# UNION OF TURKISH BAR ASSOCIATIONS REVIEW

TÜRKİYE BAROLAR BİRLİĞİ DERGİSİ

The Selected Articles

# UNION OF TURKISH BAR ASSOCIATIONS REVIEW

TÜRKİYE BAROLAR BİRLİĞİ DERGİSİ

The Selected Articles

**UNION OF TURKISH BAR ASSOCIATIONS REVIEW**
**TÜRKİYE BAROLAR BİRLİĞİ DERGİSİ**





Union of Turkish Bar Associations Review is a selection of the articles from *Türkiye Barolar Birliği Dergisi*. The original *Türkiye Barolar Birliği Dergisi* is a refereed review. The selected pieces are translated into English to be published in the Union of Turkish Bar Associations Review.

Union of Turkish Bar Associations Review is issued yearly.

Articles published in these series express solely the views of the authors. Articles published in these series can not be republished without citation.

**The original *Türkiye Barolar Birliği Dergisi* is being permanently indexed in TÜBİTAK - ULAKBİM law database.**

**İletişim Adresi** / Communication Address
Türkiye Barolar Birliği Başkanlığı
Yayın İşleri Müdürlüğü
Oğuzlar Mah. Av. Özdemir Özok Sokak No: 8
06520 Balgat - ANKARA
Tel: (0312) 292 59 00 (pbx) Faks: (0312) 286 55 65
web:www. barobirlik.org.tr
e-posta: yayin@barobirlik.org.tr

**Abonelik** / Subscription
Yıllık abone bedeli: 300 TL.

**Sayfa Tasarımı ve Ofset Hazırlık /**
Page Design and Offset Preparation
Türkiye Barolar Birliği Yayın İşleri

**Basım Yeri** / Printed by
Hazar Reklam Mat.Yay. Dan. Eği. Kır. İnş. San. ve Tic. Ltd. Şti. Kazım Karabekir Cad. Kültür Çarşısı No.7/56-57
İskitler - Altındağ / ANKARA
Sertifika No: 48999

**Basım Tarihi /** Printing Date : 31. 12. 2023

ISBN: 978-605-7848-90-1

# CONTENTS / İÇİNDEKİLER

Dear Colleagues

We are proud to present the second volume of the *Union of Turkish Bar Associations Review*.

*Union of Turkish Bar Associations Review* is a project that we have initiated to bring our authors' articles to a wider circle of readers. The *Review*, which is designed to publish once a year in English among the articles published in the previous year, is being published in full text in pdf format on our website and will be scanned by search engines and will enable the articles to reach readers in English.

We believe that the works reaching a wider network of readers in this way will contribute more to the literature and the articles will receive more citations. I would like to take this opportunity to invite our authors to submit their articles in English to the editors of the *Review*.

Like as the first volume, we are publishing a selection of four articles in our second issue but I sincerely believe that we will have the opportunity to publish more articles in future issues. In the future, I hope that the *Union of Turkish Bar Associations Review* will become an international review that accepts articles on its own.

I wish that the *Union of Turkish Bar Associations Review*, which is a product of the pioneering mission of the the Union of Turkish Bar Associations in the field of academic law publishing, will be beneficial to our legal world, and I congratulate our team for coming up with the idea of such a review and implementing this idea by pushing the possibilities.

Best regards

**Attorney R. Erinç SAĞKAN**

**President of the Union of Turkish Bar Associations**

Değerli Meslektaşlarım,

Türkiye Barolar Birliği Dergisi'nin ikinci sayısını sunmaktan gurur duyuyoruz.

Türkiye Barolar Birliği Dergisi, yazarlarımızın makalelerini daha geniş bir okuyucu kitlesine ulaştırmak amacıyla başlattığımız bir projedir. Yılda bir kez, bir önceki yıl yayınlanan makaleler arasından İngilizce olarak yayınlanması tasarlanan Dergi, web sitemizde pdf formatında tam metin olarak yayınlanmakta olup, arama motorları tarafından taranarak makalelerin İngilizce olarak okuyuculara ulaşmasını sağlayacaktır.

Bu şekilde daha geniş bir okuyucu ağına ulaşan çalışmaların literatüre daha fazla katkı sağlayacağına ve makalelerin daha fazla atıf alacağına inanıyoruz. Bu vesileyle yazarlarımızı İngilizce makalelerini Dergi editörlerine göndermeye davet ediyorum.

İlk sayımızda olduğu gibi ikinci sayımızda da dört makaleden oluşan bir seçki yayınlıyoruz ancak ilerleyen sayılarda daha fazla makale yayınlama fırsatı bulacağımıza yürekten inanıyorum. Gelecekte Türkiye Barolar Birliği Dergisi'nin kendi başına makale kabul eden uluslararası bir dergi haline geleceğini umuyorum.

Türkiye Barolar Birliği'nin akademik hukuk yayıncılığı alanındaki öncü misyonunun bir ürünü olan Türkiye Barolar Birliği Dergisi'nin hukuk dünyamıza hayırlı olmasını diliyor, böyle bir dergi fikrini ortaya atan ve imkânları zorlayarak bu fikri hayata geçiren ekibimizi kutluyorum.

Saygılarımla

**Avukat R. Erinç SAĞKAN**

**Türkiye Barolar Birliği Başkanı**

# THE OFFENCE OF ACTING CONTRARY TO MEASURES TO CONTAIN CONTAGIOUS DISEASE (TPC ART. 195)

## BULAŞICI HASTALIKLARA İLİŞKİN TEDBİRLERE AYKIRI DAVRANMA SUÇU (TCK m. 195)

Hüseyin ACAR*

**Abstract:** With the transition to sedentary life by human beings, who have struggled with various epidemic diseases throughout history, and the increase in interaction between societies, the rate of spread of epidemics has also increased. At the end of December 2019, we encountered a new epidemic that has changed our agenda, life and our expectations related to the future. This epidemic, the novel coronavirusCOVID-19, has revealed consequences that will radically affect social relations, behavioral patterns, social, political, cultural and economic infrastructure, as well as the deep-rooted problems it has caused in terms of human health. Various measures are taken by the competent authorities in order to prevent the COVID-19 epidemic, which will be felt all over the world for many years and is declared as a pandemic (global epidemic) by the World Health Organization. In order to protect public health in the fight against such contagious diseases, acting contrary to the quarantine measures taken by the competent authorities regarding the location of the person who contracted a contagious disease or died due to such a disease is defined as a crime, and is regulated under the heading *"Acting Contrary to Measures to Contain Contagious Disease"* of Article 195 of the Turkish Penal Code No. 5237. The commission of this type of offence, which arises if it is conducive to violating measures regarding contagious diseases, can be carried out through active or passive actions. The transmission of the disease to others or certain people being harmed due to the disease are not necessary for the completion of the offence. The offence is completed by violating the quarantine measures taken by the competent administrative authorities. Although the type of crime in Article 195 of the TPC is not subject to complaint, prison sentence is prescribed as a sanction.

**Keywords:** Contagious Disease, Principle of Legality, Public Health, Quarantine Measures, Acting Contrary to Measures

* Dr., Ministry of National Education, acar-huseyin@hotmail.com, ORCID: 0000-0003-4424-7219, Date of Submission: 20.10.2021, Acceptance Date: 09.11.2021

**Özet:** Tarih boyunca çeşitli salgın hastalıklarla mücadele eden insanoğlunun yerleşik hayata geçmesi ve toplumlar arasındaki etkileşimin artması ile birlikte salgınların yayılma hızı da artmıştır. 2019 yılının Aralık ayının sonunda gündemi, yaşamı ve gelecekle ilgili beklentilerimizi değiştiren yeni bir salgın hastalıkla tanıştık. Yeni tip Koronavirüs COVID-19 olarak adlandırılan bu salgın, insan sağlığı bakımından sebebiyet verdiği derin sorunların yanında toplumsal ilişkileri, davranış kalıplarını, sosyal, siyasal, kültürel ve ekonomik alt yapıyı köklü şekilde etkileyecek sonuçlar doğurmuştur. Bütün dünyada etkisini uzun yıllar hissettirecek ve Dünya Sağlık Örgütü tarafından pandemi (küresel salgın) olarak ilan edilen COVID-19 virüsü salgınının önüne geçebilmek amacıyla yetkili makamlar tarafından çeşitli tedbirler alınmaktadır. Bu tür bulaşıcı hastalıklarla mücadelede kamu sağlığının korunması amacıyla, bulaşıcı hastalığa yakalanan ya da bulaşıcı hastalıktan dolayı ölmüş olan kişinin bulunduğu yere ilişkin olarak yetkili makamlar tarafından alınan karantina tedbirlerine aykırı hareket edilmesi suç olarak nitelendirilmiş olup 5237 sayılı Türk Ceza Kanunu'nun 195. maddesinde "*Bulaşıcı Hastalıklara* İlişkin *Tedbirlere Aykırı Davranma Suçu*" başlığı altında düzenlenmiştir. Bulaşıcı hastalıklara ilişkin tedbirleri ihlal etmeye elverişli olması şartıyla ortaya çıkan bu suç tipinin aktif ya da pasif hareketlerle gerçekleştirilmesi mümkündür. Hastalığın başkalarına bulaştırılması ya da hastalıktan dolayı bazı kişilerin zarar görmüş olması suçun tamamlanması için gerekli değildir. Yetkili makamlar tarafından alınan karantina tedbirlerine aykırı hareket edilmesiyle suç tamamlanmış olur. TCK'nın 195. maddesinde yer verilen suç tipi şikâyete tabi olmamakla birlikte yaptırım olarak hapis cezası öngörülmüştür.

**Anahtar Kelimeler:** Bulaşıcı Hastalık, Kanunilik İlkesi, Kamu Sağlığı, Karantina Tedbirleri, Tedbirlerin İhlal Edilmesi

## INTRODUCTION

At the end of December 2019, after the emergence of a new type of Coronavirus (COVID- 19) pandemic in the People's Republic of China and its recognition as a pandemic by the World Health Organization, the (COVID- 19) pandemic came to the forefront of the agenda in Turkey in mid-March 2020. Public statements on quarantine measures reflected in the press and social media have frequently emphasized Article 195 of the Turkish Penal Code. In the upcoming period, it is important to examine the criminal norm in question, as well as other criminal law sanctions that are likely to be applied in the cases that judicial authorities will encounter in this context, as the issue will remain highly topical.[1]

[1] Murat R. Önok, "Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu (TCK m. 195)", *Anayasa Hukuku Dergisi,* Y. 2020, C. 9, V. 17, p. 149–150.

The offence of acting contrary to the measures regarding contagious diseases is regulated in Article 195 under the heading of *"Offences Against Public Health"* in the third section of the third part of the heading of *"Crimes Against Society"* in the second book titled *"Special Provisions"* of the TPC No. 5237. The relevant article stipulates that *"The person who does not comply with the measures taken by the competent authorities regarding the quarantine of the place where a person infected with one of the contagious diseases or who has died from these diseases is punished with imprisonment from two months to one year"*. The grounds of the article include the following sentence: *"In the article, failure to comply with the measures taken by the competent authorities to quarantine the place where people infected with contagious diseases or who have died from these diseases are located is defined as an offence. Thus, the aim is to protect public health"*.[2]

According to the aforementioned regulation, the legislator aims to prevent the acts and actions of persons who jeopardize the public health by failing to comply with these measures despite the decision of the competent authorities to quarantine the place where the person who has contracted a contagious disease or died from such diseases is located.[3]

## I. LEGAL REGULATION

The protection of public health by taking necessary measures through the introduction of legal regulations is among the most prioritized and important issues for all societies. Article 56 of our Constitution states that *"Everyone has the right to live in a healthy and balanced environment. It is the duty of the State and citizens to improve the environment, protect environmental health and prevent environmental pollution"*. This provision of our Constitution, which imposes a duty of protection, states that the right to life as a human right can only be realized in a healthy and balanced environment.[4] Article 1 of the

---

2 TBMM, Dönem, 22, Yasama Y. 2, Sıra S. 664, p. 592; İzzet Özgenç, Gazi Şerhi, Türk Ceza Kanunu Genel Hükümler, 2. Baskı, Seçkin Yayınevi, Ankara, 2005, p. 941.

3 Özlem Y. Çakmut, "Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu", Prof. Dr. Feridun Yenisey'e Armağan, İstanbul, 1. Baskı, Beta Yayıncılık, C. I, 2014, p. 543–544.

4 It is stated that since the general grounds for limitation have been abolished in the Constitution, some problems may arise in terms of the legitimate purpose of limitations in terms of some rights and freedoms where the ground of "protection of

Public Health Law No. 1593 states that controlling all diseases that pose a threat to public health is one of the requirements of public service. Likewise, in Article 1 of the Turkish Penal Code No. 5237, the protection of public health is listed among the purposes of the law.

As stated above, in the offence of acting contrary to the measures regarding contagious diseases under Article 195 of Law No. 5237, the legislator sanctioned non-compliance with the quarantine measures decided to be implemented by the competent authorities in the place where the person infected with the contagious disease or died due to the disease, with the aim of protecting public health.[5]

Article 195 of Law No. 5237 requires a number of conditions to be met in order for the offence to occur. In order for the material element of the offence to occur, there must first be an existing contagious disease in the concrete case. Issues such as the type of contagious disease, the way it spreads or the area it covers are not important.[6] In subparagraph (c) of paragraph 1 of Article 4 of the Regulation on Surveillance and Control Principles of Communicable Diseases, a communicable disease is defined as *"a disease caused by a microorganism or its toxic products that is transmitted from person to person through direct contact with an infected person or indirectly, such as exposure to a vector, animal, product or environment, or through the exchange of fluids contaminated with*

---

public health" is not included, and that although these problems can be overcome to a certain extent through interpretation, the inclusion of a clear regulation may ensure clarity; in this respect, it is suggested that Article 56 of the Constitution, titled health services and protection of the environment, should include a provision stating that fundamental rights and freedoms may be restricted for the prevention of dangerous epidemics.; Tolga Şirin,"Tehlikeli Salgın Hastalıklarla Anayasal Mücadeleye Giriş,", *Anayasa Hukuku Dergisi,* 2020, V. 9, I. 17, p. 132.

5 Zeki Hafızoğulları/Muharrem Özen, Türk Ceza Hukuku Özel Hükümler Topluma Karşı Suçlar, USA Yayınevi, Ankara, 2017, p. 128; Osman Yaşar/Hasan Tahsin Gökcan/Mustafa Artuç, Yorumlu ve Uygulamalı Türk Ceza Kanunu, C. IV, Adalet Yayınevi, 2. Baskı, Ankara, 2014, p. 6035; Ali Parlar/Muzaffer Hatipoğlu, Türk Ceza Kanunu Yorumu, Yayın Matbaacılık, 2. Cilt, (Madde 141-345), Ankara, 2007, p. 1463; Necati Meran, Açıklamalı İçtihatlı Yeni Türk Ceza Kanun, Seçkin Yayınevi, 2. Baskı, Ankara, 2007, p. 971; İsmail Malkoç, Açıklamalı Türk Ceza Kanunu Cilt 3, (Madde 150-241), Sözkesen Matbaacılık, Ankara, 2013, p. 3232; Çetin Arslan/Bahattin Azizağaoğlu, Yeni Türk Ceza Kanunu Şerhi, Asil Yayınevi, Ankara, 2004, p. 818; Çakmut, p. 544.

6 Recep Kahraman, "Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu (TCK md 195)," Y. 2020, C. 78. S. 2, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, p. 744.

*a contagious substance*".[7] The concept of epidemic, on the other hand, is defined in the dictionary as *"infecting a large number of people, animals or plants in the environment in a short time", "contagious" and "the spread of a disease or other condition and infecting many people at once"*. [8] As can be seen, contagiousness refers to the quality of a disease, while epidemic refers to the quantitative prevalence of a contagious disease.[9]

In the offence of acting contrary to the measures regarding contagious diseases, it is not sufficient to identify the disease-causing source in order to take quarantine measures. The second element to be sought here is that at least one person must have fallen ill or died due to the contagious disease.[10] It is not important whether the contagious disease has reached large segments of society or only a certain part of the society has been affected.[11]

If a quarantine declaration has not been made by the competent authorities despite the presence of a person who has contracted or died from one of the contagious diseases in an area, or if a quarantine declaration has been made by the competent authorities despite the absence of a person who has contracted or died from an contagious disease in an area, the offence will not occur due to failure to comply with the measures taken under Article 195 of the TPC.[12]

Another element that must be present regarding the offence is that quarantine measures must have been taken by the administrative authorities in order to prevent the spread of the contagious disease in relation to the place where the person who contracted the disease or died from the disease was located.[13] These quarantine measures are taken in relation to the place where the disease is located, not the

---

7 Önok, p. 162; The List of Notifiable Communicable Diseases in Annex-1 of the Regulation lists which contagious diseases are considered as notifiable contagious diseases. COVID-19 virus is listed as a contagious disease in the 50th place of the relevant list.; Kahraman, p. 744; fn. 16.

8 Tdk Türkçe Sözlük, 11. Baskı, Ankara, 2011, p. 2018.

9 Şirin, p. 53, fn. 18.

10 Tuğba Bayzit, COVID-19 Salgınının Hukuki Boyutu (Editör Muhammet Özekes), Onikilevha Yayınevi, İstanbul, 2020, p. 867.

11 Zeynel Temel Kangal, "Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu", Özel Ceza Hukuku Cilt V, Onikilevha Yayınevi, İstanbul, 2019, p. 438.

12 Yaşar/Gökcan/Artuç, p. 6036- 6037.

13 Kahraman, p. 745

person.[14] The administrative authorities authorized to take quarantine measures are regulated in Article 69 of the Public Health Law No. 1593. Article 303 of the same law specifies the health officers authorized to determine the quarantine measures and their scope are as follows: *"Physicians employed in state, municipal and administrative affairs, and minor health officers who are in the service of physicians in matters deemed necessary and authorized by the Ministry of Health and Internal Medicine"*.[15] Articles 66, 67, 72, 73 of the Public Health Law No. 1593 explain the measures that can be considered within the scope of quarantine.[16]

Quarantine is defined in the dictionary as *"a health measure applied in the form of keeping a certain region or place under control and preventing entry and exit in order to prevent the spread of a contagious disease"*.[17] In general terms, the word "quarantine" is used to refer to a set of restrictions intended to prevent the spread of a contagious disease.[18]

According to the definition of *"the place where the infected person or the person who died from the disease was found"* in Article 195 of the TPC, it is understood that quarantine measures are measures applied only in an area limited to the place where the infected person or the person who died from the disease was found.[19] In other words, the legislator does not recognize acting contrary to measures taken outside the quarantine area as an offence.[20] As a matter of fact, in case of acting contrary to measures to prevent the emergence or spread of contagious diseases, such as the obligation to wear a mask or to comply with the social distancing rule, the offence of acting contrary to the measures regarding contagious diseases will not occur.[21] Since quarantine measures are implemented through regulatory procedures issued by

14 Önok, p. 163.
15 Kahraman, p. 748-749; Önok, p. 168-169.
16 Önok, p. 169.
17 TDK Türkçe Sözlük, p. 1320-1321; In the Law No. 5996 on Veterinary Services, Plant Health, Food and Feed, quarantine is defined as "the control of animals, animal products, plants, herbal products and other substances, as well as potentially contaminated substances and materials, in order to prevent the introduction or spread of diseases or harmful organisms within the country". (Art. 3/1-41). OG. of 13.10.2010 and no. 2760.
18 Kahraman, p. 745.
19 Önok, p. 164; Kahraman, p. 748.
20 Kahraman, p. 745.
21 Kahraman, p. 745.

the competent authorities, the offence committed here is the failure to comply with the regulatory procedures of the administration.

Therefore, failure to comply with the quarantine measures taken by the competent authorities will not constitute a crime if the regulatory procedure is not in accordance with the law.[22]

According to the principle of ultima ratio, criminal law instruments should be used as a last resort. Considering the type of offence in Article 195 of the TPC, it is understood that the legislator did not prefer to punish every action in the fight against contagious diseases.[23] In the case Enhorn v. Sweden, the European Court of Human Rights, in its decision known as the "Enhorn criteria", stated that "States are not directly authorized to deprive persons of liberty in the measures they must take in terms of public health and safety in order to prevent the spread of contagious diseases" and determined two basic conditions when evaluating the "legality" of depriving a person of liberty. These are; (1) the disease constitutes a "danger" to public health/safety and (2) the person carrying the contagious disease is subjected to compulsory isolation. Quarantine measures must be a "last resort" to prevent the spread of the disease, as the use of lesser measures is inadequate. As soon as these criteria are not met, the deprivation of liberty will cease."[24]

---

22 Hafızoğulları/Özen, p. 128.

23 Kahraman, p. 745.

24 Şirin, p. 50; Dilaver Nişancı, "Salgın Hastalıklar ve Salgın Hastalıklar Özelinde Sağlık Hakkına Avrupa İnsan Hakları Mahkemesinin Bakış Açısı ile Ulusal Mevzuatın Covid-19 Özelinde Değerlendirilmesi", *Türkiye Barolar Birliği Dergisi,* Y. 2020, S. 150, p. 97; In Enhorn v. Sweden, the applicant, a homosexual man, was found to be HIV-positive and, following his refusal to attend medical appointments given to him by the district health officer, was ordered by the administrative court, in accordance with the Contagious Diseases Act, to undergo compulsory isolation in hospital for a total of seven years, each time for a period not exceeding six months, and in practice for one and a half years, as the applicant had absconded each time. According to the ECHR, while HIV is indisputably dangerous for public health and safety, it is necessary to examine whether the deprivation of the applicant's liberty is a last resort to prevent the spread of the virus, when less drastic measures are possible. According to the Court, in the circumstances of the concrete case, subjecting the applicant to compulsory isolation without exploring other measures to prevent the spread of the HIV virus cannot be considered as a last resort. On the other hand, the ECHR found that the compulsory isolation, which lasted for a total of seven years and was in fact imposed by keeping the applicant in hospital against his will for one and a half years, violated the Con-

On the other hand, it has been emphasized that the regulation in the offence of acting contrary to the measures regarding contagious diseases is insufficient to protect the public health, that it does not meet the legal needs arising from the current COVID-19 outbreak as its scope is regulated quite narrowly, and that the place where the measures are taken should not be included in the law; it has also been emphasized that in order to make the provision functional, it would be appropriate to remove the requirement of *"the place where a person who has been infected with one of the contagious diseases or who has died from these diseases"* from the law or to make an amendment as "*to quarantine a person*",[25] since it is the legislator who can change the content of the rule by taking this into account if the rule is not in line with the purpose.[26] In the doctrine, some researchers have suggested that Article 195 of the TPC should be redefined in a broader and more inclusive manner, and thus, there would be no need for Article 284 of the Public Health Law No. 1593, which refers to Article 195 of the TPC.[27]

## II. EVALUATION OF ARTICLE 195 OF TPC IN TERMS OF THE PRINCIPLE OF LEGALITY

For the purpose of this study, it would be useful to address the problem of the contradiction to the principle of legality of Article 195 of the TPC, which is a subject of debate in the doctrine, and the

---

vention, as it was considered to have upset the fair balance that had to be struck between the objective of preventing the spread of the HIV virus and the protection of the applicant's liberty. Enhorn/Sweden, ECHR, 56529/00, 25.01.2005, § 44.

25 Kahraman, p. 745; Önok, p. 181.

26 Önok, p.167.

27 In the doctrine, Önok›s proposed amendment to Article 195 of the TPC is as follows: "A person who fails to comply with the orders given by the competent authorities or the procedures and actions regarding the quarantine of the place where a person who is infected or suspected of being infected with a contagious disease is found or where a substance causing such a disease is found or suspected to be found, or the quarantine of a person who is infected or suspected of being infected with a contagious disease, shall be sentenced to imprisonment from three months to three years." Önok, p. 182; Kahraman's amendment proposal regarding relevant article is as follows: " A person who fails to comply with the measures taken by the competent authorities for quarantine to prevent the emergence or spread of contagious diseases shall be sentenced to imprisonment from six months to two years." Kahraman, p. 743.

prohibition of the imposition of crimes and penalties by the regulatory acts of the administration. As is known, one of the fundamental principles of the rule of law is the principle of legality. In order not to leave citizens unprotected against arbitrary and excessive intervention of the state, limitations must be imposed on the exercise of the power of punishment. The rule of law must not only protect individuals through criminal law, but also against criminal law (German: *den Einzelnen nicht nur durch das Strafrecht, sondern auch vor dem Strafrecht schützen*).[28]

Article 2, paragraph 1 of the TPC No. 5237 stipulates that (1)"*No one shall be punished or subjected to security measures for an act that the law does not explicitly criminalize. No penalty or security measure other than the penalties and security measures stipulated in the law may be imposed*", and in paragraph 2 (2) "*Crimes and penalties cannot be imposed by the regulatory procedures of the administration*". According to the principle of legality in the article, in order to guarantee individual rights and freedoms, the legislator must determine which acts constitute crimes and the legal sanctions (sanctions) to be imposed on those who commit these crimes in the law in a clear, precise and enforceable manner, without leaving any room for doubt.[29] As adopted in a decision of the Constitutional Court, in this case, individuals have the opportunity to learn which of their behaviours constitute a crime and to adjust their actions accordingly.[30] Thus, by ensuring *predictability* through the principle of

---

28 Claus Roxin, Strafrecht, Allgemeiner Teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre, 4. Auflage, München, 2006, § 5, kn. 1, p. 138; Bahri Öztürk/Mustafa Ruhan Erdem, Uygulamalı Ceza Hukuku ve Güvenlik Tedbirleri Hukuku, 14. Baskı, Seçkin Yayıncılık, Ankara, 2014, p. 36; kn. 26; The author prefers to use this definition not only for the Criminal Law, as Roxin states, but for legal rules in general. Berrin Akbulut, Ceza Hukuku Genel Hükümler, 6. Baskı, Adalet Yayınevi, Ankara, 2019, p. 98.

29 Mahmut Koca/İlhan Üzülmez, Türk Ceza Hukuku Genel Hükümler, 12. Baskı, Seçkin Yayınevi, Ankara, 2019, p. 54-55; Timur Demirbaş, Ceza Hukuku Genel Hükümler, 11. Baskı, Seçkin Yayıncılık, Ankara, 2016, p. 118; Mehmet Emin Artuk/Ahmet Gökçen/Mehmet Emin Alşahin/Kerim Çakır, Ceza Hukuku Genel Hükümler, 14. Baskı, Adalet Yayınevi, Ankara, 2020, p. 164; Nur Centel/Hamide Zafer/Özlem Çakmut, Türk Ceza Hukukuna Giriş, 6. Baskı, Beta Yayınları, İstanbul, 2010, p. 56; Kayıhan İçel, Ceza Hukuku Genel Hükümler, Beta Yayınları, Yenilenmiş Baskı, İstanbul, 2016, p. 126; İzzet Özgenç, Türk Ceza Hukuku Genel Hükümler, 15. Baskı, Seçkin Yayıncılık, Ankara, 2019, p. 132.

30 Veli Özer Özbek/Koray Doğan/Pınar Bacaksız, Türk Ceza Hukuku Genel Hükümler, Seçkin Yayıncılık, 10. Baskı, Ankara, 2019, p. 66; Koca/Üzülmez, p. 55;

"legality" in crimes and punishments, legal security is preserved in the field of criminal law.[31] Although an exception is made in Article 7, the principle of legality is incorporated in the European Convention on Human Rights.[32]

The definition and sanctioning of a criminal act in the law is called "full criminal law" (German: *Vollstrafgesetz*) or "closed criminal law" (German: *Geschlossene Gesetze*) in the doctrine.[33] Although controversial, in some cases, the legislator does not clearly define what the act in question is in the law, although it shows the sanction that corresponds to the criminal act, in other words, the punishment to be imposed. It leaves the determination of this to the administrative authorities,

---

Önok, p. 154; In a decision of the Constitutional Court: "19. Article 2 of the Constitution characterizes the Republic of Turkey as a state of law. One of the fundamental elements of the state of law is the principle of "certainty". According to this principle, legal regulations must be clear, precise, comprehensible, applicable and objective in a way that leaves no room for any hesitation and doubt for both individuals and the administration, and must also include protective measures against arbitrary practices of public authorities. The principle of certainty is linked to legal security, and the individual should know with certainty which legal sanction or consequence is attached to which concrete action or fact. Only in this case can the individual foresee their obligations and adjust their behavior.

[2]0. The principles of legal security and certainty are prerequisites of the state of law. The principle of legal security, which aims to ensure the legal security of individuals, requires that legal norms should be predictable, that individuals should be able to trust the state in all their actions and transactions, and that the state should avoid methods that undermine this sense of trust in its legal regulations.

[2]1. The principle of certainty refers not only to judicial certainty but also to legal certainty in a broader sense. Legal certainty can also be ensured by court precedents and regulatory acts of the enforcement authority, provided that they meet the requirements of being accessible, known and predictable on the basis of legal regulation. What is essential in the principle of legal certainty is that the consequences of the application of a legal norm should be prescribed in that legal order." R.G. 20.4.2018, S. 30397; Constitutional Court decision Case No. 2017/172, Decision No. 2018/32.

[31] According to Article 38 of the Constitution, "No one shall be punished for an act which the law in force at the time it was committed does not criminalize; no one shall be punished with a heavier penalty than the penalty prescribed for that crime in the law at the time the crime was committed.", Önok, p. 152; İçel, p. 83; Demirbaş, p. 63.

[32] Önok, s. 151.

[33] Jürgen Baumann/Ulrich Weber/Wolfgang Mitsch, Strafrecht Allgemeiner Teil, Giesseking Verlag, 11. Baskı, Bielefeld, 2003, kn:100-101, p. 131-132; Artuk/Gökçen/Alşahin/Çakır, p. 157-158; Özgenç, p. 125; Demirbaş, p. 115; Özbek/Doğan/Bacaksız, p. 72; Koca/Üzülmez, p. 67.

provided that it is within the limits drawn.[34] In this way, flexibility is provided in determining the content, which varies according to place and time to meet the needs that may arise in the future. In the doctrine, laws that allow such arrangements are called "open criminal law, framework law, blind criminal law" (German: *Blankettdelikte*).[35]

Under Article 195 of the TPC No. 5237, "failure to comply with the measures taken by the competent authorities" is subject to penalty. Therefore, it is the "competent authorities" who will determine what the measures for quarantine are and which measures should be taken in the offence of acting contrary to the measures regarding contagious diseases.[36] These measures to be taken by the competent authorities in the fight against the disease will be determined by referring to the provisions of the Public Health Law No. 1593, taking into account various factors such as the nature, type, effect, speed of spread of the contagious disease and how it is transmitted.[37]

The fact that our country, like many countries in the world, is unprepared in the fight against dangerous epidemics in terms of legislation leads to the disregard of the principle of legality.[38] Although reasons such as the difficulty of predicting the scope and impact of the epidemic in advance and the inability to concretize the measures are put forward[39], the end does not justify the means.[40]

In the type of offence regulated under Article 195 of the TPC, the fact that the element of the act regarding the quarantine measures is not defined in the text of the article is contrary to the principle of legality. Moreover, since the discretionary power to determine the content of the prohibited act is left to the administrative authorities, the provision of Article 195 of the TPC should be considered as an

34 Doğan Soyaslan, Ceza Hukuku Genel Hükümler, 6. Baskı, Yetkin Yayınları, Ankara, 2016, p. 97; Artuk/Gökçen/Alşahin/Çakır, p. 157-158; Demirbaş, p. 115.

35 Roxin, § 5, kn. 40, p. 157; Baumann/Weber/Mitsch, kn:100-101, p. 131-132; Özgenç, p. 125; Artuk/Gökçen/Alşahin/Çakır, 157-158; Demirbaş, p. 115; Özbek/Doğan/Bacaksız, p. 72; Koca/Üzülmez, p. 67.

36 "The offence is failure to comply with a regulatory act of the administration". See Hafızoğulları/Özen, p. 123.

37 Kahraman, p. 747.

38 Şirin, p. 130.

39 Kahraman, p. 747.

40 Şirin, p. 130.

open criminal norm.[41] It can be said that the future completion of the open criminal norm with the regulatory acts of the administration also contradicts the principle of *"No crime and punishment shall be imposed by the regulatory acts of the administration"* in paragraph 1 of Article 2 of the TPC.[42] According to contemporary criminal law principles, such norms should not be preferred by the legislator.[43]

## III. THE FORMATION PROCESS OF THE NORM AND THE COMPARISON OF THE FORMER TURKISH PENAL CODE NO. 765 AND THE TURKISH PENAL CODE NO. 5237

The Italian Penal Code of 1889, which was the source of the former Turkish Penal Code No. 765, which entered into force on July 1, 1926, also included the offence of acting contrary to measures regarding contagious diseases.[44] The offence of acting contrary to measures

41 Hafızoğulları/Özen, p. 128; Artuk/Gökçen/Alşahin/Çakır, p. 161; Özbek/Doğan/Bacaksız, p. 76.

42 Önok, p. 159; Fighting against dangerous epidemics without relying on the principle of legality may seem justifiable at first glance, but when considered in depth, this opens the door to risks such as arbitrariness and disregarding the principles of transparency and equality. In other words, leaving the fight against dangerous epidemics solely to the discretion of the executive may paradoxically hinder this effort. Moreover, this problem may spill over into the processes following the eradication of the disease.." See Şirin, p. 131.

43 See, the Constitutional Court for a precedent opinion. "Turkish Criminal Code No. 5237. Paragraph (1) of Article 297 prohibits bringing or carrying weapons, drugs or stimulants or electronic communication devices into the execution institution or detention center and stipulates that those who ate this prohibition shall be punished with imprisonment. Paragraph (2) of the aforementioned article, in which the rule subject to objection is included, states that the person who intentionally brings into the execution institution or detention center, knowing this prohibition, or possesses or uses the items other than those listed in paragraph (1), which are prohibited by the competent authorities to be brought into the execution institution or detention center, will be punished with imprisonment. Although paragraph (1) of Article 297 lists the qualifications of the items that may be the subject of the crime one by one, the rule subject to objection does not specify such qualifications, and authorizes the competent authority within the administration to determine the items that may be the subject of the crime in an unlimited, uncertain and wide area. Accordingly, since the rule does not clearly and distinctly specify the qualifications that the competent authority within the administration will take as basis when determining the items that may be subject to the crime, the rule is not specific and foreseeable and does not comply with the principle of legality of the crime", Constitutional Court decision Case No. 2010/69, Decision No. 2011/116; O.G. 21.10.2011, I. 28091.

44 Kangal, p. 434.

regarding contagious diseases was regulated in Article 263 of the former Penal Code No. 765 under the title of *Violence and Resistance against the Government and Opposition to the Laws* in the chapter 3, section 8 of the second book of the Penal Code, which was designated for crimes, under the title of crimes committed against the state administration. The text of the mentioned article reads as follows: "*Those who actively disobey the orders and actions taken by the Government to cordon off houses and other places infected with cholera and other contagious diseases or where deaths occur shall be imprisoned from one month to one year, depending on the extent of their actions.*" [45]

Article 256 of the draft of 1997 Turkish Penal Code, which was prepared based on the text and general justification of the preliminary text of 1989 TPC, stipulated that the offence of acting contrary to the measures regarding contagious diseases was punishable by "*imprisonment from two months to one year for those who actually obstruct the orders given by the competent authorities regarding the cordoning off of houses and other places where people who are infected with one of the diseases or who have died from these diseases are found, or for those who actually obstruct the efforts in this regard*".[46] Article 261 of the 2004 Ministerial Bill on contagious diseases stipulates that "*Those who obstruct the orders given by the competent authorities regarding the cordoning off of houses and other places where a person who is infected with one of the contagious diseases or a person who has died from one of these diseases is found, or those who actually obstruct the efforts in this regard, shall be sentenced to imprisonment from two months to one year, depending on the extent of their actions*".[47] As seen here, the provision in Article 256 of the draft of the 1997 TPC, which is a translated version of Article 263 of the former TPC No. 765, was also included in Article 261 of the 2004 Ministerial Bill.[48]

The offence of acting contrary to the measures regarding contagious diseases is regulated in Article 195 under the heading of *Offences*

---

45 İsmail Malkoç/Mahmut Güler, (Uygulamada) Türk Ceza Kanunu Özel Hükümler-2, Adil Yayınevi, Ankara, (Yayın yılı belirtilmemiş,) p. 1977; Kangal, p. 434; Çakmut, p. 544.

46 Önok, p. 149.

47 TBMM, Dönem, 22, Yasama Y. 2, Sıra S. 664, p. 320.

48 Çakmut, p. 543; fn. 1.

*against Public Health* in the TPC No. 5237.[49] Although the measures in the TPC No. 765 criminalized the contradiction to the measures taken to cordon off *houses and other places* where contagious diseases are seen according to Article 263, Article 195 criminalizes the contradiction to the measures taken to quarantine *the place* where a person who has been infected with a contagious disease or who has died.[50]

While in the TPC No. 765, the measures were aimed at cordoning off houses or other places, the TPC No. 5237 addresses measures related to *the implementation of quarantine*.[51] Although there are differences in the wording in both legal regulations regarding which diseases are within the scope of the criminal offence, their contents are the same. In the TPC No. 765, the term *cholera and other contagious diseases* were used, while in the TPC No. 5237, the term *contagious disease* was used without specifying what the disease was.[52] While in the TPC No. 765, *the violation of the orders and actions taken by the government* was the element of the crime, in the TPC No. 5237, this issue was expressed as *acting contrary to the measures taken by the competent authorities* and the action in accordance with the definition was handled more comprehensively.[53]

In the TPC No. 765, the typical act was *to actually obstruct*, in other words, to actually resist. In TPC No. 5237, on the other hand, *failure to comply with the measures* is deemed sufficient. Actions that are not of a material nature and do not involve actual opposition may also cause the crime to occur.[54]

---

49 Çakmut, p. 544; When the Law No. 5237 is compared with the Law No. 765, it is seen that the verbal expression, the title and the systematic structure of the offence have been completely changed in the Law No. 5237. For this reason, it is partially not possible to use the provision of Art. 263 of the Law No. 765, doctrine and judicial decisions in the interpretation of the offence under Art. 195 of the Law No. 5237. This situation partially harms the principles of progress in doctrine and continuity in jurisprudence. Hafızoğulları/Özen, p. 127.

50 Kahraman, p. 742.

51 Yaşar/Gökcan/Artuç, p. 6035.

52 Çakmut, p. 544.

53 Kangal, p. 435.

54 Kangal, p. 443.

## IV. THE LEGAL VALUE TO BE PROTECTED

The meaning and purpose of modern criminal law is the protection of legal values. The individual's freedom, being an independent entity and developing their personality under the conditions of social life is a requirement of the doctrine of the protection of legal values.[55] Both the fact that the section title of the offence of acting contrary to the measures regarding contagious diseases in the TPC No. 5237 is regulated by the legislator as *"offences against public health"* and the examination of the article justification of the relevant offence, it will be seen that the legal value that is protected here is the *"protection of public health"*.[56] In order to protect public health from danger and attacks, states have the responsibility of taking the necessary measures to combat epidemics through the competent authorities as per the legislation. As a matter of fact, Article 56 of the Constitution states that the State is obliged to ensure that everyone lives their lives both physically and mentally healthy.[57] Therefore, the regulation aims to prevent the possible harm and threats to the health of the individuals constituting the society by preventing the further spread of contagious diseases.[58]

On the other hand, although the doctrine predominantly states that the legal value aimed to be protected is public health, there are also researchers who hold the opposite view. For example, according to German criminal jurist Roxin, only individual legal interests are protected in criminal law. A criminal norm cannot be based on the

---

55 Yener Ünver, Ceza Hukukuyla Korunması Amaçlanan Hukuksal Değer, 1. Baskı, Seçkin Yayınevi, Ankara, 2003, p. 37.

56 Çakmut, p. 545; Hafızoğulları/Özen, p. 128; Yaşar/Gökcan/Artuç, p. 6035–6036.

57 VIII. Health, Environment and Housing. A. Health services and environmental protection. Article 56 of the Constitution- "Everyone has the right to live in a healthy and balanced environment. It is the duty of the State and citizens to improve the environment, protect environmental health and prevent environmental pollution. The State shall ensure that everyone maintains their life healthy both physically and mentally, and shall regulate the planning and service provision of health institutions from a single authority in order to promote cooperation by increasing savings and efficiency in manpower and material resources. The State shall fulfill this duty by utilizing and supervising public and private health and social institutions. General health insurance may be established by law for the widespread provision of health services." In addition to the general regulation in the Constitution, the Law on Public Health No. 1593 (Art. 57-96. and Art. 282, 284) also contains some regulations on this matter; Çakmut, p. 545.

58 Yaşar/Gökcan/Artuç, p. 6035–6036; Bayzit, p. 879.

protection of a hypothetical legal interest. It is not possible to create abstract concepts and protect them as legal interests through criminal law. Since the word "people" (German: *Volk*) is an abstract concept in the narrow sense of the word and has no real physical existence (German: *Keinen realen* Körper), the legal benefit should not be considered as *"protection of public health"* (German: *Volksgesundheit*). What should be understood here is the protection of the health of more than one member of the public. Therefore, an additional reason for punishment should not be created by justifying the protection of public health.[59] Again, Kangal argues that the legal value protected by the offence of acting contrary to the measures regarding contagious diseases is not the protection of public health, but rather the health of each individual constituting the society, and that the perpetrator endangers the health of all individuals inside and outside the quarantine zone by not complying with the quarantine measures taken due to a contagious disease.[60] In addition, according to Önok, it is not possible to consider an abstract concept such as public health as a legal value.[61]

## V. ELEMENTS OF OFFENCE

### A. Objective Elements of Offence

In the offence of acting contrary to the measures regarding contagious diseases, the examination of the objective elements of the offence is carried out in a certain order. Initially, the perpetrator of the crime, the victim, the criminal act will be examined and then finally the subject of the crime will be examined.

#### 1. Perpetrator

Article 195 of the TPC No. 5237 defines the perpetrator as *"the person who fails to comply with the measures taken by the competent authorities"*.[62] Accordingly, anyone who fails to comply with the measures taken or implemented by the competent authorities regarding the quarantine of

59 Roxin, § 2, kn. 46, p. 28.
60 Kangal, p. 435-436.
61 Önok, p. 159.
62 Hafızoğulları/Özen, p. 128.

the place where a person who has contracted or died from one of the contagious diseases is located can be the perpetrator of the offence.[63] Since the relevant article does not require a special qualification for the perpetrator, there is no specific crime here.[64]

Measures within the scope of quarantine may be taken by the competent authorities to prevent the risk of the spread of contagious diseases throughout the country, or they may be applied only to certain regions, places, people practicing certain professions and arts, or only for certain dates and time intervals, or only for certain age groups. In this case, only these persons can be the perpetrators of the offence of acting contrary to the measures regarding contagious diseases.[65]

It is possible for persons other than the addressees of the measures taken by the competent authorities to be the perpetrators of the crime in question by acting contrary to these measures.[66] It is not necessary for the perpetrator to be the person to whom the quarantine measure is directed or to live or be present in the quarantined area.[67]

The perpetrator of this offence may also be a public official. This is because it is also possible for a public official to fail to comply with the measures of the competent authorities regarding quarantine during the performance of their duty. In this case, if other conditions are also observed, the penalty will be increased in accordance with Article 266 of the TPC, which states that *"The penalty to be imposed on a public official who uses the tools and equipment in their possession as a requirement of their duty during the commission of a criminal offence shall be increased by one-third, unless the title of public official has been taken into account in the definition of the relevant offence. "*[68]

In addition, only natural persons can be the perpetrators of the offence of acting contrary to the measures regarding contagious diseases. It is not possible for legal persons to be the perpetrator of this offence (Art. 20/2 of the TPC).[69]

63 Kangal, p. 436.
64 Yaşar/Gökcan/Artuç, p. 6036.
65 Kahraman, p. 749.
66 Kangal, p. 437.
67 Kangal, p. 436-437.
68 Kangal, p. 436.
69 Kangal, p. 437.

### 2. Victim

Although there is no specific victim of the offence of acting contrary to the measures regarding contagious diseases, the legal value intended to be protected by this offence is the health of each individual. Therefore, since the health of everyone living in the society is likely to be harmed, the victim of the offence is every single member of the society.[70] Some authors in the doctrine express the victim of the offence as "the whole society in general".[71]

Hafızoğulları/Özen, on the other hand, argue that the victim of the offence is not the society, but the "competent authority", i.e. the public administration, whose quarantine measures are not complied with.[72] However, the type of offence included in Article 195 is regulated under the section of *offences against public health under the title of crimes against society* within the system of the new Turkish Criminal Code No. 5237. Therefore, contrary to the former TPC No. 765, since it is no longer accepted that the relevant crime is committed against the public administration, the public official whose measures regarding contagious diseases are not followed should not be considered as the victim of the crime.[73]

### 3. Act (Offence)

Article 195 of the Turkish Criminal Code No. 5237 defines the offence as *"failure to comply with the measures taken by the competent authorities to quarantine the place where a person who has contracted or died from one of the contagious diseases is located"*.[74] Failure to comply with

---

70 Kangal, p. 437.

71 Çakmut, p. 546; Yaşar/Gökcan/Artuç, p. 6036.

72 "...However, unlike other crimes, the victim of the crime is not society. Since The core of the crime is "failure to comply with the measures taken by the competent authorities regarding quarantine", and despite the legal issue, the victim of the crime is the "competent authority", namely the public administration, whose quarantine measures are not complied with. This regulation, which is incompatible with the norm-making technique, indicates that the Historical Legislator did not have a consistent "system idea". Hafızoğulları/Özen, p. 128.

73 See also, Kangal, p. 437.

74 According to the Court of Cassation, it should be clearly stated in the verdict which actions constitute a contradiction to the measures taken in the concrete case. "According to the facts, it is illegitimate to hold the defendant liable for the offence of acting contrary to the measures regarding contagious diseases without

the quarantine measures taken by a non-authorized authority does not constitute this offence.[75] Since the relevant article does not limit the manner in which the relevant measures may be contradicted, it cannot be said to be commit a crime. Article 195 of the TPC considers "failure to comply with the measures" sufficient. Therefore, non-material, i.e. verbal non-compliance with the measures taken by the competent authorities also constitutes this offence.[76]

The offence of acting contrary to the measures regarding contagious diseases is a result crime since it can be committed by any action. For the crime to be committed, it is sufficient that the perpetrator does not comply with the measures taken by the competent authorities in any way. In addition, there is no need to use force, violence or threats in order not to comply with the measures taken.[77] Since Article 195 of the TPC does not require a result in the form of concrete danger or damage, the offence is an abstract endangerment offence.[78]

The act of acting contrary to the measures taken by the competent authorities regarding quarantine or failing to comply with the measures they have implemented can be committed by an executive act or a negligent act. For example, the perpetrator entering the quarantined area by removing the tape set up at the entrance of the quarantine zone, taking down the notices and signs hung in certain places regarding quarantine, leaving the place where they should be without the decision of the competent authority (absconding) are acts of an executive nature.[79]

On the other hand, examples of negligent acts include the perpetrator continuing to stay in the park despite being ordered by the competent authorities to go home, not handing over the items that

---

explaining how the defendant's actions actually constituted a contradiction to the measures taken." Kahraman, p. 751, fn. 56.

75 Parlar/Hatipoğlu, p. 1463.

76 For example, continuously saying something to intimidate public officials who want to implement the measures also constitutes a crime. However, it is not enough for the perpetrator to simply say that they will not comply with the measures taken or criticize the measures; Malkoç, p. 3233; Kangal, p. 442; Kahraman, p. 752. fn. 60.

77 Yaşar/Gökcan/Artuç, p. 6037.

78 Önok, s. 161; Kangal, p. 441; Yaşar/Gökcan/Artuç, p. 6038; Kahraman, p. 752.

79 Kangal, p. 441.

need to be cleaned with special disinfectants to the officials, and not going to the health institution in the quarantine zone despite being summoned.[80]

The perpetrator's conduct in not complying with the measures regarding contagious diseases must be "capable of preventing the measures taken or implemented by the competent authorities". Suitability can be objectively determined according to the assessment of a reasonable observer, taking into account the circumstances at the time of the incident.[81] The fact that the act of acting contrary to the measures regarding contagious diseases is an abstract endangerment does not affect the necessity to make such an assessment.[82] When it is concluded that the act committed by the perpetrator is capable of preventing the implementation of the measures taken by the competent authorities, the existence of the offence must be accepted.[83] In addition, for the offence to be committed, it is not required that the measures taken or implemented are prevented or that the behaviour in the form of non-compliance is carried out in the presence of the officials who take or implement the measures.[84]

If the perpetrator resists against the authorized public officials by using force or threats due to the measures taken and implemented by them regarding quarantine, the act constitutes the crime of resisting against a public official by using force or threats to prevent them from performing their duties as defined in Article 265 of the TPC.[85] Here, the

---

80 Kangal, p. 441; Kahraman, p. 751; Önok, p. 171.
81 Kangal, p. 441.
82 Önok, p. 170.
83 Kangal, p. 441.
84 Kangal, p. 442.
85 The crime of resisting to prevent the execution of duty TPC Article 265- "(1) A person who uses force or threat against a public official in order to prevent them from performing their duties shall be sentenced to imprisonment from six months to three years. (2) If the offence is committed against persons performing judicial duty, imprisonment from two to four years shall be imposed. (3) If the offence is committed by making oneself unrecognizable or by more than one person together, the penalty to be imposed shall be increased by one third. (4) If the offence is committed with weapons or by taking advantage of the intimidating power created by existing or deemed to exist criminal organizations, the penalty to be imposed according to the paragraphs above shall be increased by half. (5) In the event that aggravated forms of the crime of intentional injury occur during the commission of this crime, the provisions regarding the crime of intentional injury shall also apply."; Çakmut, p. 548.

provisions on the offence of acting contrary to the measures regarding contagious diseases regulated under Article 195 of the TPC are no longer applicable.[86]

**4. Subject of the Offence**

One of the objective elements of the offence is the subject of the offence. The existence of a crime without a subject cannot be mentioned.[87] The act performed by the perpetrator may be directed against an object or the physical, material structure or bodily integrity of a person.[88] For example, in the crime of theft, the subject of the crime is the movable property taken from its location,[89] and in the crime of property damage, the subject of the crime is movable or immovable property. In some crimes, the subject of the crime and the victim may be different from each other. For example, in the crime of intentional injury, the victim is the injured person. The subject of the crime is the body of this person.[90]

In the doctrine, crimes are divided into "damage" and "endangerment" according to the intensity of the impact on the subject of the crime.[91]

Endangerment crimes are divided into two as "abstract endangerment" and "concrete endangerment". In abstract endangerment, the legislator assumes that a danger will arise in terms of the subject of the crime by performing the act in the legal definition of the crime.[92] In abstract endangerment crimes, the performance of the act in the legal definition of the crime is sufficient for the completion of the crime. Abstract crimes of endangerment are formal crimes (the consequence of which is contiguous to the act).[93] For this reason, as in concrete crimes of endangerment, there is no need for the judge to

86 Kangal, p. 442.
87 Artuk/Gökçen/Alşahin/Çakır, p. 374.
88 Özgenç, p. 219.
89 Sulhi Dönmezer/Sahir Erman, Nazari ve Tatbiki Ceza Hukuku, 14. Baskı, Der Yayınları, Cilt II, İstanbul, 2019, p. 33.
90 Özgenç, p. 219-220.
91 Özgenç, p. 220.
92 İçel, p. 276; Özgenç, p. 221.
93 Centel/Zafer/Çakmut, p. 256.

investigate and determine whether a danger has actually occurred on the subject of the crime, that is, the causal relationship.[94]

As stated above, the offence of acting contrary to measures regarding contagious diseases is an abstract endangerment crime.[95] The offence of acting contrary to these measures can be committed if the measures taken by the competent authorities to quarantine a place are contradicted. Indeed, Article 195 of the TPC mentions measures *"regarding the quarantine of the place where a person who has contracted one of the contagious diseases or who has died from these diseases is located"*.

Measures taken by the competent authorities to quarantine the place where a person who is infected with one of the contagious diseases or who has died due to these diseases is located and which are violated (not complied with) by persons constitute the subject of the offence of acting contrary to the measures regarding contagious diseases.[96] The occurrence of a concrete endangerment or damage is not necessary for this crime to occur. Failure to comply with the measures taken by the competent authorities is sufficient.[97] If a quarantine has not been declared by the competent authorities in a place within the scope of Article 195 of the TPC, then it is impossible for the crime to be committed since there is no measure taken by the competent authorities and violated by persons.[98]

**B. Subjective Elements of Offence**

The offence of acting contrary to the measures regarding contagious diseases regulated in Article 195 of the Turkish Criminal Code No. 5237 is an offence that may be committed intentionally. This refers to the perpetrator's knowledge of the measures taken by the competent authorities to quarantine the place where a person who has contracted one of the contagious diseases or who has died from these diseases is located, and their failure to comply with these measures knowingly and willingly.[99] The existence of general intent is sufficient

94 İçel, p. 276; Özgenç, p. 221.
95 Kangal, p. 437.
96 Kangal, p. 443; Önok, p. 161; Kahraman, p. 747-748; Bayzit, p. 877.
97 Kangal, p. 443.
98 Yaşar/Gökcan/Artuç, p. 6036- 6037.
99 Hafızoğulları/Özen, p. 129.

for the relevant offence, and it is not necessary for the perpetrator to commit the offence with a special motive.[100] In addition, the negligent form of the act is not defined as an offence in Article 195 of the TPC.[101]

As mentioned above, since the offence of acting contrary to the measures taken by the competent authorities to quarantine the place where a person who has contracted one of the contagious diseases or who has died from these diseases is an offence that can be committed intentionally, the perpetrator must have knowingly and wilfully failed to comply with these measures.[102] The measures taken by the competent authorities regarding quarantine must be announced to the public through various means.[103] For example, the measures taken can be announced by placing signs or warning notices at the entrance and exit of the area, making announcements by law enforcement officers or the municipal police, announcing the measures taken on radio and television, or sending text messages to mobile phones, etc. If the measures taken by the competent authorities are not announced, or if they are announced but the person is unable to learn about these measures due to their conditions or lack of means, it will be considered that there is a mistake in the material subject of the offence and it will not be concluded that the perpetrator has intent.[104]

Mistake, which is accepted among the reasons that eliminate or reduce criminal responsibility in criminal law, is regulated in four paragraphs in Article 30 of the TPC No. 5237. A person who does not know the subjective elements of the legal definition of the offence during the execution of the act is not considered to have

100 Hasan Gerçeker, Yorumlu ve Uygulamalı Türk Ceza Kanunu Cilt II, 5. Baskı, Seçkin Yayınevi, Ankara, 2020, p. 1838; Yaşar/Gökcan/Artuç, p. 6038; Kangal, p. 443.

101 Kangal, p. 443.

102 Kangal, p. 442.

103 Çakmut, p. 549; Yaşar/Gökcan/Artuç, s. 6038.

104 Kangal, p. 443; see Hafızoğulları/Özen, p. 129; The fact that the person does not know the measures taken by the competent authorities should be evaluated according to Art. 30/4, not Art. 30/1 of the Turkish Penal Code No. 5237. In accordance with the fourth paragraph, if the mistake is unavoidable, it is not punished. According to Article 4 of the Turkish Penal Code No. 5237, although lack of knowledge of the penal code is not considered an excuse, if the person is unable to learn the measures due to the environment in which they live, in other words, if there is an inevitable mistake about the act constituting an injustice, they benefit from this mistake and cannot be held responsible.

acted intentionally (TPC Art. 30/1). Pursuant to this provision of law, if the person misjudges the boundaries of the quarantined area, it should be accepted that the person's intent to commit an offence has been eliminated due to the error in the material conditions of the offence.[105] Since there are no qualified cases in the offence of acting contrary to measures regarding contagious diseases, it is not possible for the perpetrator to make a mistake in qualified cases (TPC Art. 30/2). A person who makes an unavoidable mistake about the realization of the conditions of the reasons that remove or reduce criminal liability will benefit from this mistake (TPC Art. 30/3). For example, if the mistake of the public official who thinks that they are authorized to enter or leave the quarantine zone in accordance with the provision of the law is inevitable, their act will not be considered as a violation of the quarantine measures, and they will benefit from their mistake. A person who makes an unavoidable mistake as to whether their act constitutes an injustice shall not be punished (TPC Art. 30/4). For example, a person who, despite knowing the quarantine measures, takes the cattle to graze or goes outside the quarantine zone to irrigate the land, not knowing that their act constitutes an injustice should be considered as an acceptable mistake.

Article 31 of the TPC No. 5237 on minority (TPC Art. 31), mental illness (TPC Art. 32), being deaf-mute (TPC Art. 33) and being temporarily unable to perceive the legal implications and consequences of the act committed under the influence of alcohol or drugs or having a significant decrease in the ability to direct their behaviour in relation to this act (TPC Art. 34) can also be applied to the offence of acting contrary to measures regarding contagious diseases.[106]

On the other hand, the offence of acting contrary to the measures regarding contagious diseases should be evaluated in terms of the provisions of unjust provocation regulated in Article 29 of the TPC. In order to be able to claim unjust provocation, there must be an unjust act arising from the victim and causing rage or severe pain in the

105 Kangal, p. 443.
106 Kangal, p. 443.

perpetrator and the perpetrator must be under the influence of this condition at the time the offence is committed. Within the scope of Article 195 of the TPC, the measures taken by the competent authorities regarding the quarantine of a place cannot be qualified as an unjust act.[107] Therefore, it will not be possible to benefit from the provisions on unjust provocation if the person does not comply with the measures taken by the competent authorities on the grounds that it leads to rage or severe pain (TPC Art. 29).[108]

According to Kangal, the perpetrator who does not comply with the measures taken in response to the situation where the person in charge of implementing the quarantine measures taken by the competent authorities exceeds the limits of their duty or causes the wrongful act by acting arbitrarily will be able to benefit from the unjust provocation remission.[109] According to Kahraman, when the person in charge of implementing the quarantine measures taken by the competent authorities acts arbitrarily while implementing the measures, unjust provocation remission should not be applied in case of contradicting the measures as a reaction to the unfair practices of the official. This is because the reaction to unjust provocation must be directed against the person who committed the unjust act. Although the excessive, disproportionate or arbitrary practices of the official cause the wrongful act, in order to benefit from unjust provocation, the reaction must be directed at the official. However, if the reaction is directed towards the quarantine measures taken by the competent authorities, it will not be possible to benefit from the provisions of unjust provocation, as the reaction will be directed towards a third party. The reaction towards the unjust practices of the official may constitute the crimes of insult,[110]

107 Kangal, p. 444.
108 Bayzit, p. 883; Kangal, p. 444.
109 Kangal, p. 444.
110 See. "Establishing a conviction for the crime of resistance to prevent the performance of duty in writing on insufficient grounds without discussing whether all the words and actions were based on the intent to insult"; 5th Criminal Chamber of the Court of Cassation, Case No.2013/8093, Decision No.2014/12058, 02.12.2014; Ramazan Keklik, "Görevi Yaptırmamak İçin Direnme Suçu", *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, Y. 2015, C. 19, S. 4, p. 287, fn. 122

threat,[111] intentional injury[112] or intentional killing, depending on the nature of the act. In this case, since these crimes will be committed as a reaction to the wrongful act of the official, there is no obstacle to the implementation of the provisions of unjust provocation in the case of the perpetrator.[113]

### C. Element of Unlawfulness

One of the essential elements of the crime is that the act should be unlawful. If the act is not unlawful or if there is a reason that renders the act lawful, the crime will not occur.[114] In order to talk about unlawfulness, two conditions must coexist. The first of these is that the act is in contradiction and conflict with the rules of law, and the other is that there is no reason that eliminates the illegality, in other words, there is no other rule that allows the act to be done by the legal order.[115] Although it is evaluated that the reasons for lawfulness in the general provisions section of the TPC No. 5237 can find an application area in terms of the offence of acting contrary to the measures regarding

111 "When the defendant was taken to the hospital for a forensic report to be prepared, although the plaintiff M.N. stated that they would write all the complaints of the defendant in the report, the defendant repeated to the plaintiff that he could not use his arm at all and stated that he wanted to write this point in the report, but the defendant did not sit on the stretcher to be examined, so they could not examine the defendant, then the defendant said to the plaintiff "I sacrificed my arm, I will have no mercy on you, I will take revenge", and since the defendant committed this act with the intention of preventing the plaintiff from performing the duty, it was decided to establish a conviction for the crime of resistance to prevent the performance of duty instead of threatening,"18th Criminal Chamber of the Court of Cassation, Case No.2015/19047, Decision No.2015/1279, 12.05.2015; Keklik, p. 280, fn. 93.

112 "...in his defense, the defendant stated that he did not have any wrongful act until he came to the police station, that one of the police officers kicked his foot and pushed him because he crossed his legs while the procedures were being carried out at the police station, and that he hit the police officer; in the face of the fact that the forensic reports available in the file confirm the defense of the defendant, a verdict of conviction was given for the crime of resistance to prevent the performance of duty in writing, as a result of an erroneous evaluation in the crime qualification, without considering that the action constitutes the crime of intentional injury to a public official under unjust provocation." 5th Criminal Chamber of the Court of Cassation, Case No.2013/809, Decision No.2014/4286, 16.04.2014; Keklik, p. 279, fn. 86.

113 Kahraman, p. 754.

114 Centel/Zafer/Çakmut, p. 280.

115 Centel/Zafer/Çakmut, p. 281.

contagious diseases, different opinions are put forward in the doctrine regarding the applicability of lawfulness within the scope of this crime. There are authors[116] who state that it is not practically possible to apply lawfulness in terms of Art. 195 of the TPC, and there are also authors who find that the reasons for lawfulness are incompatible with this offence, but that the state of necessity can be taken into consideration in terms of the offence of acting contrary to the measures regarding contagious diseases.[117]

The offence of acting contrary to the measures regarding contagious diseases may be lawful if it is committed within the scope of " *implementation of the provision of the law*" under Article 24/1 of the TPC. In the case of the implementation of the provision of the law, the legislator did not accept responsibility for the person who follows the provision of the law and decriminalized the act.[118] For example, the acts of public officials[119] who have the authority to enter the quarantine zone in accordance with the law, as required by their duties and within these limits, are considered lawful.[120] Two conditions are necessary for the act of the person who follows the provision of the law to be considered lawful. There must be a rule or provision related to the act committed, the person concerned must fulfil the requirements of this provision or rule, or the person who follows the provision must be the addressee of that provision. Because no one can exercise an authority that is not granted to them by law.[121] The lack of one of these conditions renders the act unlawful and renders the addressee's right of resistance lawful.[122]

---

116 Önok, p. 174.

117 According to some authors in the doctrine; "as a rule, the reasons for lawfulness may find an application area", Çakmut, p. 548; Kangal, p. 444; according to another view, the reasons for lawfulness are incompatible with this crime, but it is possible to consider the state of necessity; Hafızoğulları/Özen, p. 124.

118 Soyaslan, p. 361.

119 According to Article 6, paragraph 1, subparagraph (c) of the TPC No. 5237, a "public official" in the application of criminal laws is defined as a person who participates in the execution of public activity by appointment or election or by any means, permanently, for a period of time or temporarily.

120 Kangal, p. 444.

121 Soyaslan, p. 362; Zeki Hafızoğulları/Muharrem Özen, Türk Ceza Hukuku Genel Hükümler, US-A Yayıncılık, 8. Baskı, Ankara, 2015, p. 214.

122 Soyaslan, p. 362.

As a rule, the provisions on legitimate defence in Article 25/1 of the TPC do not apply to the offence of acting contrary to the measures regarding contagious diseases. Legitimate defence refers to the fact that a person is not punished for the acts that they have committed in order to defend an unjustified attack on their own or someone else's right.[123] In order for legitimate defence to be applicable, there must be an unjustified attack. Measures taken or implemented by public officials regarding contagious diseases within the scope of their public duty should not be considered as an "unjustified attack" since they are based on a provision of law.[124] Because the act that Article 195 of the TPC seeks to punish is the failure to comply with a lawful measure.[125] However, if the competent authorities exceed the limits of their duties or resort to measures or act arbitrarily in matters that do not fall within the scope of their duties, it will be considered as an "unjustified attack" and the act of not complying with the measures in the form of a defensive action against this will be considered within the scope of legitimate defence.[126]

The state of obligation or necessity as a reason for lawfulness (TPC Art. 25/2) is applicable for the offence of acting contrary to the measures regarding contagious diseases.[127]The state of obligation or necessity can be defined as a situation that requires a person to commit an act that constitutes a crime and is sufficient to eliminate the danger in the face of the obligation to save themselves or others from a danger that they did not intentionally cause.[128] If the act of acting contrary to the measures taken or implemented by the competent authorities is carried out under the obligation to eliminate a grave and certain danger or to save someone else and to protect a legal interest that is significantly superior to public health, in other words, if the protection of a legal value that is more important than the right to health, i.e. the right to life, is the case[129] , the crime will not occur since the act will be lawful due to the state of obligation. For example, if the person

123 Soyaslan, p. 369.
124 Kangal, p. 446.
125 See also Hafızoğulları/Özen, Özel Hükümler, p. 124.
126 Kangal, 446; Önok, p. 175.
127 Hafızoğulları/Özen, Özel Hükümler, p. 129.
128 Demirbaş, p. 293-294.
129 Önok, p. 176.

leaves the quarantined area due to an earthquake, natural gas leak, fire, explosion, etc. In the quarantined area, or if they have to enter the quarantined area while trying to escape from stray animals chasing them, the act will be lawful, provided that the other conditions in paragraph 2 of Article 25 of the TPC are met.[130]

On the other hand, the exercise of a right by a person is generally accepted as a reason for lawfulness. While the legal order authorizes a person to exercise a certain right, it also considers the exercise of that right as lawful.[131] The exercise of the right in Article 26/1 of the TPC cannot be accepted as a reason for lawfulness in terms of the type of offence in Article 195 of the TPC. In order to exercise a right within the context of Article 26/1 of the TPC, there must be a subjective right recognized by the legal order and this right must be directly exercisable by the perpetrator. Acting contrary to the measures regarding contagious diseases is considered an offence according to Article 195 of the TPC. It is inconceivable that the relevant behavior can be considered as the exercise of a right.[132]

In addition, since the lack of consent of the victim or the relevant person is necessary for the existence of the crime, the consent of the relevant person is very important in criminal law. When the holder of the legal interest protected by the crime gives consent to the violation of the interest, this consent affects the element of unlawfulness and renders the act lawful.[133] The consent of the relevant person does not constitute a reason for lawfulness in every case. In order for the consent of the relevant person to render the act committed lawful, certain conditions must be met. In order for the declaration of consent to constitute a reason for lawfulness, first of all, there must be a matter that the person can freely have disposition over.[134] In cases that directly affect the interests of the state and society and harm these interests, the existence of the consent of the relevant person is not taken into account, since the state and society are the ones who are primarily harmed

130 Kangal, p. 445.
131 Mehmet Emin Artuk/Ahmet Gökçen/Ahmet Caner Yenidünya, Ceza Hukuku Genel Hükümler, Turhan Kitabevi, 4. Baskı, Ankara, 2009, p. 425; Özgenç, p. 323.
132 Kangal, p. 445-446; Kahraman, p. 753.
133 Artuk/Gökçen/Yenidünya, p. 459.
134 Koca/Üzülmez, p. 292.

by the crime.[135] Since the offence of acting contrary to the measures regarding contagious diseases does not have a specific victim and the offence is committed against all members of society, the "consent of the relevant person" in Article 26/2 of the TPC cannot be applied in this type of offence as a reason for lawfulness.[136]

## VI. FACTORS AFFECTING THE OFFENCE

Article 195 of the TPC No. 5237 does not include any aggravating or mitigating factors. However, if a public official uses the tools and equipment that they possess due to their duties during the commission of the offence of acting contrary to the measures regarding contagious diseases, in other words, if there is a possibility of application of the provision of Article 266 of the TPC in the concrete case, the punishment of the perpetrator will be increased.[137]

## VII. SPECIAL APPEARENCE FORMS OF CRIME

### A. Attempt

As stated above, the offence of acting contrary to the measures regarding contagious diseases under Article 195 of Law No. 5237 is a crime of action.[138] The existence of an action against the measures is sufficient for the completion of the offence.[139] In such offence, the offence is completed when the act is completed. The offence is completed if the perpetrator fails to comply with the measures taken or implemented by the competent authorities regarding the quarantine of the place where the person infected with one of the contagious diseases or who died from these diseases is located. In the event that the offence cannot be completed due to an exceptional reason that is not under the control of the perpetrator, there will be an attempt. For example, if the perpetrator is caught by security guards while trying to bypass the barrier to enter the quarantined area surrounded by iron barriers or while trying to jump over the barriers to leave the quarantined

135 Soyaslan, p. 356.
136 Kangal, p. 446; Önok, p. 175; Kahraman, p. 753.
137 Kangal, p. 446; Önok, p. 177.
138 Kangal, p. 441.
139 Kangal, p. 441-442.

area without permission from the authorities, the perpetrator will be responsible for the attempt.[140]

It is possible to apply the provisions on voluntary renunciation for the offence of acting contrary to the measures regarding contagious diseases.[141] If the perpetrator voluntarily gives up the performance of the crime or prevents the completion of the crime or the realization of the result by their own efforts, they will not be punished for the attempt; however, if the completed part constitutes a crime, they will only be punished with the penalty of that crime (TPC Art. 36).[142] For example, if a person who wants to leave the place where they are kept under quarantine, injures the authorized officers and gives up when they are about to carry out their action, they will not be responsible for the offence of acting contrary to the measures regarding contagious diseases, but will be responsible for the crime of intentional injury.[143] On the other hand, in order for the perpetrator to benefit from the provisions of effective remorse, it must be clearly stipulated in the law. Since Article 195 of the TPC does not include effective remorse, it is not possible for the perpetrator to benefit from the effective remorse provisions in relation to the offence of acting contrary to the measures regarding contagious diseases.[144]

**B. Concurrence**

In the event that the perpetrator fails to comply with the quarantine measures regarding contagious diseases taken by the competent authorities in more than one place and more than once at different times within the scope of the execution of a criminal decision, the provisions of successive offences will be applied. (Art. 43/1 of the TPC)

---

140 The crime of violating the measures regarding contagious diseases is completed when the measures taken are violated. Since it is not a crime of harm, the act and the result cannot be separated from each other, and the act cannot be divided into parts. For the views that it is not possible to attempt the crime since the executive movements cannot be divided into parts, see Hafızoğulları/Özen, p. 129; Kangal, p. 442; Yaşar/Gökcan/Artuç, p. 6038; Çakmut, p. 550.

141 Kangal, p. 442-443.

142 Hüseyin Acar, Türk Ceza Hukukunda Gönüllü Vazgeçme Kurumu, Adalet Yayınevi, Ankara, 2013, pp. 41-55.

143 Kahraman, p. 756.

144 Kahraman, p. 756.

Here, there are more than one act, each of which constitutes the same crime. Accordingly, the perpetrator will be punished according to the number of acts by resorting to actual concurrence. However, if the perpetrator repeatedly fails to comply with the measures taken for the same quarantine zone, the principle of uniqueness of the act arises and a single crime is committed. If there is a single act in the legal sense, the penalty of the perpetrator shall not be increased according to the provisions of successive offences.[145]

In the event that the perpetrator infects others due to not following the measures taken by the competent authorities, the provisions on intentional injury[146] (TPC Art. 86- 88) are applied if the perpetrator acted intentionally, and the provisions on negligent injury (TPC Art. 89) are applied if the perpetrator violated the measures by not showing the necessary caution and attention although they did not act with the intention of making another person sick.[147] In this case, since it is not possible to apply the subsidiary norm to the act in cases where the primary norm exists (in accordance with the principle of subsidiarity of the subsidiary norm)[148], Article 195 of the TPC cannot be applied.[149]

On the other hand, when the measures taken within the scope of Article 195 of the TPC are violated by using force or threat against a public official, the perpetrator will be held responsible for the offence of resisting a public official to prevent them from performing their duties, which is punishable by imprisonment from six months to three years, in accordance with the first paragraph of Article 265 of the TPC[150] titled *" resistance to prevent the performance of duty"*. It is not possible to commit the offence referred to in Article 265 of the TPC with the behaviour of *"passive resistance"* and the perpetrator must have used "force or threat".[151] The victim of the crime of resistance to prevent the performance of duty must be a public official. A public official is defined in Article 6/1-c of the TPC as *"a person who participates in the*

145 Kangal, p. 446; Önok, p. 178.
146 Çakmut, p. 550; Bayzit, p. 889.
147 Kangal, p. 447; in terms of injuring, See also. Çakmut, p. 550.
148 Demirbaş, p. 525-526.
149 Kangal, p. 447.
150 See also Yaşar/Gökcan/Artuç, p. 6038; Çakmut, p. 548; Kangal, p. 442; Hafızoğulları/Özen, Genel Hükümler, p. 213.
151 Önok, p. 178.

*execution of a public activity by appointment or election or in any other way, permanently, for a period of time or temporarily*".[152] The person in charge of implementing the quarantine measures taken by the competent authorities will be considered a public official because they participate in a public activity within the scope of Article 6/1-c of the TPC, whether they are civil servants or not.[153]

If the perpetrator prevented the implementation of the measures by insulting public officials who want to implement the measures taken by the competent authorities, since the act will also constitute the offence of insulting a public official (Art. 125/3- a of the TPC), subparagraph (a) of paragraph 3 of Article 125 of the TPC, which has a higher penalty, will be applied in accordance with the rule of different types of intellectual concurrence.[154]

If the act of non-compliance with the measures taken by the competent authorities regarding contagious diseases takes place in the form of property damage (for example, if the perpetrator acts contrary to the measures taken by breaking and destroying the barriers in the quarantine zone), the perpetrator commits both the crime of property damage and the offence of acting contrary to the measures regarding contagious diseases with these actions. In this case, it is possible to apply Article 44 of the TPC. According to the rule of different types of intellectual concurrence, the perpetrator will be held responsible for the crime of damage to property with a heavier penalty in accordance with the provision of Article 152/1-a of the TPC.[155]

The act of contradicting the measures regarding contagious diseases under Article 195 of the TPC is also regulated as a misdemeanour under Article 32 of the Second Part of the Misdemeanour Law No. 5326 under the title of "*Violation of Order*".[156] Accordingly, acting

---

152 Kahraman, p. 758.
153 Kahraman, p. 758.
154 Kangal, p. 447.
155 Kangal, p. 447.
156 Article 32 of the Law No. 5326 on Misdemeanors reads as follows "Any person who violates an order issued by the competent authorities in accordance with the law, for judicial proceedings or for the protection of public security, public order or public health, shall be imposed an administrative fine of one hundred Turkish Liras. This fine shall be decided by the authority issuing the order" (f. 1). "This Article may only be applied in cases where there is an explicit provision in the relevant law" (f. 2).

contrary to the orders issued by the administration for the protection of public health in accordance with the law in cases specified in the law constitutes both a misdemeanour and requires an administrative fine and constitutes the crime under Article 195 of the TPC. In this case, Article 195 of the TPC will be applied pursuant to the rule *"if an act is defined as both a misdemeanour and a crime, only the crime can be sanctioned"* in paragraph 3 of Article 15 of the Law on Misdemeanours No. 5326.[157] However, in cases where sanctions cannot be imposed for the crime, the corresponding sanction in the Law on Misdemeanours No. 5326 shall be imposed for the misdemeanour.[158]

Regulations regarding the quarantine of a place due to contagious and epidemic diseases and the measures to be applied are included in Articles 72 and 73 of the Public Health Law No. 1593. Again, Article 282 of the Public Health Law No. 1593 stipulates; (Amended Article: 23.01.2008 Law No.5728/Article 48) *"Those who act contrary to the prohibitions stipulated in this Law or who do not comply with the obligations shall be imposed an administrative fine from 789 Turkish Liras to 3,180 Turkish Liras, unless their acts also constitute a crime"*.[159] Based on the phrase *"unless their acts also constitute a crime"* in the article, it is possible to conclude that Article 195 of the TPC, which is the primary norm, will be applied without taking into account Paragraph 3 of Article 15 of the Law on Misdemeanours No. 5326.[160]

### C. Participation

More than one person may have acted contrary to the quarantine measures regarding contagious diseases under Article 195 of the TPC No. 5237 in the form of participation, or one may have participated in the

157 Kangal, p. 448.
158 Malkoç, p. 3233.
159 Article 17/7 titled "Administrative fine" of the Misdemeanor Law No. 5326 published in the Official Gazette of 31.3.2005 no. 25772 (Repeated) states as follows: "Administrative fines are applied by increasing the revaluation rate determined and announced in accordance with the provisions of Article 298 of the Tax Procedure Law of 4.1.1961 no. 213 for that year to be valid at the beginning of each calendar year. In this way, the fractions of one Turkish Lira shall not be taken into account in the calculation of the administrative fine. The provision of this paragraph shall not be applicable for administrative fines of a proportional nature".
160 Önok, p. 180; Kangal, p. 447.

act of the other as perpetrator, instigator or aider and abettor, depending on their contribution to the act.[161] Since the aforementioned article does not stipulate a special regulation on participation, the general rules in our criminal code will be applied regarding participation.[162] Each person who commits the act included in the legal definition of the crime with the will of participation by agreeing and cooperating among themselves is a joint perpetrator and each accomplice is responsible for the unlawful act committed in the status of perpetrator. (TPC Art. 37/1) For example, the person who encourages the perpetrator not to comply with the measures taken by the competent authorities will be punished as an instigator. (TPC Art. 38) A person who provides the perpetrator with ladders to climb over the iron barriers placed around the quarantine zone by the competent authorities or provides the perpetrator with appropriate clothing to enable them to escape from the quarantine zone by introducing themselves as health workers will be punished as an aider and abettor (TPC Art. 39).[163]

## VIII. SANCTIONS

The sanction stipulated in Article 195 of the TPC for the offence of acting contrary to the measures regarding contagious diseases is imprisonment from two months to one year. The sanction of the offence is determined only as imprisonment and no additional judicial fine is envisaged. Since the imprisonment sentence of one year or less envisaged under this article is a short-term imprisonment sentence according to paragraph 2 of Article 49 of the TPC, it can be converted to the alternative sanctions specified in Article 50 of the TPC. Again, the court may postpone the imprisonment sentence according to Article 51 of the TPC.[164] The discretionary reduction reasons set forth in Article 62 of the TPC may also be applied for this type of offence.[165] The court may decide to defer the announcement of the verdict under Article 231 of the Criminal Procedure Code No. 5271. Since the upper limit of the sentence

161 Çakmut, p. 551.
162 Yaşar/Gökcan/Artuç, p. 6038; Çakmut, p. 551; Kangal, p. 449; Arslan/Azizağaoğlu, p. 819.
163 Kangal, p. 449.
164 Çakmut, p. 551; Kahraman, p. 759.
165 Çakmut, p. 550.

is imprisonment not exceeding two years, simple trial procedure may be applied in the trial according to paragraph 1 of Article 251 of the Criminal Procedure Code. Pursuant to Article 266 of the TPC, if a public official used the tools and equipment that they had in their possession as a requirement of their duty during the commission of the offence, the penalty to be imposed shall be increased by one-third.[166]

## IX. STATUTE OF LIMITATIONS

Statute of limitations is a concept of criminal law that results in the dismissal of a criminal case if a certain period of time has elapsed from the date of the commission of the offence and the case has not been filed, or if the case has been filed but has not been concluded within the statutory period.[167] Since the statute of limitations for crimes punishable by imprisonment for not more than five years or a judicial fine is eight years, the statute of limitations for the prosecution of the offence of acting contrary to the measures regarding contagious diseases should be applied as eight years from the date of the crime.[168]

## X. ADJUDICATION

The investigation and prosecution of the offence of acting contrary to the measures regarding contagious diseases are not subject to the complaint of the injured party. These offences are subject to investigation and prosecution ex officio. In terms of Article 11 of the Law No. 5235 on the Establishment, Duties and Powers of the Courts of First Instance and Regional Courts of Appeal, the criminal courts of first instance are authorized to hear the case. The competent court in terms of location is the court in the place where the measures regarding contagious diseases are not complied with by the perpetrator or where the measures are contradicted.[169]

Since the offence is not within the scope of prepayment and the predicate offences listed in subparagraph (b) of paragraph 1 of Article 253 of Law No. 5271, it is not within the scope of reconciliation.[170]

---

166 Kangal, p. 449; Bayzit, p. 886.
167 İçel, p. 759; Soyaslan, p. 592-593; Özgenç, p. 952-953.
168 Kahraman, p. 760.
169 Önok, p. 180; Yaşar/Gökcan/Artuç, p. 6039.
170 Çakmut, p. 552.

## XI. REGULATIONS IN COMPARATIVE LAW

The offence of acting contrary to the measures regarding contagious diseases is regulated in various ways in the legislation of countries. The regulations of various countries such as Germany, Austria, Switzerland, Italy and France, which are among the continental European legal systems, will be examined below respectively.

There is no provision in the German Criminal Code (*Strafgesetzbuch-StGB*) for the punishment of acting contrary to of measures taken to prevent the spread of contagious diseases. The provisions are regulated in the Infectious Disease Protection Act (*Infektionsschutzgesetz-IfSG*), which was enacted as a special criminal law for the purpose of preventing and combating contagious diseases and entered into force on 01.01.2001. This law has been amended three times in the last year by the German Bundestag (*Deutscher Bundestag*). The first amendment was made on 27.03.2020[171], the second on 19.05.2020[172] and the third on 18.11.2020[173]. Article 28a of Chapter 5 (*Abschnitt Bekämpfung* übertragbarer *Krankheiten*) on combating contagious diseases regulates in detail the special protection measures for the prevention of the COVID-19 pandemic (*Besondere Schutzmaßnahmen zur Verhinderung der Verbreitung der Coronavirus-Krankheit 2019*). Article 73 of the Infectious Disease Protection Act, which was enacted to prevent the spread of contagious diseases, provides for administrative fines (§73 *Bußgeldvorschriften*), Article 74 provides for criminal penalties (§74 *Strafvorschriften*), and Article 75, paragraph 1, which regulates additional criminal penalties, provides for imprisonment for up to two years or a fine for acting contrary to quarantine measures.[174]

Article 178 of the Austrian Criminal Code regulates the offence of intentionally endangering human health with contagious diseases (*Vorsätzliche Gefährdung von Menschen durch* übertragbare *Krankheiten*).

---

171 German Federal OG. 27.03.2020, S. 587, (Bundesgesetzblatt-BGBI. I 2020 S. 587; Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite).

172 German Federal OG. 19.05.2020, S. 1018, (Bundesgesetzblatt-BGBI. I 2020 S. 1018; Zweites Gesetz).

173 German Federal OG. 18.11.2020, S. 2397, (Bundesgesetzblatt-BGBI. I 2020 S. 2397; Drittes Gesetz).

174 German Infectious Disease Protection Act; Infektionsschutzgesetz-IfSG md.75/1, 20. Temmuz 2000, (BGBl. I S. 1045).

According to this article, whoever commits an act that may cause the spread of a contagious disease among people shall be punished with imprisonment of up to three years. If the acts specified in this article are committed through negligent acts, Article 179 stipulates a prison sentence of up to one year or a fine of 720 days.[175]

Article 231 of the Swiss Criminal Code, titled " Spreading Infectious Diseases" (*Verbreiten menschlicher Krankheite*n), stipulates that anyone who intentionally spreads a dangerous contagious disease shall be punished with imprisonment from one to five years. In addition, in order to combat the COVID-19 outbreak and to prevent contradictions to the quarantine measures taken, the Swiss Federal Council issued a Decree on Measures to be Taken in the Fight Against Coronavirus. Pursuant to Article 10(f) of Decree No. 2, a person who intentionally contradicts the measures taken to prevent the spread of a contagious disease at meetings, events or other organizations within the scope of Article 6 of the Decree is punishable by up to three years' imprisonment or a fine, unless it is a crime punishable more severely under the Swiss Criminal Code. According to Article 185, paragraph 3 of the Swiss Constitution, a decree may be issued on measures to be taken to prevent the endangerment of internal and external security and the disruption of public order, provided that the duration is determined in advance.[176]

This regulation has been criticized in the doctrine by some administrative and criminal law experts on the grounds that it is unconstitutional. According to Swiss criminal law expert Niggli, neither Article 7 of the Epidemic Diseases Act (*Epidemiengesetz-EpG*)[177] which authorizes the Federal Council to take necessary measures throughout the country or in a certain region in extraordinary circumstances, nor Article 185 of the Constitution authorizes the Federal Council to impose fines or imprisonment by decree. Indeed, Article 1 of the Swiss

---

175 Article 178 of the Austrian Criminal Code; Strafgesetzbuch (§178 Vorsatzliche Gefahrdung von Menschen durch Übertragbare Krankheiten).

176 Swiss OG. 13.03.2020, (der Schweizerische Bundesrat, Verordnung 2 über Massnahmen zur Bekämpfung des Coronavirus (COVID-19) vom 13. März 2020 (Stand am 20. Juni 2020).

177 Swiss Epidemic Diseases Act, Epidemiengesetz; (EpG) vom 28. September 2012, ist seit 1.1.2016 in Kraft, Und ermöglicht eine früh zeitige Erkennung, Überwachung, Verhütung und Bekämpfung.

Criminal Code states that penalties must be expressly prescribed by law. It has been stated that if the Federal Council were to be given such a power of regulation, the legislator would have to explicitly specify this power in the law.[178]

Article 650 of the Italian Penal Code imposes a penalty of up to three months' imprisonment or a fine of up to 206 Euros for anyone acting contrary to quarantine measures taken by the competent authorities for reasons of public safety, public order or public health.[179] According to Article 438 titled "Epidemic", anyone who intentionally causes an epidemic through the spread of pathogenic germs is punished with life imprisonment (life sentence). Article 452 of the Law regulates the negligent form of the aforementioned offence under the title "Criminal Negligence Against Public Health". According to this article, the person who, through negligence, imprudence or carelessness, causes the commission of the epidemic offence under Article 438, is punished with imprisonment from three to twelve years in cases of negligent violations punishable by the death penalty, and with imprisonment from one to five years in cases punishable by life imprisonment.[180] In France, the "Health Emergency Law" is in force, which consists of a series of exceptional measures to combat contagious diseases. In order to overcome the crisis caused by the COVID-19 outbreak, the French government announced a comprehensive package of regulations including health emergency measures. Under the State of Medical Emergency declared in France for two months as of March 24, 2020, entry to the country has been restricted for certain reasons. The Emergency Law provides for the possibility to declare a state of emergency in all or part of a region if necessary. According to Article 2 of the Health Emergency Law, those acting contrary to quarantine measures four times within one month are subject to fines and imprisonment for up to six months.[181]

178 Marcel Alexander Niggli, Corona-Krise: Warum der Bundesrat keine Strafen erlassen darf, Neue Zürcher Zeitung-NZZ,16.04.2020.

179 Adil Maviş, "Covid–19 Küresel Salgınının Hukuktaki Yansımaları" Covid 19 Salgınının Ceza Hukuku Bakımından Değerlendirilmesi, Ed. Kemal Şenocak, Ankara, Yetkin Yayınları, 2021, p. 1004; Kahraman, p. 761.

180 Maviş, p. 1004; Kahraman, p. 762.

181 Kahraman, p. 763.

## CONCLUSION

The epidemic disease called Novel Coronavirus COVID-19 continues to spread around the world by expanding its impact since the beginning of 2020. The global outbreak of the virus, declared as a pandemic by the World Health Organization, has thrown the whole world into chaos with a wide range of problems. The negative impact of the pandemic on the social order has also deeply affected the legal orders.

In the current process, states are under the responsibility to take the necessary measures required by the situation to combat epidemics in order to protect public health and to ensure that all individuals act in accordance with these measures. Compliance with the measures taken by the competent authorities regarding the protection of public health is important in the fight against contagious diseases. In this direction, in our country, acting contrary to the measures regarding contagious diseases is regulated as an offence in our criminal code and is subject to criminal sanctions.

Article 195 of the Turkish Penal Code No. 5237 regulates the offence of "acting contrary to the measures regarding contagious diseases" in the section of offences against public health, which is among the crimes against society. It can be said that with the aforementioned regulation, the legislator aims to prevent the acts and actions of persons who expose public health to danger by not complying with the measures taken by the competent authorities regarding the quarantine of the place where the infected or deceased person is located.

On the other hand, various opinions are put forward in the doctrine that the measures taken by the competent authorities to quarantine the place where the disease is found, which are stipulated in Article 195 of the TPC, will constitute a violation of the "principle of definiteness" since they are not clearly defined in the text of the article; and that the determination of the content of the type of crime, which is in the nature of an open criminal norm, by leaving the definition of the content of the crime type to the administrative authorities by the regulatory acts of the administration and even by individual administrative acts will also constitute a violation of the principle of legality.

The legal value protected by the provision on Acting Contrary to Measures to Contain Contagious Disease in Article 195 is the protection

of public health. Therefore, the aim here is to prevent possible damages and dangers to the health of the individuals constituting the society by preventing the further spread of contagious diseases. In this regard, anyone who fails to comply with the measures taken or implemented by the competent authorities regarding the quarantine of the place where a person who has contracted one of the contagious diseases or who has died from these diseases is located may be the perpetrator of the offence. Since the relevant article does not require a special qualification for the perpetrator, there is no specific offence here. Since the health of everyone living in the society is likely to be harmed, the victim of the offence is each member of the society. The offence of acting contrary to the measures regarding contagious diseases is a result crime, since it can be committed by any action.

For the offence to be completed, it is sufficient for the perpetrator to fail to comply with the measures taken by the competent authorities in any way. In addition, it is not necessary to use force, violence or threats in order not to comply with the measures taken. Since Article 195 of the TPC does not require a result in the form of concrete danger or damage, the crime is an abstract endangerment. The act of contradicting the measures taken by the competent authorities regarding quarantine or not complying with the measures they apply can be committed through an executive or negligent act.

Article 195 of the Turkish Penal Code No. 5237 regulates the offence of acting contrary to the measures regarding contagious diseases, which is an offence that can be committed intentionally. The intention here is that the perpetrator knows the measures taken by the competent authorities to quarantine the place where the person who has contracted one of the contagious diseases or died from these diseases is located and does not comply with these measures knowingly and willingly. In terms of the relevant offence, the existence of general intent is sufficient and it is not necessary for the perpetrator to commit the offence with a special motive. In addition, the negligent form of the act is not defined as an offence in Article 195 of the TPC.

The offence of acting contrary to the measures regarding contagious diseases may be lawful if it is committed within the scope of *"fulfilment of the provision of the law"* in Article 24/1 of the TPC. In

the case of fulfilment of the provision of the law, the legislator did not accept responsibility for the person who fulfilled the provision of the law and decriminalized the act. In the offence of acting contrary to the measures regarding contagious diseases, as a rule, the provisions on legitimate defence in Article 25/1 of the TPC do not apply. The state of obligation or necessity as a reason for lawfulness (Art. 25/2 of the TPC) is applicable for the offence of acting contrary to the measures regarding contagious diseases. The exercise of the right in Article 26/1 of the TPC cannot be accepted as a reason for lawfulness in terms of the type of crime in Article 195 of the TPC.

Since the offence of acting contrary to the measures regarding contagious diseases does not have a specific victim and the offence is committed against everyone in the society, the "consent of the relevant person" in Article 26/2 of the TPC cannot be applied in this type of offence as a reason for lawfulness. In the event that the offence cannot be completed due to an exceptional reason not under the control of the perpetrator, the attempt to commit the offence under Article 195 of the TPC shall be taken into consideration.

In the event that the perpetrator infects others due to not complying with the measures taken by the competent authorities, the provisions on intentional injury (TPC Art. 86- 88) shall be applied if the perpetrator acted intentionally, and the provisions on negligent injury (TPC Art. 89) shall be applied if the perpetrator did not act with the intention of infecting another person, but acted contrary to the measures by not showing the necessary caution and care. If the infected person dies, the provisions of the crime aggravated by the consequences should be applied. In this case, Article 195 of the TPC shall not be applied.

The investigation and prosecution of the offence of acting contrary to the measures regarding contagious diseases do not depend on the complaint of the victim of the offence. These offences are subject to ex officio investigation and prosecution. The perpetrator is punished with imprisonment from two months to one year. The sentence may be suspended. When it is a short-term prison sentence, it may be converted into alternative sanctions. Article 11 of the Law No. 5235 on the Establishment, Duties and Powers of the Courts of First Instance and Regional Courts of Appeal, criminal courts of first instance are

authorized to hear the case. The competent court in terms of location is the court in the place where the measures regarding contagious diseases are not complied with by the perpetrator or where the measures are contradicted. The statute of limitations period should be applied as eight years from the date of the offence.

The offence is not within the scope of prepayment and reconciliation since it is not included in the predicate offences listed in subparagraph (b) of paragraph 1 of Article 253 of the Law No. 5271. The discretionary reduction reasons in Article 62 of the TPC may also be applied for this type of crime. Article 231 of the Criminal Procedure Code No. 5271 provides for the deferment of the announcement of the verdict. According to paragraph 1 of Article 251 of the Criminal Procedure Code, simple trial procedure may be applied in the proceedings.

As a consequence, it is seen that the sanctions for the offence of acting contrary to the measures regarding contagious diseases are also included in the legislation of other countries in various ways, and some countries have even enacted a specific Law on Combating Epidemic Diseases or Protection from Epidemic Diseases. It is understood that the Public Health Law of 1930 no. 1593, which was enacted during the 1924 Constitutional period in our country, is inadequate in combating dangerous epidemic diseases in many respects. The scattered, incomplete, ambiguous and inconsistent provisions in our legislation on the fight against dangerous epidemics should be identified, as well as the provisions that have problems in both comprehensibility and harmonization with the Constitution. Based on the knowledge and experience gained in the fight against the Covid-19 pandemic, it would be beneficial for the legislature to enact a self-contained Law on Combating Epidemic Diseases that can meet the emerging needs, is up-to-date, comprehensive and eliminates uncertainties after negotiating with all stakeholders.

## References

### Books

Acar Hüseyin, Türk Ceza Hukukunda Gönüllü Vazgeçme Kurumu, Adalet Yayınevi, 1. Baskı, Ankara, 2013.

Akbulut Berrin, Ceza Hukuku Genel Hükümler, 6. Baskı, Adalet Yayınevi, Ankara, 2019.

Arslan Çetin/Azizağaoğlu Bahattin, Yeni Türk Ceza Kanunu Şerhi, Asil Yayın Dağıtım, Ankara, 2004.

Artuk Mehmet Emin/Gökçen Ahmet/Alşahin Mehmet Emin/Çakır Kerim, Ceza Hukuku Genel Hükümler, 14. Baskı, Adalet Yayınevi, Ankara, 2020.

Artuk Mehmet Emin/Gökçen Ahmet/Yenidünya Ahmet Caner, Ceza Hukuku Genel Hükümler, Turhan Kitabevi, 4. Baskı, Ankara, 2009.

Baumann Jürgen/Weber Ulrich/Mitsch Wolfgang, Strafrecht Allgemeiner Teil, Giesseking Verlag, 11. Baskı, Bielefeld, 2003.

Bayzit Tuğba, "Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu" COVID-19 Salgınının Hukuki Boyutu (Editör Muhammet Özekes), Onikilevha Yayıncılık, İstanbul, 2020, p. 865-898.

Centel Nur/Zafer Hamide/Çakmut Özlem Yenerer, Türk Ceza Hukukuna Giriş, 6. Bası, Beta Yayınları, İstanbul, 2010.

Çakmut, Y. Özlem, "Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu", Prof. Dr. Feridun Yenisey'e Armağan, İstanbul, 1. Baskı, Beta Yayıncılık, C. I, 2014.

Demirbaş Timur, Ceza Hukuku Genel Hükümler, 11. Baskı, Seçkin Yayıncılık, Ankara, 2016.

Dönmezer Sulhi/Erman Sahir, Nazari ve Tatbiki Ceza Hukuku, 14. Baskı, Der Yayınları, Cilt II, İstanbul, 2019.

Dönmezer Sulhi/Erman Sahir, Nazari ve Tatbiki Ceza Hukuku, Cilt I, 14. Baskı, Der Yayınları, İstanbul, 2016.

Gerçeker Hasan, Yorumlu ve Uygulamalı Türk Ceza Kanunu II. Cilt, 5.Baskı, Seçkin Yayınevi, Ankara, 2020.

Hafızoğulları Zeki/Özen Muharrem, Türk Ceza Hukuku Özel Hükümler Topluma Karşı Suçlar, USA Yayınevi, Ankara, 2017.

Hafızoğulları Zeki/Özen Muharrem, Türk Ceza Hukuku Genel Hükümler, 8. Baskı, US-A Yayıncılık, Ankara, 2015.

Hakeri Hakan, Ceza Hukuku Genel Hükümler, 22. Baskı, Adalet Yayınevi, Ankara, 2019.

İçel Kayıhan, Ceza Hukuku Genel Hükümler, Beta Yayınevi, Yenilenmiş Baskı, İstanbul, 2016.

Kangal Z. Temel, "Bulaşıcı Hastalıklara İlişkinTedbirlereAykırıDavranma Suçu" Özel Ceza Hukuku Cilt V, Onikilevha Yayıncılık, 1. Baskı, İstanbul, 2019, s. 433- 450.

Koca Mahmut/Üzülmez İlhan, Türk Ceza Hukuku Genel Hükümler, 12. Baskı, Seçkin Yayınevi, Ankara, 2019.

Malkoç İsmail/Güler Mahmut, (Uygulamada) Türk Ceza Kanunu Özel Hükümler-2, Adil Yayınevi, Ankara, (Yayın yılı belirtilmemiş,)

Malkoç İsmail, Açıklamalı Türk Ceza Kanunu Cilt III (Madde 150-241), Sözkesen Matbaacılık, Ankara, 2013.

Maviş Adil, "Covid–19 Küresel Salgınının Hukuktaki Yansımaları" Covid 19 Salgınının Ceza Hukuku Bakımından Değerlendirilmesi, Ed. Kemal Şenocak, Ankara, Yetkin Yayınları, 2021.

Meran Necati, Açıklamalı İçtihatlı Yeni Türk Ceza Kanun, Seçkin Yayınevi, 2. Baskı, Ankara, 2007.

Özbek Veli Özer/Doğan Koray/Bacaksız Pınar, Türk Ceza Hukuku Genel Hükümler, 10. Baskı, Seçkin Yayınevi, Ankara, 2019.

Özgenç İzzet, Gazi Şerhi, Türk Ceza Kanunu Genel Hükümler, 2. Baskı, Seçkin Yayınevi, Ankara, 2005.

Özgenç İzzet, Türk Ceza Hukuku Genel Hükümler, 15. Bası, Seçkin Yayıncılık, Ankara, 2019.

Öztürk Bahri/Erdem Mustafa Ruhan, Uygulamalı Ceza Hukuku ve Güvenlik Tedbirleri Hukuku, 14. Baskı, Seçkin Yayıncılık, Ankara, 2014.

Parlar Ali/Hatipoğlu Muzaffer, 5237 Sayılı Türk Ceza Kanunu Yorumu, 2. Cilt, Ankara, 2007.

Soyaslan Doğan, Ceza Hukuku Genel Hükümler, 7. Baskı, Yetkin Yayınları, Ankara, 2016.

Toroslu Nevzat/Toroslu Haluk, Ceza Hukuku Genel Kısım, Savaş Yayınevi, 25. Baskı, Ankara, 2019.

Ünver Yener, Ceza Hukukuyla Korunması Amaçlanan Hukuksal Değer, Seçkin Yayınevi, Ankara, 2003.

Yaşar Osman/Gökcan Haşan Tahsin/Artuç Mustafa, Yorumlu- Uygulamalı Türk Ceza Kanunu, Cilt IV (Madde 147-204), Adalet Yayınevi, 2. Baskı, Ankara, 2014.

## Articles

Kahraman Recep "Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu (TCK md 195)," Y. 2020, C. 78. S. 2, *İstanbul Hukuk Fakültesi Mecmuası.*

Keklik Ramazan, "Görevi Yaptırmamak İçin Direnme Suçu", *Gazi Üniversitesi Hukuk Fakültesi Dergisi,* Y. 2015, C. 19, S. 4, s. 259- 296.

Niggli Marcel Alexander, Corona-Krise: Warum der Bundesrat keine Strafen erlassen darf, Neue Zürcher Zeitung-(NZZ),16.04.2020.

Nişancı Dilaver, "Salgın Hastalıklar ve Salgın Hastalıklar Özelinde Sağlık Hakkına Avrupa İnsan Hakları Mahkemesinin Bakış Açısı ile Ulusal Mevzuatın Covid-19 Özelinde Değerlendirilmesi", *Türkiye Barolar Birliği Dergisi,* Y. 2020, S.150, s. 85-122.

Önok, R. Murat "Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu (TCK md. 195)", *Anayasa Hukuku Dergisi,* Y. 2020, C. 9, S. 17. s. 147-186.

Şirin Tolga, "Tehlikeli Salgın Hastalıklarla Anayasal Mücadeleye Giriş", *Anayasa Hukuku Dergisi,* 2020, C.9, S.17, s. 132.

## Court Decisions

Enhorn/İsveç, AİHM, Karar Tarihi, 25.01.2005, Karar No: 56529/00. (Enhorn/Sweden, ECHR, Decision Date, 25.01.2005, Decision Number: 56529/00)

AYM kararı E. 2017/172, K. 2018/32.; R.G. 20.4.2018, S. 30397. (Constitutional Court Decision Case No. 2017/172, Decision No. 2018/32.; O.G. 20.4.2018, I. 30397.)

AYM kararı E. 2010/69, K. 2011/116.; R.G. 21.10.2011, S. 28091. (Constitutional Court Decision Case No. 2010/69, Decision No. K. 2011/116; O.G. 21.10.2011, I. 28091.)

Yargıtay 5. CD, E.2013/8093, K.2014/12058, Karar Tarihi, 02.12.2014. (5th Criminal Chamber of the Court of Cassation, Case No.2013/8093, Decision No.2014/12058, Decision Date, 02.12.2014.)

Yargıtay 5. CD, E.2013/809, K.2014/4286, Karar Tarihi, 16.04.2014. (5th Criminal Chamber of the Court of Cassation, Case No.2013/809, Decision No.2014/4286, Decision Date, 16.04.2014.)

Yargıtay 18. CD, E.2015/19047, K.2015/1279, Karar Tarihi, 12.05.2015. (18th Criminal Chamber of the Court of Cassation, Case No.2015/19047, Decision No.2015/1279, Decision Date, 12.05.2015.)

# THE SEARCH FOR A NEW LEGAL PERSONALITY IN THE DIGITAL AGE: ARTIFICIAL INTELLIGENCE

## DİJİTAL ÇAĞDA YENİ BİR HUKUKÎ KİŞİLİK ARAYIŞI: YAPAY ZEKÂ

Erdem DOĞAN*

**Abstract:** The issue of granting legal personality to artificial intelligence, in essence, refers to a decision to grant a set of rights and related obligations to that entity. There are some basic questions that should be answered by especially information technology law doctrine and practice, regarding which criteria should be sought in the process of establishing a legal policy for the recognition of non-human beings and transforming this legal policy into a normative regulation.

The starting point in solving the problem of whether an entity can be recognized as a personality is determining the meaning, scope and legal nature of the concept of personality. In the second stage, the entity, which is envisaged to be granted personality rights, is subjected to an evaluation process within the framework of the material approach, which considers the personality as an existential structure, and the formal approach, which is based on whether the law and society ascribe personality to an entity.

There is no doubt that systems with a limited scope of activity and autonomy, defined as narrow or weak artificial intelligence, should be accepted as objects by the law, depending on these characteristics. On the other hand, the level of success reached by cognitive technology today has also allowed the development of autonomous artificial intelligence, which can learn from its own experiences through machine learning with different algorithmic structures and complex software and can act independently without any human interference. The autonomous decisions and actions taken by the artificial intelligence during the fulfilment of the tasks defined for it can sometimes damage the assets or personal assets of individuals or cause a breach of contract in obligation. In this respect, today, the need to develop a unique personality model has emerged in terms of artificial intelligence beings with a strong autonomy feature.

**Keywords:** Personality, legal status, artificial intelligence, capacity to have rights and obligations, capacity to act, smart machines.

---

* Av., Dr., doganerdm66@gmail.com, ORCID: 0000 0003 0541 6147

**Özet:** Yapay zekâya hukukî kişilik tanınması konusu özünde, o varlığa pozitif hukuk karşısında bir dizi hak ve buna bağlı yükümlülükler tanınmasını ifade etmektedir. İnsan olmayan varlıklara kişilik tanınmasına yönelik bir hukuk politikası oluşturulması ve bu hukuk politikasının normatif bir düzenlemeye dönüştürülmesi sürecinde hangi ölçütlerin aranması gerektiğine ilişkin özellikle bilişim hukuku öğretisi ve uygulamanın yanıtlaması gereken bazı temel sorular bulunmaktadır.

Bir varlığa kişilik tanınıp tanınamayacağı sorununun çözümünde başlangıç noktası, kişilik kavramının anlamının, kapsamının ve hukukî niteliğinin belirlenmesidir. İkinci aşama ise, kendisine kişilik hakkı tanınması öngörülen varlığın, kişiliği varoluşsal bir yapı olarak gören maddi yaklaşım ile bir varlığa hukukun ve toplumun kişilik atfedip atfetmemesini esas alan şekli yaklaşım çerçevesinde bir değerlendirme sürecine tabi tutulmasıdır.

Dar ya da zayıf yapay zekâ olarak tanımlanan sınırlı bir faaliyet alanı ve otonomi özelliğine sahip sistemlerin, bu niteliklerine bağlı olarak hukuk karşısında nesne olarak kabul edilmeleri gerektiği konusunda herhangi bir tereddüt bulunmamaktadır. Buna karşılık, günümüzde dijital çağın ve bilişsel bilimin ulaştığı başarı düzeyi, farklı algoritmik yapılar ve kompleks yazılımlar ile makine öğrenmesi yoluyla kendi deneyimleriyle öğrenebilen, herhangi bir dış müdahale olmadan bağımsız şekilde hareket edebilen otonom yapay zekânın geliştirilmesine de olanak tanımaktadır. Söz konusu varlıkların, kendileri için tanımlanan görevleri yerine getirmeleri sırasında aldıkları otonom kararlar ve gerçekleştirdikleri eylemler zaman zaman kişilerin malvarlığı veya şahıs varlığı değerlerine zarar vermeleri ya da bir borç ilişkisinde borca aykırılığa yol açmaları yönüyle hukukî bir sorumluluğun doğumuna neden olmaktadır. Bu itibarla, günümüzde, güçlü bir otonomi özelliği bulunan yapay zekâlı varlıklar bakımından kendine özgü bir kişilik modelinin geliştirilmesi ihtiyacı ortaya çıkmış bulunmaktadır.

**Anahtar Kelimeler:** Kişilik, hukukî statü, yapay zekâ, hak ve fiil ehliyeti, akıllı makineler.

## INTRODUCTION

The first seeds of human-machine cooperation were planted with the industrial revolution, which started to affect the world from the second half of the 18th century. Due to the data explosion caused by smart and connected technological products in the digital age we live in, the level of sophistication reached by cognitive science has produced artificial intelligence technology based on a modelling that imitates biological human algorithms. As of the point we have reached today, human and artificial intelligence supported systems add value to the world economy by working in cooperation and coordination at almost every stage of industrial activities such as production, marketing,

sales, inspection and logistics carried out in many sectors and business models.

Since the industrial revolution, human-machine cooperation has come a long way and has become an actor that makes significant contributions to human life. In our time, this approach has evolved from the production process carried out with muscle power and simple machines to a point where a human-machine mixed entity is designed, consisting of computers imitating biological intelligence and people with machine speed and synthetic intelligence.[1] As a result of this mental revolution, the extent and scope of the progress made within the scope of human-machine interaction has opened the door to project studies aimed at transferring many utopian dreams that were deemed impossible in the past to real life. Because, while humans have unique abilities such as intuition, imagination and adaptability that cannot be imitated by machines and algorithms, machines also have abilities such as automation, machine learning and synthetic intelligence that provide great advantages compared to muscle and biological intelligence.[2]

With such a strong and talented existence, human beings aim to eliminate global problems that may take many years to solve with traditional methods in a short time, and to reach the highest levels in economic and social life in terms of productivity, job satisfaction and social welfare. More importantly, scientists aim to reach much deeper and more sophisticated layers by breaking the static patterns of world civilization, within the framework of cybernetic society, thanks to the adaptive and dynamic structure of super artificial intelligence.[3]

---

1 J. Gunther/F. Munch/S. Beck,/S. Loffler/C. Leroux/R. Labruto, Issues of Privacy and Electronic Personhood in Robotics, Proceedings - IEEE International Workshop on Robot and Human Interactive Communication, 2012, p. 818 10.1109/ROMAN.2012.6343852.

2 Ray Kurzweil, Kurzweil Network, Accelerating Intelligence, Essays, (singularity Q&A), December 2011. https://www.kurzweilai.net/singularity-q-a SET:08.08.2020; Michael E. Porter/James E. Heppelmann, *Harvard Business Review,* HBR'S 10 Must Reads, "Artırılmış Gerçeklik Stratejisine Neden Her Organizasyonun İhtiyacı Vardır?", (Nadir Özata), Harvard Business School Publishing Corporation, 2019, p. 108.

3 James H. Wilson/Paul R. Daugherty, *Harvard Business Review*, HBR'S 10 Must Reads, "İşbirliğine Dayalı Zekâ: İnsanlar ile Yapay Zekâ Güçlerini Birleştiriyor", (Nadir Özata), Harvard Business School Publishing Corporation, 2019, p. 187;

However, it seems inevitable that a radical transformation that will fundamentally change the established rules and systems will lead to a chaotic situation in the social structure and economic relations unless supported by positive law. Therefore, while transferring the human-machine integration project to real life, it is of great importance not to neglect the efforts to establish the legal infrastructure. For example, the uncertainty of the legal status of artificial intelligence, which will work together or integrated with people and will also become a part of social life and laws in force, will cause an important problem of trust and stability in social relations. In this context, determining the legal status of these entities, which have humanoid characteristics, perform the tasks done by humans, and interact with people or objects in carrying out these tasks will be a very important step in terms of protecting the principle of legal security.[4]

## I. LEGAL PERSONALITY OF ARTIFICIAL INTELLIGENCE

### A. DISPUTE ON THE LEGAL PERSONALITY OF ARTIFICIAL INTELLIGENCE

The issue of granting legal personality to a non-biological intelligence essentially means a decision to grant that entity a set of rights and obligations. Whether such a decision can be made regarding the recognition of personality in terms of non-human beings, and if so, the criteria that should be sought in the decision-making process are considered to be the most fundamental questions in the academic field and practice.

There is a two-stage evaluation process to be followed in the recognition of personality for a non-human entity. Accordingly,

---

Thomas H. Davenport/Rajeev Ronanki, Harvard Business Review, HBR'S 10 Must Reads, "Gerçek Dünya İçin Yapay Zeka", (Nadir Özata), Harvard Business School Publishing Corporation, 2019, p. 29.

4 S. M. Solaiman, Legal Personality of Robots, Corporations, Idols and Chimpanzees: A Quest for Legitimacy; University of Wollongongs, Faculty Of Law, Humanities And The Arts - Papers, 2017, p. 2, 3. According to Hubbard, a machine that claims to have the necessary capacity to acquire personality, even though it is not a human, can claim to be considered equal to a human. F. Patrick Hubbard, Do Androids Dream?: Personhood and Intelligent Artifacts, University of South Carolina Scholar Commons, 83 Temp. L. Rev. 405 (2011), p. 407.

the starting point in solving the problem of whether an entity can be recognized as a personality is determining the meaning, scope and legal characteristic of the concept of personality. In the second stage, the entity, which is envisaged to be granted personality rights, is subjected to an evaluation process within the framework of the material approach, which sees personality as an existential structure, and the formal approach, which is based on whether the law and society ascribe personality to an entity.

The view that considers personality from a material perspective and accordingly adopts the philosophical and moral dimension of personality argues that as a rule, entities other than humans cannot be granted personality rights. The view that adopts personality in a formal sense, on the other hand, argues that whether the law and society ascribe personality to an entity will be decisive in the solution of the personality problem.[5] In this context, according to the approach advocating the formal personality, in the formation of such a decision, the scope of the rights and duties envisaged to be granted and the nature of the capabilities of that entity play an important role, rather than the physical structure, technical features or other complex functions of the assets in question. The determination of these qualifications will also guide the determination of the scope and limits of the rights and obligations envisaged for artificial intelligence systems.[6]

The decision to grant legal personality to non-biological entities depends on pragmatic as well as conceptual consequences. Accordingly, the degree of functionality and social roles of artificial intelligence entities in the social structure, whether they will be generally accepted by the society, will determine whether they can acquire legal status.[7]

The effective and indispensable roles of artificial intelligence systems in social and economic life and certain human-specific

---

5 Mireille Hildebrandt, "From Galatea 2.2 to Watson – and Back?": M. Hildebrandt and J. Gaakeer (eds.), (Human Law and Computer Law: Comparative Perspectives, Springer 2013, s. 18; J. Frederick White, Personhood: An Essential Characteristic of the Human Species, The Linacre Quarterly, 2013;80(1), p. 74.

6 Tyler Jaynes, Legal personhood for artificial intelligence: citizenship as the exception to the rule, 2019, AI & SOCIETY, p. 2.

7 Samir Chopra/Laurence F. White, A Legal Theory for Autonomous Artificial Agents; The University of Michigan Press, E-book, Ann Arbor, MI: University of Michigan Press, https://doi.org/10.3998/mpub.356801 USA, 2011, p. 156 - 157.

abilities cause pressure on the society to transform the operational status of such entities into a normative status. In addition, the possible changes that will occur in the form of interaction between humans and artificial intelligence assets in the near future, and the expectations and demands that will arise regarding the duties of artificial intelligence in the social structure, make scientific studies aimed at giving these assets legal status are very important.[8]

It has been a matter of debate since the Middle Ages whether legal personality can be recognized for other beings as well as for people who are considered to have innate rights and personality.[9] These debates basically arose from the need to grant legal personality to entities other than real persons, due to social and economic necessities. Namely, the remarkable change in urban life and the intensification of social relations have revealed problems that require long-term and collective work. This situation has increased the need for legal entities who have a longer life than people and are independent of the existence of the people who make them up. For this reason, for the first time, the right of personality was granted to entities other than people, groups of people or goods (such as associations, endowments or companies), and the opportunity to have rights and debts within the limits drawn by the law was introduced.[10]

Although there have been intense discussions and evaluations from past to present regarding the nature of legal personality and which entities should be given personality, in reality, the social realities and lifestyles of the time and geography in which it is valid

---

8 Chopra/White, Autonomous Artificial Agents, s. 154; **Çağlar Ersoy, Robotlar, Yapay Zekâ ve Hukuk, 3**th ed. İstanbul, Nisan 2018, p. 83 – 84, Jaynes, p. 14.

9 For example, although there are examples of legal entities in Roman law, this was realized very late and in an unsystematic way. In this context, in Rome; The Roman State granted legal personality to the societies (collegium) and religious associations (sodalitas) established by tradesmen and craftsmen. In Islamic law, foundations with legal personality have been widely used and have played important roles in shaping the social structure. Özcan K. Çelebican, Roma Hukuku, Yeni Medenî Kanuna Uyarlanmış 18tk ed. Turhan Kitabevi, Ankara 2019, p. 181;

10 Kılıçoğlu, Medeni Hukuk, p. 213; Aydın Zevkliler/ Şeref Ertaş/Ayşe Havutçu/ M. Beşir Acabey/Damla Gürpınar, Yeni Medeni Kanuna Göre Medeni Hukuk (Temel Bilgiler), 10th ed., Ankara 2018, p. 133; Rona Serozan, Medeni Hukuk, Genel Bölüm Kişiler Hukuku, 4th ed., Vedat Kitapçılık, İstanbul 2013, p. 493; Mustafa Dural/Tufan Öğüz, Türk Özel Hukuku, V. II, Kişiler Hukuku, 20th ed., İstanbul 2019, p. 224

have determined the course of this issue.[11] Because, in no period of history, a concrete and binding criterion has been determined in terms of granting personality rights to non-human beings, and a consistent and uniform application has not been developed as to whether being a biological human is a necessary element in order to have personality. For example, in Roman law, while some non-human entities such as monasteries, cities, and rivers were granted personality rights, rights were not recognized for spouses and children who were subject to pater familias. Pater familias became the subject of legal rights and obligations on behalf of the household, while the wife and children of pater familias could only indirectly enjoy legal rights. In this period, since strict family economy conditions were dominant rather than state power, each family had its own rules of law, customs and traditions. As a result of this situation, the law of persons was also shaped within the framework of the rules and beliefs that were valid in the society.[12]

Regardless of the valid administrative or legal system , the only power in the recognition of personality throughout human history has been the state and political will. The political will has used this preference by making laws within the framework of the current legal system or by introducing regulatory provisions under another name.[13] There is no doubt that changing social needs and economic developments are also determinants in the formation of the political will. [14]As a matter of fact, the legal rules regulating the relations of individuals with each other in social life have only granted legal capacity to real persons in the past. With the aforementioned regulations, only granting rights and personality to people was a necessity rather than an option. Because social life and relations consisted only of people. Over time, the change in social structure and relations has made it necessary to grant personality to other entities as well as legal entities.[15] Since the Middle

---

11 Chopra/White, Autonomous Artificial Agents, p. 157.

12 Çelebican, p. 160.; Chopra/White, Autonomous Artificial Agents, p. 157; Ersoy, p. 86.

13 Chopra/White, Autonomous Artificial Agents, p. 155.

14 Kılıçoğlu, Medeni Hukuk, p. 7; Bilge Öztan, Medeni Hukukun Temel Kavramları, 44th ed., Ankara 2019, p. 3 Çelebican, p. 178; Zevkliler/Ertaş/Havutçu/Acabey/Gürpınar, p. 1; Nomer, p. 1.

15 Solaiman, s. 12; Ugo Pagallo, Vital, Sophia, and Co.—The Quest for the Legal Personhood of Robots, Law School, University of Turin, Information 2018, 9, 230, p. 4 - 9. doi:10.3390/info9090230.SET:20.7.2020.

Ages, no civilization has been indifferent to this change, and has paved the way for personality recognition for beings other than humans, albeit in different degrees and forms. For this reason, no matter how many theories and philosophical arguments are produced on personality, the decision to grant personality status to non-biological intelligence will be taken by the legislator within the framework of a certain legal policy, not according to the material and philosophical understanding of personality. Social realities and needs play a decisive role in the formation of legal policy.

In today's world, social life and relations have become too intricate and complex to be carried out only with real and legal persons. In the face of this situation, it seems inevitable that a new and radical codification will be made for the legal systems that are constructed according to social relations and traditional structures consisting only of human beings. Because human-like beings are no longer fiction and humanity has begun to debate whether legal personality can be attributed to synthetic intelligent beings at the international level. The European Parliament's request from the European Commission to draft a law addressing the future challenges of artificial intelligence is a clear proof of this.[16]

Although the goal of including artificial intelligence among entities with legal personality, as in real persons and legal entities, is the result of a legal and actual necessity, this goal may also have some negative social and economic consequences. For this reason, when making legal regulations regarding personality, a multifaceted study should be carried out and the necessary preventive mechanisms should be provided for issues that may damage the legal system.[17]

Artificial intelligence systems need to be handled from a methodological point of view in order for personality discussions on artificial intelligence to progress on the right ground and to reach effective solutions. In this sense, it is of great importance to determine the scope and quality of artificial intelligence in all its aspects and to make adjustments to the extent that it is suitable for these

16 Joanna J. Bryson/Diamantis E. Mihailis/Thomas D. Grant, Of, for, and by the People: The Legal Lacuna of Synthetic Persons, Artif. Intell. Law (2017), 25, p. 274

17 Bryson/Mihailis/Grant, p. 274.

determinations. Because artificial intelligence and robotic systems have two different aspects, engineering and law. The solution of the problems related to the technology in question requires the evaluation of technical analysis and the concepts of legal status, accountability and responsibility separately.[18]

## B. SCIENTIFIC VIEW ON THE LEGAL STATUS OF ARTIFICIAL INTELLIGENCE

### 1. In General

Although there are different views on determining the legal status of the new-generation artificial intelligence in the doctrine, these are generally shaped around historical, philosophical, sociological and legal reasons. The approach, which evaluates personality from its philosophical dimension and adopts moral personality in this sense, argues that personality cannot be granted to artificial or biological entities other than humans, depending on accepting personality as a set of existential values acquired from birth. On the other hand, the approach that embraces the formal and legal meaning of personality accepts that artificial beings can also be granted a unique legal status, provided that it is justified by social facts and does not contradict the rules of positive law.[19]

The material and moral view[20] of personality argues that, as a rule, no entity other than humans can be granted personality, and accordingly, it accepts artificial intelligence as a property subject to ownership, not a subject of rights.[21] However, it is widely accepted in

18 Pagallo, Legal Personhood, p. 5.

19 White, p. 74 - 75.

20 The view of material and moral personality is essentially based on the hypothetical view of personality defended by jurists such as Savigny and Salmond. Haluk Aşar, Hayvan Haklarına Yönelik Temel Görüşler ve Yanılgıları, KAYGI, 2018, p. 245.

21 For detailed information about the view that accepts artificial intelligence as property see Andrea Bertolini, Robots as products: the case for a realistic analysis of robotic applications and liability rules, Law, Innovation and Technology, 2013, 5(2), p. 242 vd; Solaiman, p. 35; E. Diamantis Mihailis, The Extended Corporate Mind: When Corporations Use AI to Break the Law, *North Carolina Law Review*, Vol. 98, Number 4, 98 N.C. L. REV. 893 (2020), p. 926; Başak Bak, Medeni Hukuk Açısından Yapay Zekânın Hukuki Statüsü ve Yapay Zekâ Kullanımından Doğan

the doctrine that artificial intelligence beings have humanoid abilities and that these beings should be granted a unique personality status, provided that this situation is determined.[22]

The reasons for the approach that rejects granting personality rights to entities based on artificial intelligence and robotic technology are generally as follows: Since human beings are superior beings that dominate all beings, non-human beings cannot be granted personality rights, in order to obtain personality, they must have the ability to have rights and obligations, recognition of personality will be a negative decision for the future of humanity, and it is necessary to determine the legal responsibility of artificial intelligence and to take legal action. It is based on issues such as that it is not necessary for artificial intelligence to gain personality status because artificial intelligence can perform its functions in other ways without gaining personality status, and that such intelligent machines have not yet met the necessary conditions to gain personality status.[23]

The view that rejects legal personality, based on its acceptance of humans as superior beings that dominate all beings, argues that artificial intelligence is the subject of property law or that there is a slavery-like relationship between humans and artificial intelligence, and also argues that legal relations and responsibility should be determined within this framework.[24]

The approach that accepts legal personality recognition for non-biological intelligence deals with personality not in its moral or

---

Hukuki Sorumluluk, *TAAD*, S. 35, Y. 9, Temmuz 2018, p. 218; Sinan Sami Akkurt, Yapay Zekânın Otonom Davranışlarından Kaynaklanan Hukukî Sorumluluk, *Uyuşmazlık Mahkemesi Dergisi*, Y. 7, I.13, Haziran 2019, p. 44,

22 Solum, p. 1284; Gabriel Hallevy, Virtual Criminal Responsibility, *Original Law Review*, 2010, 6(1), p. 6 vd; ASARO Peter; Robots and responsibility from a legal perspective, 2007, http://www.peterasaro.org/writing SET:14.8.2020; Pagallo, (Legal Personhood), p. 1 vd.; Chopra/White, Autonomous Artificial Agents, p. 157; Emre Bayamlıoğlu, Akıllı Yazılımlar ve Hukuki Statüsü: Yapay Zekâ ve Kişilik Üzerine Bir Deneme", Uğur Alacakaptan'a Armağan V. - 2, 1. B., İstanbul Bilgi Üniversitesi Yayınları, İstanbul 2008, p. 138

23 Pagallo, (Legal Personhood), p. 7; Hildebrandt, p. 18; Peter Asaro, Robots and responsibility from a legal perspective; 2007, http://www.peterasaro.org/writing; SET:14.8.2020; Bayamlıoğlu, p. 138; Hallevy, p. 6.

24 Solum, p. 1284; Bak, Yapay Zekânın Hukuki Statüsü ve Sorumluluk, p. 218; Seda Kara Kılıçarslan, Yapay Zekânın Hukuki Statüsü ve Hukuki Kişiliği Üzerine Tartışmalar, YBHD, 2019/2, p. 378.

philosophical sense, but in its form and legal dimension. Accordingly, the aforementioned view accepts that a personality specific to artificial intelligence can be established and puts forward various solution suggestions for determining personality. These include suggestions such as establishing a legal entity-like structure, recognizing the electronic personality model, developing the concept of non-human persons, and adopting limited-purpose personality or quasi-personality models.[25]

The view that adopts the liberal, egalitarian personality approach argues that if a being has sufficient characteristics to gain personality, that being should be accepted as a person, and argues that granting personality to non-biological beings will break the negative perception on the human race due to the slavery system in the past.[26] In addition, the aforementioned view argues that the world will become more equal and peaceful in terms of social relations and the role of humanity in our increasingly technological age. This view accuses the approach that rejects the recognition of personality, claiming that they attribute different values to non-human beings simply because of the species they belong to, of chauvinist protection of a special status for biological creatures, that is, of speciesism.[27]

---

25 Lawrence B. Solum, Legal personhood for artificial intelligence. *North Carolina Law Review,* 70(4), p. 1284; ZIMMERMAN, Evan J.: Machine Minds: Frontiers In Legal Personhood, Zimmerman, Evan, Machine Minds: Frontiers in Legal Personhood, February 12, 2015, p. 41. http://dx.doi.org/10.2139/ssrn.2563965. SET.3.9.2020. ASARO, Robots and responsibility from a legal perspective, 2007, http://www.peterasaro.org/writing; Bayamlıoğlu, p. 138; Kılıçarslan, p. 377 vd. Murat Volkan Dülger, Yapay Zekalı Varlıkların Hukuk Dünyasına Yansıması: Bu Varlıkların Hukuki Statüleri Nasıl Belirlenmeli? *Terazi Hukuk Dergisi,* V. 13, I. 142, Haziran 2018, p. 85.

26 Chopra/White, Autonomous Artificial Agents, s. 186; David Calverley, Imagining a non-biological machine as a legal person, Springer-Verlag London Limited 2007, published online: 13 March 2007, Springer-Verlag London Limited 2007, AI & Soc (2008) 22: p. 523. status.irational.org/legal_person_machine.pdf. Gunther Teubner, Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law, Journal of Law and Society, Vol. 33, 2006, p. 6.

27 For detailed information about "speciesism" see, Peter Singer, Hayvan Özgürleşmesinin 30. Yılı, *New York Review of Books*, V. 50, N. 8, 15.5.2003, (Hayrullah Doğan), https://www.birikimdergisi.com/dergiler/birikim/1/sayi-195-temmuz-2005/2379/hayvan-ozgurlesmesinin-30-yili/5909.SET:11.8.2020; Samir Chopra/Laurence F. White, Artificial Agents: Personhood in Law and Philosophy, 2015, https://www.researchgate.net. SET.17.9.2020.

As a result, it is predicted that the new generation artificial intelligence will become a part of social life in the near future due to its unique technical and cognitive features and human-like abilities. It will be inevitable for any artificial or biological entity that will become the subject of social life and relations to fall within the scope of law. On the other hand, today's positive law does not contain any regulation regarding the existence and functioning of artificial intelligence, and current regulations are far from finding solutions to disputes arising from such advanced cognitive technology. For this reason, instead of looking for solutions within the regulations made by considering the traditional methodology, it is necessary to adopt solution-oriented approaches and make regulations compatible with today's information age perspective and in line with the requirements of the age.

## 2. The View That Rejects Granting Legal Personality to Artificial Intelligence

### a. Reasons For Denying Legal Personality

The reasons for the approach that rejects granting an independent legal status to artificial intelligence and robotic entities are generally based on that these entities must have the ability to acquire rights and obligations in order to acquire personality, that granting personality rights to artificial intelligence would be a negative decision for the future of humanity, and that it is necessary to grant legal personality to these entities. It is based on very different arguments, such as that there is no such thing, and that intelligent machines have not yet met the necessary conditions to gain personality. However, the arguments in question actually reflect a common point of view arising from a single source. The view that human being is a dominant, superior being over all beings constitutes the basic starting point of this approach. In this sense, the approach in question, as a reflection of the understanding of moral personality, argues that humans are the only beings to whom personality can be attributed.[28]

[28] Wolfgang Friedmann, Legal Theory, London 1953, 25. Kısım, p. 396- 412 (Tüzel Kişilik Nazariyeleri ve Tatbikat, T. Ansay, p. 50 – 51); Solaiman, p. 15; White, p. 74.

The moral view of personhood recognizes that only humans are highly self-conscious beings with the capacity of thinking, planning, biological intelligence, emotion, as well as physical capacity. Therefore, humans are in a unique position compared to other beings. Based on this idea, it is accepted that since only people can be the subject of rights and obligations, people should also have an independent personality right.[29]

According to the approach referred to as "natural rights theory", people have non-assignable and indefeasible rights from birth. [30] Humans have acquired legal personality within the framework of these rights they have. [31] In this context, minors or wards or an individual in a vegetative state, also have personality rights. In contrast, since the basic idea of designing AI as a being belongs to humans, AI's freedom and status as a moral being are inherently denied. As a reflection of this view, the relationship between humans and other beings should be evaluated within the scope of either property law or slavery.[32]

**aa. Artificial Intelligence Lacking the Required Qualities for Personality**

Some authors argue that since personality is a reflection of intelligence and internal abilities, it should only be valid for conscious beings, and accordingly, artificial intelligence cannot achieve personality because it does not yet have the necessary qualities for personality. However, according to this view, non-biological entities should also be granted a legal status if they acquire human-specific abilities such as consciousness, will, autonomy, emotion and intelligence.[33] Because if it has these abilities, artificial intelligence will turn into a conscious being, that is, a moral personality. [34]It is also stated that while granting personality to individuals who do not

29 Hildebrandt, p. 18.
30 Işıl Bayar Bravo, Thomas Hobbes ve John Locke'un Doğal Hak Anlayışları, p. 74, 75. http://hfsa-sempozyum.com/wp-content/uploads/2019/02/HFSA23-B.-Bravo.pdf.SET.15.8.2020.
31 Solum, p. 1259.
32 Bertolini, p. 225; Solaiman, p. 29.
33 Calverley, p. 527, Zimmerman, p. 22, 41, Bertolini, p. 217.
34 Dorna Behdadi/Christian Munthe, A Normative Approach to Artifcial Moral Agency, Minds & Machines 30, 2020, p. 197.

have the power to distinguish, denying it to artificial intelligence with advanced human abilities would be contrary to equality and the liberal theory's definition of personality. From this perspective, it is argued that if artificial intelligence systems meet the necessary conditions for personality, they should gain the right to self-property within the scope of Locke's liberal personality theory.[35]

The question of whether non-biological intelligence can become a humanoid entity with human-specific abilities such as consciousness, will, autonomy, emotion and intelligence is an important subject of cognitive and philosophical theories. The view that approaches this question positively claims that artificial intelligence can experience emotions. Accordingly, emotion is a facet of the human mind, and if the human mind can be explained by a computational model, the basis of artificial intelligence is a system based on modelling the human brain, then emotion can also become a cognitive process. In this context, if human emotions obey the laws of nature, then theoretically, a computer program could also imitate the operation of these laws. Therefore, artificial intelligence will be able to produce outputs and behaviours that mimic human intelligence.[36]

According to the view that argues that non-biological intelligence cannot have human-specific abilities, even if artificial intelligence produces behaviours that imitate human intelligence, consciousness and emotions, this will never mean that artificial intelligence has real emotions, consciousness and intelligence. Because no matter how perfect the simulation performed by artificial intelligence seems, a computer simulation of an earthquake never means an earthquake.[37] Furthermore, autonomy and the right to self-determination alone are not sufficient to grant legal personality to any entity. As a matter of fact, in the historical process, gaining legal rights has been conditioned on assuming social obligations and duties. Thus, the aforementioned condition has made it necessary for the entity to be attributed

35 Jeremy Waldron, Property and Ownership, Stanford Encyclopedia of Philosophy-https://plato.stanford.edu/SET.29.9.2020; Solum, p. 1276.

36 Owen J. Flanagan, The Science of The Mind, Second Edition, Massachusetts Institute of Technology 1991, p. 253. (Solum, p. 1270).

37 Solum, p. 1275.

personality to become a social reality. [38]Within the framework of this view, it is deemed necessary for an entity to have the ability to have rights and duties in order to live in an orderly manner as a member of society. It is also stated that this ability is the only quality taken into consideration by the courts in determining personality, whereas beings such as chimpanzees and artificial intelligence lack this critical feature, even though they have some advanced abilities.[39]

According to another view that tries to harmonize theories about whether non-biological intelligence can have human-specific abilities, if an entity is successful in the test to determine the conditions required for granting personality, this entity should be legally recognized as an autonomous personality with a self-identity.[40]

The skills that are stated to be present in artificial intelligence in order to be successful in the personality test are as follows: It is considered as the ability to think and communicate complexly by interacting with the environment, a sense of self with concern for achieving a life plan, and the ability to live in community with other people based on at least mutual personal interests.[41] Complex intellectual interaction is the ability of a living being to interact meaningfully with the environment by receiving and deciphering inputs from its environment and sending understandable data to its environment. This interaction must be diverse and sophisticated enough that we can view it as the product of complex thought. It is accepted that the form of interaction sought in order to gain personality must be physical communication.[42] In this context, it is stated that new generation artificial intelligence entities have the ability to interact physically with the world, for example, a

38 Teubner, p. 7.
39 Solaiman, p. 37; Teubner, p. 7.
40 Hubbard, (Personhood), p. 417, 419.
41 Hubbard, Personhood, p. 419; Kılıçarslan, p. 373; Bacaksız/Sümer, p. 136- 137. Another view is that these abilities is explained as the capacity to communicate with the environment, internal knowledge, knowledge of the external or external world, a certain level of willpower and individuality. Solaiman, p. 29. Solum states that in order for artificial intelligence to succeed in the personality test and become a competent being, it must have the ability to make moral judgments and a sense of justice.
Solum, p. 1251.
42 Ray Kurzweil, The Singularity is Near: When Humans Transcend Biology, Viking, 2005, p. 260.

smart computer can interact with the world through remote-controlled robotic machines.[43]

Another characteristic deemed necessary for a personality test is having a unique sense of self. Being a unique individual requires having a degree of imagination in designing and implementing a life plan. This criterion, which is deemed necessary for non-biological entities, does not mean that these entities are highly original and productive. Because real people cannot always reveal their originality and imagination, and they often lead a routine life. Therefore, the important thing in the sense of self is having a perception of dreams and goals for life and the planning and concretization of these dreams and goals. In order for an artificial intelligence-supported machine to become a self-aware being with a life plan, the machine must somehow care about the success of this plan.[44]

The last characteristic sought for the personality test is the ability of non-biological entities to live in communities with other people. Accordingly, artificial intelligence must be able to find a place for itself in society with other people and interact responsibly as a member of that community. As a matter of fact, the purpose of granting personality rights to an entity is to give that entity a legal status in social relations and interaction. Because it is clear that in the near future, new generation artificial intelligence systems will become an important subject against social structure and law. Therefore, personal rights are necessary and meaningful only within a community of autonomous individuals.[45]

According to the view that is based on the personality or capacity test in granting personality to non-biological intelligence, an artificial intelligence that passes the test and reaches the level of self-awareness ceases to be an object and turns into an entity that can act autonomously. Such artificial beings would have the capacity to perceive their own freedom and existence and to cause intentional harm. As a result of this behaviour, artificial intelligence will have the right to be accepted as a subject before the law and to claim legal personality. If they pass the capacity test, artificial entities can be held personally liable without the

43 Hubbard, (Personhood), p. 420
44 Hubbard, (Personhood), p. 421
45 Hubbard, Personhood, p. 423; Kılıçarslan, p. 376.

need to identify the human behind them. In addition, the acceptance of beings who contribute to social life and have sophisticated abilities as individuals is of great importance in terms of the development of society and demonstrating the will to live together peacefully. Even though it is not human, artificial intelligence that has passed the test will be able to claim that it is equivalent to a human as it has reached the super artificial intelligence stage as a self-aware being. On the other hand, the narrow artificial intelligence that is valid today, no matter how cognitively complex tasks it performs, will not have the right to personality, as it only exhibits functional features, not behaviour in the philosophical sense.[46]

Personality test is similar to the Turing Test in that it is based on behavioural criteria and is a method based on comparing artificial intelligence with a real person. However, the personality test is more comprehensive than the communication-based test proposed by Turing. Because one component of the personality test is originality, it is based on measuring the ability to learn and implement a life plan. In determining personality capacity, the assessment of whether an entity demonstrates the ability to analyse its behaviour, complex intellectual interaction, sense of self, and being a member of its community seems quite complex. Because the mentioned test has an abstract and vague nature, it also requires subjective interpretations, as in the measurement of complex thought.[47]

According to an opinion put forward in the doctrine, even if artificial intelligence passes the capacity or personality test to determine whether it has human-specific abilities, artificial intelligence should not be granted an independent personality. Because a system's successful imitation of some human abilities does not turn it into a conscious and thinking being. The success of these beings in the personality test is based on their good imitation of human behaviour and mind, but in reality, they lack characteristics such as perception, understanding, comprehension and thinking.[48] Moreover, the fact that artificial intelligence has passed the capacity test alone does not grant it a legal status. Even if an entity has

46 Hubbard, Personhood, p. 405- 408, 428; Bertolini, p. 221- 225.
47 Hubbard, Personhood, p. 428, 442.
48 For detailed information see, Dore, p. 27.

passed all the tests, its ability to gain a legal status depends on the legal order and political will granting it this right.

### bb. Granting Legal Status to Artificial Intelligence Being Contrary to Human Interests

According to the view expressed as "human-centred approach" that adopts the utilitarian movement, even if artificial intelligent beings have all the qualities found in real people, these beings should not be granted personality rights. Because granting personality to artificial intelligence is incompatible with people's interests, especially in terms of issues such as work, employment and security.[49]

According to another view defended by the "human-centred approach", granting personality to artificial intelligence beings that pose a great danger to humanity would not be a rational decision. Because if a self-aware super artificial intelligence is achieved and these beings are granted independent personality, people will face the danger of losing control and being ruled by a superior being. This view, also called the "paranoid human-centred approach", argues that if an artificial entity that can become smarter than humans is given legal entity status, these entities can take control of the world.[50] On the other hand, it is also claimed that artificial intelligence can be programmed to not harm humans or to make moral decisions from a human perspective and potentially to pursue human interests rather than its own interests. However, such a situation would mean that artificial intelligence is not autonomous and therefore not a subject, but only a tool. Therefore, both examples require artificial intelligence to be considered as an object, not a subject.[51]

---

49 Solum, p. 1260.

50 Solum, p. 1261. According to a similar view, the next generation of artificial intelligence appears to be a serious candidate to replace humans as the dominant "species" with a highly advanced computer "self" capable of using machines and weapons. If normative personality is given to an artificial being with such a potential for danger, people must at least guarantee equal personal rights. Moreover, if artificial intelligence systems gain significant competitive advantages, it would be a more rational approach to reject or limit personhood in favor of an artificial being with superior capacities that could replace humans as the dominant species, even if it is possible to compete under the same conditions as equals. Hubbard, Personhood, p. 418.

51 Bertolini, p. 225; Solaiman, p. 33- 38.

On the other hand, according to the said view, granting personality to non-biological intelligence will negatively affect the law of liability as it will reduce the effectiveness of deterrence in terms of unlawful acts by exempting people from responsibility. [52] For this reason, the aforementioned opinion argues that artificial intelligence systems, which are considered as objects before the law, should not be granted personality rights. However, it argues that a "software representation", which has a limited legal status and is recorded in a special registry, can be established to represent the producer or user in case of damages and the parties in legal relations. According to this view, through the representation, while it can be ensured that contracts are made and fulfilled validly, the principle of legal security in the field of responsibility will also be realized by determining the upper limit of the liability to be assumed and the persons represented.[53]

**cc. Lack of Ability to Have Rights and Obligations**

According to the approach that argues that legal personality should be recognized only by humans, in order for an entity to be accepted as a subject of law, it must be capable of having rights and assuming obligations, and therefore must have free will.[54] Both in doctrine and practice, in order for a being to cease being an object and be accepted as a subject before the law, that being must have the will to benefit from rights and fulfil its duties. [55] Because only with the existence of free will, it becomes possible to use the rights granted by the personality and to assume responsibility. [56]The understanding of personality in

52 Solaiman, p. 38.

53 Bertolini, p. 242; Solaiman, p. 33- 38.

54 Arie A. Covrigaru/Robert K. Lindsay, Deterministic Autonomous Systems, AI Magazine, Volume 12, Number 3 (1991), p. 117.

55 According to this view, just as the concepts of fault and intent are fundamental elements in terms of legal and criminal liability, the existence of will is seen as a necessary condition for the acquisition of personality. In addition, the ability to exercise rights depends on the existence of will, which is a subjective faculty. . Zimmerman, p. 29

56 According to a similar view in the doctrine, there is a close connection between human beings and being entitled to rights and fulfilling obligations. Because the concepts of being entitled to rights and obligations and personality are concepts identified with will and human beings. In this sense, man has personality because he has will. For this reason, the legal order cannot grant personality rights to beings that do not have will. Selin Çetin, "Yapay Zekâ ve Hukuk ile ilgili Güncel

question was developed by Canon jurists in the 13th century and is still accepted as a condition taken into account in judicial decisions.[57]

On the other hand, it is claimed that granting legal personality to some organizations that do not have the ability to exercise their rights and fulfil their duties creates an exceptional situation in terms of the condition of having will. Namely, although companies do not have a living and physical existence and do not have a will, they have been granted personality rights by the legal system in order to support economic and commercial life. Thus, it is aimed to limit the legal liability and enable the real persons behind the legal entities to carry out their commercial activities more effectively and safely.[58] Based on this view, although some structures have been granted legal personality by the legal order for functional reasons and to meet people's needs, it is accepted that it is not appropriate to recognize artificial intelligent beings who do not have the ability to reflect their own will in legal life as subjects of law.[59]

---

Tartışmalar, Yapay Zekâ Çağında Hukuk" (Current Debates about Artificial Intelligence and Law, Law in the Age of Artificial Intelligence), İstanbul, Ankara ve İzmir Baroları Çalıştay Raporu 2019, (Istanbul, Ankara and Izmir Bar Associations Workshop Report 2019), p. 54.

57 In 2015, in the New York District Court in the USA, By Non-human Rights Project (NhRP/Non-Human Rights Project), In the lawsuit filed for the release of chimpanzees held for medical research at Stony Brook University,

[I]t has been argued that chimpanzees have their own "demands for justice" because, much like humans, chimpanzees have the basic personality traits of autonomy, self-awareness, and self-determination. Based on the Habeas Corpus, which is only valid for "legal persons" in the US Constitution, it was requested that the fundamental rights of freedom and equality granted to humans were also applied to chimpanzees and that they be released. The Court decided that only entities recognized as persons are capable of having rights and assuming obligations, while "objects" do not have these legal rights and responsibilities, and in this context, all animals are legally subject to property, regardless of their intelligence level and physical appearance. The decision also made a distinction between chimpanzees and legal entities and stated that companies with legal personality consist of people, therefore they can assume legal rights and duties, and therefore it is lawful for them to have legal personality. Solaiman, p. 26, 27.

58 On the other hand, according to Beckman, when there is a legal liability for companies, the aim is to reach a decision or policy that can be attributed to the individual partners of the company, rather than the company as a representative of the group of people. Ludvig Beckman, "Personhood and legal status: reflections on the democratic rights of corporations", *Netherlands Journal of Legal Philosophy*, 1, 2018, p. 23.

59 Zimmerman, p. 28

The approach that rejects granting legal personality to artificial intelligence argues that it is inappropriate to compare artificial intelligence to animals in terms of being able to act voluntarily. However, it accepts that the provisions regarding animals may be applied due to damages caused by artificial intelligence in the context of civil liability. Thus, it is claimed that damages caused by artificial intelligence can be compensated within the scope of strict liability, without the need for recognition of personality.

Basically, an animal is a biological entity with unique characteristics such as moody, docile and friendly. In this sense, it is different from legal entities and artificial intelligence systems in that it is a naturally living being and in terms of both the subjects it is trained in and the actions it carries out based on its own will. The responsibility of the persons who undertake the care and management of the animal can be invoked due to the damage caused to third parties due to the nature of the animal and its irregular behaviour that may cause behavioural deviation. Likewise, there is no obstacle for the manufacturer, owner or user of artificial intelligence systems to be held responsible for the damage caused by artificial intelligence. However, although artificial intelligence and animals are similar in some aspects, these similarities are insufficient to recognize personality in both entities. As a matter of fact, the lawsuit regarding chimpanzees in the USA was rejected on the grounds that chimpanzees do not have the capacity to have rights and assume debts.[60]

### dd. Personality Not Being a Necessary Condition for Solving Problems Related to Artificial Intelligence

According to this view, granting personality to artificial intelligence in order to determine legal liability is not a sine qua non solution. Because legal problems arising from artificial intelligence can be resolved without granting personality to artificial intelligence.[61]

---

60 Bertolini, p. 227; Solaiman, p. 12- 34; Peter W. Singer, Wired for War: The Robotics Revolution and Conflict in the 21st Century; Penguin Press: USA, 2009, p. 415. Zimmerman, p. 33.

61 According to Pagallo, wherever there is a legal responsibility, there is a legal personality.However, considering the scope of responsibility that today's artificial intelligence technologies have, it is not necessary to grant full legal personality

On the other hand, granting an independent personality to artificial intelligence entities will serve to limit the persons to whom responsibility can be applied, rather than providing an important solution for compensation for damages arising in debt relations. That is, as long as artificial intelligence entities do not earn any income due to the tasks they perform, even if they gain personality rights, the damages that will occur will be covered by the people or companies behind these technologies. At the same time, if a fee is decided for the activities of artificial intelligence, this will mean the creation of a tax for users.[62] Based on this, it is stated that artificial intelligence does not need to gain legal personality in order to determine its legal responsibility and take legal action, because artificial intelligence can be granted rights limited to these functions without gaining personality status.

In addition, it is claimed that the fact that legal systems provide legal entities for "synthetic assets", as in companies, may lead to the abuse of the rights granted to these synthetic assets.[63] Namely, when artificial intelligence is given personality, it can turn into a shield of irresponsibility for the real people behind this artificial intelligence. However, it is stated that lack of any regulation may lead to the emergence of a class of irresponsible perpetrators consisting of robots and artificial intelligence.[64]

Although it accepts that some problems may be encountered in legal relations due to the unique characteristics of artificial intelligence, the view argues that granting personality status to artificial intelligence is not a sine qua non for the solution of the mentioned problem, and proposes different solutions in order to support this claim. Accordingly, granting a dependent and limited legal status, as in a representation relationship, or registering artificial intelligence robots and allocating a certain capital to them, as in companies, will eliminate the need to

---

to artificial intelligence.As a matter of fact, the dependent and limited forms of legal status that representatives have within the framework of a contractual debt relationship can also be applied to artificial intelligence entities in a similar legal situation. Pagallo, Legal Personhood, p. 5.

62 Bertolini, p. 242; Solaiman, p. 33

63 Serozan, Medeni Hukuk, p. 495.

64 Pagallo, Legal Personhood, p. 4; Bryson/Mihailis/Grant, p. 275 vd.

apply to artificial intelligence in the context of legal liability.[65] Thus, the financial positions of such smart machines will be made transparent.[66]

**b. Overall Evaluation**

In summary, the view against granting personality to artificial intelligence sees personality as a set of values unique to humans and acquired from birth. It also argues that people do not have the authority to dispose of these values. [67]This human-centred approach, which considers personality as an integral element of fundamental rights and duties, accepts that artificial intelligence does not have the ability to fulfil these rights and duties.[68]

On the other hand, the thoughts and behaviour of biological beings, especially humans, are influenced not only by the rational analysis of sensory input, but also by the endocrine system and various chemical messages over thousands of years. Humans have a unique level of intelligence, communication, self-awareness, and emotion. Even if intelligent machines devoid of these abilities may achieve emotion and self-consciousness in the future, they currently lack comprehension and feelings. Therefore, they can only imitate emotions and self-consciousness.[69] The opinion in question regards the legal personality recognized for organisations, which has been adopted by all legal systems, as acceptable on the grounds that these organisations are actually composed of people, their capacity to act is exercised through humans, and the rights and duties related to their personalities basically refer to the rights and duties of the people behind them. In addition, when the ability of artificial intelligence to make independent decisions on its own is taken as a criterion, it is claimed that artificial intelligence does not meet the necessary conditions in terms of its level of development.[70]

In our opinion, in today's world where a rapidly digitalizing social life prevails, the justifications based on the approach that rejects

65 Pagallo, Legal Personhood, p. 5; Ersoy, p. 86; Kılıçarslan, p. 378.
66 Pagallo, Legal Personhood, p. 5.
67 Friedmann, p. 50 – 51.
68 Solaiman, p. 11; Çetin, Yapay Zekâ ve Hukuk ile İlgili Güncel Tartışmalar, p. 54
69 Hubbard, Personhood, p. 442.
70 Solaiman, p. 35; Hubbard, Personhood, p. 442; Pagallo, Legal Personhood, p. 9.

personality are far from being rational and applicable. Because in a world where machines with autonomy and learning features will dominate, it will be inevitable for smart machines to damage the assets or personal assets of third parties while performing these tasks. This situation will bring about the necessity of establishing a normative regulation of the legal personality and liability of artificial intelligence. However, the legal personality to be granted to artificial intelligence should not be based on a system of values identical to or competing with humans, but on a personality model that is compatible with the unique characteristics of smart machines, reflects the algorithmic structure and autonomy features, and is limited to its fields of activity.

The View That Accepts Granting Legal Personality to Artificial Intelligence

In our world, where the most advanced cognitive technological designs are being implemented one by one and moving with exponential acceleration towards the cybernetic society, scientific opinions and theories advocating that the new generation artificial intelligence technology should be given a legal status set off a leverage effect. As the effectiveness of non-biological intelligence on humans and society increases, the demands and expectations regarding the determination of the legal status of artificial intelligence also increase.

The approach advocating granting legal personality to artificial intelligent beings is, as a rule, based on the legal and formal aspects of personality, and accepts that personality can be granted to these beings if social acceptance occurs and is compatible with legal policy.[71]

Scientific views, which support the process developing at the theoretical and academic level within the framework of legal personality regarding the need to grant personality to non-biological intelligence and see it as a necessity to grant personality to artificial intelligent beings, generally act from three basic points. The first of these is the difficulties encountered in determining legal liability for damages arising from the operation of artificial intelligence due to its unique technical and cognitive features. Secondly, it is the opinion that viewing the new generation artificial intelligence, which is a much

[71] White, p. 74- 75.

more complex system compared to known machines or computers, has human-like features and cannot be set to an upper limit for its progress potential, as a subject of property law, is incompatible with the modern understanding of science. Finally, it is the aim of ensuring that humanity benefits from the qualities and achievements specific to these systems at the highest level by giving them a legal status rather than ignoring artificial intelligence-based assets.[72]

Since smart software and artificial intelligence technologies are systems that are dispersed and distribute liability to different areas, it seems very difficult to determine who gave commands or training to the software and algorithms that constitute the unlawful act. In addition, determining whether there is an error in the production, design or use of artificial intelligence-based systems requires a complex process. This situation causes a legal uncertainty to arise in terms of directing responsibility and accountability.[73] Because, if artificial intelligence causes harm, the injured person faces the stages of choosing and making decisions among many factors such as the producer, employer, algorithm or software responsible, user or the artificial intelligence itself. Moreover, the complexity of the interaction between humans and artificial intelligence and multiple and distributed liability situations based on multiple actions of both elements may eliminate the possibility of compensation for damage. Furthermore, it will be impossible to determine legal liability in the event of damage occurring due to the actions and behaviours of artificial intelligence that cannot be attributed to elements such as the producer, user, algorithm or software responsible.[74] In this context, giving personality

---

72 Solum, p. 1252; Teubner, p. 6; Zimmerman, p. 21; Bacaksız/Sümer, p. 145 – 146.

73 Pagallo, Legal Personhood, p. 6; Bayamlıoğlu, p. 136. For example, artificial intelligence, which is a conscious machine that hears that its user needs to access a document from the digital environment, decides to acquire the document under the influence of the social environment and give it to the user as a birthday gift. Acting within the framework of this decision, artificial intelligence also performs various prohibited actions in the digital environment in order to access the document without paying a fee, obtains the document and gifts it to the user.
In such a scenario, it is very difficult to hold the user, designer or manufacturer responsible. Because in the mentioned incident, artificial intelligence with advanced autonomy is equal to humans in terms of being held responsible for illegal actions. Calverley, p. 533.

74 Pagallo, Legal Personhood, p. 6; Ersoy, p. 78.

to artificial intelligence will eliminate the complexity and uncertainty of accountable persons and ensure that judicial proceedings for compensation for damage proceed more quickly and safely.

This uncertainty clearly reveals that the new generation problems related to artificial intelligence entities, which have a very different systematic and logic than previous technological designs, cannot be solved by traditional methods that are incompatible with the nature of this technology.

On the other hand, due to the development process through machine learning, artificial intelligence enables the emergence of more complex cognitive structures as it constantly increases its knowledge and skills as a result of its interaction with the living creatures in the environment. In the near future, it is clear that such structures will need a status in social life, given the fact that the new generation of human-like artificial intelligence, which is predicted to be produced based on a modelling that imitates biological human algorithms, will be more integrated with the social structure.[75] For these reasons, the legislator has an important responsibility in producing innovative and sustainable solutions that are compatible with the new generation artificial intelligence technologies, which have their own unique characteristics and working systems.

Apart from this, granting legal personality to non-human beings will greatly increase the capacity of contemporary societies to benefit from cognitive technology. For example, the widespread use of electronic or smart contracts will provide significant savings in transaction costs and contribute to safer and faster execution of transactions. In this context, the "The Uniform Electronic Transactions Act" (UETA), adopted by forty-seven states in the USA, Columbia and the Virgin Islands, allows contracts to be made by machines that function as electronic representatives of the parties. The regulation considers all claims that the contract was not established due to the lack of mutual will of the parties, who are real persons, during the establishment of the contract, as invalid. When it comes to the participation of machines in the contract, it is assumed that the necessary will arises from the

75 Ugo Pagallo, Even Angels Need the Rules: AI, Roboethics, and the Law, The Authors and IOS Press, 2016, p. 209. doi:10.3233/978-1-61499-672-9-209AI.

programming and use of the machine. This issue is covered in Section 14 of the Electronic Transactions Act, titled "Automated transactions". According to the regulation, "A contract is formed by the interaction of the parties' electronic representatives, even if the parties are not aware of or have not reviewed the actions of their electronic representatives or the resulting terms and agreements."[76]

In the Electronic Transactions Law, it is stipulated that when electronic representatives interact to make a contract without any human knowledge or participation, no objection can be raised regarding the lack or absence of will by real persons regarding this contract, and the provisions and consequences of the contract will belong to the real person behind the artificial intelligence.[77]

Thus, it is aimed to use electronic contracts more widely and reduce transaction costs in today's information age. In addition, allowing contracts to be made through interaction between electronic representatives constitutes an important step towards transferring electronic personality to the real world.[78]

---

76 http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ueta.pdf.

77 In German Law, it is accepted that if the electronic representative concludes a contract with his own suggestion or acceptance, the terms and consequences of the contract will belong to the real person behind the artificial intelligence, even if the conclusion of the contract is decided autonomously by the artificial intelligence by evaluating different options. However, in this case, the basis of legal liability varies depending on whether the artificial intelligence decides and carries out the debt-generating transaction autonomously, as a result of its own will, or whether it acts within the framework of the will of the real person represented. In this context, the basis of the legal liability arising from the operations of an autonomous artificial intelligence, which has the ability to learn and improve itself as a result of its own experiences, and the operations of a system that does not have the ability to make autonomous decisions, will be different. Accordingly, in the debt relationship arising as a result of the actions of autonomously decision-making artificial intelligence, there will be a liability or representation relationship for the acts of assistant persons within the scope of contractual liability. However, since the transactions made through non-autonomous artificial intelligence, which is considered as property subject to ownership, are essentially carried out by the real person behind the artificial intelligence, the legal liability as a party to the debt relationship will belong to the real person within the framework of general provisions. Solum, p. 1284; Teubner, p. 10.

78 http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ueta.pdf. SET.23.8.2020. Also, for legal issues that may arise in this regard, see, Teubner, p. 10. Bayamlıoğlu, p. 132.

In Turkish Law, there is no regulation that allows any electronic or non-biological entity to perform legal transactions on behalf of a real or legal person and for the provisions and results to arise in the legal field of these persons. Additionally, there is no separate type of contract that can be described as an "electronic contract". Although it seems that the concept of "electronic contract" [79]is included in the doctrine as a separate contract type, in reality these contracts do not constitute a separate and unique contract category. Because the Turkish Code of Obligations (TBK) is shown as the basis for electronic contracts. Article 4/2 contains a provision stating that only communication devices such as telephones and computers can be used during the establishment of the contract, and that a suggestion made instantly and uninterruptedly online during direct communication with such devices will be deemed to have been made among the present. Therefore, the phrase "electronic" in the context of electronic contracts does not have a distinctive feature regarding the content, elements or parties of the contract. This phrase only indicates that electronic means were used in the establishment of the contract. For this reason, it is not deemed appropriate to consider contracts in which these tools are used as a separate and unique contract category under the name of electronic contracts.[80]

In Turkish positive law, within the framework of the rules regulating debt relations, there are no provisions regarding non-biological intelligent beings as a subject of law. However, it is necessary to make some pioneering legal regulations in the face of radical and comprehensive changes that will be initiated in many fields, including law, by digital transformation and new generation artificial intelligence systems, which are inevitable in the near future. Thus, the transformation in question will be adopted more quickly by the society. Because it seems difficult to resolve disputes arising from contracts made through artificial intelligence and smart

---

79 For detailed information about the concept and types of electronic contracts, see Çiğdem Kırca, İnternette Sözleşme Kurulması, *Banka ve Ticaret Hukuku Dergisi*, 2000, Cilt XX, N. 4, p. 100.

80 Gamze Turan, Elektronik Sözleşmeler ve Elektronik Sözleşmelere Uygulanacak Hukukun Tespiti, *TBB Dergisi*, N. 77, 2008, p. 92; Muzaffer Şeker, 6098 sayılı Yeni Türk Borçlar Kanunu'na Göre İnternet Üzerinden Sözleşmelerin Kurulması, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, Y.11, I. 22, 2012/2, p. 131.

software with the provisions in the Turkish Code of Obligations. For example, if a software error occurs during the establishment of the contract, this error will be taken into account only to the extent that it can be considered as a fault of the real person operating the machine, according to the Turkish Code of Obligations. However, errors arising from smart software cannot always be evaluated within the framework of the provisions of "fault", and since smart software is not responsible for the will subject to the transaction, it does not seem possible to accept any software errors as a defective intention that affects the validity of the transaction. For this reason, the most rational approach to resolving disputes that may arise on issues such as the establishment of a contract, cases of defective intention, agency and power of attorney will be to grant a legal status to smart software or artificial intelligence.[81]

On the other hand, granting a legal entity-like status to non-biological autonomous entities, as is the case with associations and endowments, will pave the way for these entities to be legally allocated to a permanent purpose and to serve humanity. Moreover, it is accepted that one of the most successful strategies for coping with the uncertainty that will be experienced whenever non-human beings are encountered at different layers of the social structure is their personification.[82]

Those who advocate the idea of granting personality rights to artificial intelligence agree on the point of giving artificial intelligence a legal status in terms of the principle of legal security and accountability, but they differ on the methods of doing so. In this context, according to one view, in order to give artificial intelligence a status before the law, there is no obligation to grant it a right and capacity to act similar to real persons.[83] It is deemed sufficient for artificial intelligence to have the authority and responsibility to perform its operations within the scope of its duties and field of work. For example, it is argued that the financial position of such smart machines can be made transparent without resorting to any legal entity, by registering artificial intelligence

81 Bayamlıoğlu, p. 133- 134.
82 Teubner, p. 6.
83 Bryson/Mihailis/Grant, p. 273.

or giving them capital, as in companies.[84] Apart from this, within the framework of the view that artificial intelligence should be given a legal status, models such as legal entity-like personality, electronic personality, non-human person, limited-purpose personality and semi-personality are proposed.

## CONCLUSION

There is no hesitation that systems with a limited field of activity and autonomy, defined as narrow or weak artificial intelligence, should be accepted as objects before the law, depending on these characteristics. On the other hand, the level of success reached by cognitive technology today has also enabled the development of autonomous artificial intelligence, which can learn from its own experiences through different algorithmic structures and complex software and machine learning, and can act independently without any external intervention. The autonomous decisions and actions taken by these entities while performing the duties defined for them sometimes lead to legal liability in terms of damaging people's property or immaterial rights values or causing a breach of duty in a debt relationship. In this respect, today, there is a need to develop a unique personality model for artificial intelligence beings with strong autonomy features.

Significant results have been reached regarding the granting of legal personality to non-biological beings in the light of multifaceted scientific studies carried out by different disciplines, both in Turkish doctrine and comparative law. Accordingly, the level of development in artificial intelligence technology and robotics reached today cannot carry the theses of granting personality rights to these beings beyond the conceptual dimension. However, it seems inevitable that artificial intelligence systems, which are based on modelling that imitates biological human algorithms and have a great potential for progress, will transform into a humanoid structure in the near future.

Various criteria have been determined in the doctrine for granting personality rights to artificial intelligence beings. It is widely accepted that if artificial intelligence is determined to meet these criteria, a

84 Pagallo, Legal Personhood, p. 5.

legal status should be granted. These determined criteria are abilities and capacities that are agreed to be unique to humans, such as sense of self-interest, free will, consciousness and self-awareness. These are the qualities that describe the moral person in terms of moral philosophy. However, the personality model intended for the new generation artificial intelligence should not be a status identical to the moral personality of real people, but a formal personality type that is compatible with the characteristic and unique structures of these beings. As a matter of fact, the personality type adopted by contemporary legal systems for legal entities, which are structures that recognize personality other than people, is a formal personality model, purified from human characteristics.

Today, considering the impact of non-biological intelligence on human and social activities and the level of development, it can be seen that giving these entities a legal status has become an important need. However, the status in question should not be a personality model that offers a full set of rights and obligations, as in real persons. This status should be a formal personality that allows artificial intelligence to acquire rights and assume obligations, be held legally responsible and accountable for the transactions it carries out, and provides transparency and trust in its functions, provided that it is limited to its fields of activity. Moreover, according to the moral personality view, even if all the qualities required for legal personality are found in artificial intelligent beings, these will not be sufficient for these beings to gain a legal status. Because throughout the historical process, in all civilizations from past to present, the sole criterion for granting personality status to beings other than humans has been human interests, not the level of physical and psychic development.

The view, expressed as the human-centred approach and reflecting a pragmatic perspective, accepts that the determining factor in giving personality to non-biological intelligence or any synthetic structure is that human interests justify such a decision. As a matter of fact, when approaching the issue in terms of legal entities, which are the only structures recognized with legal personality other than people by contemporary legal systems, the dominant factor in granting legal personality to associations, endowments or companies was not the characteristics of these structures, but the idea of meeting social needs.

In this context, considering the common characteristics of all entities that have acquired legal personality, it can be seen that granting personality to these entities is based on either humans themselves or entities that contribute significantly to humans in social and economic life.

Considering the progress potential of the new generation artificial intelligence, which constantly improves itself with the machine learning method and has the capacity to learn through its own experiences, it will go beyond the designs and targets set for them by interacting with people and the environment in extremely complex ways. At the end of this process, artificial intelligent beings will become social actors and appear in very different appearances in politics, economy, law and many other fields. When this process of change reaches a certain stage, the personification of artificial intelligence systems will become a social reality and a political necessity. Theories about granting legal status to non-biological intelligent beings, which continue at the conceptual level until they become a social reality and a political necessity, will turn into pragmatic needs after this stage. This will enable the implementation of normative regulations regarding the legal recognition of artificial intelligence entities by activating the human-centred legal system based on human interests.

Legally accepting a non-human being as a person will require extensive codification in the context of integrating these beings into the legal system. In this context, legislative changes and new legal regulations will be needed on many issues such as recognition of personality by the legal system, determination of legal action capacity, attribution of rights and duties, determination of administrative and judicial procedures and principles, and ensuring the participation of these non-human beings in political, economic and cultural life.

Giving artificial intelligence entities a legal status also requires determining a specific personality model for these entities. It would not be a sustainable approach to determine the model to be chosen by a method envisaged based on the unique needs of the past and the conditions and functioning of that day for groups of people and property such as companies, associations, foundations, various institutions and organizations. For this reason, the personality model to be preferred

must have a design and content that is compatible with the unique qualities of the new generation artificial intelligence technology, which has no similar application or example before. In this sense, no matter how much it is developed, it does not seem possible to design the world of the future with models that are legal entities or their versions. In this respect, we believe that the "electronic personality" model envisaged in the "European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics" is more compatible with the unique and innovative structure of artificial intelligence and robotic technologies. In addition, the "electronic personality" model seems to be an appropriate choice because it reflects a type of personality not in a philosophical sense, but in a formal and legal sense. Furthermore, the "electronic personality" model is considered to be feasible and rational in terms of the European Parliament Resolution's potential to systematically reveal the general principles that will shed light on the establishment of international norms in the field of artificial intelligence and guide the studies carried out on these systems. On the other hand, the "limited purpose personality" model, which emphasizes efficiency and utilitarianism, will provide significant gains, especially in terms of economic and commercial life, if it is sufficiently developed and systematized.

As a result, legal rules are a set of rules that aim to protect social life and meet human needs, and in this context, regulate the relations between individuals and society. Law is also responsible for overseeing the changes and transformations that occur in the structures or social relations that make up society and attaching them to a normative status. In this sense, the law also has important functions to take measures to ensure social order and to coordinate the changes and transformations in social life. Therefore, in the information age we are in, the impact of artificial intelligence entities on human and social activities and the cybernetic social structure that artificial intelligence promises for the near future make these entities the subject of law. The duty of the legal system in the face of changes and expectations in the social structure and new formations in social life is to realize the principle of legal security by making the necessary regulations and ensuring predictable certainty. In this context, providing a legal status to non-biological intelligence, which has become a social reality today

and is certain to develop greatly in the near future, has become one of the important duties of law. In determining legal status, the legal and formal understanding of personality should be taken as basis, rather than the deep philosophical theories and ethical discussions that do not directly contribute to the solution of the mentioned problem. In addition, the personality model to be attributed to artificial intelligence should be an innovative and applicable structure that is compatible with the unique characteristics of these systems and limited to their fields of activity, rather than a set of values that are identical to or competing with humans. In this sense, we believe that the "electronic personality" or "limited purpose personality" model would be the most rational choice for artificial intelligence beings.

## References

### Books

Akipek Jale/Akıntürk Turgut/Ateş Derya, Türk Medeni Hukuku Başlangıç Hükümleri, Kişiler Hukuku, V.1, Beta Yayınevi, 15th ed. Eylül 2019.

Bacaksız Pınar/Sümer Seda Yağmur, Robotlar, Yapay Zekâ ve Ceza Hukuku, Adalet Yayınevi, Ankara 2021.

Çelebican Özcan K., Roma Hukuku, Yeni Medenî Kanuna Uyarlanmış 18th ed., Turhan Kitabevi, Ankara 2019.

Davenport Thomas H./Ronanki Rajeev, *Harvard Business Review*, HBR'S 10 Must Reads, "Gerçek Dünya İçin Yapay Zekâ", (Nadir Özata), Harvard Business School Publishing Corporation, 2019.

Descartes René, Discourse On The Method, 1637.

Dural Mustafa/Öğüz Tufan, Türk Özel Hukuku, C. II, Kişiler Hukuku, 20th ed., İstanbul 2019.

Ersoy Çağlar, Robotlar, Yapay Zekâ ve Hukuk, 3th ed., İstanbul, Nisan 2018,

Friedmann Wolfgang, Legal Theory, London 1953, Chapter 25, p. 396- 412 (Tüzel Kişilik Nazariyeleri ve Tatbikat, , T. Ansay).

Kılıçoğlu Ahmet M., Medeni Hukuk, Temel Bilgiler, 7th ed. Turhan Kitabevi, Ankara 2018.

Kılıçoğlu Ahmet M., Borçlar Hukuku Genel Hükümler, Yeni Türk Borçlar Kanunu'na Göre Genişletilmiş 22th ed., Ankara 2018.

Porter E. Michael/Heppelmann E. James, *Harvard Business Review*, HBR'S 10 Must Reads, "Artırılmış Gerçeklik Stratejisine Neden Her Organizasyonun İhtiyacı Vardır?", (Nadir Özata), Harvard Business School Publishing Corporation, 2019.

Serozan Rona, Medeni Hukuk, Genel Bölüm Kişiler Hukuku, 4th ed., Vedat Kitapçılık, İstanbul 2013.

Singer Peter W., Wired for War: The Robotics Revolution and Conflict in the 21st Century; Penguin Press: USA, 2009.

Wilson James H./Daugherty, Paul R., *Harvard Business Review*, HBR'S 10 Must Reads, "İşbirliğine Dayalı Zekâ: İnsanlar ile Yapay Zekâ Güçlerini Birleştiriyor", (Nadir Özata), Harvard Business School Publishing Corporation, 2019.

Zevkliler Aydın/Ertaş Şeref/Havutçu Ayşe/Acabey M. Beşir/Gürpınar Damla, Yeni Medeni Kanun'a Göre Medeni Hukuk (Temel Bilgiler), 10th ed., Ankara 2018.

## Articles

Akkurt Sinan Sami: Yapay Zekânın Otonom Davranışlarından Kaynaklanan Hukukî Sorumluluk, *Uyuşmazlık Mahkemesi Dergisi*, Y. 7, I.13, Haziran 2019.

Asaro Peter, Robots and responsibility from a legal perspective, 2007, http://www.peterasaro.org/writing SET:14.8.2020.

Aşar Haluk, Hayvan Haklarına Yönelik Temel Görüşler ve Yanılgıları, KAYGI, 2018.

Bak Başak, Medeni Hukuk Açısından Yapay Zekânın Hukuki Statüsü ve Yapay Zekâ Kullanımından Doğan Hukuki Sorumluluk, *TAAD*, S. 35, Y. 9, Temmuz 2018.

Bayamlıoğlu Emre, Akıllı Yazılımlar ve Hukuki Statüsü: Yapay Zekâ ve Kişilik Üzerine Bir Deneme", Uğur Alacakaptan'a Armağan V. 2, 1. B., İstanbul Bilgi Üniversitesi Yayınları, İstanbul 2008.

Beckman Ludvig, "Personhood and legal status: reflections on the democratic rights of corporations", *Netherlands Journal of Legal Philosophy*, 1, 2018, p. 23.

Behdadi Dorna/Munthe Christian, A Normative Approach to Artifcial Moral Agency, Minds & Machines 30, 2020.

Bertolini Andrea, "Robots as products: the case for a realistic analysis of robotic applications and liability rules", Law, Innovation and Technology, 2013, 5(2).

Bryson Joanna J./Mihailis E. Diamantis/Grant Thomas D, Of, for, and by the People: The Legal Lacuna of Synthetic Persons, Artif. Intell. Law (2017), 25.

Calverley David, Imagining a non-biological machine as a legal person, Springer-Verlag London Limited 2007, published online: 13 March 2007, Springer-Verlag London Limited 2007, AI & Soc (2008) 22: p. 523. status.irational.org/legal_person_machine.pdf.

Chopra Samir/White, Laurence F.: Artificial Agents: Personhood in Law and Philosophy, 2015, https://www.researchgate.net.

Chopra Samir/White Laurence F, A Legal Theory for Autonomous Artificial Agents; The University of Michigan Press, E-book, Ann Arbor, MI: University of Michigan Press, https://doi.org/10.3998/mpub.356801 USA, 2011.

Covrigaru Arie A./Lindsay Robert K., Deterministic Autonomous Systems, AI Magazine, Volume 12, Number 3 (1991),

Çetin Selin, Yapay Zekâ ve Hukuk ile ilgili Güncel Tartışmalar, Yapay Zekâ Çağında Hukuk İstanbul, Ankara ve İzmir Baroları Çalıştay Raporu 2019.

Dore Fatma, Güçlü Yapay Zekâya Karşı Çin Odası Argümanı, *Sosyal Bilimler Dergisi*, V. XIV, I. 1, Haziran 2012.

Dülger Murat Volkan, Yapay Zekalı Varlıkların Hukuk Dünyasına Yansıması: Bu Varlıkların Hukuki Statüleri Nasıl Belirlenmeli? *Terazi Hukuk Dergisi*, V. 13, I. 142, Haziran 2018.

Flanagan Owen J, The Science of The Mind, Second Edition, Massachusetts Institute of Technology 1991.

Günther, J/Munch, F/Beck, S/Loffler, S/Leroux, C/Labruto, R; Issues of Privacy and Electronic Personhood in Robotics, Proceedings- IEEE International Workshop on Robot and Human Interactive Communication, 2012, p. 818. 10.1109/ROMAN.2012.6343852.

Hallevy Gabriel, Virtual Criminal Responsibility, *Original Law Review*, 2010, 6(1).

Hildebrandt Mireille, "From Galatea 2.2 to Watson – and Back?": M. Hildebrandt and J. Gaakeer (eds.), (Human Law and Computer Law: Comparative Perspectives, Springer 2013.

Hubbard F. Patrick, Do Androids Dream? Personhood and Intelligent Artifacts, University of South Carolina Scholar Commons, 83 *Temp. L. Rev.* 405 (2011), p. 407.

Hubbard F. Patrick, Do Androids Dream? Personhood and Intelligent Artifacts, University of South Carolina Scholar Commons, 83 *Temp. L. Rev.* 405, 2011.

Jaynes Tyler, Legal personhood for artificial intelligence: citizenship as the exception to the rule, 2019, AI & SOCIETY.

Kılıçarslan Seda KARA, Yapay Zekânın Hukuki Statüsü ve Hukuki Kişiliği Üzerine Tartışmalar, *YBHD,* Y. 4, I. 2019/2, p. 363- 389.

Kırca Çiğdem, "İnternette Sözleşme Kurulması", *Banka ve Ticaret Hukuku Dergisi*, 2000, V. XX, I 4.

Kurzweil Ray, The Singularity is Near: When Humans Transcend Biology, Viking, 2005, p. 260.

Mihailis E. Diamantis; The Extended Corporate Mind: When Corporations Use AI to Break the Law, *North Carolina Law Review*, Vol. 98, Number 4, 98 N.C. L. REV. 893, 2020.

Pagallo Ugo, Vital, Sophia, and Co. —The Quest for the Legal Personhood of Robots, Law School, University of Turin, Information 2018, 9, 230.doi:10.3390/info9090230.

Pagallo Ugo, Even Angels Need the Rules: AI, Roboethics, and the Law, The Authors and IOS Press, 2016. 209. doi:10.3233/978-1-61499-672-9-209AI.

Singer Peter, Hayvan Özgürleşmesinin 30. Yılı, *New York Review of Books*, cilt 50, sayı 8, 15.5.2003, (Hayrullah Doğan), *https://www.birikimdergisi.com*/dergiler/birikim/1/sayi-195-temmuz-2005/2379/hayvan-ozgurlesmesinin-30-yili/5909.

Solaiman SM, Legal Personality of Robots, Corporations, Idols and Chimpanzees: A Quest for Legitimacy; University of Wollongongs, Faculty Of Law, Humanities And The Arts- Papers, 2017.

Solum Lawrence B., Legal personhood for artificial intelligence. *North Carolina Law Review* 70(4).

Şeker Muzaffer, 6098 Sayılı Yeni Türk Borçlar Kanunu'na Göre İnternet Üzerinden Sözleşmelerin Kurulması, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi,

Y.11, I: 22, 2012/2.

Teubner Gunther, Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law, *Journal of Law and Society*, Vol. 33, 2006, p. 6.

Turan Gamze, Elektronik Sözleşmeler ve Elektronik Sözleşmelere Uygulanacak Hukukun Tespiti, *TBB Dergisi,* I. 77, 2008.

Zimmerman Evan J., Machine Minds: Frontiers In Legal Personhood, Zimmerman, Evan, Machine Minds: Frontiers in Legal Personhood, February 12, 2015, http://dx.doi.org/10.2139/ssrn.2563965.

White J. Frederick; Personhood: An Essential Characteristic of the Human Species, The Linacre Quarterly, 2013; 80(1).

Internet resources

Bravo Işıl Bayar, Thomas Hobbes ve John Locke'un Doğal Hak Anlayışları, p. 74, 75. http://hfsa-sempozyum.com/wp-content/uploads/2019/02/HFSA23-B.-Bravo.pdf.

Kurzweil Ray, Kurzweil Network, Accelerating Intelligence, Essays, (singularity Q&A), December 2011. https://www.kurzweilai.net/singularity-q-a.

WALDRON, Jeremy; Property and Ownership, Stanford Encyclopedia of Philosophy-https://plato.stanford.edu/.

# "IDENTITY OR SIMILARITY OF GOODS OR SERVICES" UNDER THE INDUSTRIAL PROPERTY CODE NO. 6769

## 6769 SAYILI SINAİ MÜLKİYET KANUNU KAPSAMINDA "MAL VEYA HIZMETLERİN AYNILIĞI YA DA BENZERLİĞİ"

Dilara Naz GÜLÜM*

**Abstract:** A great majority of disputes arising from trademark law consist of infringement and invalidity cases of trademark rights. In both cases, it is examined whether the trademarks in dispute are identical or similar, the identity or similarity of the goods or services within the scope of the trademark and the likelihood of confusion. In terms of evaluating the similarity of the goods or services covered by the trademarks subject to comparison, there are no directly accepted criteria in the legal regulations regarding trademark law. For this reason, within the scope of this study, it has been attempted to explain the criteria by which the relevant evaluation can be made in line with the decisions of the Court of Cassation and the Court of Justice of the European Union, the views of the doctrine and the principles set forth in practice.

**Keywords:** Intellectual Property, Industrial Property, Trademark Law, Similar Product, Likelihood of Confusion

Özet**:** Marka hukukundan doğan uyuşmazlıkların büyük **çoğunluğunu** marka hakkına tecavüz ve hükümsüzlük davaları oluşturmaktadır. Her iki dava kapsamında da uyuşmazlığa konu markaların aynı ya da benzer olup olmadığı, markanın kapsamındaki mal veya hizmetlerin aynılığı ya da benzerliği ve karıştırılma ihtimalinin varlığı irdelenmektedir. Karşılaştırmaya konu markaların kapsadığı mal ya da hizmetlerin benzerliğinin değerlendirilmesi noktasında, marka hukukuna ilişkin hukuki düzenlemelerde doğrudan kabul edilen **ölçütler** söz konusu değildir. Bu nedenle, bu **çalışma** kapsamında ilgili değerlendirmenin hangi **ölçütlerle** gerçekleştirilebileceğine Yargıtay ve Avrupa Birliği Adalet Divanı kararları, doktrinin görüşleri ve uygulamada ortaya konulan ilkeler doğrultusunda açıklama getirilmeye **çalışılmıştır**.

**Anahtar Kelimeler:** Fikri Mülkiyet, Sınai Mülkiyet, Marka Hukuku, Benzer **Ürün**, Karıştırılma **İhtimali**

* Attorney at Law, Ankara University Social Sciences Institute, Department of Private Law, PhD Candidate, dilaranazgulum@gmail.com, ORCID: 0000-0002-4804-5318

## INTRODUCTION

In the Industrial Property Code No. 6769,[1] as[2] in the Decree-Law No. 556 on the Protection of Trademarks,[3] provisions are introduced to protect the rights of prior holders who have applied for or registered their trademarks. Within this scope, if the registration of an identical or indistinguishably similar trademark for identical/similar goods/services is requested, the Turkish Patent and Trademark Office[4] has the authority to reject the application ex officio.[5] Additionally, if the registration of an identical/similar trademark for identical/similar goods/services is requested, the previous applicant/trademark holder is granted the opportunity to raise an objection.[6]

As the relative ground for refusal regulated in Article 6/1 of the IPC is also stated as a ground for invalidity in Article 25/1 of the same law, the concepts of "identical/similar trademark," "identical/similar goods/services," and "likelihood of confusion" are essential terms that need to be discussed due to the crucial role in shaping the practice.[7] The subject of our study, "identity/similarity of goods/services," has frequently been interpreted in legal doctrine and court decisions. However, within the scope of legal regulations in the context of trademark law, how this concept will be precisely defined remains uncertain.

Within the scope of our study, we will primarily focus on the position and importance of goods/services identity/similarity in Turkish legal system, along with its connection to the likelihood of confusion. Following that, we will attempt to explain the method depending the degree of similarity and the role of the classification system in determining identity/similarity. Finally, the study will

---

1 OJ, D. 10.01.2017, N. 29944. Throughout the remainder of the study, "IPC" will be used as a brief reference.

2 OJ, D. 27.06.1995, N. 22326. Throughout the remainder of the study, "Decree-Law No. 556" will be used as a brief reference.

3 Decree-Law No. 556, Art. 8/1-a, Art. 8/1-b, and Art. 42/1-b.

4 Throughout the remainder of the study, "TURKPATENT" will be used as a brief reference.

5 IPC Art. 5/1-ç.

6 IPC Art 6/1.

7 The relevant concepts have been evaluated in both doctrine and judicial decisions during the period of Decree-Law No. 556; however, the topic still maintains its significance.

include discussions on the supplementary methods utilized by industrial property registration offices to determine the similarity of goods/services, along with the criteria set forth by judicial decisions and legal doctrine in this context.

## I. IDENTITY/SIMILARITY OF GOODS/SERVICES UNDER THE TURKISH LAW

In accordance with Article 4 of IPC No. 6769, a trademark ensures the distinction of goods or services of one enterprise from those of another enterprise. This matter is closely related to the origin indicating function of the trademark. The origin indicating function of a trademark is legally protected as its fundamental role. Through this function, even if the consumer is not familiar with the enterprise, the relevant public relies on the enterprise and associates the product with it. Therefore, trademarks are assigned the duty to prevent the public from being misled about the origin of the product offered.[8] In the *Copad/Dior* case, the Court of Justice of the European Union emphasized this point in its ruling, stating, "*…it must be borne in mind that, according to settled case-law, the essential function of a trade mark is to guarantee the identity of the origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish those goods or services from others which have another origin*."[9]

The issue of similarity of goods/services within the scope of Article 6/1 of the IPC, which constitutes the subject of our study, is closely related to the likelihood of confusion by the relevant public to which the product is addressed. In this context, when the registration of a trademark for identical/similar goods/services that have previously been applied for or registered in the name of another party is prevented, it also serves the purpose of fulfilling the origin indicating function.

---

8 Sevilay Uzunallı, "Marka Hukukunda Malların ve/veya Hizmetlerin Benzerliğinin Tespiti Sorunu (Problem of Determining Similarity of Goods and/or Services in Trademark Law)", *Prof. Dr. Hamdi Yasaman'a Armağan*, Istanbul, 2017, p. 680.

9 Court of Justice of the European Union (CJEU), D. 29.09.1998, C-39/97, Canon Kabushiki Kaisha v. Metro-Goldwyn Mayer Inc., para. 28 (curia.europa.eu, Last accessed: 06.06.2021).

### A. Importance of Determining Identity or Similarity of Goods/ Services

Pursuant to the trademark legislation, significance is attributed to the situation where an application is filed for an identical/similar sign for identical/similar goods/services as a trademark that has previously been applied for or registered by someone else. This matter has been addressed within the scope of both Article 5/1-ç, which is an absolute ground for refusal, and Article 6/1, which is a relative ground for refusal, of the IPC.

In accordance with Article 5/1-ç of the IPC, trademarks that consist of *"identical or indistinguishably similar signs to trademarks that have been registered or applied for registration for the same or similar goods or services"* will be rejected ex-officio by TURKPATENT. The legislator has regulated the refusal of applications that contain signs identical or indistinguishably similar to trademarks owned by earlier applicants and covering identical or similar goods/services. In this case, when a trademark application is submitted to TURKPATENT, the examiner that is responsible for conducting the examination of absolute grounds for refusal will need to determine whether the goods or services are identical or of the same type.

The first paragraph of Article 6 of the IPC, which regulates the grounds for opposition against the publication of a trademark application, states that;

*"If a trademark application is likely to be confused with a registered or previously applied-for trademark due to its identity or similarity to such trademark and identity or similarity of the goods or services covered, including the likelihood of association by the public with the registered or previously applied-for trademark, the application shall be refused upon opposition."* In accordance with this provision, the rejection of a trademark application will only occur if, upon opposition, it is determined that the goods or services are identical or similar provided that other conditions are also met.

The determination of similarity of goods/services is also significant for the fundamental aspects of trademark law, namely invalidity

and infringement actions.[10] This is because, in cases of reasons of trademark invalidity as stipulated in Article 25/1 of the IPC, the presence of the grounds specified in Article 5 or 6 of the IPC is sought. Therefore, if a trademark has been registered despite the existence of a ground for refusal by TURKPATENT, an action for invalidation can be initiated, and within the scope of the case, the determination of identity/similarity of goods/services will be necessary. Similarly, the use of an unregistered trademark that may lead to confusion with a registered trademark constitutes an infringement of trademark rights under Article 29/1-a of the IPC (due to the reference to Article 7 of the IPC). Consequently, actions for declaratory judgment, prevention of infringement, cessation of infringing activities, prohibition of infringement, and claims for compensation can be filed as stipulated in Article 149/1 of the IPC.[11] In this case, undoubtedly, the determination of similarity of goods/services will also be necessary. However, making such determination, especially in terms of the "similarity" of goods/services, is quite challenging.[12] In the subsequent sections of the study, solutions developed by doctrine and practice on how to overcome this difficulty will be explained.

### Relationship Between Similarity of Goods/Services and Likelihood of Confusion

Determination of whether goods and services are similar or not holds significance in the context of likelihood of confusion, as it plays a crucial role in determining the point at which similarity of goods and services might lead to confusion. The common consensus is that the presence of a likelihood of confusion depends on the prerequisite of the similarity of goods/services.[13] This conclusion is also evident from the explicit provision of Article 6/1 of the IPC. Moreover, under the IPC, the registration of a trademark for goods/services different

10 Ali Paslı, Marka Hukukunda Ürün Benzerliği (Product Similarity in Trademark Law), Istanbul 2018, p. 2.

11 Uzunallı, p. 676.

12 Paslı, p. 2; Uzunallı, p. 678.

13 Paslı, p. 6; Uzunallı, p. 678; TURKPATENT 2021 Trademark Examination Guideline, p. 383 (https://www.turkpatent.gov.tr/TURKPATENT/resources/temp/CFF1AE84-9563-42D6-BC18-1EF3597D01CC.pdf, Last accessed: 17.10.2021). Throughout the remainder of the study, "2021 Guideline" will be used as a brief reference.

from those within the scope of a previously registered or an applied-for trademark has not been prohibited, with the exception of well-known trademarks. Therefore, in the assessment made regarding the existence of a likelihood of confusion under Article 6/1 of the IPC, it is essential to determine primarily whether the goods/services are similar. However, the presence of similarity of goods/services does not necessarily imply the presence of a likelihood of confusion in all cases.[14]

There are different views in doctrine regarding how the likelihood of confusion in the examination of similarity of goods and services will be addressed. According to one perspective, the likelihood of confusion should be analyzed in two stages.[15] First, the determination of the similarity of goods/services should be made, and then the criteria of similarity between the signs and their distinctive character should be examined. Because if there is no similarity of goods/services, the likelihood of confusion will also be eliminated.[16] According to authors with opposing views, it has been argued that the likelihood of confusion should be evaluated in a single stage, taking all elements into account collectively.[17] According to Paslı, who supports this view, similarity of the signs and distinctive character of the trademarks should be considered to determine the likelihood of confusion. In this context, (as indirectly indicated in the *Sabel-Puma* decision[18] by the European Court of Justice), the higher the distinctive character of a trademark is in terms of its signification, the broader the scope of evaluation should be for identifying similar goods and services within the scope of protection of the trademark.[19] Similarly, the author states that as the degree of similarity between the elements constituting the trademarks increases, the likelihood of similarity between the products will also

14 Paslı, p. 6.
15 Uğur Çolak, Türk Marka Hukuku (Turkish Trademark Law), 4th Edition, Istanbul 2018, p. 200; Uzunallı, p. 677.
16 Uzunallı, p. 677.
17 Hanife Dirikkan, Tanınmış Markanın Korunması (Protection of Well-Known Trademarks), Ankara 2003, p. 191; Canan Küçükali, Marka Hukukunda Karıştırma Tehlikesi (Likelihood of Confusion in Trademark Law), Ankara 2009, p. 107.
18 CJEU, D. 11.11.1997, C-251/95, Sabel v. Puma, Rudolf Dassler Sport (ipcuria.eu, Last accessed: 06.06.2021).
19 Paslı, p. 61.

increase.[20] According to Arkan, when different goods/services are involved in assessing the existence of a likelihood of confusion, the risk of confusion diminishes, and there is no need for a high degree of distinctiveness.[21]

In the 2021 Trademark Examination Guideline published by TURKPATENT, it is indicated that the examination of similarity of goods/services will be conducted independently of the degree of similarity between the trademarks and the distinctiveness of the earlier trademark.[22]

In our view, while both the similarity of signs and the similarity of goods/services elements are necessary in terms of the presence of a likelihood of confusion[23], it is primarily essential to evaluate whether the goods/services are similar. As mentioned, with the exception of well-known trademarks, the registration of a previously registered trademark for different goods/services is possible under Turkish law. Therefore, we agree with the perspective that the similarity of goods/services and the similarity of the signs should be independently assessed. In the event of finding similarity between goods/services, we believe that the similarity of the sign and its high distinctiveness will increase the likelihood of confusion.

## II. THE DEGREE OF SIMILARITY AND THE CLASSIFICATION SYSTEM

### A. The Role of Nice Classification in Determining the Similarity of Goods/Services

In accordance with Article 11/3 of the IPC, the goods or services subject to trademark applications are classified according to the Nice Agreement concerning the International Classification of Goods and

---

20 Paslı, p. 60.

21 Sabih Arkan, Marka Hukuku (Trademark Law), Vol. 1, Ankara 1997, p. 98. See also. Dilek İmirlioğlu, Marka Hukukunda Ayırt Edicilik ve Markanın Ayırt Ediciliğinin Zedelenmesi (Distinctiveness in Trademark Law and Dilution of Trademark Distinctiveness), 2nd Edition, Ankara 2018, p. 164.

22 2021 Guideline, p. 384.

23 Court of Cassation 11th Civil Chamber, D. 22.01.2015, Case No. 2014/15360, Judgment No. 2015/865 (Kazancı Case Law Database, Last Access Date: 06.06.2021).

Services for the Purposes of the Registration of Marks,[24] to which Türkiye is a party. The Nice classification has been prepared with the aim of preventing issues arising from the lack of classification of goods and services during the registration, examination, publication of trademarks, and other relevant stages, as well as implementing a standardized classification system on an international scale. [25]

Nice classification consists of 34 classes for goods and 11 classes for services. Each class is organized to group similar goods or services under the same category.[26] TURKPATENT has published the Communiqué on Classification of Goods and Services for Trademark Applications[27] in accordance with the Nice Agreement. In the list established by the Communiqué on Classification, certain groups are organized under general headings, and it is accepted that the general heading covers all goods/services falling within its scope and within the relevant Nice class (Communiqué on Classification, Article 3/2). Since it is not possible for all goods/services to be included in the list determined by the said Communiqué, Article 3/3 of the Communiqué on Classification states that:

*"If goods or services that do not fall within the scope of any general heading and are not mentioned in the list are included in a trademark registration application, then such goods or services will be evaluated within the same scope as the goods or services listed in the same Nice class that have similar nature, function, or purpose."*

The sole obligation that the Nice Agreement imposes on the national offices of member countries is to include the Nice class to which the trademark pertains in the documents prepared and in the publications

---

24 "Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks" (https://wipolex.wipo.int/en/text/287437, Last accessed: 06.06.2021). Throughout the remainder of the study, "Nice Agreement" will be used as a brief reference. The classification system accepted under the agreement will be referred to as the "Nice Classification."

25 Önder Erol Ünsal, "Markaların Tescili Konusunda Uluslararası Nis ve Viyana Sınıflandırmaları: Amaç, İşleyiş ve Uygulamaya İlişkin Değerlendirmeler (International Nice and Vienna Classifications on Trademark Registration: Assessments Regarding Purpose, Functioning, and Implementation)", Turkish Patent Institute Expertise Thesis, Ankara 2001, p. 5.

26 Ünsal, p. 19.

27 OJ, D. 30.12.2016, N. 29934. Throughout the remainder of the study, " Communiqué on Clasification" will be used as a brief reference.

made for the trademark.[28] In accordance with the first paragraph of Article 2 of the said Agreement, the classification does not have a binding effect on the assessment of the scope of protection afforded to any registered trademark. The second paragraph of the same article specifies that each state has the right to use the classification system provided by the Nice Agreement as the main system or as an auxiliary system.

At this point, it is beneficial to evaluate the binding nature of the Nice classification system in relation to the issue of the similarity of goods/services. In this context, two questions come to mind. Firstly, what role will the classification system play in the assessment of similarity when an objection is raised upon the publication of a trademark application submitted to TURKPATENT for registration? Secondly, what role does the classification system play in the assessment of similarity of goods/services that courts will undertake in cases brought before them?

Article 11/4 of the IPC stipulates that *"The fact that goods or services are in the same classes shall not be inferred as indicating their similarity, and the fact that they are in different classes shall not be inferred as indicating their dissimilarity."* Article 24 of Decree-Law No. 556 also specifies that the classification of goods and services was intended for the purpose of trademark registration. In this context, legal doctrine expresses that attributing a power to the classification system beyond the function of registration would not be accurate.[29]

In its 2007 *CASA* decision, the Court of Cassation stated that the Nice classification is not binding.[30] In the light of these statements and precedents, it can be argued that in the evaluation of similarity of goods/services within the specific context of a court case, there is no obligation to interpret that the absence of the same Nice classes implies the absence of similar goods/services. In summary, although the Communiqué on Classification issued by TURKPATENT can be

28 Ünsal, p. 5.

29 Çolak, p. 212; Paslı, p. 31; Ünal Tekinalp, Fikri Mülkiyet Hukuku (Intellectual Property Law), 5th Edition, Istanbul 2012, p. 442; Uzunallı, p. 682, 683.

30 Court of Cassation 11th Civil Chamber, D. 05.02.2007, Case No. 2005/13645, Judgment No. 2007/1319. See also. Court of Cassation 11th Civil Chamber, D. 27.04.2015, Case No. 2015/865, Judgment No. 2015/5841 (Kazancı Case Law Database, Last accessed: 06.06.2021).

taken into consideration by the court, it does not possess a binding authority.[31]

Answering the first question requires explaining the degree of similarity between goods/services within the scope of positive law regulations and establishing its connection with the Nice classification.

### B. The Degree of Similarity Between Goods/Services

In the IPC, a registered trademark is protected not only for the goods/services it covers, but also for similar goods/services. The use of an identical or similar sign, even for similar goods/services, constitutes a ground for refusal of registration, invalidity, and infringement.[32] In this regard, it would be beneficial to provide clarification in the relevant articles of the IPC regarding the terminology "identical/same type/similar goods or services."

#### 1. The Concept of Identical Goods/Services

According to Article 5/1-ç of the IPC, the registration of a trademark that contains an identical or indistinguishably similar sign to a previously registered or an applied-for trademark for identical/same type goods or services must be refused ex officio. Under Article 6/1 of the IPC, the request for registration of an identical/similar trademark with an earlier trademark for identical/similar goods or services will be refused upon opposition if there is a likelihood of confusion. Based on these provisions, the registration of the identical trademark for identical/similar goods or services is envisaged as both an absolute and a relative ground for refusal.[33]

In the case of identical goods/services, there will be no ambiguity, and it will be implied that the goods or services listed in the registration certificate are identical. However, determining what constitutes the "same type" of goods or services is not straightforward, as neither

---

31 Çolak, p. 211.

32 Paslı, p. 23.

33 Under the Decree-Law No. 556, the mentioned ground for refusal was regulated both in Article 7 concerning absolute grounds for refusal and in the subparagraph (a) of the first paragraph of Article 8 concerning relative grounds for refusal. It has been argued that considering the same reason as both an absolute and a relative ground for refusal is not accurate. See. Arkan, p. 75.

Decree-Law No. 556 nor the IPC No. 6769 defines it.[34] In Article 3/4 of the Communiqué on Classification, it is stipulated that for determining the same type of goods or services, the groups listed in the annex of the Communiqué will be taken into account. However, it is also mentioned that during the application for registration or objection stages, TURKPATENT can evaluate these groups in a narrower or broader manner to include different groups of goods or services when determining the same type of goods or services.

Although it may be stated that minor differences in the signs do not eliminate identity, this does not apply to goods or services.[35] The issue may only arise when the goods or services are not identical in wording.[36] According to Article 9/2 of the Regulation on the Implementation of the Industrial Property Code[37], it is required that the goods/services for which trademark registration is sought be presented by categorizing them into Nice classes and indicating the class numbers of the goods/services. However, in the following paragraph, it is stated that if the applicant uses general terms or expressions that need clarification by TURKPATENT, a two-month period will be granted. Therefore, as long as it is in accordance with the Nice classification, the person applying for a trademark can specify the goods and services using their own phrasing. As a result, identical goods/services can be expressed in different ways.[38] Furthermore, according to the 2021 Guideline, in cases where identical goods/services have multiple names or where the usage in the market is different from the technical/scientific/literary name or where the name in a foreign language has been adopted into Turkish, even if the goods/services are expressed differently, they will be considered as identical.[39]

In some cases, even if products are expressed in the same manner, they might be considered different based on their intended use.[40] As

34 Savaş Bozbel, Fikri Mülkiyet Hukuku (Intellectual Property Law), Istanbul 2015, p. 383.
35 Yasaman Hamdi/Altay Sıtkı Anlam/Ayoğlu Tolga/Yusufoğlu Fülürya/Yüksel Sinan, Marka Hukuku 556 Sayılı KHK Şerhi (Commentary on Decree-Law No. 556 on Trademark Law), Vol. 1, Istanbul 2004, p. 228.
36 Paslı, p. 50.
37 OJ, D. 24.04.2017, N. 30047.
38 Paslı, p. 51.
39 2021 Guideline, p. 392.
40 Paslı, p. 52.

exemplified in the European Union Intellectual Property Office's[41] Guidelines for Examination of the European Union Trademarks, in class 9, the application for "laser" is intended for industrial use, while the application for "laser" in class 10 is for medical purposes.[42] In this scenario, the products would be considered different due to their distinct intended uses.

According to Part C, Section 2, Chapter 2, Paragraph 2.3.2 of the EUIPO Examination Guidelines, "*If the goods/services designated in the earlier mark are covered by a general indication or broad category used in the contested mark, these goods/services must be considered identical since the Office cannot dissect ex officio the broad category of the applicant's/holder's goods/services.*" For example, if the earlier trademark pertains to marine vessel goods and the subsequent trademark application is for marine vehicles, the subsequent application will be considered as having been made for identical goods.[43] According to Part C, Section 2, Chapter 2, Paragraph 2.3.1 of the mentioned Guidelines, where the list of goods/services of the earlier right includes a general indication or a broad category that covers the goods/services of the subsequent application in their entirety, the goods/services will be considered as identical.[44]

The 2021 Guideline published by TURKPATENT also contains provisions parallel to the EUIPO Examination Guidelines regarding the presence of explanatory and specific expressions related to the content. According to the 2021 Guideline, if a general expression is followed by the word "especially," it is accepted that this expression is not limited to the goods/services that follow it, but also encompasses the general expression.[45] However, when a general expression is followed by the

---

41 European Union Intellectual Property Office (EUIPO).

42 EUIPO, Guidelines for Examination of the European Union Trademarks, Part C, Section 2, Chapter 2, para. 2.2 (https://guidelines.euipo.europa.eu/1922895/1923283/trade-mark-guidelines/1-introduction, Last accessed: 06.06.2021). Throughout the remainder of the study, "EUIPO Examination Guidelines" will be used as a brief reference.

43 Paslı, p. 53. According to the 2021 Guideline published by TURKPATENT, it has been indicated that in cases where a trademark is registered for specific goods or services, and a subsequent trademark application includes a general indication encompassing those goods or services, the said goods or services will be considered as identical. See. 2021 Guideline, p. 392.

44 See also. 2021 Guideline, p. 392.

45 The expressions "including," "particularly," and "mainly" are also phrases used

word "namely," it is acknowledged that this expression is limited to the goods and services that follow it. For example, the phrase "Toys, especially toys in the form of model airplanes" encompasses all toys, while the phrase "Electronic devices, namely portable music players" does not cover all electronic devices.[46]

In cases where the compared goods partially overlap, according to Part C, Section 2, Chapter 2, Paragraph 2.4 of the EUIPO Guidelines, if the separation of categories by the Office is not possible, they will be considered as the "identical goods/services." For instance, online banking services and commercial banking services intersect in terms of "online commercial banking services," and if it is not possible for the Office to separate them, they will be considered identical.

**2. Concept of Same Type of Goods/Services**

When the products under comparison are not identical, but categorizing them merely as "similar" is not sufficient due to the intensity of their degree of similarity, , then the term "same type" will be used.[47]

As mentioned before, according to the Communiqué on Classification Article 3/4, the groups listed in the annex of the Communiqué will be taken into consideration for determining the same type of goods/services. The Court of Cassation also states that goods and services within the same sub-group should be considered as the same type.[48] Therefore, for instance, disinfectant soaps and antibacterial hand lotions within the same sub-group belonging to Class 5 could be characterized as the "same type."

In trademark law, the core principle is to associate the sign with the product, and the classification system serves as a means to achieve this.[49] Therefore, automatically considering products within the same general category as "identical products" would not be accurate.

---

for illustrative purposes; therefore, in the evaluation of similarity of goods/services, the general wording should be taken as the basis. See. 2021 Guideline, p. 390

46 2021 Guideline, p. 220; EUIPO, Guidelines for Examination of European Union Trademarks, Part C, Section 2, Chapter 2, para. 2.3.2.

47 Paslı, p. 55, 56.

48 Court of Cassation 11th Civil Chamber, D. 16.01.2015, Case No. 2014/15359 Judgment No. 2015/503 (Kazancı Case Law Database, Last accessed: 06.06.2021).

49 Paslı, p. 57.

For example, although both white cheese and butter fall under the category of "dairy products (including butter)," they are not identical; however, they will be considered as "same type of goods/services."[50] In short, classification is not absolute.[51] As previously mentioned, Article 3/4 of the Communiqué on Classification states that TURKPATENT has the authority to interpret the groups more narrowly or more broadly during the examination of trademark applications or objections.[52] In legal doctrine, it has been argued that the specific regulation refers only to the provision of Decree-Law No. 556 Article 7/1-b (IPC Article 5/1-ç) and thus emphasizes that the classification established through the Communiqué serves the purpose of registration and is not related to determining the scope of protection for a trademark.[53]

### 3. The Concept of Similar Goods/Services

The concept of "similar goods/services" is not defined under the IPC, the Paris Convention for the Protection of Industrial Property,[54] or the Agreement on Trade-Related Aspects of Intellectual Property Rights.[55] The definition of "similar goods" is provided in Article 15/2-b of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994,[56] which Türkiye is a party to[57]

---

50 Paslı, p. 56.

51 İmirlioğlu, p. 151.

52 Öztek pointed out that according to the relevant regulation, goods or services falling within the same sub-group within a class would be considered as the "same type," and therefore, TURKPATENT should reserve the right to evaluate goods or services from different groups as "similar goods or services" rather than "the same type." See. Selçuk Öztek, "Türk Marka Hukukunda Benzer Mal ve Hizmet Kavramı (The Concept of Similar Goods and Services in Turkish Trademark Law)", *Prof. Dr. Turgut Akıntürk'e Armağan*, Istanbul 2008, p. 289.

53 Dirikkan, p. 183; Tekinalp, p. 442.

54 "Paris Convention for the Protection of Industrial Property" (https://wipolex.wipo.int/en/text/287556, Last accessed: 06.06.2021).

55 "Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)" (https://www.wto.org/english/docs_e/legal_e/27-trips.pdf, Last accessed: 06.06.2021).

56 OJ, D. 25.02.1994, N. 22213 (Bis).

57 "Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994", OJ, D. 26.05.1988, N. 19823. Throughout the remainder of the study, "GATT" will be used as a brief reference.

and has ratified.[58] In the relevant article, similar goods are defined as "*Goods that, while not identical in all respects, have similar characteristics and similar features that enable them to perform the same function and be commercially interchangeable.*"

In the 2015 TURKPATENT Trademark Examination Guideline, it was indicated that the term "similar goods and services" is referred to goods and services that could be subject to likelihood of confusion, assuming they come from the same/related origin by the relevant public. In this regard, related goods and services that can be assumed to originate from the same/related origin are also considered as similar goods and services.[59]

In this context, it is important to address the role of the Nice classification in determining similar goods/services. As mentioned, the Nice classification is not binding in the assessment of similarity conducted by the courts. However, for offices/institutions responsible for trademark registration, the EUIPO Examination Guidelines state that the Nice classification is purely administrative and cannot constitute the sole basis for determining the similarity of goods/services.[60] However, even though the Nice Agreement does not impose such a constraint, trademark offices during the registration process assign a significance to the Nice Agreement's classification system that goes beyond administrative and registration purposes.[61] Offices also utilize auxiliary methods in search for similarity, such as cross-searching and cross-classification, , but fundamentally conduct it within the scope of the mentioned classes and sub-groups.[62]

---

58 Paslı, p. 69

59 2015 TURKPATENT Trademark Examination Guideline, p. 119 (https://www.turkpatent.gov.tr/TURKPATENT/resources/temp/F9E4CFAF-A7AE-4FEA-8BCC-DA8B5C7DAB00.pdf, Son erişim tarihi: 17.10.2021). Throughout the remainder of the study, "2015 Guideline" will be used as a brief reference.

60 EUIPO, Guidelines for Examination of European Union Trademarks, Part C, Section 2, Chapter 2, para. 1.2.1.

61 Paslı, p. 36.

62 Ünsal, p. 6.

## III. DETERMINATION OF SIMILARITY OF GOODS/SERVICES

### A. Additional Methods Used by Registration Offices

#### 1. Cross-Classification

In searches conducted for earlier trademarks, it is possible that similar trademarks protecting similar goods and services may not appear in the search report due to differences in Nice classes. Cross-classification is a method devised to tackle this issue.[63] In this method, the office responsible for registration identifies classes containing goods/services that are considered similar to each other and compiles them in a list. When examining a trademark application in a certain class for similar goods/services, the examination is not limited to that specific class only; it is also carried out in the cross-classified class that has been matched.[64] After the search is conducted, experts examine the trademark in terms of cross-classified similar trademarks as well, and then make their decisions.

During the publication and registration process of applications, only the classes in which the application has been filed are mentioned in the documents or official records. Cross-classifications are for examination purposes only and are not included in any official publications or documents.[65] In some countries, the relevant cross-classification list is considered binding for the examining expert, while in others, it is regarded as a guiding reference for the expert.[66]

#### 2. Similarity Tool

The second auxiliary method used by trademark offices to determine the similarity goods/services is the "Similarity Tool,"[67] which is a computer program developed by the EUIPO.

---

63 Ünsal, p. 49.
64 Paslı, p. 36, 37.
65 Ünsal, p. 51.
66 For detailed information regarding the practices of trademark offices concerning cross-classification, see. Ünsal, p. 49 ff.
67 Similarity Tool (https://euipo.europa.eu/sim/searchList/search, Last accessed: 17.10.2021).

This program compares goods/services within the scope of the Nice classes and provides users with decisions related to the selected goods/services from the trademark offices of the WIPO, as well as the United States and the EU member states.[68] According to the EUIPO Examination Guidelines, the similarity tool serves to ensure uniformity in the application of similarity assessment and guarantees consistency in decisions.[69]

Within the scope of the EUIPO's Similarity Tool, the search conducted does not only produce results in terms of identity/similarity/difference, but also includes the reasoning behind these findings. The provided reasoning is based on the criteria outlined by the European Court of Justice in the *Canon* decision.[70] These criteria can be listed as follows:

1. Structure,
2. Purpose,
3. Method of use,
4. Complementarity of goods/services,
5. Competition between goods/services,
6. Distribution channels,
7. Relevant public,
8. Producer/supplier.

### 3. Applied Method of TURKPATENT

In the 2015 Guideline, it was stated that the following steps would be followed in the assessment of determining similar goods/services:[71]

Firstly, the signs contained in the trademarks would be considered "identical," and in this case, the question of whether the goods/services

---

68 Paslı, p. 37.

69 EUIPO, Guidelines for Examination of European Union Trademarks, Part C, Section 2, Chapter 2, para. 1.3.

70 CJEU, Canon Kabushiki Kaisha v. Metro-Goldwyn Mayer Inc., C-39/97, D. 29.09.1998 (ipcuria.eu, Last accessed: 06.06.2021).

71 2015 Guideline, p. 121.

should be evaluated as similar/related goods and services would be addressed to determine the likelihood of confusion. In this case;

a- If the answer is "definitely no," without the need for further examination, the goods and services would be considered dissimilar/unrelated to each other.

b- If the answer is "definitely yes," without the need for further examination, the goods and services would be considered similar/related to each other.

c- If the answer indicates that there is a low/moderate level of similarity or an indirect relationship between the goods and services, then the possibility of confusion would be assessed through additional tests. In applying these additional tests, the specific circumstances of each case would be taken into account, and all relevant factors affecting the dispute would be considered.

However, in the 2021 Guideline, there is no mention of such a step-by-step evaluation, and instead, the criteria set out by the European Court of Justice in the *Canon* case regarding the examination of similarity of goods/services are included. After listing these criteria, it is indicated that the criteria common to the goods/services will be identified, and based on this determination, a decision regarding the level of similarity will be made.[72] According to the 2021 Guideline, the classification of the degree of similarity of goods/services will be done in five separate categories, which are as follows:

1. Different (goods/services that are not identical or similar),
2. Low level of similarity goods/services,
3. Similar (average level of similarity) goods/services,
4. High level of similarity goods/services,
5. Identical goods/services.[73]

---

72 2021 Guideline, p. 394.
73 2021 Guideline, p. 394.

### B. Criteria Used in Determining the Similarity of Goods/ Services

The assessment of the similarity of goods/services should be carried out based on consistent, transparent, and predictable criteria.[74] It is evident that the definition of similar goods/services under the GATT can only serve as an indirect source in trademark law practice.[75] Therefore, it would be beneficial to address the various criteria presented in the 2021 Guidelines, as well as in legal doctrine and judicial decisions, regarding how the concept of similar goods/ services can be interpreted.

According to Uzunallı, the similarity of goods/services should be determined based on the perspective of the relevant public, regardless of other factors to be considered in assessing the likelihood of confusion. The relevant public refers to average consumers, and the level of attention and perception of an average consumer can vary based on the nature, type, and price of the goods or services in question.[76]

According to principles in practice, doctrine, and general understandings, the similarity or associable nature of goods and services can arise in the following situations:

- Similarity in the nature of goods and services,
- Similarity in the purposes and fields of use of goods and services,
- Similarity in the relevant public of goods and services,
- Similarity in the physical appearance of goods,
- Similarity in the sales channels/places of goods and services,
- Similarity arising from the goods and services of the same origin,

74 Uzunallı, p. 679. The Court of Cassation stated that the determination of similarity of goods/services is a matter that cannot be resolved solely by the judge's general and professional knowledge, and expert examination is necessary. See. Court of Cassation 11th Civil Chamber, D. 15.10.2009, Case No. 2008/5938, Judgment No. 2009/10605 (Çolak, p. 224). See also. Court of Cassation 11th Civil Chamber, D. 07.07.2011, Case No. 2009/8446, Judgment No. 2011/8433; Court of Cassation 11th Civil Chamber, D. 18.12.2017, Case No. 2016/5668, Judgment No. 2017/7320; Court of Cassation 11th Civil Chamber, D. 12.07.2018, Case No. 2016/11784, Judgment No. 2018/5059 (Kazancı Case Law Database, Last accessed: 06.06.2021).

75 Paslı, p. 70.

76 Uzunallı, p. 684.

- Similarity arising from the competitive nature of goods and services,
- Similarity arising from the complementary nature of goods and services.

### 1. The Emergence of the Criteria

Following the tradition of case law, the United Kingdom is a pioneer in determining similarity criteria. The *Jellinek* test, developed in the *Jellinek* application in 1946 and subsequently applied with some modifications, is based on three fundamental questions:[77]

- What is the structure and composition of the products?
- What are the relevant areas of use for the products?
- What are the trade channels for buying and selling the products?
- In the *British Sugar*[78] case, while these three questions are fundamental, answers to the following questions have also been sought:[79]
- Are the products sold on the same shelves in supermarkets?
- Do the products compete? How are they commercially classified?

The questions mentioned above continue to remain pertinent in today's context when determining similarity.

### 2. List of Applicable Criteria

#### a. Nature of Goods/Services

The nature of goods/services is determined by considering the fundamental characteristics and qualities of the goods/services. In this determination, elements such as the components of the good, its operational principles, and its physical form are taken into account.[80] The nature of services, on the other hand, is determined based on the type of action provided to third parties. For instance, cinema and

77 Paslı, p. 70.
78 British Sugar Plc. v. James Robertson & Sons Ltd. (1996) (http://www.peteryu.com/intip_msu/britishsugar.pdf, Last acessed: 05.06.2021).
79 Paslı, p. 70.
80 2021 Guideline, p. 396.

theater services are both considered entertainment services within the scope of the 2021 Guideline due to their shared nature as forms of entertainment.[81]

**b. Purpose/Field of Use**

The concept of purpose or field of use pertains to the specific manner in which products are utilized, the domain in which they are employed, and the intended purposes they serve. It is worth noting that as the alignment between the intended purposes and fields of use of products becomes closer, the probability of similarity between these products also increases. The likelihood of such similarity does not necessarily mean that the products share same physical attributes or raw materials.[82] What is significant is that the intended purposes of the products bear a substantial resemblance to one another.[83] The Court of Cassation has indicated that, in view of the protective nature of the provisions of the Decree-Law No. 556, the concept of identical or similar goods/services should be interpreted broadly, and the trademark's protective function should extend to all other goods or services *fulfilling a similar function* in the perception of customers.[84]

Moreover, within this criterion, in order for two products to be deemed similar, aside from the similarity in their intended purpose of use, it will also be required that their methods of attaining such purpose do not substantially differ from one another. For instance, products such as "waterproof coat" and "umbrella," both designed to prevent users from getting wet, cannot be considered as similar. This is because the methods by which these products achieve their intended purpose are distinct, resulting in a low likelihood of association between the two.[85]

---

81 2021 Guideline, p. 397.

82 Paslı, p. 73.

83 Paslı, p. 74.

84 Court of Cassation 11th Civil Chamber, D. 27.04.2015, Case No. 2015/865, Judgment No. 2015/5841 (Kazancı Case Law Database, Last accessed: 06.06.2021). The use of the term "broad interpretation" in the decision is considered as problematic from a technical standpoint, see. Paslı, p. 74, fn. 180.

85 Phillips Jeremy, Trademark Law: A Practical Anatomy, New York 2005, p. 336 (As cited in Paslı, p. 75.).

**c. Relevant Public**

The relevant public can encompass a broad range, including the general public, a specific segment of the public, or even a professional community.[86] The intended purpose of a product also plays a role in defining the relevant public it addresses, thus these two criteria are intertwined with each other.[87] On the other hand, despite functional differences, products can still be considered as similar due to catering to the same relevant public. For instance, even though products in Class 20, such as "fishing baskets", and products in Class 22, such as "fishing nets," as well as products in Class 28, such as "artificial fishing baits, traps for hunting and fishing", may have distinct usage methods, they share the same relevant public due to their relevance to the field of fishing.[88]

According to Article 6/1 of the IPC, the criterion used to determine the likelihood of confusion is the "public." The term "public" refers to the relevant public to which the examined goods/services are addressed.[89] In cases where the relevant public is the "general public" in a broad sense, TURKPATENT acknowledges that the relevant criterion has no impact on the assessment of similarity.[90]

**d. Physical Appearance**

It is unlikely that products would result in confusion solely based on their physical appearance. The primary consideration lies in the potential for the relevant public to establish a connection between the products due to their physical similarity.[91] In the absence of other criteria, it becomes considerably challenging for similarity to arise solely due to the physical appearance.

---

86 EUIPO, Guidelines for Examination of European Union Trademarks, Part C, Section 2, Chapter 2, para. 3.2.7.
87 Paslı, p. 77.
88 Paslı, p. 78. For other examples of goods/services that are similar despite being in different Nice classes, see. Ünsal, p. 48, 49.
89 Uzunallı, p. 684.
90 2021 Guideline, p. 406.
91 Paslı, p. 79.

**e. Sales Channels/Places**

In the context of similarity of sales channels/places, the crucial aspect to emphasize is when the products are sold in the same type of shops, side by side or very closely, on the same shelf or display.[92] Sales, advertising, and promotional methods, on the other hand, do not hold significant power for determination of similarity.[93] In the EUIPO Examination Guidelines, it is emphasized that the decisive factor is the presentation of products in the same section rather than their mere presence in the same store. The fact that products are sold in different places can indicate that the products are not similar. For example, even though both bicycles and wheelchairs are classified in the Class 12, they would not be considered as similar because they would not be sold in the same place.[94]

In the 2021 Guideline, it is stated that if goods are delivered through the same distribution channel, it is presumed by the relevant public that they are produced by the same enterprise. Therefore, it is stated that this criterion affects the assessment of similarity.[95] However, as also indicated in the 2021 Guideline, in today's context, supermarkets sell a wide variety of goods, and therefore, the relevant public is aware that products sold in such places come from different enterprises.[96] We are of the opinion that the relevant criterion impacts similarity regardless of the impression that the goods emanate from the same origin.

92 Ünsal, p. 38.
93 Paslı, p. 84.
94 EUIPO, Guidelines for Examination of European Union Trademarks, Part C, Section 2, Chapter 2, para. 3.2.6. Paslı has indicated that the relevant goods are distinguished based on other factors such as function, relevant public, structure, substitutability; thus, even if they are sold in the same type of store, they will not be considered as similar. See. Paslı, p. 84, fn. 217.
95 2021 Guideline, p. 404.
96 2021 Guideline, p. 405. The Guideline mentions that in cases where certain types of goods are exclusively (or predominantly) found and sold in specialized stores focusing on a particular area, it can be perceived that the goods originate from the same business, thus this criterion can be used in the assessment. In our opinion, in today's context, the perception has arisen that even in specialized stores that exclusively sell a particular type of goods, products from different origins can be sold. Therefore, it is necessary to separately evaluate the criteria of having a similar origin and the similarity of sales channels/places.

**f. Origin of Goods/Services**

The EUIPO Examination Guidelines indicate that the attribution of similarity may arise from the goods/services emanating from the same origin. The EUIPO bases its approach on the statement of the Court of Justice of the European Union in the *Canon* case, which indicates that there is a likelihood of confusion when there is a perception in the public that goods/services originate from the same undertaking or from economically connected undertakings. In this context, the relevant Guide specifies that this criterion should be evaluated in conjunction with all other criteria. It is emphasized that the term "source" does not solely refer to the producer, but rather whoever controls the production of the goods or the provision of the service. Furthermore, the criterion must be applied restrictively, and its significance diminishes in cases where all goods/services are provided under the control of a holding company or an international corporation.[97]

In legal doctrine, Uzunallı has also contended that in cases where different goods are manufactured by the same enterprise, such goods should not be deemed as similar. It is underscored that relying solely on this criterion will not suffice to classify goods as similar.[98] Paslı also emphasizes that the similarity of goods should not solely be determined by the fact that they are produced by the same enterprise. Paslı indicates that the relevant criterion is associated with goods being manufactured from the same raw material or as a result of the same production process.[99]

**g. The Relationship Between Goods/Services**

The fact that the compared goods/services complement each other, can be substituted for one another, or can compete with each other establishes a connection between the products and renders them similar.

If the goods/services under comparison can be substituted for each other and perform the same function, they are deemed "interchangeable," consequently placing these goods/services "in

97 EUIPO, Guidelines for Examination of European Union Trademarks, Part C, Section 2, Chapter 2, para. 3.2.8.
98 Uzunallı, p. 687.
99 Paslı, p. 80.

competition" with each other.[100] As an illustration, wall paint and wallpaper can be deemed substitutable and similar due to their shared purpose of wall decoration through coverage. Likewise, movie rental services and the cinematography offer comparable avenues of entertainment, rendering them substitutable and consequently engendering competition between the two.[101] In its verdict dated January 14, 2015, the Court of Cassation ruled that the defendant company's application, encompassing "production services for films, television, and radio programs" in Class 41, was potentially confusing with the plaintiff's trademarks due to the similarity in the relevant public, production and distribution channels, as well as sales points of the goods within the scope of the plaintiff's trademarks. Furthermore, it was stated that the likelihood of confusion, including the possibility of creating an association, existed because the signs were similar and *could be substituted for one another*.[102]

Due to the complementary nature of goods/services that have different functions and usage patterns and are not in competition with each other, they can be considered as similar. For instance, due to the complementary nature of a suit and shoes designed for men, these goods could potentially share similar customer bases and sales channels.[103] In its decision[104] dated November 2, 2010, the Court of Cassation ruled that items such as bags, suitcases, wallets, and umbrellas in Class 18, which are complementary auxiliary accessories to the "clothing" covered by the plaintiff's registered trademark in Classes 24 and 25, were considered as similar due to their complementary nature and being sold together with clothing in stores.

**h. Evaluation of Similarity within Subgroup 35.05**

Under the Communiqué on Classification published by TURKPATENT, sub-group 35.05 under Class 35 is as follows:

---

100 Paslı, p. 87.

101 EUIPO, Guidelines for Examination of European Union Trademarks, Part C, Section 2, Chapter 2, para. 3.2.5.

102 Court of Cassation 11th Civil Chamber, D. 14.01.2015, Case No. 2014/14409, Judgment No. 2015/269 (Kazancı Case Law Database, Last accessed: 06.06.2021).

103 Paslı, p. 90.

104 Court of Cassation 11th Civil Chamber, D. 02.11.2010, Case No. 2009/825, Judgment No. 2010/11154 (Lexpera, Last accessed: 06.06.2021).

"Bringing together of goods* for customers to conveniently view and purchase (said services can be provided through retail, wholesale stores, electronic platforms, catalogs, and other similar methods).

*Specify the goods or group of goods in this section."

The relevant sub-group is designated as retail (merchandising) service and can be defined as services encompassing the sale of products as well as services broader than sales.[105]

In this context, when evaluating the similarity of goods specified or to be specified within the scope of sub-group 5 of Class 35, the question arises whether there is a likelihood of similarity with an application/ registration made on behalf of another party for the same Nice class that the specified goods are included.

Prior to the amendment made in 2011, due to the absence of specification regarding the sale of which goods or services would fall under the scope of the application within the relevant sub-group, it was not clear in which good classes the registration of identical or similar trademark on behalf of another party could be prevented.[106]

Besides, the absence of clarity regarding the scope of the sub-group led individuals who had registered a trademark for use on any goods to also seek registration within Class 35 for the purpose of their sales.[107] In this context, in the booklet titled "Information and Required Documents Regarding the Preparation of Trademark and Geographical Indication Applications" published by TURKPATENT in September 2004, it was stated that;

---

105 Fülürya Yusufoğlu, "Perakendecilik Hizmeti Sınıfı (35.05. Sınıf) ile Ürün Sınıfı Arasındaki İlişkilerin Marka Hukukundaki Etkisi [The Impact of the Relationship Between Retail Services Class (Class 35.05) and Product Classes in Trademark Law]", *GÜHFD*, 2018, Vol. 17, I. 1, p. 338.

106 Deniz Topçu, "Marka Sınıflandırmasında 35. Sınıf İçeriğinin Perakende Satış Hizmetleri Alt Grubu Açısından Sağladığı Koruma (The Protection Provided by the Content of Class 35 in Trademark Classification for the Sub-group of Retail Services)", *IJOSPER*, 2020, C. 7, S. 4, p. 911.

107 Ali Paslı/İsmail Cem Soykan, "Marka Tescilinde 35.08. Sınıfın Anlamı ve Kapsamı (The Meaning and Scope of Class 35.08 in Trademark Registration)", *Fikri Mülkiyet Hukuku Yıllığı*, C. 2, Istanbul 2010, p. 450.

*"...businesses producing the goods defined in classes 01 to 34 are not required to register them separately in class 35.08 (currently 35.05), assuming that they naturally sell the goods they produce."* [108]

Paslı/Soykan has also emphasized that the sale of goods produced is not considered a "service" falling within the scope of Class 35.05, as the sale of goods produced within a business is already a natural outcome of its operational activities.[109]

TURKPATENT, referring to the decision of the Court of Justice of the European Union in the PRAKTIKER case,[110] made a change in practice as of November 21, 2011, regarding the "Services for bringing together various goods to enable customers to conveniently view and purchase them." TURKPATENT has concluded that "Services for bringing together various goods to enable customers to conveniently view and purchase them" in Class 35 will not be considered as a "sale of goods or services" and that the specified service should be regarded as "the service of presentation of goods in a retail sales environment", and service descriptions specifying certain goods have become eligible for registration.[111]

Following these explanations, it should be noted that there may arise a likelihood of confusion between trademarks[112] and service marks.[113] Retail trade services, as a rule, are not similar to the goods subject to such retail trade.[114] However, if the enterprise operates

---

108 Topçu, p. 921.

109 Paslı/Soykan, p. 453.

110 CJEU, T. 07.07.2005, C-418/02 (ipcuria.eu, Last accessed: 06.06.2021). The recognition of retail trade of goods as a distinct service and the acceptance of trademark registration within Class 35.05 for the trademarks used during this activity were initially established through the decision of the European Court of Justice in the PRAKTIKER case. The decision states that there is no need for detailed specification of the relevant services for the registration of any trademark related to such services; however, it is indicated that "details related to the goods or types of goods associated with these services" need to be explained (Paslı/Soykan, p. 459, 461.).

111 Çolak, p. 223.

112 Trademarks can be divided into two categories as trade marks and service marks depending on its use for specific goods or services. See. Arkan, p. 43.

113 Paslı/Soykan, p. 462; Uzunallı, p. 694.

114 Uzunallı, p. 694. On the contrary, see. 2021 Guideline, p. 445; Yusufoğlu, p. 358. According to the 2021 Guidelines, it is accepted that there is a low level of similarity between the goods and the services of bringing together those goods.

within a narrow range of sales of goods, the impression that the goods subject to sale and the provision of services originate from the same enterprise can arise in the relevant public. Consequently, the similarity between the goods offered for sale and the services provided can be established.[115]

In this context, it is necessary to address the situation of trademarks that were not limited to the presentation of a specific product to customers under the scope of "Services for bringing together various goods to enable customers to conveniently view and purchase them" before the 2011 amendment. In this case, with regards to the possibility of confusion, it can be concluded that the application for registration in Class 35 may cover all goods.[116] In a verdict dated May 6, 2013,[117] the Court of Cassation stated that the plaintiff's goods under the "KAYRA" trademark in Class 33 would be confused with the defendant's "KYRA" trademark for retail services. This is because the defendant *did not limit the scope of registration to specific products* when making the disputed application for retail services in Class 35.07 (currently 35.05), excluding retail services related to goods in Class 33. Therefore, the Court of Cassation pointed out that the similarity and likelihood of confusion between the mentioned goods and Class 35.07 (retail) services are inevitable.

In the case that is the subject of the Court of Cassation's verdict dated April 19, 2010,[118] the defendant aimed to register the term "AMBER" under the sub-group of "Services for bringing together various goods to enable customers to conveniently view and purchase them." On behalf of the plaintiff, trademark registrations with the wording "AMBER" have previously been obtained in classes 3, 5, 8, 26, and 29. Within the scope of the case, the Court of Cassation has established that trademarks/service marks that are likely to cause

115 Uzunallı, p. 694. See also. Beşir Fatih Doğan, "Perakende Satış Hizmeti (35.08) İçin Marka Tescilinde Ortaya Çıkan Sorunlar ve Çözüm Önerileri [Challenges Arising in Trademark Registration for Retail Sales Service (Class 35.08) and Proposed Solutions]", *IPC Journal*, 2009, Vol. 9, I. 1, p. 24; Paslı, p. 462, 463.

116 Çolak, p. 223.

117 Court of Cassation 11th Civil Chamber, D. 06.05.2013, Case No. 2012/10264, Judgment No. 2013/9052 (Kazancı Case Law Database, Last accessed: 06.06.2021).

118 Court of Cassation 11th Civil Chamber, D. 19.04.2010, Case No. 2010/2036, Judgment No. 2010/4235 (Kazancı Case Law Database, Last accessed: 06.06.2021).

confusion among the public, even if they are in different classes, can be deemed as "similar" in terms of the goods/services they cover. The court pointed out that the defendant did not restrict the trademark to the presentation of specific goods within the relevant sub-group, thus the application would also cover the bringing together of goods specified under the plaintiff's registered trademarks. Therefore, the Court of Cassation concluded that there is a possibility of confusion.[119]

Finally, it is necessary to address how the similarity between services bringing together identical/similar goods should be assessed.

In the 2021 Guideline, it is stated that the retailing service of identical goods will be considered as identical services, whereas the assessment of similarity between retailing services of non-identical goods will take into consideration factors such as the degree of similarity between the assembled goods, whether these goods are frequently offered for sale together in the industry, and the relevant public, among other criteria.[120] In this context, the service of "bringing together clothes" and the service of "bringing together bags" are considered as similar services, as the relevant goods are frequently offered for sale together and address the same relevant public.[121] However, when comparing services for bringing together different goods, the assessment will need to be made on a case-by-case basis.[122]

## CONCLUSION

The determination of similarity of goods/services is not only significant in the examination conducted by TURKPATENT, but also holds great importance in terms of the fundamental aspects of trademark law, namely invalidity and infringement cases. Likewise, as per the provisions of Article 25 of the IPC, the grounds for declaring

---

119 However, in some decisions rendered by the Court of Cassation, it is emphasized that the registered trademark for retail services can only establish rights if the services are actually used (or there is a serious effort towards such usage) within the sector where the goods subject to the services are present. See. Court of Cassation 11th Civil Chamber, D. 30.03.2016, Case No. 2015/8504, Judgment No. 2016/3492; Court of Cassation 11th Civil Chamber, D. 27.02.2017, Case No. 2015/12715, Judgment No. 2017/1112 (Kazancı Case Law Database, Last accessed: 06.06.2021).

120 2021 Guideline, p. 447.

121 2021 Guideline, p. 447.

122 2021 Guideline, p. 448.

a trademark invalid also include the reasons stipulated in Articles 5 and 6 of the IPC. Therefore, if a trademark has been registered by TURKPATENT despite the existence of the grounds for refusal, an action for invalidity will be initiated, and it will be necessary to determine similarity or identity of goods/services.

The determination of whether goods and services are similar or not holds significance in relation to the likelihood of confusion, as it plays a crucial role in identifying at which point the similarity of goods and services may lead to confusion. It is widely accepted that the presence of similarity between goods/services is a prerequisite for the possibility of confusion. This conclusion also emerges from the explicit provision of Article 6/1 of the IPC.

It would be beneficial to assess the binding nature of the Nice classification in terms of similarity of goods/services. In the light of the decisions of the Court of Cassation, it can be argued that in the evaluation of similarity of goods/services to be conducted by the court within the scope of a specific case, there is no obligation to interpret that there is no similar goods/services if the Nice classifications are different. Pursuant to Article 3/4 of the Communiqué on Classification published by TURKPATENT, it is mentioned that during the examination of trademark applications or objections, groups can be interpreted more narrowly or more broadly. In this context, while the Nice classes can serve as a reference point for the examining expert, they will not be binding.

In determining the similarity of goods/services, in addition to the Nice Classification, trademark offices aim to achieve uniformity in practice by using methods such as cross-classification and similarity tool provided by the EUIPO. Furthermore, TURKPATENT is developing application principles and issuing guidelines in relation to these matters.

In the context of similarity of goods/services, various criteria have been envisaged in the light of doctrine and judicial decisions, and these criteria serve as guiding principles in the assessment of similarity.

## References

### Books

Arkan Sabih, Marka Hukuku (Trademark Law), Vol. 1, Ankara 1997.

Bozbel Savaş, Fikri Mülkiyet Hukuku (Intellectual Property Law), Istanbul 2015.

Çolak Uğur, Türk Marka Hukuku (Turkish Trademark Law), 4th Edition, Istanbul 2018.

Dirikkan Hanife, Tanınmış Markanın Korunması (Protection of Well-Known Trademarks), Ankara 2003.

İmirlioğlu Dilek, Marka Hukukunda Ayırt Edicilik ve Markanın Ayırt Ediciliğinin Zedelenmesi (Distinctiveness in Trademark Law and Dilution of Trademark Distinctiveness), 2nd Edition, Ankara 2018.

Küçükali Canan, Marka Hukukunda Karıştırma Tehlikesi (Likelihood of Confusion in Trademark Law), Ankara 2009.

Paslı Ali, Marka Hukukunda Ürün Benzerliği (Product Similarity in Trademark Law), Istanbul 2018.

Tekinalp Ünal, Fikri Mülkiyet Hukuku (Intellectual Property Law), 5th Edition, Istanbul 2012.

Yasaman Hamdi/Altay Sıtkı Anlam/Ayoğlu Tolga/Yusufoğlu Fülürya/Yüksel Sinan, Marka Hukuku 556 Sayılı KHK Şerhi (Commentary on Decree-Law No. 556 on Trademark Law), Vol. 1, Istanbul 2004.

### Articles

Doğan Beşir Fatih, "Perakende Satış Hizmeti (35.08) İçin Marka Tescilinde Ortaya Çıkan Sorunlar ve Çözüm Önerileri [Challenges Arising in Trademark Registration for Retail Sales Service (Class 35.08) and Proposed Solutions]", *Ankara Bar Journal of Intellectual Property and Competition Law*, 2009, Vol. 9, I. 1, p. 11-31.

Öztek Selçuk, "Türk Marka Hukukunda Benzer Mal ve Hizmet Kavramı (The Concept of Similar Goods and Services in Turkish Trademark Law)", *Prof. Dr. Turgut Akıntürk'e Armağan*, Istanbul 2008, p. 277-293.

Paslı Ali/Soykan İsmail Cem, "Marka Tescilinde 35.08. Sınıfın Anlamı ve Kapsamı (The Meaning and Scope of Class 35.08 in Trademark Registration)", *Fikri Mülkiyet Hukuku Yıllığı*, Vol. 2, Istanbul 2010, p. 441-474.

Topçu Deniz, "Marka Sınıflandırmasında 35. Sınıf İçeriğinin Perakende Satış Hizmetleri Alt Grubu Açısından Sağladığı Koruma (The Protection Provided by the Content of Class 35 in Trademark Classification for the Subgroup of Retail Services)", *International Journal of Social, Political and Economic Research*, 2020, Vol. 7, I. 4, p. 904-926.

Uzunallı Sevilay, "Marka Hukukunda Malların ve/veya Hizmetlerin Benzerliğinin Tespiti Sorunu (Problem of Determining Similarity of Goods and/or Services in Trademark Law)", *Prof. Dr. Hamdi Yasaman'a Armağan*, Istanbul, 2017, p. 675-699.

Yusufoğlu Fülürya, "Perakendecilik Hizmeti Sınıfı (35.05. Sınıf) ile Ürün Sınıfı Arasındaki İlişkilerin Marka Hukukundaki Etkisi [The Impact of the Relation-

ship Between Retail Services Class (Class 35.05) and Product Classes in Trademark Law]", *Journal of Galatasaray University Faculty of Law,* 2018, Vol. 17, I. 1, p. 335-385.

## Internet Resources

"Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)",

https://www.wto.org/english/docs_e/legal_e/27-trips.pdf (Last accessed: 06.06.2021).

EUIPO, Guidelines for Examination of European Union Trademarks,

https://guidelines.euipo.europa.eu/1922895/1923283/trade-mark-guidelines/1-introduction (Last accessed: 06.06.2021).

"Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks", https://wipolex.wipo.int/en/text/287437 (Last accessed: 06.06.2021).

"Paris Convention for the Protection of Industrial Property",

https://wipolex.wipo.int/en/text/287556 (Last accessed: 06.06.2021).

TURKPATENT 2015 Trademark Examination Guideline,

https://www.turkpatent.gov.tr/TURKPATENT/resources/temp/F9E4CFAF-A7AE-4FEA-8BCC-DA8B5C7DAB00.pdf (Last accessed: 17.10.2021).

TURKPATENT 2021 Trademark Examination Guideline,

https://www.turkpatent.gov.tr/TURKPATENT/resources/temp/CFF1AE84-9563-42D6-BC18-1EF3597D01CC.pdf (Last accessed: 17.10.2021).

www.kazanci.com.tr (Last accessed: 06.06.2021).

www.lexpera.com.tr (Last accessed: 06.06.2021).

ipcuria.eu (Last accessed: 06.06.2021).

www.peteryu.com (Last accessed: 05.06.2021).

## Other Resources

Ünsal Önder Erol, "Markaların Tescili Konusunda Uluslararası Nis ve Viyana Sınıflandırmaları: Amaç, İşleyiş ve Uygulamaya İlişkin Değerlendirmeler (International Nice and Vienna Classifications on Trademark Registration: Assessments Regarding Purpose, Functioning, and Implementation)", Turkish Patent Institute Expertise Thesis, Ankara 2001.

# CASES OF JOINT LIABILITY ARISING FROM OCCUPATIONAL ACCIDENTS

## İŞ KAZASINDAN DOĞAN MÜTESELSİL SORUMLULUK HALLERİ

**Muhammed Enes YILDIZ***

**Abstract**: The duty of care is one of the fundamental obligations of the employer arising from the employment contract. When it comes to the employer's duty of care, the first thing that comes to mind is the obligation to take occupational health and safety measures. If the employer violates its obligations in this regard, the probability of an occupational accident increases. It is possible for the employee who is exposed to an occupational accident to sue the employer for compensation. In addition, if it is clearly stipulated in the law or if certain conditions are met, the employee may also claim compensation from other parties who are jointly liable.

**Keywords**: Duty of Care, Occupational Accident, Legal Liability, Joint Liability, Tripartite Labor Relations.

**Özet**: Gözetme borcu işverenin iş sözleşmesinden doğan temel borçlarından biridir. İşverenin gözetme borcu denince akla ilk olarak iş sağlığı ve güvenliği önlemlerini alma yükümlülüğü gelir. İşverenin bu konuda yerine getirmesi gereken yükümlülüklerine aykırı davranması halinde iş kazasının meydana gelme olasılığı yükselir. İş kazasına maruz kalan işçinin zararını tazmin etmesi için işverene dava açması mümkündür. Ayrıca kanunda açıkça öngörülmesi halinde veya birtakım şartların sağlanması halinde işçi müteselsil sorumlu olan diğer kişilerden de tazminat talebinde bulunabilecektir.

**Anahtar Kelimeler:** Gözetme Borcu, İş Kazası, Hukuki Sorumluluk, Müteselsil Sorumluluk, Üçlü İş İlişkileri

* Research Assistant, Yalova University Faculty of Law, Department of Labor and Social Security Law, muhammed.yildiz@yalova.edu.tr, ORCID: 0000-0001-9803-8661

## INTRODUCTION

One of the fundamental obligations of the employer arising from the employment contract is the duty of care. The scope of the duty of care is discussed in Article 417 of the Turkish Code of Obligations No. 6098[1]. Accordingly, "The employer is obliged to protect and respect the personality of the employee in the service relationship and to maintain an order in the workplace in accordance with the principles of honesty (Art. 417/1).

According to the provision on the employer's occupational health and safety measures, "The employer is obliged to take all necessary measures to ensure occupational health and safety in the workplace and to keep the tools and equipment in full" (Art. 417/2). Within this framework, it is necessary to ensure that occupational health and safety measures are taken in the most appropriate manner for the conditions of the day, taking into account scientific developments and technological inventions.

If an occupational accident occurs in the workplace as a result of failing to take occupational health and safety measures, the employer may be held liable for the occupational accident. As a result of an occupational accident, the employer may face legal, administrative and criminal liabilities. However, legal liabilities arising from occupational accidents differ from other liabilities in that they may bring up the responsibilities of the employee's current employer and other persons together.

The employee being a subcontractor employee, being sent to another employer's workplace to work within the scope of a temporary employment relationship, the transfer of the workplace to another employer or the transfer of the employment contract may legally put the employee in a relationship with more than one employer. In the presence of these tripartite employment relationships, which are referred to in the doctrine as tripartite relationships in labour law, it may be possible for the employee who has suffered an occupational accident to apply to other employers within this tripartite relationship

[1] RG, 04.22.2011, 27836.

in some cases, in addition to the current employer, for compensation for his/her damages.[2]

In the study, the concepts of occupational accident and joint liability are discussed in general, and then the effect of subcontracting, temporary employment relationship, transfer of workplace and transfer of employment contract, which are described as tripartite relationship, on the joint liability of employers arising from occupational accident is evaluated.

## I. OCCUPATIONAL ACCIDENTS AND JOINT LIABILITY IN GENERAL

### A. The Concept of Occupational Accident and the Nature of Legal Liability

#### 1. Occupational Accident in General

In the broad sense, the concept of "accident" is defined in legal theory as a sudden and unintentional event that leads to the occurrence of a loss. An accident in the narrow sense, on the other hand, excludes damage to property and covers only involuntary violation of bodily integrity or death. Accordingly, in order for an accident to occur in the narrow sense, there must be a sudden and unintended event coming from outside, as a result of which bodily integrity must be violated and there must be a causal link between the event and the result.[3]

The concept of occupational accident is addressed in different ways in the Social Insurance Law No. 5510 [4] and Occupational Health and Safety Law No. 6331[5]. Law No. 5510 defines occupational accident by listing the situations that may result in an occupational accident. Accordingly, accidents that occur while the employee is at the workplace, due to the work being carried out and when the

---

2 On tripartite relationships in labor law, see. Osman Güven Çankaya/Şahin Çil, İş Hukukunda Üçlü İlişkiler, Yetkin Yayınları, Genişletilmiş 3. Baskı, Ankara 2011, p. 15.

3 İştar Cengiz, "İşverenin İş Kazasından Doğan Hukuki Sorumluluğu", *TAAD*, Y. 9, Issue. 34, p. 128.

4 RG, 16.06.2006, 26200.

5 RG, 30.06.2012, 28339.

employee is sent to a place other than the workplace on duty, during the time he spends without performing his main job are considered within this scope. In addition, an occupational accident is defined as an event that occurs during the transportation of the worker to and from the workplace by a vehicle provided by the employer and during the period when the breastfeeding female worker is on breastfeeding leave, and which renders the worker physically or mentally disabled immediately or later (Art. 13/1 of the Law No. 5510). Law No. 6311 defines an occupational accident as "an event that occurs in the workplace or due to the execution of the work, which causes death or damages the bodily integrity mentally or physically" (Art. 3/1-g).

In terms of social insurance law and occupational health and safety legislation, the definition of occupational accident has been defined, whereas the definition of occupational accident, which is a special application of the breach of the employer's duty of care, is not included in the Labour Law No. 4857[6]. The definition of occupational accident in terms of individual labour law is found only in the doctrine. Accordingly, an occupational accident is defined as a mental or physical injury to the employee as a result of an event that occurs suddenly as a result of the work he/she performs while under the control of the employer or as a result of an external cause.[7] Here, unlike an occupational accident, especially in the meaning of social insurance law, the accident must be related to the work performed, must occur as a result of it, and moreover, there must be a causal link between the work performed and the accident.[8]

Taking occupational health and safety measures at the workplace is an obligation that falls within the scope of the employer's duty of care for the employee. The employer must protect the life, health and

---

6 RG, 10.06.2003, 25134.

7 Ali Güzel/Ali Rıza Okur/Nurşen Caniklioğlu, Sosyal Güvenlik Hukuku, Beta Yayıncılık, İstanbul Yenilenmiş 19. Bası, 2021, p. 377-378; Fikret Eren, "Borçlar Hukuku ve İş Hukuku Açısından İşverenin İş Kazası ve Meslek Hastalığından Doğan Sorumluluğu", Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara 1974, p. 10; taken from Cengiz, p. 128; Can Tuncay/Ömer Ekmekçi, Sosyal Güvenlik Hukuku Dersleri, Beta Yayınevi, İstanbul 2021, p. 391.

8 Gaye Burcu Yıldız, "İşverenin İş Kazasından Doğan Sorumluluğu", *Toprak İşveren Dergisi*, Y. 2010, Issue 86, p. 10; Süzek, p. 424; Erdem Özdemir, İş Sağlığı ve Güvenliği Hukuku Dersleri, 1. Bası, Vedat Kitapçılık, İstanbul 2020, p. 297.

physical integrity of the employee against workplace hazards.[9] In the event that the employee dies, becomes disabled or suffers material or immaterial damage as a result of the failure to take the necessary safety measures, the legal liability of the employer will arise according to the general provisions.[10]

## 2. Nature of Legal Liability Arising from Occupational Accidents

There is no consensus in the doctrine on the legal nature of the employer's liability arising from occupational accidents. Again, the opinions of the Court of Cassation on this issue have always varied until recently. In the doctrine, some authors have stated that the employer's liability arising from occupational accidents is a fault liability, while some authors have stated that no fault is required in the employer's liability.[11]

Before the Law No. 6098 entered into force, according to those who advocated the view of fault liability, the main principle in the law of liability is that the liability is based on fault. Liability without fault is a type of liability that may arise only in exceptional cases, if it is clearly stated in the law. Therefore, the employer's liability arising from an occupational accident should be considered as a fault liability.[12] According to the view advocating faultless liability, since there was no regulation regarding the employer's liability for the duty of care in service contracts during the period of the former Law, the provisions of the Code of Obligations No. 818[13] should be applied, but it was stated that the fault-based regulations of this law were not in accordance with the protective nature of labour law. For this reason, it was stated by this opinion that this legal gap should be filled with the provisions on strict liability.[14] Again, some of the authors of this opinion relied on the

9 Sarper Süzek, İş Hukuku, Beta Yayınevi, 20. Baskı, Ankara 2020, p. 409; Levent Akın, İş Kazasından Doğan Maddi Tazminat, Yetkin Yayınları, Ankara 2001, p. 46.

10 Nuri Çelik/Nurşen Caniklioğlu/Talat Canbolat/Ercüment Özkaraca, İş Hukuku Dersleri, Beta Yayınevi, Yenilenmiş 34. Bası, İstanbul 2021, p. 434.

11 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 435 et seq, bkz oradaki yazarlar; Süzek, p. 413 et seq. See the authors there.

12 Yıldız, p. 5 et seq; Akın, p. 97 et seq; Süzek, p. 417 et seq.

13 RG, 29.4.1926, 359.

14 Eren, p. 89 et seq; İlhan Ulusan, Özellikle Borçlar Hukuku ve İş Hukuku Açısından

fact that Article 77 of the İK (Labour Law) (now Article 4 of the İSGK (Occupational Health and Safety Law) and Article 417/2 of the TBK (Turkish Code of Obligations)), which obliges the employer to take all kinds of measures regarding occupational health and safety, requires strict liability.[15]

Although the Law No. 6098 entered into force in 2012 and introduced certain regulations regarding the liability of the employer, the doctrine still does not reach a consensus on the nature of the legal liability.[16] The Court of Cassation has rendered many different decisions before and after the enactment of Law No. 6098. However, it is understood from the recent decisions that the Court of Cassation accepts that the employer's liability arising from occupational accidents is a fault liability.[17]

**a. Fault Liability (Objectivized Fault)**

Currently, the predominant view in the doctrine regarding the legal liability of the employer arising from occupational accidents is that this liability is a fault liability.[18] This is because the main principle in Turkish law is fault liability. Liability without fault can only arise if it is explicitly regulated in the law.

The TBK No. 6098 also includes regulations regarding the nature of the liability arising from the employer's breach of the duty of care. Accordingly, the compensation of damages arising from the

---

İşverenin İşçini Gözetme Borcu, Bundan Doğan Hukuki Sorumluluğu, Kazancı Kitap Ticaret A.Ş, 1990, p. 125.

15 Ulusan, p. 103 et seq; Eren, p. 81 et seq.

16 Ayrıntılı bilgi için bkz. Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 437, see the authors there.

17 Yarg. HGK, 20.03.2013, E. 2012/21-1121, K. 2013/386, (www.kazanci.com, AD. 03.11.2021); "…the employer's liability is fault liability and can be held liable if fault can be attributed …" Yarg. 10. HD, 15.04.2019, E. 2016/15843, K. 2019/3473, (www.lexpera.com, AD. 27.01.2022).

18 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 439; Süzek, p. 414 et seq.; M. Kemal Oğuzman, "İş Kazası veya Meslek Hastalığından Doğan Zararlardan İşverenin Sorumluluğu", İÜHFM 1969, Vol. XXXIV, Issue. 1-4, p. 337 et seq; Ali Güzel/ Deniz Ugan Çatalkaya, "İşverenin İş Kazasından Doğan Sorumluluğunun Niteliği ve Sınırları", (Karar İncelemesi), *Çalışma ve Toplum*, Issue. 34, Y. 2012/3, p. 157; Nurşen Caniklioğlu, İş Sağlığı ve Güvenliği Kanunu Çerçevesinde İşverenin İş Kazasından Doğan Hukuki Sorumluluğu (İşverenin Sorumluluğu), Prof. Dr. Turhan Esener Armağanı, I. İş Hukuku Uluslararası Kongresi, 2016, p. 47.

employer's breach of the duty of care shall be subject to the provisions on contractual liability (Art. 417/3 TBK). The liability for breach of contract referred to in the article is a type of liability based on fault.[19]

The law stipulates that the employer must take all necessary measures in terms of the duty of care (Art. 417/1 TBK). Although this provision, which is one of the bases of those who advocate the no-fault liability view, mentions that all kinds of measures must be taken, it is not possible to reach a conclusion that would exclude the liability here from being a fault liability.[20]

Another provision of the law that points out that the employer's liability is a fault liability is the special liability provision regarding hazard liability. Accordingly, no fault shall be sought in the liability arising from the operation of an enterprise that poses a significant danger (Art. 71 TBK). The fact that the legislator has determined the source of the employer's liability to be fault liability is clearly understood from the fact that it has specially regulated the cases of strict liability in this way.[21]

In Turkish law, the existence of fault is determined according to objective criteria. In this respect, the employer's personal status, level of education, financial status and other characteristics are not taken into account in determining the employer's fault in determining that the necessary attention and care was not taken in taking occupational health and safety measures. The behaviour of a careful, reasonable and responsible employer in a similar situation with the employer is taken as the basis for the determination of fault.[22] As a matter of fact, the Court of Cassation also points out that the determination of the employer's fault should be based on objective criteria.[23]

---

19 Fikret Eren, Borçlar Hukuku Genel Hükümler (Genel), 25. Baskı, Yetkin Yayınevi, Ankara 2020.

20 Caniklioğlu, İşverenin Sorumluluğu, p. 47.

21 Caniklioğlu, İşverenin Sorumluluğu, p. 48.

22 Süzek, p. 417; Özdemir, p. 289.

23 "…Articles 4 and 5 of Law No. 6331 and the provisions of the related regulations on occupational health and safety should be considered as criteria that objectify the employer's responsibility …" Yarg. 21. HD, 13.02.2018, E. 2016/12322, K. 2018/1190, (www.kazanci.com, AD. 03.11.2021).

### b. Cases Where Fault is Not Required in Liability

The rule in the employer's liability arising from occupational accidents is fault liability. However, in some cases, the legislator has included strict liability regulations against the employer. Pursuant to article 71 of the TBK, the owner and operator shall be liable in the event of damage arising from the operation of an enterprise that "poses a significant danger". Although strict liability is not explicitly mentioned in the article, it is accepted that there is a state of strict liability from the purpose and arrangement of the provision.[24]

In the event of an occupational accident occurring in a workplace that falls within the scope of the provision on hazard liability, the employer shall not be liable for any fault of the employer, and shall be liable for the occupational accident in accordance with the provisions on strict liability. In order for the liability to arise, it will be sufficient to establish a causal link between the typical hazard of the enterprise and the damage.[25]

In addition to the hazard liability, the Law also provides for the liability of the employer for the acts of his employees (art. 66) and the liability for the acts of the auxiliary persons (Art. 116). In these cases, which are, by their nature, a form of strict liability, the injured party may apply for the strict liability of the employer.[26] If the employer has left the taking of occupational health and safety measures at the workplace to the auxiliary persons, the employer will be liable for the acts of the auxiliary persons even if the employer is not at fault.[27] Again, according to the Highway Traffic Law No. 2918[28], it is also possible for the employer to be held strictly liable.[29]

---

24 Gaye Baycık, "Çalışanların İş Sağlığı ve Güvenliğine İlişkin Haklarında Yeni Düzenlemeler, *Ankara Barosu Dergisi*", 2013/3, p. 132; Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 440; M. Kemal Oğuzman/Turgut Öz, Borçlar Hukuku Genel Hükümler, Vol. 2, 11. Bası, İstanbul 2014, p. 191 et seq.; Eren, Genel, p. 760 et seq.

25 Baycık, p. 134.

26 Caniklioğlu, p. 69.

27 Oğuzman, p. 340.

28 RG, 18.10.1983, 18195.

29 Ayrıntılı bilgi için bkz. Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 442; Çelik Ahmet Çelik, Trafik – İş Kazaları, Seçkin Yayınevi, Ankara 2019, p. 17 et seq; Yarg. 21. HD, 18.10.2016, E. 2015/17528, K. 2016/12750, (www.lexpera.com, AD. 27.01.2022).

**B. Joint Liability**

The concept of joint liability is regulated under Article 61 et seq. of the Turkish Code of Obligations. Accordingly, the provisions on joint liability shall apply if more than one person jointly causes a damage or is liable for the same damage for various reasons (Art. 61).

As stated in the Law, for joint liability to arise, two different persons must "jointly cause a damage" or "be liable for the same damage for various legal reasons". For example, if two different persons act together and injure a third person, they jointly cause a damage. Again, in the event that an insured person causes damage to a third party, the third party may apply to the person who personally caused the damage due to the tortious act, and to the insurer due to the fact that the insurer has undertaken the damage with the contract. Here, liability for the same damage is in question for different legal reasons.[30]

Joint liability is a liability in favour of the injured party. In this liability, the injured party may apply to any of the harmed parties for the full compensation of the damage. If he/she wishes, it is also possible for him/her to ask for the compensation of the damage with a single request from all of them. Thus, the injured party will be able to demand the compensation of the damages against the one with the best economic situation or the one with the highest power of proof.[31]

Joint liability arising from occupational accidents is no different from other cases of joint liability. At this point, it may be the case that another employee, the employer's representative or another employer is also responsible for the occupational accident suffered by the employee.[32] In such cases, the worker may apply to all of the jointly liable parties for the full amount of the damage, regardless of their titles. In this respect, it is sufficient that the conditions of joint liability stipulated in the Law are met.[33]

---

30 Eren, Genel, p. 915; Oğuzman/Öz, p. 294.

31 Ayrıntılı bilgi için bkz. Eren, Genel, p. 925 et seq; Yarg. 21. HD, 12.11.2018, E. 2016/19679, K. 2018/8140, (www.lexpera.com, AD. 26.11.2021)

32 Yarg. 9. HD, 18.01.2021, E. 2019/4999, K. 2021/1253, (www.lexpera.com, AD. 27.01.2022).

33 Yarg. 10. HD, 19.4.2016, E. 2014/24954, K. 2016/6004, (www.lexpera.com, AD. 26.11.2021).

## II. JOINT LIABILITY ARISING FROM OCCUPATIONAL ACCIDENTS

### A. Principal Employer - Subcontractor Relationship

#### 1. Principal Employer - Subcontractor Relationship in General

Subcontracting is regulated in paragraph 6 of Article 2 of the Labour Law. In addition, the Regulation on Subcontracting[34] has been put into force in order to provide more detailed regulations. A subcontracting relationship is defined as the relationship between the employer who hires workers for auxiliary works related to the production of goods or provision of services in his/her workplace or for works that require specialization due to the necessity of the work, the business and technological reasons, and employs his/her workers assigned for this work exclusively for this workplace, and the employer from whom the work is received (Art. 2/6). As can be understood from the definition of subcontracting, in order for a relationship to be considered a subcontracting relationship, there must be two employers who employ workers at the workplace. The sub-employer must be performing the work received from the principal employer at the principal employer's workplace. A part of the goods produced or services provided at the workplace or an auxiliary work must be transferred to the sub-employer. The main work transferred to the subcontractor must be a work that requires specialization due to business requirements and technological reasons. The sub-employer must have dedicated a group of workers to this work, in other words, the sub-employer must not employ the same workers at other workplaces (Art. 2/6). The condition of requiring specialization for technological reasons will only be required for the subcontracting of the main work by dividing it, and no similar condition will be required for auxiliary works.[35]

Article 2/6 of the Labour Law provides the definition and conditions of subcontracting, and Article 2/7 provides the presumptions of

---

34 RG, 27.09.2008, 27010.

35 Münir Ekonomi, "Asıl İşveren Alt İşveren İlişkisinin Kurulması ve Sona Ermesi", Türk İş Hukukunda Üçlü İlişkiler, Legal Vefa Toplantıları (II), Prof. Dr. Nuri Çelik'e Saygı, March 2008, p. 48.

collusion in subcontracting relationships. However, there is no regulation on the legal nature of subcontractor relationships that do not meet the conditions required in the sixth paragraph.[36] According to the Court of Cassation, just like the collusive subcontracting relationship, in a subcontracting relationship that does not have the elements listed in the Law, the subcontractor's employees must be considered as the employees of the principal employer from the beginning.[37] Applying the sanctions related to collusion to every relationship that does not meet the conditions in the law, and therefore considering the workers as employees of the principal employer, may not always be in accordance with the nature of that relationship. For this reason, each concrete case should be evaluated separately, and in cases that are not suitable for the application of the collusion provision, it should be ruled that there is no subcontracting relationship.[38]

In a subcontracting relationship, the employer (the principal employer) is jointly liable to the employees of the subcontractor for the rights arising from the Labour Law, the employment contract and the collective bargaining agreement to which the subcontractor is a party (Art. 2/6). The legislator has not only regulated joint liability, but also stipulated in Article 36 of the İK that the public contracting authorities and the principal employers are obliged to check whether the wages of the workers are paid and to pay the wages of the unpaid workers to the workers by deducting them from the progress payments of the employers.[39]

### 2. Joint Liability in the Principal Employer-Subcontractor Relationship

In the principal employer-subcontractor relationship, there is no employment contract between the principal employer and the subcontractor's employee. For this reason, it is necessary to make an assessment on the basis of the legal regulation regarding the liability

36 Süzek, p. 168.
37 Yarg. 9. HD, 14.05.2007, E. 2007/3132, K. 2007/14914, (www.kazanci.com.tr, AD. 06.11.2021).
38 Süzek, p. 168.
39 İbrahim Aydınlı, "6552 sayılı Kanun'la Alt İşveren Kurumunda Yapılan Yeni Düzenlemeler ve Değişiklikler", *GÜHFD*, C. XVIII, Y. 2014, Issue. 3-4, p. 83.

of the main employer in case the sub-employer's employee is exposed to an occupational accident.

One of the opinions in the doctrine bases the source of the primary employer's duty of care over the subcontractor's employees on "debt relations independent of performance obligations". In this case, the parties in social contact have an obligation to ensure that the persons under the protection of each other are not harmed, and in the event that a damage occurs as a result of this performance-independent debt relationship, contractual liability provisions may be applied.[40] According to the other opinion in the doctrine, which we also agree with, the subcontracting relationship is an institution specific to labour law and therefore, the solution of the problems should be sought within the labour law.[41] Again, determining the source of the duty of supervision as debt relations independent of the performance and directly holding the main employer responsible will not be in accordance with the nature of the work. This is because, even though the sub-employer performs the work at the principal employer's workplace, sub-employers should know the work they are carrying out and the risks that may arise. Therefore, the person who will take direct action to ensure occupational health and safety is the sub-employer. It is not possible to accept the existence of an operational supervision obligation of the main employer.[42]

The responsibility of the principal employer towards the sub-employer's employees is clearly regulated in the Law. Accordingly, the principal employer is jointly liable with the sub-employer for the obligations arising from the Labor Law, the employment contract and the collective labour agreement to which the sub-employer is a party. What is meant by joint liability here is, of course, joint liability.[43]

---

40 Aydın Başbuğ, "Alt İşveren İşçisi ile Asıl İşveren Arasındaki Borç İlişkisi ve Bu İlişkinin Doğurduğu Hukuki Sorunlar", *Kamu İş*, Vol. 4, Issue. 3, Ocak 1998, p. 65 et seq; İbrahim Aydınlı, "İşverenin Edimden Bağımsız Olan Koruma Yükümlülüğüne, Normun Koruma Amacı (Hukuka Aykırılık Bağı) Bakımından Bir Yaklaşım", (www.tuhis.org.tr/pdf/811.pdf, AD. 04.11.2021); Eren, Genel, p. 43.

41 Levent Akın, İş Sağlığı ve Güvenliği ve Alt İşverenlik (Alt İşverenlik), Yetkin Yayınevi, Ankara 2013, p. 175.

42 Özdemir, p. 223. See also, Demet Belverenli, "Alt İşveren İlişkisinden Doğan İş Sağlığı ve Güvenliği Yükümlülükleri", *İÜHFM*, Vol. 74, Prof. Dr. Fevzi Şahlanan'a Armağan Issue, p. 210.

43 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 129; Süzek, p. 165.

There are several issues that need to be addressed regarding the liability of the principal employer. First of all, the Law states that the responsibility of the principal employer is only related to the obligations arising from the Labor Law, employment contract and collective bargaining agreement. The rights that an employee who suffers an occupational accident may claim from the employer are regulated under the Turkish Code of Obligations. This situation may bring to mind the question of whether the primary employer may be held jointly liable according to this article. However, it should be noted here that the occurrence of an occupational accident will constitute a breach of the negligent employer's obligation to protect the worker and that this obligation arises from the employment contract.[44] In this way, the employee who has suffered an occupational accident will be able to apply to both his/her own employer and the main employer for all of his/her receivables due to the breach of the duty of care arising from the employment contract.

Unlike the liability of the subcontractor, the Law introduces a "strict liability" for the principal employer. This is because the principal employer is held liable for the damages suffered by the employee of the defective sub-employer due to an occupational accident, even if the employer is not at fault. Here, the source of the liability is directly Article 2/6 of the Labour Law.[45] Pursuant to the same provision, the joint liability of the principal employer cannot exceed the liability of the sub-employer in terms of scope.[46]

Due to its nature, the provision on joint liability can only be applied to principal employers, and persons referred to as "contracting authority" or "turnkey employer" cannot be included within the scope of this provision. This is because it is not possible to talk about a principal employer in the technical sense. The Court of Cassation has also stated in one of its decisions on this issue that the person contracting the work cannot be held liable for occupational accidents and can only be held liable for unpaid wages if the conditions in article 36 of the İK are met.[47]

---

44 Bkz. Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 130.

45 Yarg. 21. HD, 26.12.2019, E. 2019/2527, K. 2019/8120, (www.lexpera.com, AD. 04.11.2021).

46 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 137.

47 Yarg. 9. HD, 14.05.2013, E. 2003/4721, K. 2003/4643, *Çimento İşveren Dergisi*, August 2003, p. 33.

In the subcontracting relationship, joint liability is regulated only in the form that the principal employer is jointly liable with the subcontractor for the occupational accident suffered by the subcontractor's employee. There is no regulation on the joint liability of the subcontractor and the principal employer as a result of the occupational accident suffered by the employee of the principal employer.

The subcontractor performs the work in the workplace of the main employer. Considering that they share the same workplace, it is very likely that an occupational accident will occur as a result of the subcontractor's failure to comply with the occupational health and safety obligations and that the employee of the principal employer will be harmed.[48] In this case, the subcontractor who is at fault will be held liable to the employee of the principal employer according to the provisions of tort, since there is no employment contract between them. The main employer, on the other hand, will be obliged to compensate the damages of its employee according to the provisions of contractual liability due to breach of the duty of care. In this case, both employers, who are responsible for the same damage for various reasons, will be held jointly liable for the damage of the employee of the principal employer who is exposed to an occupational accident in accordance with Article 61 of the TBK.[49]

### B. Temporary Labour Relationship

#### 1. In General

Temporary employment relationship is divided into two as professional and non-professional temporary employment relationship. This relationship is regulated in Article 7 of the İK, which was amended by Law No. 6715 in light of the European Union Directive no. 2008/104/

[48] Eren Yıldız, Asıl İşveren- Alt İşveren İlişkisinde İş Sağlığı ve Güvenliği Yükümlülükleri, Master Thesis, İstanbul 2019, p. 152.

[49] Akın, p. 225; Yıldız, p. 153.

EC.[50] In addition, the Law on Turkish Employment Agency[51] and the Regulation on Private Employment Agencies[52] also contain detailed explanations on the temporary employment relationship. According to Article 7/1 of the İK, a temporary employment relationship is established "through a private employment agency or by assignment within the holding or another workplace affiliated to the same group of companies".[53] The legislator has determined in detail the cases and periods in which the professional temporary employment relationship can be established, and in the non-occupational temporary employment relationship, the legislator has avoided restrictive statements and has given more leeway to the parties.

In the temporary employment relationship, which is a type of tripartite employment relationship, unlike other institutions that create a tripartite employment relationship such as transfer of workplace and transfer of employment contract, the employment relationship between the employee and his/her main employer does not disappear when the employee is sent to work at the workplace of the temporary employer.[54] At this point, the private employment agency continues to be the employer of the worker in the professional temporary employment relationship and the transferor employer continues to be the employer of the worker in the non-professional temporary employment relationship. In this relationship, without changing the parties to the employment contract, only the creditor of the employee's performance of work becomes the temporary employer for a temporary period of time. Due to this nature of the relationship, the obligations of the employee to the principal employer, other than

50 For the requirements of the Directive, see, Şelale Uşen, "2008/104/EC Sayılı Ödünç İş İlişkisine İlişkin Avrupa Birliği Yönergesinin Getirdiği Yeni Düzenlemelerin Türkiye Açısından Değerlendirilmesi", *Çalışma ve Toplum*, 2010/3, p. 169 et seq; On the development process of the temporary employment relationship through private employment agencies in Turkish law, see also, Ercüment Özkaraca, Özel İstihdam Bürosu Aracılığıyla Geçici İş İlişkisi (Özel İstihdam Bürosu), İş Hukukuna İlişkin Sorunlar ve Çözüm Önerileri 21. Toplantısı 2016 Toplantıları, İstanbul Barosu- Galatasaray Üniversitesi, 03-04 June 2016, İstanbul 2018, p. 56.

51 RG, 05.07.2003, 25159.

52 RG, 11.10.2016, 29854

53 Article 7 of the HR was requested to be annulled due to its unconstitutionality, but the request was rejected by the court, AYM, 28.02.2018, E. 2016/141, K. 28.02.2018, RG, 29.03.2018, 30375; Süzek, p. 281.

54 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 253.

the obligation to perform work, continue without interruption. Again, the wage payment obligation, which constitutes the remuneration for the performance of work, remains as an obligation of the principal employer.[55]

Although the temporary employer is not the employer of the worker in this relationship, since the worker works within its own work organization, certain rights and obligations arise for the temporary employer.[56] These include the right of the temporary employer to give orders and instructions (Art. 7/9-a), the obligation to act equally (Art. 7/10), the obligation to provide occupational health and safety training and to take necessary occupational health and safety measures.[57]

### 2. Joint Liability in Temporary Labour Relations

The Labour Law sets forth a clear joint liability provision for the transferor and transferee employers in "non-occupational" temporary employment relationships established for the fulfilment of the performance of work within the holding or in another workplace of the same group of companies. Accordingly, the employer with whom a temporary employment relationship is established is jointly liable with the transferring employer for the wages, the obligation to take care of the employee and social insurance premiums during the period of employment (Art. 7/15). The liability stipulated herein is a joint liability as accepted in the doctrine.[58]

---

55 Süzek, p. 292.

56 Orhan Ersun Civan, "Yeni Düzenlemeler Çerçevesinde Meslek Edinilmiş Ödünç (Geçici) İş İlişkisi", *AÜHFD*, 66 (2) 2017, p. 388.

57 For more information on the temporary employment relationship, see, Özkaraca, Özel İstihdam Bürosu, p. 53 et seq.; Süzek, p. 280 et seq.; Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 249 et seq.; Ali Güzel/Hande Heper, "Sürekli İstihdamdan Geçici Atipik İstihdama!...: Mesleki Amaçlı Geçici İş İlişkisi", Çalışma ve Toplum, 2017/01, p. 11 et seq. ; Civan, p. 311 et seq.; Ayşegül Ekin, İş ve Sosyal Güvenlik Hukukunda Mesleki Anlamda Geçici İş İlişkisi, Unpublished Doctoral Thesis, Konya 2019, p. 6.; Esra Yiğit, Özel İstihdam Büroları Aracılığıyla Geçici İş İlişkisi, On İki Levha Yayınları, İstanbul, 2019, p. 70 et seq; Duygu Çelebi, Meslek Edinilmiş Geçici İş İlişkisi, Ankara, 2019, p. 30 et seq.

58 Süzek, p. 299; Yiğit, p. 170 vd; Çelebi, p. 345; Civan, Geçici, p. 384 et seq. ; Serkan Odaman, "Yeni Düzenlemeler Çerçevesinde Türk İş Hukukunda Ödünç İş İlişkisi Uygulaması", *Sicil İHD*, Issue 36, December, 2016, p. 55.

The employer who temporarily transfers the employee does not have the opportunity to inspect whether the temporary employer complies with occupational health and safety measures at the workplace. Nevertheless, due to the explicit legal regulation regarding the temporary employment relationship, the transferring employer will be jointly liable together with the temporary employer for an occupational accident that occurs.[59] In the doctrine, this regulation is criticized on the grounds that the main employer cannot actually take occupational health and safety measures.[60] On the other hand, it is also stated that this regulation is appropriate as it encourages employers to avoid temporarily transferring their employees or to act more diligently in the matter of transfer.[61] However, in any case, the employer who fulfils its responsibility arising from the occupational accident will be able to apply for recourse to the temporary employer in proportion to its fault.[62]

The Law does not include any joint liability provision for "professional" temporary employment relationships established through private employment agencies. It is inappropriate not to include any joint liability provision for this type of temporary employment relationship where the worker needs more protection. In this respect, it is necessary to regulate joint liability in the temporary employment relationship established through private employment agencies, just as in the temporary employment relationship without a profession.[63]

The temporary worker does not work for his/her own employer in the workplace where he/she is sent to work, but for the employer called the temporary employer and works in accordance with his/her orders and instructions. Therefore, taking occupational health

59 Odaman , p. 55.

60 Ömer Ekmekçi, "4857 sayılı İş Kanunu'nda Geçici (Ödünç) İş İlişkisinin Kurulması, Hükümleri ve Sona Ermesi", *Legal İş ve Sosyal Güvenlik Hukuku Dergisi*, Issue 2, Y. 2004, p. 376; Can Tuncay, "İş Kanunu Tasarısındaki Ödünç İş İlişkisi ve Eleştirisi" (Ödünç), Mercek, Y. 8, Issue 30, Y. 2003, p. 71.

61 Özdemir, p. 241, see the authors there.

62 Civan, p. 381; Özdemir, p. 24; "In receivables arising from occupational accidents, joint debtors can only sue the other joint debtor for compensation if they have made payments in excess of their fault ratios. The recourse lawsuit filed before the payment must be dismissed for lack of a cause of action", Yarg. 21. HD, 07.05.2015, E. 2014/24340, K. 2015/10282, (www.lexpera.com, AD. 26.11.2021).

63 Özkaraca, p. 95.

and safety measures is, as a rule, the responsibility of the temporary employer.[64] In this respect, although the Law does not provide for an explicit joint liability, in the event that the temporary employer violates its obligation to fulfil certain occupational health and safety measures, it will be possible to speak of joint liability together with the private employment agency against the temporary worker due to its own fault.

The temporary employer is obliged to report the occupational accident suffered by the temporary worker to the law enforcement authorities and the SGK (Social Security Institution), as well as to the private employment agency, just like a principal employer (Art. 7/9-c). The temporary employer is also obliged to provide the trainings stipulated for temporary employers in Law No. 6331, to take the necessary measures in terms of occupational health and safety and to provide basic working conditions for the temporary worker during the period of employment (Art. 7/9-f; Art. 7/10). In the event that the temporary employer fails to fulfil the occupational health and safety obligations stipulated in the Law and causes the worker to suffer an occupational accident or to increase the damage caused by the occupational accident, it is possible to be held liable due to its own fault.

When an occupational accident occurs as a result of the temporary employer's failure to comply with the occupational health and safety measures stipulated by the Law, a typical example of joint liability arises within the meaning of Art. 61 of the TBK. The temporary employer is liable for the same damage caused by his/her negligent behaviour, while the actual employer of the worker is liable as required by the Law. In this case, the main and temporary employers, who are "responsible for the same damage for various reasons", will be jointly liable as per the Law.[65] In this case, it will be possible for the injured worker to apply to both the temporary employer and his/her own employer for the full compensation of the damage.

64 Özdemir, p. 242; Ekmekçi, Geçici, p. 376; Odaman, p. 54.
65 Özkaraca, p. 97.

### C. Transfer of Workplace

#### 1. In General

According to the Labour Law, the transfer of a workplace or a part of a workplace to another employer based on a legal transaction is called a transfer of workplace (Art. 6/1). The legislator has expressed the transfer of the workplace with a general expression and has not included a detailed regulation on its conditions. However, in the EU Directive on the transfer of the workplace, the conditions that must be present in order for the transfer of all or part of the workplace to be qualified as a transfer of the workplace in the technical sense are clearly listed.

According to Directive no. 2001/23, the transfer of a workplace is defined as "the transfer of an economic entity which retains its identity in the sense of an organized pooling of resources for the purpose of carrying on a main or subsidiary economic activity" (Art. 1/1.b). Accordingly, the conditions for the transfer of a workplace or part thereof are the existence of an economic entity, i.e. a workplace or part thereof, the transfer of the workplace or part thereof to another employer, the transfer being based on a legal transaction and the preservation of the identity of the economic association despite the change of employer.[66]

Although the conditions required by the EU Directive are not explicitly stipulated in our domestic law, it is observed that the Court of Cassation's decisions require these conditions in order to qualify as a transfer of workplace.[67] In the decisions of the Court of Cassation, it is seen that the transfer of a workplace or a part of a workplace with economic integrity "while preserving its identity" is strictly sought for the characterization of the transfer of a workplace.[68] However, in

---

66 Gülsevil Alpagut, İşyerinin Devri ve İş Sözleşmesini Fesih Hakkı, Beta Yayınevi, İstanbul, 2010, p. 28; Ercüment Özkaraca, İşyeri Devrinin İş Sözleşmesine Etkisi ve İşverenlerin Hukuki Sorumluluğu, Beta Yayınevi 1. Basım, İstanbul 2008, p. 33.

67 "Transfer refers to the transfer of a business or a workplace or a part of a workplace that has an economic integrity while preserving its own identity...), Yarg. 9. HD, 27.05.2019, E. 2017/10797, K. 2019/12098, (www.lexpera.com, AD. 07.11.2021).

68 Yarg. 9. HD, 22.2.2016, E. 2014/30825, K. 2016/3327, (www.lexpera.com, AD. 7.11.2021).

the transfer of a part of a workplace, it is not necessary that all of the conditions stipulated for the acceptance of the transfer by preserving the identity are present in the concrete case. For the transfer of a part of the workplace, the existence of the element that characterizes the economic integrity, i.e. the workplace, will be sufficient for the acceptance of the preservation of identity. For example, the transfer of machinery in workplaces where goods are produced or the transfer of only workers in workplaces where labour is important may constitute a transfer of the workplace.[69] What is important here is that it is possible for the transferee to continue the same technical and economic activity and that the same activity will be continued by the transferee.[70] This is because the activities carried out in the workplace must be continued by the transferee in order to talk about the transfer of a workplace in the technical sense.[71]

### 2. Joint Liability in Transfer of Workplace

According to the Labor Law, in the event of a transfer of a workplace, the transferor and transferee employers are jointly liable for the debts arising before the transfer and due for payment on the date of transfer. However, the liability of the transferor employer ends two years after the date of transfer (Art. 6/3). As stated in the doctrine, the liability stipulated in the Law is a joint liability.[72]

The liability stipulated in the Law for the transferee is valid for the employment contracts existing in the workplace at the time of the transfer, i.e. those that have not expired. This limitation in terms of

---

69 Bkz. Orhan Ersun Civan, "Makineyle Birlikte İşçi Devri", Prof. Dr. Savaş Taşkent'e Armağan, İstanbul, 2019, p. 993 et seq; Süzek, p. 197; For examples of workplace transfers, see also Ömer Ekmekçi/Esra Yiğit, Bireysel İş Hukuku Dersleri, On İki Levha Yayınları, İstanbul, 2020, p. 218.

70 Süzek, p. 196; On factors to be considered in assessing the conditions for the protection of identity, see Alpagut, p. 49 et seq.

71 Ali Güzel, İşverenin Değişmesi- İşyerinin Devri ve Hizmet Akitlerine Etkisi, Doçentlik Tezi, İstanbul, 1987, p. 82; Özkaraca, p. 22; Kübra Doğan Yeniset, İş Hukukunda İşyeri ve İşletme, Legal Yayıncılık, İstanbul, 2007, p. 213; Alpagut, p. 48.

72 Ercüment Özkaraca, İşyeri Devri Halinde İşverenlerin Hukuki Sorumluluğu (Hukuki Sorumluluk), İş Hukukunda Üçlü İş İlişkileri, Kadir Has Üniversitesi Sempozyumu, İstanbul, 2009, p. 178; Süzek, p. 198; Yarg. 9. HD, 15.10.2010, E. 2008/377249, K. 2010/29226, (www.lexpera.com, AD. 7.11.2021); Özkaraca, Hukuki Sorumluluk, p. 178.

liability is a consequence of the provision of Article 6/3 of the HR, which stipulates that the employment contracts existing at the time of the transfer are transferred to the transferee with all their rights and obligations in accordance with the Law and that a two-year limitation is imposed on the liability of the transferor.[73] As a rule, it is not possible for the transferee employer to be held liable for the debts arising from an employment contract that does not exist at the time of the transfer, in the face of the provisions of the Labor Law regarding the transfer of the workplace (Art. 6/1).

Although Article 6 of the Labor Law does not protect the employment contracts terminated before the transfer in terms of joint liability, it is stated in the doctrine that if the conditions are met, protection can be provided for these employees by applying the provisions of the Turkish Code of Obligations regarding the transfer of the enterprise.[74] Again, the Court of Cassation considers it possible to establish a joint liability relationship based on these provisions for the employees whose employment contracts are terminated if the conditions are met.[75]

Pursuant to Article 202 of the Turkish Code of Obligations titled "acquisition of an asset or an enterprise", "the transferee of an asset or an enterprise, together with its assets and liabilities, shall be liable to the creditors for the debts in the asset or enterprise starting from the date of notification or announcement" (Art. 202/1). In this case, the transferor will also be liable together with the transferee for a period of two years (Art. 202/2). If the transferee employer fails to make the announcement mentioned in the article, the two-year period will not start to run.[76] Unlike Article 6 of the İK, the provision does not make a distinction as to whether the employment contracts exist at the time of

---

73 Özkaraca, p. 334.

74 Özkaraca, p. 345.

75 Yarg. 9. HD, 12.10.2004, E. 2004/13687, K. 2004/22962, Cevdet İlhan Günay, İş Kanunu Şerhi, Vol. I, 2. Baskı, Ankara 2006, p. 281; Yarg. 9. HD, 05.10.2006, E. 2006/4720, K. 2006/25950, (www.kazanci.com, AD. 7.11.2021); Yarg. 21. HD, 19.10.2010, E. 2010/3450, K. 2010/10172, Çalışma ve Toplum, Issue 31, 2011/4; Yarg. 21. HD, 02.07.2011, E. 2010/3098, K. 2011/5070; Yarg. 9. HD, 11.03.2020, E. 2016/15573, K. 2020/4215, (www.lexpera.com, AD. 28.1.2022).

76 Hamdi Mollamahmutoğlu/Muhittin Astarlı/Ulaş Baysal, İş Hukuku, Ankara 2014, p. 270.

the transfer or not.[77] Therefore, if the conditions sought in the provision are present in the concrete case, it will be possible for the employee whose employment contract ended on a date prior to the transfer to apply to the transferee employer for his/her receivables.

The termination of the employment contract before the transfer or the termination of the employment contract after the transfer to the new employer is of great importance in terms of the compensation claims of the survivors of the employee who died as a result of an occupational accident. This is because there is a situation that differs from most other labour claims. If the employee dies as a result of an occupational accident, the employment contract will be terminated solely for this reason (Art. 440 TBK). In this case, unlike the occupational accident that results in injury or moral damage to the worker, the possibility for the worker to participate in the transfer of the workplace that takes place after the date of the occupational accident is completely eliminated and becomes impossible. For this reason, if the employee dies due to an occupational accident on a date prior to the transfer, it is not possible to claim compensation from the employer who takes over the workplace on a later date based on Art. 6 of the İK, since the employment contract will not be transferred to the new employer. If the workplace is transferred according to the provisions of the Labor Law at a later date after the date of the accident, the injured worker may apply to both the transferor and the transferee employer for compensation. However, the joint liability of the transferor employer is limited to a period of two years.

As a result, it is not possible, as a rule, for an employee who dies as a result of an occupational accident or whose employment contract was terminated at a date prior to the transfer of the workplace to apply to the transferee employer in the face of the explicit provision of the Labor Law regarding liability in the transfer of the workplace. However, in cases where there is a transfer within the meaning of art. 202 of the TBK, or the transfer in question is of a nature that will result in the conclusion of a merger, such as a merger transaction, in the event of death of the employee who has suffered an occupational accident,

77 For detailed information on the transfer of the operation, see Hüseyin Ülgen/Mehmet Helvacı/Abuzer Kendigelen/Arslan Kaya/Füsun Nomer Ertan, Ticari İşletme Hukuku, Güncellenmiş Dördüncü Basıdan Beşinci Tıpkı Bası, İstanbul 2015, p. 196 et seq.

his/her heirs, and in other cases, he/she himself/herself may apply for the joint liability of both employers.[78]

### D. Transfer of Employment Contract

#### 1. In General

Unlike the provisions on the temporary transfer of the employee and the transfer of the workplace, there is no provision on the transfer of the employment contract in the Labor Law. The transfer of the employment contract is addressed in Article 429 of the Turkish Code of Obligations titled "transfer of the contract". Accordingly, the employment contract may be transferred to another employer with the written consent of the employee (Art. 429/1). Upon the assignment of the contract, the assignee becomes the employer party to the contract with all rights and obligations. In terms of the rights based on the length of service of the employee, it is necessary to act according to the date of employment with the transferor employer (Art. 429/2).

The transfer of the employment contract may be made by a unique legal transaction in which the transferor, the party remaining in the contract and the transferee participate, or it may occur with the consent of the employee to a contract previously concluded between the transferor and the transferee employer.[79]

The law states that the written consent of the employee shall be sought for the transfer, but there is no explanation as to the time interval in which the consent must be obtained. However, it should be accepted that the written consent must be sought at the time of the transfer, since it is a transaction that may lead to unfavourable situations such as the transfer of the employee to an employer who is financially very weak or the employee starting to work in a workplace that is not covered by job security.[80] Considering the fact that the consent is sought at the time

78 Mollamahmutoğlu/Astarlı/Baysal, p. 280; Özkaraca, p. 345.

79 Ercüment Özkaraca, İş Sözleşmesinin Devri (Sözleşmenin Devri), İş Hukukunda Yeni Yaklaşımlar, On İki Levha Yayınevi, İstanbul 2014, p. 120.

80 For the dissenting opinion see Efe Yamakoğlu/Eda Karaçöp, "6098 sayılı Türk Borçlar Kanunu'nun Hizmet Sözleşmesine İlişkin Hükümleri ve İş Kanunu ile İlişkisi", *Legal İHSGHD*, Y. 2013, Issue. 38, p. 12; For evaluations regarding the nature of the written form requirement, see. Özkaraca, Sözleşmenin Devri, p. 121 et seq.

of the transfer even in temporary employment relationship, reaching a different conclusion would not be compatible with the logic of law.[81]

With the transfer of the employment contract, the employer party to the contract changes, but there is no change in the terms of the contract.[82] With the transfer, all rights and obligations arising from the employment contract with the title of being a party are assumed by the new employer. As a result, the contractual relationship between the transferor employer and the employee ends.[83]

### 2. Joint Liability in Transfer of Employment Contract

The legislator has not explicitly regulated joint liability in the transfer of the employment contract. In this respect, Article 429 of the TBK leaves unanswered the question of whether the transferor employer continues to be jointly liable with the transferee employer for debts arising on a date prior to the transfer of the employment contract.

By its nature, the transfer of the employment contract transfers all rights and obligations arising from the employment contract to the transferee employer and releases the transferor employer from liability.[84] As a result of this transaction, the transferee employer remains as the sole addressee in terms of all receivables and debts and succeeds to the rights of the transferor employer. Here, the assignee assumes the legal status of the transferor employer as a whole.[85] Due to the nature of the transfer of the contract, the transferee employer becomes liable for all debts arising in the period before the transfer of the contract.[86]

---

81 Süzek, p. 330.

82 Mustafa Alp, "İş Sözleşmesinin Devrinde Bazı Sorunlar", *DEÜHFD*, Vol. 9, Special Issue, Y. 2007, p. 193.

83 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 310; Nurşen Caniklioğlu, Türk Borçlar Kanunu- İş Kanunu İlişkisi ve Türk Borçlar Kanunu'nun Bazı Hükümlerinin İş Kanunu Açısından Değerlendirilmesi, 10. Yılında İş Kanunu Semineri, 15 November 2013, İstanbul 2014, p. 78; Özkaraca, p. 114;

84 Özkaraca, Sözleşmenin Devri, p. 133.

85 Eren, Genel, p. 1392.

86 Şeref Güler, "İş Sözleşmesinin Devrinde Müteselsil Sorumluluk", *İMHFD*, Vol. VI, Issue 11, 2021, p. 215.

Article 428 of the Turkish Code of Obligations, which regulates the transfer of the workplace, regulates the joint liability of the transferor and transferee employers in line with Article 6 of the Labour Law (Art. 428/3 of the TBK). In the next article, the transfer of the employment contract, there is no provision on joint liability. One of the opinions in the doctrine states that the legislator aims not to accept joint liability through deliberate silence in order not to make a negative regulation, and therefore, a gap in the law cannot be mentioned here. According to this opinion, unlike the transfer of the workplace, the consent of the employer is sought in the transfer of the employment contract, and therefore the transfer of the employment contract occurs with the will of the employee who is in a position to calculate the consequences of the transfer of the receivables from the transferor employer to the transferee.[87] Again, unless explicitly stipulated in the law, it is not possible to create a joint liability through interpretation or to extend a joint liability provision by analogy.[88] Pursuant to Article 141 of the TBK, the source of joint liability is only the agreement of the parties or an express provision of law.[89]

According to another opinion in the doctrine, the absence of a provision on the liability of the transferor employer in Article 429 of the TBK regarding the transfer of the employment contract is due to the negligence of the legislator. Therefore, this gap in the law should be filled by applying the joint liability provisions stipulated in the provisions of the TBK and the İK regarding the transfer of the workplace by analogy to the transfer of the employment contract, which is similar in terms of the interests protected.[90]

In our opinion, holding the transferor employer liable for the pre-assignment debts by analogy in the face of the explicit provision of the Law on joint liability does not comply with the logic of law (Art. 141 TBK). However, even though the employee is given the authority

87 Ekmekçi/Yiğit, p. 241.
88 Ekmekçi/Yiğit, p. 242; Yamakoğlu/Karaçöp, p. 125.
89 İpek Kocagil, "Yeni Borçlar Kanunu Işığında İş Sözleşmesinin Devri", Sicil *İHD*, Issue. 22, Haziran 2011, p. 56.
90 Özkaraca, Sözleşmenin Devri, p. 137 et seq; Süzek, p. 331; Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 312; Mustafa Alp, İş Sözleşmesinin Devri, Kadir Has Üniversitesi Hukuk Fakültesi, İş hukukunda Üçlü İş İlişkileri Sempozyumu, 4. April 2009, İstanbul 2009 (Devir), p. 327.

to consent to the transfer, the employee cannot be expected to make a free decision and to have the correct belief that his/her rights are secured in every situation. For this reason, we believe that it would be more appropriate for the establishment of justice to hold the transferor employer jointly liable for the debts arising before the transfer.

In its decisions, the Court of Cassation applies Article 6/3 of the İK regarding the joint liability arising from the transfer of the workplace by analogy.[91] However, in terms of the law, it is necessary to include a clear provision of law regarding the joint liability of the transferor and transferee employers in the transfer of the employment contract, just as in the transfer of the workplace.[92] This practice is incompatible with the nature of the transfer of the contract regulated under Article 205 of the TBK.

Both employers will be jointly liable for damages arising from occupational accidents, as well as other labour receivables arising prior to the transfer of the employment contract, for a period of two years. Only the transferee employer will be liable for occupational accidents occurring after the transfer of the employment contract. Unlike subcontracting and temporary employment relationship, since the employee is not in the workplace of more than one employer or does not work under the orders and instructions of another employer, even temporarily, it will not be possible, as a rule, for joint liability to arise within the scope of Art. 61 of the TBK as a result of the existence of joint fault. This is because the transfer of the employment contract does not create a permanent relationship between the transferor and the transferee employers, and the employer, who is the transferor of the tripartite relationship at the time of the completion of the transfer, completely leaves the relationship.

## III. SCOPE OF JOINT LIABILITY

Neither the Labour Law nor the Occupational Health and Safety Law regulates the receivables that fall within the scope of the employer's liability arising from occupational accidents. Therefore, the

---

91 Yarg. 9. HD, 26.03.2018, E. 2018/2403, K. 2018/6275, (www.lexpera.com, AD. 09.11.2021).

92 Özkaraca, Sözleşmenin Devri, p. 141.

provisions of the Turkish Code of Obligations shall apply to the claims of the employee and other beneficiaries arising from the occupational accident.[93]

In the event of an occupational accident at the workplace as a result of the employer's breach of the duty of care in the broad sense and breach of the duty to take occupational health and safety measures in the narrow sense, the employee may claim compensation for his/her physical damages from the employers who are jointly liable (Art. 54 and 55). In addition to pecuniary compensation, it is also possible to claim non-pecuniary compensation for an occupational accident (Art. 56). In the event that the worker dies as a result of an occupational accident, those who are deprived of the worker's support may claim pecuniary compensation, which is referred to as compensation for deprivation of support (Art. 53). In addition, the relatives of the worker who have suffered pain and anguish due to the death of the worker may file a lawsuit for non-pecuniary damages against all of the jointly liable employers (Art. 56/2).[94]

**A. Material Compensation**

The employee may claim monetary compensation from the employer for bodily injury suffered as a result of an occupational accident. The scope of the concept of bodily injury is defined in Article 54 of the Turkish Code of Obligations. The first item of bodily damages is treatment expenses. The worker may claim the expenses incurred for going to and coming from the hospital, the expenses incurred for the treatment and surgeries performed as pecuniary compensation.[95] In addition, loss of earnings, losses arising from the reduction or loss of working capacity and losses arising from the loss of economic future can also be claimed from the employer within the scope of pecuniary compensation.

---

93 Süzek, p. 409; Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 436; Özdemir, p. 301.

94 For detailed information on the rights that the worker and his/her relatives may claim as a result of an occupational accident, see Cengiz, p. 134 et seq; Süzek, p. 427 et seq; Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 443; Özdemir, p. 301 et seq.

95 Sarper Süzek, İş Kazasından Doğan Maddi Tazminat, Prof. Dr. Ali Güzel'e Armağan, İstanbul 2010, p. 705.

In our law, pecuniary compensation does not aim for enrichment, but serves to restore the financial situation of the injured party. Therefore, the amount of pecuniary compensation to which the worker is entitled is limited to the damage suffered.[96] The Court of Cassation takes into consideration the age, wage, incapacity rate and fault rates of the worker in the calculation of financial compensation arising from occupational accidents. Using these data, calculations are made separately for three different time periods, namely the period of active loss, the period of active loss to be incurred and the period of passive loss to be incurred, and the amount of compensation to be paid is found.[97]

**B. Compensation for Loss of Support**

According to Article 53 of the Turkish Code of Obligations, the damages incurred by the persons deprived of the support of the deceased due to death resulting from an occupational accident must be compensated. The employment contract is a contract between the employee and the employer and depends on the personality of the employee. Those who are deprived of the support of the employee are not a party to the employment contract. However, with a special provision, the legislator has paved the way for those who are deprived of the support of the employee to claim compensation for their damages in accordance with the provisions of contractual liability, not the provisions of tort. Accordingly, "compensation for damages arising from the death of the employee due to the employer's... behaviour contrary to the law and the contract shall be subject to the provisions of liability arising from breach of contract" (TBK art. 417/3).

Compensation for deprivation of support may be claimed by the spouse, children, mother, father and other persons who actually benefited from the support of the worker during his/her lifetime.[98] In determining the amount of this compensation, the variables to be taken into account in the determination of pecuniary compensation will need to be taken into account. In addition, specific to this type

96 Cengiz, p. 134; Süzek, p. 427-428.
97 Süzek, p. 433 et seq; Akın, p. 119 et seq.
98 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 453; Süzek, p. 438.

of compensation, the data regarding the portion of the income of tge deceased that he/she would have allocated to his/her own expenses, savings, and how much share he/she would have allocated to which support, if he/she had survived, will also be taken into consideration in the determination of the compensation.[99]

### C. Moral Compensation

The worker who suffered an occupational accident may claim moral damages, as well as his/her relatives in the event of severe bodily harm or death of the worker (Art. 56/2 of the TBK). The provisions regarding the determination of pecuniary damage are applied to non-pecuniary damage by analogy. However, unlike pecuniary damage, since non-pecuniary damage results in a diminution in personal assets, the discretion of the judge will be much more effective than pecuniary damage.[100] As a matter of fact, it is not possible to calculate and reveal the non-pecuniary damage with calculation methods based on certain mathematical formulas as in the case of pecuniary damage.[101]

## CONCLUSION

An occupational accident is an occupational injury where the employee suffers mental or physical damage as a result of an event arising out of the work he/she is performing while under the control of the employer or as a result of an event that occurs suddenly for an external reason. In the event that there is a fault that can be attributed to the employer in the occupational accident that occurs, and therefore, if there is an attitude of the employer contrary to the employer's duty of care, the legal liability of the employer arising from the occupational accident becomes an issue. In some cases, albeit exceptional, even a fault is not required for the employer to be held legally responsible for the occupational accident.

An employee who suffers bodily injury as a result of an occupational accident may claim financial compensation and moral compensation from the employer. If the worker loses his/her life, those who are

99 Süzek, p. 442.
100 Cengiz, p. 138.
101 Süzek, p. 444.

deprived of his/her support may claim compensation for deprivation of support. In addition, in the event of severe physical damages or the death of the worker, the relatives of the worker who suffered and heard the pain and suffering of the worker may also claim non-pecuniary compensation.

In labour law, subcontracting relationship, temporary employment relationship, transfer of workplace and transfer of employment contract are referred to as tripartite relationships. The legislator has included joint liability provisions in order to protect the workers in labour relations where tripartite relationships are in question. As a matter of fact, the principal employer is jointly liable together with the sub-employer for the labour receivables of the sub-employer's employee (art. 2/6 of the İK). Again, it is regulated that the transferor and transferee employers will be jointly liable for the wages, supervision obligation and social insurance premiums of the worker in the temporary employment relationship (Art. 7/15 of the İK). Again, in the transfer of the workplace, the transferor and transferee employers are held jointly liable for the debts arising before the transfer for a period of two years.

Unlike other tripartite employment relationships, the Law does not provide for an explicit joint liability provision in the transfer of an employment contract. However, in line with the dominant opinion in the doctrine and the jurisprudence of the Court of Cassation, the two-year joint liability provision in the transfer of the workplace is applied by analogy to the transfer of the employment contract, and both employers are held liable for the debts arising from occupational accidents that occurred on a date prior to the transfer.

Unlike the temporary employment relationship established for the purpose of employing workers in another workplace within the holding or in another workplace affiliated to the same group of companies, the Law does not include a provision stipulating that the temporary employer shall be jointly liable with the private employment agency for the breach of the duty of care. Therefore, as a rule, it is not possible for the employee to claim from the temporary employer the damages incurred as a result of an occupational accident while working for the temporary employer. However, if the occupational health and safety

obligations stipulated for temporary employers in both the Labour Law and the occupational health and safety legislation are not fulfilled, the temporary employer's liability arising from its own fault may become an issue. In this case, the private employment agency and the temporary employer may be held jointly liable pursuant to Article 61 of the TBK, which stipulates that persons who cause the same damage for different reasons shall be jointly liable for the damage.

Similar to the temporary employment relationship, it is also possible to apply it to the liability arising in the event that the employee of the main employer suffers damage as a result of the subcontractor's failure to fulfil the occupational health and safety obligations of the subcontractor. In this case, the subcontractor will be liable to the employee of the principal employer under the tort provisions, while the principal employer will be held liable for the occupational accident under the contractual liability provisions. In this case, pursuant to Article 61 of the TBK, the employee of the principal employer may apply to both the sub-employer and the principal employer for compensation for the material and moral damages suffered due to the occupational accident.

## References

### Books

Akın Levent, İş Kazasından Doğan Maddi Tazminat, Yetkin Yayınevi, Ankara 2001.

Akın Levent, İş Sağlığı ve Güvenliği ve Alt İşverenlik, Yetkin Yayınevi, Ankara 2013 (Alt İşverenlik).

Alpagut Gülsevil, İşyerinin Devri ve İş Sözleşmesini Fesih Hakkı, Beta Yayınevi, İstanbul, 2010.

Çankaya Osman Güven/Çil Şahin, İş Hukukunda Üçlü İlişkiler, Yetkin Yayınları, Genişletilmiş 3. Baskı, Ankara 2011.

Çelebi Duygu, Meslek Edinilmiş Geçici İş İlişkisi, Ankara, 2019.

Çelik Ahmet Çelik, Trafik – İş Kazaları, Seçkin Yayınevi, Ankara 2019.

Çelik Nuri/Caniklioğlu Nurşen/Canbolat Talat/Özkaraca Ercüment, İş Hukuku Dersleri, Beta Yayınevi, Yenilenmiş 34. Bası, İstanbul 2021.

Doğan Yenisey Kübra, İş Hukukunda İşyeri ve İşletme, Legal Yayıncılık, İstanbul, 2007.

Ekin Ayşegül, İş ve Sosyal Güvenlik Hukukunda Mesleki Anlamda Geçici İş İlişkisi, Unpublished Doctoral Thesis, Konya 2019.

Ekmekçi Ömer/ Yiğit Esra, Bireysel İş Hukuku Dersleri, On İki Levha Yayınları, İstanbul, 2020.

Eren Fikret, Borçlar Hukuku Genel Hükümler (Genel), 25. Baskı, Yetkin Yayınevi, Ankara 2020.

Eren Fikret, Borçlar Hukuku ve İş Hukuku Açısından İşverenin İş Kazası ve Meslek Hastalığından Doğan Sorumluluğu, Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara 1974.

Günay Cevdet İlhan, İş Kanunu Şerhi, Vol. I, 2. Baskı, Ankara 2006.

Güzel Ali, İşverenin Değişmesi- İşyerinin Devri ve Hizmet Akitlerine Etkisi, Associate Professorship Thesis, İstanbul, 1987.

Güzel Ali/Okur Ali Rıza/Caniklioğlu Nurşen, Sosyal Güvenlik Hukuku, Yenilenmiş 19. Bası, İstanbul 2021.

Mollamahmutoğlu Hamdi/Astarlı Muhittin/Baysal Ulaş, İş Hukuku, Ankara 2014.

Oğuzman M. Kemal/Öz Turgut, Borçlar Hukuku Genel Hükümler, Vol. 2, 11. Bası, İstanbul 2014.

Özdemir Erdem, İş Sağlığı ve Güvenliği Hukuku Dersleri, 1. Bası, Vedat Kitapçılık, İstanbul 2020.

Özkaraca Ercüment, İş Sözleşmesinin Devri, İş Hukukunda Yeni Yaklaşımlar, On İki Levha Yayınevi, İstanbul 2014 (Sözleşmenin Devri).

Özkaraca Ercüment, İşyeri Devrinin İş Sözleşmesine Etkisi ve İşverenlerin Hukuki Sorumluluğu, Beta Yayınevi 1. Basım, İstanbul 2008.

Süzek Sarper, İş Hukuku, Beta Yayınevi, 20. Baskı, Anakara 2020.

Tuncay Can/Ekmekçi Ömer, Sosyal Güvenlik Hukuku Dersleri, Beta Yayınevi, İstanbul 2021.

Ulusan İlhan, Özellikle Borçlar Hukuku ve İş Hukuku Açısından İşverenin İşçini Gözetme Borcu, Bundan Doğan Hukuki Sorumluluğu, Kazancı Kitap Ticaret A.Ş, 1990.

Ülgen Hüseyin/Helvacı Mehmet/Kendigelen Abuzer/Kaya Arslan/Nomer Ertan Füsun, Ticari İşletme Hukuku, Güncellenmiş Dördüncü Basıdan Beşinci Tıpkı Bası, İstanbul 2015.

Yıldız Eren, Asıl İşveren- Alt İşveren İlişkisinde İş Sağlığı ve Güvenliği Yükümlülükleri, Master Thesis, İstanbul 2019.

Yiğit Esra, Özel İstihdam Büroları Aracılığıyla Geçici İş İlişkisi, On İki Levha Yayınları, İstanbul, 2019.

## Articles

Alp Mustafa, "İş Sözleşmesinin Devri", Kadir Has Üniversitesi Hukuk Fakültesi, İş hukukunda Üçlü İş İlişkileri Sempozyumu, 4. April 2009, İstanbul 2009 (Devir).

Alp Mustafa, "İş Sözleşmesinin Devrinde Bazı Sorunlar", *DEÜHFD,* Vol. 9, Special Issue, Y. 2007.

Aydınlı İbrahim, "6552 sayılı Kanun'la Alt İşveren Kurumunda Yapılan Yeni Düzenlemeler ve Değişiklikler", *GÜHFD,* Vol. XVIII, Y. 2014, Issue. 3-4.

Aydınlı İbrahim, "İşverenin Edimden Bağımsız Olan Koruma Yükümlülüğüne, Normun Koruma Amacı (Hukuka Aykırılık Bağı) Bakımından Bir Yaklaşım", (www.tuhis.org.tr/pdf/811.pdf, AD. 4.11.2021).

Başbuğ Aydın, "Alt İşveren İşçisi ile Asıl İşveren Arasındaki Borç İlişkisi ve Bu İlişkinin Doğurduğu Hukuki Sorunlar", Kamu İş Vol. 4, Issue. 3, Januar 1998.

Baycık Gaye, "Çalışanların İş Sağlığı ve Güvenliğine İlişkin Haklarında Yeni Düzenlemeler", *Ankara Barosu Dergisi*, 2013/3.

Belverenli Demet, "Alt İşveren İlişkisinden Doğan İş Sağlığı ve Güvenliği Yükümlülükleri", *İÜHFM,* Vol. 74, Prof. Dr. Fevzi Şahlanan'a Armağan Issue.

Caniklioğlu Nurşen, "İş Sağlığı ve Güvenliği Kanunu Çerçevesinde İşverenin İş Kazasından Doğan Hukuki Sorumluluğu", Prof. Dr. Turhan Esener Armağanı, I. İş Hukuku Uluslararası Kongresi, 2016 (İşverenin Sorumluluğu).

Caniklioğlu Nurşen, "Türk Borçlar Kanunu- İş Kanunu İlişkisi ve Türk Borçlar Kanunu'nun Bazı Hükümlerinin İş Kanunu Açısından Değerlendirilmesi", 10. Yılında İş Kanunu Semineri, 15 November 2013, İstanbul 2014.

Cengiz İştar, "İşverenin İş Kazasından Doğan Hukuki Sorumluluğu", *TAAD*, Y. 9, Issue 34.

Civan Orhan Ersun, "Makineyle Birlikte İşçi Devri", Prof. Dr. Savaş Taşkent'e Armağan, İstanbul, 2019.

Civan Orhan Ersun, "Yeni Düzenlemeler Çerçevesinde Meslek Edinilmiş Ödünç (Geçici) İş İlişkisi", *AÜHFD*, 66 (2) 2017: 311-397.

Ekmekçi Ömer, "4857 sayılı İş Kanunu'nda Geçici (Ödünç) İş İlişkisinin Kurulması, Hükümleri ve Sona Ermesi", *Legal İş ve Sosyal Güvenlik Hukuku Dergisi,* Issue 2, Y. 2004 (Geçici).

Ekonomi Münir, "Asıl İşveren Alt İşveren İlişkisinin Kurulması ve Sona Ermesi", Türk İş Hukukunda Üçlü İlişkiler, Legal Vefa Toplantıları (II), Prof. Dr. Nuri Çelik'e Saygı, Mart 2008.

Güler Şeref, "İş Sözleşmesinin Devrinde Müteselsil Sorumluluk", *İMHFD,* Vol. VI, Issue. 11, 2021.

Güzel Ali/Heper Hande, "Sürekli İstihdamdan Geçici Atipik İstihdama!...: Mesleki Amaçlı Geçici İş İlişkisi", *Çalışma ve Toplum*, 2017/01.

Güzel Ali/ Ugan Çatalkaya Deniz, "İşverenin İş Kazasından Doğan Sorumluluğunun Niteliği ve Sınırları, (Karar İncelemesi)", *Çalışma ve Toplum*, Issue. 34, Y. 2012/3.

Kocagil İpek, "Yeni Borçlar Kanunu Işığında İş Sözleşmesinin Devri", *Sicil İHD,* Issue 22, Haziran 2011.

Odaman Serkan, "Yeni Düzenlemeler Çerçevesinde Türk İş Hukukunda Ödünç İş İlişkisi Uygulaması", *Sicil İHD*, Issue 36, December 2016.

Oğuzman M. Kemal, "İş Kazası veya Meslek Hastalığından Doğan Zararlardan İşverenin Sorumluluğu", *İÜHFM* 1969, C. XXXIV, Issue 1-4.

Özkaraca Ercüment, Özel İstihdam Bürosu Aracılığıyla Geçici İş İlişkisi, İş Hukukuna İlişkin Sorunlar ve Çözüm Önerileri 21. Toplantısı 2016 Toplantıları, İstanbul Barosu- Galatasaray Üniversitesi, 03-04 Haziran 2016, İstanbul 2018 (Özel İstihdam Bürosu).

Özkaraca Ercüment, "İşyeri Devri Halinde İşverenlerin Hukuki Sorumluluğu", İş Hukukunda Üçlü İş İlişkileri, Kadir Has Üniversitesi Sempozyumu, İstanbul, 2009 (Hukuki Sorumluluk).

Süzek Sarper, "İş Kazasından Doğan Maddi Tazminat", Prof. Dr. Ali Güzel'e Armağan, İstanbul 2010 (İş Kazası).

Tuncay Can, "İş Kanunu Tasarısındaki Ödünç İş İlişkisi ve Eleştirisi", Mercek, Y. 8, Issue 30, Y. 2003.

Usen Şelale, "2008/104/EC Sayılı Ödünç İş İlişkisine İlişkin Avrupa Birliği Yönergesinin Getirdiği Yeni Düzenlemelerin Türkiye Açısından Değerlendirilmesi", *Çalışma ve Toplum*, 2010/3.

Yamakoğlu Efe/Karaçöp Eda, "6098 Sayılı Türk Borçlar Kanunu'nun Hizmet Sözleşmesine İlişkin Hükümleri ve İş Kanunu ile İlişkisi", *Legal İHSGHD*, Y. 2013, Issue 38.

Yıldız Gaye Burcu, "İşverenin İş Kazasından Doğan Sorumluluğu", *Toprak İşveren Dergisi*, Y. 2010, Issue 86.

## Court Decisions

AYM, 28.02.2018, E. 2016/141, K. 28.02.2018.

Yarg. HGK, 20.03.2013, E. 2012/21-1121, K. 2013/386.

Yarg. 9. HD, 12.10.2004, E. 2004/13687, K. 2004/22962.

Yarg. 9. HD, 05.10.2006, E. 2006/4720, K. 2006/25950.

Yarg. 9. HD, 14.05.2007, E. 2007/3132, K. 2007/14914.

Yarg. 9. HD, 15.10.2010, E. 2008/377249, K. 2010/29226.

Yarg. 9. HD, 14.05.2013, E. 2003/4721, K. 2003/4643.

Yarg. 9. HD, 22.2.2016, E. 2014/30825, K. 2016/3327.

Yarg. 9. HD, 26.03.2018, E. 2018/2403, K. 2018/6275.

Yarg. 9. HD, 27.05.2019, E. 2017/10797, K. 2019/12098.

Yarg. 9. HD, 11.03.2020, E. 2016/15573, K. 2020/4215.

Yarg. 9. HD, 18.01.2021, E. 2019/4999, K. 2021/1253.

Yarg. 10. HD, 19.4.2016, E. 2014/24954, K. 2016/6004.

Yarg. 10. HD, 15.04.2019, E. 2016/15843, K. 2019/3473.

Yarg. 21. HD, 19.10.2010, E. 2010/3450, K. 2010/10172.

Yarg. 21. HD, 02.07.2011, E. 2010/3098, K. 2011/5070.

Yarg. 21. HD, 07.05.2015, E. 2014/24340, K. 2015/10282.

Yarg. 21. HD, 18.10.2016, E. 2015/17528, K. 2016/12750.

Yarg. 21. HD, 13.02.2018, E. 2016/12322, K. 2018/1190.

Yarg. 21. HD, 12.11.2018, E. 2016/19679, K. 2018/8140.

Yarg. 21. HD, 26.12.2019, E. 2019/2527, K. 2019/8120.