Foreword

by V. Ahsen COŞAR

Dear Readers,

Welcome to the second issue of the Ankara Bar Review. In this issue I want to write on the independence of the judiciary. We all know that there are many principles for a fair trial, but the first and most important principle is that the judges should be absolutely independent of the executive power/government. The constitutions of many countries have been influenced by political theorists. In this sense, the doctrine of Montesquieu about the separation of powers and the political opinions of John Locke played a great part in the constitution of the United States. The doctrines of J.J.Rousseau about the rights of man are found reflected in the French Constitution. The English tradition of an independent judiciary is not a result of any political theory because the English have no written constitution, so there is no rigid separation between the legislative and the executive powers; however, the English have an independent judiciary because the English people feel strongly about the independence of their judiciary. They know in their hearts and brains that it will not do for them to allow the executive to have any control over the judges and they know it because their forefathers learned it in their struggles with the kings of England – the kings who in the old days exercised the supreme executive power of the land.

So, let me tell you the great story of the English tradition of the independent judiciary. It is as follows: In the days of King James I, there was a great judge called Sir Edward Coke who boldly asserted the independence of the judges. On one occasion, the King summoned all the judges before him and told them he proposed to take any cases he pleased away from the judges, to try and decide them himself. He called in the aid of the authority of the Archbishop Bancroft who declared that it was clear in divinity. Such power, said the Archbishop, doubtless belongs to the King by the word of God in the Scriptures. But the Chief Justice told the King that he had no power to do so, and that all cases ought to be determined in a court of justice.

King James replied: “I always thought and I have often heard the boast that your English law is founded upon reason. If that be so, why have not I and others reason as well as you, the judges?”

The Chief Justice answered: “True it is, please your Majesty, that God has endowed your Majesty with excellent science, and great endowments of nature; but your Majesty will allow me to say so, with all reverence, that you are not learned and experienced in the laws of this, your realm of England ... which is an art which requires long study and experience before ... a man can attain to the cognizance of it. The law is the golden metwand and measure to try the causes of the subjects; and which protects your Majesty in safety and peace.”

* President of Ankara Bar
King James, in a great rage, said:
“Then I am to be under the law - which it is treason to affirm.”

The Chief Justice replied: “Thus wrote Bracton, -The King is under no man, but under God and the law.”

King James is said, nevertheless, to have tried his hand as a judge, but to have been so much perplexed when he heard both sides, that he abandoned the attempt in despair. He said: “I could get on very well hearing one side only, but when both sides have been heard, upon my word I know not which is right.”

So far as Coke was concerned, the climax came when the King sought to interfere with the decision of the judges on a case by telling them not to proceed with it until they had consulted the King. Coke resolutely refused. He said: “Obedience to his Majesty’s command to stay proceedings would have been a delay of justice contrary to the law, and contrary to oaths of the judges.” The question was put to all twelve judges: “When the King believes his interest is concerned and requires the judges to attend him for their advice, ought they not to stay proceedings till His Majesty has consulted them?” All the judges save Coke said “Yes, Yes, Yes.” But Coke said, “When that happens, I will do that which it shall be fit for a judge to do.” Thereupon the King dismissed him from his office as judge, but there is no doubt that the attitude which he took up was fully approved by the people of England.

The English poet, John Milton, who was a young man when Coke died, records the high esteem in which he was held by his contemporaries.

In a memorable sonnet Milton says that Coke “with no mean applause, Pronounced and in his volumes taught our laws.”

Actually, most western legal systems strive for an independent and impartial judiciary. To this end, judges may have tenure for life once they are appointed, or if they are elected, they may be more or less assured, during good behavior, of reelection by virtue of tacit understanding within the profession.

Today in Turkey, as well as in most western countries, judges are independent in the discharge of their duties, they shall not be dismissed, or retired before the age prescribed by the constitution, nor shall be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of court or post. All these rights and securities are guaranteed by the constitution. The problem in Turkey is that, the politicians, and especially the executive power/government, try to control or influence or to interfere with the decisions of any of the judges. This is the reason, why I wrote the above English anecdote. I am not sure, but it may be useful for them.

Sincerely.
We -lawyers- bow down in honour of the rules, yet our minds are straight to challenge them, as my father once told me.

Lawyers occupy a special place of trust in society, not only for our clients but also for society as a whole. In addition to what is currently happening in our own country, recent events in Pakistan and the United States have shown how lawyers, fighting to maintain the rule of law, can have a positive and effective influence on the maintenance of civil rights. As William Shakespeare wrote in Henry VI (part 2), “if one wants to establish a tyranny, one must first kill all the lawyers as protectors of rights in society”.

The Ankara Bar Association and the editors especially, want to make the Ankara Bar Review a forum for discussion of not only what the law was and is, but also what it should be. We encourage thoughtful articles on the way our system of law can be improved and particularly the role of attorneys in make those changes. As we all know, the law is a constantly evolving creature, so lawyers should be a force for the government to contend with when governmental power threatens to exceed its constitutional and legal boundaries.

ABR is happy to publish articles bringing novel approaches to complex legal challenges. We encourage the members of the bar, other legal professionals, and other concerned persons to put pen to paper and help the Ankara Bar Association foster discussion on the future of the law. ABR shall be read as a dynamic involving contribution to the evolution process of law to the extent of experimental mind and science.

Lawyers shall be seen as the institutional guarantee of the “right to justice”, and ABR as an instrument to prove how justice may be reached through advocacy.

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How the Justice System is Portrayed in Turkish Movies

by Ayşegül ŞENARSLAN∗

The Cinema Club, which carries out activities under the auspices of the Ankara Bar Association, also took part in the workshop on “Turkish Cinema in the Light of Justice” in the General Assembly of Law this year.

Since the general theme was “justice” at the Assembly, with a collage prepared by assembling scenes from Turkish movie – in which there were court rooms, trials, attorneys, judges, and hearings – one after another in order to show how the justice system has been portrayed in Turkish movies. Subsequently, the view of the people from the movie industry was discussed and evaluated by people from the field of law, which is the most cinematographic field. Discussing the places, explanations, visual presentations, and especially the aim of the courtroom scenes in the collage, which are “must” scenes for the film industry, with participant directors, actors and actresses make the legal practitioners think about the question of “how does the film industry see law?” For sure, the justice system portrayed by the movies directly or indirectly influences the average citizen’s idea of the justice system and jurists. Unfortunately, sometimes the portrayal is not just inaccurate but also misleading. For example, in Turkish movies the audience is generally put in the place of “jury,” which does not even exist in the Turkish judicial system, and the attorney, judge or prosecutor addresses the audience, the “jury.” As the typical Turkish film comes to its end, it does not matter whether the trial is concluded fairly according to the present judicial system. If justice is maintained in the eyes of the audience, the rest is nothing but details. Although the reactions of the jurist audience range from laughing to being shocked, the truth is that the jurist audience has been watching these scenes for years, and that they have remained “just” as the audience of these scenes for years. What is aimed at in this workshop naturally is not “being funny.” The question of whether Turkish movies that are found funny by the jurist audience are really humorous or not do not constitute the subject of this article.

Generally Turkish movies do not like to reach justice in the courtrooms or through the justice system. The main instruments of the justice system are usually presented as “dispensable” in our movies. Since reaching justice through poetic means instead of the legal system makes the audience feel emotionally satisfied; this satisfaction is obviously seen as sufficient by the film industry. The audience is sure that the innocence of the hero in the movie, with whom they identify, will emerge in one way or another. The emergence of this innocence in a hearing is not very important. For this

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reason, a crucial witness arrives at the courtroom at the very last minute, generally “because they cannot live with the pain anymore,” to give their critical testimony. And the prosecutor (Kenan Pars, Avare – 1964) “accusing” the suspect with all of his or her strength understands that s/he has made a mistake and the real criminal was “the father of the suspect.” Trials are usually depicted as either noisy, with claps and laughter of the inhabitants of the suspect’s neighbourhood (Doktor Civanım – 1982) or with a deadly silence only sometimes to be broken with long and high-tension speeches. Trials are usually dependent on crucial developments in the very last minute; every unfortunate or awkward event that is unlikely to happen actually does happen to the hero. (Sadri Alışık, Şakayla Karışık – 1967). Naturally, during all the legal processes, the law practitioner viewer can never understand the “subject” of the trial. In divorce suits, a board of judges can be seen in the courtroom or the verdict “acquitted” can be heard at the end of the trial. Or even in an action of debt, the judge of Turkish movies can be heard “to dismiss the accusation” and of course a civil trial would take place in a criminal court room. Because anything in Turkish movies is done “for the sake of the movie” and anything regarding the law is touched only enough for the sake of the movie. Essentially, there is no need for the attorneys, prosecutors or the justice system to solve any legal problem for the main character. The movie industry is not interested in judicial matters or the judicial system. If the victim is innocent, then there is no need for an attorney anyways. Thus, victims usually do not need attorneys in our movies, and they do not want to have attorneys either. The movie industry has no concern about depicting the justice system accurately; therefore it is not interested in narrating the truthful depiction of the judicial system to the audience through films. Considering the example of an actor who acts as the judge, prosecutor and attorney at the same time (Yılmaz Güney – Umutsuzlar 1971), saying that the real actors of the justice system are defeated from the beginning by the heroes of the movie, who settle their own justice by themselves, is not an exaggerated comment. Of course the caveat is that these comments are for the melodrama of the Turkish movie industry and the general bias of Yeşilçam.

It that the end, when all these Turkish movies are watched, especially the melodramas, there is no main character who is an attorney or a judge that the audience can identify with to satisfy their sense of justice. There is almost no attorney in our movies solving cases, no prosecutor chasing criminals, or no judge adjudicating a difficult case fairly, with determination, in spite of any controversy. However, many Turkish jurists remember Petrocelli clearly. The average Turkish audience, even if they were jurists or not, learned about long trial scenes, how to talk to the judges, how witnesses take oaths, how many people there are in a jury, and even cross examination from the serial programs Advocate Petrocelli, LA Law, the Verdict, Accused and In the Name of Father or from other American movies. They have not only learned about the American legal system and all the procedures of an American trial, but they also identify themselves with the “enlightening attorney uncovering the lies one by one” (Emma Thompson – In the Name of Father) or “with the

1 The Turkish “Hollywood”.
ambitious attorney of the victim” (Kelly McGillis – *Accused*) as in another example. Although the Turkish audience knows how an American judge dresses, the fact that a British judge wears a wig, where a solicitor stands or where the jury is located in the courtroom, it is unfortunately a troublesome question whether they can distinguish the robes of Turkish judges from the robes of Turkish attorneys. In the movie *Ne Olacak Şimdi* (*What Will Happen Now*), a love story whose main characters are attorneys and reflecting how the attorneys can change roles with their clients in a humorous way, the question of why these attorneys (Nevra Serezli and Levent Kırca), wear court attire of different colours is nothing more than a little detail that makes a law practitioner say “a typical Turkish film in the end” (*Ne Olacak Şimdi* – 1979). The number of people thinking that there is a jury in Turkey should not be just a very few and it is not an unseen fact that a witness “holding his right hand up” while taking an oath or asking “where is the Holly Book” in real trials. The courtroom image in which long trials are made, breaks are given and false witnesses are made to feel ashamed in the mind of an average citizen dies all of a sudden when he or she enters an actual courtroom for the first time in his or her life with the bewilderment and thought of “it was so quick that we did not understand anything.” Of course the Turkish movie industry alone is not responsible for the inaccurate understanding of the Turkish legal system, but it is not unfair to say that the Turkish movie industry has not tried to establish the sense of “justice” and accurate depictions of judicial actors such as judges, prosecutor and attorneys. In current movies, we observe that the industry, using the field of law again as a necessity, is beginning to depict the judicial system in a more realistic and accurate way. There are movies in which the legal problems are solved within the justice system, like in the movie “*Barda*” (*In the Bar*). While the audience would have been satisfied for the first time with the sentence the criminals received, it is observed that the industry could not easily give up the rules of melodrama. In “*Barda*” (*In the Bar*), the prosecutor is heard saying to the victims “they could get their own justice by self-help,” because the sense of justice of the audience would be satisfied by “taking more of the revenge of the victims.” Although the other jurist, the “judge,” and “victims,” and average citizens do not agree with the prosecutor’s approach, the criminals cannot escape from being severely beaten in prison for the audience to see. It is in fact the industry itself that is beating the criminals who raped and tortured the victims in the movie. This means that it is once again metaphorically stressed that revenge of the innocent is nonetheless taken by the industry. Another example, the movie “*Pardon*,” in essence, was produced from a subject explaining that justice does not occur in the trial. In *Pardon*, the stereotyped justice characters successfully and realistically show the judicial system to the audience in a very convincing way (*Pardon* 2004). The trial in *Pardon* is a real trial and the short defence of the attorney is stereotypical but legally accurate. Victims are innocent, but they still have attorneys. On the contrary, in the “*Barda*” there is no mention of the attorneys for the victims; as usual in Turkish movies, the need for attorneys only belongs the guilty. As law practitioners watch the typical scenes in silence or by saying “whatever,” because they are used to such melodramas.
Jurist audiences cannot help saying “this is just too much” when they see multiple suspects having only one attorney.

Justice, whether revealed in the courtroom or not, must be shown accurately by the industry. I do not wish for the industry to never harm the judicial system in melodramas, or to have the “let the snake that doesn’t bite me, live a thousand years” attitude. Wishing these means not obtaining the benefit of the criticism that the cinema will offer since it is one of the most important media. An effort is needed to question the judicial system through cinema. In this way, examining heroes from all aspects before announcing them as popular heroes and breaking the acceptance of “an eye for an eye justice” imprinted in the minds of the public by the cinema would be possible. The analysis and criticism of the justice system, or both fair and unfair legal decisions by the cinema, which is the strongest medium of the contemporary age, will accomplish a meaningful meeting of cinema and the justice system. This meaningful meeting will directly affect the public’s understanding of law and justice.

In conclusion, to change the reflection of the public’s understanding of the justice system on the cinema, jurists/law practitioners should not keep themselves away from the cinema and the movie industry should review its awareness of the realities of the justice system.

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2 A common Turkish proverb.
Flexicurity and Women Unemployment

by Berda Gönil TURAL

An increasing rate of unemployment and the pursuit of becoming the most competitive economy are the main challenges of the European labour market. To reach the strategic targets a new concept, flexicurity, has been introduced. Flexicurity is believed to decrease current unemployment rates by creating more and better jobs. A considerable amount of effort has been carried out by the Commission to create common principles of this concept and to introduce flexicurity in Europe. In this article I will try to point out the main characteristic of flexicurity as well as its impact with unemployment of women and Turkish labour market. The role of flexicurity on part time agreements is also studied by a comparative method and an emphasis on Turkish law.

The European Employment Strategy

The European labour market started to face a slowdown in the overall employment rates from the late 1990’s. The 1998 Employment Guidelines for the European Employment Strategy addressed certain targets to tackle, youth unemployment and long-term unemployment in particular, which were becoming major problems both for social cohesion and the development of the market in the EU. The European Employment Strategy found the solution in instituting four main strategies, one of which was encouraging adaptability in business and their employees. After being written down as an employment strategy in 1998, “adaptability” became a major strategic pillar. Adaptability included “agreements to modernize the organization of work, including flexible working arrangements, with the aim of making undertakings productive and competitive and achieving the required balance between flexibility and security.” A new concept called “flexicurity” arose as a tool in the pursuit of creating an adoptable and competitive economy while preserving social cohesion. After two years, the European Employment Strategy was updated by the Lisbon Strategy; this time the target became full employment in Europe. This difficult goal was part of a broader target: to create the most dynamic and competitive economy with more and better jobs as well as greater social cohesion.

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1 See Eurostat employment rate statics-EU15.
A new concept: Flexicurity

Flexicurity corresponds to the combination of two principles: flexibility and security. The need for flexibility in the labour market can be explained by two reasons: to create a more dynamic and competitive economy as well as reduce unemployment through creating “more and better jobs.” The demand for goods and services in the global market economy is changing rapidly; therefore producers and providers should respond to these changes as quickly as possible in order to compete with and profit from worldwide trade. A flexible labour market is required for employers to adapt to fluctuations in the demand for goods and services. In addition to this, there are continuous technological advancements in the methods of production. This creates the need to recruit new labour capable of using new technology. Strict employment protection legislation introduced high costs that have reduced the competitive power of employers. Likewise, employers who are trying to avoid the costs of dismissing an employee, either hire fewer employees or hire their employees by way of temporary or fixed term contracts and with lower levels of security. Consequently it creates harder conditions to find a job or to stay employed in the long term and also some groups benefit from less security than others.

Flexibility and security are two different dynamics but they both need to exist together in flexicurity strategies; flexibility without security can neither sustain economic development nor bring social cohesion and prosperity for individuals. The mandatory existence of a proper balance between flexibility and security has been stressed since the European Employment Strategy was first launched. The job security, which corresponds to flexibility, is not job security in the classic sense, but employment security; in general meaning it is the security of the labour force against the risk of unemployment. In this type of security, individuals are mainly supported with training and job search services to stay employable and thereby somewhat protected against unemployment. The level of security is very important in maintaining the sensitive balance in flexicurity policies, especially for welfare and social cohesion.

According to the European Employment Strategy, a flexicure labour market can be achieved by flexible contractual agreements, active labour market policies that assist individuals in finding employment, reliable and responsive life-long learning and modern social security systems. Flexible contractual agreements can be regulated by labour laws to give diversity to the types of reliable employment circumstances.

The Actors in a Secure Labour Market

Flexibility is a dynamic of the labour market while security is a dynamic of the social state. Increasing flexibility does not unconditionally increase security at the same time simply because they are demanded by different groups. Traditionally, policies aimed at enhancing security are of a reactive

nature, i.e. they follow, usually with a significant delay, the assessment that developments in or outside the labour market are harmful to the security of certain groups.  

In the Communication of the European Commission entitled “Towards Common Principals of Flexicurity” it is stated that all stakeholders should be included in order to take responsibility in the process, especially the active involvement of social partners is deemed to be very important, because social partners are best placed to address the needs of employers and workers.

**Pros and Cons of a flexible labour market**

There are different arguments about the advantages of flexibility for the employees. Ozaki states that the flexibilisation of the labour market is making “significant erosion of workers’ rights in fundamentally important areas.” In contrast, the Report of the Employment Taskforce, 2003, alleges that flexibility is not only in the interest of the employers but “it also serves the interest of workers, helping them to combine work with care and education for example or to allow them to lead their preferred lifestyles.” There are different assumptions regarding the effects of flexibilisation, especially for employees, but the most realistic approach can only be seen after the implementation of flexicurity policies since the valuation of labour market policies is subject to empirical data and research.

As stated by the Commission “flexibility is not limited to more freedom for companies to recruit or dismiss, and it does not imply that open-ended contracts are obsolete. It is about progress of workers into better jobs, upward mobility and optimal development of talent.” Although creating a flexible labour market seems to answer mainly economic concerns, its expected results on greater employment rates stresses the underlying social concerns.

**Its foreseen effects on Labour Market Especially on Women Employment**

Denmark is singled out as the most successful countries in integrating flexicurity policies into its labour market. The reasons for this reputation are the high rate of employment, the low rate of unemployment and the unique Danish flexicurity model, the so-called the Golden Triangle. The Golden Triangle has three main angles: labour market flexibility, high level of social security, and an active employment policy. The Danish Minister of Employment, Claus Hjort Frederiksen, states that Danish employees change

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3 Ton Wilthagen and Frank Tros, The Concept of “Flexicurity”: A new approach to regulating employment and labour markets, p.5  
5 Ton Wilthagen and Frank Tros, The Concept of "Flexicurity": A new approach to regulating employment and labour markets, p. 6.  
jobs more than 800,000 times each year, adding that being unemployed is not a disaster in Denmark due to its social security system. Indeed flexicurity models have been useful in some of the countries such as Austria, Holland and Denmark; however their performance may be attributable to their relatively small population. The successful flexicurity models from these countries may only be taken as pilot projects in countries with greater population. Also in Holland, part time contracts have a high percentage due to its reforms on making this type of work more attractive.

The data shows that employment rates for women are lower than that for men in all countries in Europe (Eurostat). In the EU-25, in 2006 employment for women was 45.2% while employment for men was 60.6%, showing a significant difference between female and male employment rates.

In addition to this, in 2006 the number of females working in part-time jobs was nearly three times the number of males working in part-time jobs in the EU-25 (Eurostat). This demonstrates that part-time jobs are mostly attractive for women. The high demand of women for part-time jobs has been attributed “to their aim of combining family and career”, or in other words, to the role of women in family life.

Where part time jobs are less advantageous than regular jobs because of their working conditions, less people are going to be interested in working in a part-time job. This result in a reduced amount of women employed because the current situation shows that women prefer part-time contracts. According to some writers, if legislation is making part-time employment unattractive, then it is discriminating based on sex. It can be argued that if part-time contracts were supported with sufficient security and benefits, it would increase the employment rate. However, in the long term, only encouraging part-time work is not capable of either eliminating unemployment for women or preserving gender equality. Specific policies should be aimed at tackling unemployment for women with the perspective of providing equality between women and men. The most common solution discussed is providing pre-school child-care services. In 2002, the European Council of Barcelona decided to provide childcare to at least 90% of children between age 3 and the mandatory school age and at least 33% of children under age 3; however this has not been achieved yet because the target date is 2010.

Flexicurity and Turkey

In Turkey, migration from villages to cities has increased the supply of

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7 Speech delivered by Minister of Employment, Claus Hjort Frederiksen, at the Conference on flexicurity, Thursday 16 June 2005.
labour in the cities; the population of urban areas went from 3 million in 1950 to 30 million in 1990. Unfortunately the industrial sector did not grow as much in order to absorb the increasing supply of labor. As a result, some migrants either become unemployed or stayed out of formal employment. These conditions have affected women more than men. In villages, women were mostly unpaid family workers; in urban areas because of their lack of education or the rarity of the wage jobs in the city; generally they were not capable of finding formal employment. The inability to find formal employment, together with the economic pressure to contribute to the family income, has led women to work largely in the informal sector, such as cleaning and childcare services. Therefore the main problems of the Turkish labour market have mainly been seen as low overall employment rates and low female unemployment rates as well as segmentation of the labour market due to the large informal sector. Therefore, an important question to consider is “Do Turkish labour markets need flexibility?” Current data shows that the large informal sector is already providing a level of flexibility. The requirements of the labour law that are capable of intervening to balance supply and demand may easily be ignored in the informal sector. It has been accepted that the Turkish labour market is indeed a flexible one. However flexibility mostly exists in the informal sector; for regular formal employment, the degree of flexibility is relatively low. Therefore I am going to pay attention to flexibility in the formal sector.

Flexible Contractual Agreements in Turkish Labour Law

Atypical types of contracts have been used in practice but they were not regulated in the Labour Code until 2003 (except contracts of definite duration). The incentives to harmonise with the European Union Acquis, together with the need to regulate the flexible types of agreements in a legal code, resulted in the launch of the new labour code. Part-time contracts, on-call contracts, trial-period contracts and team agreement contracts have been regulated as atypical types of contracts.

Fixed term contracts

Under Article 11 of the Turkish Labour Code, an objective reason such as completing a particular work assignment or the emergence of a fact is needed to conclude contracts of definite duration (fixed-term contracts). In other words, if there is no objective reason arising from the nature of the job or from the needs of the employer that justifies use of a fixed term contracts, the parties may not conclude a fixed-term contract. If there is no objective reason to make or to renew the contract more than once, the contract will be deemed to be a contract of indefinite duration. The aim of the regulation is to protect individuals from the use of fixed term contracts in order to avoid complying with the legislation protecting contracts of indefinite duration.

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12 Frans Pennings ve Nurhan Süräl, Türk İşgücü Piyasasının Esnekleştirilmesi ve Modernleştirilmesi , 2005, p.4)
13 Ibid, p. 4
The European countries used to have similar regulations regarding fixed term contracts, but these were revised and changed with the need to allow flexibility. For instance, in Holland it was possible to make a fixed term contract for any reason; however the renewal of the contract meant that the second contract might not be ended without notification or permission of the public bodies. The second fixed term contract had increased protection in order to enable fixed term contracts to be concluded only once. The new code made it possible to conclude three consecutive contracts without previous notification on the condition that they do not exceed a time period of three years. Also in Belgium, according to a 1978 Act, at least two consecutive fixed term contracts were accepted as a contract of unspecified term. The code was amended to allow four consecutive fixed term contracts, each of a duration not less than three months, provided that they do not exceed 2 years time. The recent developments in European countries show that fixed term contracts may be concluded more than once within a certain limit of time without an objective reason. These developments are in line with the Council directive on fixed-term work. According to the directive, States may introduce one or more of the following measures to prevent abuse of fixed term contracts:

- Require objective reasons justifying the renewal of such contracts or relationships,
- Set a time limit for successive fixed-term employment contracts and relationships, or
- Limit the number of renewals.

In Turkey, the first and the third measures are applicable. More flexibility regarding fixed term work may be obtained by using different combinations of these measures such as in the example of Holland and Belgium.

In Turkey, the legislation concerning fixed term work also has non-discrimination rules; therefore the fixed-term employees cannot be subject to different treatment just because they are hired with a fixed term contract. In other words, they cannot be put into a disadvantageous position because of their atypical contract. The non-discrimination rule was introduced to provide more security to the fixed-term employees.

According to the directive, Member States should introduce rules that oblige the employers to inform “fixed-term workers about vacancies which become available in the undertaking or establishment to ensure that they have the same opportunity to secure permanent positions as other workers.” In addition to this “employers should facilitate access by fixed-term workers to appropriate training opportunities to enhance their skills, career development and occupational mobility.” These rules are aiming at making fixed time working attractive for employees and it complies with the objectives of the

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14 Ibid, p. 74
15 Ibid, p. 74
16 Ibid, p.75.
European Union to increase security as well as flexibility in the labour market. These rules should also be included to the Turkish labour market policies to increase the demand for fixed term contracts in the formal sector.

**Part-time Contracts**

Under Article 13 of the Turkish Labour Code, contracts in which regular weekly working time for the worker is substantially lower than the normal employee working time are called part-time contracts. A normal or reference employee is a full-time employee working in the same or similar job. Part-time employee cannot be treated differently just because he/she has a part-time contract unless there is a compelling (and legal) business reason, which justifies the discrimination. In addition to this, part-time workers should be paid in proportion with their working time, taking into account the wage of the reference employee. The non-discrimination and wage protection rules are very important to the security of part-time workers.

The last paragraph of Article 13 regulates the duty of the employer to notify the employee of any available positions suitable for the qualifications of that employee; the employer has to do the notifications timely. The request of the employee to pass from part-time to full-time or full-time to part-time, has to be reasonably considered by the employer. The employer’s duty of notification is also regulated in Holland, but a provision also regulates the time in which the employer has to respond to the request of the employee and that the employer has to give the reasoning for a rejected request. Finally employers have an obligation to meet the employee requests in adjusting their working time.\(^\text{17}\) In contrast, Turkish law in Article 13 remains silent about these issues.

Unlike the older version, the new Turkish Labour Code regulates atypical forms of contracts and it reflects the flexibility that partly existed in practice. With its security norms and non-discrimination rules, the new code is more compatible with the European Union Acquis.

There are different opinions on the necessity for flexicurity policies in Turkey. According to some writers, flexibility is more advantageous for developed countries where social state and unions are both very strong, thus more flexibility would cause lower wages and weaker unionisation in Turkey due to its labour market problems.\(^\text{18}\) According to others, flexibility is advantageous for the Turkish labour market on the condition that flexibility is followed with sufficient security.\(^\text{19}\)

Both arguments have merits. It is a known fact that the large informal labour sector is one of the main problems in Turkey; therefore flexicurity policies should concentrate more on eliminating the informal sector than on creating

\(^{17}\) Ibid, p. 82.

\(^{18}\) Ülkü HATMAN, Esneklik Kavramı Neyi İfade Ediyor?, p.4

\(^{19}\) Frans Pennings ve Nurhan Süral, Türk İşgücü Piyasasının Esnekleştirilmesi ve Modernleştirilmesi, 2005, p.8
flexibility in the formal sector. This is also supported by the approach of the European Commission that there is no single type of flexicurity policy and that the national circumstances will determine which combination of policies should be applied. From my point of view, flexicurity policies should mainly aim at transforming the informal sector into the formal sector; this could be achieved by measures in both the formal and informal sectors. Injecting flexibility into the formal sector would not have negative effects if a basic level of security with life-long learning and active labour market policies were integrated into the system.

The Relationship between Flexicurity Policies and Unemployment of Women in Turkey

The Turkish labour market statistics show that by August 2007 the employment rate for women was 23.4% while employment for men was 66.5% in comparison to the EU-25 where employment for women in 2006 was 45.2%. The employment rate for women in Turkey is nearly one-third of the rate of employment for men in Turkey and half of the rate of employment for women in Europe.

The low employment rate and the large participation in the informal sector have both an economic and socio-cultural basis. The traditional family ideology and gender division of labour assigns the caregiver and domestic roles to women and the bread-winner roles to men. Therefore the gender gap remains significant in employment and access to education. Women who cannot find formal employment because of their low level of education can easily find an acceptable job in the informal sector. The employment problems of women in Turkey are largely related to the informal sector, because the informal sector accommodates a large proportion of the women workers. It is important to point out the fact that women are working in highly-flexible conditions in the informal sector without any security being provided for them.

Another study, while not disregarding the reasons for high unemployment rates for women, stresses that the current figures are natural for a country “transiting from a primarily agriculture society to an economy led by industry and services” since the first step is usually a decline in female participation – a dynamic observed all over Southern Europe in recent decades.

The structure of the Turkish labour market shows that the level of education, the duties of women in the family and the large informal sector are the factors that cause the low employment rates for women. The policies, which aim at converting the informal sector into the formal sector, would definitely be in benefit of women.

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22 European Stability Initiative, 2007, p.28.
Flexicurity policies may be used to increase the number of available part-time positions by making part-time work attractive both for employees and employers. This may decrease informal employment and unemployment for women. In addition, life-long learning policies should be implemented for women in order for them to gain qualifications and to better integrate into the labour market. Also a childcare service is an important tool to increase the active participation of women in working life.
Gender Equality in the Constitution of the Republic of Turkey
by Elif KÜZECİ∗

“I do not wish them to have power over men,
but over themselves.”
Mary Wollstonecraft,
A Vindication of the Rights of Women
(With Strictures on Political & Moral Subjects), 1792

Equality, included among the concepts of the “axle” of human rights,¹ is protected seemingly for its significance in the constitutions of contemporary democratic states. Such protection pronounces itself particularly in these constitutions as a form of determination of “general equality” as the main principle, and of the embodiment of the “ban on discrimination”. Furthermore, it is seen that “the principle that women and men must have equal rights” is arranged as in specific norms in these constitutions in quite a few of contemporary and democratic countries with the aim of ensuring gender equality.

GENDER EQUALITY

It may be stated that the principle of entitlement to equal rights, of which the samples regarding their inclusion in the constitutions of various states are given below, is a reflection of the historical desire to the entitlement of equal rights continuing since past in respect of possession of equal rights of women. The goal which is desired by including such a principle in constitutions is the “promotion of women who have been unjustly treated to date in legal contemplation to the level of men”. According to such understanding, gender discrepancies that are against law should have no effect.² However, such principle should not be interpreted to mean that there

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are no gender differences between women and men. If any event can be accomplished only by women or men, then the existence of different standards will be unavoidable. For instance, the introduction of some arrangements with respect to the protection of mothers or the women who are prospective mothers will not infringe the principle of having equal rights for women and men because, in such a case, the need for special consideration originates from the biological characteristics of motherhood that confronts us as a direct reason for protection of a mother.  

To put it differently, “the principle of equality can only be applied where identical rights for women and men are in question. To defend an absolute equality will cause women to be treated unjustly due to biological differences of women.” After all, the understanding of equality, which also takes characteristics of being a woman into consideration, is needed in order to empower women in the economic and political fields.

Basically, it may be said that the principle of possession of equal rights is not anything other than emphasizing the contents of the general principles of equality. In other words, if provisions specifically with respect to the principle that women and men are equal had not been included in constitutions, it would have been necessary to take appropriate measures in countries where inequality and discrimination were accepted. Consequently, it can be also seen that the aforementioned principle, which has become a political slogan and a substantial meaning as a political demand rather than a meaning oriented to law, has been often asserted.

Indeed, it may be said that such a provision alone will not introduce a great change in thinking. However, in our opinion the embodiment of such a principle separately will be a sign of the importance given to the era by the protector of a nation’s constitution. Thus, the necessity of ensuring such equality should be called to the attention of the legislature. However, the performance of the necessary arrangements will be inevitable in the management and community which assimilate understanding of such equality and apprehend the importance of the issue even though no such emphasis exists in a nation’s constitution.

**Article 10 of the 1982 Constitution**

In the Republic of Turkey, the principle of equality is expressly stated in the 1982 Constitution in the section where “General Principles” are defined rather than in the section with the headline of “Fundamental Rights and Freedoms”, which was different from the one in 1961. This means that the principle of equality is one of the principles determining the basic structure of

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3 Ibid, p.11.
4 Bihterin Vural DINÇKOL, İnsan Hakları Hukuku ve Kadın, İstanbul Ticaret Üniversitesi Yayınları No:6, İstanbul 2003, p. 17.
constitutional system such as the principles of republicanism, secularism, Kemalist nationalism, being of a social state, and the state being governed by the rule of law. In other words, the principle dominates the whole constitution and the state, but this situation does not remove the reality that equality is certainly one of the basic rights.

The principle of equality and the ban on discrimination are introduced in Subparagraph 1 of Article 10 of the 1982 Constitution. In accordance with this provision “All individuals are equal without any discrimination before law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such consideration.”

And in Subparagraph 3 of Article 10, the ban on privilege is set forth in the provision of “No privilege shall be granted to any individual, family, group or class.” And the provision on the “necessity of behavior in compliance with the principle of equality before law in all proceedings” of the state bodies and administrative authorities is set forth in the last subparagraph.

Subparagraph 2 of Article 10 was added to the Constitution through Article 1 of Law No. 4710 of May 7, 2004. In accordance with this provision “Women and men have equal rights. The State shall have the obligation to ensure that this equality exists in practice.” Thus, the “principle of possession of equal rights of women and men” gained a constitutional basis. It may be expressed that this amendment has a supplementary character to the amendments made in Articles 41 and 66 of the Constitution in 2001.

It may also be stated that the criticisms and proposals made for many years, to include the principle of absolute equality into the Constitution to entitle women to the same rights as men, have been affected by the work to harmonize Turkish law with that of the EU.

Thus, it may be stated that the creation of an active policy as a more powerful guarantee, than the ban on unequal process or discrimination, to remove inequalities has gained a constitutional character. However, this amendment is fairly limited in comparison with the proposals made. In fact, in our opinion, this new provision will not be satisfactory to meet the purposes of ensuring equality. The proposals with respect to Article 10 will be re-evaluated below by taking into consideration actual examples, following a

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9 As amended on October 17, 2001 the subparagraph 1 of the Article 41 set forth that provision: “The family is the foundation of the Turkish society and based on the equality between the spouses”.
10 As amended on October 17, 2001 the subparagraph 2 of the article 44 set forth that provision: “The child of a Turkish father or a Turkish mother is a Turk”.
general explanation relating how the issue is arranged in the constitutions of the member states of the EU.

**Provisions relevant to the issue in the constitutions of the member states of the European Union**

The principle of general equality and the bans on discrimination are so routinely included in the constitutions of the member states and the candidate countries approved for European Union membership so as to be characterized as a mutual provision. However, the constitutional provisions with regards to the subject matter were observed first in the constitutions of the Federal Republic of Germany\(^\text{11}\) and Switzerland\(^\text{12}\) and then later in the other member countries – Finland,\(^\text{13}\) France,\(^\text{14}\) Spain,\(^\text{15}\) Italy,\(^\text{16}\) Hungary,\(^\text{17}\) Malta,\(^\text{18}\) Poland,\(^\text{19}\) Portugal,\(^\text{20}\) Slovakia,\(^\text{21}\) Slovenia,\(^\text{22}\) Greece\(^\text{23}\) and Romania.\(^\text{24}\)

Only the point that women and men are entitled to equal rights is set forth in one section of these provisions\(^\text{25}\) while more powerful provisions than the embodiment in Article 10 of Turkish Constitution are contained in other sections. The assessment of these provisions would be beneficial as guidance for the evaluation of amendments made and proposed to the Turkish Constitution.

If we examine the provisions in the constitutions of the Federal Republic of Germany and Switzerland, which we consider to have been the source for the amendment to Article 10 of our Constitution, it should be mentioned that ensuring equality between women and men in these countries is a task charged to the state by their constitutions. The provision set forth in Article 3 of the Constitution of the Federal Republic of Germany is quoted as follows:

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13 http://www.oefre.nibe.ch/law/icl/fi00000.html

14 http://www.assemblee-nationale.fr/english/8ab.asp

15 http://www.oefre.unibe.ch/law/icl/sp00000_html

16 http://www.oefre.unibe.ch/law/icl/sp00000_html

17 http://www.oefre.unibe.ch/law/icl/hu00000_html

18 http://www.oefre.unibe.ch/law/icl/mo00000_html

19 http://www.oefre.unibe.ch/law/icl/pl00000_html

20 http://parlamento.pt/ingles/cons_leg/crp_ing

21 http://www.oefre.unibe.ch/law/icl/lo00000_html

22 http://www.us-rs.si/en/index.php?sv_path=6,17&itlang=_L1


25 For an example see the subparagraph 2 of the Article 4 of the Constitution of Greece: “Greek men and women have equal rights & equal obligations”.  

“(1) All humans are equal before the law.

(2) Men and women are equal. The state supports the effective realization of equality of women and men and works towards abolishing present disadvantages.”

(3) No one may be disadvantaged or favored because of his/her sex, parentage, race, language, homeland and origin, his/her faith, or religious or political opinions. No one may be disadvantaged because of his handicap.”

As to the Federal Constitution of Switzerland of 18 April 1999, some issues considered to which they had particular importance were also paid attention subsequent to the emphasis that women and men are entitled to equal rights; the legislature was instructed to eliminate problems relating thereto. Indeed, Article 8 sets forth the provisions:

“(1) All human beings are equal before the law.

(2) Nobody shall suffer discrimination, particularly on the grounds of origin, race, sex, age, language, social position, lifestyle, religious, philosophical or political convictions, or because of a corporal or mental disability.

(3) Men and women have equal rights. Legislation shall ensure equality in law in fact, particularly in family, education, and work. Men and women shall have the right to equal pay for work of equal value.

(4) Legislation shall provide for measures to eliminate disadvantages affecting disabled people.

According to the Hungarian Constitution, the state must provide for the equality of women and men with regards to civil, political, economic, social and cultural rights (§ 66). In Malta, ensuring equal rights of women, and, in particular, equal wages for equal work are the tasks from the constitution for the state to focus on (§ 14).

As in the Constitution of Malta, it is seen that the provisions targeting the economic empowerment of women in their working lives, by ensuring that they are provided with equal rights, are also included in the constitutions of other states. For instance, according to Article 6 of the Constitution of Finland, equality between genders must be ensured in social activities, working life, and particularly in assignment of wages, and in other sections of life. The detailed provisions relating to the subject matter shall be ensured by laws. The necessity of equal wages for equal work of women and men in Romania is a constitutional provision (§ 38).

26 Sentence inserted by 42nd Amendment (27.10.1994).
27 Sentence inserted by 42nd Amendment (27.10.1994).
On the other hand, it is seen in some constitutions that increasing the political participation of women is emphasized rather than empowering their positions in working life. For instance, the provision ensuring equal access in duties and positions assigned through elections is contained in Article 3 of the French Constitution of 04 October 1958. The points that citizens can, under equal terms and conditions, be elected for public institutions and positions assigned through elections, and that special provisions necessary to increase the possession of equal opportunities for women and men should be made by the state, are contained in Article 51 of the Italian Constitution. Similar provisions (§ 109 and § 43) are also contained in the Portuguese and Slovenian Constitutions, respectively.

It should also be mentioned that ensuring equality between women and men in the Portuguese Constitution is deemed to be among the fundamental tasks of the state (§ 9). In our opinion, it is noticeable that respecting gender equality as described in line with equal rights in the Croatian Constitution, is among the constitutional order of the Republic of Croatia and the fundamental values of constitution (§ 3).

Lastly, it is essential to mention the provisions of the EU Constitution, which was adopted in June 2004. The provision of Article II-83 of the Constitution sets forth:

“Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex.”

5. Proposal for constitutional amendments oriented to provision of equality between genders

The provision included in Article 10 of our Constitution is an important step on the way to ensuring gender equality in Turkey. In our opinion, it is however not satisfactory to deal with the problem in a shorter time and more effectively. Therefore, a new package of constitutional amendments relevant to the subject matter should be included in the agenda.

In this context, re-arrangement of Article 10 in particular is necessary. In our opinion, the following proposal presented in the report prepared in 1999 in respect to Article 10 is suitable:

“X. Principle of equality, possession of equal rights of women and men

All are equal before the law.

Women and men are entitled to equal rights and freedoms.

The legislature shall make the necessary arrangements to remove direct and indirect discrimination for unjustly treating women in any and all fields of public law, and to equalize the status of women and men.

The state is obliged to take any and all measures which will ensure actual attainment of the entitlement to equal rights for women and men and removing existing unjust treatment.

No one shall suffer wrongful or preferential treatment based on discrimination of any kind, such as sex, race, birth language, and religion, political or other opinion.

No one, family, group or class shall be privileged.”

As mentioned in the proposal a “temporary provision” shall also be included in the constitution to bring in such amendment immediately. This provision may be stated as follows:29

“The provisions contrary to the subparagraphs II, III and IV of Article 10 shall have to be complied with this provision until .............

Subparagraphs II, III and IV of Article 10 of Constitution shall be connected with jurisdiction as directly valid constitutional norms until the date determined.”

An important discussion with respect to the provision to be included in Article 10 of the Constitution by Law No. 5170 shall have been ended by means of such an arrangement. Attention was already drawn to the fact that legal provisions which could be made to the Constitution in this direction may create the problem of discrimination due to the reprobation of proposals with respect to acceptance of positive discrimination from the opposition party during the work regarding the amendments to Article 10 of the Constitution. In fact, Subparagraph 2 of Article 10 of the Constitution contains the provision “No one, family, category or class shall be privileged.” and no provision, or the exception of this provision regarding that positive discrimination oriented towards women, shall be involved in our Constitution.

Notwithstanding the point expressed that “the discrimination and application of different status for different groups to stabilize or eliminate some actual

29 ÇELİKEL/GÖREN, p.207.
disparities” may not be contrary to the concept of equality and may not be deemed arbitrary discrimination; this discussion may easily be ended in favor of gender equality by means of a similar provision in Subparagraph 2 of the proposal.

Moreover, the amendment to be brought in should not be limited to the provisions of Article 10. Arrangement of the constitutional provisions, which will guide the legal corrections, to be made to ensure progress in fields such as education, working life and political participation, and to prevent violation oriented to women will also positively affect the results positively.

Some provisions increasing the participation of women in political life rank first among the amendments to be attained in this context. As in the French and Italian Constitutions, Article 67 stipulating that the “Rights for electing, to be elected and acting in political activities” may be added with a provision ensuring equal access of women and men to the tasks and positions assigned through elections. For this purpose, we propose the following text to be added subsequent to the Subparagraph 1 of Article 67:

“The State shall make the special arrangements necessary for the possession of equal opportunities to benefit such rights for women and men”.

In addition, a gender quota may be brought in by means of an amendment to be made in Article 35 of the Constitution detailing the foundation of the Grand National Assembly of Turkey. Such provisions supporting the involvement of women in political parties in greater ratios may be achieved by amendments to Articles 68 and 69 of the Constitution.

Paragraph 1 of Article 55, with the subtitle of “Provision of justice in wages” may be added, with the following provision to remove unjust treatment encountered in the working lives of women:

“Working women are entitled to equal rights and, for comparable jobs, equal pay as for men. Working conditions have to be such as to allow women to fulfill their essential family duties and to ensure adequate protection of mother and children.”

CONCLUSION

As seen, even though the provision included in Article 10 of the Turkish Constitution is an important step to eliminate the problem of gender inequality for our nation, other provisions indicating removal of inequalities in economic, social and political fields should also be included as well in the Turkish Constitution, as we have seen in some member countries of the EU. However, effective work oriented to eliminate inequalities can and must be conducted until such provisions are made.

30 TANÖR/YÜZBAŞIOĞLU, p.114.
In fact, the constitution obliges the state to ensure the attainment of such equality. The issues we mentioned above should be taken at first into consideration during determination into which fields this obligation should particularly be accomplished. Moreover, it should be kept in mind that the provisions regarding gender equality are included in the conventions to which Turkey is a party. It may be said that the most important one among them is the CEDAW. Our country is a party to both of this convention and of the selective annexed Protocol.

Our country has accepted a number of obligations with this convention. The provision added by Law No. 5170 to the last paragraph of Article 90 of the Turkish Constitution should be taken into account:

"International agreements duly put into effect carry 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 the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect, and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

In this case, the legislature must introduce provisions of law to eliminate situations contrary to the fundamental principles set forth in the convention of the CEDAW, and must act in line with the obligations therein.

Introduction of these problems and solutions thereof shall mean ensuring a great development on the way to membership in the EU. However, the more significant thing is that an important necessity of being a contemporary democratic state shall have been fulfilled.

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31 “The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination”. See, http://www.un.org/womenwatch/daw/cedaw/
Some Words for Judicial Reform...

by Ömer Faruk EMINAĞAOĞLU∗

The discussion of an independent judiciary, judicial guarantees and the politization of the judiciary are still ongoing. The politization of judiciary has been accomplished through dependency and is without any safeguards. The following steps of politization are staffing in public offices and having proper judicial decisions to meet expectations.

Judiciary has no more norms beyond the establishment of a secular legal system. In a democracy based on the notion of separation of powers, it has been stated that the judiciary must be separated from the executive and legislature powers and there must be cooperation instead of hierarchy between the three of them. In a democracy, these three powers must be in the legal system. Moreover ‘the guarantee of rights and freedom’ and the judicial bodies as the symbols of justice must be only in the legal system. The duties of judicial bodies are to provide public and constitutional order, to protect individual rights and freedom and to audit the functions of political bodies. Judicial power is not so close to the other powers because of its entity. The political power, which has no control mechanism, pulls judiciary towards it and destabilizes democracy.

When we refer to independent judiciary, we mean judges and public prosecutors -as judiciary bodies- being free from interference of executive and legislative powers, public opinion, internal dynamics, and even themselves by being fair-minded judges and public prosecutors. The independence of attorneys shall also be examined under the same heading. However the role of the attorneys is not included in this article.

Amendments took place in almost all parts of the 1982 Constitution; however, the amendments were limited in the role of judiciary with a decision by the European Court of Human Rights; the only compulsory amendments were about the National Security Courts (DGM). This shows the perspective of the political mind to the judiciary because the 1982 Constitution has obstacles to the independence of judiciary. We always see the same statement -- ‘to provide independent judiciary’ -- in the plans of all political parties but somehow we have not seen any steps progressing towards such a seemingly agreed issue. Some actions have been taken but they did not meet the expectations of the judiciary.

∗ President of Union of Judges and Prosecutors Turkey.
In our country, the picture of executive and legislature branches being close to each other in the framework of judiciary bodies is political will. This understanding has never changed in any case. Poor implementation and disorganization have been damaging the independence of the judiciary. Today, even the man in the street criticizes the situation without any legal knowledge but political power is still insensitive to the issue. These criticisms are as follows:

Political figures such as the Minister of Justice and Undersecretary of the Ministry of Justice should not serve in the High Council of Judges and Prosecutors (HSYK). The council has a total of seven members. Five of them are elected and the other two members participate as of right from office. The main criticism is that these two members are ineffective in the council; however their positions have been the members of the council for 26 years. The question is if these two natural members are ineffective why do they still insist on being a part of the HSYK? This question has not yet been answered. No matter if these two members have the right to vote or not, they should be removed from the HSYK. Furthermore the meetings of HSYK cannot be without all seven members of the Council. This is the basic rule of the High Council of Judges and Prosecutors. If any of the seven members cannot attend a meeting, including the Minister of Justice, a deputy member attends the meeting from the High Council of Judiciary. However, if the undersecretary has an excuse for attendance, only the deputy undersecretary may act as a substitute for undersecretary. Thus the meetings of the High Council of Judges and Prosecutors are dependent on the undersecretary. In conclusion, the five elected members therefore become ineffective with the position of undersecretary in the HSYK.

The secretariat of the Council is not independent as well. The whole secretariat should be separated from the Ministry of Justice, General Directorate of Personnel (PGM). The PGM holds the confidential and non-confidential records of judges and prosecutors as well as prepares the drafts of the judicial decrees and designations. The HSYK has limited time to work on the drafts and the two natural members of the Council focus on the protection of the drafts in this period of time. Thus, the control of the Council cannot be effective. The staff of the PGM is dependent on the Minister of Justice. Even if they hold the position of judges in this administrative system, they could be assigned to a judicial position upon the request of the Minister of Justice. For this reason, either the PGM should be dependent on the HSYK or the responsibilities of the PGM should be taken and an independent unit in the Council should be formed for all these duties.

The inspection board (TKB), which carries out inspections of judges and prosecutors, is also dependent on the Ministry of Justice. The HSYK is not authorized to designate inspectors. The Minister of Justice has a voice and is authorized to conduct all activities of the TKB, such as opening an investigation and designation of inspectors to conduct investigations. The selection of inspectors from among the judges cannot build up confidence for the investigation because the inspectors may also be reassigned to other missions with just a word from the Minister of Justice. The inspection board
(TKB) is also voiceless and without any confidence, like the PGM, to the Minister of Justice. The inspection board must be controlled by the HSYK.

Officials from the category of judges should not be designated for the missions of the Ministry of Justice. Specialists who have graduated from the law academy may also be designated for missions, which require legal knowledge. However judges work in such missions and thus judges are placed under the stewardship of the Minister of Justice. The HSYK has been voiceless in this designation process in the Ministry of Justice. The only person who has a voice to discharge those people is the Minister. This is the same for officials being designated by three decrees. When we compare the situation in other ministries, the bureaucrats of the Ministry of Justice are in the worst condition without any safeguard. The Ministry of Justice has a high workload regarding the judiciary and is directly dependent on the Minister. The bureaucrats working in the Ministry of Justice have lost their identities as judges. If officials should work in the Ministry of Justice in the category of judges, the number of judges should be at a minimum level and the HSYK should be responsible for their appointment or discharge and conduct these processes with safeguards.

All files of the HSYK are prepared by the Ministry of Justice and the HSYK is not authorized to participate in the process of the preparation of those files. Those files are prepared by the officials of the Ministry without any safeguards. In conclusion, the HSYK has no ability to participate in the decisions in the files.

Effective methods of application should be provided within the HSYK. The discipline rules of the HSYK should be published so that the people who have to obey and implement these rules should know the implementation, content and the outcomes of the disciplinary rules. Arbitrary implementations shall be removed with transparency.

Designation and authorization of judges and prosecutors in the on-duty courts and the elections of the Supreme Court membership should depend on written, objective and efficient documents.

The election of the members of the HSYK has been carried by the President of Turkey. The election system of the HSYK should be changed and officials who are not even a high judge should carry on an election and choose the members of the HSYK.

Official rules should be established to prevent current and former members of HSYK to be candidates, to be nominated and to be elected to the judiciary for a period of time after their service in the HSYK ends.

During disciplinary proceedings, judges and prosecutors have to defend a suit without any access to the investigation file. This system should definitely be changed. Judges and prosecutors should be able to have the access to any kind of records be used against them.
The Ministry of Justice is responsible for the examination of candidate judges. The bureaucrats of the Ministry of Justice are the ‘only’ authority, especially in the interviews. It seems that the HSYK should have the last word on the candidates; however, the HSYK has no right to say no to a candidate judge having completed a two-year candidate training. The HSYK should have a voice both for the decision on judges and candidate judges.

The application for interviews was created after March 12, 1972 for the candidate judges and prosecutors. The designation of the candidates has been the responsibility of the Ministry since 1934; however, applicants for the vacant positions were designated based on their graduation year until 1972. Today the political will talks about judiciary reform; if they are serious, then they must change the 1972 system and revoke the authority of the Ministry. There is no place for even a little shadow on judiciary and the judiciary should stay far away from those kinds of debates. For this reason, the Ministry of Justice should have no right to say a word. UN resolutions, specialists and the regular reports of the EU and the recommendations of the Council of Europe share this same point of view.

The HSYK should decide the number of candidates by seeking the opinion of the Ministry of Justice and Turkish Justice Academy for each period of time.

Judges should not act as civil servants or become civil servants. In the period of candidacy, judges may end up feeling like the other civil servants of the Ministry of Justice; therefore at the end of the candidacy period it cannot be so easy to break free from the influence of the Ministry. The candidacy period in the Ministry is temporary. For this reason, the designation of the candidate should be according to the judiciary and those candidates should be apart from the permanent civil servants of the Ministry of Justice.

It should be understood clearly that judges are not ‘civil servants.’ These officials use their sovereign power and they should also use their employee personal rights in the same level with the others in legal system. Judges should not have any administrative duties but if they have an administrative job then they should not be dependent on the Ministry of Justice.

The HSYK and the high judicial bodies should control their own budgets and the ‘legislative power’ should not interfere with the judicial bodies during the preparation of the budgets before having a discussion in the general meeting of Turkish Grand National Assembly (TBMM).

Judges (at least the judges in the first rank) should have a geographical guarantee and should not be reassigned to another place or duty except by their own requests.

The Ministry of Justice is very active in the administration (the presidency and the general assembly) of Turkish Justice Academy. The effects can easily be seen in the education, training and appointments of the instructors at the Academy. The power of legislature should not be dominantly felt on the administration of the Justice Academy. Attending the courses in the Justice

1 The mentioned system is preserved since September 12, 1980.
Academy may be good references for particular missions; however, the HSYK should determine the participants of those courses. Although the Department of Training in the Ministry of Justice has no such authorization according to the law of organization, the Ministry of Justice is responsible for the training of judges and prosecutors. The Ministry should not implement this training. The Turkish Justice Academy should come to the forefront.

The administrative bodies present visual and verbal information about judicial investigations to the press and the public. This is not their main mission and should definitely be discontinued. The investigations should move along far away from the administration and legislature and apart from media press.

Any kind of offense of judges and prosecutors, such as related to their duty or person, should depend on a ‘separate investigation method.’ It is the natural consequence of the safeguards of judges in the framework of the principles of UN. This situation should not be the reason for revocation of the privilege of immunity. The differences between concepts and the institutions should not be confused. An iron hand should not be used in a velvet glove against the judiciary.

In the sake of independent judiciary, a ‘union of judges’, which is free from interference of the legislature should be established. The Ministry of Justice has been preparing a draft law for a ‘Union of Judges and Prosecutors of Turkey’ and it is possible to have guardianship in the judiciary. The judiciary is a necessary condition for non-governmental and free organizations and for the independence of judiciary in a more universal aspect.

Regional general courts should not be established in such a framework. Although there are not enough judges for the vacant positions in the regional general courts, the problem of vacant positions has been solved by making the conditions of the first rank separation easier by law and this creates ‘sufficiency by designation.’ Political power has tried to be efficient in the establishment and restructuring of regional courts. Moreover the Supreme Court of Appeals has been put out of action on this issue in this period of time. This period is such a period that all of the basic laws have been changing. This approach takes the judiciary far away from the center of the solution and makes legislating more difficult.

All case-law of the judiciary bodies should be published and there should be transparency in the judiciary. All judges and prosecutors (lawyers and the others as well) should have access to all case-law. There should be a specialization in the judiciary and the designation for the high judiciary positions should be according to the level of specialization. The activities of judges and prosecutors should not be evaluated for a “grade” by high judiciary bodies. This system shows that the high judiciary bodies are dominant and judges and prosecutors are disempowered.

The chief public prosecutors are not the representatives of the Minister of Justice in provinces. The governors should represent all the Ministers, including the Minister of Justice, in the provinces. The chief public
prosecutors represent the Minister of Justice in provinces but this should be changed immediately. When we take the universal developments around the world into consideration, an organized office of the chief public prosecutors should be established in Turkey where all public prosecutors could come together under the same roof and the administrative unit cannot be effective any more. A judicial unit should also be established dependent on the office of the chief public prosecutors.

Justice Commissions should be formed by an election based on the principles of democracy and the bar associations should have a voice for the particular issues in those commissions.

There should not be any suggestions and advice on judicial issues. Auditing tools such as parliamentary inquiry and questions should not be used by the executive power for this purpose.

Judges and prosecutors should not be administratively dependent on the Ministry of Justice.

The Ministry of Justice can issue administrative announcements (circulars) about judges. Inspectors are responsible for those circulars and the adaptation to the circulars; thus the impact of the Ministry has been increasing on judges by means of those circulars. This method of influence should definitely be removed.

When it comes to judicial issues, the Ministry of Justice has some restrictions according to Article 125 of the Turkish Constitution and Article 30 of Law No. 2992; it can only issue circulars related to the field of the Ministry. Therefore, the Ministry of Justice should not issue any circulars to prosecutors regarding the form and rules of investigations. The Ministry may only be authorized to issue circulars for judicial issues such as the transfer of cases.

The number of judges and prosecutors should definitely be increased, the problem of workload in judiciary should be solved, and right to legal remedies should be more effective. An effective judiciary is essential for the rule of law, state of law and justice. This is a fact, not a thesis, and it should not be ignored.

Being a judge and a prosecutor are not the same professions. The differences between these two professions should not be ignored and there should not be any transfers between these two professions without any request from those involved.

The political will should not be effective in the election of high judiciary bodies.

Judiciary decisions should be followed. The rules and enforcements should be complied with by the executive and legislature powers and for the judicial administration to obey the judiciary decisions and not to make any amendments.
We should use technology in the judiciary as much as possible. However, the judiciary should not be bound by technology. The Ministry of Justice has been carrying out the Project of National Judiciary Network. This situation should be ended immediately.

The organization of expertise should not have the authorization of judicial power and should not be misapplied.

It is possible to increase the number of issues beyond the abovementioned ones. Unfortunately the fact is that the number of issues shows the insensitivity for the independence of the judiciary and judicial reforms. This means, the aim seems to be to bring the judiciary closer to the political power by being insensitive and having implementations and regulations affecting the judiciary in negative ways. Even if legislature power is strong and judiciary has no safeguards, the judges are devoted to their jobs and are fair-minded in our country but of course there may be some exceptions.
A) WHAT IS A PRESIDENTIAL SYSTEM?

In the existing governmental systems in the world, democracies are shaped according to the level of separation of the legislative, executive and judicial powers. In modern democracies, the judicial branch of the government, as a body, is always set up separately and away from the influence of the legislative and the executive bodies. Our main subject here will be the connection between legislative branch (the legislature or parliament) and executive branch (the government) and their relationships. The essence of this relationship and this link generally appears in written constitutions. The idea of the legislative, executive, and judicial powers being in separate hands dates back to Aristotle’s times. This very theory of “Separation of Powers” that occupied the minds of many thinkers have found its modern manifestation in the writings of the famous French thinker Montesquieu. Montesquieu, in his work called “The Spirit of Laws” indirectly emphasized the need for the separation of powers and the use of these powers by separate bodies by saying: “If the power of legislation and the power of execution are given to the same people or same officers, there remains no sense of liberty” and “…..again if the legislative and judicial powers are not separated one cannot talk about liberty.” As it can be noticed, the essence of the concept of separation of powers lies the need for creating a “government based on legal principles” and the concern for “securing the liberties.” Briefly, the theory of the separation of powers is nothing but an effort to create a “limited competence.” One of the most important dimensions of the separation of powers is the preoccupation that human beings might potentially be evil, and that the person in power might use his powers for his evil deeds and that might continue to do so unless he otherwise faces serious consequences. In order to prevent such misuse, the power of that authority shall be restricted or limited. The oldest living constitution in the world is the US constitution. During the creation process of the US constitution, many famous lawyers and scientists openly emphasized the following points: “to take such precautions in order to prevent the misuse of the political power… Isn’t that the biggest insecurity felt towards the human nature? If people were like angels there would be no need for a state. If people were ruled by angels, then there would be no need for internal or external controls.” The idea of modern constitutionalism and

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the separation of powers is completely based on the mistrust felt towards the government. The separation of governmental powers is vital for democracy. In the light of this way of thinking, the US constitution was exposed to a strict separation of powers. They called it the presidential system. It was with this constitution that the term “presidential system” entered into the related lexicon worldwide. After the US gained its independence from England, it entered into the phase of constitutionalization after 1787. The politicians and the scientists of that era were fascinated by the English governmental structure and after they devised the legislative and the judicial branches, they wanted to find a way to organize the executive body. In other words they began to search for someone to head the executive body. In the English system, which was the system they took as an example, the executive body was the king, so the Americans were in search of a person or authority to replace the king as the executive body. After many discussions, it was decided that the power of execution would be gathered in one single hand and they named such person the “President.” So, this was the way the presidential system was born in the US. Unlike the parliamentary system, the presidential system was not born nor developed by itself. It was actually created within the US constitution. The presidential system has been experimented in many countries without success. Today, it is only in the US that the presidential system works successfully. Despite the fact that other presidential experiments were soon ruined by coup d’etats and replaced by despotic “presidential” prototype regimes. So, whenever the presidential system is concerned, it is the US type of regime that must come to mind and things must be analyzed accordingly. So, what is the US type of presidential system anyway? And how come it works so perfectly? According to the US constitution, the power of legislation lies in the hands of the US Congress, which is constituted by the Senate and the House of Representatives. The power of execution lies in the hands of the US president. The judiciary is represented by a high court and many other practically-created lower courts. The Senate, which is one of the constituent bodies of the Congress, consists of 100 Senators, two from each state. Senators are elected for a six-year term. The House of Representatives consists of 435 representatives coming from each state in proportion to their respective populations, elected for two-year terms. The US President is elected for a four-year term. The election of the President takes place in two phases. First, each federal state chooses delegates, in an election with universal suffrage that will elect the president. In the second phase, these delegates choose the US president. The president, who is elected by the people through elections, is not accountable to the Congress. Except for a special set of actions, the Congress has no authority over the president and cannot normally ask for his resignation as is possible in a parliamentary system. The way his presidency comes to an end is through the completion of his term in office at the end of the four years. In other words, the President is only responsible to the voters until the end of the four-year period. In return, the president cannot abolish the Congress. Despite the fact that there is a strict separation between the legislative and the executive powers, there is an established system of “checks and balances” in
the American Constitution to prevent them from crossing the line while using their authorities. The President has the authority to veto bills (legislation) passed by Congress. And again, the President has the authority to select federal judges. The Congress, on the other hand, has authority over areas such as deciding the Presidential budget, setting up the ministries (departments) for the President, overriding the veto of the President with 2/3 approval, and approving international agreements signed by the President. To summarize, the US president is only the head of the executive body, not the head of all branches of the government. Also, in the check and balance system, the judicial system works completely independent and neutral to control the legislative and execute branches. After understanding how the presidential system works, here it is time to emphasize the specific features and the negative sides of this system:

a) A parliamentary regime is a democratic and constitutional type of governance in which the executive body come from the legislative body (in other words the executive body is derived from the parliament) and that is responsible to it. In parliamentary systems, the head of the executive body (the prime minister) and cabinet (the ministers) are based on the confidence of the legislative body and, through a vote of lack of confidence; they can be removed from power. In presidential systems however, the executive (the president) is chosen by the people for a certain time period and he normally is removed from power only by new elections. This provides the continuous existence of the executive body. A similar kind of stability can be obtained in parliamentary systems by the majority rule of a single party.

b) In parliamentary systems, the prime ministers are chosen by the parliament. However in a presidential system the president is directly chosen by the people.

c) The presidential system, by its nature, weakens the political parties, which are essential to democracy. That’s because the government is constructed not through the ideas of the political parties but according to the characteristics of a single person. This also weakens the democracy in parallel ways.

d) In a presidential system the president personally represents the executive body and stays suspicious about any other political or bureaucratic structure and may prevent them from strengthening. That is to say, the very bodies and the institutions of the government could be weakened.

e) Since the Parliament and the President are both brought to power by the people in elections, they both claim to represent the will of the people. In case that the parliament and the president (that is to say both the legislative and the executive bodies) have different and conflicting preferences, it is always probable that a continuous environment of crisis might exist. (the Allande period in Chile or the Goulart period in Brasil for instance…)

f) The parliament in the parliamentary system continuously checks the government and follows its actions. There exists no such checks in the presidential systems, and the lack of this paves the way for an environment in which illegalities become severe.
g) The presidential system becomes epitomized in the character of the person representing it. A president with a bad image hurts democracy in the eyes of the people. (Boris Yeltsin, who was behind the bombings in the Russian Duma and who was used to make drunken public appearances is an example to this.)

h) In presidential systems, the president who won a proportion of votes with little more votes than his opponent absolutely holds the power for a time being. “The winner takes it all.” A person can hold the position of the executive body being supported by the 51 per cent of the population, but at the same time this person is not favored by the 49 per cent of the voters. In France (where there is a semi-presidential system) it is always that a person not being favored by the 45 per cent of the population is elected. And again G.W. Bush was elected by only 51 per cent of the votes.

i) In parliamentary systems the representatives are chosen by universal suffrage. It is possible for qualified politicians and statesmen to be elected to the legislative and executive bodies (the government) by the votes of their people. In presidential systems however the people who are close and loyal to the president have a chance to participate in the executive body because the only authority of the executive body is the president himself and he can appoint any person he wishes to any position.

j) In a parliamentary system, political challenging takes place between political parties or “institutionalized ideas.” In contrary, in presidential systems these challenges are between persons and their personal characteristics.

k) Whenever there are deadlocks between the executive and the legislative bodies in parliamentary systems, these deadlocks can be resolved through the preferences of the legislative body. The legislative body can replace an existing government by a vote of no confidence or by forcing resignation of the ministers. However in a presidential system, there is no such chance for resolving the deadlocks in this way. It cannot install another president (executive). It has to accept the fact that the executive body will be in power all through its term in office. Now, let’s come to the question of why the presidential system can only be experienced fully in the US in its real sense:

a) The USA has a (sui generis) system of governance that has no similar to it in any other country in the world. The tradition of democracy in the United States is very strong. The democratic way of thinking and the democratic culture is so embedded that it is accepted by the people with tolerance.

b) The two parties (the Democrats and the Republicans) that hold the political life of the country are so similar to each other. They also have no party discipline. A Democratic senator can support a Republican one on a certain subject even if their general views are completely in contradiction to each other. This is seen as very natural. The Democrat party, in such case does not punish its own member for supporting the Republican.

c) The federal system works quite successfully and this federal structure has the ability to check the power of the president.
d) The High Court has a great role to play in the American Democracy.

e) The Americans deeply respect their democracy. They show a huge opposition to any criticism towards their constitution.

It is not possible to understand the presidential system in the US without having a good understanding of the position of the President. Both regimes are democratic and modern regimes existing in today’s world. However, I would like to state here that the parliamentary system is much more favored in the world today and it is much more widely used. While presidential systems can only be implemented in the US, the parliamentary or the semi-presidential systems can find wider areas of implementation worldwide. Parliamentary systems, as a system of governance, are overwhelmingly accepted and used in EU countries. Today, many political scientists in the US (Lloyd Cutler for instance) have analyzed the shortcomings of the American presidential system and have suggested majority parliamentary regimes instead. Presidential systems were tried in the Latin American countries and they resulted in failure. These countries could not follow the discipline of “separation of powers” which is the essence of presidential systems. The presidents that came into power through elections surrounded themselves with extraordinary powers (such as the power to abolish the parliament) in search of gaining dominance vis-à-vis the legislative body. For these purposes, they headed towards becoming dictatorships and caused crises and conflicts to appear between them and the legislative bodies. Since there were no constitutional provisions that helped decide who would have the last word in such conditions of conflict and crisis, the army intervened. The army, while acting as a mediator had toppled the governments and gained control. In the US, to prevent his concept, the army is under the control of civil authority. This minimizes the possibility of a coup d'état to minimum or zero. Today, in countries that have presidential systems, the democratic order cannot sustain the country and political crises are severe. In Mexico, the people are on street following every presidential election and the polarized sides protest against each other for weeks. In Philippines there are frequent rumors of military coup d'état. In Venezuela there are attempts for arming the president with extraordinary powers. In Georgia, where the presidential system has been tried, the opposition has unified under a single roof and they are promising the people that in case they come to power the first thing they will do is abolish this system.

B) IS THERE ANY POSSIBLITY THAT THE PRESIDENTIAL SYSTEM CAN BE USED FOR THE TRNC?

Before analyzing the subject in detail, we must find an answer for the question: is there a legal possibility to allow us to make a regime change and for a complete change of our governmental system? To find an answer to this, we must refer to our Constitution because the legal text that legally regulates the parliamentary system (governmental regime) we are using is this very constitution of 1985. In the opening passage of the Constitution, the “Turkish Cypriot People” are referred to as the unquestionable and the unconditional owner of the sovereignty of the State. In the same section again, it is stated that it was desired to constitute a democratic, secular state.
based the rule of law and a “multiparty system.” In another related article of the constitution, that is Article 3 Section 1, it is stated “the sovereignty unquestionably and unconditionally lies in the hands of the people who are TRNC citizens.” Article 3 of our constitution is an unchangeable and unquestionable one. As can be seen, our constitution states both with its essence and its spirit that the sovereignty cannot be separated from the people under any condition. In addition, the constitution accepts a regime that has a multiparty essence. This acceptance of a regime characterized by a multiparty system has found place in our constitution. Now, if we analyze the constitution within this framework, the only source of state governance is the people. The legislative body that was elected by the people now is sovereign, and the government (executive) was born of this legislation. In other words, under no condition can this people-based sovereignty be altered. There is constitutional logic based on the multiparty political system and the overall sovereignty of the people. And by taking into account Article 9 of the constitution this cannot be altered. Our current constitutional system is a “parliamentary system” and all power is accumulated in the legislative body that was born of the sovereignty of the people itself. Even the executive is born of this body and it is not independent of it. Within this legal framework, any attempt towards altering the multiparty-based democratic system would be an open breach of the constitution. In a presidential system, the legislative and executive branches are brought to power by separate elections, the executive is a single person and is not accountable to the legislative body (because the executive is not born of the legislative). Shortly, the sovereignty of the people is divided into two (legislative-executive). However, our own constitution has unquestionably and unconditionally given the sovereignty to its own people and bound the execution of this system to a parliamentary regime. If we want to bring the presidential system to the TRNC as a government regime, we will need to abolish the constitution completely and to devise a brand-new constitution. Article 9 constitutes an obstacle to such alterations of the constitution (bringing a presidential system). Furthermore, to accept a multiparty-based political system is completely contradictory to the presidential system. In the US, where the genuine presidential system exists there is no multi-party system but a two-party one. Even if we assume for a moment that there are no constitutional obstacles to bring a presidential system to the TRNC, to what extent will it be possible to implement it practically, given the democratic, political and the physical situation of the country?

A. We cannot really say that the constitutional monitoring bodies function properly in our country. It is obvious that the monitoring over the executive is really weak. The most important indicators of this situation are the illegals experienced in many governmental institutions and the late detection of these illegals. If we do bring this presidential system to our country, who is going to check an executive body that will be in a single person and unaccountable to the legislative body? In parliamentary systems, at least the opposition within the legislative body has serious competences of checking and monitoring the executive body. The lack of this monitoring will create an
environment of indifference and relentlessness, which will pave the way to increased number of illegalities.

B. We cannot think of our political life without the political parties. Their activities, however, will be minimized in a presidential system. In the current regime, the political parties come to the people with their political agendas (with things such as their party programs and election campaign leaflets) and they are competing for power. In a presidential system, such competition will be among persons. Since the power will be in a single hand, the importance of these personalities and their ideas will be gaining importance and the ideas of the political parties will no more be discussed. Our democracy will be weakened in the same proportion of the weakening of the political parties.

C. Since the president would be the executive body, the right to select all the ministers and bureaucrats would be in the hands of a single person. Favoritism will replace partisanship. The President will designate people for the bureaucratic apparatus among his supporters, his favorites, his loyalists and probably among some profit-seekers (in the selection of ministers etc.). The bureaucracy will be full of such people; in other words full of the loyalists of the President. Qualified politicians can still come to power in the current context. However this will also be terminated with the presidential system.

D. In a presidential system, the President (executive) and the Parliament would be elected separately. In case that they both belong to the same party and support the same ideology, they could work in harmony and without any problems. However in case they have different points of view, the probabilities of the occurrence of political crises and chaos will be high. For instance if the TRNC president is from the Republican Turkish Party (CTP) and the parliamentary majority belongs to the National Unity Party (UBP), it is obvious that there will be differences of opinions and that conflicts will arise. These different views will surely create crises and chaos. Then, whatever the Parliament does, it will not be able to replace the President that holds the government in his hand, and will have no effects on the ministers. In this case, the President will veto the bills that come from the parliament with which he is already in conflict. This will make the Parliament dysfunctional. Actually in this kind of situation, the Parliament creates a new government and overcomes the problem or early elections could be done. A presidential system does not provide such chances for overcoming such crises.

E. TRNC is a microstate. It is comparably much easier to influence people’s minds and reflect this at the ballot box. Presidential candidates can prepare for the election with a strong budget (through ads, establishing political cadres, promotion campaigns and financial aid for the public) and get elected whether he has qualifications for holding such a position or not. With the election of such person, both the prestige of the country and the democracy will be hurt.

F. In Presidential systems the person that gets the 51 per cent of the votes wins everything and becomes the President. If the level of participation to the
election is 60 per cent and if he gets elected by 51 per cent this actually means that he came to power with the support of only 31 per cent of the voters. In other words, a person, unwanted by 69 percent of the people could be elected as the President of TRNC. This would be an election that conflicts with democracy. In our current system, no such shortcomings are experienced. And usually those who get 50 to 65 percent of the votes represent the executive body.

G. The democratic culture in the TRNC has not yet reached the ideal state. We are currently living in a system in which partisanship is given importance and bright brains are pushed behind. We could not embrace the democracy yet and we could not establish a democratic culture similar to the US one.

H. In our country, there is a multiparty political system. The governing and opposition parties frequently debate in a strong manner and sometimes argue like they are fighting. Our parties have completely conflicting ideas and ideologies. That is to say, we do not have a US-type two-party regime and or such similar parties. From this angle, it would be very hard for the legislative and executive to perform their duties in harmony or without problems. They would only work in properly only if both bodies are held by the same party.

I. The level of respect for the TRNC constitution among the citizens is comparatively less than the respect Americans have for their constitution. Even a little attack on the US constitution is highly protested by the Americans. On the other hand in our country, the constitution gets breached, every kind of attack to the constitution can be seen and nobody shows any kind of opposition o these!

J. Our high court does not efficiently work as the American Court when democracy is concerned.

In the light of the above discussion, it is not possible to say that the replacement of our current parliamentary system with a presidential one would make things work better. Let’s keep what we have in our hands for we can lose what we already have while we are looking for something better!
Universal Service in Telecommunication

by Associate Prof. Hüseyin ALTAŞ*

The 20th century has been the century of the information technology industry all around the world. Services and the variety of products have rapidly increased in the field of telecommunication. However, inequalities occurred with the terms such as “digital division” in the access of information and communication technologies. According to the “Human Development Report” prepared in 1999 within the framework of the United Nations Development Programme (UNDP), current access to information technologies has an important role in economic development, education, health and public administration. On the other hand, this access increases inequality, dividing the educated from the illiterate, the rich from the poor, the urban population from the rural and the English-speaking populace from people who do not know the language.

As a conclusion, some telecommunication services should use the term “universal service” to prevent social gaps in society.

Universal service means that every citizen of a country can easily access the telecommunication services without any discrimination such as language, religion, ethnicity and geographical location or current economic situation. We can include universal services under the heading of public services because of their features; therefore, nobody can be deprived of these services because of economic, social or geographic reasons. One of the most essential elements of being an information society is the concept of “universal service.” Universal service is a dynamic and a comprehensive concept. The aim of this concept is that all of the citizens of a country shall benefit from telecommunication services without any social and economical barriers. Universal service is the essential feature of telecommunication policy as well.

Some concepts such as “general economic benefit service,” “minimum service,” and “universal service” have been recently used instead of public service in European Union Law with the liberalization of

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1 Sayısal Uçurum (Numerical Gap); Dünya ve Türkiye’de Durum (http://www.tubitak.gov.tr)
2 Sayısal Uçurum; p. 9.
3 KARAKURT Alper (Competition Expert); Evrensel Hizmet Yükümlülüğü (Universal Service Obligation), p. 2.
5 KARAKURT; p. 10.
In other words, universal service is the new name for public service with its new context and its new expression in European telecommunication. When we compare universal services with public services, universal services are more limited than public services. However, universal services include minimum services for modern humanity and additional subservices. In other words, universal services mean providing a group of minimum services to all users, at an affordable price according to the economic situation of a country, without distorting competition.

An agreement was signed between the member countries of the World Trade Organization for the Basic Services of Telecommunication in 1997 (Basic Telecommunications Agreement). A framework regarding universal service has been formed after several studies related to this agreement. According to this framework, each member country has the right to define its choice of type of universal service obligation. These obligations shall not be implemented against the rules of competition, shall be objective for transparency and competition, and shall not burden the predefined universal services for countries. Today, all of the telecommunication services are in competition; for this reason the definition, principles of universal services and sustainability and development of those principles of the concept of universal service shall be guaranteed. The objective accomplished with the approach of the European Parliament and European Council “to guarantee universal service” is underlined in the fundamental principles. There shall be elements of universal service “to provide the access of all users to a predefined quality service at an affordable price regardless of their geographical location.” In other words, universal services shall have predefined quality, geographical location shall not be regarded and universal services shall be available to all users at an affordable price.

A guideline was published for the National Regulatory Authorities in the annex of the report by the European Council entitled “Qualification Criteria
for the National Program in Costing and Funding of Universal Services” in 1996.\(^\text{13}\) Three fundamental elements of universal service for national programs were emphasized. The first one is to calculate the net cost of universal service; the second one is who shall be the contributors for the funding and determination of the costs to share and the last one is the funding mechanisms for the obligation for universal service.\(^\text{14}\) These principles were defined in detail in the Universal Service Directive published by the European Community in 2002. As a conclusion, the concept of universal service shall be essential as the outcome of the competition of all telecommunication services and with the privatization of state enterprises, government loses its determining role, because private sector entrepreneurs usually do not make any investments for nonprofit purposes. If we would like to catch up to the information and technology society, we should present some minimum services to our people. So to speak, this is the binding duty of the government.

**Universal Service in Turkey**

As mentioned above, with the developments in the world, Turkey has also defined universal service in Turkey under the name of “minimum service” in Law No. 406. According to Law No. 406, minimum service means, “...minimum universal services such as fixed telephone services, public payphone services, and telephone directory services are to be provided in the printed or electronic media and emergency calls services which are accessible to anyone within the territory of Republic of Turkey regardless of the geographical position, and which are to be offered at a predefined level of quality and at an affordable cost. Unfortunately, the definition of minimum service has been taken out of Law No. 406 with Article No. 11 of Law 5369, dated 16 June 2005.

This provision for minimum service had limited the scope of universal service because the services had been provided in a monopolist mentality during that period. For this reason, an appropriate study about the significance of universal services has been carried out by the Ministry of Transport and submitted to the Prime Ministry; finally a new law was enacted. According to this law, we can say that the formation and the functions of universal service are compatible with legal principles.

According to Article 1 of Law No. 5369 on the Provision of Universal Service and Amendments to Certain Laws about Universal Service, the purpose of this law is to govern the rules and procedures for the implementation of services.\(^\text{15}\) Articles 2 and 3 are about the principles of universal services.\(^\text{16,17}\) Article 4 underlines that, operators, which have a

\(^{13}\) http://www.fcc.gov/web/tapd/universal_service/.


\(^{15}\) Article 1- The purpose of this law is to lay down the rules and procedures to govern the provision and implementation, and fulfillment in the electronic communications sector, of the universal service which has the qualities of a public service, but is financially challenging for operators to provide.

\(^{16}\) Article 2- For the purpose of this law: The Ministry means the Ministry of Transport, The Authority means: the telecommunication authority. Electronic communications’ means
general authorization, concession and authorization agreement or a license in the telecommunication sector, are incumbent universal service providers. The scope of universal service has been expressed. According to this explanation universal services are fixed telephone services, public payphone services, telephone directory services (printed or electronic media), emergency calls services, basic internet services, passenger transportation services for settlements to which maritime lines is the single option of access as well as communications services regarding distress and safety at sea.

The scope of universal service becomes dynamic and may be redefined according to the social, cultural, economic and technological conditions of the country under this article.

Article 6 is about the revenues for universal service. The revenues for universal service are as follows:

a) The Authority shall declare to the Ministry 2% of the authorization and concession agreement, as well as the license and general authorization amount, by the end of the month following the date of authorization,

b) Operators other than GSM operators, and Türk Telekom, shall declare to the Ministry 1% of their annual net sales proceeds by the end of April of the following year,

c) GSM operators shall declare to the Ministry 10% of the share they are to pay to the Treasury within the month of payment,
d) The Authority shall declare to the Ministry 20% of the administrative penalties it has applied under the Wireless Law No. 2813, dated 5 April 1983, and the Telegram and Telephone Law No. 406, dated 4 February 1924, by the end of the month following the month of collection,

e) The Authority shall declare to the Ministry 20% of the amount remaining after all expenditure is met at the end of the fiscal year by the end of January every year.

Article 7 defines the net cost of universal service. The net cost of universal service shall be calculated on the basis of the difference between the net cost when the incumbent operator does not provide services within the scope of universal services and when it provides such service as an incumbent universal service provider. However, the calculation of the net cost of the universal service shall also take into consideration the benefits to be obtained by operators due to their incumbency to provide universal service. This calculation suggests that the additional cost load brought about by the obligation to universal service shall be based on net costs.

Article 8 and 9 are about universal services to be implemented by an organization of Ministry of Transport. However, in Article 10, Türk Telekom is responsible for auditing the quality and standards of universal service. Generally, national regulatory authorities are responsible for the implementation of universal service in Europe. However, the government is responsible for the universal services in some countries as well. With the abovementioned law, universal telecommunication services shall be implemented by a ministry but audited by the national regulatory authority. In our opinion, this is the best system for universal services. This system is

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18 Article 8- The following item (l) shall be incorporated in Article 2 of the Law No. 3348 on the Organization and Duties of the Ministry of Transport dated 9.4.1987: l) Formulating universal service policies under the applicable laws with due consideration to the country’s social, cultural, economic and technologic circumstances; taking measures aimed at implementing the general policy of the Government; laying down the rules to ensure the conduct of the universal service; monitoring their implementation; and approving the calculations related to their net cost.

Article 9- Following items shall be annexed to the Law No. 3348 to follow item (g) of Article 13 and the former item (h) shall be changed as item (o).

h) Setting out, and monitoring the implementation of, rules to ensure the conduct of universal service to the legislative provisions pertinent to the provision of the universal service; and ensuring that operators’ net costs are met, i) Selecting the incumbent universal service provider on the regional and national level from among operators requesting to provide services coming under the scope of the universal service, j) Making payments to incumbent universal service providers, k) Monitoring and auditing the incumbent operator to find the net cost of the universal service and whether it is within the set out rules and procedures or causing the same to be supervised by independent auditors, in which case expenses shall be met through universal service revenues, k) Monitoring and auditing the incumbent operator to find the net cost of the universal service and whether it is within the set out rules and procedures or causing the same to be supervised by independent auditors, in which case expenses shall be met through universal service revenues, l) Monitoring and auditing the incumbent operator to find the net cost of the universal service and whether it is within the set out rules and procedures or causing the same to be supervised by independent auditors, in which case expenses shall be met through universal service revenues, m) Designating temporary incumbent universal service providers, where required, in order that services are made available to high-cost areas including places distant to the center and rural areas under the terms and conditions to be established, n) Prescribing the method to be used for the calculation of net costs of operators incumbent to provide the universal service.
appropriate for the universal service directives of the European Community and compatible with the general board as well where the general board means national regulatory authorities, which are regulation authorities but not an executive authority. As a conclusion, the troubles that may occur after the liberalization and privatization in the telecommunication sector for services shall be prevented with this law.

CONCLUSION

Universal service is a kind of public service with its social and economic position for us. However; the implementation of regulation of universal services by the government in accordance with the predefined policies and principles is an essential development. Universal services shall be accessible to anyone within the territory of the country regardless of the geographical location and region, and these services shall be offered at reasonable prices affordable to anybody, standards and the quality of services shall be accurate and permanent. All these conditions shall be guaranteed.
Turkey`s Law On the Utilization of Renewable Energy Sources for the Purpose of Generating Energy

by Ayşegül Özdemir

The law on the Utilization of Renewable Energy Sources (RES) for the purpose of generating energy, (Law No. 5346 of 10/05/05) is the first Renewable Energy Law of Turkey which was enacted in the year 2005 by the Turkish National Parliament.

Considering environmental issues and achieving the goal of sustainable development, renewable energy is generally accepted as a key energy source for the future. The utilization of RES will bring efficient and effective solutions, by lessening the dependence on fossil fuels and importing energy from other countries.

Turkey has got considerable amounts of RES, but it is still an energy importing country, with more than half of its requirement being imported from neighbouring countries. ¹

For the last few years, Turkey’s economy has significantly developed and its population has rapidly grown, but at the same time its environmental concerns have increased. As a result, Turkey’s need for generating more electricity from RES has become vitally important. If the utilization from these RES is improved, it can develop to be a significant source of energy for the country.

Turkey has a wide range of RES and they provided approximately 12% of total primary energy supply in 2003, the second largest source of energy after coal in the country. The primary RES in Turkey are: solar, wind, geothermal, hydro and biomass.

Solar energy: The amount of sunlight that Turkey receives annually is equivalent to roughly 11,000 times the amount of electricity generated in Turkey in 1996.² As the statistics show, solar energy is being used extensively, especially for the purpose of generating heat energy in


households. This sort of energy could be exploited more, as the country’s total solar energy potential is 35 Mtoe per year and solar energy production is expected to reach 602 kilo tonnes of oil equivalent in 2010 and 1119 Ktoe in 2020.3

Wind energy: The west and south coast part of Turkey have significant potential for wind energy development. Turkey’s technical wind energy potential is 88.00 JMW. Wind energy potential is 10.600MW4 40 new wind farm projects (totalling app. 1400 MW) have already obtained licences and 751 licensee are still awaiting approval.5

Geothermal energy: Turkey is located in the Mediterranean sector of the Alpine- Himalayan Tectonic Belt and is one of the top seven countries in the world for geothermal energy resources.6 It is equivalent to one eighth of the world’s total geothermal potential. Yet, the use of its potential is not higher than %5.

For the last 40 years, direct use of geothermal resources has increased relatively, from the space heating of single buildings to district heating, greenhouse heating and industrial usage.

By 2010, the aim is to increase geothermal energy by ten times. Due to this considerable potential, geothermal energy is also covered with a special law other than the RES law.

Hydropower: Turkey is exploiting 35% of its hydro potential, and the 2010 national development plan goal is to use all of this potential.

Biomass: Fuel wood and animal wastes are the main biomass fuels in many rural areas in Turkey. Despite a drop in its usage since the 1980s, it still holds an important share in energy consumption. By 2030, the aim is to increase its current potential by seven times.

The utilization of renewable energy resources in Turkey as an alternative to fossil fuels has been promoted and encouraged particularly over the last few years.7 There are two regulations that layout rules in this area: Electricity Market Law8 (EML); and the Electricity Market Licence Regulation (Licensing Regulation). EML, No 4628, entered into force in 2001 and

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4 Ibid.
5 Ibid.
7 Öztürk, Mehtap Yıldırım & Ergün, Çağdaş Evrim, “The Turkish renewable Energy Law: Still Hungry” Çakmak Law Firm
8 Law No. 4628, Official gazete 3 March 2001, 24335
empress the Energy Market Regulatory Authority (EMRA) to take the necessary measures to promote the utilization of renewable energy resources. Furthermore, the Licensing Regulation sets forth a number of provisions for promoting the utilization of renewable energy resources.

The Licensing Regulation specifies incentives for RES. Article 12/4 of the Regulation states that legal entities applying to obtain a licence for the generation of electricity based on RES are required to pay only 1% of the total licensing fee and are exempt from annual license fees for the first eight years following the facility completion date, as inserted in the respective licenses. Legal entities engaged in generation activities at facilities based on RES can purchase electricity from private sector wholesale companies on the condition that they do not exceed the annual average generation amounts which are indicated in their Licenses for that calendar year.

The regulation presents an opportunity for auto-producers who purchase electricity from RES. They may purchase electricity from private sector wholesale companies under certain conditions, but other auto-producers (who do not buy RES electricity) are not warranted to make such purchases, as stated in article 17 of the regulation.

Furthermore, in article 38, it provides that the Turkish Electricity Transmission Company (TEIAS) and/or the legal entities holding a distribution license shall assign priority to the system connection of generation facilities based on RES.

Turkey’s EU Membership process has played a significant role in the development of the law. In the previous National Program that has been prepared and submitted by the Turkish Government, this legislation which aims to improve the utilization of RES was among the short term aims.

**AIM AND SCOPE OF THE LAW**

As stated in Article 1 of the regulation, the aim of the law is to assure the expansive utilization of RES in a safe, economic and qualified manner, to increase the diversification of energy resources, reduce greenhouse gas emissions, assess waste products, protect the environment and to develop the related manufacturing sector to realize these objectives.

The law includes wind, solar, geothermal, biomass, biogas, wave, stream, tidal energy resources, canal and river type hydroelectric generating facilities and hydroelectric generation facilities with a reservoir area of less than fifteen square kilometers.

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10 Gaupp, Dirk “Turkey’s New Law on Renewable Energy Sources within the Context of the Accession negotiations with the EU”, vol.08, no.4, pp. 413-416
13 Gaupp, Dirk “Turkey’s New Law on Renewable Energy Sources within the Context of the Accession negotiations with the EU”, vol.08, no.4, pp. 413-416
Geothermal energy is also covered in a separate law named ‘Geothermal Resources and Natural Mineral Waters’, which came into force on 11/12/2007. The regulation outlines the procedure, elements and sanctions for: issuing operation Licenses; transferring these licenses; auditing the actions; resource and the environment; revoking the License; protecting the resources; leaving the area of the License in relation to the geothermal resources and natural mineral water that are specified or will be specified; and gas, which originates from geothermal sources.¹⁴

**Renewable Energy Sources Certificate**

EMRA is authorized to grant a RES certificate and with this certificate legal entities are able to take advantage from the incentives under the law. EMRA is also the entitled authority to issue the regulation which includes the procedures and principles for issuing this certificate called: **RES Certificate Regulation** 4/10/2005 O.G. No. 25956. It is stated in the regulation that the certificate lasts for one year.

**INCENTIVES AND SANCTIONS**

A) Incentives

Listed below are the incentives provided by the law for entities generating electrical energy from RES:

1) No housing plans can be made in public areas or in lands owned by the Treasury that will adversely effect the utilization and productivity of RES.

2) The law allows EMRA to purchase the price for electrical energy generated from RES, and to set the price at the previous year’s average wholesale electricity price. This price can be increased by %20 at the beginning of each year by the Council of Ministers. EMRA is authorized to determine the prices until the year 2011, until the privatization of the sector.

3) Retail sale license holders must purchase electrical energy from RES certified generators which have been in use for less than 10 years. Every year, each retail license sale holder, allowed to purchase RES Certificated electricity energy, according to the ratio of the amount of electricity energy that was sold by the retail licence sale holder’s entity in the previous year to the whole amount of electricity energy that has been sold in the country that year.

Article 6 of the Law was amended on 18 April 2007 and it determines that the wholesale retail price must be between 5.0-5.5 Euros. Last year’s wholesale electrical energy sale price was determined by EMRA and was 9.67 Ykr/Kwh, which is approximately 5 Euros. In addition, the article states a generator can sell its electrical energy for a higher price if there is market demand. As a result of the current supply gap in Turkey, recently all

generators have been selling their electrical energy to the Market Financial Reconciliation Center, which offers the highest price.

4) The second amendment made last year was on Article 8 which aims to encourage RES development by lowering the deduction rate on fees from %50 to %85, in cases where parties want to sell, lease, gain rights of access or usufruct rights to forests and lands under private ownership of the Treasury or under the control of the State, in order to generate electricity from RES.

5) Article 7 of the law states that: (i) investment in energy generation facilities; (ii) procurement of domestically manufactured electromechanical systems; (iii) investment in research, development and manufacturing for electricity generation systems using solar cells and concentrated collectors; and (iv) investment in research and development facilities for the generation of electrical energy of fuels from biomass resources, can benefit from incentives determined by the Council of Ministers.\(^{15}\)

6) In areas of adequate geothermal sources, where the allocation units in that area is in the administration of a municipality or governorship, geothermal and solar thermal energy resources must be used primarily for heat energy.

7) Hydropower resources with a maximum installed capacity of 1,000kW that are used to satisfy the needs of an isolated and grid supported electricity generation plant are not required to pay service charges for these projects. This is provided that the final design, planning, master planning, preliminary surveying and first auditing were prepared by either State Hydraulic Works (DSI) or the Electrical Power Resources Survey and Development Administration (EIE).

B) Sanctions

EMRA are able to impose up to 250,000 YTL in fines (approximately US 200,000) if the requirements of the Law are not abided by the market players. The legal entity in breach of the law is also required to rectify this within sixty days.\(^{16}\) In case of a repeat violation, the law also allows EMRA to impose heavier sanctions, including cancellation of their RES License.

CRITICISM OF THE LAW

Surprisingly, no tax advantages are granted by the law to the entities generating energy from RES. This is an important issue, as it will take some time until RES will be economically competitive with conventional energy resources.\(^{17}\)

The law limits the RES types and is not flexible to new technological developments, which in this area tend to develop very quickly. Instead of enumerating the types of RES, the law could set minimum characteristics of

\(^{15}\) Turkey: Renewable Energy\(^{16}\), Güner Law Office.

\(^{16}\) Ibid.

\(^{17}\) Gaupp, Dirk “Turkey’s New Law on Renewable Energy Sources within the Context of the Accession negotiations with the EU”, vol.08, no.4, pp. 413-416
RES, or even authorize EMRA to add other types of RES to the scope of the law if it meets certain criteria.  

The scope of the law and the licensing regulation do not match in certain areas. First of all, stream energy (as in rivers) is one of the RES listed in the law, whereas the Licensing Regulation does not cover this type. In addition, the law accepts all river and arc type hydroelectric generation facilities, whereas the regulation limits them to those with an installed power of 50 megawatts (only smaller facilities are considered RES). The Licensing Regulation also stipulates that hydroelectric generation facilities with a reservoir volume less than a 100 million cubic meters or with a reservoir area less than 15 square kilometers are considered to be RES. In the law, for hydroelectric generation facilities to be considered RES they only have to have a reservoir area of less than 15 square kilometers. A single definition of RES should be produced by EMRA to avoid future conflicts.

There are two different authorities who are entitled to administrate and supervise the Law. They are EMRA and the Ministry of Energy and Natural Resources (MENR). EMRA is the only entitled authority to grant RES Certificates and to apply the sanctions which are pledged in the law. On the other hand, the authority to prepare projections for the amount of electrical energy to be generated by RER Certificate holders is granted to MENR. MENR is also authorized to coordinate the implementation and supervision of the general principles and requirements provided by the law, as well as the planning of necessary measures. Finally, MENR was also responsible for issuing the geothermal energy resources regulation, whereas EMRA is the entitled authority to issue RES Certificate regulation. EMRA is a specified independent authority in the energy sector, and it would lessen the problems and forecoming conflicts between two public authorities if it would become the only empowered authority.

A lack of independence for EMRA as an economic regulator. EMRA has experienced intrusions from TEDAS, the privatization authority and MENR on its role in tariff-setting and other regulatory matters.

CONCLUSION

Turkey’s geographic conditions mean that it has great potential for RES. Nonetheless, it has a growing need for energy. Generating electricity from RES will reduce its dependence on fossil fuels and importing energy from abroad. In addition, it would also create job opportunities, protect the environment (by reducing carbon emissions) and strengthen supply security.

Eventhough companies will face some obstacles because of the Turkish legislation, as mentioned above, they will also have the advantages of being

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18 Ibid.
pioneers in this rapidly growing sector. The law has already started to attract foreign direct investors, including in partnership with local companies that have already obtained generation licences. The wind sector is a very good example, as EMRA received 751 licence applications up until last year. It is therefore good news that for RES in Turkey, a highly competitive market is emerging.

The law is a first step in the renewable energy area. In the year 2007 two amendments were made on the law in order to fall into line with investors’ wishes. In future, it is expected that there would be more amendments to the law to make it more compatible with EU legislation.
Jurisdiction of Sovereign States and International Commercial Arbitration: A Bound Relationship

by Murat Sümer∗

Historically, judgment has private roots, rather than public. Before States took over control of the entire judgment process, it was a private issue. Parties, which had a dispute, apply to a local authority for a “fair” solution. This authority could have been a chief of the clan (in early ages) or a senator (in Roman time) or an imam (or kadi) (in Islamic law) and so on. The picture was more or less the same all around the world; different communities (racial or religious) had different laws and different types of courts in the same country in order to resolve their own disputes. Until the 18th century, courts of the States were only one of these different types of authority for judgment (but on a nationwide and supreme basis compared with the others) and especially were used for disputes that arose between separate communities.

This view fell into disfavor after the appearance of the modern sovereign states in the 18th century. Modern sovereign states were extremely keen to unify and control their judicial system. That was considered to be an essential part of being a “country.” After judgment began to be perceived as an entirely public interest, there was not enough room for alternative dispute resolutions (in any form rather than litigation) in the national law systems.

However, arbitration survived in the commercial field. Because of the needs of modern trade, the importance of arbitration increased dramatically in the 20th century. This trend created the UNCITRAL Arbitration Rules in 1976 (main arbitration institutions’ rules based on that) and the Model Law on International Commercial Arbitration in 1985 (Model Law).

Some could say that arbitration means an exception to the jurisdiction of sovereign state courts, and it was created by sovereign states on their own. On the other hand, sovereign states have invented new solutions through their courts or by legislatures to keep that unwanted but necessary private method of dispute resolution. Sovereign states have developed a zone (with delimitations) for arbitration in their systems of law but also continue to supervise and support it within that zone.

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How far can sovereign states tolerate international commercial arbitration as exclusion to the jurisdiction of their courts?

There are three necessary elements to one of the most accepted definitions for sovereign states. These are territory (land), people (nation) and recognition by other sovereign states. It is a supreme authority over a geographic region and group of people.¹ Therefore, a sovereign state’s interests in its own territory could be easily called its “vested interests.” Otherwise discussing whether that is a vested interest or not, means discussing whether that state is sovereign or not. Like all other authorities, states are extremely interested in what occurs within their lands.

Being a supreme authority within a certain territory also means being the only legislator for this territory. However, without being a practitioner, this theoretical uniqueness would not be enough to fully cover the meaning of being a sovereign state. In this concept, exclusivity of jurisdiction is emphasized as a key element of sovereignty. Therefore it is very understandable why states cannot tolerate any attempt that brings an exception to the jurisdiction of their courts. “Parties cannot by contract agree to oust [except] the jurisdiction of the courts to deal with their rights under the contract…”²

Parties, in a dispute, may to opt for arbitration as a method to resolve their problem without applying to national courts. This is a flexible, cheaper and, most importantly, a confidential method.³ That means arbitration is a way to escape from state authority.

Historically, and as a matter of strict legal theory, the court’s jurisdiction cannot be excluded by private agreement. However, the law always follows real life needs and organizes them (through a very slow process), in light of the fact that there is no possibility to stick with that legal theory at the present. In commerce, people need fast, cheap and confidential methods to resolve their disputes. This need became a necessity especially after the industrial revolution. People start to build bigger ships, new railways and factories using mass production techniques. The amount of the capital involved was huge for this engineering madness, which was not possible to finance like good old-fashioned family businesses. That necessity created huge trans-national companies and they become the main actors in commercial life. These new actors start to cause far more complicated disputes for courts than ever. Tribunal processes become more complicated, long and expensive. Consequently, the need for alternative dispute resolution becomes vital in order for that new type of economy to continue. As the closest Western country to the East and the closest Eastern country to the West,⁴ Turkey is in the very heart of that new commercial world.

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¹ Stanford Encyclopedia of Philosophy.
² Scot v. Avery and others, HL, 10 July 1856.
Under these circumstances, modern sovereign states may permit arbitration as an exception to the jurisdiction of their courts, but only with some very functional “safeguards” that they can be justified as necessary public interest.  

3- State safeguards in arbitration

Like living creatures, states also develop some defense systems against those who attack their existence and this existence certainly concerned with the jurisdiction of their courts. From that point of view, sovereign states have placed “limitations” and “restrictions” on the arbitral process as a defensive system in order to protect the jurisdiction of their courts. There are the limits to the powers of an arbitral tribunal, arbitrability and public policy; State courts intervene in the arbitral process to protect these interests.

The Limits to the Powers of the Arbitral Tribunal;

The arbitration process is not independent of national jurisdiction. States give an existence to arbitration, but this existence unbreakably depends on the law system. States create this dependence through legislation (with separate clauses in different statues, but mostly and recently with an independent Arbitration Act) and control with their courts. National courts have a supreme position over an arbitral tribunal.

When it comes to having or changing an arbitration act, the UNCITRAL Model Law on International Commercial Arbitration is the main source for that scope. Most states have adapted the Model Law in one way or another. The Turkish International Arbitration Law (TIAL), which was enacted on 21 June 2001 and came into force on 5 July 2001, has a hybrid structure on that respect by combining the Model Law and the Swiss International Arbitration Law.

Through legislation, sovereign states create a framework for arbitration in order to keep it under control. In Article 5 of the Model Law, “In matters governed by this Law, no court shall intervene except so provided in

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2 “An arbitral tribunal, unlike a national court, drives its power, authority and jurisdiction from an arbitration agreement (or an arbitration clause in a contract) between parties to a contract. However, arbitral proceedings, subject to the relevant national law, are subjected to judicial supervision and control. A national court also plays a supportive role in making the arbitral adjudication more effective. It, generally, directs back to the arbitration a party to a valid arbitration agreement who is not willing to arbitrate. It also gives effect to the arbitration agreement by staying local judicial proceedings. Finally, when the award is made a court converts the arbitral award into a judgment to enable the winning party to obtain its recognition and enforcement” Richard B. Lillich, and Charles N. Brower (eds). International Arbitration in the 21st Century: Towards ‘Judicialisation’ and Uniformity? (Transnational Publishers, New York, 1994).
4 Z. Akinci, supra note 4.
this Law,” 9 seems to create a limitation on national courts in matters of International Commercial Arbitration rather than other way around. This article has a strong “pro-arbitration” sense. However, another side of the coin is when the Model Law creates a free area for international commercial arbitration to function, it also draws limits too.

The powers of an arbitral tribunal are those conferred upon it by the parties themselves within the limits allowed by the applicable law (law governing the arbitration agreement and the law of the seat of the arbitration), together with any additional powers that may be conferred by operation of law. If legislatures keep those limits too tight, arbitral tribunals may have less power to operate effectively.

The powers that parties confer upon the arbitral tribunal, whether directly or indirectly, are limited by the relevant national law systems. These powers may be exercised by a national court. The reason for that is that an arbitral tribunal does not actual power (to order and enforce) over property and persons. Because the arbitral procedure is entirely private, it is not possible to extend it powers to third parties without court decisions.

This fact has its clear reflection in Article 6/II of the TIAL that states that “Arbitrators or arbitral tribunals have no authority to grant any preliminary injunction or sequestration which need to be conducted by an execution office or any other public authority; neither these cautions can have any affect on the third parties.”

In recognition of this fact, many systems of law supplement the powers of arbitral tribunals. This may be done by:

- giving powers directly to arbitral tribunals;
- authorizing national court to exercise powers on behalf of arbitral tribunals or the parties themselves; or
- a combination of these two methods.

It would not incorrect to say that Turkish law has a dual system in this matter. For instance in Article 9 of the TIAL, an arbitrator or tribunal has the direct power to decide the place of arbitration, if parties have not agreed on that point previously. According to the exigencies of the situation, the arbitrator or tribunal has full authority to decide to hold a hearing in a different place than where the parties have agreed on already. In Article 12-B “…An arbitrator or arbitral tribunal can require assistance from a civil court of first instance to determine evidence.”

Similarly, the English Arbitration Act sets out the powers of the national courts in relation to arbitral proceedings in Articles 42-45. This relationship, like the one in the TIAL, can be in two forms. First, English courts may issue

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9 Same rule, with exact words, has been placed in Article 3/II of the Turkish International Arbitration Law.
an order to support orders of the tribunal. 10 Secondly, courts may issue its own orders to assist the arbitral tribunal. 11

Court intervention promotes arbitration by supplying it with a much needed “control system” when enforcing arbitral agreements, appointing arbitrators, reviewing awards, and so forth. 12

In addition, the law governing the arbitration itself, lex arbitri, should be considered to see whether it supplements or restricts powers the parties have conferred, or purported to have conferred, on the arbitral tribunal. The 1996 English Arbitration Act provides a good example, in theory at least, of how arbitral tribunals and national courts can work together to make an arbitration regime effective. 13

Arbitrability and Public Policy;

This is the most common and most effective limitation on arbitration. In general, arbitration is limited to only commercial concerns. Present politics and economic positions see commercial activities, almost purely, as the subject matter of the private individuals. There is very small room for public and public interests in arbitration. Obviously this trend also affects national law systems too and they have broadly allowed arbitration in that field. 14 In Turkey, the scope of public interest, as a limitation on international arbitration, 15 has been reduced by legislation that changed two articles (Articles 128 and 155) in the Turkish Constitution on 13 September 1999. Before this amendment, investments in the forms of Built-Operate and Built-Operate-Transfer 16 (nearly all in energy sector) had been considered to be “public service concession agreements” by Turkish courts. 17

Dealing with “commercial” disputes is the main limitation on arbitration. The meaning of commercial is defined by States. 18 This gives a huge power to States to limit, through their wishes, the matter that arbitrable. There is no common definition of exactly the term “commercial” means; every State

10 “Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.” Art. 42-(1).
11 “Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.” Art. 44.
13 A. Redfern & M. Hunter, supra note 7.
17 Turkish Constitutional Court, 28.06.1995 date and 71/23 Decision No.
18 “...it will apply the Convention only to differences arising out of legal relationships, whether contacual or not, which are considered as commercial under the national law of the State making such declaritn.” New York Convention, Art.1.3.
creates their own definition compatible with their interests. Also there is a definition in an explanatory to Article 1(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter the “New York Convention”]. “The term “commercial” refers to matters arising from all relationships of a commercial nature, whether contractual or not.” However this is not binding even for states which sign that convention.

According to Swiss law, any alleged non-arbitrability of a controversy may be raised either as “lack of jurisdiction” or as “public policy.” 19 The authority or competence of the arbitral tribunal comes from the arbitration agreement (or an arbitration clause in a contract) between the parties. Therefore lack of a valid arbitration agreement means lack of jurisdiction. 20 The arbitral tribunal would not be possible without a valid arbitration agreement. The TIAL, in Article 4, requires a written form for this agreement, either as a separate arbitration agreement or an arbitration clause in a commercial contract.

The brief definition for arbitrability would be that the subject matter of the dispute is capable of settlement by arbitration. 21 Similarly in the English Arbitration Act “(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.” 22 In that article, public policy looks much wider a term than arbitrability, which is entirely true. Public policy (ordre public) is a concept of law where every country has its own view on the meaning.

Arbitrability creates a zone for arbitration and that zone is controlled by sovereign States through public policy. Like the TIAL (Article I para. IV; “This law has no jurisdiction over disputes on Turkish real property rights and subject matters that are beyond the power of the parties”). Some other arbitration acts 23 do not separate arbitrability from public policy. 24 This may understandable, because, at the end, arbitrability mainly is a reflection of the public interests in the arbitration (in the grounds of the dispute). “Arbitrability refers to the public policy limitations upon arbitration as a method of settling disputes.” 25 “Arbitrability, in essence, is a matter of national public policy.” 26

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20 Model Law, Art. 16.
21 New York Convention, Art. II.1.
22 1996 English Arbitration Act, Art.1(b)
23 “Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy…” New Zealand Arbitration Act of 1996.
24 “In many jurisdictions, a challenge to an award based on grounds of arbitrability will often be linked to the concept of public policy.” A. Redfern & M. Hunter, supra note 7.
26 P.M. Baron & S. Liniger, supra note 19.
However these two terms are separated in Article V(2) of the New York Convention: “(a) The subject matter of the differences not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.” This article gives a different basis for those two terms. Arbitrability is based on matter of the dispute while public policy is based on recognition and enforcement of the arbitration agreement or award. The reason for that is in an international convention (the New York Convention) and in that field, things are not as clear as they are on a national basis. The importance of this distinction becomes clearer and more necessary when an arbitration award crosses the border of the country for recognition and enforcement in another country. As already mentioned above, public policy is different in each country, similar to how they have different legal systems, and can also change from time to time within the same legal system. Therefore arbitrability and public policy cannot always necessarily have the same meaning. For example; a perfectly arbitrable and, or enforceable, subject of a dispute in one country, possibly cannot be arbitrable and, or enforceable, in another country.

To consider arbitrability and public policy separately could bring more separation to international commercial arbitration from national legal systems in the order to deal with these to issue separately. In that context more separation would mean more autonomy for arbitration.

National courts may take a “second look” at the arbitrability of a particular matter. US Supreme Court explains this statement in the Mitsubishi case, which reserved the right to have a potential judicial review in the award enforcement stage. This safeguard has been implemented differently by different countries. For example, the Swiss legal system has a very pro-arbitration perspective on that issue.

Through the definitions of arbitrability, states keep the jurisdiction of their courts in certain areas where there are strong public interests. This concept of non-arbitrability can be certain for that entire area. For example, criminal law is entirely and internationally accepted to be a non-arbitrable area because of its non-commercial nature. However this may not be so clear in some other areas of law. Antitrust and competition law would be a very good example. In this areas, some disputes may concern an arbitrable subject matter, where as some others may not. On the contrary, the entire field of maritime law is perfectly arbitrable, because of its totally commercial nature.


28 “Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the laws has been addressed” Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc, 473 US 614, 628 (1985).

29 An example for this: “Unlike patents or trade marks, copyright is an intellectual property right which exists independently of any national or international registration, and may be freely disposed of by parties. There is, therefore, generally no doubt that disputes relating to such
So what is public policy? Referring to Redfern & Hunter, most developed arbitral jurisdictions have similar conceptions of public policy. In Switzerland, public policy is considered to be the fundamental legal principles of the Swiss legal and economic system. Also in Germany, public policy means fundamental notions of justice, and there is a very similar definition in the US. All these criteria are very subjective and easily filled up through the wishes of sovereign States. Apparently there are two different systems that fill that very wide concept -- civil law and common law. In effect, “public policy” is a product of the common law, "discovered" case by case, while “ordre public” is an abstract notion which expresses the fundamental principles of a legal system and a society that is applied by interpretation (i.e. under the standard civil law process). Obviously, this means that the difference is primarily one of the structure and method of creation of the content of public policy. It is worth mentioning that Turkish Constitutional Court, in a decision (see footnote 17), has recognized the legislators’ sole right to define public policy through legislation by stating that the legislature has an absolute power to say what goes into that definition.

The common law process may bring flexibility to the subject of public policy, but may also uncertainty too. Common law courts, in comparison, could have more influence on arbitration than their civil law counterparts; they can use that advantage to protect or regain their jurisdiction. Civil law practice on that subject may look old-fashioned, but when its sets out what is public policy and what is not, that certainly will help create a more arbitration-friendly atmosphere. Therefore it is important to have a clear view of public policy.

Also there is a specific and unwritten restriction on arbitration arising out of state immunity (when one of the party is a state or its agencies). When a is State acting as a commercial individual, obviously their disputes, which arise out of commercial transactions with private individuals, can be settled by arbitration. However, it would not be wrong to say, in general, that states are not to keen to arbitrate on that commercial transaction instead of going to their national courts. In the national courts, the State can be “more equal” than private individuals by using (at least) their legislative power. States are using some instruments to exempt arbitration on that particular base. Every country has different practices on that issue; some countries have special

private rights may be referred to international arbitration.” A. Redfern & M. Hunter, supra note 7.

30 “Public policy is only violated if an award violates fundamental legal principles and is therefore incompatible with Swiss legal understanding.” P.M. Baron & S. Liniger, supra note 19.


33 TIAL, Article 1 para. V (related to the public service concession agreement).
requirements (e.g. permission for an arbitration agreement) and limitations but also there are some other perspectives – for example Swiss law has a very pro-arbitration provision on that issue.

At this stage, the solution looks quite clear: if states or their entities act in a commercial nature as a counterpart to private individuals, arbitration should be permitted without any specific restrictions or limitations. However, in practice, the issue is more difficult than this. Because even if states agree to arbitrate, the arbitration is going to go through their law system at the end and their courts will be supreme for all process (see footnote 33). For this reason, national court intervention in the arbitration process becomes more important to the concepts of “fair hearing” and “independence of the arbitral tribunal.”

**Intervention in the Arbitral Process by National Courts;**

Any decision given by an arbitral tribunal as to its jurisdiction is subject to control by the courts of law, which in this respect have the final word. According to Redfern & Hunter, in practice that involvement is likely to take place at one of three stages: in the beginning, during (interim awards) the arbitral process, or following the award. There is an exception to this for ICSID arbitration where all applications are awaiting a decision by national courts to become final. Whether as an interim or final, any arbitral award may be set aside by a “competent” court and it may be refused recognition or enforcement by under Article 16(3) of the Model.

As briefly mentioned above, the relationship between national courts and the arbitral process is not a garden of heaven, and certainly not a relationship of equal partnership. This relationship is (ideally) described as one of supervision and assistance, from the court to the arbitral process.

But what are the limits of this position? The answer is changing country by country and it depends on their legal systems’ perspectives on arbitration. In modern, arbitration-friendly legal systems, this involvement is very limited and formed by the Model Law (with some national differences). However these limitations can be very strict in some countries.

According to Redfern & Hunter, Article V of the Model Law may seem to be “a striking declaration of independence,” but actually the Model Law cannot exclude, and does not seek to exclude, national courts as the competent court. In Article VI, the Model Law refers to another authority beside courts “…courts or, where referred to therein, other authority competent to perform these functions;” this other authority could possibly be an arbitral institution.

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35 “If a party to the arbitration agreement is a state or enterprise or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or arbitrability of a dispute covered by the arbitration agreement.” Swiss Private International Law Act 1987, Art.177(2)
or chamber of commerce. That limitation for competent court assistance and supervision can be considered in two main groups.

The first group has been listed in Article VI. These are Articles 11, 13, 14, 16 and 34 that have been issued regarding, for example, the appointment of an arbitrator (Art. 11), jurisdiction of the arbitral tribunal (Art. 16) and setting aside of the arbitral award (Art. 34).

The second group are Articles 8, 9, 27, 35 and 36. Articles 8 and 9 are about recognition of the arbitration agreement. Article 27 says: “The court may execute the request within its competence and according to its rules on taking evidence.” Articles 35 and 36 are organized for the recognition and enforcement of arbitral awards.

Article V clearly excludes any form of intervention in international commercial arbitration, instead of these two groups.

Nonetheless, the involvement of national courts in the international arbitration process remains essential to its effectiveness.

CONCLUSION

International commercial arbitration is dependent on, and based on, relevant laws. National courts have a supreme position over the entire arbitral process. Safeguards are, at the very beginning, set out by states in order to protect the jurisdiction of their courts where it is necessary.

Growing international recognition of the commercial importance of arbitration has helped to modernize many different national laws that govern the process of international commercial arbitration in different parts of the world. This liberal approach has tended to minimize court interference. However this intervention is not necessarily disruptive of the arbitration process; it may equally be supportive. Finally we should bear in mind that arbitration is a private proceeding with public consequences.

From that point of view, on the path to more effective and more widely-used arbitration, limited intervention and power of national courts should not be the only way to take. But also, a court’s power to be used to support and cover the weaknesses of arbitration, should considered as another way to shape modern international commercial arbitration. To give national courts the opportunity to practice in that way, will allow national legislatures the opportunity to appropriately determine the content of proper safeguards.

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36 There is four possible relevant laws: first, governing law; second, lex arbitri; third, substantive law (law for commercial dispute) and finally law that governs recognition and enforcement of the arbitral award.

37 “The relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership... it is not a partnership of equals... National courts could exist without arbitration, but arbitration could not exist without national courts”. A Redfern & M. Hunter, supra n 7.

In conclusion, more public influence on international commercial arbitration does not necessarily bring harm to its spirit as a private method of dispute resolution, but may bring more strength to its functionality in terms of effectiveness.
Evaluation of the Principle of “Duty of Care” In Terms of the Responsibilities of the Board Members of Corporations

by Doğan Gözde ÖZGÖDEK∗

A Board of Directors (BD or Board), which is the management and representation body of a Corporation that is regulated by the Fourth Chapter of the Second Book of Turkish Commercial Code (TCC), is furnished with many authorizations and capabilities that could make any Corporation reputable or disreputable. Some of these authorities can be summarized as follows:

a) Representing the Corporation (Article 317)

b) Keeping the “Stockholders Plenary Committee” (PC) informed and preparing interim balance sheets, in case the financial position of the Company goes bad (Article 324)

c) Obligation of Accounting (Articles 325-326)

d) Preparation of Annual Activity Report (Article 327)

e) Employing and/or laying off workers (Article 328)

However, together with those listed above, the TCC reminds the members of a PC that they have a “duty of care” while they fulfill both these duties in particular and manage the Company in general. According to the dominant view in doctrine, “duty of care” is a principle that creates great rights and duties for the members of the PC.1

What does a “duty of care” mean for the BD? How is it interpreted in practice? What are the consequences?

The TCC creates the framework of the duty of care for a BD in the following basic provisions by applying the ascribed method.

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1 Pulaşlı, Şirketler Hukuku (Corporate Law), Third Print, Istanbul 2001; Poroy, Tekinalp, and Çanoğlu, Ortaklıklar ve Kooperatif Hukuku (Corporate and Cooperative Law), Seventh Print, Istanbul 1997.
Degree of care for board members

According to Article 320, regarding the attention and foresight that the members of the Board of Directors must present in company affairs, the decree of second subclause of Article 528 in the Code of Obligations is applied.

The second subclause of Article 528, having been placed under Ordinary Company, reads as follows.

Degree of Care

Article 528 – Every partner is obliged to participate in company affairs with all his/her efforts and care as routine. He/she is obliged to cover the loses, which he/she causes to other partners with his/her mistakes, without having the right of deducting from other gains he/she has obtained on behalf of the company in other company affairs.

The partner, who manages company affairs on a salaried basis, has to be responsible as an administrator

As can be understood from these two clauses, while managing company affairs, BD members should act with exactly the care of an administrator as far as possibly can be foreseen. While not having caused any losses to the Company while directing it, they are also required to administer all necessary decisions, actions and precautions best suited to the Company’s benefit.

Because of the presence of the wording “managing on salaried basis” in the referenced clause, it is also disputed in the doctrine whether Board members, who have a changing status as to whether or not they are paid or not, have different standards regarding a duty of care. How will the responsibility of a BD member be evaluated who is not paid in this aspect?

In fact, in order to be a Board member of a corporation according to the TCC, one must be a partner in the company (Article 312). Since every partner of a company obtains a certain amount of earnings or benefits from the company, including some share of the profit from the corporation or at least the possibility of those gains, I believe that it should not be disputable that the Board members have an exceptional character in terms of “collecting a salary.” Considering this, there should be no basic difference between a Board member being paid a salary under the name of “honorarium” or any other name, and another member not being paid, since they all obtain some benefit from the Company.

Moreover, it is generally accepted that the “duty of care” of Board members is not of a subjective (idiosyncratic) character, but is on the contrary an objective (independent of personal matters) one.

The objective term “duty of care” is used to mean that Board members should abide as carefully and solicitously as an administrator in the similar
circumstances would.\(^2\) Therefore, the duty of care must have a character independent of any personal matters explained above, and not have a character with personal features (that a salary is in this regard a subjective criterion).

On the other hand, the TCC describes the character of Board members’ responsibilities as a “non-absolute responsibility.” This emerges from the provisions of several provisions. Based on the wording and meaning of the Code, in order to hold BD members liable, they must have acted negligently. However, the TCC brings a legal presumption against Board members under Article 338.

**Exclusive Clause for Liability**

As Article 338 puts it, a Board member, who is shown to not be at fault in the dealings requiring joint liability according to the articles above, is not liable, particularly, if such liability is not assigned to a Board member who has voted against such dealings and had it recorded in the report of proceedings, or declared such opposition immediately to the auditors in writing, or was excused from the proceedings of such dealings.

The essence of this clause is that the damages sustained by the Company, as a result of the Board decisions, is considered to be a result of the negligent conduct of Board members, unless they prove the contrary, and Board members are assumed to be at fault.\(^3\) The burden of proof at this point is on the Board members; it is advisable that we pay attention to this assumption in lawsuits, interpretations and expert examinations.

As can be clearly seen, the TCC has brought rather detailed assumptions stressing the concept of liability in this context. It is also important that these assumptions be applied in practice.

We should not forget that whichever Board member “conducts company affairs with regard to the duty of care” does not yield differing results for the company and particularly for closed-type corporations belonging to single capital groups. Surely, the primary responsibilities of Board members are to the company that they represent and manage; however, their responsibilities are not limited to only that. Particularly in a company, which is a closed-type (for instance, one in which only family members constitute all the shareholders) and belongs to one capital group as we mentioned, this would not cause much effect. In such a case, “the capital belongs to that one capital group and both potential surpluses and losses will belong to this group.” Then, why is it necessary to determine “whether a duty of care has been followed or not”?

In the first place, in commerce today that is not limited by national borders, and has been globalized, or at least has been regionalized, the chance of surviving is very low and exceptional for companies, which are administered

\(^2\) Poroy, Tekinalp, and Çamoğlu, ibid, p. 311.
\(^3\) Poroy, Tekinalp, and Çamoğlu, ibid, p. 315.
Duty of Care

by single capital groups and are not liable to render account. Their chances of prospering are also very small. Companies generally need the collaboration of different national or foreign capital groups. They would like to promote their ability to go public; even the ones not going public increasingly need to work with different capital groups. Therefore, company administrators and Board members must have an administrative attitude in this direction; in other words, by not being accountable to themselves or to the company, they must develop an attitude of being objectively accountable in any circumstances.

Moreover, a company does not call forth rights and liabilities only for the dominant stockholders of its capital. A company is an organism that calls forth outcomes primarily for minority stockholders, and for third parties such as persons and corporations doing dealings with the company, company staff and the State. The conduct of Board members that do not pay company debts by not taking necessary precautions, and cause the downfall of the company also bring about inequitable effects that would cause third parties serious losses of rights depending on the scale and areas of activities of the company.

We have not forgotten the public shocks created just a few years ago by some bank owners who assumed the savings in their banks to be “their own money” and caused bankruptcies because of their “ill-managed” conduct. It has been suggested that this could be easily valid, even on a smaller scale, for a closed-type Small and Medium-sized Enterprise (SME) Company and its creditors, and workers.

Therefore, the duty of care of Board members, which they must strictly follow while representing and managing the Company, is important socially and legally as much as commercially.

Another importance of auditing whether the duty of care is followed or not is that, as is well known, corporation companies are liable for their debts with their own assets as equity companies. In addition to this legal limitation of liability, the incorporated body of the company is taken be liable for the inequitable actions of Board members.

Therefore, the positive and negative features of a director as a real person who embodies the conduct of a corporation, which is a virtual being, has been reflected exactly in the performance of the company. However, these actions which are suitable for the structure of the corporation must also not cause any losses to the third parties when the unsuccessful actions of Board members cause company performance to drop. The individual liabilities of Board members, who purposely cause losses to Company, or conduct themselves imprudently and improvidently with attitudes contradicting the obligation of objective care because of this structure of corporation, should be interpreted in a rather broad and dissuasive way.

4 See Article 269.
5 See Article 321.
In the TCC, it is accepted that company is liable, as a principal rule, for the liabilities and conducts of Board members that contradict the duty of care; however as an exception, it is possible that the aforementioned third parties (stockholders, creditors, workers, etc) may demand their losses directly from Board members.\(^6\)

However, in practice, when direct losses are demanded, ascertaining the burden of proof as described above appears to be important. Otherwise, it will be difficult to bring forward their demands for third parties, which are not in the control of the company and of its records and/or are an outside company. To reverse the burden of proof that is set by legal presumption for lawsuits of direct losses will not make any contribution towards solving the problem, but on the contrary, will be contradicting the essence of the code.

It should be also apparent that the “Objective Bona Fide Principle” is another cross-principle which must be applied in evaluating the duty of care and in terms of direct or indirect losses of third parties and company losses caused by Board members.

**Scope of judicial relations: Conscientious conduct**

Article 2 - While exercising his/her rights and fulfilling his/her debts, everyone is required to abide by the rules of conscientious conduct.

A legal provision does not guarantee the blind misuse of a right.

**Good will**

Article 3 – In cases where the Code assesses a jurisdiction for bona fide, the essence is the presence of “bona fide.”

However, depending on the condition of the case, one who does not show care as expected from him/herself cannot claim “good will”.

In the first place, this rule assigns an important place to the principle that the trust of persons to the judiciary, who deal with people exercising their rights, or fulfilling their debts, must be protected. The main function of the “Bona Fide” rule is to draw a limit in exercising rights and fulfilling obligations, and moreover to serve largely to interpret judicial rules, particularly codes, and completing loops. Judges will also make use of these rules when creating jurisdiction or using discretionary powers.\(^7\)

Therefore, there is an advantage in making use of the concepts of “Rule of Conscientiousness” and “Objective Good Will” in the Turkish Civil Code in order to evaluate corporate BD members in terms of liability, particularly in auditing whether an objective duty of care has been abided by or not. Company administrators who misuse the principle that a Corporation is liable within its own incorporated body and within its estates, and causing company loss, however doing it not as a fraudulent conveyance but within the Turkish

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\(^6\) Pulaşlı, ibid, pgs. 463-464

\(^7\) Köprülü, Common Code, Istanbul, 1984, pgs.135-137
Code of Execution and Bankruptcy Article 331 etc, and whoever doesn’t act in good will -in legal and objective terms- must be directly liable and such armor shall not be a shield for them in the context of liability. This is an important point in terms of both regulations envisaged by the TCC and maintaining a public sense of justice.

Up to this point, I have tried to deal with the regulations and interpretations in the present-day TCC, predominantly regarding the principle of duty of care. However, as it has been known for some time now, there has been a bill introduced for a new Turkish Commercial Code (the Bill) in the agenda of the Turkish Grand National Assembly (TGNA). The Bill has come up as a result of that fact that the TCC, which had been enacted in 1956 based on the Commercial Code of the Federal Republic of Germany, has long been not meeting progressive needs, and also the EU Adaptation Process. The Bill, purpose of which is to re-organize Turkish commercial life under the principles of the “Acquis Communautaire” (Community Assets), covers important regulations in fields such as corporate governance, company transparency, and diversifying the possibilities of financial and legal auditing. Because its scope is broad and consists of major changes, I find it very useful to look at the Bill bringing new regulations that must be discussed in terms of the system of corporate board members and the duty of care principle which is our subject, although the Bill has not been enacted yet.

It is possible to summarize the 1514 clauses of the Bill as follows, with its chapters related to our subject directly.

First, let us briefly look at what functions and powers the Bill ascribes to the BDs of Corporate Companies.

**Functions and powers**

Article 374 – Board of Directors and the management, in its ascribed domain, excluding the ones within the power of the plenary committee in accordance with the code and the founding charter, have the power to make decisions regarding all types of matters and transactions necessary for the attainment of the company’s areas of activity.

After this regulation, we see that the Bill describes some of the powers, differently from the present TCC, as powers that are personal to BD members and cannot be alienated.

**Inalienable functions and powers**

Article 375 – The inalienable functions and powers of a Board of Directors are as follows:

a) Top-level governance of the Company and giving guidance for governance.

b) Setting up the organizational chart.

c) Determining the principles of financial planning as needed by the accounting department, financial auditing and company management.
d) Appointment and removal of managers and others who have similar functions, and who have power to bind the Company.

e) Top supervision of the management staff, and in particular whether they act according to the laws, the founding charter, the company regulations and the written instructions of the Board of Directors.

f) Maintaining the casebook, the stock register and the proceedings of the plenary committee, preparing and presenting the annual activity reports and corporate governance comments to stockholders plenary committee, arranging plenary committee meetings and executing the decisions of the plenary committee.

g) Applying to the court in case of heavy debt.

After these two principal regulations, discussed Articles 376 and 377 have also been regularized. With this Bill, new important functions and powers are given to the Board and to its members, in particular that they should not let the economic position of the Company go bad, or that what to do when it does. For instance, “Early Diagnosis of Threats” in public companies, or what-to-do’s in order to “prevent a closure and serious loss” in all types of companies; such regulations are in the Bill as new legal institutions that direct and oblige BD members to be more assiduous.

After mentioning these regulations related to functions and powers of BD members shortly, let us come to how duty of care is regulated in the Bill.

In my opinion, the most important change in the Bill is that the presumption of fault designated in Article 338 of the present Code was reversed in paragraph 3 of Article 369 in the Bill in terms of the duty of care. According to this (proposed, but changed during negotiations) regulation, the new regulation was proposed as follows.

Duty of Care and Loyalty

Article 369  (1) Members of Board of Directors and third persons, who are appointed for management, are obliged to fulfill their functions with the care of a cautious manager and to protect company interests abiding the rules of bona fide.

(2) The provisions of Articles 203 to 205 are reserved.

(3) It is the presumption that while fulfilling their functions, members and managers conduct with care in the concept of this clause.

In this case, contrary to the present regulation, when there is conduct of the Board members contrary to the duty of care and/or they are alleged to have caused losses to the Company or third parties, the burden of proof is on the one who asserts such conduct. The converse of this legal presumption is surely to be proven, but to do this the obligation will be on the assertor.

However, there is a chance of going back to the former status with the amendments in this matter, during the negotiations of the Legislature.
In the Bill, it is also clear that the provisions regarding liabilities have been summed up under a separate heading in a separate chapter. According to this, under this Chapter, these apply for not only BD members, but also for founders and liquidators, and even the persons outside company who do relevant transactions detailed liability provisions are brought. For instance:

a) Documents not being correct (Article 549)

b) False declarations on capital shares and knowledge of payment (Article 550)

c) Corruption in valuation (Article 551)

d) Collecting capital from the public without permission (Article 552)

e) General liability of Founders and Board Members together with other administrators (Article 553)

f) Liability of auditors (Article 554)

In all these articles, the cases of liabilities, some of which exist in the present Code as a primary principle, have been regulated in details. Here, in order to have a more detailed look in terms of our subject, I would like to draw your attention separately to (proposed but changed during negotiations) Article 553 of the Bill.

**Liabilities of founders, members of administrative council, managers and liquidators**

Article 553 - (1) Founders, members of Board of Directors, managers and liquidators are liable for the losses that they may harm the company, stockholders and creditors upon negligently contravening their obligations emanating from the Code and the founding charter.

(2) The bodies or persons alienating a function or power emanating from the Code or from the founding charter to others on a legal basis are not liable for their actions and decisions, providing that they prove that they displayed enough care while choosing those persons assigned to these functions and powers.

(3) Nobody can be held liable because of supervision and duty of care as a result of, outside of one’s own control, corruption and incongruity with the Code or the founding charter.

When this article of the Bill is analyzed, BD members are still liable for the losses in case of violating their duty of care, since it is also known that the duty of care is a legal liability. However, together with the description of the inalienable powers of the BD in Article 375 of the Bill, it is a new provision before us that objective care must be present in choosing the assignee when the alienable powers are to be alienated. If it is determined that this care was not present, BD members will be liable for the actions and conduct of those persons they assigned. If they have assigned them with a suitable objective duty of care, BD members will not be liable for the decisions taken and
conduct by these persons. This is a new change in the Bill and surely if it passes into law this way, that attenuates the liabilities of the BD members. Yet, in the TCC and in the Bill, BD members are the topmost body in the making of operational decisions and the performance of the Company. That the personal assignee is an acceptable and adequate person when alienating these powers alone saves the BD member from liabilities adds a subjective element to the duty of care, which should be completely objective.

Once again, the causes absolving the liabilities ascribed in Item 3 of the same article should be accepted, in my opinion, since these causes cannot be controlled by BD members and originate from outside of Company. Otherwise, that BD member is not liable legally for corruption in Company or a contradiction to the Founding Charter because the duty of care should not absolve liabilities of the BD and its members which do not take necessary precautions to prevent complications for the Company that could occur in the scope of an objective duty of care. For this purpose, the BD must be responsible to create on one hand a healthy system of work and supervision in the Company, and on the other hand must make its working style a model with standards. For example, a BD should designate a system of work and meeting, and must conduct its business according to that schedule. Particularly when thinking about the proverb “speech vanishes, script persists,” keeping the proceedings of BD meetings, and recording them should be assumed to be a part of this duty of care.

It is important to keep the proceedings of the BD, both in terms of institutionalization and protection against legal risks. Documenting the decisions of BD makes it easy to share them with top management, and therefore the execution and following-up of the decisions. In addition, the records of BD proceedings have an important place in an examination of the Company’s decision-making mechanisms by stockholders, as well as by regulatory and auditing commissions and by public authorities.²

By the way, we should emphasize that the Code provisions find their meaning in the end only by the practitioners. By practitioners, I mean both BD members, who shall execute the provisions in the Company, and the judges and lawyers, who are expected to resolve conflicts in case one occurs. It can be observed that many provisions of the TCC today are interpreted differently or reversed by both administrative and judicial practitioners. If passed into law as is, even if it is claimed and accepted that these regulations of liabilities in the Bill will bring subjective and attenuating elements to the existing liability system, it will only be clear in practice whether this is true or not. Moreover, there is still a possibility that the Bill would be changed drastically during the negotiations in the Parliament.

While bringing, in a general sense, some new mandatory provisions and some new optional provisions, there is an incentive if not an obligation towards better corporate governance in corporate companies. The Bill attempts to rely on the principle of corporate governance in terms of the duty

² Yılmaz Argüden, Board of Directors’ Proceeding Notes, March 2007.
of care and the liabilities of BD members. The legal basis for the Bill and the regulations, some of which I have tried to refer to above, also show this predisposition. In general, I believe the Bill will make positive contributions to commercial life and its judicial implementation.

However, I have this argument that some subjective elements, which are already in the Bill and will be passed into law, will in practice enlarge the meaning of the term duty of care, and contradict with the predisposition that I have claimed the Bill has. It would be worthwhile to amend the regulations of the Bill that will attenuate particularly the principle of joint liability concerning aggrieved parties.
Dance of the Corporate Veils: Shareholder Liability in the United States of America and in the Republic of Turkey

by Wendy B. E. DAVIS* and Serdar HIZIR**

The foundation of corporate law is the existence of a legal entity separate from its shareholders, thus shielding shareholders from liability for corporate obligations. Courts have rarely, and with trepidation, pierced through this corporate veil to impose liability on shareholders for corporate malfeasance. These instances have become more common in recent decades, suggesting that corporate investors and parent corporations acquiring subsidiaries need to be diligent to minimize their risk. In this article two academicians discuss the consequences of wrongdoing and mismanagement underlying the pros and cons of the systems adapted by both countries.

SHAREHOLDER LIABILITY IN THE UNITED STATES OF AMERICA

I. THE LIMITED LIABILITY OF SHAREHOLDERS

Many entrepreneurs incorporate their businesses primarily to limit their liability.1 One court has acknowledged, “[t]he fundamental concept of a corporation is that it is a separate entity created under the law to enable a group of persons to limit their liability in a joint venture to the extent of their contributions to the capital stock.”2 A federal court has referred to this principle of limited liability as “a pillar of corporate law.”3 The limited liability of shareholders is critical to encourage investment in corporations.4 There are exceptions to this limited liability, however, where the court will

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3 United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corporation, 960 F.2d 1080, 1091 (1st Cir. 1992).
pierce the corporate veil to find a shareholder liable. While the risk of personal liability is low for the average investor who buys a block of stock, the investor who is involved in the management and runs the company as his own should be aware of this risk. When the shareholder is a parent corporation, responsibility for the obligations of a subsidiary is similarly problematic. The possibility of acquiring unforeseen liability when subsidiaries are acquired has the potential to disrupt a significant sector of the U.S. and global economy and increase the costs of doing business, particularly in today’s climate of intensified mergers and acquisitions activity.

II. FEDERAL OR STATE LAWS

The liability of shareholders, like other corporate issues, is determined by state laws. In diversity cases, federal courts generally apply the laws of the relevant state. When a United States federal court has jurisdiction because a federal statute is involved, but the statute does not specify whether state corporate law is preempted, the courts have been inconsistent in their decision of whether to create a federal common law of veil piercing, or to apply the law of a particular state. Several courts have held that federal common law should decide whether the corporate veil should be pierced to find a parent corporation liable. The federal vs. state law determination impacts shareholders because it is more likely that a court will impose liability on a shareholder when federal rather than state laws control, as the following cases will illustrate. The factors that have been used by lower federal courts to determine whether to pierce a corporate veil under federal common law are:

“(1) inadequate capitalization in light of the purposes for which the corporation was organized; (2) extensive or pervasive control by the shareholder or shareholders; (3) intermingling of the corporation’s properties or accounts with those of its owner; (4) failure to observe corporate formalities and separateness; (5) siphoning of funds from the corporation; (6) absence of corporate records; and (7) nonfunctioning officers and directors.”


6 The courts of the United States are not alone in their ability to impose liability on shareholders for corporate acts; China has recently enacted a veil piercing statute. See Mark Wu, “Piercing China’s Corporate Veil: Open Questions from the New Company Law”, 117 Yale L.J. 329 (2007).

7 DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 684 (4th Cir. 1976.) For a discussion of when state law is applied, compared to when federal courts use federal common law, see United States v. Bestfoods, 524 U.S. 51, 63 n. 9 (1998).


In 1998, the U.S. Supreme Court attempted to limit federal common law in *United States v. Bestfoods*, stating that state corporation law should not be replaced by federal common law “simply because a plaintiff’s cause of action is based upon a federal statute.”

The federal statute at issue was the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”). The issue was the derivative liability of a parent corporation for CERCLA response costs, because of the parent’s control of its subsidiary. While the *Bestfoods* Court did not decide whether federal or state law would govern, the Court condemned federal courts using statutory gaps as an excuse to reject state corporate law principles.

The Sixth Circuit acknowledged that application of federal law would be more likely to result in shareholder liability in *Carter-Jones Lumber Company v. LTV Steel Co.* Finding that the result would have been the same under federal common law as under Ohio law when applied to the facts at hand, the court applied Ohio law.

The federal courts have applied a slightly different test to impose liability on shareholders in cases involving employee retirement plans. The court considers (1) whether the shareholder defendant respected the separate corporate entity; (2) the fraudulent intent of the defendant; and (3) the degree of injustice that would result if the veil were not pierced. Fraudulent intent is the threshold issue.

Fraudulent intent is less than the fraud needed for criminal or even civil fraud. In *Crane v. Green & Freedman Baking Co.*, the court found that a reasonable jury could have concluded that two individuals, who were officers, directors, and shareholders of the corporation, were personally liable for the corporation’s failure to make the required contributions to the ERISA plan. The court was concerned that the shareholders caused the corporation to make payments to the shareholders and their relatives for “no apparent business justification,” at a time when the corporation was nearly insolvent. The shareholders used corporate funds to pay for personal vacations, at the same time making undocumented loans to the corporation. A further justification for piercing

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11 42 U.S.C.A. § 9601 et seq.
12 Id. at 64.
13 Id.
15 Id.
17 Id. at 22, (citing United Electric, Radio and Machine Workers v. 163 Pleasant Street Corp., 960 F.2d 1080, 1093 (1st Cir. 1992)).
18 Crane, 134 F.3d at 22.
19 Id. at 22.
20 Id. at 22.
21 Id. at 23.
22 Id. at 24
23 134 F.3d at 22.
the veil was falsified records of directors’ meetings, which the shareholders admitted were altered to indicate the presence of the shareholder’s wives, who were directors, but did not attend the meetings.24

Although the federal common law rule for veil piercing is similar to the laws in many states, more specific state rules will be examined below.

III. FACTORS CONSIDERED TO IMPOSE LIABILITY ON SHAREHOLDERS

When state law applies in a veil piercing controversy, the standards of the various states have been substantially similar and all are hesitant to impose liability on shareholders. Massachusetts courts consistently state that shareholders will be held liable for corporate obligations only in “rare particular situations in order to prevent gross inequity.”25 Virginia courts agree, piercing the corporate veil only under extraordinary circumstances, when necessary to promote justice.26 California courts similarly hold that even if unity of interest and ownership is proven, the corporate veil will be pierced only if “injustice would result from the recognition of separate corporate entities,” and the inability to collect a debt or enforce a judgment does not satisfy the standard.27 Delaware courts have noted that “[p]ersuading a Delaware court to disregard the corporate entity is a difficult task.”28 Delaware courts agree that a shareholder will be liable for the actions of the corporation only if the corporation is a sham and was created for fraudulent purposes.29 It is worth noting, however, that many scholars agree that “there is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law.”30

The First Circuit Court in the case of Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc., stated the Massachusetts twelve factor test to determine whether the corporate veil should be pierced, as follows:

1. insufficient capitalization
2. nonobservance of corporate formalities
3. nonpayment of dividends
4. insolvency of the corporation at the time of litigation

24 Id.
28 Wallace v. Wood, 752 A.2d 1175, 1183 (Del. Ch. 1999).
29 Id. at 1184.
5. siphoning of corporate funds
6. nonfunctioning of corporate officers and directors
7. absence of corporate records
8. use of corporation for transactions of the dominant shareholder
9. fraud or injustice
10. confused intermingling of business activity
11. common ownership
12. pervasive control. 31

West Virginia courts add the following factors:
13. use of the same office or business location by the corporation and its individual shareholders
14. employment of the same employees or attorney by the corporation and its shareholders
15. the formation and use of the corporation to assume the existing liabilities of another person or entity. 32

The above factors are weighed, 33 but no single factor is determinative, 34 with most courts requiring some evidence of misrepresentation or confusion of identity, proving the plaintiff was uncertain about whom they dealt with. 35 Some courts will refer to the “alter ego” doctrine, with a focus on the pervasive control of the corporation by the shareholder. 36

The factors used by the Virginia courts are not as clearly enumerated as in other jurisdictions, but most Virginia courts agree that the following issues are relevant:

1. The corporation was the alter ego, stooge, or dummy of the shareholder, which is determined by:
   a. the shareholder commingled corporate and personal assets; or
   b. the shareholder siphoned corporate assets; or
   c. corporate formalities were not followed; and

34 Virtualmagic, 99 Cal. App. 4th at 245.
2. the corporation was a device or sham used to disguise wrongs, obscure fraud, or conceal crime. \[37\]

Virginia courts, and many other jurisdictions, also consider deliberate undercapitalization, where the corporation was unable to pay its costs of doing business from its inception. \[38\]

Georgia courts, similar to Virginia courts, avoid a long list of factors, instead piercing the corporate veil only if there is “abuse of the corporate form”, evidenced by commingling or confusing the properties, records, or control of the two entities.” \[39\]

The majority of jurisdictions do not require proof of fraud to pierce the corporate veil. \[40\] The D.C. Circuit Court of Appeals is in the minority of courts that still requires evidence of fraud, although the fraud need not be directly related to the plaintiff’s claim. \[41\] Delaware courts require fraud, but consider undercapitalization and lack of corporate formalities to be elements of fraud. \[42\] Although fraud is one of the more common reasons for piercing the corporate veil, inadequate capital is often used as the reason for shareholder liability. \[43\] Some courts require evidence of misrepresentation or confusion of identity, proving the plaintiff was uncertain about which person or entity they dealt with. \[44\] Other courts impose liability on officers or directors who participate in the tortuous conduct, whether fraud or otherwise. \[45\]

A. Liability of a Parent Corporation for the Obligations of its Subsidiary: Dominion and Control

Parent, or holding, corporations and their subsidiaries are regarded as separate entities, so that a parent corporation is not usually liable for the torts

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\[37\] Cheutele, 234 Va. at 212, 360 S.E.2d at 831.

\[38\] Dana, 266 Va. at 501; DeWitt Truck Brothers, Inc., v. W. Ray Flemming Fruit Co., 540 F.2d 681, 685 (4th Cir. 1976); See also Mark W. Kelley, “Piercing the Corporate Veil: Collecting Judgments When the Corporation is Defunct,” 2000 ATLA CLE 1659 (2000).


\[40\] DeWitt Truck Brothers, Inc., 540 F.2d at 684 and cases cited therein.

\[41\] Jackson v. Loews Washington Cinemas, Inc., ---A.2d---, 2008 WL 793617 (D.C. Cir. 2008) (“The fraud, however, need not directly taint the obligation on which the plaintiff is suing”).


\[45\] Itofka, Inc. v. Hellhake, 8 F.3d 1202 (7th Cir. 1993). A Virginia court used this reasoning in N.S. Gumenick v. Ferebee, 192 Va. 174, 63 S.E.2d 767 (1951).
or liabilities of the subsidiary. Liability may be imposed on the parent corporation, as a shareholder, if the parent pervasively controls the subsidiary, so that the subsidiary is an agent or instrumentality of the parent, or if the corporations are engaged in a joint venture.

A Massachusetts court held a corporate defendant responsible for the actions of other corporations with a common shareholder, although the corporate defendant was not a shareholder in any of the related corporations. The court based its decision on agency and causation principals, because a manager of the corporate defendant had instructed each of the other corporations to wrongfully retain the plaintiff’s property.

Also relying on agency principles, the U. S. District Court in Devlin v. WSI Corporation decided an employee who was wrongfully terminated based on age discrimination was allowed to sue both the corporation that employed him, and its parent corporation. Because the plaintiff’s immediate supervisor, and the two people to whom that supervisor reported, were employees of the parent corporation, the court deemed the subsidiary to be the agent of the parent corporation, and therefore any claim against the subsidiary could also be asserted against the parent corporation.

A Bankruptcy court relied less on agency theories and more on the misleading of the plaintiff when it pierced the corporate veil in In re Plantation Realty Trust. A member of a golf course, who was owed a refund of membership dues, was permitted to file a proof of claim against the bankrupt owner of the real estate on which the golf course was located. The member’s contract was with a subsidiary of the bankrupt corporation. The court noted the common ownership and pervasive control by one individual and the lack of corporate formalities. Although there was no commingling or under-capitalization, the representations made to the plaintiff were “confusing, and perhaps misleading.” Also, the individual who represented the golf course to the plaintiff failed to clearly indicate in which capacity he was acting.

The bankrupt corporation owned all real estate on which the

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47 Id.; Gurry v. Cumberland Farms, 406 Mass. 615, 550 N.E.2d 127 (1990); see also Wallace v. Wood, 752 A.2d 1175, 1184 (Del. Ch. 1999) (refusing to pierce the veil of a subsidiary without sufficient facts to indicate that the parent corporation’s complete dominion and control of the subsidiary.).
48 My Bread Baking Co., 353 Mass. at 616.
49 Id.
51 Id. at 74.
53 Id.
54 Id.
56 Id. at 283.
57 Id.
The plaintiff’s membership agreement misleadingly stated that his membership fees would be secured by a mortgage on real estate owned by the golf course operator. This deceit persuaded the court to pierce the veil of the corporate operator to place liability with the real estate owner.

The Fourth Circuit imposed liability on a parent corporation that created a wholly owned subsidiary to operate a West Virginia steelmaking facility. The parent’s control of the subsidiary was dominant, with the parent required to approve all proposals and expenditures of the subsidiary. When the subsidiary was liquidated in bankruptcy, the parent sold its assets and retained the nine million dollars in proceeds. The court found this sufficient unfairness to pierce the corporate veil, stating that the dominance alone may have been sufficient reason to pierce.

Absent evidence of fraud, a mere unity of ownership between a parent and wholly owned subsidiary was not sufficient for a D.C. Circuit Court to impose liability on the parent, where separate corporate records were maintained.

As the preceding cases indicate, scrupulous maintenance of separate corporate records is critical for a parent corporation to avoid liability for the actions of its wholly owned subsidiaries.

**B. Liability of Individual Shareholders: Lack of Corporate Formalities**

Although courts were reluctant in the past to find an individual personally liable for the contract or tort liability of a corporation, more recent decisions are contrary. In 1985, the First Circuit found individuals liable for the contract obligations of the corporation in *Pepsi-Cola Metro Bottling Co. v. Checkers, Inc.* A husband and wife were held personally liable for the obligations of several corporations in which they owned stock. The husband owned all of the stock of one corporation, the wife all of the stock of a second corporation.

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58 Id.
59 232 B.R. at 284.
60 Id.
61 Id.
62 Id. at 65.
63 Id.
64 Id.
66 See, generally, Wendy B. Davis, The failure of the federal courts to support Virginia’s reluctance to pierce the corporate veil, 5 J. of Small and Emerging Bus. L. 203, 207 (2001) (“No recently published Virginia court decision pierced the veil of a Virginia corporation to find a corporate or individual shareholder liable for a corporate obligation.”); but see Dana v. 313 Freemason, 266 Va. 491, 587 S.E.2d 548 (2003) (piercing the corporate veil to find an individual shareholder liable for corporate obligations.)
68 754 F.2d at 12-13.
corporation, and the wife and others owned shares in a third corporation.\textsuperscript{69} Even though these individuals were not the sole shareholders, they were held liable for the actions of the three corporations, because the court reasoned “\textit{w}here the principal shareholders of a close corporation fail to observe with care the corporation’s existence, a court will not later heed their requests to do so.”\textsuperscript{70} The reasons for the court’s decision were (1) the use of corporate funds for personal expenses of the officers, (2) lack of a corporate telephone listing, (3) operation of the corporation out of the home of the officers, and (4) no records of shareholder meetings or major corporate transactions.\textsuperscript{71} The court found that the shareholders used the corporation for their personal transactions.\textsuperscript{72}

Following the \textit{Pepsi} decision, the Federal District Court in \textit{Talaria Waste Management, Inc. v. Laidlaw Waste Systems, Inc.},\textsuperscript{73} denied a motion for summary judgment brought by a shareholder, refusing to shield the shareholder from liability for a corporate debt.\textsuperscript{74} Although the court could have reached this same conclusion on the grounds that the individual was also the promoter of the corporation and the contract with the plaintiff was entered into before the corporation’s existence, the court stated that “two separate grounds support this conclusion.”\textsuperscript{75} The court found that the corporate form was a sham because the individual defendant was the sole shareholder and officer, and the corporation had filed no tax returns, maintained no corporate records, and paid no salary to the shareholder.\textsuperscript{76} The shareholder also admitted that he used the corporate checking account to pay personal expenses.\textsuperscript{77}

More recently, Massachusetts courts have imposed personal liability for both contract and tort liability.\textsuperscript{78}

The lack of corporate formalities caused another Massachusetts Court to pierce the corporate veil of a construction company in \textit{Strong v. Hegarty}.\textsuperscript{79} The shareholder never used the full name of the corporation, Hegarty Construction Co., Inc., in letterhead, advertisements, invoices, or when answering the telephone.\textsuperscript{80} The shareholder always used the name Hegarty Construction, which the plaintiffs believed, and the jury agreed, was a trade

\begin{thebibliography}{9}
\bibitem{Id} Id.
\bibitem{Id at 16} Id. at 16.
\bibitem{Id at 14} Id. at 14.
\bibitem{754 F.2d at 16} 754 F.2d at 16.
\bibitem{Id} Id.
\bibitem{Id at 845} Id. at 845.
\bibitem{Id} Id.
\bibitem{Id at 847} Id. at 847.
\bibitem{Id at *1} Id. at *1
\end{thebibliography}
name used by the shareholder individually. The court’s decision was also supported by the lack of shareholder or director meetings, lack of wages paid, and because the worker’s compensation insurance was subscribed by the shareholder individually.

The Fourth Circuit found a sole shareholder liable for the debts of a corporation because there was a lack of corporate formalities and under-capitalization, in DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co. The DeWitt court noted that, although fraud was not required under South Carolina law, there must be some “element of injustice or fundamental unfairness.” Although fraud may not have been deemed a requirement, the facts of DeWitt indicate a clear example of fraud. The corporation acted as an agent for fruit growers. The dominant shareholder told the fruit growers that he had paid the plaintiff the funds due for transportation, which were then deducted from the net proceeds delivered to the growers. This statement was not true, because the amount owed for transportation was pocketed by the shareholder, and the plaintiff remained unpaid, hence this suit to collect transportation costs. The corporation had never had a shareholder or directors’ meeting, and there was conflicting testimony regarding the identity of its officers. The corporation was insolvent and paid no dividends.

Although DeWitt is often cited for the proposition that fraud is not required, in fact fraud was evident in this case.

A the above cases indicate, strict adherence to corporate procedures, such as shareholder and director meetings, minutes of those meetings, separate bank accounts, and corporate letterhead, is critical to avoiding shareholder liability. At the end of this article are suggestions for corporate procedures to minimize the risk of shareholder liability.

C. Liability of Individual Shareholders: Dissolution of Corporation

When a corporation dissolves with some obligations outstanding, shareholders may be held responsible for paying those obligations, as the following cases illustrate. The shareholder’s fraud and deceit convinced a Massachusetts Court to impose liability on a shareholder who was the president, clerk, and director of nine corporations, in Dujon v. Williams. Several unpublished decisions will be relied on in the article. According to the Eighth Circuit, in Anastoff v. United States, No. 99-3917 EM, 2000 WL 1182813 at *1 (August 22, 2000) (vacated on other grounds, 235 F.3d 1054 (8th Cir. 2000), unpublished decisions have the same precedential effect as published decisions.
The corporations operated taxi services, and a taxi owned by one of the corporations injured the plaintiff.\footnote{Dujon, 1996 WL 402344 at *2.} The shareholder caused the dissolution of one corporation after the plaintiff filed her complaint, although the shareholder continued to draw funds from the “dissolved” corporation’s account.\footnote{Id at *6.} Other transfers of assets were made to newly formed corporations, the stock of which was owned by the shareholder’s wife, daughter, and a long-time employee.\footnote{Id. at *8.} The court held the shareholder liable even though the capitalization of the new corporation was sufficient, there were some corporate records, all corporations were solvent at the time of litigation, and corporate funds were not used to pay the personal expenses of the shareholders.\footnote{Id. at *11.} The court noted the non-observance of most corporate formalities and lack of significant records, siphoning of assets by the individual, and non-functioning of other officers.\footnote{1996 WL 402344 at *11.} The shareholder’s pervasive control of all the related corporations, and his actions in transferring assets to new entities to avoid paying the plaintiff, helped to persuade the court.\footnote{Id.} The court also noted the shareholder’s attempts to persuade the plaintiff that her only remedy was a small insurance policy.\footnote{Id.}

An individual shareholder who dissolved the corporate debtor was found liable for a corporate debt in \textit{Maury Kusinitz Insurance Agency, Inc. v. Medical Devices of Fall River, Inc.}\footnote{Maury Kusinitz Insurance Agency, Inc. v. Medical Devices of Fall River, Inc., No. Civ. A. C94-01422, 7 Mass. Law Rptr. 205, 1997 WL 426970 (July 23, 1997).} The shareholder owned, at relevant times, between 45 and 51\% of the shares of a corporation that made medical instruments.\footnote{Id. at *1.} The corporation became insolvent and all assets were sold at auction to an acquaintance of the shareholder.\footnote{Id.} The shareholder continued to be involved in a medical instrument business operated at the same location with the same equipment, under a different name.\footnote{Id.} Insurance premiums were owed to the plaintiff by the predecessor corporation, which the shareholder refused to pay.\footnote{Id.} The court ordered the shareholder to pay the cost of the premiums to the plaintiff, because of his pervasive control of the corporation.\footnote{1997 WL 426970 at *1.} The court noted that other officers did not function in their intended roles, there was a lack of corporate formalities, and no dividends
had been paid. The auction of assets to an acquaintance also supported a disregard of the corporate form.

In a similar case also involving a dissolved corporation, the court pierced the corporate veil to impose liability on the two individual shareholders in *Mount v. Baypark Development, Inc.* The corporation constructed the plaintiff’s home, with a two year warranty for a dry basement. As soon as the plaintiff’s closing occurred, the shareholders dissolved the corporation, closing the corporate account and distributing all assets to themselves. This unjust action, combined with the lack of any corporate formalities such as dividends, meetings, or annual reports, convinced the court to pierce the veil.

To avoid personal liability, shareholders should make certain that proceeds of corporate assets of a dissolving corporation are used to pay corporate debts. Assets should be appraised or sold at public auction to avoid the appearance of impropriety.

**D. Liability of Individual Shareholders: Inadequate Capitalization**

A recent Virginia decision found individual shareholders liable for the actions of a close corporation, where the corporation was significantly undercapitalized and created for the sole purpose of avoiding liability. The corporation had no liquid assets and all revenue of the corporation was deposited in the personal checking account of the shareholder. The shareholder was aware that the condominium units sold to the plaintiffs had significant structural defects, and the formation of the corporation was for the sole purpose of avoiding personal liability for such defects. The court found that injustice could be avoided only by finding the shareholder personally liable. This is a departure from many earlier Virginia decisions that refused to pierce the corporate veil under even more compelling circumstances, and may indicate a trend. In a 1971 decision, the Virginia Supreme Court of Appeals refused to pierce the veil of an insolvent corporation, disregarding the presence of most of the factors commonly used as reasons to pierce, in *Garrett v. Ancarrow Marine, Inc.* A husband was the sole stockholder and president, his wife the secretary, of a boat building

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104 Id.
105 Id. at *4.
107 Id. at *2
108 Id.
109 Id.
111 Id. at 497.
112 Id. at 499.
113 Id. at 501.
corporation operated out of their home pursuant to an oral lease.\textsuperscript{115} The corporation was insolvent, but continued operations with substantial loans from the couple.\textsuperscript{116} The Plaintiff contractor agreed to build a launching ramp and slip for the corporation on a cost- plus basis.\textsuperscript{117} The corporation paid the contractor $115,000, but failed to pay the remaining $85,464 owed.\textsuperscript{118} Although the corporation was insolvent at the time of the contract, and the plaintiff was not informed of this fact, the court found the husband and wife’s silence did not amount to fraud and denied any personal liability of the couple.\textsuperscript{119} The court did not analyze the factors traditionally used for piercing the veil, but refused to pierce based on the lack of any action to defraud.\textsuperscript{120} Many other jurisdictions would impose liability on shareholders based on inadequate capitalization.\textsuperscript{121}

In a recent California decision, a court found an individual shareholder liable for a corporate obligation where the individual dominated the company, paid corporate taxes from his personal account, and conveyed corporate assets to himself without compensating the corporation.\textsuperscript{122}

E. Liability of Individual Shareholders: Fraud

Applying Virginia law, the Fourth Circuit Court found fraud sufficient to impose liability on an individual shareholder in \textit{National Carloading Corp. v. Astro Van Lines, Inc.}\textsuperscript{123} The individual defendant had converted the only corporate asset for his personal use by encumbering the asset with a lien.\textsuperscript{124} The court stated that “in holding [the individual shareholder] liable it is not necessary to disregard the corporate entity of Astro or Van Lines.”\textsuperscript{125} Van Lines’ main asset was an I.C.C. motor common carrier certificate.\textsuperscript{126} The shareholder transferred this certificate to Astro, for which Astro assumed the encumbrances, including a $373,000 security interest for a bank loan, which loan was later paid by the shareholder.\textsuperscript{127} The court found that Astro purchased the only asset of Van Lines while Van Lines was insolvent.\textsuperscript{128} This was known to the sole shareholder of both corporations.\textsuperscript{129} The court found this transfer to be fraudulent, because the effect of the transfer to Astro was

\textsuperscript{115} Id. at 756, 180 S.E.2d at 669.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} See, e.g., \textit{Anderson v. Abbott}, 321 U.S. 349 (1944).
\textsuperscript{122} \textit{Crestmar Owners Assoc. v. Stapakis}, 157 Cal. App. 4\textsuperscript{th} 1223, 1232 (2007).
\textsuperscript{123} \textit{National Carloading Corp. v. Astro Van Lines, Inc.}, 593 F.2d 559 (4\textsuperscript{th} Cir. 1979).
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 562.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
the inability of the creditors of Van lines to collect their debts. This was a fraudulent conveyance according to Virginia Code s. 55-80. Even if the debt owed to the shareholder for paying off the bank loan was valid, the court would have deemed the transfer fraudulent. The court found that the shareholder had participated in the wrongdoing, and was therefore personally liable.

Commingling and misrepresentation were sufficient for the Fourth Circuit, applying Virginia law, to find a shareholder liable in Cancun Adventure Tours, Inc. v. Underwater Designer Company. The court noted that its power to impose liability on a shareholder should be exercised with “extreme circumspection”, however, “the corporate veil is not sacrosanct.” The plaintiff purchased an air compressor for filling scuba diving tanks from the defendant’s corporation. The compressor continually overheated, but the defendant was unwilling or unable to fix the problem. The individual shareholder regularly commingled corporate and personal assets. The corporation operated out of the shareholder’s home, with the real estate inconsistently being listed as a personal or corporate asset on tax returns. Although the plaintiff alleged fraudulent misrepresentations of the capabilities of the compressor, the court did not find fraud, instead basing the recovery on breach of warranty. The court awarded punitive and compensatory damages against both the corporation and its sole shareholder.

Even the Federal courts have been unable to pierce the corporate veil in cases where the plaintiff was unable to produce any evidence of fraud. The Bankruptcy Court for the Eastern District of Virginia did not pierce the corporate veil in a case where domination of the corporation was the only factor proven, in In re Criswell. There was no evidence of fraud, undercapitalization, or any factors other than dominance by the shareholder.
IV. NOTWITHSTANDING RECENT TRENDS, MANY COURTS STILL REFUSE TO IMPOSE LIABILITY ON SHAREHOLDERS FOR CORPORATE LIABILITIES

Although the trend is toward disregarding the corporate form, many courts remain hesitant to impose liability on shareholders. In a recent First Circuit case, *In re Strangie*, the court refused to pierce the veil, even though many factors weighed in favor of shareholder liability. The court noted that the shareholder did not sign corporate checks and did not knowingly or directly participate in any diversion of funds. Although a plaintiff presented evidence of confused intermingling of activity between a parent and subsidiary, the court refused to pierce the veil in *Omni-Wave Electronics Corporation v. Marshall Industries*. The subsidiary was adequately capitalized to compensate the plaintiff, therefore no fraud or gross inequity would result from a failure to pierce the corporate veil. Similarly, the court found no fraud or injustice sufficient to pierce the veil in *In re Computer Engineering Associates, Inc.* Pervasive control was lacking, because one of the individual defendants only owned 55% of the stock, while the other was merely an officer, not a shareholder, and it appeared that officers were functioning. The court refused to find evidence of fraud, when the defendant corporation was merely seeking payment for services provided. A lack of evidence of pervasive control, under-capitalization, or fraud, similar to the situation in *Computer Engineering*, lead the court to refuse to pierce the corporate veil in *United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corporation*.

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145 *In re Strangie*, 192 F.3d 192 (1st Cir. 1999).
146 *Id.*
147 *Id.* at 196; see *Pepsi-Cola Metro. Bottling Co., Inc. v. Checkers, Inc.*, 754 F.2d 10 (1st Cir. 1985).
149 *Id.*
151 *Id.*
152 *Id.*
A Virginia court in *Cheatle v. Rudd’s Swimming Pool Supply Co., Inc.* also refused to pierce the corporate veil.\(^{154}\) Rudd’s Swimming Pool Supply Co., Inc. (“Supply”) serviced swimming pools.\(^{155}\) An employee of Supply purchased the right to use the Rudd name, and incorporated a new business as Rudd’s Swimming Pool Management and Service Company, Inc. (“Management”).\(^{156}\) The purchase was paid for by promissory notes signed by Management payable to Supply.\(^{157}\) Supply filed for bankruptcy protection.\(^{158}\) Management transferred all its assets and liabilities to a new corporation, Regency.\(^{159}\) Regency operated the same business as Management, with the same employees, location, and customers.\(^{160}\) The plaintiff, a 50% shareholder in Supply, brought this action to recover the balance on the promissory notes from the individual shareholders as well as Regency, as the successor corporation.\(^{161}\) After Regency filed bankruptcy, the claim against Regency was abandoned.\(^{162}\) The court noted that “a corporation is a legal entity entirely separate and distinct from the shareholders or members who compose it. This immunity of stockholders is a basic provision of statutory and common law and supports a vital economic policy underlying the whole corporate concept.”\(^{163}\) The plaintiffs must prove that the corporation was the “alter ego, alias, stooge, or dummy” of the individual stockholders.\(^{164}\) Even if the transfer of all assets was done with the intent to hinder, delay, or defraud the plaintiff, the court found this insufficient to pierce the veil of Regency.\(^{165}\) The court noted that corporate formalities were followed, and there was a valid purpose for the reorganization: the need for a new image after the bankruptcy of Supply.\(^{166}\) This negated any inference that Regency was the alter ego of the shareholders.\(^{167}\) The court also found insufficient evidence of fraud, because there was no evidence that the individuals made a knowing misrepresentation to the plaintiff, and there was no evidence that the shareholders personally benefited from the transfer from Management to Regency.\(^{168}\) The court downplayed the benefit the shareholder received when


\(^{155}\) *Id.* at 209, 360 S.E.2d at 829.

\(^{156}\) *Id.*

\(^{157}\) *Id.*

\(^{158}\) *Id.*

\(^{159}\) 234 Va. at 210, 360 S.E.2d at 830.

\(^{160}\) *Id.* at 211, 360 S.E.2d at 830.

\(^{161}\) *Id.*

\(^{162}\) *Id.*

\(^{163}\) *Id.* at 212, 360 S.E.2d at 831.

\(^{164}\) *Id.*

\(^{165}\) *Id.* at 213, 360 S.E.2d at 831.

\(^{166}\) *Id.*

\(^{167}\) *Id.*

\(^{168}\) *Id.*
the stock in Regency was not encumbered with the debt of Management, finding this benefit to be tenuous and indirect.\footnote{169}

In one of the first Virginia cases to use language that reduced the level of fraud required to pierce, the court in \textit{O’Hazza v. Executive Credit Corporation}, stated that a shareholder could be liable if he used the corporation to “evade a personal obligation.”\footnote{170} Although this language appears to signal an increased willingness to impose liability on shareholders, the court again refused to pierce the corporate veil, finding insufficient evidence of fraud.\footnote{171} The Executive Credit Corporation had agreed to advance money to Sounds You See, Inc., (“Sounds”) for the installation of a sound system in a hotel.\footnote{172} The president of Sounds had informed Executive Credit Corporation of the cash flow problems of Sounds.\footnote{173} The President of Executive Credit Corporation testified that he believed that the parents of the president of Sounds, who were its shareholders, would “stand behind these deals.”\footnote{174} The hotel backed out of the deal, after Executive Credit Corporation had advanced $35,000, which Sounds was unable to repay.\footnote{175} Sounds was dissolved for failure to pay the annual license fee, and minimally capitalized by the parents as a way to provide income for their son.\footnote{176} The court did not allow Executive Credit Corporation to reach the assets of the shareholder parents, notwithstanding that the parents had made significant loans to Sounds in the past to keep it afloat.\footnote{177} The court held that Executive Credit Corporation was not the victim of fraud, because it had been informed of the financial difficulties of Sounds.\footnote{178}

Recognizing that many shareholders use the corporate structure to limit their liability to their initial investment, a Virginia court refused to find that a shareholder used a corporation to “evade a personal obligation” in \textit{Greenberg v. Commonwealth}.\footnote{179} The Commonwealth brought charges against the defendant corporation for making usurious loans.\footnote{180} Pursuant to a statute prohibiting actions by a “lender”, the trial court imposed liability against the defendant corporation as well as its individual shareholder, although this individual was

\footnotesize{\begin{itemize}
\item \footnote{169} Id. at 214, 360 S.E.2d at 832.
\item \footnote{170} O’Hazza v. Executive Credit Corporation, 246 Va. 111, 431 S.E.2d 318 (1993).
\item \footnote{171} Id. In a case decided months before \textit{O’Hazza}, the Supreme Court of Virginia used an even weaker standard, stating that the corporate veil could be pierced “when necessary to secure justice.” \textit{Nedrich v. Jones}, 245 Va. 465, 429 S.E.2d 201 (1993). The \textit{Nedrich} court did not decide to pierce the veil, instead deciding only that the claim was objectively reasonable and therefore sanctions against the plaintiff’s attorney were not warranted. \textit{Id.}
\item \footnote{172} O’Hazza, 431 S.E.2d at 320.
\item \footnote{173} Id.
\item \footnote{174} Id.
\item \footnote{175} Id.
\item \footnote{176} Id.
\item \footnote{177} Id. at 322.
\item \footnote{178} Id. at 323.
\item \footnote{179} Greenberg v. Commonwealth, 255 Va. 594, 499 S.E.2d 266 (1998).
\item \footnote{180} Id. at 598.
\end{itemize}}
not involved in the day to day operations.\textsuperscript{181} The appellate court did not reach the issue of whether the corporation was an alter ego of the shareholder, finding sufficient reason to reverse the trial court’s piercing.\textsuperscript{182} Although there was no evidence that the individual shareholder was not aware that the corporation was violating a statute, the court found that the corporation was not formed to “perpetrate or disguise illegal activities.”\textsuperscript{183}

The trial courts of Virginia are in accord with the appellate courts, refusing to pierce the veil in a majority of cases, finding insufficient evidence of fraud.\textsuperscript{184}

The Fourth Circuit showed an unusual deference to the Virginia courts when deciding that a lack of fraud prevented shareholder liability in \textit{Perpetual Real Estate Services, Inc. v. Michaelson Properties, Inc.}\textsuperscript{185} The defendant was an Illinois corporation formed for entering into real estate joint ventures.\textsuperscript{186} When condominium purchasers sued for breach of warranty, the defendant’s joint venturor paid the full amount of their claim, because the profits earned by the defendant had been distributed to its shareholders, leaving no capital.\textsuperscript{187} The joint venturor sought to pierce the veil to find the individual shareholder liable.\textsuperscript{188} Factors considered by the court in its decision of whether there was dominion and control were corporate records, payment of dividends, and whether other officers and directors existed.\textsuperscript{189} Following the \textit{Cheatle} decision, the court held that mere domination is not enough, but the plaintiff must prove that “the corporation was a device or sham to disguise wrongs, obscure fraud, or conceal crime.”\textsuperscript{190} “The fact that limited liability might yield results that seem ‘unfair’ to jurors unfamiliar with the function of the corporate form cannot provide a basis for piercing the corporate veil. Virginia law requires proof of some legal wrong before it undermines this basic assumption of corporate existence.”\textsuperscript{191} Because no fraud was involved, the court refused to find the shareholder liable.\textsuperscript{192}

\begin{thebibliography}{99}
\bibitem{note1} Id. at 599, 602.
\bibitem{note2} Id. at 605, n.10.
\bibitem{note3} Id. at 605.
\bibitem{note5} Perpetual Real Estate Services, Inc. v. Michaelson Properties, Inc., 974 F.2d 545 (4th Cir. 1992).
\bibitem{note6} Id. at 545.
\bibitem{note7} Id.
\bibitem{note8} Id.
\bibitem{note9} Id. at 548.
\bibitem{note10} Id. at 548 (quoting Cheatle, 360 S.E.2d at 831).
\bibitem{note11} Id. at 548-49.
\bibitem{note12} Id at 551.
\end{thebibliography}
The Fourth Circuit did not pierce the veil in United States Fire Insurance Company v. Allied Towing Corp., because the court found a lack of evidence of any factors other than an identity of officers and directors in the two corporations at issue. There was no evidence of fraud.

A lack of fraud also resulted in the Fourth Circuit’s refusal to find shareholder liability in Ost-West-Handel Bruno Bischoff GMBH v. Project Asia Line. Following the rule of law of Dewitt, the court found no evidence of fraud, although they stated that injustice or unfairness would have been sufficient, and there was no evidence of under-capitalization, insolvency, or any other cause for piercing.

The Virginia courts recognize that shareholders often incorporate for the purpose of limiting personal liability, which should not be deemed a sufficient evasion of personal obligations to impose liability on the shareholders.

A Georgia court stated that sole ownership of a corporation by one person, acting as sole director and officer, was not sufficient to hold that person liable for a corporate action. Absent evidence of abuse of the corporate form, such as commingling of assets or a lack of records, the court did not pierce the veil, even where the shareholder had both borrowed and loaned money to the corporation, because such loans were adequately documented in the corporate records.

A recent Delaware decision did not pierce the corporate veil because of a lack of fraud, notwithstanding that the court defined fraud broadly to include undercapitalization or a lack of corporate formalities.

Texas courts are similarly hesitant to find a shareholder liable, unless “the subsidiary is being used as a sham to perpetrate a fraud, to avoid liability, to avoid the effect of a statute, or in other exceptional circumstances.” A court did not impose liability on the parent because of a lack of exceptional evidence of fraud or unfairness to the plaintiff.

Investors should be aware that even without evidence of fraud, some courts will impose liability on shareholders for corporate obligations if there is

192 Id.
193 Id. at 829.
195 Id.
196 Greenberg, 255 Va. at 594, 499 S.E.2d at 266.
198 Id.
201 Id.
Insufficient capitalization of the corporation, corporate procedures are not followed, or where the corporation is controlled by one person or parent corporation.

CONCLUSION

The Courts of the various United States are consistent in their hesitancy to impose liability on shareholders for corporate obligations; however, where a plaintiff can prove fraudulent conduct by the shareholder, liability is more likely. Virginia protects the limited liability of shareholders to a greater extent than other jurisdictions, although such protection has diminished in recent years. The Fourth Circuit and other Federal courts have demonstrated more willingness to find fraud sufficient to pierce a corporate veil, even in situations where the state courts would likely fail to find sufficient evidence of wrongdoing. Both state and federal courts have become increasingly willing to impose liability on a shareholder for an obligation of their corporation, therefore investors and parent corporations need to be more diligent in maintaining the separate existence of the corporate entity.

Business owners who incorporate to limit their liability should scrupulously maintain corporate records, accounts, and other formalities. Customers and others who deal with the corporation must be made aware that they are dealing with the corporation, not any individual shareholder or subsidiary. Even these precautions will not protect the shareholder if a court finds evidence of fraud or injustice.

The following suggestions may help to protect a shareholder from personal liability:

- Although one individual can be the sole director and hold all offices in some states, it may be preferable to avoid this situation. Consider electing the corporate accountant as the Treasurer, and assign an active role to this person. If there is no corporate accountant, consider retaining one. Avoid inactive officers, such as relatives or friends, who draw a salary without performing actual services.

- Document the purposes of the corporation other than limiting the liability of the shareholders. Suggestions include attracting investors, liquidity of investment, management options, professional image, public relations, authority to do business in other regions.

- Stationery with the complete corporate name should be used for all business communications. This should include Inc., Corp., Ltd., or other such designations if included in the articles of organization filed with the secretary of state. Avoid trade names, initials, or shortened forms.

- Signatures on corporate documents and correspondence must include the complete corporate name above the signature, with the name and title of the signer beneath their signature.
Use the full name of the business in all advertising, signs, directories, telephone listings, and when answering the telephone. This should be considered when choosing a corporate name; simple, short, and easy to pronounce is preferable. Sales personnel should be trained to use the correct corporate name at all times and avoid using personal pronouns such as “I”, “me” or “we”.

Establish accounting records and bank accounts in the corporate name.

All income and expenses from the corporation should go through the corporate account. Never deposit personal funds of the shareholder in this account or pay personal expenses from this account. Be sure to document the funds transfer, as well as its legitimate business purpose, in the corporate records.

If the corporation uses a shareholder’s equipment, a signed bill of sale or lease should be signed and retained.

Hold shareholder and director meetings on time and keep accurate minutes.

Pay all corporate, employment and withholding taxes when due. Retain a competent corporate accountant.

Contact an attorney at least annually to file annual reports and review corporate records.

Maintain sufficient capitalization for business purposes, and insurance for liabilities.

After dissolving the corporation, do not maintain any accounts or draw a salary. Ensure that funds from the liquidation of assets are used to pay corporate debt promptly.

Subsidiaries should not operate out of the same office as a parent corporation, and avoid having identical employees, officers, or directors as the parent.

Avoid fraud, or even the appearance of fraud.
SHAREHOLDER LIABILITY IN THE REPUBLIC OF TURKEY

I- PRINCIPLE OF LIMITED LIABILITY

A. Overview

The corporate body came into being as a result of various needs of real bodies. In this respect, person and property communities are formed so as to achieve an objective which real bodies cannot by themselves accomplish since it exceeds their lifetime or limited opportunities. When such person or property community is recognized by the law as a unit independent from the persons and properties making it up, it is a "corporate body." This independence is expressed as "the principle of separation;" the rights and debts that result of the activities the corporate body is engaged in through its organs belong directly to the corporate body, not its members.

As an extension to this rule, the corporate body called the corporation, as a legal person, is responsible for the debts of the company under the Trade Law, with the exception of the provisions concerning liability of the managers (eg. Article 336 and 339 of Turkish Commercial Code). In this respect, company managers, partners and representatives are not liable to creditors of the company (Article 269/2, 503 and 532 of Turkish Commercial Code). As stated before, their liability concerning company debts is in the name of the "corporate body of the corporation, confined to the amount of capital they committed but failed to bring de facto to the company." In this case, it is the principle of limited liability which arises.

B. Historical Information

The principle of limited liability has been accepted and implemented for more than a century. In this respect, the principle was introduced in the middle of the 19th century (between 1820 and 1870) into the legal system of the European states and the USA. Before these dates, the generally held opinion was that the real body partnering with a commercial company should be unlimitedly liable; it was believed that whoever gained power and profit should manage the partnership and compensate for any losses, because the activities and structures of the companies were quite simple at that time and there was trust in the financial power and honesty of the liable partner of the company. However, the principle of limited liability became an

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206 Tekinalp, G./Tekinalp, Ü.: “Perdeyi Kaldırma Teorisi”, A Tribute to Prof. Dr. Reha Poroy, İstanbul 1995, s. 387; Yanlış, p. 10 and more.
207 Atabarut, I. S.: İngiliz ve Amerikan Hukukunda Tüzel Kişilik Örtüsünün Aralanması Teorisi ve Uygulama Alanlarından Dava Örnekleri, Prof. Dr. Nuri Çelik’e Armağan, Ç. I, İstanbul 2001, p. 486; Yanlış, p. 76.
208 Atabarut, p. 487.

C. Main Reasons for the Adoption of the Principle of Limited Liability

In general terms, the principle of limited liability serves the entrepreneurs who wish engage in commercial activities, yet aim to limit liability to creditors. In this way, the entrepreneur will know the highest possible debt risk will be as a result of the principle of limited liability and conduct commercial activities in comfort based on this knowledge.\footnote{Hacıalioğlu Reva, Z.: “Anonim Şirketlerde Tek Borç İlkesi ve Türk Ticaret Kanunu Tasarısı Çerçevesinde Değerlendirilmesi”, Y. 2005, İstanbul Barosu Dergisi, C. LXXIX, S. 5, p. 1552; Easterbrook/ Fischel, p. 91; Yanlı, p. 75-76; Atabarut, p. 486.} This principle encourages the commercial activity of the entrepreneur.\footnote{Atabarut, p. 487; Hacıalioğlu Reva, p. 1555.}

The principle of limited liability mainly depends on two principles. One is that the association of the capital and the partners of these associations (corporations) are totally independent bodies. In this sense, a corporation is a body separated from those who conduct its activities via its constituent organs and its managers. Also, the principle of “personalisation of debt relation” is valid for the corporation. Therefore, as separate entities, each person is responsible only for his/her own debt and is not bound to be affected personally from the relationships between the corporation and its creditors.\footnote{Antunès, p. 127-128; Yanlı, p. 77; Hacıalioğlu Reva, p. 1555.}

Second is that the associations of capital, especially the corporate bodies having a large number of shareholders, do not give active roles to these shareholders in the management of the company. In an ordinary general partnership, the general partners and limited partners are unlimitedly liable to the creditors to the second degree (Article 178/1 and 258 of the Turkish Commercial Code) because these partners are given the broad opportunity to participate in the management, representation and assets of the company and have the power of saving (association of persons). However in associations of capital, partners do not have a very active role in company decision-making. The goals of the shareholders here is to make profit. Therefore, it was found unjust to assign unlimited liability to people, who do not play an active role in the management of company unlimited liability, against creditors for the debts of company.\footnote{Ocaktan, H.: Anonim Şirketlerde Sınırlı Sorumluluk İlkesi Karşısında Şirket Alacaklarının Korunması, Ankara 2000, p. 5 (Unpublished Master Thesis); Yanlı, p. 78;
II- “THE PRINCIPLE OF LIFTING THE CORPORATE VEIL” AS A PRINCIPLE OF LIMITED LIABILITY

A. Overview

Associations of capital were regarded as “a product of economic needs” when they first emerged, while the principle of limited liability was regarded as an outcome of the features of this type of organization. However, since the beginning of the last century, the principle of limited liability has become the main reason why such corporations have been preferred.214

However, the lawmaker has not envisaged any limitation for this particular preference. In other words, it is not against law to aim solely for the limitation of liability in the preference of partners for associations of capital.215 On the other hand, the legal system is not supposed to make it possible for the partners to hide behind the corporate body of the company if they aim to deceive others by misusing legal limited liability through the establishment of associations of capital or weakening the financial standing of the company due to the fault of managers of the company, where as a result creditors have a loss when they can not collect on their loans.216

The solution of “the principle of lifting the corporate veil”217 aims to improve the partners’ and managers’ sense of responsibility and to avoid unlawful situations, which in turn helps protect the rights of the creditors of the company.218 219 Here the particular objective is not to allow the misuse of the


215 Battal, p. 657.


217 Despite the absence of a uniformity in German and Swedish law to clarify this principle, in English and American law mostly the concepts “Lifting The Corporate Veil” or “Piercing The Corporate Veil” are used. Also, the principle is also named as “Disregard of Legal Entity” or “Disregarding The Corporate Entity”. In Turkish law this principle is named as “Lifting the Disguise”, “Lifting the Corporate Body Disguise” or “Clarifying Principle”. In this study, the term of “Lifting the Corporate Veil” term will be used, inspired by “Piercing The Corporate Veil”. (See Poroy [Tekinalp/Çamoğlu] for its use in Turkish law, p. 97; Yalcı, p. 13 and more.


219 Another principle functioning to protect creditors of the partnership against the principle of limited liability is the principle to protect company assets. In this respect, in the registry of company, as well as full commitment of the whole capital [Art 285/1 of Turkish Commercial Code] and no bonding for less than its nominal value [TArt. 286/1 of Turkish Commercial Code] and other measures for adequate assets, the failure of the company to transfer or pledge its own shares in principle [Art. 329 of Turkish Commercial Code] and special measures on condition that the assets decrease [Article 324 of Turkish Commercial Code] and provisions the like
legal separation of the corporate body and its partners under the disguise of the strict rules of the principle of limited liability, but to mitigate this strict principle. For instance, if (H) is a bond owner and (D) who develops it within time, the bill, he takes it for granted that (D) is his creditor and can put forward this situation as a “personal exception.” If (H) endorses the bill to a corporate body, whose majority of company shares is on his account, just to overcome this legal obstacle and wishes to obtain his credit from (D) through a new holder company instead, this is regarded as a “misuse of the corporate body” and it does not matter if the corporate body who transfers the bill and the corporate body who owns it are different bodies or not. Thus, (D) should be able to put forward the personal exceptions against the corporate body holding the bill as well as the endorser (H) in accordance with the “principle of lifting the corporate veil.”

For associations of capital, the principle of lifting the corporate veil means, in accordance with the “liability law,” the expansion of the areas of liability so as to include the partners of the company as well who owe a debt of the corporate body to his creditors because of his own assets. This principle abolishes the rule that the liability of the partners is limited to the capital share they commit to the company and opens the path for the creditors of the corporate body to attach the personal assets of the partners in order to satify debts.

B. The Principle of Lifting the Corporate Veil within Turkish Law

1- Legislation Perspective

It is possible to find regulations in the legislation of Turkish Law on lifting the corporate veil through delegating the liabilities of the corporate body to the partners or managers. In this respect, Articles 179, 180 and 192 of the Turkish Trade Law which allow creditors to apply for the personal liability of the partners to be held accountable for the debt of collective companies, include the principles which protect the assets of the company for the sake of the creditors of the partnership and prevent any unwanted outcomes of the principle of limited liability. See Ansay, T.: Anonim Şirketler Hukuku Nereye Gidiyor, Ankara 2005, p. 41; Yalıl, p. 82.

220 Tekinalp, p. 387.
221 Here the important issue is that the bill has been transferred by (H) with an “assignation endorsement” to an incorporated body, instead of a collection endorsement. Because, the debtor can claim the pleas he has against collection endorser also against plea endorser in any asset document transferred in this way. (TTL art. 600/2). In this case, it is clear that there is no need to apply the principle of lifting disguise of the corporate body.

222 Tekinalp, p. 387.
223 This was explained by Poroy and Tekinalp as follows; “Pursuant to the principle of lifting the disguise, in the case of endorsement of a promissory note to a single body partnership or endorsement of the bill from such partnership to single partnership, pleas against partnership or the partner can be put forward to the transferee as well. In the case of plural partners to a partnership if they are not real partners (dummy partners assumption), there is single partnership”. Poroy, R./ Tekinalp, Ü.: Kıymetli Evrak Hukuku Esasları, 16th Ed, İstanbul 2005, p. 84.
224 Yalıl, p. 37.
225 Atabarut, p. 482; Yalıl, p. 37.
Article 435 of Turkish Commercial Code which suggests that “straw men” are not acceptable in corporate bodies, Article 35 of the Law 6183 on Procedures concerning the Collection of the Public Credits, which allows creditors to apply for the partners of the debtor companies to be held accountable for uncollected public credits, and Article 10 of the Tax Procedure Law, entitled “Tasks of the Legal Representatives,” which authorizes the collection of partially- or totally-uncollected tax from the assets of a company and the resultant credits from the assets of those who represent the company are examples of this principle in legislation. Also, Articles 110 and 134 of Banking Law 5411 do not totally eliminate the legal disguise of personal separation of legal bodies before the law, yet constitute another example of this principle, since they set aside the personal separation of the bank and the dominant partners, and that between other companies in the community, on the condition of compensating the losses of the banks transferred to the Savings Account Insurance Fund and the bank credits which become Fund credits from those liable in accordance with the Law.

2- Court Decisions Perspective

It has been observed that court decisions have been made with respect to the principle of lifting the corporate veil, which is included in the legislation indicated above. The first one of such decisions is the decision by the 19th Legal Chamber of the Supreme Court of Appeals on 02.11.2000 (Basis No: 2000/5828, Decision No: 2000/7383). The decision and resultant text of the verdict suggests; “DECISION: The attorney of the claimant claimed and sued on the grounds that the defendant was the sole guarantor of the credit contract between client’s bank and out-case B…. Automative Co., there was no positive outcome of the notice issued due to the failure of payment of the credit debt, the prosecution started with confiscation against the defendant, who was turned to bankruptcy, the defendant objected to prosecution, and the decision was to claim the bankruptcy of the defendant on grounds that the objections are not right. The defendant’s attorney asked for the rejection of the case, stating that his client is not a tradesman, therefore his bankruptcy cannot be requested since being a partner does not provide the position of tradesman to real bodies. The bankruptcy verdict was appealed by the defendant’s attorney on grounds that bankruptcy conditions were attained for the defendant who failed to pay despite the stock order who was founder member for various companies and who was chairman of MUSIAD from 1990 to 1999. RESULT: Since there is no inconsistency about the verdict and the fact that the defendant who was the partner and manager of Kağıt

227 Bahriyar, M.: Ortaklıklar Hukuku, 2nd Ed, Istanbul 2006, s. 7; Poroy [Tekinalp/Çamoğlu], p. 97 - 98. In accordance with this provision, all shareholders in a private limited company are liable for the public debt of the company from the first level and unlimitedly. However, there is no clarity in Act No. 6183 concerning the liability of partners of the company for the debts of the company other than these. Kumkale, R.: Şermaye Şirketleri, Ankara 2003, p. 243.
228 RG: 01.11.2005 - 25983.
on the grounds of the evidence on which the decision is based and, even though the defendant does not have a personal registry in the trade registers and who is the manager of the Istanbul Chamber of Commerce which is bound to MÜSİAD as an industrialist, all objection demands of the defendant attorney are rejected and the verdict is unanimously approved on 2.11.2000. In this decision, although he was not registered in the trade registry as a tradesman, he is registered in the trade and navy trade chambers and professional committees and has a large share in large companies, it was stated that the decision was a good model for practising the principle of lifting the corporate veil in court. However, this decision caused some confusion in terms of relation between the principle and decision since the reasons were not clearly understood from the decision.

Another decision, which was another model for the principle of lifting the corporate veil, resulted from a case before the Izmir 4th Trade Court of First Instance on 17.02.2005 (Basis No: 2002/843, Decision No: 2005/64) and the Supreme Court of Appeals 19th Legal Chamber decision on 15.05.2006 (Basis No: 2005/8774, Decision No: 2006/5232) which approved this decision. In the conflict, the claimant company concluded a sales contract with the defendant companies (Ege Limited Co. and Ege Inc.) concerning the sales of goods. In accordance with this contract, two orders of goods were sold to the defendant companies at different prices and amounts; two invoices were prepared and one was submitted to Ege Limited Co., and the other to Ege Inc. After a while, following the contract, Ege Limited Co. partners transferred their shares to third bodies. The claimant company fulfilled its responsibilities under the sales contract yet sales prices failed to be paid by the defendant companies. So the claimant company sued the defendant companies for the joint and in solide collection of the total price of both contracts from the defendant companies. Following this, defendant Ege Inc. attempted to avoid payment on the grounds that the invoices were developed differently and it cannot be liable for the debt of Ege Limited Co. and that the liability for payment on his account concerning the sales cost under the invoice was transferred to the other defendant by its own will, so therefore he was exempt from the relevant debt in accordance with the Articles 173/1 and 174/1 of Debts Law. The local court stated in his decision with reason that “... although there are different legal bodies from the legal aspect under the “theory of lifting the corporate veil,” both defendant companies have the

229 www.kazanci.com.tr (23.04.2007)
230 Seven/Göksoy, p. 2459.
231 Poroy, Tekinalp and Çamoğlu, most probably and rightfully, criticized the decision since it was not possible to understand if the decision was based on the registry of the relevant person as tradesman in the chambers or his large share in various companies. Poroy [Tekinalp/Çamoğlu], p. 98 - 99.
232 For detailed analysis of the decision see Seven/Göksoy, p. 2455 - 2470.
identical properties due to sister company relations.233 Defendant Ege Inc has only the argument that the other defendant is liable for the debt since they are separate legal bodies. This argument is the misuse of the right in accordance with the Article 2 of the Civil Law... The phenomenon of separate legal bodies cannot be taken into consideration in form. It should be considered under the conflict between the parties, honesty principles and equality criteria. The attempts of the defendant Ege Inc. to leave the debt to the other defendant (Ege Ltd. Co.) which does not have the capability to pay and is a separate corporate body is not acceptable. Therefore the decision is that both companies are in solido liable for the debt.” The decision by the local court was approved by the Supreme Court of Appeals and High Court decision included the phrase “... it is not appropriate to find both defendants liable by lifting the corporate veil ...” and the principle of lifting the corporate veil was clearly approved for the first time234.

In agreement with the approaches and decisions by the local court and Supreme Court of Appeals in the particular case, we would also like to note that there are further considerations that are particularly important. The principle of lifting the corporate veil is to avoid the misuse of the principle of limited liability and to detect the real liable parties under the disguise. Therefore it should be considered “how far” the corporate body was misused. In this respect, in the particular case, it is necessary to go beyond the principle of limited liability which is brought by the corporate body of incorporation and reach the real persons on condition that Ege Inc. partners misused not only the legal personality of Ege Limited Co. but also that of Ege Inc. as against the principle of honesty in accordance with Article 2 of Turkish Civil Law.

3- Doctrine Perspective

The principle of lifting the corporate veil has been the subject of comprehensive studies in Turkish legal doctrine for the recent 15 years now.235 It has been suggested that the relevant principle is of particular importance for our legal system, especially in the situation of starting large businesses with inadequate capital and when the capital of company falls short of that needed for the operation of the company in time, it hurts the financial trust in the company; therefore it is necessary to find those responsible under the concept of lifting the corporate veil.236

233 The local court based this identical situation in this particular case on the fact that the same persons were the partners and managers of the defendant companies on the date when the contract was concluded and the person who concluded the contract with the claimant on behalf of the defendants, who received the good and issued the containership letter of credit was the joint representative of both companies. Also, the fact that Ege Limited Co. partners transferred their shares does not disturb the identical situation in the particular case; even so, it has been stated in the decision with reason. Seven/Göksoy, p. 2456.

234 Seven/Göksoy, p. 2469.

235 Tekinalp/Tekinals, p. 387-404; Atabarut, p. 481 - 498; Seven/Göksoy, p. 2451-2470; Battal, p. 645-662.

236 Ansay, p. 55.
The first issue considered regarding the principle of lifting the corporate veil in Turkish legal doctrine is whether a specific intent must be found in order to apply this principle. One view in literature suggests that “a deliberate misuse” is required for applying this principle while the other holds, as we also agree, that it should be practiced “even in the absence of deliberation.”

Whichever approach is adopted, it is unanimously held that the principle of “lifting the corporate veil” in Turkish legal system is based on the principle of honesty and the prohibition of misuse of rights contained in Article 2 of the Turkish Civil Code. Therefore, the legal system shall not protect the misuse of rights born by the corporate body through the establishment of a corporate body, making use of an existing corporate body or hiding behind the corporate body in an attempt to violate a liability born by law or an agreement to hurt any third party.

On the other hand it has been expressed that lifting the corporate veil is not only covered under conditions of misuse of the principle of limited liability but also some other situations. In this respect, Articles 180 and 182 of the Turkish Commercial Code are not related to the principle of limited liability; and the relevant articles can be models for the principle of lifting the corporate veil where it concerns general and limited partnerships.

The final point here is that the approach in theory and practice is that the principle of separation is a rule and the principle of lifting the corporate veil is an exception. Therefore, creditors of a company are required to apply to the corporate body first for satisfaction of a debt even if there is something contrary to the principle of honesty under Article 2 of Turkish Civil Code.

On the other hand, in the presence of special provisions which allow for lifting the corporate veil, at the same time making it possible to reach the personal liabilities of the partners of the company in law – since the principle of lifting the corporate veil is not directly regulated in law – the provision present in law will have the priority. In this case, for instance on conditions of culpa in contrahendo liability of the partners of the company, the principle of lifting the corporate veil shall not apply. However, there is no need to apply the principle to reach the liability of the partner of the company who is the in personal guarantor of the debt of company.

CONCLUSION

The principle of limited liability, which has become an indispensable element in corporate law in the last century, has assumed the role of “promoting”
entrepreneurs in commercial life. Thus, the entrepreneur who is a partner to an association of capital can both take part in activities beyond the capacity of this capital and he can keep his liability at a particular level, which ensures the “trust” which is indispensable for trade.

The principle of limited liability is based on the idea that the partner who did not take part in management owing to the organization of the association of capital; and mostly who did not attempt it, shall not be affected by any negative outcome (from debt of the company) of the mismanagement of a company in which he did not have a role in managing. Since this is the main principle, recently it has been observed that the “principle of lifting the corporate veil” has been accepted in legal systems as an element to balance the conditions of misuse of limited liability in time and the losses of the creditors of the company.

Despite the regulation of the principle of limited liability and the presence of some provisions to prevent misuse of this principle in Turkish law, it has been criticized that the principle of “lifting the corporate veil” has not overtly been bound to a provision in law and that this gap has been attempted to be closed by the principle of honesty contained in Article 2 of the Turkish Civil Code. We hold the opinion that the relevant principle should be taken into the scope of a provision so as to decrease misuse of the principle to a minimum, in line with the needs of the rapidly developing commercial sector.
Derogation from the Free Movement of Goods in the EU: Article 30 and 'Cassis' Mandatory Requirements Doctrine

by Öznur İnanılır

Under the term “single market,” it is important to understand the interpretation of Articles 28, 29 and 30 of the European Union Treaty. While Articles 28 – 29 prohibit quantitative restrictions and measures of equivalent effects, Article 30 provides an exception by listing categories like public health, public security and public morality. In this way, it gives a freedom to import and export goods without restrictions. However, the European Court of Justice (ECJ) held that the list of grounds for derogation in Article 30 is exhaustive. This means, new measures cannot be added to the scope of Article 30. On the other hand, the ECJ developed another exception list arising from the Cassis de Dijon case under the term of mandatory requirements. In this case, the Court held that this list is not exhaustive; it can be, and has been, added to by the ECJ. Consequently, both Article 30 and mandatory requirements constitute derogations from the principle of the free movements of goods. This essay argues the scope and limits of Member States’ discretion under these listed categories.

Derogations under Article 30 and the Cassis de Dijon case are all non-economic and cannot be used for taxation or economic benefits. In light of this explanation, Member States can determine the scope of such derogations according to their own values. However, these derogations must be interpreted restrictively to prevent the extension of their effects for reasons other than the protection of public interest. For this reason, the ECJ can limit the scope of the effects under some of the requirements. There are three basic requirements for both mandatory requirements and Article 30 derogations:

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firstly, there should be no harmonizing legislation occupying the field; secondly, the national rule must fall within one of the categories of derogation or constitute a mandatory requirement; thirdly, the rule must, in effect, be proportional and not constitute arbitrary discrimination or a disguised restriction on trade. Moreover, if one Member State uses these measures, the burden of proof falls upon that Member State. Accordingly, Member States must prove the justification of these restrictions; they have to show that the measures are non-discriminatory and proportionate. In other words, a measure may not restrict trade between Member States more than is necessary to achieve its legitimate object. 

**Derogations under Article 30**

According to Article 30, under the listed categories Member States can restrict the importing or exporting of goods. As mentioned above, Member States can only use the listed measures and they must prove the proportionality by showing that the restrictions are not going to be used for economic gain or to protect internal market. These categories are public morality, public policy, public security, protection of the health and life, protection of national treasures, and protection of industrial and commercial property. Each of these categories is discussed further below.

**Public Morality**

When a Member State bans an importation of goods on grounds of public morality, this prohibition cannot be discriminatory. In many cases, the Court has held that Member States are free to set up their own standards of morality. However, there are limits to the freedom: a Member State must regard the public policy issue as sufficiently serious to justify an exception to one of the fundamental Treaty freedoms and ultimately the ECJ remains free to review the scope of the Member State action.\(^5\) This decision can be seen in the case of *Henn and Darby*.\(^7\) In this case, the United Kingdom Government banned the importation of pornographic materials by relying to Article 30. The ECJ found that this prohibition is justified under the public morality exception within the meaning of Article 30 and such prohibition can be justified if there is no lawful trade in such goods within the UK. In addition, the Court did not seek to define the boundaries of the concept of public morality.\(^8\) This means there are no standards to determine the scope of the Member State behavior in public morality.

On the other hand, in the *Conegate*\(^9\) case the Court made a different decision; the UK banned the importation of love dolls under the public morality measure in Article 30. However, this time the UK legislation did not prohibit

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\(^7\) Case 34/79 *R. v. Henn and Darby* (1979) ECR I-3537.  
\(^9\) Case 121/85 *Conegate Ltd. v. Commissioners of Customs and Excise* (1986) ECR 1007.
the manufacturing and marketing of such products in its territory. For this reason, the ECJ held that this prohibition was discriminatory and not justified under Article 30. Consequently, while Member States are free to determine the sense of public morality which should pertain within their own territory, they cannot place marked stricter burdens on goods coming in from outside than those which are applied to equivalent domestic goods.\(^{10}\)

**Public Policy**

Public policy is broader than the other measures in Article 30. Therefore, it is only used when no alternative derogations could be applied. Because of this reason, there are only a few cases that rely on the public policy exception; in *Bouchereau*\(^ {11}\) the ECJ held that reliance on that exception presupposed the existence of a genuine and sufficiently serious threat to the requirements of public policy that affects one of the fundamental interests of society.\(^ {12}\) As earlier mentioned, Member States cannot rely on economic benefits when using any measures in Article 30. In fact, in *R. v. Thompson*\(^ {13}\) the Court drew a distinction between public policy and economic interest. In this case, the UK prohibited the importation and exportation of certain coins by relying on the public policy provision. The judgment was based on the assertion that the State enjoyed a right akin to a property right in the coins;\(^ {14}\) protection of a property right does not reflect protection of the economy. Consequently, the ECJ held that “A ban on exporting such coins with a view to preventing their being melted down or destroyed in another Member State is justified on grounds of public policy within the meaning of Article 30 of the Treaty, because it stems from the need to protect the right to mint coinage which is traditionally regarded as involving the fundamental interests of the State.”

**Public Security**

The third exception, public security, covers both internal and external security. This measure is exemplified in the *Campus Oil*\(^ {15}\) decision. In this case, Irish law requested that petrol importers buy 35% of their requirements from state-owned refinery and the prices of that oil would be determined by the Irish government. The Irish government argued that this rule is important for the country to protect its own oil capacity. The ECJ held that this rule could be justified under public security because oil is an important energy source for public services even though it is also important for the country’s economy.

**Protection of the Health and Life of the Humans, Animals or Plants**

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\(^{10}\) Craig, P. and de Burca, G. *EU Law Text, Cases and Materials* (2003) pg.628.


\(^{13}\) Case 7/78 *R. v. Thompson, Johnson and Woodiwiss* (1978) ECR 2247.


\(^{15}\) Case 72/83 *Campus Oil Ltd. v. Minister for Industry and Energy* (1984) ECR 2727.
Protection of the health and life of humans, animals or plants is another important derogation in Article 30. According to several decisions of the ECJ, human life and health come before other public interests. In addition, each Member State can decide the strictness of both the protection and checking process. However, this authorization can be used at a number of stages; first of all, the real aim of the restriction must be the protection of public health. That is to say, the Member State must not intend to improve its internal market by using this measure. This can be exemplified in the Commission v. UK\textsuperscript{16} case; the UK banned poultry meat importation from other Member States in order to prevent New Castle disease by relying on the protection of public health, but the Court decided that this prohibition was actually made to block the importation of poultry meat, especially French meat. This situation protected the domestic producers.

According to the second stage, this derogation can only use if it is sustainable where there is no perfect consensus on the scientific or medical impact of particular substances.\textsuperscript{17} In other words, this restriction must be necessary for achieving the protection of public health. In fact, in De Peijper,\textsuperscript{18} the ECJ held that the public health measure can only be used when there is no other regulation protecting human life and health, and also does not restrict trade in Community; “national rules or practices do not fall within the exception specified in Article 30 if the health and life of humans can be as effectively protected by measures which do not restrict intra-Community trade so.”\textsuperscript{19} This decision refers to the proportionality rule, which is also last stage of applying the public health measure.

As mentioned before, proportionality shows that the restriction cannot be strict more than is required. In the Commission v. Italy\textsuperscript{20} case, Italy prohibited the marketing of energy drinks contain caffeine, claiming high caffeine may threat human health. However, Italian authorities did not show that the restriction was necessary and proportionate for public health. Moreover, the scientific evidence that Italy based their claims on did not consider that this prohibition is valid. In fact, the latest research had proven that energy drinks containing high doses of caffeine did not show any risk to health. As a result, in paragraph 36, the ECJ stated that “by applying to drinks produced and marketed in other Member States a rule prohibiting the marketing in Italy of energy drinks containing caffeine in excess of a certain limit, without showing that that limit is necessary and proportionate for the protection of public health” was not consistent with Article 30.

\textsuperscript{16} 40/82 Commission v. UK (1982) 3 CMLR 497.  
\textsuperscript{17} Craig,P. and de Burca,G. EU LawText, Cases and Materials (2003) pg. 632.  
\textsuperscript{18} Case 16-74, Centrafarm BV et Adriaan de Peijper v Winthrop B, ECR. 1183.  
\textsuperscript{19} Philipson, A. Guide to the Concept and Practical Application of Articles 28-30 EC (2001) pg.20.  
\textsuperscript{20} Case C-420/01 Commission v. Italy (2003) ECR I-6445.
Questions arising from the principle of scientific evidence and answers are laid down in the *Sandoz*\(^{21}\) and *Re UHT Milk*\(^{22}\) cases. First, the problem is about the uncertainty of the scientific evidence; according to the *Sandoz* case, *Sandoz* wanted to sell muesli bars in Holland. However, Dutch authorities did not allow this on grounds that the vitamins in muesli bars are dangerous to public health. Scientific evidence was not certain whether the vitamins were excessive. The Court held that if there is uncertainty about the medical implications of some substance it would be for the Member State to decide upon the appropriate degree of protection for citizens under the proportionality rule.\(^{23}\)

Another problem arises from “double checking.” The exporting Member State controls and tests goods before exportation. The importing Member State should not duplicate these controls; they can only make spot checks to ascertain any damage. In the UHT milk case, the UK limited importation of French UHT milk and argued that milk can only be marketed in approved diaries. This regulation brought about a second control, repacking and a new importation license. In fact, the ECJ held that this limitation couldn’t be justified under Article 30 because evidence showed that all Member States apply the same controls on milk, so milk has a similar quality in all Member States; this situation did not cause any important danger. To sum up, “the importing Member States must take account of tests or controls carried out in the exporting Member States providing equivalent guarantees. The importing Member States may not systematically duplicate those controls, but may carry out spot checks as well as tests designed to detect damage or disease which might have occurred after the inspection in the exporting State.”\(^{24}\)

Another important aspect to the public health provision is the precautionary principle. This principle was explained in the case of the *United Kingdom v. Commission*.\(^{25}\) In this case, the Commission banned the exportation of UK-origin beef in order to prevent the spread of BSE (mad cow disease). At that time, there were still uncertainties about the mechanism for transmission of BSE but the number of the BSE cases was dropping. On the other hand, there were still doubts about its effectiveness. Consequently, the ECJ held that where there is uncertainty as to the existence or extent of risks to human health, institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.\(^{26}\) According to this decision, the precautionary principle permits restrictions when there may be an unproven but postulated existence of high risk to public health consistent with scientific evidence.

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The second part of that measure encompasses the protection of animal life and health. This principle is same as the protection of human life and health. The only one exception is that human life is more important than animal life. There are three main themes that run through the case law in this area: first is the need to protect the health of the animals and plants from the diseases; the second one is animal welfare and the third is the protection of rare and endangered species.

Protection of National Treasures Possessing Artistic, Historic or Archaeological Value

There is no case law concerning this area because of secondary legislation in Community: Regulation 3911/92 and Directive 93/7.

The Protection of Industrial and Commercial Property

There are two principles that case law use regarding the application of this measure under Article 30: the existence and the exercise of the right. On the existence of the right, national legislation on the acquisition, transfers and extinction of such rights is lawful. The exercise of the right is known as the exhaustion of the right; after the first marketing of the product, the owner cannot object to the importation into another Member State.

Mandatory Requirements

Besides the derogations contained in Article 30, the ECJ mentioned mandatory requirements in the Cassis de Dijon case. In this case, Germany did not allow the importation of a French liqueur called Cassis de Dijon on the grounds that its alcohol content was too low. Germany relied on three arguments: public health, consumer protection and unfair commercial practices. The ECJ held that prohibiting the importation of such goods is a breach of Article 28, because Cassis passed the French standards, and this situation established a barrier to trade. Although the Court recognized that certain measures might be necessary for the protection of public health, the effectiveness of fiscal supervision, the fairness of commercial transactions and consumer protection, this particular measure could not be justified on these grounds. In opposition to Article 30, the list of mandatory requirements is not exhaustive. In fact the ECJ has added other objective justifications, which might have been difficult to fit within the framework of Article 30. Some of the important mandatory requirements are discussed below.

Consumer Protection

Consumer protection claims can be based on different phrases such as labeling, language requirements or consumer understanding. This measure must be necessary and proportionate for applicability. The general rule from the *Cassis de Dijon* case, which is called “golden rule,” is that the sale of a product should not be prohibited when the consumer can be sufficiently protected by adequate labeling requirements. In light of this rule, in the case of *Rau v. De Smedt* Belgium sold margarine with a cube shape packaging in order to prevent consumer confusion between margarine and butter. Because of this rule, if a Member State wanted to export margarine, they had to package it in a cube shape, which resulted in extra cost. The ECJ held that this regulation was not justified; distinguishing margarine and butter with adequate labeling would be enough.

**Public Health**

As can be seen, public health provisions are contained both in Article 30 and mandatory requirements. There are many cases that exemplified the public health measure under these different categories. One of them is explained in *Aragonesa de Publicidad*. In this case, there was a restriction of the high rate of alcohol advertisement on streets, in public transport and in cinemas in order to protect public health. The ECJ stated in paragraph 18, that this prohibition is justified because the restriction is only made in specific places on the grounds of the special importance of preventing alcoholism in drivers and young persons.

**Protection of Environment**

The ECJ adopted this measure as a mandatory requirement in the *Danish Bottles* case. According to this case, beer and soft drinks manufacturers can be forced to market with reusable containers; the Court found this regulation was necessary and proportionate for protecting the environment. On the other hand, the Court rejected the requirement, which stated that only approved containers could be used for sales. This situation gave rise to extra costs for providing special containers and was not proportionate.

In conclusion, derogation provides the counterbalance by permitting some, albeit limited, retention of Member State sovereignty. Both Article 30 and mandatory requirements allow derogations on grounds of protecting public health.

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34 Paragraph 18: “On the other hand, the measure at issue does not prohibit all advertising of such beverages but merely prohibits it in specified places some of which, such as public highways and cinemas, are particularly frequented by motorists and young persons, two categories of the population in regard to which the campaign against alcoholism is of quite special importance. It thus cannot in any event be criticized for being disproportionate to its stated objective.”


interests. The concept of public interest may result in allowable differences in each Member State. In fact, Member States determine the scope of the derogations with their own values, but they can only cite the listed measures. However, by reason of the broad scope of measures in the listed categories, it is easy to extend the aim of public interest. Because of this, derogations must be interpreted strictly; rules such as proportionality and non-discrimination must be applied in every case, whether the restriction is based on Article 30 or mandatory requirements. By the same token, the ECJ does not prefer to use broad measures, like public policy. It is only applied if there is no alternative area that could be used. On the other hand, the ECJ gives more importance to some derogation like public health, public morality and public security.
The Historical Development of the Ownership of Real Property in Turkey by Foreigners

by Nursel ATAR∗

In 2008, the Constitutional Court of the Turkish Republic released two important decisions: First, the Court cancelled the second sentence of the first paragraph and the seventh paragraph of Article 35 of the Land Registry Law. Second, the Court cancelled Article 3(d) of the Direct Foreign Investments Law. This article attempts to provide a snapshot of the current legal situation of the ownership of real property in Turkey by foreigners.

In the first half of 2008, the Constitutional Court of the Turkish Republic released two important decisions affecting the regulation of the ownership of real property in Turkey by foreigners. First, on 16 January 2008, the Court cancelled the second sentence of the first paragraph and the seventh paragraph of Article 35 of the Land Registry Law (LRL). Second, on 13 March 2008, the Court cancelled Article 3(d) of the Direct Foreign Investments Law (FDI Law). The main purpose of this article is to provide information on the current legal situation of the ownership of real property in Turkey by foreigners. However, it would be helpful to review the prior decisions of the Court on the subject in order to understand the historical development of the rules regulating the ownership of real property in Turkey by foreigners. In this way, one could get a better understanding of the current legal situation by looking at the development of the rules and the Court’s response to them. Taking a brief look at the different time periods in which different rules applied to the ownership of real property by foreigners, along with the four related past decisions of the Constitutional Court, will reveal the view of the Court on the issue of foreign ownership of real property. Below is a brief summary of the legal evolution over different time periods in which different rules applied to foreign ownership of real property, along with the Court’s response to these rules.

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1 Land Registry Law, 22 November 1934 Law Nr. 2644.
2 Foreign Direct Investments Law, June 5, 2003, Law Number: 4875. Article 3(d): Legal entities in Turkey incorporated by foreign investors or in which foreign investors are shareholders, can freely acquire ownership and similar in rem rights in any real estate where Turkish citizens can acquire ownership rights.
The period between 1934 and 2003

The principles governing the purchase of real property in Turkey by non-Turkish nationals are governed by the 1934 Land Registry Law\(^3\) (LRL). Only foreign individuals, not companies, could acquire real property in Turkey with the permission of the Government, subject to reciprocity and subject to existing legal rules introducing restrictions and prohibitions. It was not possible to acquire real property in villages, military zones and certain zones of strategic importance. The changes made in 1984\(^4\) and 1986\(^5\) made an exception to the reciprocity requirement for foreign real persons with the approval of the Council of Ministers. Thus real persons were able to acquire land even if their countries did not provide the same opportunity to Turkish individuals in their countries. The ability to suspend the principle of reciprocity with a decision by the Council of Ministers was cancelled by the Turkish Constitutional Court in 2003\(^6\) because the Court was of the opinion that creating an exception to the reciprocity clause could only be made by the legislature, not by the Council of Ministers.

In 1954, the Foreign Capital Incentive Law\(^7\) (FCIL) came into effect which provided foreign investors freedom to enter the Turkish real estate market with Turkish investors as long as no monopolies and concessions were created. All the rights and privileges that were given to Turkish investors were also provided to foreign investors. Thus, as long as companies with foreign capital\(^8\) were founded in Turkey pursuant to the provisions of the Turkish Commercial Code and registered in the Turkish Commercial Registry, these companies were considered to be Turkish companies. Therefore, these companies were subject to the legal rules of Republic of Turkey. However, the FCIL required Turkish companies with foreign capital to obtain permission for real estate purchases; as long as the permission and approval system requirements were satisfied, acquiring real property by Turkish companies, in which some or all of their capital belonged to foreign real or legal persons, was allowed.

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\(^3\) Land Registry Law, 22 November 1934 Law Nr. 2644.

\(^4\) Constitutional Court Decision, June 13, 1985 E: 1984/14 K: 1985/7. Law Nr. 3029 in 1984, which added a subparagraph both to Article 35 of the Land Registry Law number 2644 and to Article 87 of the Village Law Nr. 442, permitted: “The acquisition by foreign real persons, companies and societies, following a decision of the Council of Ministers, of land everywhere including villages, suspending the principle of reciprocity.” However, the Constitutional Court annulled this law on June 13, 1984 in Decision 1984/14 Principle, 1985/7.

\(^5\) Constitutional Court, October 9, 1986 E: 1986/18 K: 1986/24. In spite of the Constitutional Court’s lengthy reasoning for the 1984 law (see footnote 9), the government enacted Law Nr. 3278 on 22 April 1986, and for a second time that made changes to the law by adding the same subparagraphs to Article 35 of the Land Registry Law and Article 87 of the Village Law. The Constitutional Court again annulled the law in question in Decision Nr. 986/18 Principle Nr, 986/24 on October 9, 1986, repeating similar reasons.


\(^7\) Foreign Capital Incentive Law, Law 6224, January 18, 1954.

\(^8\) Turkish companies in which only a part or all of their capital belonging to foreign real or legal persons.
The period between 2003 and 2005

After the cancellation of the 1984 and 1986 changes, the legal framework set up in 1934 was modified with a by-law ⁹ (Law Nr. 4916) in 2003. With these changes, the legal framework was as follows:

- Foreign real persons were subject to a reciprocity clause except if acquiring real property ownership through inheritance.
- Non-Turkish legal entities (companies) were also subject to a reciprocity clause with a twist; that is to say, foreign companies formed in a country whose government allows Turkish nationals/companies to purchase real estate in their countries, were to be allowed to purchase real estate in Turkey. In this way it was possible for a company from country A that does not have reciprocity with Turkey to form a new company in country B that has reciprocity with Turkey to form a Turkish company in Turkey on the basis of this clause. With this indirect reciprocity, the company that is originally from a country that does not have a direct reciprocity with Turkey could bypass the legal reciprocity requirement.
- As foreign nationals, non-Turkish legal entities (companies) also had the right to acquire real property in Turkey subject to legal restrictions and prohibitions.
- A foreign national could not purchase more than 25,000m² (6 acres) of land (with or without construction) in Turkey without the specific consent of the Turkish Council of Ministers. The Council of Ministers was authorized to increase this limit up to 300,000m² per person.

With the Foreign Direct Investments Law ¹⁰ (FDI Law) in 2003, the Foreign Capital Incentive Code ¹¹ of 1954 was abolished and new terms were imposed to encourage and increase foreign investments, protect the rights of foreign investors, and transform the permission and approval system into an information system in order to encourage foreign investments. With the FDI Law, foreign investors were subject to the same treatment as domestic investors: permissions and approvals such as the investment permission and company foundation permission were abolished; companies with a legal entity founded or established in Turkey by foreign investors to acquire real property ownership or limited in rem rights in the regions open for the acquisition by the citizens of Republic of Turkey was decontrolled.

Therefore, the acquisition of real property by Turkish companies with foreign capital that would conduct activities pursuant to FDI Law could send their real property acquisition request directly to the Deed Registry Offices. The office would evaluate the authority certificates issued by Trade Registry Offices, subjecting them to the same terms and procedures as companies that

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¹⁰ Foreign Direct Investments Law, 5 June 2003, Law Number: 4875.

¹¹ Foreign Capital Incentive Law, 18 Ocak 1954, Law Number: 6224.
were founded pursuant to Turkish Commercial Code. As long as the authority was shown, the authorized person(s) of the company could acquire real property in the name of the company. This simple procedure was applied to all Turkish companies regardless of the existence of foreign shareholders or investment.

**The period between 2006 and 2008**

Following the constitutional challenge made by Turkey's main opposition party, the modifications brought about by the 2003 by-law (regarding foreign real persons and companies founded in foreign countries) were declared void by the Turkish Constitutional Court on 26 April 2005. In its reasoning, the Court stated that to allow indirect reciprocity circumvents the legal requirement and effectively makes the reciprocity requirement meaningless. Secondly, the Court found an erroneous transfer of power in the transfer of that power to the Council of Ministers. The Court was of the opinion that the power to create exceptions belonged to the legislature.

Most importantly, throughout its reasoning the Court acknowledged the need to provide foreigners a right to acquire real estate in Turkey:

> Advances in science and technology, dramatically improved means of transportation and communication, the need for restructuring of economic, social and political relations have all brought a new intensity and dimensions to the international relations. As a result of all these developments, the need to provide foreigners with a right to purchase real estate in some circumstances and, in relation to this right, the need to create certain legal limitations has emerged.\(^{12}\)

As seen in the quote above, the Court does not oppose foreign ownership of real property but requires that the relevant regulations be in place. The Court articulated its reasons more on page 21 of its decision for cancellation with the following sentence: “Even though the foreign real property ownership rights are subject to reciprocity and adherence to the legal limitations, the procedural and substantive principles of acquiring real property are not set forth in Section 35 of the Land Registry Law Nr. 4916, July 3, 2003.” The Court goes on to say that the fundamental rights and freedoms for non-Turkish persons set forth in Section 16 of the Turkish Constitution\(^{13}\) can only be limited in accordance with international law. Thus as long as foreign ownership of real property is regulated within the boundaries and framework of national and international law, the Court suggested that it will recognize these rights.


\(^{13}\) Constitution of Republic of Turkey, October 18, 1982, Law Nr: 2709.
As mentioned above, following the constitutional challenge made by Turkey's main opposition party, the modifications brought by the 2003 by-law were declared void by the Turkish Constitutional Court on 26 April 2005. The decision was to enter into effect as of 27 July 2005 and the purchase of real estate by foreign nationals was suspended until a modified law became effective. The modified law, Law Nr. 5444, was retrospective in its application to 26 July 2005 and was largely the same as the by-law of 2003 (with regards to reciprocity and legal rules introducing restrictions and prohibitions) with some notable amendments, especially with regards to size limitations.

In the period since 2003 until the March 2008 decision of the Constitutional Court, the original FDI Law applicable to the Turkish companies with foreign capital remained unchanged.

The Current period:

There have been two Constitutional Court decisions that changed the legal status of foreign ownership of real property in the current period since January 2008. The first decision came on January 16, 2008 in which the Court cancelled the second sentence of the first paragraph and seventh paragraph of Article 35 of the Land Registry Law (LRL). The second decision came on March 13, 2008, in which the Constitutional Court cancelled Article 3(d) of the Direct Foreign Investments Law14 (FDI Law). These decisions have created uncertainty and waiting for the current Turkish government to regulate this uncertain area mark the current period.

In the first decision, the Court cancelled the second sentence of the first paragraph and seventh paragraph of Article 35 of the LRL, which gave the Council of Ministers broad power to increase the property area limitation up to 30 hectares for foreign real persons and foreign entities acquiring real property in Turkey. The Court was of the opinion that this broad and unlimited power transfer to the Council of Ministers violated the Turkish Constitution. The Court also found an erroneous transfer of power and stated that enacting legislation is the Parliament’s exclusive and non-assignable power. This ruling was to become effective 3 months following its publication in the Official Gazette, in which period the Turkish government would have time to regulate a new legal framework in line with the Court’s decision. However, the Turkish government did not enact any new law in this area during that 3 months period; the ruling became effective as of 16 April 2008. In the absence of new regulations, the Ministry of Public Works and Settlement announced a circular (the “Circular”) on 14 April 2008 to avoid any ambiguity until the date that anew law enters into force. According to the Circular the legal situation for the real property ownership by foreigners in Turkey is as follows:

14 Foreign Direct Investments Law, June 5, 2003, Law Number: 4875. Article 3(d): Legal entities in Turkey incorporated by foreign investors or in which foreign investors are shareholders, can freely acquire ownership and similar in rem rights in any real estate where Turkish citizens can acquire ownership rights.
• Foreign real persons and foreign companies incorporated outside of Turkey shall not be able to acquire immovable (real) property as of 16 April 2008 until the date the Parliament enacts a new law governing the acquisition of real property by foreigners.

• With the condition that the real property which is subject of the acquisition was acquired prior to 16 April 2008, foreign real persons and foreign companies may sell their real properties to Turkish citizens and companies until 16 October 2008 by which date the Parliament enacts a new law governing the acquisition of real property by foreigners.

• Real properties, which have been acquired before 16 April 2008, by foreign real persons and foreign companies incorporated outside of Turkey, shall not be affected.

• The acquisition of real property by foreign real persons and foreign companies will be frozen until further notice.

• The by-law does not limit foreigners’ right to establish rights in rem on immovable property, such as mortgage, usufruct, or easement rights. Such rights shall continue to be granted.

• Turkish companies incorporated by foreign investors or in which foreign investors are shareholders shall be able to acquire real property until 16 October 2008 (at the end of the sixth month following the Court’s second decision on 16 April 2008).

In the second decision, which was entered on 13 March 2008, the Constitutional Court cancelled Article 3(d) of the Direct Foreign Investments Law (FDI Law). The reasoning of the cancellation decision was published in the Official Gazette on 16 April 16, 2008. The cancellation of Article 3(d) will take effect at the end of the 6 month period following the publication of the decision in the Official Gazette (which will be 17 October 2008).

As will be seen in the quotes below, the Court does not oppose foreign ownership of real property but requires that the relevant regulations be in place and within the boundaries and framework of national and international law; only then the Court suggests that it will recognize these rights. Since I believe the most recent decision of the Constitutional Court will speak better for itself, I provide an excerpt of the decision relating to Article 3(d) of the FDI Law.

B- Analysis of Article 3(d) of the Law on Direct Foreign Investments

In the legal rule16 of which its cancellation has been requested, foreign investors are treated equally with local investors for the acquisition of real

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15 Foreign Direct Investments Law, June 5, 2003, Law Number: 4875. Article 3(d): Legal entities in Turkey incorporated by foreign investors or in which foreign investors are shareholders, can freely acquire ownership and similar in rem rights in any real estate where Turkish citizens can acquire ownership rights.

16 Article 3(d) of the FDI Law.
property; there is no difference between the treatment of the local and foreign investors and there are no limits as to the size of the real property to be acquired by companies incorporated by foreign investors or companies in which foreign investors are shareholders. Therefore, without any size limits and without any inquiry as to the necessity of the investment activity, foreign investors could acquire real property and *in rem* rights in where Turkish citizens could acquire such rights.

Advances in science and technology have dramatically improved the means of transportation and communication while the need for restructuring of economic, social and political relations have all brought a new intensity and dimensions to the international relations. As a result of all these developments, the need to provide foreigners with a right to purchase real estate in some circumstances and, in relation to this right, the need to create certain legal limitations according to the country’s conditions has emerged.\(^{17}\)

In the Article 2 of the Turkish Constitution, it is emphasized that the Republic of Turkey is a democratic, secular and social state governed by the rule of law, bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.

With the legal rule at hand\(^{18}\) legal entities in Turkey incorporated by foreign investors or in which foreign investors are shareholders, can freely acquire ownership and similar *in rem* rights in any real estate where Turkish citizens can acquire ownership rights. For the attainment of the rule of law principle mentioned above, and for the organization of the national economy according to national interests, there exist no legal regulations in regards to the purpose, the forms of utilization and the transfer of the acquisition of real property and *in rem* rights by foreign investors. This absence of relevant legal regulations causes legal uncertainties and also unlimited acquisition rights for foreign investors.

For the above mentioned reasons, the legal rule at hand is in violation of the Article 2 of the Turkish Constitution. It should be cancelled.\(^{19}\)

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17 This whole paragraph is taken from the Constitutional Court’s decision in April 2005 (Constitutional Court (Anayasa Mahkemesi), March 3, 2005, E: 2003/70 K: 2005/14).
18 Article 3(d) of the FDI Law.
The Path to Modern Turkish Law

By Av. Ö zgür Metin & Av. Onur Gelbal∗

In this issue, we will try to concisely convey some information about the Turkish jurisdiction system as well as the overall composition of the Turkish legal system. As an introduction, the history of the Turkish constitutional system will be analyzed briefly. In the following issue the courts, their jurisdiction and the law that the courts practice will be explained in further detail.

Since the Turkish Republic is the successor to the Ottoman Empire, it would be plausible to begin with an overview of the Ottoman legal system (the last century of the Empire, to be exact) in order to efficiently examine the Turkish legal system.

A System in Transition

The legal system of the Ottoman Empire was founded solidly on the principles of Islamic law, with absolute power belonging to the Sultan. In classical Islamic theory, “law is a divinely-ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society.”∗1 The Sultan was his instrument and representative on earth. In principle, the Şeriat∗2 covered all aspects of Muslim life, public and private. The main function of the state was to maintain and enforce the divine rules. Thus, in theory, there was no legislative power to regulate any aspect of social or political life. However, in reality, the Sultans could not find answers to their complex government and society in revelation. When the Empire grew enormously, it became impossible to govern it by enforcing only Şeriat, which had only a few rules concerning public law. As a result, “in order to rule their wide lands by filling the vacuum in the field of public law, Ottoman Sultans made local and sui generis arrangements.”∗3 Accordingly, Muslim jurists tried to find answers to many problems for which revelation provided no explicit answers. If the answers came from society, they were called gelenek (custom). If they came from Muslim jurists, they were called içtihat

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∗2 Shar‘iah in Arabic. Throughout the paper, Arabic derived terms are spelled according to their Turkish transliteration.

(interpretation). If the answers came from the Sultan, they were *kanuns* (regulations). Kanuns were imperial directives rather than legislative enactments for the Ottomans. Even though disguised, it was, in fact, the making of new laws (*kanuns*). However, *kanuns* were justified since they covered areas not mentioned in the Şeriat. “In earlier centuries [of the Empire], the Ottomans had developed secular civil law (*kanuns*) in terms of administrative categories and rules to an extent unmatched in other Islamic states.”

Thus, early forms of secular administrative law, even commercial law, came from the directives of the Sultan, but for the private or social life, the Şeriat was the answer.

Thus, in classical era, Islamic laws dominated the legal system in the Ottoman Empire. However, it is important to recognize the difference between private and public law during this period. While the Ottomans adopted the Islamic private law in full, Islamic laws were supplemented with local and *sui generis* arrangements in the areas of public law. In conclusion, Islamic legal and social patterns, which the Ottoman Empire itself helped to perfect, functioned very efficiently during the rising years of the empire. As Joseph Schact argued, the Ottoman Empire gave the Şeriat the greatest degree of actual efficiency it had ever possessed. Later, Findley pointed to the paradox in Ottoman legal development that the same Empire “ultimately evolved in such a way as to prepare the legal and judicial foundations for the most secular Islamic state of the twentieth century.”

The gradual decline of Ottoman power started at the end of the seventeenth century with the gradual increase of Ottoman Sultans’ reforms towards Europeanization/modernization. The 1839 Charter of Liberties, in which Ottoman citizens were granted some fundamental rights and freedoms, is considered to be the start of these reforms. The first Turkish Constitution was promulgated in 1876 and re-promulgated in 1908. Furthermore, the cultural influence of the states of continental Europe, especially France, showed itself in a broad movement towards codification. Many laws were adopted from France, including commercial, penal and administrative laws; France became the country to which the Ottomans looked in search of models of change and reform. “Young Turks” were sent to Paris by the Sultans and they came back with their ideals of civilization, modernization, nationalism and secularism. Although some Sultans succeeded for a short-term in these reform efforts, their successes were only temporary. They tried to rehabilitate

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5 Starr, *supra* note 9 at 27.
7 Findley, *supra* note 14, at 5-6.
the existing system with a patchwork of reforms, instead of having major
systematical changes. Furthermore, reforms in this era introduced some
European legal concepts – such as ‘rule of law,’ ‘public service,’
‘equality’ and ‘parliamentary regime’ – into the Ottoman legal system. This was a
period in which two entirely different legal and social ideas and institutions
(Islamic and Western) coexisted. In spite of the law reforms, which were
transplanted from the continental European legal systems, Islamic law
remained in force until the end of the Ottoman Empire. This created legal and
cultural duality, wherein institutions based on Western models began to
emerge side-by-side with the long established Islamic institutions. Even
though this legal and cultural dualism caused uncertainty in theory and
practice, it paved the way for the total reception of civil law system in the
modern era.

The modern era started when the Turkish Republic was established in 1923,
after a four-year war of independence against British, French, Italian, and
Greek troops. The leader of the independence movement was Mustafa Kemal
(one of the ‘Young Turks’). The Republic had a Parliament which had
already been established in 1920. Radical changes were introduced into the
lives of Muslim Turks. Under the revolution led by Mustafa Kemal (later
named Atatürk10), every feature of Turkish life began anew. Again, the wave
of westernization was rising without the West. Under Atatürk’s leadership,
the new regime abolished the Caliphate that belonged to Sultan (the Turks
were no longer the leader of the Muslim world), Arab calligraphy, Arabic
numerals, the Islamic educational system, Shari’ah (Islamic law according to
the Koran), and polygamy (which was allowed under Shari’ah). Instead, the
regime introduced a secular democracy with a parliament, Latin characters
(alphabet), Western numerals, secular public education, and the civil law
tradition of continental Europe (with a penal code modeled on the Italian
Penal Code and a Civil Code modeled on the Swiss Code). The new regime’s
desire for modernization/Westernization was reflected in these and many
other reforms. “Atatürk also began introducing more egalitarian gender
relationships. His reforms were so revolutionary that hearth, home, the
business firm, and public spaces were virtually reconstructed from the
bottom.”11 Ironically, these reforms were imported from the West and at the
same time were the products of the independence war against the West.
During the following two decades, Turkey changed more than it had been
changed in the previous two centuries.

The legal reforms were an attempt to reconstruct a new culture and society
through radical legal reforms. Law was an instrument to lead a complete
change and rearrangement of not only legal, but also social, life. In 1925, at
the opening ceremony of the first law school of the Republic, University of
Ankara – Faculty of Law, Atatürk candidly stated his purpose: “The greatest
and at the same time the most insidious enemies of the revolutionaries are

10 Because Mustafa Kemal was respected very much for creating the modern Republic, he was
given the title “Atatürk” or “father of the Turks.”
11 See Starr, supra note 9.
unjust laws and their decrepit upholders... It is our purpose to create completely new laws and thus to tear up the very foundations of the old legal system.”

Like the secular system of education that began under the Ottoman Empire, Atatürk’s secular system of government was firmly based on the European tradition. For his minister of justice, Atatürk chose Mahmut Es'ad Bey, who had been trained in law at Lausanne, Switzerland. He became the chair of the committee that would overturn Islamic family law and create a new civil family law.

The new secular civil code was meant to change domestic life of Turkish families, the smallest units in society. Marriage was not a private matter anymore, as under the Şeriat, but it was to be under state control. In order to be legitimate, the marriage ceremony had to be performed by a state official and be registered with the state. For the first time, the Civil Code required a minimum age for marriage, both for men and women, and it allowed a Muslim woman to marry a non-Muslim.

The European model was essential to [Mahmut Es’ad] Bey’s thinking… By 1926 an entirely secular legal system was in place… The paradox cannot be ignored that secular law and courts represent a configuration of cultural ideas in opposition to Islamic culture. A secular legal system … symbolizes a fundamental reorientation of values and a disassociation or disavowal of values inherent in Islam ... Turkey’s secular court system asserts universal legal norms of individuality and equality and, like other civil law countries, uses established norms of proof and systemic legal procedures, required by the rule of law.

**History of the Turkish Constitutional System**

The Turkish Grand National Assembly abolished the Sultanate on 1 November 1922 subsequent to the final victory over the Greek army. The Republic was officially proclaimed on 29 October 1923 by this constituent assembly.

The new Republic clearly needed a new Constitution since it was determined to introduce a new social structure and law reform. The constitution of 1921 was not meant to be a constitution in the sense of the word, but rather a document dealing only with the most urgent constitutional problems at that time.

A new constitution was enacted by the Turkish Grand National Assembly in 1924 in consideration of the particularities of the 1921 Constitution. The provisions of 1924 Constitution set out a representative democracy. This was the underlying characteristic of this Constitution.

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12 Starr, supra note 9 at 27. See also Lewis, supra note 18, at 269.
13 Starr, supra note 9 at 17-19.
14 Id.
In 1937, secularism found a place in the legal history of the Republic for the first time through a constitutional amendment. This was also the last of Mustafa Kemal’s revolutionary steps.

In 1961, a new constitution was drafted by the Constituent Assembly, which was composed of the House of Representatives and the National Unity Committee (*Milli Birlik Komitesi*). The Constitution of 1961 was prepared and adopted by this assembly and came into force after being ratified by a popular vote of the people.

The general characteristics of 1961 Constitution were as follows:

- Pluralistic Democracy (Representative democracy was superseded by pluralistic democracy)
- Principle of social state (Direct control of the economy by the state)
- Separation of powers (Legislative, executive, judicial)
- Improvement of civil rights and liberties

In 1982, the third Constitution of the Republic was promulgated. Although amended several times, this Constitution is still in force. The general characteristics of 1982 Constitution are as follows:

- Strong state and strong executive
- State authority having priority over social rights and freedoms due to concerns about public security and law and order
- Less participatory democracy
- Although the Turkish Grand National Assembly held the legislative power, the 1982 Constitution conferred on the Executive the power to make decrees.

In summary, currently Constitutional review in Turkey relies on a centralized model. There is a special court with exclusive jurisdiction over constitutional matters. The Constitutional Court consists of eleven regular and four substitute members. It ensures that legislative enactments do not violate the Constitution. It may declare that a law is unconstitutional; if so, the law is annulled. Individuals cannot challenge the constitutionality of laws, however, constitutional challenges can be raised by a public authority, like the executive branch, a political party, a parliamentary majority, or a lower court.\(^{15}\)

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CONFEERENCE ON LAW NO 5641

The Ankara Bar Association held a panel on Monday, May 5, 2008, at the Ankara Bar Association Culture Center regarding Law No. 5641 on the Systemizing of Online Publications and the Fight Against Crime Committed Through such Publications and Filtering the Websites Within the Framework of Related Regulations.”

Doçent Doktor (Associate Professor) Akgül has evaluated the prevention of access to websites. In his speech, Mr. Akgül said that in the past, access to a blogsite called “Wordpress” was prevented upon a single complaint and the blog owners could not access their blogs. This is “an attack on the freedom of communication” he described. He also added “YouTube has 102 thousand videos about Istanbul and 40 thousand about Atatürk. Who do we punish by preventing the access to YouTube? There are plenty of books against Turkey and against Atatürk in the Library of Congress in USA. Are we forbidding Turkish People from accessing this library? Everybody except Turks has seen the movie Midnight Express. Not even one Turk was capable of defending Turkey, nor did anybody know what to defend, because nobody has seen the movie.”

Mrs. Füsun Sarp Nebil, Director of the website “Turk.internet.com,” said that it is wrong to shut down a whole site, instead of just the objectionable pages. “This is like incinerating a library because of a book” she described and added that access to 886 websites in Turkey was barred in 2006. She also said that specialized courts should be established for such cases.

Mr. Osman Nihat, Director of Internet Department at the Telecommunication Board, explained in his speech that education on the proper usage of the Internet is vital. He said Internet filtering software is commonly used in Europe and USA; even in Europe people have been encouraged to use such software. He also emphasized a Council of Europe Committee of Ministers decision that encourages the use of such software and said Turkey should follow the same path.

Participants in the 11th and 12th terms of the Ankara Bar Lawyers Academy IT Law Certificate Program received their certificates from President Mr. Vedat Ahsen Coşar after the panel.
ANKARA BAR’S WEBSITE HAS BEEN SELECTED AS BEST BAR WEBSITE

The Ankara Bar Association came in first place in a survey called “Best Bar Website” which was conducted by the Turkish Law Site (TLS). TLS’s jury (Attorneys M. Gökhan Ahi, Cengiz Aladağ and Can Doğanlı) selected eight finalists: Ankara, Antalya, Bursa, Istanbul, İzmir, Konya, Mersin and Tunceli Bar Associations. The Istanbul Bar Association took the second place, while the İzmir Bar Association came in third.

A DEDICATION AND WALK FOR ATTORNEY CENGIZ KAYA

Lawyers at the Ankara Bar named one of Ankara Bar Associations’ rooms in the Ankara Court House after Cengiz Kaya and walked to the Ankara Bar in their robes.

Attorney Cengiz Kaya was shot dead by a shop owner while performing his duty in an execution (collection) procedure.

The first ceremony for 25-year-old lawyer was held in front of the Cengiz Kaya Room. President of the Assembly of Turkish Bar Associations Mr. Özdemir Özkök gave the first speech and emphasized that practitioners of advocacy have difficult working conditions in Turkey. He said “lawyers defend the legal system at the risk of their own lives.” He also added that 116 lawyers were physically assaulted during his term as president.

A panel was held on the same day at Ankara Bar Association Culture Centre where participants discussed safety issues for legal practitioners and lawyers in particular.

BARO TV AND BARO RADIO TO START BROADCASTING

Ankara Bar’s Radio and TV have started online broadcasting. Baro TV, which is accessible at www.ankarabarosu.tv, has an extensive archive, which contains all attorney swearing-in ceremonies since 2002, interviews and some features from Bar Association events. Current events can be watched live.

Listeners can access Baro Radio at www.baroradyo.com. Baro Radio aims to provide 24 hours of quality music daily to its listeners. Concerts of the Ankara Bar Turkish Folk Music Choir are broadcast live on the radio. In the near feature, other bar events, like conferences, will be broadcast live too.

23 APRIL CHILDREN’S FESTIVAL EVENTS

The Ankara Bar Association Children Rights Center organized several events between 21st and 26th April for the 23 April National Sovereignty and Children’s Festival holiday.
Within the framework of the activities in which compositions written by children on the subject of “Your Hero in the Media” and some paints and caricatures about Children’s Rights were displayed, the subjects of “Children and the Media” and the “Commercial and Sexual Abuse of Children” were discussed and also a fictional trial took place with the participation of children.

In his opening speech, Ankara Bar Association President Mr. Vedat Ahsen Coşar mentioned that a new era has started for children after United Nation Convention on the Rights of the Children. He reminded the audience that Turkey is one of the signatories of this convention and according to the convention; children are regarded as individuals having rights. He also added that governments and non-governmental organizations have to make their contributions to the implementation of the convention.

In his opening speech, Ankara Bar Association President Mr. Vedat Ahsen Coşar said that the ECHR’s decisions inspired lawyers and, even at a less significant level, judges, and made great contributions to the body of law.

He emphasized that ECHR’s decisions have a deterrent effect on states and thereby help provide a transition from a “state-centered law system” to an “individual-centered law system.”

A CONFERENCE ABOUT EUROPEAN COURT OF HUMAN RIGHTS

The Ankara Bar Association, the Diyarbakır Bar Association, the Modern Jurists Association, the European Association of Lawyers for Democracy and the World Human Rights held a conference on “The Court of Human Rights in New Europe: Success or Disappointment?” on 8-9 March 2008 at Ankara Court House Conference Center.

Participants criticized the ECHR’s mission under changing conditions and additional protocol and the evaluated possible tools for it. Diverse cases and the ever-increasing workload also were discussed within the scope of the theme of the “Expansive Human Rights Court” at the conference being headed by participants, many of which were ECHR judges.

He added that ECHR’s decisions have a deterrent effect on states and thereby help provide a transition from a “state-centered law system” to an “individual-centered law system.”

PANEL OF ORGAN TRANSPLANTATION

The Ankara Bar Association and Ministry of Health Ankara District Headquarters of Organ Transplantation held a panel on “Organ Transplantation” in the Ankara Court Hall.

Prof. Dr. Mehmet Haberal, Rector of Başkent University, declared that Turkey is in a very desired situation regarding organ transplantation with both its codes and organ transplantation stations. Haberal said that chronic organ disease is not only a matter between doctor and patient but also a social and psychological issue. There is a significant chronic kidney matter in Turkey, which is increasing day by day.
day. Current donations are not able to meet the need; this old issue is drawing attention on the deficiency of donation.

code numbered 2238 relating to organ transplantation is one of the leading codes in the world, which is followed by other countries. Haberal emphasized that Turkey is one of the most advanced countries in the domain of transplantation with its code, stations and application; and adds, "our citizens don’t need to go abroad for transplantation, we are here".

Cevdet Erdöl, President of Turkish Grand National Assembly Health commission, pointed out that people don’t think of donating their kidneys themselves; people must be encouraged to do empathy. Erdöl emphasized the task falls to the physicians, that they must feature and maintain the problem and convince people that organ donation must be considered as a “life donation”.

MINISTRY OF JUSTICE RECOGNIZES THE ANKARA BAR

The Ministry of Justice rewarded the Ankara Bar Association on 09 January 2008 for the many technological facilities and innovation that it has put into the service of jurists. According to the written comments of the Ankara Bar, the Ministry of Justice rewarded the Ankara Bar as a consequence of the Bar card, which has been put in practice for the first time in Turkey and was fabricated with smart card technology, plasma monitors and kiosks which serve people information at various points in the Ankara Courthouse.

Ankara Bar has shared its experiences with UYAP with the Madrid Bar Association and has also begun to furnish technical service to all districts of Ankara.

Some of the innovations of the Ankara Bar that were recognized were:

- The Bar card that provides lawyers convenience in the courthouse entrance, copy rooms and distributing offices

- Kiosks, which are placed in several locations of the courthouse and provides ease of access to lawyer addresses and courthouse information

- Plasma screens where daily news and bar announcements can be watched.

- The opportunity of filing lawsuits and other litigation actions by the Internet.

- Publishing a DVD including all publications of the Ankara Bar Association.

- Instituting an SMS service which has the capacity of announcing all activities of Ankara Bar to 7,700 lawyers in four minutes
ANKARA BAR ASSOCIATION HOLDS ITS FIFTH INTERNATIONAL LAW CONGRESS

The International Law Congress – the most comprehensive law gathering in Turkey –, which has become a biennial event of the Ankara Bar since 2000, was held on January 08-11 in the Sheraton Hotel & Convention Center.

The topics of “Informatics and Law,” “Law in the Light of Justice,” and “Economy and Law” were discussed by more than 200 native and foreign attendees.

The President of Ankara Bar Association, Vedat Ahsen Coşar, brought out in the opening, which was monitored by an assemblage of media, that they put the concept of justice on the agenda in the three-day Congress and said that law, constitution and transnational documents covering individual rights, paraphrasing of constitutions and law codes, discrimination, human rights, freedom of expression will be analyzed in the light of justice.

The President of the Turkish Grand National Assembly and Deputy President Köksal Toptan ascended to the podium after Coşar’s speech and said that he believes that the subjects discussed in the Congress would guide everybody and rendered thanks to the Ankara Bar, of which he feels proud to be a member for a long time, for organizing the Congress.

UNIVERSAL VOICE OF THE LEGAL PROFESSION: PROFILE OF UNION INTERNATIONALE DES AVOCATS (UIA)

The Union Internationale des Avocats (UIA) was created in 1927 by a group of French-speaking European lawyers who were convinced of the need for lawyers to establish international contacts. The English title is the “International Association of Lawyers.”

Today, the UIA is an association open to all lawyers of the world, made up of both general and specialist practitioners, counting more than 200 bar associations, organizations or federations (representing nearly two million lawyers), as well as several thousand individual members from over 110 countries.

Its official languages are English, French, Spanish, German, Italian, Arabic and Portuguese. Its working languages are English, French and Spanish.
OBJECTIVES

To promote the basic principles of the legal profession;

To participate in the development of legal knowledge at an international level;

To contribute to the establishment of an international legal order based on the principles of human rights and justice among nations, through the law and for the cause of peace;

To co-operate as a Non-Governmental Organization (NGO), with the activities of national and international organizations;

To establish relations and exchanges between bars, bar associations and law societies at an international level and

To defend the profession.

Under Article 3 of the Statutes of UIA, the objectives of the UIA, free from all political and religious considerations, are as follows: To promote, in the interest of those subject to the system of justice, the essential principles of the legal profession throughout the world, particularly independence and freedom, as they have been defined by the Charters adopted by the UIA.

To promote the development of the science of the law in all areas and to facilitate the continuing education of lawyers;

To contribute towards the establishment of an international legal order based on the principle of justice among nations, through law and in the cause of peace; and

To protect the ethical and material interests of members of the profession, and to study together problems of professional status and organization, particularly in the international context.

The UIA pursues its objectives using all appropriate means, particularly by organizing international congresses, issuing publications and distributing them through all media channels and organizing international seminars.

To these ends, the UIA:

• Co-operates with all national or international organizations having similar interests or able to facilitate the realization of its objectives;

• Establishes and maintains, at an international level, permanent relations and exchanges between bars and national associations or federations of lawyers and their members, to support their actions and to participate in their work;

• Provides for permanent representation of the UIA before international organizations, both governmental and non-governmental.

UIA AND INTERNATIONAL ORGANIZATIONS

Since 1971, the UIA has been granted consultative status as a non-governmental organization (NGO) before the United Nations and the Council of Europe. The UIA is represented in each of the principal headquarters of the United Nations (New York, Geneva and Vienna).

The UIA is also represented at the International Criminal Tribunal for the former Yugoslavia (ICTY) and at the International Criminal Tribunal for Rwanda.
In addition, the UIA participates in the work of the Assembly of State Parties to the International Criminal Court Statute. The UIA is also represented at the Council of the International Criminal Bar, which was created recently.

THE WORK OF THE UIA THROUGH ITS COMMISSIONS AND WORKING GROUPS

Each commission and working group of the UIA is comprised of a group of lawyers from various jurisdictions throughout the world, who are engaged in private practice at law firms or in-house counsel with corporations and government entities. The main focus of each commission is to examine developing areas of that subject of the law (or practice). The commissions also endeavor to determine how the developing law in that subject area will either be affected by or will affect other areas of the law. Accordingly, each commission works together with other commissions within the UIA in order to stay abreast of current developments.

UIA IN TURKEY

UIA has been represented in Turkey since the beginning of the 1990s. Thereafter, the numbers of Turkish individual and institutional members of the UIA within Turkey has rapidly increased. The UIA Turkish National Committee organizes a General Assembly every year. Besides, every Local Bar Association may establish a local UIA Committee like Ankara Bar Association has. All of local committees operate with the UIA Turkish National Committee for cooperation and coordination purposes. Last year, the Turkish National Committee with the full support and co-operation of the Istanbul Bar Association organized a “Mediation and Arbitration Seminar” on May 18-19, 2007 in Istanbul. Next year, the UIA Turkish National Committee, with the support of the Ankara Bar Association as host Bar, will organize a “Seminar on Financial Crime and The Prevention on Money Laundering /Terrorism Financing” on Sept. 25-26, 2009 in Ankara. At the last Annual Conference in Paris, the UIA Executive Committee selected Istanbul to host their Annual Conference for 2010. The Istanbul Bar Association has therefore established a “National Organizing Committee” to that effect. This Committee has already started to work for the preparation of the Conference. The UIA in Turkey has gained momentum day by day, with the contributions of all Turkish members of the UIA and submitted global perspective and legal opinions for their use.

UIA Turkish National Committee

Mr. Toptan highlighted that the existing constitution can no longer meet the changing and developing circumstances of the time thus it is essential to draft a new constitution. “The method and content of the new constitution will be prepared by the Turkish Grand National Assembly” affirmed Mr. Toptan and said that all parties can convey their opinions in good time. Extensive social participation will provide a constitution, which is comprehensive and can move Turkey to the future.