] In our view, by granting permission to members of a holding company to pursue derivative claims, common law aims to prevent the abuse of controlling power in corporate groups and ensure the accountability of the board of directors.

As explained above, multiple derivative actions can be brought in relation to corporate groups. They can be initiated not only by a shareholder of a parent company on behalf of a subsidiary (known as a 'double derivative action'), but also by a shareholder of a parent company of the parent company of a subsidiary (known as a 'triple derivative suit').[27]

2. Potential Defendants in Multiple Derivative Actions

2.1. The Directors of Subsidiary

Multiple derivative actions can be brought against the directors of the subsidiary just like in the case of ordinary derivative actions. The conditions for derivative claim in common law are explained in *Prudential Assurance Co. Ltd v Newman Industries & ors,* stating that in order to be able to file a derivative claim, the claimant must demonstrate that (i) the company is entitled to the relief claimed, and (ii) the claim falls within an exception to the rule in *Foss v Harbottle*.[28] Also, in this decision, it was expressed that 'what has been done amounts to fraud, and the wrongdoers are themselves in control of the company. In this case, the rule is softened in favour of the aggrieved minority, allowing them to bring an action. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers, being in control, would not allow the company to sue'.[29] This explains the reasoning behind the conditions of derivative claims.

To make it clear, under common law, shareholders are entitled to bring a multiple derivative action under the conditions of fraud by directors and control by wrongdoers. In *Universal Project v. Fort Gilkicker* decision it is established that wrongdoer control can even arise where the aggrieved members and the wrongdoers are in 50/50 control, because even %50 control may prevent the company from suing, and also that '*fraud includes a variety of forms of equitable wrong, including breach of fiduciary duty, although not mere negligence*'.[30] Accordingly multiple derivative claims can be filed against the directors of subsidiary for their breaches.

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[26] See Keay (n 2) 40

[27] Dignam and Lowry (n 1) 186.

[28] *Prudential Assurance Co. Ltd v Newman Industries & ors (No. 2)* [1982] Ch 204, 211 A-B

[29] *Prudential Assurance Co. Ltd v Newman Industries & ors (No. 2)* [1982] Ch 204, 221H-222B

[30] *Universal Project v. Fort Gilkicker,* para 18.

The term 'Director' is defined as '*any person occupying the position of a director, by whatever name called*' in section 250 of the Companies Act 2006. De facto director is a person who have not been officially appointed, but who nevertheless act as director.[31] Accordingly, the duties owed by a director of a company are also owed by a de facto director in the same way and both directors are legally responsible to the extent that a properly appointed director would be.[32] In other words, a de facto director will owe the same common law and statutory duties to the company, shareholders, and creditors, and, in the case of a multiple derivative action, to the shareholders of the holding company, as a de jure director does.[33]

In addition, multiple derivative actions should be able to be brought against former directors for their wrongs committed while they were directors, as well as for breaches of duties related to the post-directorship period, as specified by the law, such as those concerning conflicts of interest.[34]

2.2. Shadow Directors

a. General Remarks

'Shadow directors' can be defined as those who can issue instructions to the directors of a company and therefore have a significant influence over the company's affairs, even though they have not been appointed to the board of directors and are not official or de jure directors.[35] In other words, shadow directors, distinct from de jure directors, are those who have a decisive influence over the company and can control the company's activities, and therefore should be held liable for corporate actions in certain cases.[36] In the section 251 of Companies Act 2006 it is also defined as a person in line with whose directions or instructions the directors of the company are accustomed to act. A shadow director cannot directly carry out the duties of directors themselves; instead, they act behind the scenes.[37]

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31 Lee Roach*, Company Law* (1st edn, Oxford 2019) 174

32 CompaniesAct2006ExplanatoryNotes,para308<https://www.legislation.gov.uk/ukpga/2006/46/notes/division/5/30?view=plain> accessed 9 September 2024.

33 See Mark Ratcliff, 'D&O: de facto directors and policy implications' (Womble Bond Dickinson, 18 October 2019) <https://www.womblebonddickinson.com/uk/insights/articles-and-briefings/de-facto-directors> accessed 9 September 2024.

34 Dov Ohrenstein, 'Reflective Losses & Derivative Claims' (*Radcliffe Chambers*) <https://radcliffechambers.com/wp-content/uploads/2019/11/Reflective_Losses_and_Derivative_Claims-DO.pdf> accessed 9 September 2024; see Li Xiaoning, 'A comparative study of shareholders' derivative actions' (PhD Thesis, University of Groningen 2006) 78

35 Simon Witney 'Duties owed by shadow directors: closing in on the puppet masters?' (2016) Journal of Business Law 4 311,312 < http://eprints.lse.ac.uk/66225/> accessed 11 September 2024.

36 Roach (n 31) 175.

37 Institute of Directors, 'De facto directors and their liabilities' (*Institute of Directors,*22August2019)<https://

In Section 251 of the Companies Act 2006, the term ‘person’ includes both individuals and legal entities, meaning that a company can also be regarded as a shadow director.[38] However, it also provides that a body corporate will not be regarded as a shadow director of its subsidiaries for the purposes of Chapter 2 (general duties of directors), Chapter 4, and Chapter 6. Therefore, in our view, under UK law, it seems unlikely that a parent company in a corporate group would be held liable as a shadow director for the wrongdoings committed against the subsidiary. Also, in our opinion, there is a conflict of interest in bringing a multiple derivative claim by a shareholder of a holding company against the holding company of which s/he is already a shareholder.

b. Dominant individuals in the Corporate Groups

In the structure of corporate groups, there might be some persons who can exercise decisive influence over subsidiaries’ board of directors and can play dominant role in the management of the group of companies. These persons, as stated in the Companies Act 2006, are those whose directions or instructions the directors of the subsidiary and all group companies customarily follow. For instance, in family owned corporate groups, family members usually prefer to sit on the board of directors of holding company and control day to day operations of the group[39], but they may not be sitting on the board of subsidiaries. In practice, some families form informal ‘Shareholder Councils’ to represent the family in dealings with the boards. This establishes a connection between the shareholders and the board.[40] In these cases, even though family members, who are the dominant shareholders of the corporate group, are not directors of the subsidiary, they can still influence the subsidiary’s board of directors and determine its course of action.

Since family members who are dominant shareholders in corporate groups do not carry out these duties themselves but act behind the scenes, these family members who are ‘dominant individuals’ in the parent company and the corporate group could be categorized and regarded as shadow directors.[41] Consequently, in our view, minority shareholders of a parent company can bring a multiple derivative claim against dominant individuals in a corporate group for the wrongdoings they commit against the subsidiary.

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www.iod.com/resources/factsheets/company-structure/de-facto-directors-and-their-liabilities-2/#:~:text=A%20shadow%20director%20is%20’a,seen%20as%20a%20shadow%20director> accessed 11 September 2024.

[38] ibid

[39] Lizzie Hill, ‘The family holding company’ (*Deloitte* 28 February 2018)<https://www2.deloitte.com/uk/en/blog/deloitte-private/2018/the-family-holding-company.html> accessed 11 September 2024.

[40] ibid

[41] See Ratcliff (n 33)

c. Parent Company's Directors and Chief Executive

Section 251(3) of the Companies Act 2006 provides that a holding company cannot be a shadow director by reason "only" that the directors are used to act in line with its directions or instructions for certain purposes. However, there is not any legal obstacle to hold the directors of a holding company liable as a shadow director.[42] If the directors of a parent company exercise decisive influence over the board of directors of a subsidiary, and the subsidiary's board perceives that they should follow the instructions of those directors, a minority shareholder of the parent company can bring a derivative action against the parent company's directors as shadow directors, as well as against the subsidiary's directors as de jure directors.

In *The Commissioners for Her Majesty's Revenue and Customs and another v. Holland*, the Court held that it is not necessary for a shadow director to be someone who 'lurks in the shadows'.[43] This decision also indirectly confirms that the directors of parent companies could be shadow directors. Moreover, it specifically establishes that the chief executive of a group of companies who directly gives instructions to the board of a subsidiary on which he does not sit could be a shadow director.[44]

d. Creditors as Shadow Director

The other group of persons who can be held liable as shadow directors are creditors, such as banks or other types of lenders. When a company faces financial difficulties, it may have to comply with the instructions of the bank it borrowed from, and therefore, the creditor bank may be considered a shadow director.[45] It is accepted that the liability of creditors as shadow directors arises in exceptional circumstances, particularly in the context of debt restructuring where creditors exercise decisive influence over the management of the subsidiary.[46]

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42 Claire Banks and Francesca Jus-Burke, 'Shadow Directors: What Are They and What Liability Do They Have?' (Greenwoods Legal, 23 February 2024) <https://www.greenwoods.co.uk/article/shadow-directors-what-are-they-and-what-liability-do-they-have/> accessed 11 September 2024.

43 *The Commissioners for Her Majesty's Revenue and Customs and another v. Holland,* [2010] UKSC 51 para 109.

44 ibid para 109.

45 CMS Law-Now, 'Shadow and de facto directors - a reminder of the risks' (CMS Law-Now, 22.01.2004) <https://www.cms-lawnow.com/ealerts/2004/01/shadow-and-de-facto-directors-a-reminder-of-therisks?cc_lang=en> accessed 11 September 2024.

46 Clifford Chance, 'Lender As A Shadow Director' (University of Oxford, 02 Jun 2017) <https://www.law.ox.ac.uk/business-law-blog/blog/2017/06/lender-shadow-director> accessed 11 September 2024.

However, where creditors do not get involved in the 'managing and executing of the business activities' of the debtor company, but instead monitor and demand compliance with the facility agreement in defense of their legitimate interests, they are not considered shadow directors.[47] There must be continuous and significant interference by the creditor in the decision-making process of the debtor company, such as controlling income and payments, for the creditor to be considered a shadow director with control over the debtor company.[48]. In such circumstances, the directors of the company are not able to exercise their own discretion.[49] Additionally, there must be a causal connection between the acts of the subsidiary's directors that cause damage to the company and the instructions of the creditor for the creditor to be held as a shadow director.[50]

Accordingly, a minority shareholder of a parent company in a corporate group can bring a derivative action against a bank or another creditor which is involved in decision-making process of debtor subsidiary or which controls and exercises decisive influence over the insolvent debtor subsidiary due to the loss and damages incurred by subsidiary these creditors cause.

C. The Matter of Applicable Law in Multiple Derivative Actions Concerning Transnational Corporate Groups

1. General Remarks Concerning Applicable Law in Derivative Actions

Today, since commercial transactions involve multiple jurisdictions and legal systems, this may create uncertainty regarding the applicable law in disputes. Such issues arising in transnational commercial transactions are addressed by applying conflict of laws rules, which function to refer a dispute to a specific national law.[51]

In the context of transnational corporate groups, where claimants and the defendant company are of different nationalities, the issue of conflict of laws inevitably arises in derivative actions. The issue of conflict of laws may arise in single derivative actions but becomes more significant in the case of international multiple derivative actions. If the applicable law does not allow the filing of multiple derivative actions, then shareholders cannot benefit from

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47 ibid

48 ibid

49 *Buzzle Operations Pty Ltd (In Liquidation) v Apple Computer Australia Pty Ltd [2010] NSWSC 233*) para 247.

50 ibid, para 247.

51 A. N. Yiannopoulos, 'Conflict of Laws and Unification of Law by International Convention: The Experience of the Brussels Convention of 1924' (1961) Louisiana Law Review 21 3 553,553

this legal remedy as they would in wholly domestic disputes.[52] For instance, when a German minority shareholder in a German parent company brings a multiple derivative action against the directors of an English subsidiary in an English court, the issue of choice of law arises. In such a case, the court must first address the issue of applicable law to determine whether the shareholder of the parent company has the right to bring a multiple derivative action against the directors of the subsidiary.

2. The Choice of Law in Multiple Derivative Actions

The issue of choice of law and conflict of laws can frequently arise in the context of multiple derivative actions, just as it does in ordinary derivative actions. The choice of law in multiple derivative actions is crucial in determining whether the claimant has the right to bring such an action. In other words, the choice of law answers the question, 'Which state's law should apply to the rights of the claimant in multiple derivative actions?' and helps to determine whether the applicable law grants a shareholder of the parent company the right to bring a multiple derivative claim.[53] In short, choice of law is directly impactful and determinative to the success of the proceeding.

In English law, there is no precedent specifically addressing choice of law in the context of multiple derivative actions. However, in some common law precedents on choice of law, the law of the place of incorporation has been applied to derivative actions. This is because such disputes are regarded as 'internal affairs' between shareholders and the company, and therefore, it is considered that they should be governed by the law of the place of incorporation.[54]

On the other hand, when the parent and subsidiary are incorporated in two different jurisdictions, the choice of law in multiple derivative actions can be more complicated compared to ordinary derivative actions. In this respect, in common law countries, the laws most commonly chosen are the law of the place of incorporation of the subsidiary and the law of the place of incorporation of the parent company.[55] It is argued that, since the relationship between directors' duties and the law of the state of incorporation is closely connected, and most common law jurisdictions apply the law of incorporation for breaches of fiduciary duties, which is also the most common cause of action in derivative actions, the governing law in multiple derivative actions should be the law of the place of

[52] King Fung Tsang, 'International Multiple Derivative Actions' (2019) Vanderbilt Journal of Transnational Law 52 1 75, 77-78

[53] ibid 86.

[54] ibid 86-87; See Yaad Rotem, 'The Law Applicable to a Derivative Action on Behalf of a Foreign Corporation - Corporate Law in Conflict,' (2013) Cornell International Law Journal, 46 2 321, 326.

[55] Tsang (n 52) 89.

incorporation of the subsidiary. However, some courts prefer to emphasize the rights of shareholders stemming from their ownership of the parent company's shares.[56] In multiple derivative actions brought before English courts so far, the issue of choice of law has not been raised. The court applied English law to these cases without addressing the choice of law question.[57]

In addition to the choice of law in multiple derivative actions, it is also important to determine whether multiple derivative actions are a matter of procedural law or substantive law, as procedural issues will be governed by the domestic law of the court handling the dispute.[58] English law views all aspects of rights concerning multiple derivative actions as procedural issues. Since, under English law, the availability and all related preconditions to initiate multiple or ordinary derivative actions are considered procedural issues, multiple derivative actions are essentially governed by the *lex fori*.[59] This interpretation will make multiple derivative actions available to all minority shareholders in England, even if the laws of the place of incorporation do not allow for such actions. On the other hand, in some jurisdictions, courts treat the availability of derivative actions and litigation conditions as substantive, while other requirements are considered procedural.[60] When aspects of multiple derivative actions are regarded as a substantive issue, the choice of law rules determine the applicable law. However, if they are considered procedural, the *lex fori* will govern the dispute.

Finally, in our view, considering that English law regards multiple derivative actions as a procedural issue, the applicable law for multiple derivative actions will be English law as *lex fori*. Therefore, common law rules and the Companies Act 2006 will be applied. In this respect, according to Section 260 of the Companies Act 2006, multiple derivative actions could be brought against dominant individuals in a transnational corporate group, a parent company's directors or chief executive, or creditors such as banks acting as shadow directors, in addition to the members of the board of directors as de jure directors.

CONCLUSION

Under the general principles of company law, a company has a separate legal personality and can therefore sue in its own name to protect its rights. In this respect, shareholders are not permitted by law to bring a claim on behalf of the company. Such an action can only be carried out by the company itself through its board of directors.

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[56] ibid 92, 95.

[57] *Abouraya v Sigmund*, Para 13.

[58] Tsang (n 47) 103.

[59] ibid 105.

[60] ibid 105 ff.

However, in practice, there may be difficulties in bringing an action against wrongdoers on behalf of the company. When the wrongdoers are directors, and are therefore in a position to decide whether to bring an action on the company's behalf, the board of directors may avoid initiating proceedings against the wrongdoers.

This legal framework was considered by the courts to cause injustice, and therefore, over time, the right to bring a claim against wrongdoers on behalf of the company, known as a 'derivative claim,' was granted to shareholders. Subsequently, another type of derivative claim, called a 'multiple derivative claim,' was created by common law. Multiple derivative actions are brought in relation to corporate groups. These actions can be initiated by a member of a parent company on behalf of a direct or indirect subsidiary where the corporate group is under the control of the wrongdoer. Additionally, it aims to preserve the integrity of business administration by deterring directors from engaging in misconduct.

Multiple derivative claims can be brought against the directors of a subsidiary. A 'director' is defined as 'any person occupying the position of director, by whatever name called' in section 250 of the Companies Act 2006. A de facto director is a person who has not been validly appointed but nevertheless acts as a director. Accordingly, the duties owed by every person who is a director of a company are also owed by a de facto director in the same way and to the same extent as they are by a properly appointed director. In other words, a de facto director owes the same common law, fiduciary, and statutory duties to the company, its shareholders, creditors, and, in the case of a multiple derivative action, to the shareholders of the holding company, as a de jure director does.

In addition, a multiple derivative action should be able to be brought against former directors for wrongs committed during their time as directors and for breaches of obligations related to the post-directorship period, such as non-compete obligation.

This essay also concludes that shadow directors can be held liable in multiple derivative actions for breaches of duties owed to a subsidiary. Shadow directors are those who have a decisive influence over the company and can control the company's activities; therefore, they should be held liable for corporate actions in certain cases. Dominant individuals in a transnational corporate group, directors and the chief executive of the parent company, and creditors of the subsidiary may be subject to multiple derivative actions brought by minority shareholders of the parent company.

The choice of law in multiple derivative actions plays a key role in determining whether the claimant has the right to bring a derivative action. In other words, the choice of law answers the question, 'Which state's law should apply to the

claimant's rights in multiple derivative actions?' It helps establish whether the applicable law grants the shareholder of the parent company the right to bring a multiple derivative claim. It also matters to determine whether multiple derivative actions are a procedural law issue or a substantive law issue, as procedural issues will be governed by the domestic law of the court handling the dispute. Since English law views all aspects of rights concerning multiple derivative actions as procedural issues, and the availability and related preconditions for initiating such actions are also considered procedural matters, these actions are essentially governed by the *lex fori*.

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ILLICIT FINANCIAL GAINS IN INTERNATIONAL COMMERCIAL ARBITRATION: THE ARBITRAL TRIBUNAL'S DUTY[*]

Uluslararası Ticari Tahkimde Yasadışı Mali Kazançlar: Hakem Heyetinin Görevi

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ABSTRACT

The confidentiality of arbitration proceedings is paramount, as it is a fundamental principle that safeguards the privacy of the parties involved. However, this confidentiality that arbitration affords can also, on occasion, serve to obscure criminal activities. This can give rise to considerable risks of illicit financial gain within arbitration. Arbitral tribunals operate without a specific regulatory framework explicitly tailored to address issues that may arise from underlying contract in dispute. This article examines how arbitral tribunals address potential misconduct in two distinct scenarios. The first scenario considers cases where the tribunal's jurisdiction is contested, resulting in a determination that the underlying contract is invalid under the applicable legal framework. In such circumstances, the tribunal is tasked with navigating the implications of this invalidity while upholding the integrity of the arbitration process. The second scenario pertains to instances where the underlying contract is deemed valid yet entangled with illicit financial activities. In this instance, the tribunal is confronted with a pivotal decision: whether to invoke the rules of international public order or to apply mandatory rules from a jurisdiction other than that which governs the contract. If the tribunal uncovers evidence of illicit activities, it may withdraw from the case or declare the contract invalid by invoking principles of international public policy and foreign mandatory regulations. This study examines these potential responses, elucidating the tribunal's role in balancing confidentiality and the

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imperative of addressing and preventing criminal conduct during arbitration proceedings.

Key Words: International commercial arbitration, confidentiality, illicit financial activities, public policy, kompetenz-kompetenz

ÖZ

Tahkim yargılamalarının gizliliği, ilgili tarafların mahremiyetinin korunmasını sağlayan temel bir kural olduğundan büyük **önem** taşımaktadır. Bununla birlikte, tahkimin sağladığı gizlilik, zaman zaman suç faaliyetlerinin tespit edilmesini de engelleyebilmektedir. Bu durum, tahkim bağlamında yasadışı mali kazanç riskine yol açabilmektedir. Bu makale, hakem heyetlerinin böyle bir hususla karşılaşmasını iki durum **özelinde** incelemektedir. İlk durum, hakem heyetinin davaya bakma yetkisine itiraz edildiği ve bunun sonucunda altta yatan esas sözleşmenin uygulanacak hukuk bağlamında geçersiz olmasının ele alınmasıdır. Bu gibi durumlarda, hakem heyeti, tahkim sürecinin bütünlüğünü korurken bu geçersizliğin sonuçlarını yönetmekle görevlendirilmektedir. **İkinci** durum, altta yatan sözleşmenin geçerli kabul edildiği ancak yasadışı mali faaliyetlerle iç içe geçtiği durumlarla ilgilidir. Bu durumda, hakem heyetinin uluslararası kamu düzeni kurallarına mı başvuracağı yoksa sözleşmenin tabi olduğu yargı alanından başka bir yargı alanının emredici kuralları mı uygulanacağı sorusu gündeme gelmektedir. Bu **çalışma**, tahkim yargılamasında yasadışı mali faaliyetlere karşılaşan hakem heyetinin bu süreçte nasıl hareket etmesi gerektiği ve gizlilik ile suçu bildirme yükümlülüğü arasındaki rolü incelenmektedir.

Anahtar Kelimeler: Uluslararası ticari tahkim, gizlilik, yasadışı mali faaliyetler, kamu düzeni, kompetenz-kompetenz

INTRODUCTION

The principal objective of arbitration is to facilitate the expeditious and impartial resolution of disputes outside the realm of state judicial processes, thereby conserving the parties' time and resources that would otherwise be expended on litigation.[1] This naturally prompts the parties to seek alternative avenues for resolution. Arbitration responds to this quest by enabling the parties to the dispute to assume control of the resolution process. Arbitration facilitates dispute resolution by providing a framework of rules that can be adapted to the specific structure of the dispute between the parties.[2] Consequently, there

[1] Thomas E. Carbonneau, *The Law and Practice of Arbitration* (Juris 2012) 1; Gary B. Born, *International Commercial Arbitration*, (3rd ed, Wolters Kluwer 2021) 67-69; Jan Paulsson, *The Idea of Arbitration*, (OUP 2013) 2–18.

[2] Stephen B Goldberg, Frank E.A. Sander, Nancy H. Rogers and Sarah Rudolph Cole, *Dispute Resolution: Negotiation, Mediation and Other Processes* (6th ed, Wolters Kluwer 2012) 1–4.

is a growing tendency towards using international arbitration for commercial disputes.[3] The fact that arbitration proceedings provide "justice on a private scale"[4] Moreover, having limited supervision may result in using the arbitration mechanism in criminal activities.[5] In particular, the transfer of substantial financial resources as a consequence of arbitral awards enhances arbitration's appeal as a vehicle for criminal activity. Consequently, this article will investigate the nexus between international commercial arbitration and illicit financial gains, the legal ramifications of financial crimes in arbitration, and the recommended course of action for arbitral tribunals confronted with illicit financial gains during proceedings.

The remainder of this study, which examines illicit financial gains in arbitration, is divided into three sections. The second part will examine the concept of money laundering as an illicit financial gain in the context of national and international legislation, focusing on its intersection with arbitration proceedings. The third part will address the legal consequences of illicit financial gains in arbitration, identify the relevant dispute scenarios, and propose solutions. The final part will discuss the data emerging from the study and offer suggestions for future research.

I. ARBITRATION AND ILLICIT FINANCIAL GAINS

It is widely acknowledged that criminal law and arbitration are two distinct and separate fields of legal practice.[6] Arbitration proceedings are based on the consent of parties, whereas criminal law is a branch of law that has emerged as an extension of the state's sovereignty without the consent of parties consent.[7] The doctrine is predicated on the notion that criminal law matters, which are inherently related to the state's sovereignty, cannot be adjudicated within the framework of arbitration proceedings.[8] Nevertheless, while it is acknowledged that matters about the core of criminal law are beyond the purview of arbitration,

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3 Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th ed, OUP 2009), 1–3.

4 Sergio Puig and Anton Strezhnev, 'Affiliation Bias in Arbitration: An Experimental Approach' (2016) Arizona Legal Studies Discussion Paper No 16-31, 1, 2.

5 Alexis Mourre, 'Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator' (2006) 22 *Arbitration International* 95, 97.

6 Kathrin Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration* (CUP 2017) 3-4; Mourre (n 5) 95.

7 Loukas A. Mistelis, "Arbitrability - International and Comparative Perspectives" in Loukas A. Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer International Law 2009) 3; Karim Youssef, "The Death of Inarbitrability" in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer International Law 2009) 58.

8 Mourre (n 5) 96.

it is evident that there are instances where the two fields intersect.[9] One such issue is money laundering. In this context, it is necessary to address its dimensions in general and its appearance in arbitration.

A. Global Regulations and Illicit Financial Gains

The concept of money laundering has been defined in several ways. Regarding sovereignty, countries can determine which proceeds from which crimes will be regarded as money laundering in their legal code. Consequently, the scope and legal definition of money laundering may vary from one country to another. Indeed, the concept of money laundering[10] has its origins in the US Money Laundering Control Act of 1986.[11] The Black's Law Dictionary defines money laundering as " taking money illegally and washing or laundering it so it appears to have been gotten legally."[12] whereas the United Nations Convention on Combating Trafficking in Narcotic Drugs and Psychotropic Substances[13] and the Vienna Convention of 1988 defines it as "...The conversion or transfer of property, knowing that such property is derived from any offense or offenses established by subparagraph (a) of this paragraph, or from an act of participation in such offense or offenses, to conceal or disguise the illicit origin of the property or 12 assisting any person who is involved in the commission of such an offense or offenses to evade the legal consequences of his actions." In addition, the Council of Europe's 1991 Directive 91/308 on Prevention of the Use of the Financial System for the Purpose of Money Laundering defines money laundering as follows: " Whereas money laundering must be combated mainly by penal means and within the framework of international cooperation among judicial and law enforcement authorities, as has been undertaken, in the field of drugs, ….and more generally about all criminal activities".[14] The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing

[9] The fundamental issue of corruption, including bribery and fraud, arises in arbitration proceedings. See Tatu Giordani, *Allegations of Criminal Conduct in International Commercial Arbitration* (Master's thesis, University of Helsinki 2017) 1.

[10] It is noteworthy that, despite the contemporary prevalence of money laundering, the concept has its roots in the past. The term "money laundering" was first used in the 1920s in America. It is postulated that the term was coined as a result of criminal organizations using faulty washing machines in public laundries. See Peter W Schroth, 'Bank Confidentiality and the War on Money Laundering in the United States' (2016) 42 *American Journal of Comparative Law* 369.

[11] H.R. 5077, *Money Laundering Control Act of 1986*.

[12] *Money Laundering* https://thelawdictionary.org/money-laundering/ accessed [May 5, 2024].

[13] *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* [1988] UNTS 1.

[14] *Council Directive (EC) 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering* [1991] OJ L166/77.

of Terrorism (also known as the Strasbourg Convention) [15], defines money laundering as " any economic advantage, derived from or obtained, directly or indirectly, from criminal offenses." In this context, it seems reasonable to define black money as money, goods, or values obtained through illicit activities.[16]

The concept of money laundering first emerged at the national level. The regulation and supervision of money laundering at the national level was more straightforward, as it was related to a single legal order. However, with the internationalization of trade, the forms of money laundering have become more complex and multi-layered. Money laundering, which involves the participation of numerous legal systems, has manifested itself in a multitude of ways. This has rendered the prevention of money laundering at the international level an inherently challenging endeavor. The generation of income through illicit means has a profound impact on the economic stability of nations. This is because the income obtained through money laundering has both long-term and short-term effects on society. [17] As a result, countries implement a range of measures to prevent the inclusion of illicitly obtained funds in the global financial system. Consequently, regulations have been established to prevent money laundering within the international financial system.

The initial formulation of the international anti-money laundering regulation can be traced back to the work of the Committee of Experts of the Council of Europe between 1977 and 1980. The Committee of Ministers adopted Recommendation No. R80(10) to the Member States on Measures Against the Transfer and the Safekeeping of Funds of Criminal Origins.[18] This recommendation constituted the inaugural international initiative to prevent money laundering. Subsequently, the Vienna Convention of 1988 established regulatory measures about this matter. In essence, the money laundering provision outlined in the Vienna Convention is primarily concerned with the prevention of proceeds derived from drug trafficking, as explicitly stated in Article 3(1)(b). On November 8, 1990, the Strasbourg Convention determined that the source of money laundering should not be restricted to the drug trade and that other serious crimes should not be overlooked. Subsequently, the concept of "money laundering" was broadened in scope in 2000 with the adoption of the United

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15 European Commission, 'Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime' (European Treaty Series – No 141, 1990).

16 David Chaikin, 'Commercial Corruption and Money Laundering: A Preliminary Analysis' (2008) 15(3) Journal of Financial Crime 269-271.

17 Monica Violeta Achim and Sorin Nicolae Borlea, *Economic and Financial Crime* (Springer 2020) 250-255.

18 *Council of Europe Committee of Ministers, 'Measures Against the Transfer and the Safekeeping of Funds of Criminal Origins' (Recommendation No R(80)10).*

Nations Convention against Transnational Organized Crime and the Protocols[19] to it, also known as the Palermo Convention. The Palermo Convention requires state parties to criminalize money laundering and a wide range of other acts. Such offenses include corruption, obstruction of justice, and certain types of organized crime. The most significant regulatory framework about money laundering is the Financial Action Task Force (FATF) 40 Recommendations[20]. The FAFT 40 recommendations, which were initially proposed in 1990, were finalized in 2022. The FAFT is an intergovernmental organization established for the purpose to combat money laundering, the prevention of terrorist financing, and the prevention of the financing of weapons of mass destruction. As of 2022, the organization has 39 member countries, including Türkiye. It is a matter of record that these standards on money laundering are not legally binding. The directives issued by the FAFT are intended to serve as guidelines rather than as legally binding mandates for member states. Nevertheless, they exert a considerable influence on the formulation of anti-money laundering legislation at the national level. Similarly, FAFT Recommendation 3 calls for the criminalization of the offenses delineated in the Vienna and Palermo Conventions. In light of the foregoing, it is evident that the FAFT is complementary to the Vienna and Palermo Conventions. By the FAFT Recommendations, the FAFT requests that member states criminalize information obtained from corruption, fraud, information trafficking, tax crimes, and drug trafficking in the context of money laundering. In the context of European Union members, money laundering is included in the category of "euro crimes." Furthermore, it is addressed in the Treaty on the Functioning of the European Union[21], also referred to as the Lisbon Treaty. Article 83(1) of the Lisbon Treaty explicitly delineates the competence of the European Parliament and the Council in matters about serious crimes with a cross-border dimension, including illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of payment instruments, cybercrime, and organized crime. Indeed, the European Union has been engaged in the fight against money laundering since its inception.

B. The Intersection of Money Laundering and Arbitration

The concept of laundering assets derived from criminal activities more commonly known as money laundering, is the process of converting illicit income obtained through illicit means into other assets. This is achieved by preserving the value of the assets, concealing them in a way that does not attract the attention of legal authorities, increasing their usefulness, or by creating a

[19] *United Nations Convention against Transnational Organized Crime and the Protocols Thereto* [2000] UNTS 349.

[20] *The Financial Action Task Force Recommendations* (FATF 2012).

[21] Consolidated Version of the Treaty on European Union (2008) OJ C115/13.

legal basis for their ownership. Proceeds derived from criminal activities be incorporated into the financial system in a manner that is legally compliant.[22] It is evident that the phenomenon of money laundering has manifested in diverse forms in conjunction with the advancement of technology and the phenomenon of globalization. Nevertheless, an examination of the various methods employed in money laundering reveals that it typically occurs in three distinct stages. The initial phase is referred to as the placement stage.[23] At this stage, the illicit funds are introduced into the financial system. This is due to the fact that the proceeds of crime are predominantly in the form of cash and are often substantial in amount. The utilization of credit cards, cheques, and other non-cash payment instruments draws attention to the use of large amounts of cash. This is predicated on the notion of obviating any suspicion regarding the source of the funds in question. It is, therefore, necessary to integrate the proceeds of crime into the financial system or export them abroad. The second stage is referred to as "layering."[24] This refers to the process of combining funds obtained through legitimate channels with those obtained through illicit means and subsequently transferring the combined sum through a network of transactions across different jurisdictions. In other words, income is distributed through a multitude of disparate financial transactions to conceal the illicit origin of the funds. In essence, the launderer removes the income from the primary source through intricate transactions, thereby making it challenging to trace. The third stage, integration, involves the incorporation of the laundered asset into the legal economic system through investment or the purchase of specific products.[25] This is because any potential inquiries regarding the source of the funds that have undergone placement and separation are rendered moot by the establishment of a legal foundation. Consequently, it is challenging to ascertain whether the funds in question are indeed illicit. Indeed, those engaged in money laundering activities invest funds derived from legitimate sources. These transactions are conducted by incorporating a multitude of banking institutions into disparate legal frameworks, thereby creating a complex and intricate structure.[26] There are numerous methods of money laundering. These include smurfing, opening accounts with fictitious or false names, cooperating with financial institutions, using companies that operate legally or ostensibly, cash smuggling, using workers,

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[22] For more detailed information, see Fabian Teichmann, *Methods of Money Laundering* (Wolters Kluwer 2021).

[23] Paul Allan Schott, 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism' <https://documents1.worldbank.org/curated/en/982541468340180508/pdf/634980WP0Refer00Box0361517B0PUBLIC0.pdf> accessed August 11, 2024.

[24] Schott (n 23) 8.

[25] Ibid.

[26] Mitchell McBride, 'Money Laundering' (2020) 57 Am Crim L Rev 1045.

using foreign exchange kiosks, cooperating with foreign financial institutions, false or misleading import or export invoices, insurance policies, and so forth. These activities can manifest themselves in several ways. The proceeds of illicit activities may be laundered through a variety of means, including the use of casinos and other gambling establishments, the involvement of financial institutions in foreign jurisdictions, the utilization of money remitters and travel agencies, the sale of luxury goods such as automobiles, aircraft, boats, and real estate, the conversion of checks into cash, the use of postal remittance services, the black market, and the purchase of art and historical artifacts. Nevertheless, the import/export scheme is the most prominent of these. One of the traditional methods for ensuring the flow of capital is to sell goods at a price above the market rate. In such instances, the relevant parties may include a clause stipulating that any disputes that may arise between them shall be resolved through arbitration. It can thus be seen that commercial arbitration plays a role in money laundering.

The nexus of money laundering and international commercial arbitration is the universalization of trade. The foundations of arbitration proceedings are rooted in antiquity. Arbitration proceedings have been observed to have been employed in commercial contexts from ancient Greek times to those of ancient Egypt.[27] Arbitration has traditionally been utilized in the context of local commercial relations rather than international commercial relations. However, the advent of globalization has led to a notable increase in multinational commercial relations.[28] As a natural consequence, the parties have tended to prefer the resolution of their disputes through arbitrators who are perceived to be impartial. This has resulted in the development of international legislation on arbitration proceedings and the imposition of limits on the review of arbitral awards before state courts. Those engaged in commercial activities have historically preferred to conduct proceedings in a more private manner rather than in a public setting. This has resulted in a high degree of privacy in arbitration proceedings. The primary area where arbitration and money laundering intersect is the freedom that arises from the privacy of arbitration. The fact that arbitration proceedings arise out of the contract between the parties and that the decisions rendered are enforceable has been the main point of the demand for arbitration proceedings.

II. ILLICIT FINANCIAL GAINS IN ARBITRATION PROCEEDINGS AND THE ARBITRAL TRIBUNAL

While arbitrators are entrusted with a role analogous to that of judges in

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27 Christian Bühring-Uhle/Lars Kirchhoff/Gabriele Scherer, *Arbitration and Mediation in International Business* (2nd ed, Kluwer International Law 2006) 176.

28 Kyriaki Noussia, *Confidentiality in International Commercial Arbitration - A Comparative Analysis of the Position under English, US, German and French Law* (Springer 2010) 1-3.

state courts[29], their status as non-judges raises questions about the potential remedies that an arbitral tribunal may pursue in the event of a criminal offense. In light of international precedents and practices, it can be posited that there are three potential courses of action for the arbitral tribunal to pursue in such a scenario. In such instances, the arbitral tribunal may choose to withdraw from the proceedings, apply the principles accepted in the international public order, or decide based on mandatory provisions of a law other than the law applicable to the substance of the contract.

A. Withdrawal from Arbitral Proceedings

Arbitrators are at liberty to determine their competence when formulating their awards. This freedom is essential to ensure the efficacy of international arbitration as a method of dispute resolution.[30] and to guarantee that arbitrators are endowed with the same powers as judges.[31] In this context, the principle of Kompetenz-Kompetenz has emerged. In accordance with this principle, arbitrators are required to rely on the authority granted to them by the arbitration agreement in order to determine their own powers. This authority encompasses the ability to determine the existence of the arbitration agreement, the validity of the arbitration agreement, and the scope of the arbitration agreement.[32] In this regard, it is essential to assess the arbitral tribunal's authority to decline arbitration in the event of money laundering in the contract subject to arbitration proceedings. This is due to the absence of explicit stipulations pertaining to the arbitral tribunal's authority to decline jurisdiction in the event of money laundering during the course of proceedings.[33] It seems reasonable to suggest that similar procedures could be applied in cases of bribery and corruption, as well as money laundering, given that the interests safeguarded are similar. This is due to the fact that the circumstances associated with money laundering are fundamentally analogous to those that are considered in the context of bribery and corruption. In a manner analogous to the assessment of arbitral authority

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[29] The question of an arbitrator's independence and impartiality is a matter of considerable debate. One view, which is found in the doctrine, is that the judge should emulate the impartiality and independence of a judge. In the event of the judge's impartiality and independence being called into question, it would be reasonable to expect them to act in a manner consistent with the principles.

[30] William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) Boston University School of Law Public Law & Theory Papers Series 24.

[31] Pierre Mayer, 'Must Justice be a Goal for the Arbitrator?' (2021) 37(2) *Arbitration International 503,* 504.

[32] Janet A. Rosen, 'Arbitration Under Private International Law: The Doctrines of Separability and Competence de la Competence' (1993) 17(1) *Fordham Law Journal* 599, 608.

[33] Andrew de Lotbiniere McDougall, 'International Arbitration and Money Laundering' (2005) 20(1) *American University International Law Review* 1021-1040.

in the context of bribery and corruption, the arbitrator must determine whether they have jurisdiction over the allegations regarding the invalidity of the articles of association.

The process of corruption in arbitration may prove instructive for the assessment of money laundering in arbitration. The International Chamber of Commerce Case No. 1110 (ICC Case No. 1110)[34] represents a groundbreaking case study on the phenomenon of corruption in the context of arbitration. The 1963 decision provided a definitive clarification on this matter. In the aforementioned arbitration, the arbitrator discovered evidence of corruption. A British company and its intermediary, an Argentine-based company, provided illicit financial incentives to an Argentine public official. The evidence demonstrated a significant correlation between the illicit payment and the contractual agreement. The arbitrator presiding over the case ruled that the award could not be made on the underlying contract of the dispute. This is because the arbitrator highlighted in his award that the parties are entitled to seek the assistance of the courts in resolving the dispute. Indeed, in subsequent proceedings, ICC Case No. 1110 was invoked as a rationale for the proposition that allegations of corruption and bribery are not arbitrable. However, this stance has evolved over time. In the case of National Power Corp. v. Westinghouse[35], the arbitral tribunal underscored the authority of arbitrators to adjudicate matters pertaining to corruption and bribery. This was subsequently followed by the 1998 decision in Westacre Investments Inc. v. Jugoimportant SPDR Holding Co. Ltd.[36] Indeed, it is widely accepted that the arbitral tribunal is vested with the authority to adjudicate allegations of corruption and bribery.

Considering the appropriateness of applying the approach used for addressing corruption and bribery in arbitration proceedings to cases of money laundering, we believe that evaluating the allegations and evidence related to money laundering within the contract at the center of the dispute falls within the arbitral tribunal's jurisdiction. Accordingly, the arbitral tribunal holds the authority to withdraw from the proceedings if it identifies instances of money laundering in the underlying contract.

B. The Public Policy Interference

It would be appropriate to discuss whether the arbitral tribunal may invoke public order to set aside the award if the underlying contract on which the

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34 ICC Case No 1110 (Collection of ICC Arbitral Awards, Vol IV) 1; (Yearbook Commercial Arbitration, 1996) 47.

35 *Nat'l Power Corp v Westinghouse* 949 F 2d 653 (3d Cir 1991).

36 *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd.*, [1998] 2 Lloyd's Rep. 111, 114 (Q.B.).

dispute is based is affected by corruption and bribery. It is in accordance with both national and international regulations that public policy intervention is a legitimate ground for the rejection of arbitral awards.[37]

While the concept of public order is a robust rationale for setting aside an award, there is ambiguity surrounding its precise definition. The concept of public policy has been a topic of contention at both the national and international levels.[38] Indeed, there is considerable ambiguity surrounding the definition of public policy. The primary foundation of public policy in various countries is the national synthesis of justice and ethics. The fact that these principles and values change at the social level over time and that various countries have different notions of the content of public policy has resulted in a multifaceted and flexible concept of public policy. In essence, the concept of public order can be defined as a set of institutions and rules that ensure the optimal functioning of public services, the security and peace of the state, and the adherence to the principles of morality in the relations of equal interests between individuals.[39]

It is widely acknowledged that the concept of public policy can be understood to have three distinct dimensions.[40] These are national, international, and transnational public policies. National public policy is shaped by the national values that states have agreed to apply to their citizens.[41] Second, there is international public policy. The concept of international public policy can be defined as the consensus on universal norms[42] and generally accepted principles based on common values that must be applied internationally.[43] These are national, international,

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[37] Born (n 1) 2926.

[38] For detailed information, see Farshad Ghodoosi, *International Dispute Resolution and the Public Policy Exception* (Routledge 2018).

[39] Gui J Conde de Silva, *Transnational Public Policy in International Arbitration* (Doctoral thesis, Queen Mary College, University of London 2007) 87; Mark A. Buchanan, 'Public Policy and International Commercial Arbitration' (1988) 26(1) *American Business Law Journal* 511.

[40] Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer International Law 1987) 258–260

[41] Buchanan (n 38) 513; Veena Anusornsen, *Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Awards in International Arbitration: The United States, Europe, Africa, Middle East and Asia* (Master's thesis, Golden Gate University 2012) 10.

[42] *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4.10.2006. In this decision, it was stated that acts such as corruption and bribery should be evaluated in the context of international public policy and that contracts based on such acts would be invalid.

[43] James D. Fry, 'Desordre Public International under the New York Convention: Wither Truly International Public Policy' (2009) 8(1) *Chinese Journal of International Law* 81.

and transnational public policy. National public policy is shaped on the axis of national values that states have agreed to apply to their citizens. Secondly, there is international public policy. The concept of international public policy can be defined as the consensus on universal standards and generally accepted principles based on common values that must be applied internationally. It is widely accepted that international public policy is founded upon the principles that underpin the state and that its primary objective is to prevent actions that contravene the values of the international legal system from having consequences.[44] International public policy is structured around the principles of lex mercatoria. [45] Indeed, international public policy can be defined as a state policy that prevents the recognition and enforcement of decisions made by foreign arbitrators or judges. [46] In most countries, the obstacle to the recognition of an award is the violation of international public policy. The significance of international public policy in the context of commercial arbitration lies in its role in ensuring the enforceability of arbitrators' awards. [47] It has a more limited scope than national public policy. Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) [48] and Article 34(2)(b) of the UNCITRAL Model Law represent manifestations of international public policy in international arbitration. [49] The third type of public order is recognized as transnational public policy (truly international public policy).[50] The concept of transnational public policy is distinct from that of national and international public order. Transnational public policy is a concept that is based on universal values and is protected by the majority of countries, rather than being limited to

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44 *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 02.08.2006.

45 Born (n 1) 2928.

46 Christopher S. Gibson, 'Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law' (2009) 113(1) *Penn State Law Review* 1227.

47 Pierre Mayer, 'International Public Policy, Related Concepts and Legal Regimes' in Lauro Da Gama E Sozua Junior, Maria Ines Sola and Patrich Thieffry (eds), *Navigating the New Contents of International Public Policy – Compliance in Environment and Human Rights* (ICC Institute Dossiers 2023) 92-98.

48 United Nations, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

49 Pietro Ortolani, 'Application for Setting Aside as Exclusive Recourse against Arbitral Award' in Ilias Bantekas, Pietro Ortolani, Shahla Ali, Manuel A. Gomez, and Michael Polkinghorne (eds) *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (CUP 2020) 893.

50 For detailed information, see Jan Kleinheisterkamp's 'The Myth of Transnational Public Policy in International Arbitration' (2023) 71(1) *The American Journal of Comparative Law* 98-141.

the public policy of a single nation.[51] Crimes such as corruption, drug trafficking, terrorism, the smuggling of artworks, and human trafficking are considered to fall within the transnational public policy.[52] While the concept of transnational public policy is not explicitly addressed in the New York Convention, it is widely accepted that arbitrators should take into account this concept, as it encompasses universal values.

In general, the concept of public policy that serves as the basis for the annulment of arbitration awards on public order grounds is that of public policy under domestic law. However, in addition to this, the arbitral tribunal should also take into account the international public order in relation to the interference of the public order in the arbitration award. Corruption is regarded as a matter of international public policy in a number of legal jurisdictions. In addition to international conventions, this position has been reinforced by a series of judicial decisions.[53] In this regard, the reasoning of Judge Lagergren in ICC Case No. 1110 represents a leading example. In the pertinent decision, Judge Lagergren asserted that the consideration of public international law by the arbitrator is crucial for the enforceability of the award rendered as a consequence of the arbitration proceedings and thus formed the basis of his decision.

It is widely acknowledged that corruption and bribery are fundamentally incompatible with the principles of transnational public order.[54] Indeed, the prevention of corruption represents the fundamental tenet of transnational public order. The question, therefore, is whether money laundering can also be considered within the parameters of transnational public order in a manner analogous to corruption. While money laundering and the implementation of pertinent agreements fall within the purview of national and international public order, the question of which acts can be considered in this context is a matter of contention. This is due to the fact that the definition of acts in question possesses a multitude of meanings within the context of disparate legal orders. This inevitably gives rise to a debate as to whether they fall within the scope of transnational public order, which is based on shared values. In light of the foundational principles underlying corruption and money laundering, and the

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[51] Pierre Mayer, ‘Effect of International Public Policy in International Arbitration’ in Julian DM Lew and Loukas A Mistelis (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 61; Conde de Silva (n 38) 109. In fact, although the concept of transnational public policy was first introduced by Pierre Lalive in the ICCA report of 1986, it was universally adopted in a very short period.

[52] Mayer (n 51) 62.

[53] In *World Duty Free v Kenya*, the arbitral tribunal made it clear that corruption-related situations fall entirely within the scope of international public policy.

[54] In ICC Case No. 8891, the arbitral tribunal held that invalidity of the consultancy contract, which was the cause of the corruption, was a matter of transnational public policy.

values they threaten, it becomes evident that they warrant a similar approach.[55] It is our view that money laundering, similar to corruption, falls within the scope of transnational public policy. Consequently, the arbitral tribunal may conclude the proceedings by invoking the concept of transnational public policy.

C. Mandatory Rules of Foreign Law

An arbitral tribunal is empowered - and obliged - to apply mandatory national law ex officio, even if not invoked by the parties.[56] While the money laundering contract is valid and enforceable under the applicable law, it is necessary to address the issue of whether it is enforceable under foreign mandatory rules. Indeed, it is open to question whether arbitrators are empowered to declare the money laundering contract invalid on the grounds of foreign peremptory rules, given that the contract remains valid under the law applicable to the arbitration.[57] Mandatory rules represent the application of the mandatory provisions of the law of the relevant country, reflecting concerns related to public order, even in the absence of an agreed law governing the substance of the contract. In this context, the method of peremptory provisions, as regulated in Article 7 of the Convention on the Law Applicable to Contractual Obligations[58], otherwise known as the Rome Convention of 1980, have been applied by the courts. In consequence, the method of mandatory provisions is the determination of the mandatory provisions reflecting the basic policy and the application of the mandatory provisions, if appropriate, after determining the closest connection between the legal system, the case subject to arbitration, and the application or the consequences of non-application.[59] In this context, there are two situations in which the arbitral tribunal may find itself regarding foreign mandatory provisions.[60] These two situations are distinct and independent of one another.

1. Application of Mandatory Rules to the Extent of *Lex Contractus*

In the first case, the arbitral tribunal considers the prohibition imposed by the mandatory provisions of the law other than the law applicable to the proceedings as a factual fact and then observes the limits of these prohibitions in the context of the lex contractus.[61] Arbitrators may take into account the peremptory provisions while taking the provisions of the lex contractus as a basis. The most illustrative

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55 McDougall (n 33) 1044.

56 Born (n 1) 2929

57 McDougall (n 33) 1046.

58 Convention on the Law Applicable to Contractual Obligations [1980] OJ L266/1.

59 McDougall (n 33) 1047.

60 Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 852.

61 McDougall, (n 33) 1047.

example of this is the Hilmarton[62] decision. In the case at hand, the applicable law to the contract is Swiss law, and the seat of arbitration is Switzerland. The claimant was unable to provide sufficient evidence to demonstrate that a bribe was paid during the proceedings. In the case at hand, the claimant advanced a claim of bribery based on the premise of influence peddling. Although the practice of influence peddling was not a criminal offense under Swiss law, it was a criminal offense under Moroccan law. With regard to the question of the validity of the main contract between the parties, the arbitrators reached their decision on the basis of Swiss law without taking into account Moroccan law. Consequently, the arbitrators determined that the contract between the parties was invalid under Swiss law. In its rationale, the arbitral tribunal invoked the provision safeguarding foreign mandatory provisions, specifically the Swiss regulatory framework. The pertinent party initiated legal proceedings against the arbitral award. The Court of First Instance and the Swiss Federal Court both reached a conclusion in line with the arbitral tribunal's decision. They held that the violation of foreign peremptory provisions was contrary to Swiss ethics. However, they also held that the Moroccan rule put forward by the party did not constitute such a peremptory rule. This was because its main purpose was not to fight corruption. [63] With regard to this method, it can be seen that in order for the foreign peremptory rule to be applicable, a provision in the lex contractus providing such an opportunity is required. [64]

2. Direct Application of the Mandatory Rules of Foreign Law

In the second case, the arbitral tribunal directly applies the mandatory provisions of foreign law to the contract, thereby overriding the provisions of the lex contractus. [65] This authority is typically granted to the arbitrator in accordance with the dominant view in the doctrine. [66] It is argued that the arbitrator is given jurisdiction by the states and, therefore, has a responsibility to consider the public order and mandatory provisions of the states. Adopting such an attitude will also serve the function of the arbitration proceedings. This is because the most vital element of the arbitral tribunal's award is its enforceability. Adherence to these regulations will enhance the enforceability of the award. The opposing view in the doctrine is that the direct application of the mandatory provisions of foreign law is contrary to the freedom of will of the parties in the arbitration. This is because, although the parties have determined the applicable

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[62] Hilmarton Ltd v Omnium de Traitement et de Valorisation SA, ICC Case No 5622.

[63] Ibid.

[64] Christoffer Coello Hedberg, *International Commercial Arbitration and Money Laundering* (Master's thesis, Uppsala Universitet 2016) 27.

[65] McDougall (n 33) 1047.

[66] Born (n 1) 2318-2350; McDougall (n 33) 1047.

law, the mandatory provisions of a foreign law are applied against their will. Consequently, the argument has been made that transnational public order should be applied in lieu of the mandatory provisions of foreign law. [67]In instances of corruption, which protects the same legal interest as money laundering, it has been observed that arbitral tribunals frequently refrain from applying foreign directive provisions. Cases where foreign directive provisions are applied are subject to rigorous judicial review.[68] It is, therefore, our contention that the arbitral tribunal should apply the mandatory provisions, as opposed to the lex contractus, in the dispute before it.[69]

CONCLUDING REMARKS

The legal basis of proceeds of crime has diversified in the context of globalization. It is widely acknowledged that arbitration proceedings are selected for the advancement of international trade and the expeditious resolution of disputes between the parties. As part of the distinctive structure of arbitration proceedings, the issue of confidentiality is a pertinent one. This is an attractive proposition for those engaged in money laundering activities. Furthermore, it inevitably intersects with arbitration proceedings. The articles of association do not provide guidance on the actions that an arbitral tribunal may take in the event of money laundering during arbitral proceedings. Given the overlap between money laundering bribery and corruption crimes, suggestions have been made regarding the application of regulations in the context of arbitration proceedings. In this context, the question arises as to whether the arbitral tribunal is able to accept the jurisdiction of the arbitral tribunal over the dispute if the contract is deemed invalid in accordance with the law that is applicable to the main contract during the arbitration proceedings. In accordance with the prevailing opinion among legal scholars, the arbitral tribunal will accept jurisdiction over the dispute in such a case. The primary question is how the arbitral tribunal should proceed in the event that the pertinent arbitration agreement is valid under the law applicable to the underlying contract that is the subject of the arbitration proceedings, yet the underlying contract contains money laundering. In this case, the arbitral tribunal may consider two potential courses of action. The first is the set of rules that govern international public order. The second option is to resolve the dispute in accordance with the mandatory provisions

[67] Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer International Law 2004) 264–265.

[68] Ibid at 265.

[69] This was the case in Northrop v. Triad 1984. In that case, one of the parties argued that the agreement was invalid based on the mandatory provision prohibiting the Kingdom of Saudi Arabia from using intermediaries in the arms trade. However, the arbitral tribunal rejected the claim as unfounded. See Hedberg (n 63) 28.

of a legal system other than that which governs the substance of the contract. In this context, the arbitral tribunal is empowered to reject the arbitration in the event that it encounters money laundering in the arbitration proceedings and to invalidate the contract by invoking the mandatory provisions of public international order and foreign law.

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THE REGULATIONS ON THE USE OF DNA IN FRENCH CRIMINAL PROCEEDINGS[*]

"Fransız Ceza Muhakemesinde DNA Kullanımına İlişkin Düzenlemeler"

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ABSTRACT

DNA samples are unique evidence for criminal proceedings to identify the criminals. DNA analysis in criminal proceedings is performed in a variety of ways, including comparisons between the samples collected at the crime scene with the DNA of a person or with a DNA profile stored in a DNA databank. Even it is further used by law enforcement officers to find out the suspects, witnesses, as well as victims of future crimes. All these different ways of collecting and analysing DNA samples are conducted for the same purpose: Finding out the truth.

France is one of the pioneering countries in the world in terms of legislative grounds and the increasing capacity of the DNA databank, which is called the Automated National File of Genetic Prints (Fichier National des Empreintes Génétiques, or FNAEG). With the increasing demand over time, the scope of the use of DNA in criminal proceedings has expanded inevitably. Thus, the legislation has been repeatedly amended in different years. Having acknowledged the importance of DNA samples, the exponential use of them has raised some concerns on the right to respect private life, particularly on data protection issues. To this extent, the European Court of Human Rights (ECtHR) has significant reverberations over these legislative changes.

In this study, the provisions of the French Criminal Procedural Code (FCPC) on collecting and processing DNA in criminal proceedings will be under scrutiny, and proposals will be made for the Turkish legislative amendments, in conclusion.

Key Words: DNA, DNA databank, molecular genetic examination, protection of personal data in criminal procedure.

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ÖZET

DNA örnekleri, ceza davalarında suçluların kimliğini tespit etmek için eşsiz bir delil niteliğindedir. Suç yerinden elde edilen örnekler ile bir kişinin DNAsı veya yine bu örneklerle bir DNA veri bankasında muhafaza edilen bir DNA profili arasında karşılaştırmalar dahil olmak üzere ceza muhakemesinde DNA analizi çeşitli şekillerde gerçekleştirilebilir. Hatta, kolluk görevlileri tarafından gelecekte işlenecek suçların şüphelileri, tanıkları ve mağdurlarını bulmak için yeniden kullanılabilmektedir. DNA örneği toplamanın ve analiz etmenin tüm bu farklı yolları aynı amaç için gerçekleştirilmektedir: Gerçeği ortaya çıkarmak.

Fransa, yasal zemini ve Otomatik Ulusal Genetik Veri Bankası (Fichier national des empreintes génétiques - FNAEG) olarak adlandırılan DNA veri bankasının artan kapasitesi açısından dünyadaki öncü ülkelerden biridir. Zaman içinde artan taleple birlikte DNA'nın ceza yargılamalarında kullanımının kapsamı da kaçınılmaz olarak genişlemiştir. Bu nedenle, mevzuat farklı yıllarda defalarca değiştirilmiştir. DNA örneklerinin önemi kabul edilmekle birlikte, bu örneklerin kullanımındaki artış, özel hayata saygı hakkı ve özellikle de veri koruma konularında bazı endişelere yol açmıştır. Bu kapsamda, Avrupa İnsan Hakları Mahkemesi'nin (AİHM) bu mevzuat değişiklikleri üzerinde önemli yansımaları olmuştur.

Bu çalışmada, Fransız Ceza Muhakemesi Kanunu'nun (FCPC) ceza yargılamalarında DNA'nın toplanması ve işlenmesine ilişkin hükümleri mercek altına alınacak ve sonuç bölümünde Türkiye'deki mevzuat değişiklikleri için önerilerde bulunulacaktır.

Anahtar Kelimeler: DNA, DNA veri bankası, moleküler genetik inceleme, ceza muhakemesinde kişisel verilerin korunması.

INTRODUCTION

The use of DNA to uncover material truth in criminal proceedings is of undeniable importance. Being aware of this fact, many countries have invested in the use of DNA analysis in criminal proceedings. In this era, at the point where the criminal system stands, it is now impossible to deny the contribution of DNA evidence to criminal proceedings since many cold cases are now solved with the help of it. However, what is indisputable is that there need to be dedicated regulations covering all the needed safeguards and protecting the right to respect for private life.

France introduced a wide range of novelties in the FCPC to expand the scope of DNA analysis in criminal proceedings. Although it was introduced to be used in the investigation and prosecution of sexual offenses, the scope has been expanded to most of the offenses laid down in the FCPC. In the wake of these changes, some concerns on fundamental rights have emerged, especially recently

after a significant decision of the ECtHR: Aycaguer v. France. Even though some amendments have been made to be in compliance with this judgment, there are still prevailing concerns in respect of private life, and particularly data protection.

In this study, the importance of DNA as evidence in criminal proceedings will be summarised with the historical background of it. The second part is devoted to the leading judgments of the ECHR on the use of DNA. In the third part, the provisions of the FCPC will be looked into with recent amendments made in France. These changes will also be assessed in terms of private life and protection of personal data. By doing so, current debates connected with fundamental rights will be shared where needed. Finally, concrete suggestions with regards to the processing of DNA data for Turkish legislation will be made in the conclusion.

I. The Importance of DNA as an Investigative Tool in Criminal Proceedings

DNA was first used in criminal proceedings in the UK in 1986 to solve a rape case. In this case, after two young girls were found dead, a suspect called Richard B. was accused of being a perpetrator of these two crimes. The Police carried out the DNA identification method with the assist of Prof. Alec Jeffreys, and the innocence of Mr. Richard B. was proved accordingly. Through the process of gathering the DNA of over 5.000 men living in the neighborhood, Colin P. was found guilty and sentenced to 30 years of imprisonment for two separate crimes[1]. Following this judgment, the use of DNA in solving crimes increased, and DNA results started to be used as evidence, afterwards. These developments paved the way for setting up a DNA Databank (CODIS - Combined DNA Index System) in the USA in 1994[2]. According to the recent statistics, France with 3.902.741 of profiles[3], has one of the largest databases in Europe, preceded by the United Kingdom which has 7.226.795 profiles from 6.031.139 individuals by 31 March 2024[4].

1 Ian Cobain, ‘Killer Breakthrough – The Day DNA Evidence First Nailed a Murder’ *The Guardian* (London, 7 June 2016) <https://www.theguardian.com/uk-news/2016/jun/07/killer-dna-evidence-genetic-profiling-criminal-investigation> accessed 12 June 2024.

2 Rahime Erbaş, ‘DNA Databases for Criminal Justice System: A Pathway Towards Utopian or Dystopian Future?’ (2022) 18 The Age of Human Rights Journal 331, 334.

3 J. F. avec AFP, ‘6,5 Millions de Personnes Sont Enregistrées en France dans le Fichier des Empreintes Digitales’ (*BFMTV,* 13 April 2023) <https://www.bfmtv.com/police-justice/6-5-millions-de-personnes-sont-enregistrees-en-france-dans-le-fichier-des-empreintes-digitales_AD-202304130754.html#:~:text=Des%20donn%C3%A9es%20conserv%C3%A9es%2010%20%C3%A0,de%20police%20scientifique%20(SNPS),> accessed 30 May 2024.

4 Home Office, *National DNA Database (NDNAD) Statistics*, <https://www.gov.uk/government/statistics/national-dna-database-statistics#full-publication-update-history> accessed 30 September 2024.

DNA is a unique, inherited genetic material that reveals a wide range of information from genetic disorders to familial relationships[5]. DNA is such a powerful tool widely used in criminal proceedings that it could ensure the exoneration of innocent and the conviction of guilty[6]. With the help of running DNA tests, the identification process is conducted in a shorter time compared to any other investigation method. Moreover, high accuracy of results also contribute to the deterrence for some potential criminals[7]. Besides, DNA evidence has become such an incontestable evidence due to its complex nature that even judges, prosecutors, and lawyers are not in a position to comprehend every detail of it. To this end, courts are now more dependent on it, while lawyers are not expertised enough to challenge DNA evidence[8].

DNA samples contain a wide range of information, such as physical traits of a person, while DNA profiles stand for a set of numbers which help reveal the identity of that person[9]. In this respect, it is deduced that setting up a DNA profile is less intrusive than storing a DNA sample, as the latter could be used to reach further information. As it is examined below, DNA profiles stored for the purpose of law enforcement basically do not reveal any information with regard to the physical appearance, race, genetic, or medical disorders of the person in question. Indeed, after law enforcement officers collect a DNA sample, laboratory technicians translate the sample into a DNA profile (a numerical sequence), subsequently. It is that profile, and not the genetic material itself, that enters the DNA database. The information contained in the DNA profile does not predict or identify physical characteristics, race, medical disorders or genetic disorders.

Even though DNA generally offers undeniable help in solving crimes, some concerns are sometimes raised about the contamination of samples, which could lead to miscarriages of justice[10]. It is noteworthy that to prevent DNA samples from being contaminated, some planned measures should be taken, including

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5 Liz Campbell, 'Non – Conviction DNA Databases and Criminal Justice: A Comparative Analysis' (2022) 1 Journal of Commonwealth Criminal Law 55, 57.

6 Andrew Roberts, Nick Taylor, 'Privacy and the DNA Database' (2005) 4 European Human Rights Law 373, 373.

7 Campbell (n 6) 55.

8 Vololona Rabeharisoa, Florence Paterson, 'Maintenir une Infrastructure en Droit: le Rôle du Comité Technique du Fichier National Automatisé des Empreintes Génétiques' in Joëlle Vailly (ed), *Sur la Trace des Suspects, L'incorporation de la Preuve et de l'indice à l'ère de la Génétique* (Éditions de la Maison des Sciences de l'Homme, coll. "Le bien commun" 2021) 54.

9 Campbell (n 6) 69.

10 H. M. Wallace, A. R. Jackson, J. Gruber, A. D. Thibedeau, 'Forensic DNA Databases – Ethical and Legal Standarts: A Global Review', (2014) 4 Egyptian Journal of Forensic Sciences 57, 60.

forensic training for those collecting the sample and setting standards for the laboratories processing the data. In addition to contamination of samples, mislabeling of samples, or misinterpretation of results could also be misleading in a criminal proceeding[11]. Therefore, the results of DNA analysis should be interpreted together with other evidence to reach a final conclusion. In other words, the matching of samples does not undoubtedly confirm the accomplice of a person to a crime, rather, it underpins the presence of that person at the crime scene. In that sense, suspects should be in a position to elucidate for what reason he/she was present at the crime scene. By doing so, it is fair to admit that burden of proof in that kind of cases is reversed from the prosecutor to the suspect himself/herself[12].

Nevertheless, after the DNA match, the purpose of the perpetrator must be made clear by the investigator with additional evidence[13]. Namely, DNA matches should be interpreted with further answers in the context of the investigation[14]. For this reason, DNA evidence is mainly considered among circumstantial evidence[15], rather than direct evidence.

II. THE REGULATIONS ON THE USE OF DNA IN CRIMINAL PROCEEDINGS IN FRANCE

A. The Purpose of DNA Databank in France

The FNAEG is such a significant platform that it establishes a robust bridge between judicial procedure and evidence by ensuring technical reliability and judicial admissibility[16]. Pursuant to article R53-9 of the FCPC, the main purpose of having a DNA databank is to facilitate the search for and the identification of the perpetrators of the crimes set out in article 706-55. In other words, the FNAEG enables investigators to match the DNA of a person or taken from a crime scene with the DNA already stored in the database[17]. As it is understood from what is

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11 Erbaş (n 3) 334.

12 Valerie Olech, 'La Place de l'AND dans les Procedures Policieres et Judiciaires' in Bruno Py, Julie Leonhard, Mathieu Martinelle, Catherine Ménabé (eds), *ADN et Justice: l'utilisation de l'empreinte Génétique dans les Procédures Judiciaires*, (Presses Universitaires de Nancy et Éditions Universitaires de Lorraine 2020) 53.

13 Ibid 46.

14 Joëlle Vailly, Gaëlle Krikorianp, 'Durabilité et extension du soupçon Catégorisations et usages policiers du fichier d'empreintes génétiques en France' (2018) 59 Reveu Française de Sociologie, 707, 717.

15 Circumstantial evidence is defined as evidence not drawn from direct observation of a fact in issue. For further information, see <https://www.britannica.com/topic/circumstantial-evidence>

16 Rabeharisoa, Paterson n (9) p. 30.

17 For further information, see 'Cahier des Clauses Techniques Particulières Tierce Maintenance

described in this context, the collection and storing of DNA of a person is not just relevant to the crime already committed. The DNA collected within the flow of an investigation or prosecution would be used to identify suspects or accused persons in future crimes. In fact, one of the main purposes of setting up such a databank is the prevention of new heinous crimes before committed[18]. However, with the expansion of its scope over time, the functionality of the FNAEG has gone beyond it. According to the research conducted in France, approximately 70 – 80% of DNA analyses in criminal proceedings are done in the wake of the identification of perpetrators in order to strengthen the bundle of clues and to psychologically affect persons involved in the proceedings[19].

Another aim of the DNA databank is to help the search for missing minors and adults in need. In addition to this, the identification of a deceased person would be another reason for the use of DNA databank in France. The latter is quite substantial to find out the identity of persons, specifically during natural disasters. As a result, it could be put forward that the FNAEG stores two different profiles: profiles of identified persons, and profiles of unidentified persons whose samples somehow gathered from crime scenes[20].

B. Scope

The French DNA Databank is under criticism for two main reasons: One of which is the extension of the scope of the implementation of DNA gathering in criminal procedures. The amendments made over time have mainly paved the way for this argument. The second reason could be stated that the power of police forces over the processing of personal data through DNA collecting, storing, and analysing[21].

Indeed, the FNAEG mainly comprises a wide range of DNA data of persons, from suspects, convicts, and unknown persons to the relatives of missing persons[22].

Applicative de l'application FNAEG - NG (Fichier National Automatisé des Empreintes Génétiques – Nouvelle Génération) Annexe 1 Présentation Fonctionnelle', <https://cdnx.nextinpact.com/data-next/file-uploads/CCTPFNAEG-NG-Annexe1V16.pdf> accessed 25 May 2024.

18 Rabeharisoa, Paterson n (9) 27.

19 Olech n (13) 49.

20 Bruno PY, 'ADN et Procedure Penale: la science au service des enqueteurs' in Bruno Py, Julie Leonhard, Mathieu Martinelle, Catherine Ménabé (eds), *ADN et Justice: L'utilisation de L'empreinte Génétique dans les Procédures Judiciaires* (Presses Universitaires de Nancy et Éditions Universitaires de Lorraine, Collection Santé, qualité de vie et handicap 2020) 24.

21 Ousmane Gueye, François Pellegrini. 'Vers une Remise en Cause de la Légalité du FNAEG?' (2017) Convergences du Droit et du Numérique, Forum Montesquieu 1, 3.

22 Coralie Ambroise Casterot, 'Le FNAEG, un Outil de Fichage au Service des Enquetes' (2019) 9 Le Proces Penal a L'epreuve de la Genetique 23, 26.

Given the circumstances of perpetrators, the DNA match in criminal proceedings in France is mainly done in two different circumstances. One of which is in the case of the perpetrator, who is already known and apprehended, and there is a need to compare the DNA of that person with the samples gathered either at the crime scene or on the body of the victim. In this case, the FNAEG does not play a role since there is no comparison with the profiles in the databank. However, in the second, the FNAEG is essential. Should the perpetrator is not known or even unidentified, those samples could be compared with the DNA profiles that are already stored in the FNAEG databank. On the other hand, the DNA profiles processed from unidentified person's samples are also stored in the FNAEG by virtue of having a future match in a potential case[23].

The use of DNA in criminal procedures in France is laid down between articles 706-54 and 706-56-1-1 in the FCPC. The DNA Database in France[24] was set up in 1998 to store DNA profiles of sexual offenders. However, due to the amendments made over time, its scope now covers most of the offenses in the FCPC[25]. It is evident that with all these changes, the prerogative of the police has been expanded at the expense of the rights of people over the course of time[26]. For the time being in France, it is estimated that at least three – fourths of files handled by courts comprise a DNA file[27].

The FNAEG holds DNA of persons who are accused or have been convicted of one of the extensive scale of crimes with the specific purpose of facilitating the identification of offenders. Namely, the DNA of those investigated because of these offenses is also included in the system of the FNAEG. It should be noted that almost 75% of the profiles in the FNAEG belong to those who are not convicted[28].

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23 Olech n (13) 48.

24 Pursuant to Article R53-16 of the FCPC, The FNAEG is established under the Ministry of Interior Affairs and is supervised by a magistrate who is appointed by the French Minister of Justice for a three-year term. A committee which consists of a magistrate and two specialists in the field of genetics or information technology assists the magistrate.

25 The first extension was made by the Law 2001-1062 of November 15, 2001, and this amendment was mainly related to the offences against persons, such as wilful attacks on the life of the person. In 2003, with the Law 2003-239 of March 18 new offenses were added to the list of offenses, including threats of attacks against persons, drug trafficking, attacks on personal freedoms, destruction, damage and threats of damage to property. Even though some minor amendments have also been made in the Article to expand its scope, in the following years, the main changes were made in the years mentioned above.

26 Gueye, Pellegrini n (22) 2.

27 Vailly, Krikorianp n (15) 712.

28 Ibid 708.

In the file of each person, in addition to the information on DNA, names, data, and place of birth, as well as the nature of the case are stored, respectively. In the event of natural disasters or missing people, DNA samples taken by ascendants, descendants, or collaterals could also be stored in the FNAEG to find out the identity of the person in question. In this case, written consent must be taken from those the sample could be taken from. Pursuant to article R53-11 of FCPC, the following information must be added to the file retained in FNAEG:

- The number of the procedure for which registration in the file is requested,
- The judicial authority or judicial police officer requesting registration in the file,
- The date of the application for entry in the file,
- The date of the decision if there is any decision declaring the person guilty or not criminally responsible.
- The name of the authorised natural or legal person who carried out the analysis.

Moreover, some other information should be added considering the reason for collecting a sample of DNA. For instance, during the investigation of offences laid down in Article 706-55, it is required to have a reference to the specific offence. If possible, the date on which the offence was committed, the name, surname, date and place of birth of the person from whom the DNA was collected[29].

The FNAEG stores a wide range of DNA profiles collected from different stages of criminal procedure. Pursuant to Article 706 – 54 and 706 – 55, the sources of DNA stored in the FNAEG are as follows:

- DNA left by unknown persons under the investigation of the offences referred to in Article 706-55 of the FCPC.
- Persons convicted of one of these offences are required to give samples in order to facilitate identification and search for the perpetrators of these offenses.
- Persons who have been prosecuted for one of these same offences but who have subsequently found not criminally responsible are also enlisted in the databank.
- Suspects of these offenses referred above are supposed to give samples if there is serious or corroborating evidence making it likely that they have committed one of these same offences.

French Law enshrines two separate ways of collecting and storing DNA for suspects. In other words, a kind of hierarchy is set up among suspects[30]. As it is

[29] Article R53-11 of the FCPC.

[30] Casterot n (23) 28.

underlined above, if there is serious or corroborating evidence laying out that the suspect has committed the offence in question, then there is no doubt that the DNA of that person would be collected and kept in the FNAEG. In this case, it is not needed to have an indictment against those whose data has been collected[31]. Besides, in Article 3 of the 706 – 54, it is laid down that if there is a plausible reason to suspect that a person has committed one of the offenses mentioned in Article 706 – 55, then DNA samples would be taken. However, the analysis of DNA gathered in this way can't be kept in the FNAEG. To elaborate more, it should be noted that the latter suspects have looser connection with the offense in question than the suspects categorised in the first concept of suspects. For instance, to reach out the suspect, there may be a need to collect DNA of persons who were at the vicinity of crime scene at the time of the crime committed. In this case, these persons could be classified as suspects, and their DNA could also be collected, but their DNA can not be stored in the FNAEG since there is no serious or corroborating evidence to blame them for the offence[32]. In addition to these ways, DNA of persons could also be stored in the system if there is any need to determine the cause of death or the cause of a disappearance in an investigation. Lastly, if there is any need to identify deceased persons, the DNA of those persons are also kept in the system.

One of the crucial regulations of the FCPC is the fact that the genetic file should only contain non-coding deoxyribonucleic acid segments, which correspond to the type of DNA that does not contain proteins. In other words, DNA stored for criminal purposes in the FCPC enables experts to match the results. It is mainly underlined that the DNA stored in the FNAEG does not reveal any further information, including diseases, pathological predispositions, and race of individuals[33]. If the FNAEG collected such sensitive data in the system, it could create highly intrusive implementation for those whose data is processed. However, there are also some concerns, claiming that given the type of DNA stored by the FNAEG, more information could be obtained, such as the disease or geographic origin of the person to whom the DNA in question belongs[34]. Should there be a possibility of reaching the disease or origin of a person, this

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31 Rabeharisoa, Paterson n (9) 33.

32 Vailly, Krikorianp n (15) 720.

33 For further information see 'Cahier des Clauses Techniques Particulières Tierce Maintenance Applicative de l'application FNAEG - NG (Fichier National Automatisé des Empreintes Génétiques – Nouvelle Génération) Annexe 1 Présentation Fonctionnelle', https://cdnx.nextinpact.com/data-next/file-uploads/CCTPFNAEG-NG-Annexe1V16.pdf, accessed 25 May 2024.

34 Joëlle Vailly, Yasmine Bouagga, 'Opposition to the Forensic Use of DNA in France: The Jurisdiction and Veridiction Effects' (2019) 15 BioSocieties <https://shs.hal.science/halshs-02132130/document> accessed 12 May 2024.

means that broader information than aimed is under risk. While the purpose of the FCPC by allowing just non-coding DNA is compatible with protection of personal data in this regard, the ambiguity over if there is any possibility to obtain further information by processing DNA data held by the FNAEG still creates question marks. To put these concerns aside, the actual statistics of the FNAEG should be shared with the public regularly.

Another point in the French system is that the samples can not be kept in the system. The FNAEG only enables to store DNA profiles, not the samples from which the profile constituted. This fact is quite important not to allow unlawful intrusion into one's personal data. Otherwise, the samples would be at a risk of being used for further studies to gather unlawful information.

In French criminal investigation procedure, the recording of DNA of a person in the FNAEG is conducted by the decision of a law enforcement officer, acting either ex officio or at the request of the public prosecutor or the investigating judge. It should be noted that almost 93% of the records to the FNAEG are based on the decisions of these officers while the rest are of the decision of a magistrate. Namely, the decision of whether serious or corroborating evidence is at place is made by law enforcement officers, not the judiciary itself[35].

C. The Retention Period and Deletion

As it is explicitly laid out by the ECtHR in many judgments, indefinite retention of DNA by governments could lead to disproportionate interference with human rights, specifically the right to respect for private and family life. As it is explained in detail below, the ECtHR underlines the importance of differentiation of storage time based on the seriousness of the crime as well as the age of the suspect. Considering this, Decree No. 2021-1402 Of 29 October 2021 Amending The Code of Criminal Procedure and Relating to The National Automated Genetic Fingerprint Database and The Central Service for the Preservation of Biological Samples amended the FCPC and incorporated the specific articles in the FCPC.

The storage time of DNA profiles in France varies due to from whom the sample is taken. The maximum time for storing data is forty years for persons who are convicted of a serious crime and for missing or deceased persons. The DNA of accused persons could be kept for twenty-five years, at most. During that time, DNA profiles could be deleted either by the ex officio decision of the public prosecutor or at the request of the relevant person if the DNA profile is about a suspect. However, the former is mostly not the case[36].

35 Vailly, Krikorianp n (15) 720.

36 Vailly, Bouagga. n (35).

According to the FCPC,

- If DNA has been taken from an unidentified person during the investigation of the offences referred to in Article 706-55, the storage time will be 25 years, at most. That time is also valid for DNA taken during the investigation of a deceased person.
- If DNA has been taken from a suspect about whom there is serious or corroborating evidence making it likely that he/she has committed one of the offences referred to in Article 706-55, the storage time will be 15 years. In case the suspect is a minor, that time would be 10 years.
- If there is a conviction or non-liability decision about one of the offences referred to in Article 706-55, the DNA taken from that convicted person would be kept for 25 years. In case the convicted person is a minor, that time would be 15 years.
- If DNA has been obtained from an unidentified corpse, a missing person, a victim of a natural disaster, and an ascendant or descendant of a missing person, the time of retention would be 40 years.

On the other hand, the retention period underlined above could change under certain circumstances provided in Article R53-14. Pursuant to the relevant sentence in the article, if the offence in question is among some specific offences[37], then 10 years of retention period would be extended to 15 years, 15 years of retention period would be extended to 25 years, and 25 years of retention period would be extended to 40 years. Considering a wide-range of offences listed under this Article, the actual period of retention is quite longer than what is actually laid down. In other words, the article that specifies the exception makes the exception the main rule. Besides, the data of a deceased person should also be deleted if the identification is definitively complete. This fact is also similar to the situation for missing persons. Once the person has been reached, the data in the FNAEG should be removed. Otherwise, the data will be kept for 40 years.

One of the significant criticisms to be made in that sense is the lack of automatic deletion of the DNA profile from the FNAEG once investigation or prosecution has concluded that the suspect or defendant is not guilty. If investigation or prosecution phases have concluded in that way, the DNA profiles of suspects or defendants should be erased automatically once the decision has become final. However, it is not exactly the case. In practice, it is underscored that the number of the deleted profiles over the decision of judicial authorities after the request of the person whose data has been processed is quite low[38].

[37] In fact, most of the offences are included. For instance, crimes against humanity, wilful attacks on life, torture and act of barbarism, theft, sexual assault, drug trafficking, kidnapping, human trafficking, endangering minors, robbery with violence, extortion, treason and espionage, acts of terrorism, etc.

[38] Rabeharisoa, Paterson n (9) 27.

D. Refusal to Give a Sample

Considering the number of DNA profiles in the FNAEG, there is an unavoidable concern regarding whether the process of DNA collecting and storing would constitute disproportionate interference with freedoms[39]. From this point of view, there are some debates over whether the suspect has a right to refuse to give samples that are to be under analysis for the DNA matching.

There are also some deterrence factors that lead people to give a DNA sample. A person who is demanded to give a DNA sample could not know that there is a possibility of refusing. Moreover, fear of further proceedings he/she may face when refusal could also be deemed another reason. Indeed, unprecedented costs in further proceedings could be a serious deterrent[40]. Furthermore, refusing to give a DNA sample could also be construed as an acknowledgement of the offence in question[41]. In other words, if a person refused to give a sample, this could turn out to be a negative consequence for him/her in the course of the establishment of truth in a criminal procedure.

Gathering that amount of DNA data without having classification among crimes is one of the motives for refusing to give the DNA sample. In fact, once the data of a person is stored in the FNAEG, this means that that person's personal data, the DNA profile in this case, is listed on the same list of serious offenders. On the other hand, it is underlined that there is no substantial objection to giving a DNA sample if that sample would be used to match a certain sample found at crime scenes[42]. The main objection piles up around the indiscriminate collection of personal data, and the lack of categorisation of crimes.

On the other hand, according to the FNAEG, refusal to give sample for the DNA test is possible, but it could result in imprisonment. In fact, under Article 706-56, refusing to give the sample would constitute an offence with one year of imprisonment and a fine of 15.000 euros. If a convicted person refused that, it would increase to two years of imprisonment and 30.000 euros of fine. On the other hand, if a suspect or convicted who is required to give samples, would be in an act to substitute his/her samples with a third person's samples, then he/she would face three years of imprisonment and a fine of 45.000 Euros.

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39 Gueye, Pellegrini n (22) 4.

40 Vailly, Bouagga n (35).

41 Chloe Lievaux, 'Du Droit de la Prevue par le Corps aux Droits de la Personne sur son Corps' in Bruno Py, Julie Leonhard, Mathieu Martinelle, Catherine Ménabé (eds), *ADN et Justice: L'utilisation de L'empreinte Génétique dans les Procédures Judiciaires* (Presses Universitaires de Nancy et Éditions Universitaires de Lorraine, Collection Santé, qualité de vie et handicap 2020) 186.

42 Vailly, Bouagga. n (35).

In French criminal proceedings, either in investigation, prosecution, or after conviction, consent of the person whose sample is to be processed, needs to be taken beforehand. However, this does not mean that the person who refused to give consent would not face any sanction. The only situation that does not give rise to any sanction is when a relative of a missing person would refuse to give sample[43]. It could be put forward that consent in its true sense is only sought in such situations. Besides, Article 706 – 56 of the FCPC which specifies in a case that a person has been convicted of a crime that requires ten years or more of imprisonment, there is no need to take consent from him/her. The same applies to persons prosecuted for at least ten years of imprisonment[44].

Given these regulations above, this becomes an intricate issue considering the fact that refusal to give a sample is laid down as a separate crime. One says that knowing the latter has dissuading effect on persons once they think not to give consent[45]. It turns out that "requirement of taking the consent" is not an effectively implementable regulation when the impugned person is aware of being imprisoned for refusing to give the sample. In that sense, if a person is not in favour of giving consent, that person automatically would be in a position of "refusal to give sample".

III. ECHR Judgments Regarding the Use of DNA in Criminal Proceedings

A. S. and Marper v. The United Kingdom

DNA profiling and sample collection are related to the right to data protection, which the ECHR does not recognize as a separate right. The ECtHR instead acknowledged that protection of personal data is recognised as a component of Article 8 of the ECHR, which guarantees the right to respect for one's private and family life. The Court first needs to figure out whether the impugned interference has a basis in the law, and the law is clear, foreseeable, and accesible. After this examination, the second phase is to check if the interference with the right to respect for private life has a legitimate purpose, and it is regarded as necessary in a democratic society.

In the case of S. and Marper v. the United Kingdom, the DNA samples of Mr. S. were processed when he was accused of robbery and arrested at the age of 11. Then he was acquitted of those crimes. On the other hand, the other applicant Mr. Michael Marper, was also charged with the harassment of his

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43 Casterot, n (23) 29.

44 Lievaux n (42) 184.

45 Julie Leonhard, 'Le Fichage de L'empreinte Genetique' in Bruno Py, Julie Leonhard, Mathieu Martinelle, Catherine Ménabé (eds), *ADN et Justice: L'utilisation de L'empreinte Génétique dans les Procédures Judiciaires* (Presses Universitaires de Nancy et Éditions Universitaires de Lorraine, Collection Santé, qualité de vie et handicap 2020) 84.

partner, and his samples were also taken for the DNA test. However, since his partner and his were reconciled, the file was not continued. Both requested police to remove their DNA and samples, yet they were refused. They applied to the Administrative Court and the Court of Appeal respectively, but the decision was not changed in favour of them.

The applicants submitted their application before the ECHR by underlining that retention of their DNA samples, and DNA profiles for an indefinite duration is in violation of Article 8 of the European Convention on Human Rights. They further underlined that storing the DNA samples would give rise to even more immense interference with their right to respect for private life since those samples could be further processed to reveal their and their relatives' genetic information.

The Court underlines that the retention of DNA information for the purpose of detection and prevention of crime is regarded as a "legitimate aim" within the context of Article 8 of the Convention. However, it also emphasises that the retention of DNA is as significant as telephone tapping, secret surveillance, etc. Thus, it requires rather detailed regulations to ensure robust safeguards and to prevent any abuse or arbitrariness. On the other hand, at the time of the impugned case, England, Wales, and Northern Ireland are the only states where indefinite retention of DNA information of any suspect of any offence is allowed. Acknowledging the importance of DNA information in the pursuit of crimes, the Court repeatedly lays out that the states should not be in a position to allow the extensive use of DNA information without any limits, and any balance between the right to protection of personal data and the interest of the criminal system.

The Government put forward that the retention of DNA information of the applicants does not give rise to interference with the private life unless it matches with the offenses to be committed in the future. However, this argument is not upheld by the Court since the mere retention is already tantamount to the interference with the right in question. Therefore, future use of data is not a prerequisite in this regard. The Court further emphasises that indefinite retention of DNA information of acquitted people could lead to stigmatisation as they are treated in the same way as convicted persons. For this reason, the data of innocent persons, as it is the case in the file, should be destroyed after a certain while to be envisaged in the law. Moreover, the law should lay down more precise provisions to protect children's rights. Indeed, indefinite retention of personal data of children could hinder their development and integration in society. Having underlined all these facts, the Court came to the conclusion that having a blanket and indiscriminate retention of DNA fingerprints, samples, and DNA profiles of not convicted persons, as happens in the present case, results in the violation of Article 8 of the Convention. The balance between personal and public interests is undermined to the detriment of the applicants and ultimately

not established in a fair manner[46].

The case of S. and Marper v. the United Kingdom is regarded as one of the landmark judgments on the use of DNA in criminal proceedings. It is so significant that countries even outside the EU shaped their policy according to the outcomes of it[47]. In the wake of this judgment, the UK destroyed 7.7 million DNA samples and removed 1.7 million profiles[48]. It underlines the importance of striking a balance during the collection of DNA samples and setting up profiles so as to refrain from unfair and disproportionate interference with the rights of persons. However, even though the Court brought proportionality issue on the table in this judgment, it did not reveal the details of the proportionality. Considering that the use of DNA in criminal proceedings has widely expanded since the decision made, vagueness has also increased on how to substantially protect the right to privacy[49].

B. Aycaguer v. France

One of the most significant decisions made by the ECtHR is in the case of Aycaguer v. France. In that case, the applicant attended a rally organised by a trade union, and a scuffle broke out between gendarmes and demonstrators. It was alleged that the applicant used intentional violence against gendarmes with his umbrella. After an immediate summary trial, the court sentenced him to a suspended 2 months of imprisonment. The applicant was summoned by the police to give a DNA sample on the basis of Articles 706-55 and 706-56 of the FCPC. Upon his refusal to comply with this order, the applicant was fined 500 euros by the Bayonne Regional Court. The appeal of the applicant was dismissed, and the decision became final, subsequently.

The applicant claimed that his right to respect for his private life was violated since the DNA Database in France (FNAEG) was established as a platform to store DNA profiles of sexual offenders, but it is now extended to a wide range of offences without any differentiation among them. He also underlined that considering the seriousness of the offence he committed, storing his DNA profile for forty years is quite disproportionate.

According to the Court, DNA profiles contain substantial amount of unique personal data, and storing that DNA resorts to interference with the right to respect private life. It is coherent that states set up DNA databases within their legislation to prevent and prosecute certain crimes, however, it does not give

46 *S. and Marper v The United Kingdom* App no 30562/04 and 30566/04 (ECtHR, 4 December 2008).

47 Wallace, Jackson, Gruber, Thibedeau n (11) 60.

48 Vailly, Krikorianp n (15) 725.

49 Erbaş (n 3) 338.

rise to storing data more or longer than needed. Even if fourty years of storing duration is set out in the FCPC, there is no differentiation made among the crimes, taking into account their seriousness. Besides, in the relevant articles of the FCPC, convicted persons were not endowed with a right to lodge a request to have their DNA data deleted.

Based on these facts, the Court observes that the French legislation regarding the storage of DNA profiles does not provide the applicant with sufficient protection. As a consequence, the conviction of the applicant for having refused to give DNA samples violated his right to respect for private life[50]. This judgment of the Court has immensely affected the legislation of France. As it is magnified below, with the amendment made in 2019 by Law 2019-222, convicted persons were given the right to request his/her data to be deleted from the databank.

C. Gaughran v. the United Kingdom

This case also underlines the importance of safeguards by making references to the S. and Marker judgment that is explained above. The applicant, Mr. Gaughran was arrested for driving with alcohol, and his photograph, fingerprints, and DNA samples were taken subsequently. He was fined, and 12 months of driving ban was also given. The applicant's DNA sample was destroyed on his request; however, his demand to have his DNA profile removed was rejected by domestic courts.

The Court firstly admits that the aim of having a DNA databank and adding profiles to it pursues a legitimate purpose, which is the detection and prevention of crimes. The margin of appreciation of states in terms of DNA gathering and retention must be limited with certain safeguards provided in the law. In this regard, the Court found that the seriousness of offences, the need for keeping the data, as well as the duration of retention should be given importance when assessing if the margin of appreciation is overstepped. Indeed, the law should enshrine such details to delimit the extensive power of indefinite retention. Moreover, the data subject, the applicant in this case, should be endowed with the right to resort to a request for his/her data to be deleted. The Court reached the conclusion that Article 8 of the Convention had been violated since there was no provision in the law to provide safeguards to the applicant, and the State overstepped the margin of appreciation[51].

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50 *Aycaguer v France* App No 8806/12 (ECtHR, 22 June 2017).

51 *Gaughran v The United Kingdom* App No 45245/15 (ECtHR, 13 February 2020).

CONCLUSION

The ways of committing crimes have been rapidly changing in line with the advancements in technology, and thus new and effective methods for the investigation of crimes have emerged. In this era, it is unavoidably important to set up a DNA databank for a country, which aims to effectively prevent, investigate, and prosecute crimes.

In France, if the DNA is kept under the FNAEG, that DNA is always comparable with the new DNA samples, which have been found in more recent cases. Evolved particularly with recent amendments in the legislation, the DNA tests are run not just for the purpose of identification of suspects but also strengthening evidence in the relevant case. As it is explained above, in France, 70 – 80% of the DNA tests in criminal proceedings are conducted after the perpetrator has been identified. In other words, regardless of whether the identification of the suspect has been made, the DNA test could be run for the purpose of confirming the suspect, victim, etc. Our research has shown that collecting and storing DNA from persons has started to be done for the sake of feeding the French National DNA Databank. Automatically processed DNA is not for the elucidation of the crimes in question but mainly for future crimes.

Having a DNA databank is not just efficient for the purpose of criminal issues; it is rather efficient during natural disasters, such as earthquakes or floods. Indeed, the identification process of corpses requires a solid DNA analysis to find out who has passed away. Considering Türkiye is among the countries, which earthquakes occur quite likely, the need for a DNA databank is felt thoroughly.

However, it should be kept in mind that personal freedoms must not be jeopardised for the sake of elucidation of crimes. As is underlined in many cases by the ECtHR, there should be a fair balance between personal freedoms and the power used to solve crimes. To do so, some concrete measures, among others, to avoid disproportionate infringement of the right to privacy should be taken.

- It is evident that the wording of Article 78 “molecular genetic examination” in Turkish CPC should be reviewed, including the purpose and the scope of the measure.
- While doing that, a proportionate balance shall be struck between public interest and personal rights. The rules to be laid down in the relevant regulation must consider this fact in all articles.
- A national DNA databank should be set up under certain digital safeguards, and compliance of it with the UYAP must be securely ensured.
- The laboratories running DNA tests for criminal purposes must be shaped in compliance with certain requirements to protect personal data.
- Any interference into the system is to be thwarted in advance with regularly updated measures.

- The DNA databank should keep the profiles constituted from the samples gathered. However, the samples themselves are not kept since they could be used to reach further information about the person concerned.
- There should be appropriate standards to set out the way of collecting, sealing, storing, and transferring DNA samples and test results. These standards would contribute to the reliability of tests.
- A supervisory authority consisting of a judge(s) and scientific experts must be established to monitor the compliance of the DNA Databank with the regulations.
- The Turkish Data Protection Authority must be endowed with special powers to monitor the DNA Databank in terms of data protection issues.
- Statistics of this national DNA databank should regularly be shared with the public.

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ACCREDITATION OF THE MEDIATOR IN TERMS OF TURKISH LAW AND ITS ASSESSMENT IN TERMS OF THE UN SINGAPORE CONVENTION[*]

Türk Hukuku Açısından Arabulucunun Akreditasyonu ve BM Singapur Sözleşmesi Açısından Değerlendirilmesi

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ABSTRACT

The work initiated by the United Nations (UN) to harmonise international commercial mediation efforts and make their cross-border effects predictable has materialized both as a convention and as a model law.

The aim of this article is to compare the accreditation of mediators for the execution of settlement agreements under both the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention)[1] and Turkish Law. As the practices of competent authorities regarding the implementation of the Singapore Convention have not yet been established, both in our country and in other participating nations, our objective is to provide a forward-looking perspective within the microcosm of our chosen research area.

In the first section of our study, we will examine the process of entry into force of the UN Singapore Convention for Türkiye. The second section will explore the qualifications required for mediators under Turkish Law. In the third section, we will delve into the qualifications necessary for mediators under the Convention. Finally, the fourth section will focus on the prioritized implementation and interpretation of the Convention due to accession of Türkiye. Our study will be concluded with a results

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1 It will be briefly referred to as the 'Singapore Convention' in this article.

section containing our findings and recommendations based on our national and international literature research.

Keywords: Mediation, registry of mediators, accreditation, settlement agreement, enforcement of settlement agreements, Singapore Convention.

ÖZ

Milletlerarası ticari arabuluculuk çalışmalarını yeknesaklaştırmak ve sınır ötesi etkilerini öngörülebilir kılmak amacıyla Birleşmiş Milletler (BM) tarafından başlatılan çalışma hem bir sözleşme hem de bir model kanun olarak somutlaşmıştır.

Bu makalenin amacı Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Singapur Sözleşmesi'ne ve Türk Hukukuna göre sulh anlaşmalarının icrası konusunda arabulucunun akreditasyonunu karşılaştırmaktır. Hem ülkemizde hem de diğer taraf ülkelerde Singapur Sözleşmesi'nin uygulanması konusunda yetkili makam uygulamalarının henüz şekillenmediği bu aşamada mikro alan olarak belirlediğimiz çalışma konumuzda bir projeksiyon oluşturmak hedeflenmektedir.

Çalışmamız dört bölümden oluşmaktadır; 1. bölümde 'BM Singapur Sözleşmesi ve Türkiye yönünden yürürlüğe girme süreci', 2. bölümde 'Türk Hukuku açısından arabulucu olma koşulları', 3. bölümde 'Singapur Sözleşmesi açısından arabulucu olma koşulları' ve 4. bölümde 'Türkiye'nin taraf olması nedeniyle Singapur Sözleşmesi'nin öncelikle uygulanması ve yorumu' konuları incelenecektir. Çalışmamız, ulusal ve uluslararası literatür araştırmalarımızın sonucunda vardığımız görüş ve önerilerin yer aldığı sonuç kısmıyla tamamlanacaktır.

Anahtar Kelimeler: Arabuluculuk, arabulucular sicili, akreditasyon, sulh anlaşması, sulh anlaşmalarının icrası, Singapur Konvansiyonu

INTRODUCTION

Along with the impact of globalisation, companies have evolved into multinational enterprises conducting operations in different countries and continents.[1] However, despite this rapid development, today there are no regulations such as International Trade Law or International Code of Obligations regarding the contracts that form the basis of international commercial relations.[2] Nor is there an International Trade Court to resolve issues.[3] The absence of an objective legal framework in international trade increasingly emphasizes the importance of the

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1 May Olivia Silverstein, 'Introduction to International Mediation and Arbitration: Resolving Labor Disputes in the United States & the European Union' (2011) 1(1) Am U Lab & Emp L F 101, 102.

2 Cemal Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* (7th edn, Beta 2019) 10.

3 ibid.

will of the parties as per the contracts among them.[4] Recently, the concept of mediation has gained popularity as a preferred and amicable resolution method in international disputes.[5] The advantage of mediation is that it not only serves the function of resolving disputes, but it also plays a crucial role in the sustainability and development of international trade.

In support of this notion, Ware & Cole lists arbitration, negotiation, and mediation as the three major methods of alternative dispute resolution.[6] In the post-World War II era, arbitration, as a form of non-litigation dispute resolution, gained a considerable amount of attention; however, as time approached the 21st century, rising costs, delays, and procedural formalities have led to a search for other methods.[7]

I. THE UN CONVENTION OF SINGAPORE AND THE PROCESS OF ITS IMPLEMENTATION IN TÜRKİYE

The United Nations Commission on International Trade Law (UNCITRAL), a commission of the United Nations (UN) General Assembly,[8] is organised to ensure the representation of various states with different legal systems and varying degrees of economic development across different geographical regions. Among its many tasks, the primary mission of UNCITRAL is to regulate and modernise international trade through the harmonisation and unification of the national laws of states.[9] In this context, UNCITRAL serves as the legal backbone of the UN in the field of international trade.[10] The Singapore Convention is structured within UNCITRAL, and the history of its formation will be briefly summarized below.

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4 ibid 11.

5 Gülin Güngör, *Türk Milletlerarası Özel Hukuku* (2nd edn, Yetkin 2021) 328.

6 Stephen J. Ware and Sarah Rudolph Cole, 'Introduction: ADR in Cyberspace' (2000) 15(3) OHIO ST J ON DisP RESOL 589, 590.

7 Necla Öztürk, 'Arabuluculuğun Milletlerarası Özel Hukuk Boyutu: Genel Bakış' (2015) BATIDER, 31(2) 203, 203; Mediation process was initiated in an international dispute amounting to one billion US dollars, which could not be resolved for seven years and arbitration proceedings were ongoing, and it was concluded with a settlement in a short period of 3.5 days. The commercial dispute between Posco (South Korea) & FuelCell Energy (USA) was publicised since FuelCell Energy is traded on the US Stock Exchange. See Ng Xin Yi, 'Singapore Convention Week: Insights into a US$1B International Dispute' (simc.com.sg) <https://simc.com.sg/blog/2022/09/07/insights-into-a-us1b-international-dispute/> accessed 27 July 2023.

8 United Nations Commission On International Trade Law <https://uncitral.un.org/> accessed 16 July 2023.

9 Nadja Alexander, Shouyu Chong and Vakhtang Giorgadze, *The Singapore Convention on Mediation: A Commentary* (2nd edn, Wolters Kluwer 2022) para 0.07.

10 Corinne Montineri, 'The United Nations Commissions on International Trade Law (UNCITRAL) and the Significance of the Singapore Convention on Mediation' (2019) 20(4) Cardozo J Conflict Resol 1023, 1023-24.

Upon the proposal[11] made by the Government of the United States of America, the UN Commission on International Trade Law commissioned Working Group II in 2014 to carry out a study similar to the New York Convention on the enforcement of mediation settlement agreements.[12] Chaired by Natalie Y. Morris Sharma, Working Group II commenced its work, and after an intensive period of activity, successfully completed the Singapore Convention in 2018.[13] The result of the efforts by the UN, aiming to uniformise the work of international commercial mediation and to make its cross-border impacts predictable, has been consolidated as a convention and as a model law.[14]

Following extensive discussions and research, on 25 June 2018, during its 51st session, UNCITRAL unanimously approved the 'United Nations Convention on International Settlement Agreements Resulting from Mediation'.[15] Commonly

[11] The UNCITRAL work programme is established upon proposals from states or organisations; Hal Abramson, 'The New Singapore Mediation Convention: The Process and Key Choices' (2019) 20(4) Cardozo J Conflict Resol 1037, 1038; The proposal to establish an international convention has also been a topic of discussion in the literature. See: S. I. Strong, 'Beyond International Commercial Arbitration? The Promise of International Commercial Mediation' (2014) 45 Wash U J L & Pol'y 11, 11ff; There have also been critics of the proposal. Some commentators have labelled the proposal as the 'Mediators Full Employment Act'. See: Deborah Masucci, 'From Skepticism to Reality - The Path to Convention for the Enforcement of Mediated Settlements' (2019) 20(4) Cardozo J Conflict Resol 1123.

[12] 'Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting from International Commercial Conciliation/Mediation' (27 November 2014) UN Doc A/CN9/WGII/WP187; Ergun Özsunay, 'Yeni Kabul Edilen Singapur Sözleşmesi'ne Genel Bakış: Arabuluculuk Anlaşmalarının İcra Edilebilirliği' (Singapur Sözleşmesi'nin Arabuluculuk Üzerine Yansımaları Sempozyumu, İstanbul, 56 Aralık 2019) 31, 32 <https://adb.adalet.gov.tr/Resimler/SayfaDokuman/1412021155535Singapur%20S%C3%B6zle%C5%9Fmesi%E2%80%99nin%20Arabuluculuk%20%C3%9Czerine%20Yans%C4%B1malar%C4%B1%20Sempozyumu.pdf> accessed 30 December 2022; Banu Şit Köşgeroğlu, *Milletlerarası Ticari Uyuşmazlıklarda Arabuluculuk Sonunda Varılan Anlaşmaların Singapur Konvansiyonu Çerçevesinde Taraf Devletlerde İcra Edilebilirliği* (Adalet, 2020) 25; Xiantao Wen (with an introduction by Susan Finder), 'Comparative Analysis at the Singapore Convention in Light of the New York and Hague Choice of Court Conventions' in Shahla Ali (ed), *Comparative and Transnational Dispute Resolution* (Routledge 2023) 166.

[13] Natalie Y. Morris Sharma is regarded as the architect of the Singapore Convention in the literature due to her successful management and studies. See: Ergun Özsunay, 'Yeni Kabul Edilen Singapur Sözleşmesi'ne Genel Bakış: Arabuluculuk Anlaşmalarının İcra Edilebilirliği' (Singapur Sözleşmesi'nin Arabuluculuk Üzerine Yansımaları Sempozyumu, İstanbul, 56 Aralık 2019) 31, 32 <https://adb.adalet.gov.tr/Resimler/SayfaDokuman/1412021155535Singapur%20S%C3%B6zle%C5%9Fmesi%E2%80%99nin%20Arabuluculuk%20%C3%9Czerine%20Yans%C4%B1malar%C4%B1%20Sempozyumu.pdf> accessed 30 December 2022.

[14] Ergun Özsunay, *Arabuluculuk Sonucunda Yapılan Uluslararası Sulh Anlaşmalarının İcrası Hakkında Singapur Sözleşmesi ve UNCITRAL Model Kanunu* (2nd edn, Aristo 2021) 5; Alexander, Chong and Giorgadze (n 10) para 0.52.

[15] Edna Sussman, 'The Singapore Convention Promoting the Enforcement and Recognition of

known as the 'Singapore Convention',[16] it was officially adopted by the UN General Assembly through Resolution 73/198 on 20 December 20th 2018.[17]

The Convention aims to provide a uniform recognition and enforcement mechanism for international mediation settlement agreements, a demand long-sought by practitioners and academics alike.[18] Considered a reform-oriented development, the Singapore Convention was opened for signature on 7 August 2019. The signing ceremony witnessed the participation of representatives from 70 countries, with a total of 46 states including Türkiye eventually signed the Convention. Among the signatories are the world's two largest economies, the United States and China, along with three of Asia's largest four economies - China, India, and South Korea. As of the date of our completion of this study, 57 countries[19] have signed the Singapore Convention, and 14 countries[20] have ratified it. It is worth noting that international treaties come into force not upon signing but upon ratification, which is set as six months in the Singapore Convention.[21] With the submission of the third instrument of ratification (internal ratification process of Singapore, Fiji, and Qatar), the Singapore Convention came into

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International Mediated Settlement Agreements' (2018) 3 ICC Dispute Resolution Bulletin 42, 43; Sibel Özel, 'Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi: Singapur Konvansiyonu' (2019) 25(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Prof. Dr. Ferit Hakan Baykal Armağanı) 1190, 1194.

16 In our study, it will be referred to as the 'Singapore Convention', or 'Convention' in short.

17 UNGA Res 73/198 (20 December 2018) UN Doc A/RES/73/198.

18 Edna Sussman, 'The Singapore Convention Promoting the Enforcement and Recognition of International Mediated Settlement Agreements' (2018) 3 ICC Dispute Resolution Bulletin 42, 54; The Singapore Convention has universal potential for the enforceability of mediated settlement agreements in international commercial disputes. See: Miglė Žukauskaitė, 'Enforcement of Mediated Settlement Agreements' (2019) 111 Teisė 205, 214.

19 In alphabetical order; Afghanistan, Armenia, Australia, Belarus, Benin, Brazil, Brunei, Chad, Chile, China, Democratic Republic of the Congo, Colombia, Congo, East Timor, Ecuador, Eswatini, Fiji, Gabon, Georgia, Ghana, Grenada, Guinea-Bissau, Haiti, Honduras, India, Iraq, Iran, Israel, Jamaica, Japan (direct accession), Jordan, Kazakhstan, Laos, Macedonia, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, Palau, Paraguay, Philippines, Qatar, Rwanda, Samoa, Saudi Arabia, Serbia, Sierra Leone, Singapore, South Korea, Sri Lanka, Türkiye, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, Venezuela.

20 In alphabetical order; Belarus, Ecuador, Fiji, Georgia, Honduras, Japan, Kazakhstan, Qatar, Nigeria, Sri Lanka, Saudi Arabia, Singapore, Turkiye, Uruguay.

21 Art 14/(1) of the Singapore Convention; Elisabetta Silvestri, 'The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation' (2019) 2(3) Access to Just E Eur 5, 6; Sibel Özel, 'Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi: Singapur Konvansiyonu' (2019) 25(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Prof. Dr. Ferit Hakan Baykal Armağanı) 1190, 1208.

force on 12 September 2020.[22]

Türkiye was among the first countries to sign the UN Singapore Convention on 7 August 2019, when it was opened for signature. It has not deposited any reservations regulated by the Article 8 of the Convention. The ratification of 'United Nations Convention on International Settlement Agreements Resulting from Mediation' is found eligible by Law No. 7282[23] and approved by the Presidential Decree No. 3866 dated 21 April 2021. The effective date of the Convention was determined to be 11 April 2022.[24] Türkiye submitted its instrument of ratification to the United Nations Secretariat on 11 October 2021. Pursuant to Article 14 of the Convention, Türkiye became a party to the Convention on 11 April 2022, six months after the date of deposit.

The Singapore Convention is a multilateral treaty that provides an effective, uniform and consistent framework for the cross-border circulation of mediation settlement agreement documents concerning the resolution of international commercial disputes.[25] Beyond being a mere instrument for the enforceability of settlement agreements resulting from mediation, the Singapore Convention is designed as a springboard for mediation in the dispute resolution arena.[26] The Convention introduced a functional approach to recognition and enforcement.[27] Even if specific phrases such as recognition and enforcement are not used, their legal effects are detailed in the Convention.[28] In all member states of the Convention, the fulfilment of the settlement agreement concluded as a result of mediation is guaranteed by the mechanisms to be established in the competent state institutions. The Singapore Convention does not allow for *double exequatur* (dual enforcement), which would defeat the purpose of creating an effective and expedited enforcement mechanism.[29]

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22 Josèphine Hage Chahine and others, 'The Acceleration of the Development of International Business Mediation after the Singapore Convention' (2021) 32(4) European Business Law Review 769, 771; Alexander, Chong and Giorgadze (n 10) para 0.24.

23 Law No 7282, Date of adoption: 25 February 2021 (see Official Gazette of the Republic of Türkiye RG 11.03.2021/31420); Presidential Decree, No 3866 (RG 22.04.2021/31462).

24 Presidential Decree, No 5235 (RG 25.02.2022/31761).

25 Alexander, Chong and Giorgadze (n 10) para 0.01.

26 ibid para 0.34.

27 Natalie Y. Morris Sharma, 'Panel speech' (Singapur Sözleşmesi'nin Arabuluculuk Üzerine Yansımaları Sempozyumu, İstanbul, 5-6 Aralık 2019) 33, 36 <https://adb.adalet.gov.tr/Resimler/SayfaDokuman/1412021155535Singapur%20S%C3%B6zle%C5%9Fmesi%E2%80%99nin%20Arabuluculuk%20%C3%9Czerine%20Yans%C4%B1malar%C4%B1%20Sempozyumu.pdf> accessed 30 December 2022.

28 ibid.

29 Mustafa Serdar Özbek, *Alternatif Uyuşmazlık Çözümü* (5th edn, Yetkin 2022) 883; Alexander, Chong and Giorgadze (n 10) para 0.46; Sibel Özel, 'Arabuluculuk Sonucunda

In summary, the purpose of the Convention is to eliminate uncertainties regarding how a solution achieved through mediation in different countries will be recognized and enforced, thus promoting predictability and encouraging the use of mediation. It remains a subject of curiosity how much the Convention will enhance the culture of consensus in the field of international trade law and to what extent it will contribute to the revitalization of international trade.

II. CONDITIONS FOR BECOMING A MEDIATOR UNDER TURKISH LAW

Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu No. 6325 (Code on Mediation in Legal Disputes, hereinafter referred as 'Mediation Code', or briefly as the 'Code'), which is among the legislative activities required by the harmonisation process with the European Union acquis, entered into force on 22 June 2013 and introduced mediation as a new and alternative dispute resolution method to the Turkish Legal System. In Purpose and Scope Article 1/(2) of the Mediation Code, it has been decided that mediation would be applicable to private law disputes arising from transactions and actions over which parties could freely dispose of, including disputes with foreign elements. The Regulation on the Mediation Code came concurrently into force on 22 June 2013.

Article 2/(1)(a) of the Mediation Code defines a mediator as a real person who carries out mediation activities and is registered in the registry of mediators of the Ministry of Justice.[30] Article 20 of the Mediation Code outlines the prerequisites for registration in the registry of mediators, including being a Turkish citizen,[31] being a graduate of a law faculty and having a certain period

Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi: Singapur Konvansiyonu' (2019) 25(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Prof. Dr. Ferit Hakan Baykal Armağanı) 1190, 1195.

[30] Serhat Sarısözen, 'Hukuk Uyuşmazlıklarında Arabuluculuk Kanun Tasarısının Getirdikleri, İcra Edilebilirlik Belgesi ve Arabuluculuğun Avukatın Tekel Hakkında Aykırılık Oluşturup Oluşturmadığı Sorunu' (2011) 15(1-2) EÜHFD 255, 260; Ömer Ekmekçi, Muhammet Özekes and Murat Atalı, *Hukuk Uyuşmazlıklarında İhtiyari ve Zorunlu Arabuluculuk* (Onikilevha 2018) 52.

[31] Foreigners will not be able to mediate within the scope of the Mediation Code. See: Elif Kısmet Kekeç, *Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler* (3rd edn, Adalet 2016) 113; The capacity of the mediator to be a mediator is determined according to his national law. See: Güven Yarar, *Milletlerarası Özel Hukukta Arabuluculuk* (Onikilevha 2019) 133; Since the requirement of being a Turkish citizen is sought in the Code on Mediation in Legal Disputes, it does not seem possible for blue and turquoise card holders to become mediators. See: Güven Yarar, *Milletlerarası Özel Hukukta Arabuluculuk* (Onikilevha 2019) 133 footnote 376; If the mediator is a foreign national, there will be no mediation activity within the scope of the Mediation Code. See: Ezgi Kara, 'Milletlerarası Özel Hukuk Açısından Arabuluculuk' (Master's Thesis, Yeditepe Üniversitesi 2021) 94; Since the characteristic performance obligor of the mediator agreement will be the mediator,

of seniority in the profession,[32] not being convicted of crimes defined in the law, not being associated or affiliated with terrorist organisations, completing mediation training, being a real person[33] and being successful in the written exam[34] conducted by the Ministry of Justice.[35]

According to Article 6/(1) of the Mediation Code, ‘Mediators registered in the registry have the right to use the title of mediator and the powers conferred by this title’. As stated in the rationale of Article 6,[36] parties can agree on a person who is not registered in the registry and has not received relevant training as a mediator on an ad hoc basis. However, this activity, conducted in accordance with the wishes of the parties, will not grant that person the title of mediator, nor will it confer the authorisations specified in the law. To be able to use the title of mediator and exercise the rights and powers associated with it, a person must be registered in the mediator registry.

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the law of the country where the workplace of the mediator is located will be taken as basis. See: Ezgi Kara, ‘Milletlerarası Özel Hukuk Açısından Arabuluculuk’ (Master’s Thesis, Yeditepe Üniversitesi 2021) 94; According to Tanrıver, the reason why the performance of the mediation activity is exclusively reserved for Turkish citizenship is that the mediator’s duty is associated with public service. See: Süha Tanrıver, *Hukuk Uyuşmazlıkları Bağlamında Arabuluculuk* (2nd edn, Yetkin 2022) 72; According to Article 6/(1) of İSTAC (İstanbul Tahkim Merkezi), ‘Except the disputes consisting of a foreign element, the Mediators are persons chosen or appointed by the Board among the real persons registered to the mediation registry of the Ministry of Justice in order to serve for the resolution of the dispute.’ <https://istac.org.tr/ISTAC-ARABULUCULUK-KURALLARI-20151026.pdf> accessed 27 March 2023; According to Article 70 of the Constitution of the Republic of Türkiye, ‘Every Türkish citizen has the right to enter the public service’.

32 Süleyman Dost, ‘Mediation for Disputes in Private Law in Turkey’ (2014) 4(10) IJ-ARBSS 81, 96 <http://dx.doi.org/10.6007/IJARBSS/v4-i10/1210> accessed 22 July 2023; Güven Yarar, *Milletlerarası Özel Hukukta Arabuluculuk* (Onikilevha 2019) 134; For the view in the literature that the requirement of graduating from a law faculty to become a mediator should be abolished, see Ahmet M. Kılıçoğlu, *Arabuluculuk Sözleşmeleri* (3rd edn, Turhan 2022) 50; Mediation, which is one of the alternative dispute resolution methods, can also be performed by persons with different professional qualifications such as sociologists and psychologists in various countries. See: Michal Malacka, ‘The Singapore Mediation Convention and International Business Mediation’ (2023) 22(2) ICLR 179, 181.

33 Güven Yarar, *Milletlerarası Özel Hukukta Arabuluculuk* (Onikilevha 2019) 134; Ezgi Kara, ‘Milletlerarası Özel Hukuk Açısından Arabuluculuk’ (Master’s Thesis, Yeditepe Üniversitesi 2021) 98; According to the Turkish Legal System, it is not possible for legal entities to be mediators. See: Ahmet M. Kılıçoğlu, *Arabuluculuk Sözleşmeleri* (3rd edn, Turhan 2022) 50.

34 There is no written examination requirement for law school graduates with 20 years of seniority in the profession.

35 The conditions for becoming a mediator and the quality of mediation training were the most criticised issues during the draft of the Code on Mediation in Legal Disputes. See: Malike Polat, *Milletlerarası Usul Hukukunda Arabuluculuk* (Yetkin 2010) 73.

36 <www5.tbmm.gov.tr/sirasayi/donem24/yil01/ss233.pdf> accessed 25 July 2023.

The rationale of Article 19 of the Mediation Code clarifies that the purpose of the registry of mediators is to regulate the use of the title of mediator and the powers arising from this title, as well as to make it possible to supervise mediators.[37] The Code primarily envisions the coordination of mediation-related institutions and organizations under the Department of Mediation, within the Directorate General for Legal Affairs, Ministry of Justice of Türkiye.[38]

Since the mediation activity carried out by a mediator not registered in the Turkish registry of mediators cannot be considered within the scope of the Mediation Code, the mediator and the parties will not have legal rights and obligations.[39] This is because, according to Turkish Mediation Code, mediators are obliged to register in the registry of mediators.[40] However, there is no local or higher court decision yet regarding the legal and criminal liabilities and consequences of conducting mediation without being registered in the registry or after being delisted from it.[41]

In Türkiye, facilitative mediation was initially adopted in the legislation. Later, the phrase 'capable of providing a solution in case the parties cannot reach a resolution' was added, and the powers of mediators were expanded to facilitate evaluative mediation.[42] The issue of whether evaluative mediation has been fully adopted or not is still a subject of debate in the literature.[43] Pursuant

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[37] ibid.

[38] Ömer Ekmekçi, Muhammet Özekes and Murat Atalı, *Hukuk Uyuşmazlıklarında İhtiyari ve Zorunlu Arabuluculuk,* (Onikilevha 2018) 39; Süha Tanrıver, *Hukuk Uyuşmazlıkları Bağlamında Arabuluculuk* (2nd edn, Yetkin 2022) 186; Article 19/(1) of the Code on Mediation in Legal Disputes states that 'The Department shall keep a register of persons authorised to mediate in private law disputes. The information regarding the persons included in this register shall also be announced electronically by the Department.'

[39] Ferhat Büyükay, *Arabuluculuk Anlaşma Belgesi ve İcra Edilebilirlik Şerhi* (Adalet 2018) 72; Orhan Dür, *Arabuluculuk Faaliyeti ve Arabulucuların Hak ve Yükümlülükleri* (2nd edn, Adalet 2018) 340 footnote 150; Ezgi Kara, 'Milletlerarası Özel Hukuk Açısından Arabuluculuk' (Master's Thesis, Yeditepe Üniversitesi 2021) 30.

[40] Elif Kısmet Kekeç, *Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler* (3rd edn, Adalet 2016) 113; Orhan Dür, *Arabuluculuk Faaliyeti ve Arabulucuların Hak ve Yükümlülükleri* (2nd edn, Adalet 2018) 453ff; Özlem Bora, *Arabuluculuk Sözleşmesi* (Turhan 2020) 89; Ezgi Kara, 'Milletlerarası Özel Hukuk Açısından Arabuluculuk' (Master's Thesis, Yeditepe Üniversitesi 2021) 30; Ahmet M. Kılıçoğlu, *Arabuluculuk Sözleşmeleri* (3rd edn, Turhan 2022) 51.

[41] Orhan Dür, *Arabuluculuk Faaliyeti ve Arabulucuların Hak ve Yükümlülükleri* (2nd edn, Adalet 2018) 464.

[42] Özlem Bora, *Arabuluculuk Sözleşmesi* (Turhan 2020) 89.

[43] Evaluative mediators clarify the weaknesses and strengths of the parties and encourage the parties to make assessments that are more realistic. See: Christopher W. Moore, *The Mediation Process* (4th edn, Jossey-Bass 2014) 52; Bektaş Kar, İş Yargılaması Usulü (expanded 2nd edn, Yetkin 2018) 137; According to Dür, A transition has been made from the interest-based

to paragraph 17/(6) of the Regulation on the Mediation Code, the mediator is allowed to propose a solution based on interests only, not on rights. In this regard, it is difficult to assert that a fully evaluative mediation model has been adopted. It can be said that Mediation Code embraces a limited evaluative mediation model.[44]

According to Turkish law, a mediator must be impartial, meaning they should be equally distant from the disputing parties, not have interests that could compromise their neutrality, and not engage in discussions with one party without the knowledge of the other party.[45] In alignment with the mediation system of Türkiye and its social and cultural values, *Türkiye Arabulucular Etik Kuralları* (Turkish Mediation Code of Ethics, hereinafter referred as 'Code of Ethics') have been established and published.[46] These ethics principles include obligations to uphold equality, the right to make one's own decision, impartiality, avoidance of interest conflicts, ensuring the quality of the process, performing duties diligently, confidentiality, professional competence, the use of the title, advertising and promotion, and requesting fees and other expenses for mediation services, and the development of mediation practices In our opinion, the mediator's obligation to inform, regulated in Article 2/(3) of the Code of Ethics, includes the obligation to disclose whether the mediator is registered or not.

Article 7 of Code of Ethics regulates professional competence, and according to paragraph 7/(3), 'Knowledge and skills acquired through education, mediation experience, awareness of gender, socio-economic and cultural differences are important elements necessary for the professional competence and development of a mediator.' The issue of professional competence is not regulated in the Mediation Code or its Regulation, and no reference is made to the Code of Ethics. While criteria such as professional seniority, mediation training, and passing a written exam are among the registration requirements for the mediator

passive mediation approach to the rights-based evaluative active mediation process. See: Dür (n 42) 23-24; Bora (n 43) 28; Although various mediation models potentially fall within the definition of mediation described in Article 2/(3) of the Singapore Convention, the element of non-imposition of a third party solution is decisive here. See: Alexander, Chong and Giorgadze (n 10) 159 footnote 70.

44 Leyla Akyol Aslan, '6325 Sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu'nun 15'inci Maddesi ile Arabulucunun Çözüm Önerisi Getirebilmesine Olanak Sağlayan Yeni Düzenlemenin Değerlendirilmesi' (2018) 13(145) Terazi Hukuk Dergisi 29, 38.

45 Elif Kısmet Kekeç, *Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler* (3rd edn, Adalet 2016) 61-62; Doğa Elçin, *Milletlerarası Ticari Tahkim Hukukunda Sulh* (Turhan 2019) 16.

46 Turkish Mediation Code of Ethics was prepared by the Ministry of Justice, Directorate General for Legal Affairs, Department of Mediation and was reviewed and accepted by the Mediation Board. <https://adb.adalet.gov.tr/Resimler/SayfaDokuman/1512021075717T%C3%BCrkiye%20%20Arabulucular%20%20Etik%20Kurallar%C4%B1.pdf> accessed 18 July 2023.

registry, there is no separate regulation on professional competence. According to paragraph 7/(1) of the Code of Ethics, 'If the mediator does not possess the professional competence required in the concrete dispute and is unable to meet the reasonable expectations of the parties, he/she should reject the mediation offer and withdraw from the mediation at whatever stage.' However, the issue of withdrawal from the mediation process due to professional incompetence is covered neither in the Mediation Code nor its Regulation.

III. ASSESSMENT OF THE CONDITIONS FOR BECOMING A MEDIATOR FROM THE PERSPECTIVE OF THE SINGAPORE CONVENTION

1. Assessment from the perspective of the Definition of Mediation

The Singapore Convention does not provide a specific definition of a mediator or the conditions for becoming one. However, it is possible to deduce the meaning of mediation from Article 2(3).[47] According to this article:

> 'Mediation' means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.[48]

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[47] For the report and paragraphs of UNCITRAL Working Group II on Article 2/(3) of the Convention, see: (19 February 2018) UN Doc A/CN9/934 3032, (11 October 2017) UN Doc A/CN9/929 43, (30 September 2016) UN Doc A/CN9/896 39-47, (10 February 2016) UN Doc A/CN9/867 121, (17 September 2015) UN Doc A/CN9/861 21; Alexander, Chong and Giorgadze (n 10) para 2.2.

[48] Nuray Ekşi, 'Turkish Translation of the United Nations (Singapore) Convention on International Settlement Agreements Resulting from Mediation' (2020) 9(1) UTTDER 203, 208; The same definition is adopted on the official website of the Department of Mediation, the Directorate General for Legal Affairs, Ministry of Justice of Türkiye <https://adb.adalet.gov.tr/Resimler/SayfaDokuman/612021141924Singapur%20Konvansiyonu%20T%C3%BCrk%C3%A7e.pdf> accessed 03 January 2023; It was considered that describing mediation as a 'structured/organised' process would exclude processes that take place entirely in informal settings or only in the form of negotiations. See: Report of WGII (Dispute Settlement) on the Work of its 65th Session, (Vienna, 12-23 September 2016) (30 September 2016) UN Doc A/CN9/896 42; It was reiterated that the terms 'structured/organised' are not commonly used and can be understood differently. See: ibid UN Doc A/CN9/896 43; During the negotiations of the Singapore Convention, some delegations made suggestions to include the concepts of 'structured' and 'organised' process in the definition of mediation, but the suggestions are not found acceptable. See: Ellen E. Deason, 'What's in a Name: The Terms Commercial and Mediation in the Singapore Convention on Mediation' (2019) 20(4) Cardozo J Conflict Resol 1149, 1164; The Singapore Convention will not apply to settlement agreements reached without mediation. See: Gary B. Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2021) pt 2 ch 23.01 para [E][1] footnote 60.

In the definition, it is underlined that what is important is not the label given to the process, but the essence of the process itself.[49] According to this definition, mediation does not encompass adjudicative processes like arbitration, but it does cover facilitative mediation and advisory dispute resolution processes.[50] As can be seen, the definition of mediation in the Singapore Convention is extremely broad[51] and flexible. This is due to the fact that the Singapore Convention aims to harmonise and unify the internal laws of the contracting states, by introducing uniform rules.

The definition of mediation in the Singapore Convention incorporates four key features of the UNCITRAL Model Law definition of mediation.[52] First, mediation is treated as an umbrella concept that includes variations in regional and national practices.[53] Second, the motive for the process is irrelevant.[54] In other words, it may result from the choice of the parties, the court's encouragement, a legal obligation, or a contractual agreement.[55] Third, the primary purpose of mediation is the resolution of disputes.[56] Fourth, mediation involves the assistance of a third party who lacks the authority to make binding decisions.[57]

According to the Singapore Convention, at one end of the spectrum, there are situations where the mediator merely brings the parties together, and the rest of the negotiation and agreement process is carried out by the parties themselves. At the other end of the spectrum, there are situations where the mediator actively participates in the process and can even propose solutions when the parties cannot reach an agreement on their own.[58] Throughout the Singapore

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49 Alexander, Chong and Giorgadze (n 10) para 2.28.

50 ibid 132 para 2.26.

51 Banu Şit Köşgeroğlu, *Milletlerarası Ticari Uyuşmazlıklarda Arabuluculuk Sonunda Varılan Anlaşmaların Singapur Konvansiyonu Çerçevesinde Taraf Devletlerde İcra Edilebilirliği* (Adalet 2020) 40.

52 Ellen E. Deason, 'What's in a Name: The Terms Commercial and Mediation in the Singapore Convention on Mediation' (2019) 20(4) Cardozo J Conflict Resol 1149, 1163.

53 ibid.

54 ibid.

55 ibid.

56 ibid.

57 ibid (n 53); The Singapore Convention covers dispute resolution processes with both facilitative and advisory recommendations of the mediator, but does not cover outcome-determining processes such as arbitration. See: Nadja Alexander and Shouyu Chong, 'An Introduction to the Singapore Convention on Mediation - Perspectives from Singapore' (2018) 22(4) Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement 37, 41.

58 Talat Kaya, 'Singapur Sözleşmesi ve Uluslararası Ticari Arabuluculuk Sonucunda Ortaya Çıkan Sulh Anlaşmalarının Tanınması ve İcrası Meselesi' (2019) 25(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Prof. Dr. Ferit Hakan Baykal Armağanı) 979, 990.

Convention, particularly in Articles 1, 4, and 5, the concept of mediation is frequently referred to, and no limitations or specific definitions or provisions regarding the mediation model are provided. On the contrary, when examining Article 2(3), which defines mediation, and considering the entire text of the Convention, it becomes evident that an extremely broad definition is made.

2. Assessment in terms of the Presence of a Third Party or Parties

In the framework defined by the Singapore Convention, the key point in mediation is that parties resolve their disputes through the assistance of a third party.[59] The definition of mediator adopted by the Convention only emphasises certain characteristics such as impartiality and independence[60] and third party.[61] Any document of agreement concluded by the parties with the assistance of a third party,[62] which does not have the power to impose a solution, is considered within the scope of the Convention.[63] In other words, the Convention anticipates that an assistant to the parties may be qualified as a mediator as long as they lack the authority to impose a solution upon the parties to the dispute.[64]

3. Assessment in terms of Methodology and Nomenclature

According to the definition in Article 2/(3) of the Singapore Convention, mediation is a procedure in which the parties to a dispute, regardless of the wording used[65] or the procedure followed,[66] endeavour to reach an amicable

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59 Sibel Özel, 'Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi: Singapur Konvansiyonu' (2019) 25(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Prof. Dr. Ferit Hakan Baykal Armağanı) 1190, 1196.

60 Article 5/(1)f of the Singapore Convention.

61 Article 2/(3) of the Singapore Convention.

62 In order to emphasise the requirement that the mediator shall not impose a solution is limited to the mediation process, it was suggested to add the phrase 'at the time of mediation'. Since the mediator would only be able to impose a solution only after taking office as an arbitrator, especially in mediation-arbitration processes, the addition was considered unnecessary and was not accepted. See: Report of WGII (Dispute Settlement) on the Work of its 68th Session (New York, 5–9 February 2018) (19 February 2018) UN Doc A/CN9/934 para 32.

63 Ersin Erdoğan, 'Milletlerarası Arabuluculuk Anlaşma Belgelerinin İcrasına İlişkin BM Sözleşmesinin (Singapur Sözleşmesi) Değerlendirilmesi' in Ersin Erdoğan (ed), *International Symposium on Enhancing Mediation (6-7 December 2018, Ankara)* (Pozitif Matbaacılık 2018) 189, 192 <https://testapi.aybu.edu.tr/admin/genel/GetFile?id=4db24fd3-a751-44f4-bc2e-71cd8758aeba.pdf> accessed 30 December 2022.

64 Elisabetta Silvestri, 'The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation' (2019) 2(3) Access to Just E Eur 5, 7.

65 It does not matter whether the activity in which the parties to the dispute take part is called mediation or not. See: Güven Yarar, *Milletlerarası Özel Hukukta Arabuluculuk* (Onikilevha 2019) 156; Özel (n 60) 1196.

66 It does not matter what the procedure is called and it does not matter what is at the basis

settlement with the assistance of a third person or persons[67] who are not authorised to impose a solution on the parties to the dispute.[68] According to the Singapore Convention, it does not matter what the process is called or the procedure used.[69] What matters is the presence of a third party who does not have the authority to impose a solution on the dispute and that the parties themselves decide on their own dispute.[70] The definition of mediation also emphasises the consensual nature of mediation.[71] There is no distinction between mediation within the scope of application of the Convention being ordered or recommended by a court or arbitral tribunal, or being mandatory or voluntary.[72] The Singapore Convention focuses on the outcome of the mediation process rather than how it commences.[73] As rightly pointed out by some delegates during the drafting process of the Singapore Convention, mediation is practised differently in different countries, and since no form of mediation is wrong, the settlement agreement reached as a result of mediation should be enforced.[74]

4. Assessment in terms of Mediator Accreditation

The Singapore Convention does not require the mediator to be accredited by a professional mediation institution or otherwise.[75] The parties to the dispute have the freedom to choose as mediator a professional mediator of an accredited organisation or any other person who possesses the knowledge and skills to fulfil the duties of a mediator.[76]

For a settlement agreement to be included within the scope of the Convention,

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of the recourse to mediation. See: Köşgeroğlu (n 52) 39; Edna Sussman, 'The Singapore Convention Promoting the Enforcement and Recognition of International Mediated Settlement Agreements' (2018) 3 ICC Dispute Resolution Bulletin 42, 59.

67 There is no indication of the mediator's 'assistance' in the Singapore Convention. See: Alexander, Chong and Giorgadze (n 10) para 2.49.

68 According to Yarar, Article 2/(3) of the Singapore Convention is based on the classical definition of mediation. See: Güven Yarar, *Milletlerarası Özel Hukukta Arabuluculuk* (Onikilevha 2019) 156; Article 1.3 of the 2018 UNCITRAL Model Law provides a similar definition. See: Ergun Özsunay, *Arabuluculuk Sonucunda Yapılan Uluslararası Sulh Anlaşmalarının İcrası Hakkında Singapur Sözleşmesi ve UNCITRAL Model Kanunu* (2nd edn, Aristo 2021) 50.

69 Silvestri (n 65) 7.

70 Köşgeroğlu (n 52) 40.

71 Alexander, Chong and Giorgadze (n 10) para 2.45.

72 Özel (n 60) 1196.

73 Alexander, Chong and Giorgadze (n 10) para 2.38.

74 Allan J. Stitt, 'The Singapore Convention: When Has a Mediation Taken Place (Article 4)?' (2019) 20(4) Cardozo J Conflict Resol 1173, 1174.

75 Alexander, Chong and Giorgadze (n 10) para 2.52.

76 ibid.

it is not a requirement that it complies with any national law (such as being made by a mediator registered in a registry, adhering to specific mediation rules, etc.). Similarly, it is not necessary for the agreement document to have been cancelled in a manner that would have consequences in other relevant legal systems.[77] The parties and the mediator conduct the process by taking into account the legal system of a particular country and shall bear the sanctions for violating the rules of that country.[78] However, such violations would not impede the recognition and enforcement of the agreement documents in other countries.[79] In this framework, it can be said that settlement agreements are stateless under the Convention.[80]

Regarding the validity of the settlement agreements, apart from the conditions stipulated in the Singapore Convention, the law chosen by the parties is taken into account.[81] Invalidity cannot be claimed on the grounds that it does not meet the other conditions required in the relevant country.[82] Thus, reasons such as the mediator not being registered in the official registry or the settlement agreement not being concluded through a notary public cannot be claimed.[83]

The concept of recognition is not used in the Singapore Convention; the term legal remedy is used to cover both the concepts of recognition and enforcement.[84] In Article 5 of the Singapore Convention, the grounds for refusal to apply for legal remedy are listed in a limited manner, and these reasons can be divided into two categories; (i) reasons to be examined upon the objection of the parties (Art.5/(1)), and (ii) reasons to be examined ex officio (Art.5/(2)).

The grounds for refusal to be examined upon objection of the parties include; 1) if one of the parties to the settlement agreement is incapacitated, or 2) if the settlement agreement is null and void or not operative or enforceable under the law of the state to which the settlement agreement is governed by, or, if there is no law governing the parties, then pursuant to Article 4 by the law of the competent authority to which the request is made, or 3) if it is not binding or final

77 Erdoğan (n 64) 193.

78 ibid.

79 ibid.

80 Silvestri (n 65) 7; Erdoğan (n 64) 193; Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19(1) Pepp Disp Resol LJ 1, 22; Ezgi Kara, 'Milletlerarası Özel Hukuk Açısından Arabuluculuk' (Master's Thesis, Yeditepe Üniversitesi 2021) 124; Mustafa Serdar Özbek, *Alternatif Uyuşmazlık Çözümü* (5th edn, Yetkin 2022) 882.

81 Erdoğan (n 64) 199.

82 ibid.

83 ibid.

84 Mehmet Kara, 'Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Konvansiyonu (Singapur Konvansiyonu)' (Master's Thesis, Başkent Üniversitesi 2022) 43.

under the terms of the settlement agreement, or 4) if the settlement agreement has been subsequently amended, or 5) if the obligation subject to the settlement agreement has been performed, or 6) if the obligation subject to the settlement agreement is not clear or comprehensible, or 7) if the granting of relief would be contrary to the terms of the settlement agreement, or 8) if there has been a serious breach by the mediator of the standards applicable to the mediator or to mediation, and, had that breach not occurred, the party would not have entered into the settlement agreement, or 9) if there are grounds to believe that the mediator displayed a lack of impartiality or independence, and the failure to disclose the circumstances that give rise to such a belief, which was likely to have had a significant impact on a party entering into the settlement agreement, and, had the circumstances been disclosed, a party would not have entered into the settlement agreement.

The *ex officio* grounds for refusal are 1) contravention of the public order of the state where the relief is sought, or 2) the subject matter of the dispute is not amenable to mediation under the law of the state where the relief is sought. The grounds for refusal to apply for legal remedy in the Singapore Convention are not absolute grounds for refusal, and the competent authorities of the contracting states have the right of discretion in this regard.[85]

As we have examined in detail above, the issue of professional competence is not regulated in the Code of Mediation and its Regulation. Since there is no regulation on professional competence, the issue of professional qualifications alone will not be one of the reasons for refusing access to legal remedies under the Singapore Convention.

The state to which the legal remedy is applied cannot introduce new conditions, nor can the competent authority of the state to which the legal remedy is applied require conditions other than the terms of the Convention.[86] For example, it will not be required that the mediation process be conducted by a registered mediator or the mediator taking part in every stage of the mediation.[87] In other words, requirements such as mediators not being licensed in a particular jurisdiction, mediation not being conducted under certain rules or by certain institutions are not among the grounds for refusal of judicial recourse under Article 5(1)(b)(i) of the Singapore Convention.[88]

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85 Aysel Çelikel and Bahadır Erdem, *Milletlerarası Özel Hukuk* (17th edn, Beta 2021) 859.

86 Kara (n 85) 72.

87 ibid.

88 Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19(1) Pepp Disp Resol LJ 1, 44; Alexander, Chong and Giorgadze (n 10) para 4.02.

5. Assessment in terms of Institutional and Ad-Hoc Mediation

International commercial mediation can be conducted either as ad-hoc mediation, which means it can take place without being affiliated with any organization, or as institutional mediation.[89] Examples of international organizations that offer institutional mediation include the International Chamber of Commerce (ICC) [90] and the International Centre for Settlement of Investment Disputes (ICSID)[91].

For the Singapore Convention, there is no distinction or significance between mediation conducted within an institutional framework or in an ad-hoc manner.[92] Working Group II, during the convention preparation process, preferred not to devalue mediation conducted outside of institutional structures or other approaches that benefit from the flexibility of mediation (even mediation conducted in a pub).[93]

6. Assessment in terms of Standards Applicable to Mediation

There have been numerous efforts to ensure that mediation is conducted within certain standards. An example is the European Parliament and Council Directive 2008/52/EC (EU Directive) on certain aspects of mediation in civil and commercial matters.[94] The EU Directive provides recommendations on flexibility, effectiveness, impartiality, confidentiality, and competence principles.[95] The International Mediation Institute (IMI), a voluntary organisation, works towards the development of globally applicable standards in mediation.[96] An example for these efforts is the IMI's Code of Professional Conduct for Mediation, revised in 2017.[97] IMI has also initiated a review of ethical standards

89 Doğa Elçin, *Milletlerarası Ticari Tahkim Hukukunda Sulh* (Turhan 2019) 15.

90 <https://iccwbo.org> accessed 08 February 2023.

91 <https://icsid.worldbank.org> accessed 08 February 2023.

92 Shouyu Chong and Felix Steffek, 'Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective' (2019) 31(special issue) SAcLJ 448, 459.

93 Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19(1) Pepp Disp Resol LJ 1, 16.

94 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, Official Journal of the European Union (24 May 2008) L136/3 <https://eur-lex.europa.eu/eli/dir/2008/52/oj> accessed 06 September 2023.

95 Lola Akin Ojelabi, 'The Challenges of Developing Global Ethical Standards for Mediation Practice' in Shahla Ali (ed), *Comparative and Transnational Dispute Resolution* (Routledge 2023) 114.

96 ibid 115.

97 ibid.

in light of the Singapore Convention.[98] There is a trend towards certification or accreditation to enhance the professionalism of mediation processes on an international level.[99] Prominent mediation credentialing institutions include the Singapore International Mediation Institute (SIMI) and the Hong Kong Mediation Accreditation Association Limited (HKMAAL).[100] In the realm of institutional mediation standards, international organizations such as Singapore International Mediation Centre (SIMC), Japan International Mediation Center (JIMC) and International Chamber of Commerce (ICC) are also active.[101]

While the Singapore Convention remains silent on matters of quality, it does raise the issue of mediation standards stipulating that a state party may reject a request on the grounds of a serious breach of valid mediation standards.[102] The standards applicable to the mediators and mediation, such as equal treatment of the parties, independence, impartiality, etc are included in the own mediation regulations of the countries.[103] In order to reject the application for judicial remedy, a serious violation of standards that would have led to the conclusion of a settlement agreement is required, not just any breach of the standards.[104] This also applies if the mediator fails to disclose to the parties to the dispute circumstances that justifiably raise doubts about their impartiality and independence.[105] In cases where undisclosed matters are significant and would have led the concerned party not to enter into the settlement agreement, the execution of the reached settlement may be refused.[106] In our opinion, the mere fact that the mediator is not accredited will not be interpreted as a serious breach of standards on its own.

7. Assessment in terms of Public Order

Article 5/(2)(a) of the Singapore Convention recognises as a ground for refusal that the enforcement of the settlement agreement concluded as a result of mediation is contrary to the public order of the state party. The approach regarding the exceptional and narrow interpretation of the concept of public

98 ibid 116.

99 Nadja Alexander, 'International Comparative Mediation Law, Hong Kong and Singapore in Perspective' in Shahla Ali (ed), *Comparative and Transnational Dispute Resolution* (Routledge 2023) 138.

100 ibid.

101 Alexander, Chong and Giorgadze (n 10) para 5.72.

102 Ojelabi (n 96) 115; The New York Convention does not contain a provision on the status, duties and rights of arbitrators, leaving the issue to national laws. See: Gary B. Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2021) pt 2 ch 13.02 para [A] 3017-3018.

103 Özel (n 60) 1203.

104 ibid.

105 ibid.

106 ibid.

order, as seen in the 1958 New York Convention, [107] is acknowledged to apply also for the enforcement of the international settlement agreement concluded as a result of mediation.[108] A state party may not refuse the execution of a settlement agreement on the grounds that the operation of licensed mediators is a matter of public order.[109]

IV. PRIORITY APPLICATION OF THE SINGAPORE CONVENTION DUE TO ACCESSION OF TÜRKİYE AND THE INTERPRETATION OF THE SUBJECT MATTER OF THIS STUDY

Firstly, it would be beneficial to determine the place of international treaties in the hierarchy of Turkish norms. In Türkiye, while international treaties are a source of international law, they are also a source of domestic law.[110] According to Article 90, paragraph 5 of the 1982 Constitution of the Republic of Türkiye (hereinafter referred as 'Constitution'):

International treaties duly put into force shall have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In case of disputes arising out of differences between international treaties on fundamental rights and freedoms duly put into force and laws on the same subject, the provisions of international treaties shall prevail.

The meaning of the phrases 'concerning fundamental rights and freedoms' and 'shall prevail' in the relevant article is unclear.[111] Based on the idea that 'fundamental rights and freedoms' are equivalent to 'fundamental rights and liberties', then virtually all rights and liberties within the scope of Articles 12-74 of the Constitution would be covered.[112] According to Erkan, since the Singapore Convention is related to fundamental rights and freedoms in terms of 'freedom to seek rights' regulated under Article 36 of the Constitution, paragraph 5 of Article 90 of the Constitution will be applicable.[113] This is because the Singapore Convention aims to ensure the fulfilment of the rights arising from the settlement

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[107] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) regulates the rules and procedure for the recognition and enforcement of international arbitral awards. For detailed information, see: Gary B. Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2021) pt 3 ch 26.01 5786ff.

[108] Özel (n 60) 1204.

[109] Erdoğan (n 64) 201; Özel (n 60) 1204; Kaya (n 59) 1003; Schnabel (n 94) 54.

[110] Kemal Gözler, İnsan Hakları Hukuku (2nd edn, Ekin Basım 2018) 113.

[111] Rona Aybay, 'Uluslararası Antlaşmaların Türk Hukukundaki Yeri' (2007) 70 TBB Dergisi 187, 200.

[112] ibid 202.

[113] Mustafa Erkan, *Arabuluculuk ve Singapur Sözleşmesi* (Onikilevha 2020) 265.

agreement signed by the parties as a result of the mediation process.[114] According to paragraph 1 of Article 36 of the Constitution, which regulates the freedom to seek justice, 'Everyone has the right to claim and defend himself as a plaintiff or defendant before the judicial authorities and to a fair trial by using legitimate means and remedies.' In our opinion, while 'before the judicial authorities' concept in the regulation may include special means of seeking rights, such as arbitration, we believe that it does not encompass mediation. This is because mediation is not a judicial activity. Fundamental rights and freedoms are listed between Articles 17 and 74 in the Constitution, and there is a possibility that almost all treaties may be related to these rights and freedoms.[115] If there is any doubt as to which treaties are related to fundamental rights and freedoms, the *exceptiones sunt strictissimae interpretationis* (principle of narrow interpretation of exceptions) should be applied, and broad interpretation should be avoided.[116]

In addition to the constitutional regulation, pursuant to Article 1/(2) of the law no. 5718 *Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun* (Private International Law and Procedural Law), treaties are among the sources of private international law.[117] There is no regulation on mediation in this law. Although mediation is not within its scope, the principle of reserving the right to implement international treaties applies. As a later dated and special legal provision, the Singapore Convention will have priority over the Mediation Code. As can be seen, even if the Singapore Convention is not considered as a treaty arising from the freedom to seek rights, it will be applied primarily both as a provision of subsequent law and as a provision of special law.

In accordance with the constitutional systems of states, international conventions enter into force and become a source after ratification by the legislature.[118] According to the Turkish Legal System, international conventions have the ability to be applied before national laws.[119] Given these reasons, the Singapore

[114] ibid.

[115] Gözler (n 111) 115.

[116] ibid.

[117] According to Article 1 of the Private International Law and Procedural Law No. 5718, not only the conventions on human rights, but all conventions related to international law take precedence over the laws. See: Işıl Özkan, 'Uluslararası Hukuk - Ulusal Hukuk İlişkileri' (2013) 8(special issue) Journal of Yaşar University 2127, 2170 <https://dergipark.org.tr/tr/pub/jyasar/issue/19146/203212> accessed 25 June 2023; Güngör (n 6) 24.

[118] Ziya Akıncı, *Milletlerarası Özel Hukuk* (Vedat 2020) 16; Cemal Şanlı, *Milletlerarası Özel Hukuk* (9th edn, Beta 2020) 17; Çelikel and Erdem (n 86) 42; Ergin Nomer, *Devletler Hususi Hukuku* (23rd edn, Istanbul 2021) 72; Vahit Doğan, *Milletlerarası Özel Hukuk* (8th edn, Savaş 2022) 14.

[119] Ziya Akıncı, *Milletlerarası Özel Hukuk* (Vedat 2020) 16; Cemal Şanlı, *Milletlerarası Özel Hukuk* (9th edn, Beta 2020) 17ff; Çelikel and Erdem (n 86) 45; Ergin Nomer, *Devletler Hususi*

Convention is an international source that has priority over the Mediation Code.

The correct interpretation of international conventions, which bring together states with different cultures, different legal regulations and sometimes different understandings of concepts inside a circle, is a crucial issue. If the question arises as to whether international conventions can be interpreted by national courts, from the Turkish perspective, their interpretation falls within the jurisdiction of our national courts.[120] The Vienna Convention on the Law of Treaties[121] is the only treaty that contains rules on the interpretation of treaties.[122] Since Türkiye is not a party to the Vienna Convention on the Law of Treaties, it is not binding for Türkiye. However, the provisions of the Convention are binding since they do not lose their customary law characteristics.[123] In other words, even though Türkiye is not a party to the Vienna Convention on the Law of Treaties, it is a source that can be taken as a basis for the interpretation of the Singapore Convention, since it is applicable as a rule of customary law.

Although good faith is a valid principle in all areas of international law, it has a special importance in the law of treaties.[124] Article 31(1) of the Vienna Convention on the Law of Treaties recognises it as a general rule of interpretation.[125] The same article stipulates that the treaty shall be interpreted in its entirety and in

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Hukuku (23rd edn, Istanbul 2021) 71ff; Güngör (n 6) 25ff; Vahit Doğan, *Milletlerarası Özel Hukuk* (8th edn, Savaş 2022) 14.

120 İlhan F. Akın, 'Milletlerarası Antlaşmaların Milli Mahkemeler Tarafından Yorumlanması' (1960) 25(14) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 94, 103.

121 The Vienna Convention on the Law of Treaties was opened for signature in Vienna on 23 May 1969 and entered into force on 27 January 1980. See: Mukaddes Korkmaz Sürer, 'Viyana Andlaşmalar Hukuku Sözleşmesi'ne göre Andlaşmaların Yorumu' (PhD Thesis, Anadolu Üniversitesi 2023) 48.

122 Sürer (n 122) 44; According to Bayındır, it is the turning point of the law of treaties. See: Ümit Barış Bayındır, *Milletlerarası Andlaşmaların Evrimsel Yorumlanması* (Onikilevha, 2021) 11.

123 Sürer (n 122) 48; Ümit Barış Bayındır, *Milletlerarası Andlaşmaların Evrimsel Yorumlanması* (Onikilevha, 2021) 9-10; The Convention on the Law of Treaties has codified the rules of customary law. See: Sürer (n 122) 150; According to the generally accepted view in the doctrine on Articles 31 and 32 of the Vienna Convention on the Law of Treaties, it is a codification of the rules of customary law on interpretation. See: Selcen Nur Kışla, *Uluslararası Yatırım Andlaşmalarının Yorumlanması* (Adalet, 2022) 127-28; In its *Guinea-Bissau v Senegal* Judgment, the International Court of Justice considered that Articles 31 and 32 of the Vienna Convention on the Law of Treaties can be seen as a codification of the rules of customary law. See: *Guinea-Bissau v Senegal* (1991) I.C.J. Reports 53 para 48 <www.icj-cij.org/sites/default/files/case-related/82/082-19911112-JUD- 01-00-EN.pdf> accessed 18 July 2023.

124 Alexander, Chong and Giorgadze (n 10) para 0.27.

125 Vienna Convention on the Law of Treaties (1969) Article 31/(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'; Alexander, Chong and Giorgadze (n 10) para 0.27.

the light of its subject matter and purpose. In fact, in the field of international law, various approaches to treaty interpretation have been adopted, with four categories generally standing out;[126] objective (literal) interpretation, subjective (historical) interpretation, teleological (purposive) interpretation and systematic interpretation. All these four interpretative approaches are adopted in Articles 31 and 33 of the 1969 Vienna Convention on the Law of Treaties.[127] In short, from the perspective of the Law of Treaties, no single approach is sufficient on its own.[128]

In terms of the qualifications and accreditation of the mediators, which is the subject of our study, it would be appropriate to consider all these interpretative approaches together. Especially when literal and purposive interpretations (the purposes summarised in the Preamble[129] of the Convention) are taken into account, it will be seen that, unlike Mediation Code, mediation under the Singapore Convention is not subject to a particular mold or restriction.

Under the Singapore Convention, it is not a requirement for mediation to have been conducted in accordance with Mediation Code for the agreement between the parties to be enforceable.[130] This significant detail is also mentioned in the official webpage of the Singapore Convention with regard to Türkiye.[131]

Even if the settlement agreement in a mediation process conducted under the Mediation Code is an international commercial settlement agreement, it will not be considered within the scope of the Singapore Convention, since it is a document in the nature of a judgement according to Article 18 of the Mediation Code and can be enforced in Türkiye.[132] This is because Article 1/(3)(a)(i) of the Singapore Convention stipulates that the Singapore Convention does not apply to 'settlement agreements that have been approved by a court or concluded in the course of proceedings before a court'[133] and Article 1/(3)(a)(ii) stipulates

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126 For detailed information, see: Sürer (n 122) 29ff; Selcen Nur Kışla, *Uluslararası Yatırım Andlaşmalarının Yorumlanması* (Adalet 2022) 115ff.

127 Sürer (n 122) 30.

128 ibid 152.

129 From Singapore Convention Preamble; '… the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations, ...'.

130 Özel (n 60) 1197-98; Köşgeroğlu (n 52) 89 footnote 153; Erkan (n 114) 24.

131 'The execution in Turkey of a settlement agreement reached as a result of a mediation that is not made within the scope of the provisions of the Mediation Law may be subject to the provisions of the Singapore Convention.' <www.singaporeconvention.org/jurisdictions/turkey> accessed 23 March 2023.

132 Özel (n 60) 1198.

133 The Singapore Convention may apply to the settlement agreement resulting from mediation

that the Singapore Convention does not apply to ‘settlement agreements that are enforceable as a judgment in the State of that court’. A notable provision can be found in Article 18/(4) of the Mediation Code:

Except for cases where obtaining an enforceability annotation is compulsory under the laws, the settlement agreement signed by the parties, their lawyers and the mediator, and for commercial disputes, by the lawyers and the mediator, shall be deemed to be a document in the nature of a judgement without requiring enforceability annotation.

In our opinion, settlement agreements deemed as enforceable documents under Article 18(4) of the Mediation Code fall outside the scope of the Singapore Convention. In the event that a settlement agreement resulting from mediation is approved by a court or is adjudicated during court proceedings, it will fall within the scope of Article 1(3)(a)(i) of the Mediation Code and the Convention will not be applicable.[134] The fact that the settlement agreement is enforceable as a judgement in court pursuant to Article 1/(3)(a)(ii) is an additional requirement for exclusion under Article 1/(3)(a).[135] On the other hand, since a mediation settlement agreement in Türkiye that can be executed as an enforcement document is not so enforceable in another country, it may fall under the scope of the Singapore Convention in that country.[136]

Even if the settlement agreement reached through mediation conducted in a foreign country in accordance with its own national mediation law or under an institution is deemed as a document enforceable as an award in that country, since it cannot be enforced as such in Türkiye, its execution can be requested within the framework of the Singapore Convention.[137]

Article 16/(2) of the Mediation Code stipulates that the statute of limitations shall be suspended from the commencement of the mediation process and the statute of limitations shall not be taken into account.[138] In a mediation that falls within the scope of the Singapore Convention but not within the scope of the CLC, the statute of limitations shall not be suspended and the limitation periods shall not be taken into account.

Article 18/(4) of the Mediation Code stipulates that, except for legal obligations, the settlement agreement signed by the parties, their lawyers and the mediator in

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if it has not been authorised by the court and if it does not meet the requirements of the other exceptions to the Convention. See: Alexander, Chong and Giorgadze (n 10) para 1.34.

[134] Alexander, Chong and Giorgadze (n 10) para 1.35, para 1.40.

[135] ibid 74, para 1.41.

[136] Özel (n 60) 1198.

[137] Özel (n 60) 1199; Vahit Doğan *Milletlerarası Ticaret Hukuku*, vol. 2 (2nd edn, Savaş 2023) 64-65.

[138] Ahmet M. Kılıçoğlu, *Arabuluculuk Sözleşmeleri* (3rd edn, Turhan 2022) 96.

commercial disputes shall be deemed as a document in the nature of a judgement without seeking a certificate of enforceability. In a mediation activity that falls within the scope of the Singapore Convention but was not carried out within the scope of the Mediation Code, it will not be possible for the settlement agreement to be deemed as a document in the nature of a judgement.

The *Arabuluculuk Asgari Ücret Tarifesi* (Minimum Fee Tariff for Mediation or 'Tariff' in short) regulates the fees of mediators, and Article 2/(1) of the Tariff[139] stipulates that only mediators registered in the registry of mediators will benefit from this tariff. Therefore, in mediations falling under the Singapore Convention but not conducted under the Mediation Code, unless otherwise agreed by the parties, the mediator cannot benefit from the minimum fee schedule.

CONCLUSION

Pursuant to Article 2/(a) of the Mediation Code No. 6325, those who can mediate within the scope of the law are real persons who are registered in the registry of mediation organised by the Ministry of Justice. Currently, there is a mediation accreditation system in Turkey that requires mediators to comply with certain conditions.

When comparing the mediator definition in the Mediation Code No. 6325 to the one defined in the Singapore Convention, it becomes evident that these two concepts do not completely overlap. In terms of being a Turkish citizen, being a lawyer, applying systematic techniques, having specialised training and being registered in the registry of mediators, the Mediaton Code has interpreted mediation in more restrictive patterns within the Turkish legal framework. On the other hand, the Singapore Convention does not foresee any registration and accreditation obligation.

However, if we look at the bigger picture, it is possible to say that the Singapore Convention is largely compatible with the Turkish legal system.[140] In this context, adapting the Convention to Turkish Law is not expected to pose significant challenges.[141] Although there are no major differences between the Singapore Convention and the Turkish mediation legislation, it is inevitable to experience double standards in matters such as statute of limitations and limitation periods, accreditation system, registry of mediators, the qualification

[139] Article 2/(1) of the 2024 Minimum Fee Tariff for Mediation states that 'The mediation fee stipulated in this Tariff is the equivalent of the monetary payment made by the parties to the dispute to the person registered in the mediators' registry, who conducts the mediation activity, in return for the labour and effort he/she has spent, in order to ensure that the dispute is resolved through mediation.' (see Official Gazette of the Republic of Türkiye RG 29.12.2023/32414).

[140] Ergun Özsunay, *Arabuluculuk Sonucunda Yapılan Uluslararası Sulh Anlaşmalarının İcrası Hakkında Singapur Sözleşmesi ve UNCITRAL Model Kanunu* (2nd edn, Aristo 2021) 38.

[141] ibid.

of a document in the nature of a judgement, and minimum fee tariff. For the aforementioned reasons, it would be a prudent step to align the legislation with the Singapore Convention and resolve any ambiguities to prevent potential loss of rights. Another way to address uncertainties is for the commercial court of first instance, which is accepted as the competent authority in Türkiye, to interpret the Singapore Convention[142] by thoroughly understanding its spirit and considering its status as a primary source.

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