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DIFFERENT WAYS OF LEGAL REASONING - THE CASE OF LON FULLER

by

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Introduction

Lon Fuller (1902-1978) was educated at Stanford, but he taught contracts and jurisprudence at Harvard. from 1939 to 1972 . The author of eight books[1] and a lot of articles, he was one of the leading legal philosophers of the 20th century. He was famous and because of conducting a long-running dispute in the law journals with H.L.A. Hart on the merits of positivism in law[2]. Here he took the anti-positivist position. In his major statement of legal philosophy, *The Morality of Law* which was published in 1964 , he drew together and made systematic his statements against positivism and argued for a limited form of natural law. This book was followed by fictitious legal case, *The Case of the Grudge Informer*, that was less famous than the first one- the Case of the Speluncean Explorers[3].

Using legal reasoning as the start point , in the Case of the Speluncean Explorers Fuller wrote five Supreme Court opinions on the case which explored the facts from the perspectives of quiet different legal principles.

Although the case was a hypothetical one, there have been cases like it in the real life. In a case *United States v. Holmes, U. S. Circuit Court*, from 1842 , the subject was the charge of murder on the high seas. The attorney for the defense argued that if and when citizens are isolated and/or cut off from the rest of society, the normal, conventional rules are not possible to apply. Citizens are then in, as it were, a "state of nature" and their actions ought to be governed by "natural law," and the "law of self-preservation." [4] .Fuller " borrowed" from this case, and another one, *The Queen v.*

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[1] *Law in Quest of Itself*, Foundation Press, 1940; *Reason and Fiat in Case Law*, American Book-Stratford Press, 1943; *Basic Contract Law*, West Publishing Co., 1947, 2d ed. 1964; *Problems of Jurisprudence*, Foundation Press, 1949; *Human Purpose and Natural Law*, Notre Dame Law School, 1958; *The Morality of Law*, Yale University Press, 1964, rev. ed., 1969; *Legal Fictions*, Stanford University Press, 1967; and *Anatomy of Law*, Praeger, 1968, the source: Peter Suber : The Case of the Speluncean Explorers: Nine New Opinions, Routledge, 1998, pg. 7-12

[2]Peter Suber, ibid. , James Boyle: Legal Realism and the Social Contract: **Fuller's** Public Jurisprudence of Form, Private Jurisprudence of Substance , Cornell Law Review № 371 ,1993

[3] Fuller, Lon L., "The Case of the Speluncean Explorers", *Harvard Law Review*, Vol.62, (1949): pp.616-645

[4] ***United States v. Holmes*, U. S. Circuit Court, 1842** .Some 250 miles southeast of Cape Race, Newfoundland, the ship struck an iceberg . Within an hour and half of being struck, the ship went down The crew then "went to work." The mate Holmes ordered the crew "not to part man and wife, and not to throw any women overboard." Frank Askin was one of the men who were supposed to be thrown overboard. He offered Holmes five sovereigns to spare his life until the next morning, ", but Holmes did not accept that. Along with him two his sisters went overboard. But those efforts could not save the ship. Several passengers who survived that night filed a complaint against the crew with Philadephia's District Attorney. Holmes, who was the only crew member then in the city, was arrested and charged with the murder of Frank Askin. Before trial the charge was reduced to voluntary manslaughter, after the grand jury refused to indict Holmes for murder. The *Female Seamen's Friend Society* helped Holmes to hire David Paul Brown, the best criminal lawyer in Philadelphia at the time. Brown argued that in situations of necessity, conventional law ceases to operate and gives way instead to "natural law," i. e. "the law of self-preservation" and Brown argued "the law of self-

Dudley & Stephens, some point such as: desperate situation of defendants, choosing victim by lottery, cannibalism as the final state of desperation , public opinion that goes in favor of the defendants, politically inspired prosecution and rather different opinions of judges that were hearing the case; all that in order to create an imaginary story about profound ways of legal reasoning.

But the case of Speluncean Explorers proves what powerfull weapon can law be , especially the ways that someone interprets it. The story begins in 4299. with entering of four defendants and Roger Whetmore into the interior of a limestone cavern located in the Central Plateau[5]. While they were probing the remote inner reaches of the cave, a strong landslide shook the area. A barrage of massive boulders blocked its only exit. After 20 days of their captivity, they contacted the rescue team, wanting to know what are their chances to survive. Even speeding up the rescue efforts could not help them, so they asked a very unusual question: would it be possible for them to survive if they "consume the flesh of one of their number"[6]. , Roger Whetmore had been the first to propose such a sacrifice. Eight days after the exchange with Whetmore, they finally laid bare the cave's exit. Whetmore was dead, because the four, who became the defendants, killed him on the twenty-third day of their captivity and - eaten him.

No one from the survivors wanted to hide what has happened inside the cave. Although at first repelled by the idea, his colleagues acquiesced in Whetmore's proposal when they heard not so good predictions of the medical experts. He was having a pair of dice with him, and suggested that they can be used to determine the victim. Before the dice were cast, Whetmore declared that he withdrew from the arrangement, as he had decided on reflection to wait for another week before embracing an expedient so frightful and odious. The others charged him with a breach of faith and proceeded to cast the dice[7]. When it came Whetmore's turn, the dice were cast for him by one of the defendants, and he was asked to declare any objections he might have to the fairness of the throw. He stated that he had no such objections. The throw went against him, and he was then put to death and eaten by his companions[8].

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preservation" is no different and is just as compelling as the "law of self-defense." Holmes was convicted and sentenced to six months in jail and given a $20 fine. A Presidential pardon relieved him of the fine but he served his entire sentence. Peter Suber, ibid.

[5] Facts according to Fuller, Lon L., "The Case of the Speluncean Explorers", *Harvard Law Review*, Vol.62, (1949): pp.616-645

[6] Fuller, Lon L., "The Case of the Speluncean Explorers", *Harvard Law Review*, Vol.62, (1949): pp.616-645

[7] Ibid.

[8] The similar situation was in the case *The Queen v. Dudley & Stephens, 14 Q.B.D. 273* **,** from 1884. The four seaman just barely managed to get into their lifeboat, after their ship was smashed by a heavy wave. Sixteen hundred miles away from the closest shore their only hope was to get on the main trade route and be picked up by another ship On the nineteenth day, feeling more dead than alive, one of them ,Dudley, proposed that one of them, to be chosen by lots, be killed for the rest to feed on. Brooks would not hear of it; Stephens was hesitant, and the idea was temporarily abandoned. Dudley next tried to persuade Stephens. Parker evidently was the sickest, and he had no wife or children; it only seemed fair, Dudley reasoned, that he be the one t be killed. Finally, Stephens agreed. For the next four days all three, including Brooks who had objected to the killing, fed on the young boy's body, even drinking his blood. They were spoted on the twenty-fourth day after the accident.The jury on the case was not permitted to render a verdict, for fear it would simply acquit the defendants, but was merely allowed to determine the facts. Nor did the trial judge render a verdict. Instead by way of a highly unorthodox procedure, the case was brought before a five judge tribunal, presided over by Lord Chief Justice Lord Coleridge, who gave the opinion for the court: guilty as charged. Peter Suber, ibid.

At the trial, after the testimony had been concluded, the foreman of the jury inquired of the court whether the jury might not find a special verdict, leaving it to the court to say whether on the facts as found the defendants were guilty. After some discussion, both the Prosecutor and counsel for the defendants indicated their acceptance of this procedure, and it was adopted by the court. In a special verdict the jury found that if on these facts the defendants were guilty of the crime charged against them, then they found the defendants guilty.

The case went to the Newgarth Supreme Court on appeal, before a five judges tribunal . They must consider whether this sentence should be upheld or set aside. Each of them represented one way of legal reasoning , regarding the very same facts about the case tat is before them. Some authors described them as: ".. pompous formalist chief justice called Truepenny, a relentless positivist called Keen, and an agonized and indecisive justice Tatting. .. and the most fully realised characters, those whose opinions read as though they come from profound, if antithetical convictions, are Justices Foster and Handy.."[9]. As a result ,one justice recused himself, the remaining four Supreme Court justices reached a tie vote, 2-2. The Court explained, that, though the Court was evenly divided, the conviction and sentence of the Court of General Instances were affirmed.[10]

Differences and profound ways of legal reasoning

Chief Justice of the Newgarth's Supreme Court, whom Fuller called Truepenny, as it was mentioned earlier, expressed really formalistic, positivistic[11] view of this case. His thinking is rather logical and makes sence even to any non-lawyer person: Statute requires that the killing must be punished, actually that " … whoever willfully takes the life of another shall be punished by death." The four defendants killed Whetmore, so they commited a crime. He concludes that they must be punished, by sentencing them to death by hanging.

Literally reading and applying a statute expands the power of the Supreme Court because it means the lower courts will have to follow him. In this situation, leading the statement of Chief Justice Truepenny, we might have serious problem regarding the interpretation of the statutes. They are ment to address to the courts, leaving no space or a little space for different application of the law. Truepenny also mentioned " the principle of executive clemency", which is a way "to mitigate the rigors of the law" But here, there aren't such circumstances, so the justice can be accomplished only by literal application of the law.

On the other hand, Justice Foster has different opinion[12]**.** The enacted or positive law in any state, including all of its statutes and precedents, is inapplicable to this **case**, though it is predicated on the

[9] James Boyle: Legal Realism and the Social Contract: **Fuller's** Public Jurisprudence of Form, Private Jurisprudence of Substance , Cornell Law Review № 371 ,1993
[10] *Mark D. Harrison and Jeffrey K. Dorso*:Does a Tie Go to Appellee or Appellant under CEQA? VEDANTA SOCIETY OF SOUTHERN CALIFORNIA V. CALIFORNIA QUARTET, LTD
[11] Interpreted as one-way projection of authority
[12] Some think that he is Fuller himself, especially when it explains that law is not morality, but is intertwined with it; Professor Frickey: THEORIES OF THE LEGISLATIVE PROCESS , some outlines for the classes of Legislation, Spring 2004, available on http://www.boalt.org/outlines/Legislation/legislation_frickey_2004spr.doc

possibility of men's coexistence in society. But if that coexistence does not exist, the only way to handle with problem is using the so -called natural law.

Positive law has territorial limits, and they are known in every state. Foster argues that the murder statute couldn't be applied in this case, because the positive law does not apply in the cave. At this point I cannot agree with his opinion, because, the territorial limits of applying the law go all the way to the imaginary center of the Earth[13]. For justice Foster it is enough that the tragic events of this case were taken place a mile beyond the territorial Commonwealth. In his opinion, "state of civil society" didn't exist when they entered that cave, but simply a "state of nature". What these men did was done in pursuance of an agreement accepted by all of them and first proposed by Whetmore himself. This can even pardon them, for commiting this crime, because, even their minds were in the state of nature.

But in second part, Foster changes his mind. He pretends that positive law does reach the explorers, but he says that we must look to the intent of the statute in order to know if the men should be punished. He holds that while a statute may plainly prohibit some conduct, if the situation is such that the purpose of the law would be frustrated by punishing, then we shouldn't punish the defendants. Purpose of a statute is the reason for its creation. According to Foster, the initial purpose of this act was to preserve life. But it is not important that much to respect the letter of the law preserving the one's life, but to preserve your own life. In order to that, it is possible to disregard the purpose of the statute. Then, the application of itself isn't any more obligatory. [14] Also he thinks that every proposition of positive law, whether contained in a statute or a judicial precedent, must be interpreted reasonably, in the light of its evident purpose[15]. Reasonable interpretation, in both his opinions leads to only one solution a nd that is setting aside the present conviction.

Justice Tatting is presenting the legal indeterminacy , that caused him to declare his withdrawal from the decision of this case**.** In his opinion, those men should not be executed, because it is not the purpose of the law. In fact the unique nature of the motivation for the killing, is something that makes the whole process , including the prosecution of these men - useless. No statute, whatever its language, should be applied in a way that contradicts its purpose[16]. Legislative intent, Tatting argues, might not always be clear. There may be more than one purpose behind a statutory provision, and those purposes may serve as a cause for dispute. Also, Judge Tatting claims the purpose of the law is deterrence. According to law and economics, assuming everyone is a rational thinking, as long as the costs are high enough, you can keep someone from doing something. If deterrence is the sole purpose of the criminal statute, economic interpretation fits perfectly. But if deterrence doesn't serve its purpose here, we can add incapacitation, retribution and other theories to justify criminal justice

[13]Radomir Lukić: Uvod u pravo, zavod za udžbenike I nastavna sredstva, Beograd, 1998.
[14] Some authors conclude that justice's claims , which are allowing the men to be executed for the murder, shall make the executioner a murderer, who must be punished by death and so on.
[15] Fuller, Lon L., "The Case of the Speluncean Explorers", *Harvard Law Review*, Vol.62, (1949)
[16] But purpose can not be sometimes understood well, and that does not makes things easier, because, there is no sence to apply something that you do not understand or you are afraid to interpret it in a wrong way.

Tatting is equally unimpressed with Foster's social contract argument. His sharply expressed disagreement with Foster's opinion shows the "battle" between the positivism and natural-law thinking. Precisely when, Tatting asks, did the explorers pass from the "state of civil society" into a "state of nature".[17] If the rule here comes from natural law, then how can the judges have any role in deciding the case, especially when the law of contracts[18] is more fundamental than the law of murder?

The reason for his indeterminacy is that he is "torn between sympathy for these men and a feeling of abhorrence and disgust at the monstrous act they committed"[19]. On the other side, it is very absurd to put to death defendants, when their lives have been saved at the cost of the lives of ten workmen, while they were trying to save those five. He finds "that almost every consideration that bears on the decision of the case is counterbalanced by an opposing consideration leading in the opposite direction". Tatting thinks that it would be better not to indict them at all, having in mind all the circumstances of the case.

The fourth judge Keen is also presenting the positivistic view of this case. According to his own personal conscience, he would let the men go free . Application of a statute as it is written and remaking it to meet his own wishes at the same time is not possible in this case. He doesn't like convicting the defendants, but he is obligated by office to ignore his personal interpretation positivism. In fact, there could be nothing moral about a law. A law enacted by a legislature can be evil and immoral, yet it creates the obligation of its application. Judges are here to act not regarding their personal opinions but with respect to this positive law, no matter what it is really like. "Though the principle of the supremacy of the legislature has been accepted in theory for centuries, such is the tenacity of professional tradition and the force of fixed habits of thought that many of the judiciary have still not accommodated themselves to the restricted role which the new order imposes on them"[20]. Judge Keen is acting like he would like to see justice done, but that it must be explicitly relevant in order to incorporate it into a case.

But the sole question before the Court, important for decision, is whether these defendants did, within the meaning positive law, willfully take the life of Roger Whetmore .A hard decision is never a popular decision .The decision is sometimes that hard to make because we aren't satisfied with the content of a law, especially when the case before us has something to do with morality as a higher standard. Then we are between two opposite sides, two different solutions. law is wholly distinct from morality; if we think the law is wrong, we should leave it alone anyways and let the legislature fix its mistakes[21]. Judges aren't entitled to do that. The conclusion that finalizes the efforts of this judge to act as legal Hercules is that the conviction should be affirmed.[22]

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[17] ibid.
[18] Regarding the contract between four defendants and Whetmore, before he changed his mind, which in a way, became the irrevocable one and entitled the other to kill Whetmore.
[19] Ibid.
[20] Fuller, The Case of Speluncean Explorers....., pg.621.
[21] Professor Frickey: THEORIES OF THE LEGISLATIVE PROCESS , some outlines for the classes of Legislation, Spring 2004, available on http://www.boalt.org/outlines/Legislation/legislation_frickey_2004spr.doc.
[22] It is a kind of decision that was made by justice Coleridge in the case *The Queen v. Dudley & Stephen.s,* because he refused to recognize self-preservation as an all-justifying end. The harder case, the more the judge has a moral obligation to look up the law and determine what is right. About " legal Hercules " wrote Ronald Dworkin in Taking

The last judge Handy sees the law as a matter of practical politics, though "government is a human affair" .[23] Handy's realism might fit into pragmatism. He constantly flaunts the conventions of the judicial role and delights in puncturing the constructs with which his earnest colleague Foster attempts to defend a middle ground between raw politics on the one hand and formalism on the other .Handy also stated that juries can very well ignore the instructions they are given. Their personal opinions and values inevitably factor into the decision. Jurors are required to give a decision on the totality of the case. The ultimate question of applying the law to the facts is one that a jury has to make, at least in a criminal case. In a civil case a special verdict like this would have been fine.

Acting like an arch-realist ,Handy admits that there are a few fundamental rules of the game that must be accepted if the game is to go on at all. One of those rules in this case is paying attention on public opinion. About ninety per cent expressed here f that the defendants should be pardoned or let off with a kind of token punishment.[24]. The realist judge will use public opinion if it helps, but primarily the judge must use his/her own subjective perceptions. Sometimes it can be hard to look at the case with different eyes. Sometimes the subjective perception of a judge is unconsciously inspired by the public opinion. Especially when those defendants have already suffered more torment and humiliation than most of the people would endure in a thousand years. His conclusion that the defendants are innocent of the crime charged, and that the conviction and sentence should be set aside, is expected.

After the Newgarth's Supreme Courts' opinions

Fuller's five Supreme Court justices tranquilly but rigorously show the complexity of the facts and the flexibility of legal reasoning. The five opinions focused on different factual details and legal precedents, and fit them into different background structures of legal and political principles. By these means Fuller crystallized important conflicts of legal principles and illustrated the major schools of legal philosophy in his day[25].

What about the necessity defense, would it be enough to justify the defendants' killing of Roger Whetmore ? Like a plea of self-defense, the necessity defense, if successful, relieves the defendant of any and all guilt. But self-defense is circumscribed by a number of conditions. If those conditions are not met, the defense cannot be sustained. A plea of self-defense is appropriate in those circumstances where the defendant reasonably believed that it was necessary to take the action he did in order to avert an immediate and direct threat against his person by another.

Rights Seriously (Ronald Dvorkin: Suština individualnih prava,Službeni list SRJ, Beograd, i CID Podgorica, 2001, p.141.

[23] James Boyle: Legal Realism and the Social Contract: **Fuller's** Public Jurisprudence of Form, Private Jurisprudence of Substance , Cornell Law Review № 371 ,1993

[24] Throughout the trial and the preparations preceding in the case *The Queen v. Dudley & Stephen.s* , public sympathy was almost entirely on the side of the "cannibals."Even Daniel Parker, eldest brother of the victim, forgave Dudley in open court, and even shook hands with him.

[25]Peter Suber in The Case of the Speluncean Explorers: Nine New Opinions, Routledge, 1998;
Anthony D'Amato, "The Speluncean Explorers —Further Proceedings," *Stanford Law Review*, 1980, vol. 32, pp. 467-85 at p. 467; William N. Eskridge, Jr., "The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell," *George Washington Law Review*, August 1993, vol. 61, no. 6, pp. 1731-53 at p. 1732

Some authors tried to create even more solutions of this "hard case". With the respect of consistency and plausibility of those opinions, the number of opinions that could be reached is enourmous[26]. At some points , the efforts of those authors were combined with obligation of not inventing some new facts about the history of Newgarth, and to play within the four corners of the playground that were inherited from Fuller.But the idea stayed the same- that each opinion has to have a dominant orientation within jurisprudence.

It is important to mention that Peter Suber wrote nine different opinions, including those regarding feminist, communitarian, economic, constructionist, postmodern theories of law, Anthony D'Amato wrote three for the *Stanford Law Review* in 1980 (vol. 32),and Naomi Cahn, John Calmore, Geoffrey Miller, Jeremy Paul, and Laura Stein wrote one apiece, from different legal and political standpoints, for the *George Washington Law Review* in 1993 (vol. 61) Also ,there are new opinions in Speluncean Explorers , put by Judges Coombs and Greene , which are reflecting feminist and Critical Race Theory approaches.

Also , Alexander M. Sanders Jr. invented another case for the Supreme Court of Newgarth in his article *Newgarth Revisited: Mrs. Robinson's Case*[27].On this occasion, the issue is whether this appellate court should uphold damages awarded to a comatose plaintiff (Mrs. Robinson) against a supersonic train that slammed into her car, killing her husband and reducing her to a vegetative state broken only once after a ten-year interval, when she became semi-conscious just long enough to recite the facts of the case before witnesses. Each of the five judges represents one (or more) jurisprudential traditions: Legal Formalism, Liberal Positivism, Law and Economics, Legal Realism and Critical Legal Studies, and Natural Law (which gets the last word, incidentally).

At the end , we can only ask which of the contending legal philosophies is most acceptable, most compelling, most persuasive. Each one of them is reasoned in its own way, but which is the best? And not for the defendants, not for the judges or for the public oinon, but for the aim of the law itself? From one point of view, they are all equally adequate just because they have strong arguments to offer. On the other side, it is possible that they are just emerged from important moral, legal, political, or philosophical traditions, and that is enough to give them the strength they need..

But, we can see that several opinions were not equally strong in their arguments or not equally faithful to the law. Legal and ethical controversies are often, yet they are not all resolved by courts, but by other branches of government, who are entitled to make that kind of decisions.Sometimes, the decisions are reached on the basis of prevailing public opinion, which can be good basis, though it can be manipulative. According to Fuller, this case contains " a few modest truths"[28] about the nature of law and government. It also shows that the possibilities for interpretation the very same regulation are almost uncountable .That is something that produces the so-called "hard cases", who "would not be such if they could be satisfactorily resolved by simple methods"[29]. Expecting much of judicial reasoning is never enough to resolve the practical problems and that was really

[26] Peter Suber, ibid.
[27] *South Carolina Law Review* № 49, 1998, p . 407-461
[28] Fuller: The Case of Speluncean Explorers, *in fine*
[29] Peter Suber, ibid.

bothering judge Tatting[30]., while he was preoccupied with some theoretical problem, which are impossible to be resolved at all .

Everything but conclusion

This case could be seen in the reflection of Fuller's later definition of legal order as " the diverse vehicles by which freedom is effectively exercised in society", and understanding lawyers as "architects of social structure," or else "as creators and managers of the various forms of legal order". His five judges in The Case of Speluncean Explorers were acting like those lawyer, each creating his view of the same legal order, but according to their own beliefs.[31] Problems that are introduced here are very real, especially when it comes to realization of judicial decision-making. Rules are impersonal; their simple application is not sometimes the only possible solution ."In such circumstances, citizens and officials alike must be deemed entitled to make legitimate departures from rules"[32]. That is what , in my opinion , did Fuller's judges- they made that departure from rules, but not all of them. One of them made the right decision, but it is up to readers to determine , which one is it, according to own perception and belief.

Reading a statute for its "plain meaning" became very popular in judicial circles nowadays. In a way, it describes the authority of judges. This tendention can be really dangerous when it comes to ignoring influence of one's values and past in making a lawfull decision(but is it always a fair decision?).But "modest truths" that Fuller has offered to us in his case of Speluncean explorers, just showed us how little we exactly know about the law and its meaning." Any attempt to reconcile two concepts that both deny and depend on each other are inherently instable"[33]. In this case, the concepts that were the subjects of possible aproval , were formal and substantive justice. In theory, those concepts are very different. But something called democratic society is always trying to predict the possible conflicts. From this point of view we can conclude that the truth whether it is "modest" or of some other kind, can never be contained in a single point of view, and that is the main reason of importance of this fictitious case .

[30] Neil Duxbury : AMBITION AND ADJUDICATION , University of Toronto Law Journal - Volume XLVII, Number 1, Winter 1997
[31] The Principles of Social Order - Selected Essays of Lon L Fuller, Edited by Kenneth Winston, short review available on http://www.hartpublishingusa
[32] Neil Duxbury, ibid.
[33] James Boyle, ibid.

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TERMINATION OF LABOR CONTRACTS AND UNFAIR DISMISSAL UNDER TURKISH LABOR LAW

by

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I. INTRODUCTION

Because of the recent developments in Turkey mainly in the society and in the fields of economy and technology, Turkish Labor Code no.1475 was no longer adequate to answer the new social needs and working relations[1] It had contained many inflexible rules, therefore it was abolished, and replaced with a new Labor Code, that complied with the rules of the International Labor Organization (ILO) and the European Union (EU). The new Code was prepared by a commission mostly consisting of academicians and during the drafting the commission considered doctrine, judicial decisions as well as the views of social partners. The new Labor Code was put into effect in Turkey on 10 June 2003.

The new Labor Code didn't please the contractors. As a matter of fact, employers have cautioned the government against triggering a new economic crisis by passing the code. In a joint declaration private sector agencies termed the law as an outright election compromise and criticized lawmakers for resorting to populism to attract votes in the upcoming election. Furthermore, almost all employer organizations declared that the Labor Code and employment protection system regulated by the Labor Code is a unilateral arrangement that will negatively affect the Turkish industry, commercial life and productive economy. This code was criticized by the unions as well[2]. It was called a "slavery code" by them. Despite the reactions, the Labor Code has been applied for about one and half years. But just for today, there is not a big trouble on the economy. However a lot of workers were dismissed just before the enacting of the legislation[3]. Some of them are employed again during the period. But the others are still unemployed.

The concept of employment protection in Turkish Labor law has, to a limited extent, gained a legal dimension through the new Labor Code. The dismissal process in the former Labor Code, which can today still be applied in establishments that employ less than 30 workers, allows the employer to terminate the contract of employment without showing any cause. For such a dismissal to be effective it is only required that the appropriate compensation is paid and that the power of dismissal has not been abused. Otherwise, the worker gains the right to compensation for bad faith that is the say *"bad-faith compensation"*.
In spite of this change, bad-faith compensation to this day has not been seen as providing enough security for an employee, as it is extremely difficult to prove bad faith on the part of an employer.

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[1]The former Labor Code remained in effect between 1971 and 2003.
[2] See below Table 4, 5.
[3] See below Table 6.

The Turkish State, seeing a need for employment protection in the working life of its citizens, ratified the Convention no. 158 of the ILO, the 1994 Termination of Employment Convention and undertook the appropriate legal reforms. This has resulted in Code no. 4773 of 2001, which enshrined employment protection in law. However, subsequent developments together with discussions between employers and employees have brought more radical rooted changes in the organization of working life into the agenda. Such discussions have led to the passing of a new Labor Code no. 4857, which incorporated a somewhat modified Code no. 4773. However, the scope of employment protection is limited in this new Code.

II. TERMINATION OF THE CONTRACT

Terminations of the Labor contracts are divided into three categories under Turkish Labor Law: termination through a term of notice, just cause termination and unfair dismissal.

1. Termination through a term of notice

A. General

Before terminating an employment contract made for an indefinite period, a notice to the other party must be served by the terminating party (Labor Code Article 17). According to the statutory rule, employers must give a two week's notice period (term of notice) to an employee who has been employed for less than six months. Nevertheless, in accordance with the duration of employment, this notice period is stated differently by the Labor Code. Where the length of employment has been between six months and 1.5 years, the notice period must be four weeks. Moreover, the Labor Code provides for a six week's notice period for 1.5 years to 3 years service, an eight week's notice period for more than three years service to the employer. This type of unilateral termination is possible only for open-ended Labor contracts in which the period is indefinite; that is, where the duration of the employment is not pre-determined by the parties[4].

These are minimum periods and may be increased by contracts between the parties[5]. The party, who does not abide by the rule to serve notice, have to pay compensation covering the wages which correspond to the term of notice. The employer may terminate the employment contract by paying in advance the wages corresponding to the term of notice. This is called a notice pay.

In cases where employment contracts of employees who fall outside the scope of employment protection rules have been ended by the abusive exercise of the right to terminate, the employee have to be paid compensation amounting to three times the wages for the term of notice (Labor Code Article 17/VI). For instance, a worker dismissed because of having filed a grievance against the employer will be considered as having been abusively dismissed. This is called bad faith compensation[6]. The Turkish Court of Cassation thought that bad-faith compensation was a special type of notice compensation, so that when bad-faith compensation was to be paid, notice

[4] Y.9.HD. 26.4.2000, 2291/6305 (GÜNAY, 2001, p.502).
[5] Süzek, 2002, 449. Çelik, 2000, 174. Narmanlıoğlu, 1998, 294.
[6] Süzek, 2002, 459. Ekonomi, 1987, 188. Çelik, 2000, 172. Narmanlıoğlu, 1998, 307. Nurhan SÜRAL, Labor Law, Ankara 1993, p.25

compensation could not be decided[7]. Until the new Code was enacted, such decisions were criticized extensively[8]. But now, according to the new Labor Code, employers must pay this compensation separately in such situations.

If the rule to give notice has not been observed either, the employee must pay an additional compensation (notice pay).

When the employee wants to termination by notice, he has to abide only notice period. He doesn't need any reason for the termination. Nevertheless, employee has to work during the period. Employer has to pay his wage during the term as well. At the end of the period, employee entitle to severance pay. However, employer doesn't obey this rules, the termination is also called unfair dismissal. Today, the termination system is used on the workplace where working less than 30 employee. Whereas the system was applied all workplaces until Code no: 4773.

B. Employment protection system

a. Restrictions In Regard To The Establishment

Whether or not one can benefit from employment protection system measures firstly depend on the size of the establishment. The Code numbered 4773 took establishments employing 10 or more people into its scope. This number is increased by the new Labor Code numbered 4857, which became effective later than the former and amended its provisions regarding employment protection system. Accordingly, an employee[9] who wished to benefit from employment protection provisions had to be working in an establishment employing 30 workers or more.
In the reasoning the Labor Code submitted to the parliament by the government, it is expressed that convention no. 158 recognizes the discretion of the countries on this issue. The relevant part is cited: *"In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are*

[7] Y.9.HD. 29.3.2000, 900/4078. Y.9.HD. 8.3.2000, 51-2578 (İ.Cevdet GÜNAY, Şerhli İş Kanunu, Ankara 2001, p.730, 732).
[8] Sarper SÜZEK, İş Hukuku, Ankara 2002, p.463. Nuri ÇELİK, İş Hukuku Dersleri, İstanbul 2000, p.177. Münir EKONOMİ, İş Hukuku, C.I, Ferdi İş Hukuku, İstanbul 1987, p.189. Kenan TUNÇOMAĞ/Tankut CENTEL, İş Hukukunun Esasları, İstanbul 1999, p.189. Ünal NARMANLIOĞLU, İş Hukuku Ferdi İş İlişkileri I, İzmir 1998, p.313. Hamdi MOLLAMAHMUTOĞLU, Hizmet Sözleşmesi, Ankara 1985, p.261. Ercan AKYİĞİT, İş Hukuku, Ankara 2002, p.165-166. Haluk Hadi SÜMER, İş Hukuku, Konya 2000, p.83. Haluk Hadi SÜMER, İşçinin Sendikal Nedenlerle Feshe Karşı Korunması, Konya 1997, 127. Ercan AKYİĞİT, Kıdem Tazminatı, Ankara 1999, p.338. Münir EKONOMİ, İHU, İşK.13, No.21. Öner EYRENCİ, İHU.İşK.13, No.11.
[9] According to the Labor Act, a worker is any person working under a Labor contract (Article2/I). In addition a worker also has to be a real person. But the Unions Act broadens the concept of worker. Apart from those employed under a Labor contract, those working under three other types of contracts are also named as workers (SÜRAL, 1993, p.8): *persons* who work in an establishment yielding physical services in accordance with a transportation contract, excluding the vehicle owner, or *persons* who give a publisher the right to publish their written work according to a copyright contract, and *persons* who receive partnership share for their physical or intellectual Labor according to a partnership contract in an ordinary company which is not a corporated body, provided such contract is open to any other person fulfilling the same conditions, are defined as an employee (Union Act Article2/II).

governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention."

According to the doctrine this arrangement narrows the field of application for employment protection provisions[10]. In other words, it defends the exclusion of small establishments. In Turkey, 60% of establishments employ fewer than 30 people[11]. For this reason, employment protection provisions are considered insufficient in countering unfair competition and irregular employment practices, which are a continual cause of complaint.

Some scholars claim that this distinction between establishments made under the new Labor Code may be annulled by the Turkish Constitutional Court.[12] They find support in the precedent where Article 2 of Code no. 3417, that provided deductions for compulsory savings from employees in establishments with over 10 workers, was annulled by the Constitutional Court on the basis of discrimination in the status of the establishments[13].

b. The Individual Restrictions

The new Labor Code does not make any distinction between white or blue collar workers and public or private sector workers[14]. All workers who are included in Article 4 of the new Labor Code are covered by the same legislation, as long as the employment relationship relies on a Labor contract[15]. But employment protection provisions do not cater for all workers in workplaces employing 30 or more workers[16]. In order to be covered by the provisions, a worker must be

[10] Fevzi DEMİR, İş Hukuku ve Uygulaması, İzmir 2003, p.84.
[11] Labor Statistics, Ministry of Labor and Social Security Republic of Turkey, Ankara 2003, p.136.
[12] Devrim ULUCAN, Çalışma Hakkı ve İş Güvencesi, Prof.Dr. Ümit Yaşar Doğanay'ın Anısına Armağan, V.II, İstanbul 1992, p.30.
[13] Decision of the Constitutional Court, 18.11.1998, 59/7 (O.J.31.1.2001, 24304).
[14] See below Table 2.
[15] According to the Turkish Labor Code Article 4 "The provisions of this Act shall not apply to the activities and employment relationships mentioned below:
a) Sea and air transport activities, b) In establishments and enterprises employing a minimum of 50 employees (50 included) where agricultural and forestry work is carried out, c) Any construction work related to agriculture which falls within the scope of family economy, d) In works and handicrafts performed in the home without any outside help by members of the family or close relatives up to 3rd degree (3rd degree included), e) Domestic services, f) Apprentices, without prejudice to the provisions on occupational health and safety, g) Sportsmen, h) Those undergoing rehabilitation, I) Establishments employing three or fewer employees and falling within the definition given in Article 2 of the Tradesmen and Small Handicrafts Act.
However, the following shall be subject to this Act: a) Loading and unloading operations to and from ships at ports and landing stages, b) All ground activities related to air transport, c) Agricultural crafts and activities in workshops and factories manufacturing implements, machinery and spare parts for use in agricultural operations, d) Construction work in agricultural establishments, e) Work performed in parks and gardens open to the public or subsidiary to any establishment, f) Work by sea-food producers whose activities are not covered by the Maritime Labor Act and not deemed to be agricultural work."
[16] Amount of the workers were 10 or more in numbered 4773 Act which abolished by the new Labor Code. This rule was also criticized by the doctrine (Polat SOYER, 158 Sayılı ILO Sözleşmesi Çerçevesinde Yapılması Gerekenler, İktisadi, Sosyal ve Uluslararası Hukuki Boyutu ile İşçinin Feshe Karşı Korunması, İş Hukukuna ilişkin Sorunlar ve Çözüm Önerileri 2001 Yılı Toplantısı, İstanbul 2002, p.274-275. Devrim ULUCAN, İş Güvencesinin Kapsamı ve Temel Kavramlar (a), İş Güvencesi Temel Kavramlar ve Uygulamadan Öneriler Semineri, İstanbul 2003, p.24.)

employed for at least six months (Labor Code Article.18/I)[17]. This is considered as a probation period. Employment protection provisions are not applicable in terminations mentioned.

In calculating the six month period, there exist a number of situations in which the worker does not work actually but is considered as a part of employment term. These are stated in Labor Code (Article 66): time spent in mines, stone quarries or any other underground or underwater workplace by workers in shafts or galleries or in descending into or on their way to and back from the actual place of work; time spent in traveling when the employee is sent by the employer to another place on business; time spent by the worker either at work or in a situation where he is ready for work at a moment's notice but is waiting for work to arise rather than actually engaged in work; time spent occupied, though not engaged with the actual job, while traveling on business, or at the employer's house or place of work, or in any place connected with the employer; time set aside for nursing mothers to feed their babies; with regard to places of employment far from centers of population, such as highway and railway construction, maintenance or repair, in which substantial time is required for transport to and from the establishment, the time required for such travel.

Periods spent in travel to and from the place of work where the transport is provided by the employer as a social convenience are not considered part of the period of work. Therefore, such periods are not counted as part of the six month period.

According to the Labor Code, the employer's representative is any person acting in the establishment on behalf of the employer and is the one who is in charge with the administration of the work, the establishment as well as the enterprise[18]. Some representatives of employers are outside the scope of employment protection in establishments that fall within the scope of such protection. Actually, such people are workers in that they work within the context of the establishment's activities, however owing to the nature of their employment, are counted as employer representatives. According to the Labor Code, employer's representative and his assistants are authorized to manage the entire enterprise and they do not benefit from employment protection provisions (Labor Code Article19, 21 and 25 together with Article 18/V). In addition to the person, representatives of the employer who run the entire establishment and have the authority to employ workers and terminate their contracts (i.e., human resources and personnel managers), do not benefit from the provisions either.

Thus, an employer can easily terminate the employment of the staff closest to him. However, additional employment protection provisions not currently in the Code may be brought in for such personnel. Apart from this, other general provisions in the Labor Code outside those related to employment protection are also applicable to the representatives of the employer. Therefore they are not entirely without protection.

[17] Y.9.HD. 8.7.2003, 12505/13186 (İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, 2004/1, p.229-230).

[18] Employer's representatives are defined differently by Unions Code. According to this, any person authorized to manage an entire enterprise or an establishment in the name of the person or corporation or non-corporate public bodies considered to be an employer shall be considered to be an employer's representatitive. So the employer's representative shall be considered to be an employer for the purposes of this Code. As a consequence of this rule, employers' representatives could be members of the employer's unions.

c. Employment Protection Provisions

aa. Invalid reasons for termination of the employment contract

The greatest innovation that employment protection system introduced was the obligation of the employer to provide a valid reason when terminating a worker's employment. For a better understanding of this part of the Code, examples of situations which do not provide a valid reason are given. These are mainly: membership of a trade union or participation in union activity without the employer's permission; representing a union at the establishment; initiating legal action in the judicial or administrative courts against the employer in pursuit of a right; discrimination because of race, color, sex, marital status, pregnancy, birth, religion, political viewpoint, etc.; temporary inability to work due to illness or accident.

The examples given are not exclusive and similar situations do not provide a legitimate reason for dismissal either. In other words, a worker may not be dismissed for these and similar reasons without paying compensation.

These arrangements are in compliance with the Termination of Employment Convention no: 158, Article 5. According to the Convention; *"the following, inter alia, shall not constitute valid for termination: union membership or participation in union activities outside working hours or with the consent of the employer, within working hours; seeking office as, or acting or having acted in the capacity of a workers' representative; the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; discrimination because of race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; absence from work during maternity leave."*

bb. Valid reasons for termination of the employment contract

ILO Convention no: 158, which provides for the basis of some of the provisions of the new Labor Code, brings a legal obligation for an employer to provide a valid reason for dismissal. According to the Termination of Employment Convention Article 4: *"The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on operational requirements of the undertaking, establishment or service."*

In the new Labor Code there is also an obligation for employers to provide for a valid reason for terminating employment. This obligation was not stated in the former Labor Code number 1475. Thus, the employer was not under the legal obligation to provide and to prove a valid reason. Any reason not abused was sufficient for terminating employment. But this method of termination has been abolished by the new Labor Code and as previously mentioned, an employer must show a valid reason.

There are two categories of valid reasons for termination: valid reasons relating to the worker's competence or behavior and valid reasons stemming from the needs of the service, establishment and enterprise. Examples are given in the reasoning of the Code. However, characterization of a valid reason remains to be seen through the opinions of the Court of Cassation.

aaa. *Valid reasons arising from the employee*

Valid reasons arising from the employee constitute those situations in which an employer can not be expected to continue the employment. This can be divided into two categories. The first category arises from the incompetence of the worker, and the second from the worker's behavior.
In the reasoning of the Code, examples of valid reasons arising from the *worker's incompetence* are given: being less productive than average, demonstrating a lower than expected performance, insufficient attention to his work, being unable to do the work, inadequate ability to learn, frequent illness, unsuitability for the job, reaching retirement age. The reasoning of the Code also gives examples of valid reasons arising from the *worker's behavior*: causing damages to the employer, creating a damaging environment, annoying colleagues by continually requesting loans, inciting colleagues against the employer, performing work inadequately or badly, making long telephone calls, frequent lateness, incompatibility with work colleagues and, frequent arguments with colleagues.

When the reasons given above are severe nature, employers entitle to dismiss without compensation. In such cases, these reasons can be described as *"just causes"* and the employer can terminate employment with instant dismissal. This kind of termination is stated under Articles 24 and 25 for employees and employers respectively[19].

bbb. *Valid reasons arising from the needs of the service,the establishment and the enterprise itself*

Valid reasons arising from the needs of the enterprise, the work place or the work itself can also be divided into two groups: the first comprises external reasons, the second comprises internal reasons.

External reasons are reductions in sales, falling demand, energy problems, economic crises in the country, stagnant markets, and falling export problems with raw materials. Internal reasons are new working practices, reductions in scale, utilization of new technology, and disuse of certain working processes.

ccc. *Ultima-ratio principle*

The new Labor Code considers the employer's right to dismiss as a last resort. Even if a valid reason arises, an employer is expected to be reluctant to resort to dismissal. If possible, the employee must be given a different job appropriate to his or her qualifications[20]. Consequently, the employer should use the right to dismiss only if there is no other option. This is also plainly mentioned in the reasoning of the Labor Code.

C. Procedure for the Termination

[19] See below II.2.
[20] Münir EKONOMİ, Hizmet Akdinin Feshi ve İş Güvencesi, Çimento İşveren Dergisi Özel Eki, Mart 2003, p. 23. Nuri ÇELİK, İş Güvencesi (a), İstanbul 2003, p.28. Öner EYRENCİ, 4857 sayılı İş Kanunu ile Getirilen Yeni Düzenlemeler, İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, 2004/1, p.34. Savaş TAŞKENT, İş Sözleşmesinin Kurulması ve Sona Ermesi, Yeni İş Yasası, 25-29 Temmuz 2003, p.120. Devrim ULUCAN, İş Güvencesi (b), İstanbul 2003, p.44.

An employer who wants to dismiss an employee must inform him or her in writing (Labor Code Article 19/I). Previously, the Court of Cassation had considered a dismissal not made in written form to be valid[21]. However, according to the new Code, unwritten dismissals are not acceptable. The reason for this is that clear and definite reasons for dismissal must be given in this written notice. Owing to this, written dismissals that state the reason for dismissal are compulsory[22].
According to the statutory rule mentioned above, employers must give a notice period (term of notice) to an employee for termination[23]. The period of notice may be arranged differently in employment contracts[24], since these periods are the minimum periods required by the Code and can be increased through mutual agreement. If the contract of employment expressly states the period of notice that the employee is entitled to receive, then at least that period must be given. If the employment contract does not state any period of notice, then the notice stated in the Labor Code has to be given.

If a worker is dismissed with notice and is asked to work until the expiry of that notice, then the dismissal does not take effect until the notice expires. During this period, the employer must provide a normal week's pay independent from the working of his employee. Or, the employer may make an advance payment (lump sum payment) and terminates the employment contract immediately. At first sight, this may seem to be in favor of the employee because the employee still receives his or her wages without working and now has time to seek a new job. But this situation can also negatively affect the worker[25]. According to the previous decisions of the Court of the Cassation, the employment contract will be deemed to have expired at the moment the advance payment is paid and covered by the Social Insurance Association (SSK). However, the notice period will not be taken into consideration in the calculation of the employee's severance pay and the employee will not be entitled to claim extra benefits, if any, for the notice period[26]. This opinion of the Court of Cassation has been criticized on doctrinal grounds[27]. On the contrary, if the employer does not make an advance payment, the worker is entitled to claim extra benefits[28]. These kinds of benefits generally arise from collective contracts that are agreed upon with object of making detailed provisions for the conclusion, tenor and termination of contracts of employment.

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[21] Y.9.HD. 20.10.1997, 13230/17815. Y.9.HD. 28.5.1985, 2971/5867 (TÜHİS, Ocak, 1986, p.15-16), YHGK..19.3.1986, 1984-9.555/1986-251 (YKD, Ocak 1988, p.11-12).
[22] SÜZEK, 2002, 612, 613. ÇELİK, 2003 (a), p.38. Nuri ÇELİK, İş Hukuku Dersleri (b), İstanbul 2003, p.203. Kenan TUNÇOMAĞ/Tankut CENTEL, İş Hukukunun Esasları, İstanbul 2003, p.197. Ali GÜZEL, İş Güvencesine ilişkin Temel İlke ve Eğilimler Işığında Yasa Tasarısının Değerlendirilmesi, Türk İş Hukukunda Güncel Sorunlar 2001 Toplantısı, İş Güvencesi Yasa Tasarısının Değerlendirilmesi, Galatasaray Üniversitesi-İstanbul Barosu Yayınları, İstanbul 2001, p.37. ULUCAN, 2003 (b), p.73. TAŞKENT, 2003, p.116. EYRENCİ, 2004, p.34. Can TUNCAY, İş Güvencesi Yasası Neler Getiriyor, Çimento İşveren Dergisi, Ocak 2003, p.9. ULUCAN, 2003 (a), 42.
[23] See above II.1.a.
[24] SÜZEK, 2002, 436. ÇELİK, 2003 (b), 175. NARMANLIOĞLU, 1998, p.271. EKONOMİ, 1987, 170. Y.9.HD. 9.5.2000, 2834/6715 (GÜNAY, 2001, p.501).
[25] SÜRAL, 1993, p.24
[26] YHGK. 24.6.1983, 257/748. Y. 9.HD. 28.4.1997, 9-148/245 (Mustafa KILIÇOĞLU, İş Kanunu Şerhi, Ankara 2002, p.265).YHGK. 19.12.1982, 9-1220/132 (Devrim ULUCAN, İHU, İşK.No.18).
[27] Kemal OĞUZMAN, Türk Borçlar Kanunu ve Mevzuatına Göre Hizmet Akdinin Feshi, İstanbul 1955, p.200. Ünal NARMANLIOĞLU, Türk Hukukunda Kanundan Doğan Kıdem Tazminatı, İstanbul 1973, p.151. EKONOMİ, 1987, p.177. SÜZEK, 2002, p.444. ÇELİK, 2003 (b), p.179. Tankut CENTEL, İş Hukuku C.I, Bireysel İş Hukuku, İstanbul 1994, p.189. SÜMER, 2000, p.84. AKYİĞİT, 2002, p.162-163.
[28] Y.9.HD. 25.9.1995, 8979/27973 (KILIÇOĞLU, 2002, p.271)

If the employee leaves before the notice has expired, he terminates his own employment contracts and is not considered dismissed, unless he leaves employment early with the employer's agreement.

In the event that the employer does not pay wages during the notice term, the employer is liable to pay notice compensation. This compensation is equal to the total wages[29] that must be paid during the notice period[30]. These rules mentioned above were also regulated in the former Labor Code. However, in the new Labor Code, in addition to these, the *reason for dismissal* must be plainly explained (Article 19)[31].
In situations where a dismissal arises from the worker's behavior or productivity, it is required that a defense has to be obtained from the worker[32]. If the employer does not obtain a defense from the worker, this dismissal is then invalid[33]. This situation also appears under the Convention no: 158, which states in Article 7: *"The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."* Nevertheless, when there is a just cause for a worker's behavior, there is no need to give a chance for defense[34]. This situation is criticized in the doctrine[35]. In the case of a worker's mental or physical incapacity, or in disagreements with colleagues or superiors or similar cases, a defense is also not required[36].

A written notice of dismissal must be given to the worker in return for his or her signature obtained on receipt. If the worker refuses to sign the notice of dismissal, this situation needs to be reported in writing.

D. Appeal Against The Termination

When a reason for the termination of a worker's contract can not be shown, or when the given reason is considered invalid, legal action may be taken. Such action must be taken within one month of dismissal. This one month period is a result of the concept under Convention no: 158 of a

[29] This wage also include fringe costs (meals, transportation, fuel pay, family, children and education allowances, etc.). See below Table 3.
[30] Y.9.HD. 1.11.1999, 16223/16478 (GÜNAY, 2001, p.483).
[31] According to the Article: "The notice of termination shall be given by the employer in written form involving the reason for termination which must be specified in clear and precise terms…" (Article 19/1).
[32] According to the Article: "The employment of an employee engaged under a contract with an open-ended term shall not be terminated for reason related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made…" (Article 19/2).
[33] EKONOMİ, 2003, p.14. ÇELİK, 2003 (b), 204. TAŞKENT, 2003, p.122. ULUCAN, 2003 (b), p.75. EYRENCİ, 2004/1, p.35. DEMİR, 2003, 133.
[34] According to the Article: "…The employer's right to break the employment contract in accordance with Article 25/II of the Labor Code is, however, resisted." (Article 19/2).
[35] SÜZEK, 2002, p.612. SOYER, 2002, p.293. GÜZEL, 2001, p.35, 36.
[36] TBMM, S. 893, 2. reasoning of the Articles.

reasonable period of time (Article 8/3)[37]. The decision may be appealed to the Court of Cassation (Labor Code Article 20/1)[38].

The possibility of arbitration in the event of dismissal also exists. Since many cases are currently being processed through the Labor courts, disputes may instead be taken to arbitration. This not only reduces the work load on the courts, but also leads to speedier results. On issues other than this, the Labor Code does not provide an opportunity for arbitration. For this reason, in the doctrine some scholars take an opposing view that this can lead to problems in practice[39]. However, there is no provision preventing disputes arising from work agreements from being taken to private arbitration. If this has not been done up to date, the reason has been because of obstruction from the Court of Cassation. However, clear provisions in the new Labor Code appear to make it difficult for the Court of Cassation to continue its former practice[40]. But general trial is principal and arbitration is an exception. This provision of exception should be narrowly interpreted, as the trials carried on in the specialized courts have a nature of protecting the employees.

Arbitration conditions may appear in employment contracts or in collective Labor agreements. The arbitrator's award is considered final and binding. The manner of contesting a dismissal from an employer on the part of the worker under Convention no:158 is as follows: *"A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, Labor tribunal, arbitration committee or an arbitrator."* The period of contest appears under Article 8/3: *"A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination."*

Convention no: 158 contains another provision on the subject of objections to dismissal in Article 9: *"The bodies referred to in the Articles of this Convention shall be empowered to examine the reason given for termination and other circumstances relating to the case and to render a decision on whether the termination was justified. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:*

> *a) The burden of proving the existence of a valid reason for termination as defined in Article 4 of this Convention shall rest on the employer.*

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[37] Münir EKONOMİ, Türkiye'de İşçinin Feshe Karşı Korunması Bakımından 158 sayılı ILO Sözleşmesi ve Yeni Model Arayışı, Almanya'da ve Türkiye'de İşçinin Feshe Karşı Korunması Semineri, İstanbul 1997, p.98. GÜZEL, 2001, p.38.

[38] According to this Article: "The employee who alleges that no reason was given for the termination of his employment contract or who considers that the reason shown were not valid to justify the termination shall be entitled to lodge an appeal against that termination with the Labor court within one month of receiving the notice of termination…".

[39] Fevzi ŞAHLANAN, 4857 sayılı Yeni İş Kanunu Değerlendirme Konferansı (a), 12-13 Temmuz 2003, p.87. Fevzi ŞAHLANAN, Yeni İş Yasası (b), 25-29 Haziran 2003, p.136-137. Ömer EKMEKÇİ, Toplu İş Hukuku Bakımından İş Güvencesi Tasarısının Değerlendirilmesi, Türk İş Hukukunda Güncel Sorunlar 2001 Toplantısı, İş Güvencesi Yasa Tasarısının Değerlendirilmesi, Galatasaray Üniversitesi-İstanbul Barosu Yayınları, İstanbul 2001, p.60. EYRENCİ, 2004, 36. GÜZEL, 2001, 38.

[40] SÜZEK, 2002, p.613. ÇELİK, 2003, p.41. Baki KURU, Hukuk Muhakemeleri Usulü, C.VI, İstanbul 2001, p.5951.

b) The bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for termination, having regard to the evidence provided by the parties and according to those procedures provided for by national law and practice."

The new Labor Code has introduced provisions as regards to contesting an employer's dismissal notice in parallel with the above mentioned provisions. According to the Code, after an objection the decision will be made by a court. The burden of proof regarding the validity of the reason for dismissal belongs to the employer. However, if the worker claims that dismissal was on the basis of a different reason than the one given, he or she is obliged to prove it (Labor Code Article 20/11). The fact that the employer carries the burden of proof is in accordance with the Convention no: 158 and is acceptable to workers.[41] For, proof is a heavy burden. However, under Turkish law judges have wide discretion in the area of proof,[42] a situation that eases the issue with regard to proof.
Under Convention no:158, notices of dismissal need to be investigated by judges or courts. According to Article 9, *"In case of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention."*

This refers to dismissal arising from the need of the service, the establishment and enterprise. It is stated that courts are empowered to investigate these reasons. The provisions of Turkish Labor Code are parallel. Moreover, in Turkish law the situations in which courts are to investigate reasons are not limited to dismissal for service, establishment and enterprise. Reasons deriving from a worker's competence and behavior are also subject to investigation.

These cases must be settled within two months. Where decisions are appealed, the high courts must give their decision within one month. However, these periods are extremely short for the Turkish judicial system. For this reason, it is difficult to put them into practice[43].

There is no practical procedure for solving disputes through arbitration under the Labor Code. A regulation on this subject is currently being prepared, but has not yet been completed. To date, no dispute has been resolved through arbitration.

E. Effects of the Termination

a. Reinstatement of the worker

Reinstatement is expressed under Article 10 of Convention no:158 as *"If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do*

[41] SÜZEK, 2002, p.613.
[42] ÇELİK, 2003, p.43.
[43] EKONOMİ, 1997, p.98. GÜZEL, 2001, p.39. SÜZEK, 2002, p.613. ÇELİK, 2003, p.43.

not find it practical, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker…"

Similarly, under Article 10 of the new Labor Code, workers dismissed without a valid reason may be reinstated by the courts. Reinstatement is also possible after such a decision by the arbitrator.
A worker who wishes to benefit from reinstatement and who thinks they were dismissed without a valid reason may apply to the courts or arbitration. Following a decision for reinstatement they must then apply to the employer. The employer is required to reinstate the worker within one month (Labor Code Article 21/1).
For a dismissal to be considered invalid would be to continue as if it had never happened. Here, considering the termination of contract invalid would have different effects according to whether or not the worker has started work[44]. If the employer accepts the reinstatement, the agreement continues as if no termination had happened. If, on the other hand, despite a reinstatement decision on the part of an arbitrator or court, the worker has not restarted his employment, the contract is not in effect. Such a situation gives rise to eligibility for compensation.

For a worker to start working again, he or she must apply to the employer within 10 days of the arbitration award or court's decision (Article 21/V). If no application is made, then the termination becomes valid[45] and the worker may not apply for the compensations described below.

b. Compensations and payments

A worker dismissed by an employer may return to his or her place of work if reinstated on the basis of a decision by an arbitrator or by a court. However, the employer is not required to take back the reinstated worker. The employer has a choice in this matter, as this may disrupt the peace of the establishment. However, the employer in such a situation must pay certain compensations. According to the Termination of Employment Convention *"… they shall be empowered to order payment of adequate or such other relief as may be deemed appropriate."* (Article 10).

Compensation payable to workers who have not begun working again despite being reinstated can be divided into three groups: The first is a compensation equivalent to between 4 and 8 months worth of salary. In other words, an employer who does not reinstate the worker must pay compensation of 4, 5, 6, 7 or 8 months salary (Labor Code Article 21/1)[46]. This amount in the previous "code project" varied between 6 months and one year. However, this has been reduced in

[44] SÜZEK, 2002, p.614.
[45] EYRENCİ, 2004, p.37. ŞAHLANAN, 2003 (b), p.90. Savaş TAŞKENT, İş Güvencesi ve Yeni Yasal Düzenleme, Ankara 2002, p.50. TAŞKENT, 2003, 128.
[46] According to the Article "If the court or the arbitrator concludes that the termination is unjustified because no valid reason has been given or the alleged reason is invalid, the employer must reinstate the employee in work within one month. If, upon the application of the employee, the employer does not reinstate him in work, compensation to be not less then the employee's four months' wages and not more then his eight months' wages shall be paid to him by the employer."

the new Labor Code[47]. The amount is in the discretion of the court or arbitrator. In practice, it appears that an 8 month compensation (the maximum amount) is normally awarded.

The second compensation that a worker can apply for is "paid notice". According to the Labor Code, a worker who is not taken back must receive pay in lieu of notice (Labor Code Article 21/V). However, if this compensation has been paid during the period of termination, it may not be paid again. According to Convention no:158, this compensation is thus: *"A worker whose employment is to be terminated shall be entitled to a reasonable period of notice, or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period."* (Article 11).

The third payment that can be awarded to a worker who has not restarted work despite reinstatement is a "severance pay". The reason for this relies on the fact that the worker can not continue his employment as a result of the employer's choice. On the other hand, to be entitled to a severance pay, a worker must have been working for at least one year[48] (Former Labor Code Article 14)[49]. If severance pay has been paid during the termination, it can not be paid again. A worker's right to severance allowance is covered under Convention no:158: *"A worker whose employment has been terminated shall be entitled, in accordance with national law and practice to a severance allowance or other separation benefit, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions."*

Another form of payment is also brought by the new Labor Code. This payment arises from the fact that a worker who is taking legal action may not find another employment during this period. According to the Labor Code, if a worker taking legal action does not work during this period, he will receive his salary. However, this payment is limited to a period of four months (Labor Code Article 21/III)[50]. In the event of the case lasting for more than four months, only four months salary will be paid to the worker. This procedure has been criticized in the doctrine, because cases in Turkish law system take a long time, usually more than four months, to be resolved[51]. A worker's right to receive this payment does not depend on the worker having begun work again or not. Whether or not the worker has begun work, he may claim this payment. This is clearly explained under the mentioned Article.

In order to benefit from the right to compensation, a worker must apply to the employer within 10 days of the arbitrator's or court's decision (Labor Code Article 21/V). An employer who does not

47 In regard to other countries, see Gülsevil ALPAGUT, Karşılaştırmalı Hukukta İşçinin Feshe Karşı Korunması, İktisadi, Sosyal ve Uluslararası Hukuki Boyutu ile İşçinin Feshe Karşı Korunması, İş Hukukuna ilişkin Sorunlar ve Çözüm Önerileri 2001 Yılı Toplantısı, İstanbul 2002, p.100-103.

48 See below Table 1.

49 Article 14 of the former Labor Code is still in force.

50 According to this Article: "The employee shall be paid up to four months' total of his wages and other entitlements for the time he is not reinstated in work until the finalization of the court's verdict…"

51 GÜZEL, 2001, p.42. SÜZEK, 2002, p.614-615. TAŞKENT, 2002, 47-48. ULUCAN, 2003 (b), p.35. EYRENCİ, 2004, p.37. Y.9.HD. 11.9.2003, 14994/14267 (İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, 2004/1, p. 224-226).

return the worker to work within one month of this application is assumed to have chosen to pay compensation.

c. Unemployment benefit

A worker who has not returned to work after a case for wrongful dismissal is not limited to applying for the options outlined above. Other than these, another important issue that arises from the termination of contract is the unemployment insurance. According to the Termination of Employment Convention Article 12/1-b: *"A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalid benefits, under the normal conditions to which such benefits are subject;"*

Under Turkish Labor law, a worker dismissed without a valid reason may benefit from unemployment payment. However, for this to take place a number of conditions must be fulfilled: First of all worker who wishes to receive unemployment payment must have worked for at least 600 days in the three years prior to the termination of contract, and have paid unemployment benefit contributions. In addition to this, the worker must have worked for 120 days continuously prior to dismissal with full payment of contributions (Code number 4447 Article 51).

Unemployment rate was % 9.3 at the end of 2004 in Turkey. Today there are almost 2.4 unemployed[52], %16 of which were dismissed[53]. Only 70.000 unemployed persons could take unemployment benefit in 2004. Unfortunately rest of them couldn't take it[54].

Turkey's unemployment rate is expected to reach to %11.2 in 2005. This rate will be lower than that of Poland and Slovakia. In 2009, the unemployment rate of Turkey is expected to fall to %9.5. However, all OECD members with the exception of Poland and Slovakia will still have unemployment rates lower than that of Turkey. In the same year, the unemployment rate is expected to be %6 on average for the industrialized countries and %7.7 percent on average for EU member countries.

F. Collective dismissals

This kind of dismissal was not regulated by the former Labor Code. That's why thousands of workers unfair dismissed in last 2 years carrying on economic crisis couldn't use the protection provided by the collective dismissals system. But now, this system is used strictly.

According to the new Labor Code, when the employer contemplates collective terminations for reasons of an economic, technological, structural or similar nature necessitated by the requirements of the enterprise, the establishment or activity, he shall provide the union representatives the

[52] See below Table 7.
[53] www.DİE.org
[54] www.isguc.org

relevant regional directorate of Labor and the Turkish Employment Organization with written information at least 30 days prior to the intended lay-off (Article 30).

A collective dismissal occurs when, in establishments employing between 20 and 100 employees, a minimum of 10 employees; and in establishments employing between 101 and 300 employees, a minimum of 10 percent of employees; and in establishments employing 301 and more workers, a minimum of 30 employees, are to be terminated in accordance with Article 17[55] on the same date or at different dates within one month.

The said written communication shall include the reason for the contemplated lay-off, the number and groups to be affected by the lay-off as well as the length of time the procedure of terminations is likely to take.

Consultations with union representatives to take place after the said notification shall deal with measures to be taken to avert or to reduce the terminations as well as measures to mitigate or minimize their adverse effects on the workers concerned. A document showing that the said consultations have been held shall be drawn up at the end of the meeting.

Notices of termination shall take effect 30 days after the notification of the regional directorate of Labor concerning the intended lay-offs.

In the event of closing the entire establishment which involves a definite and permanent stoppage of activities, the employer shall notify, at least 30 days prior to the intended closure, only the regional directorate of Labor and Turkish Employment Organization and shall post the relevant announcement at the establishment.

If in seasonal and campaign work layoffs are carried out in conjunction with the nature of such work, provisions on collective dismissals shall not apply.

The employer shall not apply the provisions on collective dismissals to evade and prevent the application of employment protection regulations (Articles 18, 19, 20 21). Otherwise the employee may file suit under these Articles. This kind of dismissal is supposed unfair dismissal in that situation.

2. Just Cause Termination

Parties of the Labor contract must have just causes which are taken place in Labor Code for the termination. On the contrary the termination is unfair dismissal.

A. Just causes for employee

[55] This Article is regulating termination through a term of notice. See above II. 1. A.

According to the Turkish Labor Code, the employee is entitled to break the contract, whether for a definite or an indefinite period, before its expiry or without having to observe the specified notice periods, in the following cases (Article 24).

I. For reasons of health

a) If the performance of the work stipulated in the contract endangers the employee's health or life for a reason which it was impossible to foresee at the time the contract was concluded;

b) If the employer, his representative or another employee who is constantly near the employee and with whom he is in direct contact is suffering from an infecting disease or from a disease incompatible with the performance of his duties.

II. For immoral, dishonorable or malicious conduct or other similar behavior

a) If, when the contract was concluded, the employer misled the employee by stating the conditions of work incorrectly or by giving him false information or by making false statements concerning any essential point of the contract;

b) If the employer is guilty of any speech or action constituting an offence against the honor or reputation of the employee or a member of the employee's family, or if he harasses the employee sexually;

c) If the employer assaults or threatens the employee or a member of his family to commit an illegal action, or commits an offence against the employee or a member of his family which is punishable with imprisonment, or levels serious and groundless accusations against the employee in matters affecting his honor;

d) If, in cases where the employee was sexually harassed by another employee or by third persons in the establishment, adequate measures were not taken although the employer was informed of such conduct;

e) If the employer fails to make out a wages account or to pay wages in conformity with the Labor Act and the terms of the contract;

f) If, in cases where wages have been fixed at a piece or task rate, the employer assigns the employee fewer pieces or a smaller task than was stipulated and fails to make good this deficit by assigning him extra work on another day, or if he fails to implement the conditions of employment.

III. Force majeure

Force majeure necessitating the suspension of work for more than one week in the establishment where the employee is working."

B. Just causes for employer

According to the Turkish Labor Code the employer may break the contract, whether for a definite or indefinite period, before its expiry or without having to comply with the prescribed notice periods, in the following cases (Article 25).
I. For reasons of health

a) If the employee has contacted a disease or suffered an injury owing to his own deliberate act, loose living or drunkenness, and as a result is absent for three successive days or for more than five working days in any month.

b) If the Health Committee has determined that the suffering is incurable and working in the establishment shall be harmful.

In cases of illness or accident which are not attributable to the employee's fault and which are due to reasons outside those set forth in (a) above and in cases of pregnancy or confinement, the employer is entitled to terminate the contract if recovery from the illness or injury continues for more than six weeks beyond the notice periods set forth in Article 17. In cases of pregnancy or confinement, the period mentioned above shall begin at the end of the period stipulated in Article 74. No wages are to be paid for the period during which the employee fails to report to work due to the suspension of his contract.

II. For immoral, dishonorable or malicious conduct or other similar behavior

a) If, when the contract was concluded, the employee misled the employer by falsely claiming to possess qualifications or to satisfy requirements which constitute an essential feature of the contract, or by giving false information or making false statements;

b) If the employee is guilty of any speech or action constituting an offence against the honor or dignity of the employer or a member of his family, or levels groundless accusations against the employer in matters affecting the latter's honor or dignity;

c) If the employee sexually harasses another employee of the employer;

d) If the employee assaults or threatens the employer, a member of his family or a fellow employee, or if he violates the provisions of Article 84;

e) If the employee commits a dishonest act against the employer, such as a breach of trust, theft or disclosure of the employer's trade secrets;

f) If the employee commits an offence on the premises of the undertaking which is punishable with seven days' or more imprisonment without probation;

g) If, without the employer's permission or a good reason, the employee is absent from work for two consecutive days, or twice in one month on the working day following a rest day or on three working days in a month;

h) If the employee refuses, after being warned, to perform his duties;
i) If either willfully or through gross negligence the employee imperils safety or damages machinery, equipment or other Articles or materials in his care, whether these are the employer's property or not, and the damage cannot be offset by his thirty days' pay.

III. Force majeur

Force majeure preventing the employee from performing his duties for more than one week. For example, the worker has gone to his village for his annual leave and now he is unable to return due to a very heavy snow or earthquake or fire or loss of a close relative in an accident or a severe illness of his children. The employer has to pay the worker half wage for each day up to one week following which he can terminate the Labor contract (Article 40).

IV. If due to the employee's being taken into custody or due to his arrest, his absence from work exceeds the notice period indicated in Article 17.

C. Procedure for the just cause termination

The right to break the employment contract for the immoral, dishonorable or malicious behavior of the other party may not be exercised after six working days of knowing the facts, and in any event after one year following the commission of the act, has elapsed. The "one year" statutory limitation shall not be applicable, however, if the employee has extracted material gains from the act concerned (Article 26/I).

D. Results of the just cause termination

When the employee is dismissed according to Article 25/I (health reasons), Article 25/III (force majeure) or Article 25/IV, he will be entitled to severance pay. Only if the worker is dismissed according to Article 25/II (immoral, dishonorable or malicious conduct or other similar behavior by the employee), will he not be entitled to severance pay.

If the Labor contract is terminated by the worker according to the any just cause, he will be entitled to severance pay too. But employees must have been working for at least 1 year.

The employee or employer who has terminated the contract for any of the reasons mentioned above within the period indicated in the above subsection is entitled to claim material and moral compensation from the other party.

During the term of notice the employer must grant the employee the permission to seek new employment within working hours without any deduction from his wage. The time devoted to this purpose should not be less than two hours daily and if the employee so requests such hours may be added together and taken at one time. But if the employee wishes to take these hours at one time, he must do so on the days immediately preceding the day on which his employment ceases and must inform the employer in advance (Article 27).

If the employer does not grant the permission to seek new employment or allows less time than that stipulated under this Article, he must pay the employee the wages corresponding to the time to which he was entitled. If the employer makes the employee work during the time to be allowed for seeking new employment, he must compensate the employee twice the amount of wages he is entitled to even for no work during the time which should be allowed for seeking new employment. The employer must furnish the employee leaving employment with a certificate stating the nature and duration of employment. The employee who suffers a loss or the new employer who has recruited him may claim compensation from the previous employer for the latter's failure to furnish the certificate on due time or for the incorrect information contained in the certificate. Such certificate is exempt from taxes and fees.

3. Unfair Dismissal

Termination with or without notice could be assumed unfair dismissal by the Turkish courts in Turkish law. Specially, if the employer cannot prove a valid reason or just cause mentioned above[56] for dismissal, it is consider as unfair. Furthermore, in the situation where parties don't obey the notice period, termination will be also unfair.

The employee may file a lawsuit according to employment protection rules regulated under articles 18,19, 20 and 21 of Labor Code by claiming that the termination was not in conformity with the subsections cited above[57]. This kind of dismissal is supposed unfair dismissal in that situation as well.

Results of the unfair dismissal are different for each party. When a workman terminates the contract unfairly, he doesn't take any compensation and payment. On the contrary, he must give a notice payment to his employer if he terminates the contract without giving any notice. But the employee is unfair dismissed; he can claim for severance pay, notice payment as well as material-moral compensation.

Unfair dismissal causes different results for the fixed term contract. Actually the employer terminates to the contract unfairly, employee may entitle to the rest of the wage. However when the contract is terminated to the same way by the employee, employer may demand a compensation. The compensation recovers damages that arise from the rest of the contract term. For example, employer may not have found any substitute employee for the rest of the period.

[56] See above II.1.B.c.bb.aaa.
[57] See above II.1.B.c.bb.aaa

When the worker is dismissed according to Article 17 (termination through a term of notice), or Article 25/I (health reasons), or 25/III (force majeure), he will be entitled to severance compensation. Only if the worker is dismissed according to Article 25/II (immoral or dishonorable conduct or similar behavior by the worker), will he not be entitled to severance compensation. For this reason and the fact that it is up to the worker to prove the existence of bad-faith in abusive dismissals, some employers, whatever the real cause for dismissal is, tend to state one of the cases listed under Article 25/II as the reason for dismissal. The worker will, in most cases, refrain from applying to the courts not only because of the expense and the time involved, but also because other workers, due to the lack of job security, do not want to stand witness against the employer. These factors make it very difficult for the worker to prove the real grounds of the dismissal. For the same reasons, the efforts to build up a case study based on quantitative estimates will be fruitless and/or mainly misleading. New employment protection system could have reduced this problem. But it was not able to get rid of completely.

SUMMARY

Because of the recent developments in Turkey mainly in the society and in the fields of economy and technology, Turkish Labor Code no.1475 was no longer adequate to answer the new social needs and working relations. It had contained many inflexible rules, therefore it was abolished, and replaced with a new Labor Code, that complied with the rules of the International Labor Organization (ILO) and the European Union (EU).

The new Labor Code didn't please the contractors. As a matter of fact, employers have cautioned the government against triggering a new economic crisis by passing the code. In a joint declaration private sector agencies termed the law as an outright election compromise and criticized lawmakers for resorting to populism to attract votes in the upcoming election.

The concept of employment protection in Turkish labour law has, to a limited extent, gained a legal dimension through the new Labour Code. The dismissal process in the former Labour Code, which is still applied today in small places of employment, allows an employer to terminate a contract of employment without showing any cause. For such a dismissal to be effective requires only that the appropriate compensation is paid and that the power of dismissal has not been abused. Otherwise, the worker gains the right to compensation for bad faith. This compensation has to this day not been regarded as providing security for an employee, as it is extremely difficult to prove bad faith on the part of an employer. The Turkish State, noticing a need for employment protection in the working life of its citizens, ratified the Convention no. 158 of the International Labour Organisation, the 1994 Termination of Employment Convention, and undertook the appropriate legal reforms. This resulted in Turkish Code number 4773 of 2001 which enshrined employment protection in law.

However, subsequent developments together with discussions between employers and employees brought more deep rooted changes in the organisation of working life onto the agenda. This led to the passing of a new Labour Code which incorporated a somewhat modified Code number 4773. The new Labour Code, numbered 4857, came into force in June 2003 and contains detailed rules of employment protection and unfair dismissal.

TABLE 1
DISTRIBUTION OF SENIORITIES BY END OF 2001 (%)

Industry	0-1	1	2	3	4	5	6-10	11-15	16-20	21-25	26+	Total workers
Wood	8.4	5.1	7.6	8.6	11.6	7.5	22.4	15.3	10.7	2.5	0.3	100
Glasswork	3.8	2.7	2.1	2.8	2.0	4.1	35.0	17.9	23.1	6.0	0.5	100
Cement	3.4	3.2	5.3	5.2	7.9	8.2	25.1	16.5	16.2	8.0	1.0	100
Leather	15.3	8.3	7.3	4.5	6.0	2.5	34.3	15.0	1.5	4.8	0.5	100
Pharmaceuticals	14.0	14.1	8.2	12.9	7.8	7.8	19.5	9.1	4.2	1.8	0.6	100
Construction	32.4	14.0	11.7	10.3	6.2	5.9	9.4	5.3	2.7	1.3	0.8	100
Paper	10.0	3.9	4.5	5.1	7.0	9.7	29.1	11.7	14.2	4.7	0.1	100
Chemicals	7.0	5.8	3.6	4.0	6.1	5.3	23.9	13.6	15.0	13.1	2.6	100
Metal	16.4	10.8	6.4	7.0	5.9	6.0	23.1	14.5	7.5	1.8	0.6	100
Sugar	0.1	4.0	5.1	4.6	5.7	9.1	23.8	15.5	13.0	11.7	7.4	100
Textile	16.6	14.4	8.1	6.9	7.4	4.9	23.9	10.4	6.6	0.8	-	100
Clay	9.7	7.6	5.1	7.8	8.0	7.6	32.6	12.8	7.3	1.0	0.5	100
Total	13.9	9.9	6.6	6.8	6.2	6.3	23.3	13.4	8.8	3.5	1.3	100

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TABLE 2

POPULATION [1]	2001	2002	2003
Total Population [2] (thousand)	68.529	69.626	70.712
Rate of Increase (%)	1,63	1,59	1,55
Population Density (person per km^2)	89	90	92
Share of Urban Population [3] (%)	59,6	60.2	60.8
Rate of Dependency (per thousand)	542	540	538
EMPLOYMENT [4]			
Civilian Labor Force (thousand)	23.491	23.818	23.640
Civilian Employment (thousand)	21.524	21.354	21.147
Unemployment (thousand)	1.967	2.464	2.493
Unemployment Rate (%)	8,4	10,3	10,5
Underemployment Rate (%)	6,0	5,4	4,8
Rate of Unemployment + Labor Force Idle Because of Underemployment (%)	14,4	15,7	15,3
Civilian Employment By Sector (thousand)			
Total	21.524	21,354	21.147
Agriculture	8.089	7.458	7.165
Industry	3.774	3.954	3.846
Services	9.661	9.942	10.135
Construction	1.110	958	965

Employment Status (thousand)			
Total	21.524	21.354	21.147
Paid Workers	10.155	10.625	10.707
Self Employed and Employers	6.504	6.274	6.302
Unpaid Family Workers	4.865	4.455	4.138
Employment Status (%)			
Total	100.0	100.0	100.0
Paid Workers	47,2	49,7	50,6
Self Employed and Employers	30,2	29,4	29,8
Unpaid Family Workers	22,6	20,9	19,6
Workers Employment			
Number of workers at workplaces covered by SSK (thousand)	4.887	5.223	5.615
Public Sector (%)	15,4	13,4	12,2
Private Sector (%)	84,6	86,6	87,7

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TABLE 3

COMPARISON OF BASIC WAGE AND FRINGE COST, 2003

Industry	Basic Wage %	Fringe Cost %
Wood	35.4	64.6
Glass	36.2	63.8
Cement	33.3	66.7
Leather	44.0	56.0
Pharmaceuticals	40.3	59.7
Construction	55.8	44.2
Paper	35.5	64.5
Chemicals	34.2	65.8
Metal	36.5	63.5
Sugar	40.0	60.0
Textile	36.3	63.7
Clay	35.3	64.7
AVERAGE	37.8	62.2

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TABLE 4

NUMBER OF WORKERS AND UNIONIZATION BY PERIODS

PUBLICATION	NUMBER	OF	NUMBER OF UNIONIZED	UNIONIZATION

PERIOD	WORKERS	WORKERS	RATE %
JANUARY	3.973.306	2.695.627	67,84
JULY	4.051.295	2.708.784	66,86
JANUARY	4.111.200	2.713.839	66,01
JULY	4.215.375	2.774.622	65,82
JANUARY	4.266.097	2.856.330	66,95
JULY	4.327.156	2.923.546	67,56
JANUARY	4.350.016	2.987.975	68,69
JULY	4.381.039	3.037.172	69,33
JANUARY	4.508.529	3.086.302	68,45
JULY	4.521.081	2.468.591	54,60
JANUARY	4.537.544	2.580.927	56,88
JULY	4.562.454	2.609.672	57,20
JANUARY	4.564.164	2.648.847	58,04
JULY	4,572,841	2,680,966	58,63
JANUARY	4,686,618	2,717,326	57,98
JULY	4,781,958	2,751,670	57,54
JANUARY	4,857,792	2,806,927	57,78
JULY	4.916.421	2.854.059	58,05

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TABLE 5
PERCENTAGE OF UNIONISED EMPLOYEES (December, 2003)

Industry	Employees	Union Members (%)
Wood	666	45.3
Glasswork	6591	73.2
Cement	6529	54.6
Leather	399	65.4
Construction	10328	11.3
Paper	826	50.2
Chemicals	4993	50.5
Metal	84783	72.5

Sugar	19641	78.7
Textile	24704	70.0
Clay	5701	72.7
TOTAL	165161	67.5

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TABLE 6
LABOR TURNOVER 2002

Industry	Average of Employees (1)	Recruitments During 2002 (2)	Leavings During 2002 (3)	Recruitment Ratio [(2)/(1)]x100	Leaving Ratio [(3)/(1)]x100
Glasswork	6223	719	630	11.6	10.1
Cement	6825	350	760	5.1	11.1
Leather	553	95	91	17.2	16.5
Pharmaceuticals	10919	2205	1620	20.2	14.8
Construction	11705	9664	8191	82.6	70.0
Paper	775	33	60	4.3	7.7
Chemicals	7257	711	832	9.8	11.5
Metal	69779	13319	9918	19.1	14.2
Local Adm.	19508	13167	11860	67.5	60.8
Sugar	19508	13167	11860	67.5	60.8
Textile	23512	5329	4546	22.7	19.3
Clay	4703	524	607	11.1	12.9
Total	179830	46622	40246	25.9	22.4

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TABLE 7
EMPLOYMENT BY INDUSTRIES, 2003

Industry	Average of Employees	Average of Employees per Enterprise
Wood	657	164
Glass	6666	513
Cement	6541	198
Leather	398	40
Pharmaceuticals	6257	391
Construction	7156	9.5

Paper	871	55.2
Chemicals	6560	63.7
Metal	70230	69.3
Sugar	22195	81.3
Textile	30984	78.3
Clay	4512	72.4
Tourism	975	49.4
TOTAL	159273	69.2

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AN EXAMPLE OF CONSENSUAL CONTRACTS: LOCATIO CONDUCTIO REI

by

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In some cases Roman civil law acknowledged an exception to the rule that the contracts should be made in certain ways which were recognised as consensual contracts that depended only on the *consensus* of the parties. Consensual contracts[1] were not the earliest contracts to have emerged in Roman law. They were developed due to the needs of the expanding Roman economy in the middle Republic[2]. They were bilateral and depended on *bonae fidei*. The four consensual contracts - sale (*emptio venditio*), hire (*locatio conductio*), partnership (*societas*) and mandate (*mandatum*) - had distinct commercial characters. In these contracts the obligation was contracted by consent. It was stipulated that the presence of both parties was not required; consequently the contract could be concluded by lessor or messenger. All these contracts gave rise to reciprocal actions[3].

"*Locare*" means "to place, place out or place at the disposal or to entrust something to a person", and "*conducere*" means "to carry along, to take with one"[4]. *Locatio-conductio*, "letting and hiring", was an agreement for the use of one thing belonging to another or for the use of another's services in consideration of an agreed payment. This contract closely resembles a sale. It was, in many respects, under similar rules that regulated purchase and sale[5].

D. 19. 2. 2.,pr., *Gaius* (*Rerum cottidianarum*)
"***Locatio et conductio proxima est emptioni et venditioni isdemque iuris regulis constitit: nam ut emptio et venditio ita contrahitur, si de pretio convenerit, sic et locatio et conductio contrahi intellegetur, si de menrcede convenerit.***"
"Lease and hire is close to sale and purchase, and it is formed by the same rules of law. Sale and purchase is contracted if the price is agreed upon; similarly, lease and hire is considered to be contracted once the rent is agreed upon."

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[1] Iust. Ins. 3, 22, 1-3; Rudolf SOHM, The Institutes, (Translated By: James CRAWFORD LEDLIE), 3. Ed., Florida, 1994, p. 404.
[2] William BURDICK, Principles of Roman Law and Their Relation to Modern Law, New York, 1938, p. 442; Andrew BORKOWSKI, Text-book on Roman Law, Blackstone Publications Co., 2. Ed., United Kingdom, 2001, p. 265.
[3] Fritz SCHULZ, Classical Roman Law, Oxford, 1969, p. 525.
[4] Paul KOSCHAKER, & Kudret AYITER, Roma Hususi Hukukunun Ana Hatları (The Main Lines of Roman Private Law), A.U. Faculty of Law Publications, Ankara, 1975, p. 236; SCHULZ, p. 543.
[5] Iust. Ins. 3, 24, pr.; BORKOWSKI, 2001, p. 281; BURDICK, 1938, p. 448; Pasquale VOCI, Istituzioni di Diritto Romano, 5. Ed., Milano, 1996, p. 455; Antonio GUARINO, Diritto Privato Romano, 8. Ed., Napoli 1988, p. 803; CEYLAN (GÜNEŞ), Seldağ: Roma Hukukunda ve Türk Hukukunda Hizmet Akdi – Locatio Conductio Operarum (Yayınlanmamış Yüksek Lisans Tezi), Ankara 1999, s. 15.

The price was called *merces* "hire-money"[6] which we could translate as "rent" in the case of land or houses, and "wages" etc. For personal services. The sum paid (*merces*) had to be fixed before the contract was complete, and compensation had to be in the form of money[7]. The contract was formed by consent without any special form of words or writing or other formality being required.

D. 19. 2. 1., *Paulus* (*Edictum*, lib. 34)
"***Locatio et conductio cum naturalis sit et omnium gentium, non verbis, sed consensu contrahitur, sicut emptio et venditio***."
"Because the contract of lease and hire is found in nature and among all peoples, it is contracted not by formal words but by agreement, like the contract of sale and purchase."

According to the Roman society, *locatio-conductio*[8] was a uniform contract and this uniformity was upheld irrespective of the variety and diversity of relationships covered by the contract[9]. *Locatio-conductio* was a form of consensual contract which included three types of contract that today we divide into: the hire of things (*locatio-conductio rei*), the hire of services (*locatio conductio operarum*) and the hire of work (*locatio conductio operis*)[10]. In each of these three cases, the monetary rent, fee or wages (*merces*, less often *pretium*) passed from one party to the other according to the economic sense of the contract. For its validity, the contract did not depend upon the presence of the parties because it was concensual. It may be concluded by a lessor or messenger. It was complete as soon as the parties were agreed upon its essential terms[11].

The parties were termed *locator* and *conductor*. The *locator* was the party who made a thing available, like renting something out. The party of the contract who wanted to labour as result of the "piece of work contract" or the party placing his services at the disposal of another in the services contract was also the *locator*. On the other hand, the *conductor* is the one who takes the object away as lessee, the one who engages himself to do work (*l.c. operaris*) or the employer who takes the labourer with him (*l.c. operarum*). In accordance with the nature of this contract, which implied an exchange of performances, the *actio locatio* of the *locator* and the *actio conducti* of the *conductor* were the actions for the parties of the contract[12]. Both parties were responsable for *dolus* and *culpa*, but the party who received one thing from the other (whether he was termed *locator* or *conductor*) was liable additionally for *custodia*[13].

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[6] John Henry ROBY, Roman Private Law, Vol.:2, New Jersey, 2000, p. 169; VOCI, p. 456; KOSCHAKER & AYITER, 1993, p. 236; Gaius 3. 143; Iust. Ins. 3. 24. 1 .
[7] BURDICK, 1938, p. 447; Ozcan CELEBICAN-KARADENIZ, Iustinianus Zamanına Kadar Roma'da Iş Ilişkileri (Labor Relations in Rome Till Iustinian), A.U. Faculty of Law Publications, Ankara, 1976, p. 120.
[8] Mario TALAMANCA, Istituzioni di Diritto Romano, Milano, 1996, p. 453; VOCI, 1996, p. 455; SOHM, 1994, p. 404.
[9] Max KASER, Roman Private Law (Translated by: Rolf DANNENBRING), Durban, 1965, p. 183.
[10] CELEBICAN-KARADENIZ, 1976, p. 122; Ziya UMUR, Roma Hukuku (Roman Law), Istanbul, 1990, p. 366; Reinhard ZIMMERMANN, The Law of Obligations, Johannesburg, 1992, p. 351.
[11] R. W. LEE, The Elements of Roman Law, Sweet and Maxwell Publications Co., 4. Ed., London, 1956, p. 321; KOSCHAKER & AYITER, 1993, p. 236.
[12] SCHULZ, 1969, p. 546; KASER, 1965, p. 183.
[13] TALAMANCA, 1996, p. 456; SCHULZ, 1969, p. 547.

I - THE FORMATION OF *LOCATIO CONDUCTIO REI*

Locatio conductio rei, in the sense of the hire of a thing, occured where the *conductor* (lessee) was allowed the use of a thing by the *locator* (lessor) in return for payment[14]. The contract was made when the parties agreed on the subject matter of the hire and on the amount of payment. Unless the remuneration for the letting had been agreed upon, the contract would be formed. In these contracts the obligation was contracted by consent. There was no formal procedure and the agreement of the parties was enough to fulfil the contract.

In this case the question arose as to whether hire was formed when the remunaration was left to be decided by the other party. It was generally accepted that events determined the classification as if there were conditional sale or hire of each one. For this reason, there was no doubt that things could be sold and hired subject to conditions[15].

D. 19. 2. 20.pr., *Paulus* (*Edictum*, lib. 20)
"***Sicut emptio ita locatio sub condicione fieri potest***."
"Like purchase, lease can also be contracted under a condition."

II - THE SUBJECT MATTER OF THE CONTRACT AND REMUNERATION

In the early times of the Roman Empire, *locatio conductio rei* was a type of contract regulating the renting out rooms. These rooms were called *insulae* in the notorious tenements of Rome where the risk of fire and frequent collapses threw the rules on the landlord's responsibility into grim relief, if they were destroyed during the tenancy[16]. Another area of equal economic importance in which *locatio conductio rei* was applied was for the leasing of land for agricultural exploitation[17]. The lessee of the land was called *colonus* and could benefit from the fruits of the land. In the case of agricultural tenancies, it could be agreed that the *locator* would receive a specified proportion of fruits of the land, in place of a monetary reward. This arrangement was called *colonia partiaria*.

Locatio conductio rei was an consensual contract which was possible both for movables and immovables. Houses, rooms, slaves, animals and other movables were the objects of lease[18]. In some texts, it was found that the slaves were also the object of the hire[19]. With regard to the hiring of a thing, in principle there was no difference between a movable and an immovable. The leasing of land did not create a real right: it was merely contractual. The thing that was hired would normally be a corporeal thing and something not consumable through use.

[14] Türkan RADO, Roma Hukuku Dersleri Borçlar Hukuku (Roman Law of Obligations), Filiz Publications Co., Istanbul, 1992, p. 134; Cahit OGUZOGLU, Roma Hukuku (Roman Law), Istanbul, 1950, p. 239; CELEBICAN-KARADENIZ, 1976, p. 123; CEYLAN (GÜNEŞ), s. 20.
[15] Gaius, 3, 142-146; Iust. Ins. 3, 24, 2.
[16] Ditlev TAMM, Roman Law, DJOV Publications Co., Copenhagen, 1997, p. 136.
[17] SOHM, 1994, p. 404; TAMM, 1997, p. 137.
[18] KASER, 1965, p. 184; BURDICK, 1938, p. 448.
[19] Gaius 3. 146.; ZIMMERMANN, 1992, p. 352.

The payment for *locatio conductio rei* was called *merces*[20]. In a contract of *locatio conductio rei*, remuneration must have consisted of money. It must have been certain (certa) or ascertainable. If the *merces* was not paid by money, this contract was called *contractus innominati*. The rule that the remuneration must have consisted of money allowed just one exception: in the case of agricultural tenancies, part of the produce of the land was frequently used as payment. This might consist of a portion of the fruits, if it was determined absolutely[21].

III - DUTIES OF THE PARTIES

The duties for both parties could be varied by agreement, the rules being similar to those of *sale*. The remedies available to the parties for the enforcement of respective duties were the *actio locati* for the *locator* and *actio conducti* for the *conductor*. The measure of damages was the plantiff's "interest" in the performance of the contract. As both of the parties benefited from the contract, they had the responsibility of *omnis culpa.* In certain cases in the classical period, they were responsible for *custodia*[22].

1) DUTIES OF THE LESSOR (LOCATOR)

The *locator* was bound to let the thing to the other party for use and possibly for enjoyment during the agreed term and to keep the thing in such a state that it was always fit for that purpose. In another sense, the lessor had to allow the lessee its use and enjoyment for the purpose contemplated by the contract. If the lessor neglected his duty, knowingly commiting a breach of faith, he was liable to compensate for the damages under his responsibility[23]. The lessee could enforce these duties by *actio conducti* [24].

While the *locator* left the use and the enjoyment of the thing to the *conductor*, the accessories that were normally required for the use of the property also had to be handed over.

D. 19. 2. 19. 2., *Ulpianus* (*Edictum*, lib. 32)
"***Illud nobis videndum est, si quis fundum locaverit, quae soleat instrumenti nomine conductori praestare, quaeque si non praestet, ex locato tenetur. Et est epistula Neratii ad Aristonem dolia utique colono esse praestanda et praelum et trapetum instructa funibus, si minus, dominium instruerea debere: sed et praelum vitiatum dominum reficere debere.***"
"Now we must examine what the lessor (*locator*) of a farm customarily provides to his tenant farmer under the heading equipment; for if he does not provide this, he is liable on the hire. There is a lessor from Neratius to Aristo to the effect that the tenant must, in any case, be provided with storage jars, a press and grinder both fitted with ropes; if not the owner must provide them, but the owner must also repair a broken press."

[20] TALAMANCA, 1996, p. 452; VOCI, 1996, p. 594; D. 19. 2. 2. pr., *Gaius* (*Rerum cottidianarum*).
[21] BORKOWSKI, 2001, p. 282; RADO, 2001, p. 135.
[22] UMUR, 1990, p. 367.
[23] D. 19. 2. 30., *Alfenus* (*Digestorum a Pauloepitomatorum*, lib. 3); KOSCHAKER & AYITER, 1993, p. 236; ZIMMERMANN, 1992, p. 360.
[24] BORKOWSKI, 2001, p. 284; OGUZOGLU, 1950, p. 240.

The *locator* had to keep the hired thing in good repair throughout the period of hire (unless damage had been caused by the negligence of the *conductor*). Necessary expenses, incurred due to the thing, fell on the *locator*[25]. If the *conductor* incurred reasonable (necessary and useful) expenses in the maintenance of the property, he was normally entitled to recover them[26]. But if the use or the enjoyment was prevented by *vis maior*, the risk (*periculum*) was with the *locator*. The conductor had no claim for rent and had to refund what had already been paid, but he was not further liable for damages[27].

D. 43. 10. 3., *Papinianus* (Care of Cities)[28]
"And are to care that private walls and enclosure walls of houses facing the street are not in bad repair, so that the owners should clean and refurbish them as necessary."

The lessor had the liability to deliver the thing free from defects. The extent of this liability varied with the circumstances. The lessor's duty to supply a thing fit for its purpose had substantially the same effect[29].

D. 19. 2. 19. 1., *Ulpianus* (*Edictum*, lib. 32)
"***Si quis dolia vitiosa ignarus locaverit, deinde vinum affluxerit, tenebitur in id quod interest nec ignorantia eius erit excusata.***"
"If someone unknowingly leases out defective storage jars and wine runs out of them, he will be liable for the lessee's interest, nor will his lack of awareness have been excused."

The *locator* was liable, however, to the *conductor* for the damages in the case of eviction[30]. In this case, *actio conducti* was brought against the *locator*. If the *locator* substantially prevented the *conductor* from enjoying the property, the lessor could terminate the contract and sue for damages[31]. The lessor was not responsible for disturbance or eviction attributed to a cause which came into existence after the conclusion of the contract unless it was attributable to his own act[32]. Thus he was not liable if the land he had given on lease was expropriated by public authority, but he must forgo his claim to rent[33].

[25] KASER, 1965, p. 184; UMUR, 1990, p. 368.
[26] BURDICK, 1938, p. 449; D. 19. 2. 25. 2., ; For example, A let a house to B, and C, an adjoining owner, erected a building which shut out the light from B, the lessor could rescind the contract, as also he could do if the doors and windows of the rented house became out of repair and were not restored by the locator.
[27] KASER, 1965, p. 184; VOCI, 1996, p. 595; KOSCHAKER& AYITER,1993, p. 237.
[28] The original text is in Greek language.
[29] ZIMMERMANN,1992, p. 367; LEE, 1956, p. 323.
[30] D. 19. 2. 25. 1., *Gaius* (*Edictum provinciale*, lib. 10); D. 19. 2. 30. pr., 1., *Alfenus* (*Digestorum a Paulo epitomatorum*, lib. 5); Cod. 4. 65. 9; UMUR, 1990, p. 368; ZIMMERMANN, 1992, p. 378.
[31] 19. 2. 24. 4., *Paulus* (*Edictum*, lib. 34); ZIMMERMANN, 1992, p. 369; KOSCHAKER & AYITER, 1993, p. 237.
[32] VOCI, 1996, p. 456; SCHULZ, 1969, p. 547; Sometimes a *locator* was liable for *custodia*. Suppose A hired a place in a storehouse from B, and delivered a thing to him. Then B was liable for *custodia* unless this liability was expressly excluded.
[33] LEE, 1956, p. 324.

D. 19. 2. 33., *Africanus* (*Quaestionem*, lib. 8)
"***Si fundus quem mihi locaveris publicatus sit, teneri te actione ex conductio, ut mihi frui liceat, quamuis per te non stet, quo minus id praestes."***
"If you lease out a farm to me and it is then made public property, you are liable to me in an action on hire for allowing me the enjoyment even though you are not responsible for your failing to prove it."

2) THE DUTIES OF THE LESSEE (*CONDUCTOR*)

The person who had to pay the remuneration was the *conductor*; he had to accept delivery of the hired property and normally had to pay for the hire either by a lump sum or instalments. The lessor could enforce these duties by *actio locati*[34]. The lessee had to retain possession of a thing for the time agreed. He was similar to a *detentor*[35] and was therefore not protected by possessory interdictions. In Roman law, the lessee could be ejected by a purchaser of the land[36].

D. 19. 2. 55. 2., *Paulus* (*Sententiarum*, lib. 2)
"***Qui contra legem conductionis fundum ante tempus sine iusta ac probabili causa deserverit, ad solvendas totius temporis pensiones ex conducto conveniri potest, quatenus locatori in id quod eius interest indemnitas servetur.***"
"A person who, contrary to a lease clause, abandons his farm without legal and probable cause before the term is over, can be sued on the lease for payment of the rent for the remaining term to the extent that the lessor preserves his compensation upto the amount of his interest."

The lessee had to take proper care of the farm with *exacta diligentia* and thus keep the agricultural land in proper cultivation or not overload a hired beast of burden.

D. 19. 2. 25. 3., *Gaius* (*Edictum provinciale*, lib. 10)
"***Conductor omnia secundum legem conductionis facere debet. Et ante omnia colonus curare debet, ut opera rustica suo quoque tempore faciat, ne intempestiva cultura deteriorem fundum faceret.***"
"The lessee should perform everything in accord once with the clauses of the lease. Above all, the tenant farmer should see to it that he does farm work during his term as well, so that he does not make the farm worth less by his unseasonable cultivation. Furthermore, he should take care of the farmhouses so as to preserve them in good condition."

[34] SOHM, 1994, p. 404; OGUZOGLU, 1950, p. 240; KOSCHAKER & AYITER, 1993, p. 237; ZIMMERMANN, 1992, p. 375.
[35] KASER, 1965, p. 184; SCHULZ, 1969, p. 546; VOCI, 1996, p. 456.
[36] ZIMMERMANN, 1992, p. 379; SCHULZ, 1969, p. 546; LEE, 1956, p. 321; RADO, 2001, p. 136; KOSCHAKER & AYITER, 1993, p. 236; Cod. 4. 65. 9; From the middle ages onwards it was matter of controversy whether "sale breaks hire" (*emptio tollit locatum*) or " hire goes before sale". It was decided that "hire goes before sale" did not necessarily mean that the lessee had a real right. It might give him security only against the lessor and persons claiming under him, not against third parties. In this case the lessee could require the damages that were caused by the formation of the contract.

At the end of the contract, the lessee was bound to return the thing he hired just as he received it, in as good condition, less ordinary wear and tear[37]. Allowing a decrease allowed in the value of the property could amount to a breach of this duty:

D. 19. 2. 11. 2., *Ulpianus* (*Edictum*, lib. 32)
"***Item prospicere debet conductor, ne aliquo vel ius rei vel corpus deterius faciat vel fieri patiatur.***"
"Likewise, the lessee should take care in no way to lower in value the thing's legal or physical condition, nor to allow it to become lower."

The lessee had to pay the agreed *merces*[38] subject to just grounds to excuse. Both parties were required to exercise *exacta diligentia*, in other words were answerable for *dolus* and *culpa levis in abstracto*[39]. If the property was destroyed or damaged during the period of hire and it was not the conductor's fault, the risk of accidental or unavoidable loss was normally on the *locator*.

D. 19. 2. 15. 2., *Ulpianus* (*Edictum*, lib. 32)
"*... **sed et si ager terrae motu ita corruerit, ut nusquam sit, damno domini esse: oportere enim agrum praestari conductori, ut frui possit***."
"... if an earthquake so completely destroys the land that the property no longer exists, the owner bears the loss: for he must present the land to the lessee for his enjoyment."

IV - TERMINATION OF THE CONTRACT

It was usual that the parties could decide the duration of the contract. If they specified the duration, the hire would normally terminate on the expiry of the relevant period. Also, the parties could terminate the agreement before the expiry of the term only on the grounds of breach of contract. If the contract was for an indefinite time, the agreement could presumably be terminated unilaterally at any time[40].

If the *conductor* continued to use the thing after the expiry of the agreed term, the contract was held to be renewed[41]. The death of the *conductor* did not terminate the contract. If the lessee died while the period of the hire was stil running, his heirs succeed to the contract on the same terms[42].

In the case of agricultural land, an implied re-letting was possible on a year to year basis. In practice, this meant that the *conductor* would continue to be the tenant unless he was given notice to leave before the expiry of the original period. However, the implied extension was regarded as a new lease rather than a continuation of the old one[43]. The contract could also end through the destruction or the termination of the subject matter, or through the misconduct of either party.

[37] BURDICK, 1938, p. 450; BORKOWSKI, 2001, p. 284.
[38] Iust. Ins. 3, 24, 5.
[39] LEE, 1956, p. 324; VOCI, 1996, p. 456.
[40] ZIMMERMANN, 1992, p. 357.
[41] KASER, 1965, p. 185.
[42] Iust. Ins. 3, 24, 6; BURDICK, 1938, p. 450; OGUZOGLU, 1950, p. 241; UMUR, 1990, p. 368.
[43] BORKOWSKI, 2001, p. 282.

BIBLIOGRAPHY

BORKOWSKI, Andrew : Textbook on Roman Law, Blackstone Publishing Co., 2. Ed., United Kingdom 2001

BURDICK, William : Principles of Roman Law and Their Relation to Modern Law, New York 1938

CEYLAN (GÜNEŞ), Seldağ: Roma Hukukunda ve Türk Hukukunda Hizmet Akdi – Locatio Conductio Operarum (Yayınlanmamış Yüksek Lisans Tezi), Ankara 1999

ÇELEBICAN-KARADENIZ, Ozcan : Iustinianus Zamanına Kadar Roma'da İş İlişkileri (Labor Relations in Rome Till Iustinian), A.U. Faculty of Law Publications, Ankara 1976

GUARINO, Antonio : Diritto Privato Romano, 8. Ed., Napoli 1988
KASER, Max :Roman Private Law (Translated by: Rolf DANNENBRING), Durban 1965

KOSCHAKER, Paul, AYITER, Kudret : Roma Hususi Hukukunun Ana Hatları (The Main Lines of Roman Private Law), İzmir 1993

LEE, R. W. : The Elements of Roman Law, Sweet and Maxwell Publishing Co., 4. Ed., London 1956

OGUZOGLU, Cahit : Roma Hukuku (Roman Law), İstanbul 1950

RADO, Türkan : Roma Hukuku Dersleri Borçlar Hukuku (Roman Law of Obligations), Filiz Publishing Co., İstanbul 2001

ROBY, John Henry : Roman Private Law, Vol.:2, Lawbook Exchange Union, New Jersey 2000

SCHULZ, Fritz : Classical Roman Law, Oxford 1969

SOHM, Rudolf : The Institutes (Translated By: James CRAWFORD LEDLIE), Gaunt Holmes Beach Publishing Co., 3. Ed., Florida 1994

TALAMANCA, Mario : Istituzioni di Diritto Romano, Dott. A. Giuffrè Editore, Milano 1996

TAMM, Ditlev : Roman Law, DJOV Publishing Co., Copenhagen 1997

UMUR, Ziya : Roma Hukuku (Roman Law), Beta Publishing Co., Istanbul 1990

VOCI, Pasquale :Istituzioni di Diritto Romano, 5. Ed., Dott. A. Giuffrè Editore, Milano 1996

ZIMMERMANN, Reinhard: The Law of Obligations, Johannesburg 1992

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PRODUKTHAFTPFLICHT IN DEUTSCHLAND UND EU

by

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Die gesetzliche Produkthaftung ist eine Gefährdungshaftung, es kommt daher nicht auf das Verschulden des Herstellers an, der ein gefährliches Produkt in Verkehr bringt. Die gefährliche Handlung, die den Anknüpfungspunkt für die Haftung des Herstellers gibt, ist das Inverkehrbringen des Produkts, das eine Gefahr für bestimmte Rechtsgüter begründet[1]. Es handelt sich um einen Unterfall der Verkehrssicherungspflichtverletzung. Es ist in zwei Gesetzen geregelt: in Produkthaftungsgesetz (ProdHaftG) und in Burgerlichem Gesetzbuch (BGB)[2].

Da auch das ProdHaftG Lücken im Rechtsschutz aufweist, hat es die Produzentenhaftung aus § 823 ff. BGB nicht verdrängen können. Weiterhin kann Schmerzensgeld nur aus dem allgemeinen Deliktsrecht verlangt werden, so wie auch die Haftungssumme im Rahmen der Gefährdungshaftung begrenzt ist[3]. Daher ist immer dann, wenn auch ein Verschulden des Herstellers vorliegen könnte (und das ist wegen der Beweislastumkehr eigentlich immer der Fall), auch das allgemeine Deliktsrecht zu prüfen Eine Spezialregelung für Gefahren für Leben und Gesundheit, die von Arzneimitteln herrühren, enthält das Arzneimittelrecht in den §§ 84 ff. AMG[4], das insoweit die allgemeine Produkthaftung des ProdHaftG verdrängt. Auch das Arzneimittelrecht lässt eine Verschuldenshaftung nach dem allgemeinen Deliktsrecht zu (§ 91 AMG).

Das ProdHaftG ist zur Umsetzung der EG-Produkthaftungsrichtlinie erlassen worden und 1990 in Kraft getreten. Für die Auslegung des Gesetzes ist daher auch das Gemeinschaftsrecht zu berücksichtigen, vor allem die Produkthaftungsrichtlinie.

Zu beachten ist, dass die Haftung nach dem ProdHaftG nach § 14 ProdHaftG nicht im Voraus abbedungen werden kann. Entsprechende Vereinbarungen sind nach S. 2 dieser Vorschrift nichtig.

Tötung oder Verletzung einer Person oder Sachbeschädigung (§ 1 ProdHaftG)

Das Produkthaftungsgesetz statuiert die Gefährdungshaftung nur für die Verletzung von bestimmten

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[1] Koch, D., Produzentenhaftung, 1995; Kullmann/Pfister, Produzentenhaftung (Loseblatt); Rolland, Produkthaftungsrecht, 1990;

[2] Es ist auch in anderen Akten geregelt, z.B. KrW-/AbfG: Jürgen Ensthaler, Dagmar Gesmann-Nuissl, Christian Wenzel: Abfallwirtschaft in Forschung und Praxis Bd.129 - Produzenten- und Produkthaftung infolge abfallrechtlicher Produktverantwortung nach Paragraph 22 KrW-/AbfG, SCHMIDT, BERLIN, 2004

[3] Westphalen, Produzentenhaftung 1 + 2, 2. Aufl. 1997

[4] M. Gosewinkel :Produkthaftung im medizinischen Bereich Eine Gegenüberstellung der Haftung für Arzneimittel und Medizinprodukte in Bezug auf die deutsche und österreichische Rechtslage und die diesbezüglichen EU-Richtlinien Salzburg,1997

Rechtsgütern[5], nämlich für Leben und Gesundheit und für das Eigentum.Die Umgrenzung der hier geschützten Rechtsgüter ist identisch mit der des allgemeinen Deliktsrechts, so dass hier nur auf die Ausführungen zu § 823 Abs. 1 BGB zu verweisen ist. Sehr wichtige sind Sachschäden nach dem § 1 Abs. 1 S. 2 ProdHaftG. Wird die Sachbeschädigung geprüft, dann gelten zunächst einmal die allgemeinen Kriterien zur Bestimmung der Sacheigenschaft. Sodann sind die nachfolgenden drei Tatbestandsmerkmale zu prüfen. Zuerst ,wird es eine andere Sache als das fehlerhafte Produkt selbst beschädigt. Damit soll das fehlerhafte Produkt aus der Gefährdungshaftung herausgenommen werden. Der Verkäufer haftet nach Sachmängelrecht (für Mangel- und Mangelfolgeschäden). Das Sachmängelrecht wird formell nicht berührt.

Die Abgrenzung des fehlerhaften Produkts von der anderen Sache kann gelegentlich Schwierigkeiten machen. Ausschlaggebend ist zwar die Verkehrsauffassung, doch ist damit noch nicht gesagt, wie es sich bei Weiterfresserfehlern verhält. Das ProdHaftG geht von der Sicht des Konsumenten aus: für ihn ist das erworbene Produkt eine Einheit. Kann hier aber nicht der Fall vorliegen, dass ein Produkt ein durchaus abgrenzbarer Bestandteil einer Gesamtsache ist, die dann als andere Sache anzusehen ist?

Es ist wohl die Ansicht vorherrschend, dass Beschädigungen der Hauptsache durch einen Bestandteil nur dann berücksichtigt werden sollen, wenn das fehlerhafte Teilprodukt nicht von vornherein eingebaut, sondern erst als Ersatz- oder Ergänzungsteil eingebaut worden ist; klassische Weiterfresserschäden sind danach also nicht vom ProdHaftG umfasst[6] . Dies ist mit dem Begriff des Produkts aus § 2 ProdHaftG zu erklären, der auf das Produkt nicht als Summe seiner Einzelteile, sondern als Gesamtwerk abstellt, wie es sich dem Verwender darstellt [7]. Allerdings zeigt sich, dass diese Ansicht durch das Gesetz nicht aufgenötigt wird: § 2 ProdHaftG bezeichnet als Produkte sogar auch die beweglichen Sachen, die Bestandteil einer anderen sind..

Soll der Hersteller für weiterfressende Fehler nicht zumindest dann haftbar sein, wenn die Einzelteile funktionell selbständig sind? Die in der Literatur wohl vorherrschende Ansicht ist, dass die Weiterfresserrechtsprechung des BGHs nicht auch auf die Fälle des ProdHaftG angewendet werden könnten. Allerdings: Das Gesetz verlangt nicht, dass die beschädigte Sache selbst wieder ein Produkt darstellt, das sich von dem fehlerhaften Produkt als von ihm völlig unabhängig unterscheiden müsste. So kann auch nicht darauf abgestellt werden, dass bei der Gesamtsache nicht von einer anderen Sache gesprochen werden kann, die als Produkt ohne das fehlerhafte Teilprodukt nicht denkbar wäre. Letztlich scheint nahe zu liegen, dass zur Abgrenzung dieselben Kriterien nutzbar zu machen sind, wie sie schon für die Haftung nach zur Produzentenhaftung gem. § 823 Abs. 1 BGB in der Tradition der Schwimmer-schalterentscheidung entwickelt worden und vielleicht noch weiter zu entwickeln sind. Danach kommt es allerdings auch nicht mehr auf die funktionelle Selbständigkeit des zerstörerischen Teils an. Somit scheint es auf einen eher zufälligen Zeitpunkt anzukommen, in dem eine Sache in die andere eingebaut wird; ebenso kann es nicht darauf ankommen, ob der schadensverursachende Bestandteil von einem anderen Hersteller kommt oder von dem der Gesamtsache.

[5]Nettelbeck, Beate I.: Produktsicherheit. Produkthaftung - Anforderungen an die Produktsicherheit und ihre Umsetzung, Springer, 1995.
[6] Taschner/Frietsch, ProdHaftG und EG-ProdHaftRL, 2. Aufl. 1990, § 1 Rn 39
[7] Rolland, Produkthaftungsrecht, 1990, § 1 Rn 44, § 2 Rn 23 f

In anderem Fall ist es möglich,dass die andere Sache ihrer Art nach gewöhnlich für den privaten Ge- und Verbrauch bestimmt ist. Ob eine Sache ihrer Art nach gewöhnlicherweise privat gebraucht wird, richtet sich nach der allgemeinen Verkehrsanschauung. Produkte, die nur für die Erwerbs- oder Berufstätigkeit bestimmt sind, können daher nicht in den Schutz von § 1 ProdHaftG einbezogen werden. Ist in manchen Fällen nicht auszumachen, ob die Sache von ihrer Art nach für den Privatgebrauch bestimmt ist (z.B. Kugelschreiber, PC), dann muss die Abgrenzung den weiteren Tatbestandsmerkmalen überlassen werden, insbesondere dem Merkmal, dass die Sache auch tatsächlich vom Geschädigten zum Privatge- oder verbrauch verwendet wird. Dass sich die Bestimmung für den privaten Ge- oder Verbrauch nach der allgemeinen Verkehrsauffassung richtet, hat u.a. die Konsequenz, dass der Hersteller einer Sache nicht durch Deklaration bestimmen kann, die Sache sei nur für den gewerblichen Gebrauch bestimmt, um die Sache dem Schutz des ProdHaftG zu entziehen.

Auch ist es möglich ,dass die andere Sache von dem Geschädigten hauptsächlich zu privatem Ge- oder Verbrauch verwendet wird. Damit ist also auch auf die tatsächliche Verwendung der beschädigten Sache abzustellen. Es werden aber nicht tatsächlich privat genutzte Sachen geschützt, die nach allgemeiner Verkehrsauffassung für den Erwerbs- oder Berufsgebrauch bestimmt sind. Wird durch ein Produkt beispielsweise die zum Spielen privat genutzte Landmaschine beschädigt, dann wird die Beschädigung der Landmaschine nicht den Tatbestand von § 1 ProdHaftG erfüllen können, da diese allgemeiner Auffassung nach nicht für den privaten Gebrauch bestimmt ist. Umgekehrt kann auch nicht eine allgemein als für die Privatnutzung bestimmte Sache dadurch in den Schutzbereich von § 1 ProdHaftG eingeführt werden, dass sie beruflich benutzt wird. Wer man den Nachttisch als Aktenbock im Büro einsetzt, kann sich im Schadensfall nicht auf die Anspruchsgrundlage § 1 ProdHaftG und die Verkehrsauffassung stützen, Nachttische seien für den privaten Gebrauch bestimmt.

Allerdings kommt es nicht darauf an, ob die beschädigte Sache im Zeitpunkt der Beschädigung gerade im beruflichen oder privaten Gebrauch war, sondern vielmehr darauf, wozu sie vom Geschädigten hauptsächlich benutzt wird. Das selten mal für einen Tag mit in das Büro gebrachte Radio, das sonst nur zu Hause steht, wird damit noch nicht dem Schutz des ProdHaftG entzogen, dass es zum Zeitpunkt der Beschädigung gerade im Büro stand.

Produkt (§ 2 ProdHaftG)

Die Verletzung muss von einem Produkt ausgehen. Das ProdHaftG versteht nach § 2 ProdHaftG unter Produkt jede bewegliche Sache[8], auch wenn sie einen Teil einer anderen beweglichen Sache oder einer unbeweglichen Sache bildet. Außerdem unterfällt auch die Elektrizität dem ProdHaftG als Produkt. Nicht als Produkt im Sinne des ProdHaftG gelten Erzeugnisse der Landwirtschaft, Fischerei und Jagd, soweit sie nicht einer Verarbeitung unterzogen worden sind.

Für den Begriff des Produkts kommt es nicht darauf an, ob es aus industrieller Fertigung stammt. Es kann sich auch um handwerkliche oder künstlerische Erzeugnisse handeln. Der Begriff Produkt legt nahe, dass es sich um eine von Menschenhand hergestellte Sache handeln muss, also Grundstoffe

[8] Barchetti und L. Formanek, Das österreichische Produkthaftungsgesetz, 1988

wie Sand, Kies, Kohle usw. keine Produkte sein können. Richtig ist allerdings, dass auch diese Grundstoffe Produkt sein können, was auch der Herstellerbegriff aus § 4 Abs. 1 S. 1 ProdHaftG bestätigt, wonach Hersteller auch jener sein kann, der einen Grundstoff herstellt.

Auch wenn die Beweglichkeit einer Sache mit dem Einbau in ein Grundstück aufhören kann, bleibt sie doch ein Produkt, wenn sie es auch vorher gewesen ist. Ein Bauwerk auf dem Grundstück als Ganzes ist aber kein Produkt, da es nie beweglich gewesen ist. Dabei ist es unerheblich, ob es sich um Bestandteile des Grundstücks (z. B. Haus) oder Scheinbestandteile (ein für die Mietzeit errichteter Carport) handelt.

Streitig ist, ob auch eine (z. B. in Büchern bzw. Disketten) verkörperte geistige Leistung ein Produkt i. S. d. ProdHaftG darstellt. Die geistige Leistung selbst ist keine bewegliche Sache. Aber sie findet in dem Buch, auf der Diskette oder der Patentakte ihre sachliche Verkörperung. Wendet jemand ein fehlerhaft entwickeltes, im Buch dargestelltes Verfahren falsch an und kommt dadurch ein von § 1 ProdHaftG umfasster Schaden zustande, dann kann dies doch nicht anders bewertet werden, als wenn ein Werkzeug aufgrund einer gleichartigen geistigen Fehlleistung falsch konstruiert ist und daher einen Schaden verursacht[9].Also sind auch Computerprogramme als Produkte anzusehen. Man mag streiten, ob es sich bei dem Computerprogramm selbst nicht nur um eine Sammlung von Informationen handelt, die als Sache völlig ungeeignet sind, Schäden anzurichten. Jedenfalls werden Computerprogramme auf Datenträgern zu Eigenschaften dieser Datenträger, deren Nutzung sich als Sachnutzung erweist[10] .

Produktfehler (§ 3 ProdHaftG)

Das Produkt ist fehlerhaft[11], wenn es aufgrund eines Konstruktionsfehlers, Fabrikationsfehlers oder Instruktionsfehlers nicht Sicherheit bietet, die der Verbraucher unter Berücksichtigung aller Umstände legitimerweise erwarten darf (BGH NJW 1995, 2161). "Berechtigterweise" bzw. "legitimerweise" drücken aus, dass es nicht auf die subjektive Erwartung des Geschädigten oder eines anderen individuellen Verbrauchers ankommen darf, sondern die Bewertung des Fehlers vielmehr vor dem Hintergrund eines überindividuellen Sicherheitsbedürfnisses vorzunehmen ist. Daraus ergibt sich, dass die Auslegung des Begriffs Fehler im Sinne des ProdHaftG anders als die des Gewährleistungsrechts ist, bei dem es gerade auf die durch die vertraglichen Vereinbarungen gestützten Erwartungen des einzelnen Erwerbers einer Sache ankommt. Was im einzelnen unter Berücksichtigung der in § 3 ProdHaftG genannten Gesichtspunkte erwartet werden darf, ist eine Frage der Billigkeit. Es sind daher die Interessen des Verbrauchers und die des Herstellers in ein gerechtes Verhältnis zu bringen. Eine Hilfe können bei der Abwägung Begriffe wie Verkehrsanschauung und Kriterien wie Zumutbarkeit sein.

Was der Verbraucher erwarten darf, richtet insbesondere nach folgenden Umständen:

[9] Rolland, Produkthaftungsrecht, § 2 Rn 16
[10] ibid, § 2 Rn 17
[11] Gerhard Mark: Produkthaftung: Konsequenzen für die Technische Dokumentation, Doculine, Ausgabe Juli 1997, http://www.doculine.com/news/1997/07_97/Produkthaftung.htm

- Darbietung des Produkts (z. B. durch Werbung oder Gebrauchsanweisung). Der Preis einer Ware beeinflusst auch die Erwartung des Käufers an das Produkt. Jedoch kann auch bei Billigprodukten (z. B. bei billigen Fahrrädern) eine Basissicherheit verlangt werden.

- Gebrauch des Produkts, mit dem billigerweise gerechnet werden kann. Der Hersteller haftet damit auch für bestimmungswidrigen Gebrauch, soweit dieser für den Hersteller vorhersehbar oder auf mangelhafte Instruktion zurückzuführen war. Wird das Produkt jedoch evident missbraucht, so scheidet der Anspruch aus[12].

- Zeitpunkt, in dem das Produkt in Verkehr gebracht wurde**:** Der Zeitpunkt des Inverkehrbringens prägt die Sicherheitserwartung der Verwender eines Produkts erheblich mit. Vor allem werden die Anwender erwarten, dass die Sicherheits-standards eines Produkts im wesentlichen denen entsprechen, die von Konkurrenz-produkten gesetzt werden, die gleichzeitig auf dem Markt sind. Allerdings ist ein Produkt nicht allein deshalb fehlerhaft, weil später ein verbessertes Produkt in den Verkehr gebracht wurde[13].

Die Beweislast für den Produktfehler trägt der Anspruchsteller, wobei der Anspruchsteller nur beweisen muss[14]: das Produkt hat den Sicherheitserwartungen nicht entsprochen, als der Unfall passierte. Dabei muss er aber auch beweisen, welche Sicherheitserwartungen bestanden sind. Die Beweislast dafür, dass das Produkt nicht fehlerhaft war, als es vom Hersteller in Verkehr gebracht worden ist, ist nämlich nach § 1 Abs. 2 Nr. 2 ProdHaftG umgekehrt worden.

Haftungsbegründende Kausalität

Der entstandene Schaden muss durch den Produktfehler entstanden sein. Die Kausalität ist nach der Adäquanzformel zu bestimmen. Gem. § 1 Abs. 4 ProdHaftG trägt der Anspruch-steller die Beweislast nicht nur für die Fehlerhaftigkeit des Produkts, sondern auch für die Verursachung des Schadens durch den Fehler, womit er auch die haftungsbegründende Kausalität zu beweisen hat.

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[12] In den USA wurde einer Frau ein horrendes Schmerzensgeld zugesprochen, die sich einen im Schnellrestaurant erworbenen Pappbecher mit Kaffee beim Autofahren über die Beine goss - der Verkäufer habe auf die Verbrühungsgefahr hinweisen müssen

[13] Mehrwegflasche II - BGH 9. 5. 1995 NJW 1995, 2162: Die Beklagten vertreibt kohlensäurehaltiges Mineralwasser, das sie in Mehrwegflaschen abfüllt. Die damals neunjährige Klager holte zwei dieser Flaschen aus dem Keller der elterlichen Wohnung. Dabei explodierte eine Flasche und verletzte die Kl. am Auge, so dass es trotz Operation zu einer erheblichen Einschränkung des Sehvermögens kam. Die Kl. hat behauptet, unmittelbar am Bruchausgang habe sich auf der äußeren Oberfläche der geplatzten Flasche eine ca. 4 mm breite Ausmuschelung befunden. Es sei nicht auszuschließen, dass diese Beschädigung im Zeitpunkt der Auslieferung der Flaschen bestanden und zu dem Bruch geführt habe. Die Kl. beruft sich dabei auf ein Gutachten einer staatl. Materialprüfanstalt. Die Bekl. meint hingegen, die Explosion der Flasche könne ebenso auf einen Haarriss zurückzuführen sein, der nach dem Stand der Technik nicht erkennbar war. Die Kl. verlangt Schadensersatz für die Kosten der Heilung sowie für die infolge der herabgesetzten Sehfähigkeit entstandenen Vermögenseinbußen.

[14] C.O. Bauer :Bedeutung der Zerstörungsfreien Prüfverfahren für die Produkthaftung, *DACH-Zeitung Nr. 57, Seite 62 bis 65*

Hersteller (§ 4 ProdHaftG)

Als Hersteller im Sinne des ProdHaftG[15] haftet: a)wer das Endprodukt, einen Grundstoff oder ein Teilprodukt hergestellt hat, also auch der Zulieferer als Hersteller eines Teils, wenn dieses fehlerhaft ist; b)wer seinen Namen, seine Marke oder ein anderes unterscheidungskräftiges Kennzeichen anbringt und sich damit als Hersteller ausgibt (sog. "Quasihersteller"); c)wer ein Produkt zu gewerblichen Zwecken in die EG importiert, auch wenn der Hersteller außerhalb der EG bekannt ist; d) der Lieferant, sofern der Hersteller oder Importeur des Produkts nicht festgestellt werden kann.

Wenn der Lieferant nicht haften will, muss er binnen eines Monats nach entsprechender Aufforderung des Geschädigten entweder den Hersteller oder Importeur oder aber seinen Lieferanten benennen, der ebenfalls weiter verweisen kann. Es handelt sich hier nicht um einen Auskunftsanspruch des Geschädigten gegen den Lieferanten, sondern nur um eine Obliegenheit dieses, wenn er nicht haften will.

Als Hersteller wird immer das Unternehmen, nicht der einzelne Mitarbeiter in Anspruch genommen, auch wenn dies im allgemeinen Deliktsrecht anders ist. Bei der Produkthaftung nach dem ProdHaftG geht es um die Unternehmerhaftung, die sich an seiner unternehmerischen Tätigkeit und den damit verbundenen Möglichkeiten zur Risikosteuerung (Organisation, Produktentwicklung, Preisgestaltung) orientiert. Daher ist es auch nicht erforderlich, die Handlungen der Mitarbeiter des Unternehmens dem Unternehmen mit Hilfe weiterer Zurechnungskriterien zuzurechnen; so scheidet die Anwendung von § 831 BGB aus.

Auch derjenige, der einfach nur verschiedene Produkte zusammenfügt, ist Hersteller eines neuen Produkts. Seine Haftung ist nicht davon abhängig, ob der Unfall auf ein Fehler seines Gesamtprodukts oder eines Teilprodukts zurückzuführen ist.

Wer Hersteller ist, muss ebenfalls der Geschädigte beweisen, so wie er auch ggf. beweisen muss, dass der Hersteller nach § 4 Abs. 3 ProdHaftG nicht zu ermitteln ist.

Schadensersatz (§§ 7-10 ProdHaftG)

Wie dies für die Gefährdungshaftung typisch ist, ist die Haftung für die vom ProdHaftG erfassten Unfälle auf Höchstsummen begrenzt. Daraus ist nicht zu schließen, dass bei Verschulden und dem Eingreifen der allgemeinen Deliktshaftung (§§ 823 ff. BBG) ebenfalls diese Beschränkungen gegeben wären. Diese gelten nur für die Haftung aus dem ProdHaftG.

Der Haftungshöchstbetrag für Personenschäden ist in § 10 ProdHaftG auf 85 Millionen € festgesetzt, der auch dann gilt, wenn mehrere Personen geschädigt worden sind. Dabei kommt es

[15] Gerhard Mark: Produkthaftung: Konsequenzen für die Technische Dokumentation, Doculine, Ausgabe Juli 1997, http://www.doculine.com/news/1997/07_97/Produkthaftung.htm

nicht darauf an, dass nur ein Unfall mehrere Verletzte mit sich gebracht hat, sondern sich ein bestimmter Produktfehler bei verschiedenen Verletzten ausgewirkt hat (§ 10 Abs. 1 ProdHaftG).
Eine entsprechende summenmäßige Begrenzung der Haftung bei Sachschäden ist dem Gesetz nicht zu entnehmen. Sie ist auch nicht in der EG-ProdHaft-RL vorgesehen. Allerdings muss der Geschädigte an Sachschäden bis zur Höhe von 1125 DM beteiligen.

In den §§ 7 bis 9 ProdHaftG sind die Schadensersatzansprüche bei Personenschäden genauer ausgestaltet. Seit dem 1.8.2002 hat der Geschädigte auch einen Anspruch auf Schmerzensgeld (§ 8 S. 2 ProdHaftG). Es ist zu beachten, dass dem § 844 BGB entsprechende Anspruchsgrundlagen Dritter für den Fall der Tötung des Verletzten in § 7 Abs. 1 S. 2 ProdHaftG und § 7 Abs. 2 ProdHaftG enthalten sind.

Dem Hersteller werden vom Gesetz verschiedene Entlastungsmöglichkeiten zur Seite gegeben. Wie die Nummer 2 aus § 1 Abs. 2 ProdHaftG zeigt, handelt es sich zum Teil auch um bloße Beweislastregeln. Das angeführte Beispiel zeigt, dass die materielle Rechtslage sich durch die Vorschrift nicht ändert, aber durchaus die prozessualen Folgen. Die Zurechnung des Verletzungserfolgs zum Produktfehler entfällt, wenn dieser nicht bereits bestanden hat, als das Produkt in den Verkehr gebracht worden ist, da die Haftung des Herstellers nicht an die Herstellung des Produkts oder einen Zustand des Produkts zu irgendeinem Zeitpunkt anknüpft, sondern an das Inverkehrbringen des Produkts und die dadurch hervorgerufenen Gefahren. Durch § 1 Abs. 2 Nr. 2 ProdHaftG wird dem Geschädigten genommen, zu beweisen, dass das Produkt bereits fehlerhaft in den Verkehr gebracht worden ist. Stattdessen muss der Hersteller das Gegenteil beweisen.

Mitverschulden (§ 6 ProdHaftG, § 254 BGB), Erlöschen (§ 13 ProdHaftG) und Verjährung (§ 12 ProdHaftG)

Gem. § 6 ProdHaftG ist § 254 BGB anwendbar, wenn der Geschädigte den Schaden schuldhaft mitverursacht hat.

Bei der Produkthaftung nach dem ProdHaftG sind zwei Fristen zu beachten.Gem. § 13 Abs. 1 ProdHaftG erlischt der Anspruch zehn Jahre nach dem Zeitpunkt, in dem der Hersteller das Produkt, das den Schaden verursacht hat, in den Verkehr gebracht hat. Der Anspruch geht also unter bzw. kann nach dem Ablauf dieser Frist nicht entstehen. Allerdings geschieht dies dann nicht, wenn der Anspruch bereits rechtshängig ist oder ein Mahnverfahren läuft. Zu beachten ist, dass auf diese Frist nicht die Vorschriften über die Unterbrechung oder Hemmung der Verjährung anwendbar sind, die Frist also nicht etwa wieder oder von vorn läuft, wenn der Umstand wegfällt, nach dem Verjährungsfristen gehemmt oder unterbrochen werden. Ist der Anspruch rechtskräftig festgestellt, gilt die 30jährige Verjährung. Die Frist beginnt mit dem Inverkehrbringen des einzelnen Produkts an zu laufen, nicht etwa damit, dass eine Serie oder das letzte Stück aus ihr in Verkehr gebracht wird .

Gem. § 12 Abs. 1 ProdHaftG verjährt der Anspruch in drei Jahren von dem Zeitpunkt an, in dem der Ersatzberechtigte von dem Schaden, dem Fehler und von der Person des Ersatzpflichtigen Kenntnis erlangt oder hätte erlangen müssen.

Die Produkthaftung in EU

Die zivilrechtliche Haftung des Herstellers ist Gegenstand eines gemeinschaftlichen Rechtsrahmens auf der Grundlage der Richtlinie 85/374/EWG vom 25. Juli 1985. Mit der Annahme der Richtlinie 99/34/EG (IP/97/844) zur Änderung dieser Richtlinie sind auch die Hersteller landwirtschaftlicher Primärerzeugnisse verschuldensunabhängig für die von ihren fehlerhaften Erzeugnissen verursachten Gesundheitsschäden haftbar.

Die wichtigsten Akten in EU, dass für jedes Produkt gelten, sind die Richtlinien 1985/374[16] und 1999/34 [17]. Sie wird im Europäischen Wirtschaftsraum vermarktet und betreffen die Bürger und Erzeuger in diesem Raum unmittelbar. Indem die Gesetzgebung das Risiko zwischen Verbrauchern und Erzeugern gerecht verteilt, versucht sie, die Interessen der Verbraucher mit den Anforderungen des Binnenmarktes (namentlich des freien Warenverkehrs und der Beseitigung von Wettbewerbsverzerrungen) in Einklang zu bringen.

Mit der Richtlinie 85/374/EWG über die Haftung für fehlerhafte Produkte wurde 1985 in der Gemeinschaft der Grundsatz der objektiven bzw. verschuldens-unabhängigen Haftung eingeführt. Diesem Grundsatz gemäss ist der Hersteller einer fehlerhaften beweglichen Sache verpflichtet, Schäden an der körperlicher Unversehrtheit und am privaten Eigentum von Personen wiedergutzumachen, unabhängig davon, ob eine Fahrlässigkeit seitens des Herstellers vorliegt oder nicht. Die Richtlinie 85/374/EWG hat eine gerechte Verteilung der Risiken, die einer modernen, hochtechnisierten Gesellschaft innewohnen, bewirkt. Sie hat somit einen angemessenen Ausgleich zwischen den beteiligten Interessen geschaffen, insbesondere zwischen dem Schutz der Gesundheit der Verbraucher, der Förderung der Innovation und der Entwicklung von Wissenschaft und Technik, der Sicherstellung eines unverzerrten Wettbewerbs und der Erleichterung des Handels auf der Grundlage eines harmonisierten Haftungsrechts.

Die genannte Richtlinie hat auf diese Weise zu einer stärkeren Sensibilisierung der Wirtschaftsteilnehmer für die Produktsicherheit und die ihr beigemessene Bedeutung beigetragen. Die Einbeziehung landwirtschaftlicher Primärerzeugnisse in den Anwendungsbereich der Richtlinie 85/374/EWG wird zur Wiederherstellung des Vertrauens der Verbraucher in die Sicherheit der landwirtschaftlichen Erzeugung beitragen. Diese Einbeziehung entspricht den Anforderungen eines hohen Verbraucherschutzniveaus.[18]Daher muß es geändert werden Seit 1985 ist jeder Hersteller verpflichtet, die aufgrund eines fehlerhaften Produktes verursachten Schäden an der Gesundheit, der Sicherheit und dem Eigentum der Bürger wiedergutzumachen. Die Richtlinie von 1985 zielt darauf ab, die Opfer zu schützen, und die Verbesserung der Produktsicherheit im Binnenmarkt zu fördern. Sie bietet einen weitgehend kohärenten Rechtsrahmen, der auf den gerechten Ausgleich der einer modernen Produktion innewohnenden Risiken abzielt.

[16] Richtlinie 85/374/EWG des Rates vom 25. Juli 1985 zur Angleichung der Rechts- und Verwaltungsvorschriften der Mitgliedstaaten über die Haftung für fehlerhafte Produkte Amtsblatt Nr. L 210 vom 07/08/1985 S. 0029 - 0033 Diese Richtlinie wurde den Mitgliedstaaten am 30. Juli 1985 bekanntgegeben .

[17] Richtlinie 1999/34/EG des Europäischen Parlaments und des Rates vom 10. Mai 1999 zur Änderung der Richtlinie 85/374/EWG des Rates zur Angleichung der Rechts- und Verwaltungsvorschriften der Mitgliedstaaten über die Haftung für fehlerhafte Produkte Amtsblatt Nr. L 141 vom 04/06/1999 S. 0020 - 0021

[18] Die Preambul die Richtlinie 99/34/EG, punkt 5.

Die kürzlichen Krisen auf dem Lebensmittelsektor (BSE-Krise, Dioxin-Skandal) haben gezeigt, dass es kein Nullrisiko gibt. Jede Gesellschaft muß sich also auf ein optimales, ihrer Entwicklung angepaßtes System verlassen, um die produktionsbedingten Schäden bei den Opfern bestmöglich wiedergutmachen zu können. Es ist daher unerläßlich zu prüfen, ob ein Instrument wie die Richtlinie 85/374/EWG in Anbetracht der neuen Risiken, denen die europäische Gesellschaft im Verlauf des neuen Jahrtausends gegenüberstehen wird, auch weiterhin diese Zielsetzung erfüllt.

Die Kommission hat ein Grünbuch über die zivilrechtliche Haftung für fehlerhafte Produkte angenommen.Mit der Veröffentlichung dieses Grünbuchs will die Europäische Kommission unter Mitwirkung der interessierten Kreise die effektive Umsetzung der Vorschriften über die zivilrechtliche Haftung für fehlerhafte Produkte (Richtlinie 85/374/EWG geändert durch die Richtlinie 99/34/EG) untersuchen und feststellen, wie sie sich auf die Funktionsweise des Binnenmarktes, den Verbraucherschutz und die Wettbewerbsfähigkeit europäischer Unternehmen auswirken. Fakten sollen Aufschluß darüber geben, inwieweit die Ziele der Richtlinie, wie der Schutz der Opfer, die Förderung der Produktsicherheit, die Erleichterung des Warenaustausches innerhalb des Binnenmarktes, ohne die Innovation und die Schaffung neuer Arbeitsplätze zu beeinträchtigen, tatsächlich erreicht werden.

Die Kommission möchte auf diese Weise einen Meinungsaustausch über eine mögliche grundlegende Überarbeitung der Richtlinie anregen, wie sie vom Europäischen Parlament gefordert wird. Dieses Dokument richtete sich an alle interessierten Kreise und zielte darauf ab, praktische Informationen zu erhalten, die es der Kommission erlauben würden, eine umfassende Prüfung der Anwendung der Richtlinie 85/374/EWG durchzuführen. Die Ergebnisse dieser Befragung sollten der Vorbereitung des zweiten Berichts über die Anwendung der genannten Richtlinie dienen.

Der vorliegende Bericht berücksichtigt alle Informationen und Anmerkungen, die zum Grünbuch eingegangen sind, sowie alle sonstigen verfügbaren Angaben. Er fasst im wesentlichen die Fakten über die praktische Anwendung der Richtlinie 85/374/EWG zusammen und bewertet in der Folge die Informationen und die Argumente, die die betroffenen Akteure zu den Diskussionspunkten vorbrachten.Anhand der derzeit verfügbaren Informationen kann die Situation in den Mitgliedstaaten wie folgt beschrieben werden:

- Die Erfahrungen in Hinblick auf die Anwendung der Richtlinie sind immer noch begrenzt. Dies ist im wesentlichen darauf zurückzuführen, dass die Richtlinie in einigen Mitgliedstaaten relativ spät umgesetzt wurde und dass gemäß Artikel 13 der Richtlinie die Mitgliedstaaten von ihrer Möglichkeit Gebrauch machen, nationale vertragliche oder außervertragliche Haftungsvorschriften bzw. besondere Haftungsregelungen parallel zur Richtlinie anzuwenden.

- Nach den spärlichen vorliegenden Informationen zu urteilen, gab es bei der Anwendung der Richtlinie keine größeren Probleme.

- Kostenwirksame Rahmenbedingungen sollten erhalten bleiben, um so das Gleichgewicht zwischen den Interessen der Verbraucher und jenen der Hersteller zu bewahren.

Generell hat sich die Sachlage gegenüber der Situation im Jahre 1995, als die Kommission ihren ersten Bericht vorlegte, nicht geändert. Nach der Auffassung der Kommission sollten alle Änderungen der Richtlinie auf objektiven Tatsachen beruhen. Die derzeit verfügbaren Informationen sind nicht ausreichend, um klare Schlussfolgerungen zu ziehen. Daher ist die Kommission der Ansicht, dass es verfrüht wäre, die derzeit geltende Haftungsregelung zu ändern.Die Kommission hat jedoch beabsichtigt, eine Reihe von Folgemaßnahmen einzuleiten, die zwei Bereiche betreffen: direkt auf die Produkthaftung abgestellte Maßnahmen mit kurz- und mittelfristigen Zielen; Maßnahmen in anderen Bereichen, die die Produkthaftung ergänzen, wie der Produktsicherheit, dem Zugang der Verbraucher zum Recht und der Umwelthaftung, sind bereits angelaufen oder werden in naher Zukunft beginnen.

Auf der Grundlage der Ergebnisse dieses Berichts beabsichtigt die Kommission, eine Gruppe von Sachverständigen zu schaffen; diese fördert Dialog und Meinungsaustausch zwischen der Kommission, Sachverständigen staatlicher Verwaltungen und interessierter Kreise über Fragen der Produkthaftung, insbesondere über die Anwendung der Richtlinie, über die neueste Rechtsprechung und Änderungen relevanter nationaler Rechtsvorschriften.

Sie schlägt vor, zwei Studien in Auftrag zu geben: Die erste Studie[19] soll beurteilen, wie sich die Einführung der Herstellerhaftung auch für Entwicklungsrisiken und die Aufhebung der Haftungsobergrenzen bei Serienunfällen auf die Industrie, die Versicherungswirtschaft, die Verbraucher und die Gesellschaft als ganze (vor allem die Sozialversicherung) auswirken.

Die zweite Studie[20] wird die praktischen Auswirkungen der einzelnen in den Mitgliedstaaten geltenden Regelungen unter denen Ansprüche wegen fehlerhafter Produkte geltend gemacht werden, analysieren und vergleichen. Ein anderer Teil der Studie beschäftigt sich mit der Frage ,ob aufgrund den einzelstaatlichen Regelungen eine einheitliche Produkthaftungsregelung für die Gemeinschaft eingeführt werden könnte. Die Ergebnisse dieser Studien werden die derzeit vorliegenden Informationen ergänzt und es der Kommission zu bewerten erlaubt, ob es nötig und machbar ist, eine strengere gemeinschaftliche Haftungsregelung für fehlerhafte Produkte zu entwickeln

Die Kommission achtet darauf, dass die Regeln zur Produkthaftung in den Mitgliedstaaten wirksam angewendet werden (z.B.Vertragsverletzungsverfahren gegen Griechenland und Frankreich). Dies kommt Bürgern und Produzenten gleichermaßen zugute. Die Kommission muss regelmäßig die Wirksamkeit des Systems der Produktsicherheit überprüfen.

Die Kommission wird jedoch einige Maßnahmen ergreifen, um die Informationslücken zu füllen. Diese Aktionen betreffen die Einrichtung einer Gruppe von Sachverständigen sowie die Beauftragung zweier Studien.

Im Rahmen der Gesetzgebung zur Produkthaftung für aus Nicht-EG-Ländern eingeführte Investitionsgüter sind auch Leasing-Unternehmen betroffen[21], da sie ihren Leasing-Nehmern

[19] Die produkthaftung in EU-ein Bericht für die Europäische Kommision,Lovells, 2001
[20] Analysis of the Economic Impactof teh Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products, Fondazione Rosseli, 2004.
[21] Die Texte an seite : http://www.aspect-online.de/prodinfo/abc_leasing/produkthaftung.htm

gegenüber als Vermieter haften. Ein Ausweg besteht in der Übertragung der Produkthaftung im Innenverhältnis auf die Lieferfirma jedoch wird hierbei eine Prüfung des Lieferanten und der Objektqualität angeraten.Die andere Moglichkeit ist, daß der Leasing-Nehmer in solchen Fällen das Wirtschaftsgut selbst importiert ,um danach einen Sale-and-lease-back-Vertrag (SALB) über das Objekt zu schließen. Das Produkthaftungsrisiko verbleibt dann beim Leasing-Nehmer. Voraussetzung ist hierbei die für SALB-Verträge notwendige gute Bonität des Leasing-Nehmers.

Am Ende

Die gesetzliche Produkthaftung , die eine Gefährdungshaftung ist, ist sehr wichtig heute, als es gibt viele fehlerhaften Produkten.. Zwei Gesetzen regulieren dieses Berich in Deutschland Produkthaftungsgesetz (ProdHaftG) und in Burgerlichem Gesetzbuch (BGB)[22]. Auch, wichtig ist das Produktsicherheitsgesetz von 22.04. 1997, dass enthaltet die allgemeine Regelungen uber die Produktsicherheit. Diese Regelungen haben Auffangcharakter gegenuber zahlreichen Spezailreegelungen im Arznei- und Medizinproduktwesen, fur Gentechnik, Bauprodukte, Bedarfsgegenstande und Lebensmittel.

Die wichtigsten Akten in EU, dass für jedes Produkt gelten, sind die Richtlinien 1985/374 und 1999/34, aber es ist moglich dass die EU Gesetzgebung eine neue Akten machen wird.

[22] Es ist auch in anderen Akten geregelt, z.B. KrW-/AbfG: Jürgen Ensthaler, Dagmar Gesmann-Nuissl, Christian Wenzel: Abfallwirtschaft in Forschung und Praxis Bd.129 - Produzenten- und Produkthaftung infolge abfallrechtlicher Produktverantwortung nach Paragraph 22 KrW-/AbfG, SCHMIDT, BERLIN, 2004

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НЕКИ АСПЕКТИ ИДЕЈЕ О ДРЖАВИ У СРБИЈИ У ПЕРИОДУ ОД 1804-1813. ГОДИНЕ[1]

Драгана Ћорић*

Уводне напомене

Делује веома сурово тврдња теоретичара Трајана Стојановића, да су «1804. годину становници Србије , после векова живота под Османским царством , дочекали као заједница ближа неолиту него традицији средњовековне српске државе».[2] Међутим, ова констатација више одговара правом стању ствари, без обзира на сваки покушај романтизовања положаја Срба, посебно у Београдском пашалуку. Велики број неписмених , развијено сточарство и пољопривреда у време када Европа стреми индустријском развоју и не могу дати другачију слику од већ приказане. Друштво су чиниле породичне задруге, патријархално уређене, ослоњене на културну традицију средњовековне српске државе.Чувар националног идентитета је била црква , све до укидања Пећке патријаршије. Свеопшта историјска анонимност српског народа у Европи је допринела посматрању почетка устанка као јединственој прилици да се поразе Турци, а да се на браник слободе истуре припадници народа, чији порази не би директно утицали на односе између великих сила.[3] Зато је и новооткривена тенденција Срба ка постизању индивидуалности и независности изазвала велику пажњу на Блакану и у целој Европи. Почетно средство за борбу је била једино традиција Душанове средњовековне државе, очувана са једнаким жаром националног осећаја свих ових векова под турском влашћу.

Први српски устанак започет је као устанак уперен не против легитимне турске власти у пашалуку, већ као противљење дахијској тиранији.О томе сведочи и често обраћање устаника султану, посебно у првим годинама устанка (1804-1806), где су га уверавали о својој бескомпромисној оданости Великој Порти.

Ипак, управо се то показало највећим изазовом од свих дотадашњих, будући да је требало створити државу са свим потребним институцијама, на територији која је стално ратовала и где становништво , услед своје неукости, није разумевало значај стварања било каквих државних органа. Схватити и прихватити психологију сељака- хајдука у том периоду је било најтеже. Тај и такав сељак се укључио у устанак са намером да се реши плаћања

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[1] Чланак је настао као резултат рада на пројекту Поводом обележавања двестоте годишњице Првог српског устанка (1804-2004) и изградње модерне српске државе и правног система**,** који је реализован на Правном факултету Универзитета у Новом Саду, Србија и Црна Гора.

[2] Чедомир Антић: *Први српски устанак*, доступно на www.royalfamily.org/ustanak/USTANAK_yu.htm. Такође и текст : *Сретење 1804. године- настанак модерне Србије*, непознатог аутора.

[3] Тако је, нпр. Француска штампа имала изузетно критичан став према устанку, али још више према руској умешаност у сукобе. Србија је сматрана унутрашњим питањем турске државе; руски утицаји су били својеврстан атак на суверенитет те државе. *Француска штампа о Првом српском устанку*, приређивач: проф. др Драгољуб Јанковић, Српска академија наука, Историски институт, књига 10, Београд, 1959. такође и Никола Радојчић: *Ранкеова нова концепција српске револуције*, поговор у књизи: Леополд Ранке, *Српска револуција*, Српска књижевна задруга,Београд ,1991.

прекомерних намета, без размишљања о последицама његовог делања.[4] Тог и таквог сељака је у устанак увео жар не за ослобођењем од Турака уопште (јер то и није деловала као могућа опција), већ за успостављањем легитимног турског режима и кажњавање, сходно начелима (народног поимања) правде, дахија.

Тек након што је добио националну компоненту, Устанак се може сматрати револуцијом у правом смислу те речи. Све до тада је његов ток био у рангу притужби на неправилан рад турских државних органа, уз ,наравно, извесно кокетирање са великим силама , као што су Аустрија и Русија. Године 1806. , у једном обраћању Петру I , исказана је јасна представа устаника о националном јединству, посебно са Црном Гором и Босном и Херцеговином.[5]. Или још раније, приликом слања депутације у Петроград, где се изражава воља за изменом постојеће кнежинске аутономије, која постаје недовољна у односу на устаничке аспирације. Инсистирано је на конституисању Србије као независне државе, са сопственом управом, под руском заштитом и са плаћањем данка султану[6].

У свим признатим периодизацијама српске нововековне историје, период од 1804-1813. године називан је периодом српске револуције и обнове државе, или налик томе ,периодом борбе за слободу. Независност као посебан државни квалитет , је дошла касније, током 30-их и 40-их година 19.века, када је у потпуности наступило национално отрежњење српског народа, а била су јасније и контуре међународне дипломатске активности и њихова нестабилност.[7]

Зато је потпуно оправдано посматрати почетак српске револуције као борбу српског народа и свештенства на два фронта- борбу за физичко и духовно ослобођење.[8] Ранке је Устанак зато назвао «наглашеним еманципационим процесом са ширим историјским значајем за цео регион».[9]

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[4] Више о томе видети у: Миша Глени:*Балкан 1804-1999, Први део- национализам, рат и велике силе*, Самиздат Б92, Београд, 2002.

[5] Радош Љушић: *Историја српске државности. Србија и Црна Гора*, књига II , САНУ- огранак у Новом Саду, Беседа- издавачка установа православне епархије бачке, Друштво историчара Јужнобачког и Сремског округа, Нови Сад, 2001, стр.63-71.Премда неки аутори посматрају једнонационалну државу као проклетство Балкана. То проклетство јесте заправо основа такве државе, која почива на етничким разликама и различитим вероисповестима, што непогрешиво води у атмосферу нетолеранције и фундаментализма. Франциско Веига: *Балканска замка (1804-2001)- једна европска криза*,Београд, 2003, стр. 38 и 86-88.

[6] Помало необична концепција државне самосталности, у оквиру које с едугује покорност двома господарима. Никола Бура: *Србија и Свет у време Првог српског устанка 1804-1813*,теовид, Београд, 2003,стр. 38; Владимир Ћоровић. *Карађорђе и Први српски устанак*», Book & Marso,Библиотека града Београда, , Београд, 2003, стр.44.

[7] Радош Љушић:*Државно-друштвена и генерацијска периодизација нововековне Србије (1804-1918*), , чланак објављен у зборнику радова *Србија 19. века*, Војна књига, Београд, 1998, стр. 9-20.

[8]«Што је јаничарство било у држави-царевини турској - то је фанариотство било у цркви. Једно другом ни у длаку није уступало, а само је разлика била у средствима»- Проф. др Станимир Спасовић: *Однос владика фанариота према српској револуцији 1804. и српском свештенству*, интернет издање часописа Источник- листа српске православне епархије канадске (у даљем тексту: Источник), бр.59.Исто и код Леополд Ранке, *Српска револуција*, Српска књижевна задруга,Београд 1991, стр. 58, као и код Мирослава Ахтика: *Клерикализација Србије*, Република, Београд, бр 340-341/2004,стр17-18.

[9] Леополд Ранке, наведено дело, стр.13.

Идеје о обнови српске државе

Иако су одредбама Свиштовског мира из 1791. године враћени под управу Турској, међу Србима је почела да јача идеја о стварању независне државе.Томе у прилог је ишла и заповест султана Селима III да се земља у Београдском пашалуку проглашава државном, а јаничари су протерани услед непослушности турским властима и издаји током рата са Аустријом.[10]

У следећих неколико година кнежинска самоуправа[11] је, као најзначајнија установа код Срба после Пећке патријаршије, добила коначан облик. Ферманима из 1793, 1794 и 1796. године су установљене следеће повластице[12]: народ је слободно бирао нахијске кнезове и кнежинске кнезове, с тим да је београдски паша давао сагласност на њихов избор, порез се одређује одсеком а остала давања цару и спахијама су утврђена законом, слободно је подизати цркве и манастире, слободна је трговина, Турцима је забрањено да ходају по селима и плене (тј.пљачкају) рају, установљена је народна војска која ће заједно са царском одржавати унутрашњи ред и бранити границе Београдског пашалука. Наведено се сматрало великм успехом српских старешина, будући да је турска држава била организована на изарзито привредним принципима.Услед снаге сопственог ауторитета и неминовно богатства које га је подупирало, без већих напора покоравала сваку освојену територију, заводећи сопствено државно уређење као њавише и најбоље могуће. Са друге стране, овакви потези Селима III, у оквиру стварања Новог поретка, су били оцењени као реформаторски , и у Истамбулу нису били благонаклоно дочекани.

Ова , условно схваћена победа српских старешина је постакла на даља размишљања малобројну интелектуалну елиту, првенствено у свештеничким редовима[13]. У годинама непосредно пред Устанак настали су пројекти Саве Текелије[14], о територији на којој живе Срби и која би се протезала од Јадранског до Црног мора, архимандрита Арсенија Гаговића из 1803 (обнова славјаносербскога царства), који је више представљао територију под руским протекторатом, јер би највиши орган био руски кнез одређен од стране руског цара лично; и Митрополита Стевана Стратимировића из 1804. године, који је опет предвиђао известан степен аутономије, тј. дароване самосталности од стране султана, али под

[10] Овде је примењено правно праило из исламског права да , када муслиманско становништво поново освоји територију коју су претходно освојили неверници (хришћани), губи над истом право власништва. Видети: Никола Бура: наведено дело, стр. 7-8.

[11] Радош Љушић: *Векови под турском влашћу и обновљена државност*, чланак објављен у зборнику радова «Србија 19. века», стр. 37-47.

[12] Ибид, стр.10-12.

[13] С тим да је овде нужно учинити једну ограду- након укидања пећке патријаршије, свештенство су чинили махом Грци, који су се стављали на страну турских власти све време устанка, и касније. Те владике- фанариоти су проузроковали самом устанку већу моралну штету него што је то могла учинити иједна изгубљена битка.

[14] Писмо са наведеним предлогом је упућено Наполеону, са следећим образложењем.Оваква држава би представљала идеалну противтежу аспирацијама Русија и Аустрије на Балкану, а спречило би се њихово ширење на штету Турске која је била француски савезник. Исти предлог је упутио , годину дана касније и аустријском цару, са намером да се тако спречи ширење руског утицаја на Балкану, а да истовремено са Русијом склопи антифранцуски споразум. Приметноје велико дипломатско лутање чак и малобројне интелектуалне елите у годинама устанка, будући да су се тешко одлучивали «чијем царству да с еприволе». Никола Бура, наведено дело, стр. 33.

контролом Русије.[15]Дакле, заједничко свим плановима јесте упознавање руског двора са њиховом садржином, првенствено због активне улоге Русије, која јој је била намењена у сваком од њих. Из свих ових планова непосредно извире обнова општег народног духа као основе једне хришћанске, славјанске државе, у изразито муслиманском окружењу, која , посебно према Митропилиту Стевану Стратимировићу, поприма максималне размере, на ивици самог национализма и националне искључивости.[16]

Срби су сматрали да их пут ослобођења од Турске може повести једино Аустрија и то због ратова које је водила против ње. Заблуда је постојала и током Устанка ,у тренуцима када је руска страна заборављала да испуни свој део обећања. Последњи турско- аустријски рат који је окончан примирјем и Свиштовским миром , је коначно разуверио будуће устанике да су инспирацију и помоћ тражили на погрешној страни. Устанком су бранили своје природно право на опстанак, као људи, као врсте (јер су већ били доведени на ивицу истребљења). Иако временски смештена после Француске буржоаске револуције 1789. године, ова српска револуција није имала идеолошку основу у декларацији права човека и грађанина. Барем не у почетку, док интелетуална елита у виду војвођанских Срба није унела те идеје у једну конзервативну средину каква је Србија у овом смислу. Међународни односи великих сила, посебно у овој епохи Наполеонових ратова и њихових непосредних исхода, су овде били на највећем испиту. Српска револуција 1804-1815. имала је своју најдиректнију европску димензију и улогу у политичком, социјалном и војном погледу, будући да је сматрана битном компонентом тзв. Источног (руског) питања. [17]

Почетак устанка. Концепт Божидара Грујовића.

Већ након првих борби у првој половини 1804. године, ствара се тежња за прерастањем буне у устанак са изразито ослободилачком компонентом То најбоље осликава део писма које су упутили Карађорђе и други прваци архимандриту Арсенију Гаговићу:»... Ми ништа туђе нећемо тицати, ко собствено наше од старинах које је свему свијету познато да је рођено наше хоћемо возвратити, и то је поштено пред свијем светом и по законом божијим и царским нико нам неће бранити."[18]

Током целе 1804. година једина власт у Србији је војничка , у рукама скоро свемогућег вожда.Такву власт је поседовао сваки други војвода, старешина , бимбаша у својој нахији , па је стога разумљива суревњивост међу вођама устанка, будући да је свако своју сопствену реч сматрао законом, све и да је иста изречена због личне користи. Сходно традицији

[15] Радош Љушић: *Историја српске државности. Србија и Црна Гора*, књига ИИ , САНУ- огранак у Новом Саду, Беседа- издавачка установа православне епархије бачке, Друштво историчара Јужнобачког и Сремског округа, Нови Сад, 2001, стр.21-25. Исто и код проф. Др Драгољуба Р. Живојиновића. *Прилике у београдском пашалуку 1790-1804 године и почетак Првог српског устанка*, Источник, бр.57. Такође и Владимир Ћоровић: *Историја српског народа*, прва књига, Глас српски –Бања Лука и Арс Либри- Београд, 1997.
[16] Владимир Ћоровић, наведено дело, стр. 72.
[17] Наведено је била основа истраживања свих историографа, почев од Вука Караџића, преко Леополда Ранкеа, до наших савременика. Треба истаћи «сличност» српске «револуције» са револуцијама у Француској , Италији, САД, али тек од момента када борба добије национални призвук и предствља борбу за независност.
[18] Наведено асоцира на римску максиму *Honeste vivere,alterum non laedere, sum qiuque tribuere.* Владимир Ћровић, наведено дело, стр. 72.

средњовековне српске државе, и Душановим закоником, требало је установити «прави» закон, изнад кога се ниједан човек не може узвисити , а да му се сви покоравају.Такође је и установљавање Управног савета, тј. Правитељствујушчег Совјета било прихављено у начелу, без подробнијег објашњења значења те институције и њене улоге у младој српској држави[19]. Ипак, била је присутна недоумица око тога чију моћ ће оснажити установљавање овог органа.Вожд је то посматрао на себи својствен начин, тј. као могућност ограничавања његове власти. Иако му је превасходно била намењено вршење судске функције, Совјет је повремено издавао и извесне наредбе.

Чак је примамљиво деловао предлог Божидара Грујовића за стварање савезне државе, будући да је свака од 12 ослобођених нахија требало да има свог кнеза у смислу шефа (државе) нахије.Предлог је одговарао постојећем стању и тежњама осталих старешина да сачувају неограничену власт у кнежинама које су освојили у току устанка.Међутим овакве предлоге је Карађорђе лоше дочекао сматрајући х атаком на своју власт. Његове аспирације су биле у супротности са старешинским, јер јер је желео да прошири своју власт на све нахије. То је отворило унутрашњи спро уставне природе о уређењу врховне и локалне власти у устаничкој Србији[20].

Наиме, Карађорђе је хтео да успостави систем монархијског централизма док су се његови утицајни противници борили за стварање олигархије у којој би сваки поглавар имао врховну власт у свакој области.[21]Са друге стране, као слаби опоненти обема струјама јављају се интелектуалци из Војводине(коа што је већ поменути Божидар Грујовић, или Доситеј Обрадовић), која се налазила у Хабзбуршкој монархији[22]. Они су се залагали за независно судство и остале институције које би ограничиле моћ како Карађорђа тако и обласних заповедника. Свестан опасности која му долази са њихове стране, Карађорђе је њихову делатност ограничио на Београд, где је могао да контролише модернизаторске тенденције и држи их подаље од народа који би се могао одушевити таквим идејама. Политички утицај Војвођанских Срба је био уопште мали и то не само зато што су Срби у матици били незаинтересовани за револуционарне идеје просветитељства које су гајили Обрадовић и његови сународници, већ што Срби који су ризиковали животе у оружаном сукобу у унутрашњости нису имали времена за такве интелектуалне расправе. Такав угњетени народ је могао бити само идеално средтсво за ослобођење територије, док би се смишљање неких флоскула налик онима из француске револуције могло препустити ретко умним људима тога времена. Одвајање цивилне од војне власти, те супрематија цивилне у односу на војну власт,

[19] Премда је генерално схватање Совјета било да је то неки врховни судија, о чему сведоче записи Вука Караџића и проте Матеје Ненадовића.
[20] Стојан Новаковић: *Уставно питање и закони Карађорђева времена- студија о постању и развићу врховне и средишње власти у Србији 1805-1811*,Нова штампарија «Давидовић», Београд, 1907,стр.5-7
[21] Миша Глени, наведено дело, стр. 158; *Кнез Милош прича о себи*, за штампу приредио академик М.Ђ. Милићевић, Државна штампарија Краљевине Србије, Београд, 1893, стр.1-3.
[22] Устројство Совјета , као органа грађанске власти, Грујовић је највероватније преузео из угарског права, које познаје жупанијско уређење слично уређењу и надлежностима Совјета. Видети: Стојан Новаковић, *Васкрс државе српске. Политичко-историјска студија о Првом српском устанку 1804-1813* (објављено према издању Српске књижевне задруге, 1954), Аранђеловац, Напредак, Српска књижевна задруга, Београд 2002, стр. 98-99, 122, 123-124, 125-128, 134-136, 138, 188-160; Стојан Новаковић: *Уставно питање и закони Карађорђева времена*, Београд, 1907,стр.15.

је било потребно али првих година устанка немогуће, будући да је Карађорђе у институцији вожда објединио обе, али ни стална ратна ситуација није дозвољавала тако нешто.
Са друге стране , Карађорђе је високо ценио ставове Скупштине, посебно у овом периоду. Иако у први мах изгледа да је она имала консултативни карактер, фактички је била носилац суверене власти заједно са Карађорђем. Наведени значај проистиче и из правила окупљања ради доношења битних одлука, која је сегмент српског обичајног права. Њихова унутрашња организација није била тачно одређена, али се претпоставља да су је сачињавали «сви» старешине.

Врховну власт, према пројекту Божидара Грујовића, у оваквој држави не би вршио ниједан одређени орган већ- закон. Сувереност овде проистиче из саме чињенице да је свако лице дужно покоравати се садржини неког закона, без обира на функцију коју обавља у неком друштву. Чак, што је друштвена функција виша у хијерархији, то је обавеза поштовања закона већа. То је једино средство које ће сходно начелима правде и разума , исто деловати у односу на цара или на просјака. Тај апстрактни закон ће бити једина вредност државног поретка,[23], јер је он гаранција државности уопште, слободе и сигурности. Разум и правда су основ сваког друштва и државе, и то је једна непромењива вредност . Прокламовање начела слободе у оквиру поштовања закона је део српског правног наслеђа и то чл.171. и чл.172. Душановог законика, којима је управо установљена надмоћ закона над сваким човеком без обзира на његов друштвени положај.

Истовремено, Правитељствујушчи Совјет би чинили представници- 12 ослобођених нахија. Од тог броја, неки би добили функцију попечитеља, тј. министара.Совјет је , заједно са скупштином и законом, као апстрактним сегементом државо, требао да буде противтежа вождовом самодржављу. Након његовог званичног установљавања, постао је први централни орган, с тим да се његов положај мењао сходно односу снага између Карађорђа и обласних војвода[24].Совјет, иако никада није формално произведен за највиши државни орган, мешао се у ингеренције Карађорђа.

У прво време после оснивања на Велику Госпојину 1805, на скупштини у Борку, Совјет је био нека врста владе и Карађорђева помоћна грађанска власт у земљи[25]. Тада је Карађорђе први пут онемогућио опозицију да му преотме супрематију у српском народу.Следећи покушај је био осујећен већ на скупштини у Смедереву, али је Совјет и поред тога наставио прећутно да обавља функцију врховног државног органа.Приметно је ипак, што се Совјет бавио више решавањем у цивилним стварима, посебно установљавањем судија у ослобођеним местима, док је Карађорђе био неприкосновен у погледу одлучивања у војним стварима и стратегије.Тако је Совјет доносио одлуке које су се тицале продаје турских кућа, набавке муниције, и сл., а старешине су Совјету на редовним скупштинским заседањима подносили финансијске извештаје.[26]

[23] Божидар Грујовић: *Слово, Мемоари проте Матеје Ненадовића*, издао Љубомир П. Ненадовић, Београд 1867, стр. 295-297, као и репринт у часопису Република, бр. 237/2001.
[24] Милован Ристић: Народне скупштине у Првом српском устанку,Просвета Београд, 1954, стр.45.
[25] Божидар Грујовић, наведено дело.
[26] Радош Љушић: *Вуков Правителствујући Совјет*, Зборник радова, Београд, 1998, стр.210-225.

Пређутно је установљена супрематија војне власти у односу на цивилну, јер су се све одлуке доносиле у сврху помагања војне компоненте устаничке државе.Војно обележје устаничке државе је било присутно како у ратном, тако и у мирнодопском периоду. И у првој организацији власти «војинство « је изборило примат у односу на цивилне установе.[27] Иако спутан самовољом Карађорђја и главних старешина, утицај Совјета на даљи ток устанка али и на расположење српског народа је био велики. [28] Треба имати у виду запажање Вука Караџића да се Совјет није смео Карађорђу противити, а он је могао Совјету заповедати.[29]

Међународна помоћ, било руска или турска, је представљала средство у борби против вождове самовоље и апсолутизма. Међутим, није се посезало за истом из разлога правдољубља, већ су намере старешина нагињале према стварању једне савезне државе или чак конфедерације нахија.Наиме ,сваки од њих сматрао је да би по основу угледа и заслуга могао да управља једном облашћу, чак и да се то непосредно противи општем интересу српског народа и финалном исходу устанка. Први српски устанак и прилику коначног ослобођења од турског зулума, уништили су не само инострани утицаји , већ константна конфронтација између вођа устанка , која је их одвела у уништење.

Правни акти устанка

Први српски устанак , који је започет у духу романтизма и историзма, позивом на правду и својеврсни *Volkgeist* , као и начела правде која су дахије немилосрдно повредили, је многа државноправна питања решавао у ходу.»..У времену у ком је, уопште, сила била једини главни извор власти, власт је из силе и извирала и докле се ко налазио у сили, дотле је и власт била у рукама његовим ..».[30] Скоро је невероватно да је једно такво турбулентно време обележено са три званична устава: од 8 августа 1807, Родофиникинов; од 14 децембра 1808 године, Младена Миловановића, и од 8-11 јануара 1811, Младена Миловановића и Ивана Југовића, «сва три с потписом Карађорђевићевим»[31]. У питању су ретки писани правни акти, што је веома значајно за обављање делотнасти из надлежности државе. Наиме, током првих година Првог српског устанка, што због некости народа, заузетости старешина борбама или дипломатском делатношћу, није постојао писани закон на основу кога судови могу да суде.Обичај је био главни и једини извор права, те то није промењено

Кнежинска аутономија са српским изборним кнезовима и с турским судом у окружном месту, је у поређењу са Карађорђевим централистичким тежњама, које су водиле ка

[27] Радош Љушић: *Војводе*, Источник, бр.59. Војводе су били војне старешине у нахијама до 1808. годиен, кад је уведена стајаћа војска. Од 1811. године уведена су два нова звања-попечитељ (министар) војни и главнокомандујући.Тако је хијерархија устаничке војне власти садржала 9 инстанци, највиша је био вожд(као иу цивилној власти), а најниже рангиран је био обичан војник.
[28] Стојан Новаковић, *Васкрс државе српске. Политичко-историјска студија о Првом српском устанку 1804-1813* (објављено према издању Српске књижевне задруге, 1954), Аранђеловац, Напредак, Српска књижевна задруга, Београд 2002, стр. 98-99, 122, 123-124, 125-128, 134-136, 138, 188-160.
[29]Радош Љушић: *Вуков Правителствујући Совјет*, стр.214-215.
[30] Ибид.
[31] Стојан Новаковић, *Двадесет година уставне политике у Србији, 1883-1903, Историјско-мемоарске записке к томе времену и к постању и практиковању устава од 1888 и 1901*, издање Књижарнице С. Б. Цвијановића, Београд 1912, стр. 1-4.

апсолутизму, деловала превазиђено, те се истакла идеја стварања нове државне управе. Наравно, под заштитом Русије.

Првих година устанка државна управа је била оскудна. Почињала је и завршавала се у личности нахијских кнезова или самих војвода, чиме су обједињене цивилна и војна власт; били су истовремено судије, али и законодавци. Својом делатношћу су одређивали унутрашњу и међународну политику устаничке државе, али су управљали и финансијама. Поред толико истакнутих самовласних тенденција, једино им је ефективно могла парирати Народна скупштина, коју су по предтсваничком принципу , чинили виђени људи из сваке нахије. Скупштина је предтсваљала једини извор власти који није непосредно проистекао из силе, већ је била конципирана на демократском принципу представљања. Одлуке Скупштине је чак и Карађорђе прихватао, са задршком да је Скупштина махом прокламовала вождове предлоге, чак и када су њену већину чинили Карађорђеви опоненти. Треба истаћи да је оваква скупштина имала ингеренције само у погледу целе ослобођене територије или општег интереса народа (нпр. званична обраћања великим силама, упућивање депутација и сл.), док су све друге одлуке локалног карактера биле оверене на доношење локалним органима. Из овог се јасно види својеврсна еволуција кнежинске самоуправе у децентрализован систем локалне самоуправе, јер се одлуке локалног карактера нису дотицале скупштине, нити је била потребна њихова верификација од стране Скупштине.

Једини довољно јак опонент Скупштини јесте сам Вожд, чије се признање, са свим функцијама тражило у сваком даљем покушају успостављања сарадње са великим силама[32]. Иако прокламован као *primus inter partes*, вожд је једини полагао неограничено право на суверености своје функције, јер је његова моћ потицала не од стране изабраних представника, него из народа. То му је обезбеђивао и његов лични ауторитет и уважавање стечено услед успешне ратничке стратегије.Тиме је и његов положај, сходно положају данашњег председника републике, био повољнији, са много већим овлашћењима и са много мање ограничења.

Први образац државног уређења, је представљао идеју конфедерализма , будући да је почивао на сарадњи војвода једино ради «опште потреба одбране и опште опасност турскога напада и из градова и испреко границе побуњене земље. У свим осталим стварима, управници нахија су деловали као апсолутни господари.

Стога је борба старешина за ограничавање Карађорђеве власти добила другачију димензију, када се у унутрашњу ствар умешао руски утицај.Вождово неприхватање рукс емисије и њених представника на Блакану је било проузроковано његовим сумњама у искреност руских намера. Увек је у тим делањима видео скривену опасност по своју личност и власт, као што и јесте својствен самодршцу. Аустрија је увек играла на ту карту Карађорђевог самољубља и очувања личне користи, те га је много пута , такои навела на погрешан пут .

[32] На Скупштини у Остружници, у првим захтевима српским, од Порте се тражи да изабране кнезове везир мора признати, а изабрани кнезови да имају право изабрати врховнога кнеза, којему се управо давао задатак да врши посредничку улогу међу овим изабраним окружним кнезовима и турском влашћу. Видети: Стојан Новаковић: *Васкрс државе српске*, стр. 46.

Руски утицај на обнову српске државности

Тако је Карађорђе потписао, не ставивши свој печат на конвенцију са маркизом Паулучијем 28. јуна 1807.године. Конвенција, тј. врста обећања Србије Русије се није , услед недостатка печата, могла сматрати валидном. Значајан је правно-политички део те конвенције, којим је Србија претворена у територију под руским протекторатом . Наиме, уз изјављивање чврсте воље Србије да дође под заштиту Русије, исказана је и молба да Русија одреди Србији «способног земљеуправитеља, који би довео народ у ред и у име руског цара му дао конституцију, као и да поставља чиновнике у име руског цара» [33]

Долазак првог руског представника К. К. Родофиникина у Београд је означио пристанак Русије на активно учешће у револуцији. Истовремено сматрало се да је на овај начин успостављен контакт са Русијм на дипломатском нивоу, али и да је Родофиниккин дорасато задатку доношења акта о новом државном уређењу Србије.Већ 8. августа 1807, Родофиникин је предочио «Основе правитељства српског», првог српског устава, састављеног према руском државном уређењу. Примесе руског конзервативизма су и овде биле очигледне.

Према овом пројекту, Правитељствујушчи Сенат са књазом као председником је вршио врховну власт у земљи. Књаз је поред номиналне функције председника Сената добио и почасну титулу Светљејшег , као и право помиловања и додељивања награда за заслуге .Књаз би додењивао титуле заслужнима, чиме се уводи племство у Србију. Глас књаза је пресуђивао у стварима поводом кјих с еније могла обезбедити већина гласова у Сенату. Сам књаз је иначе има право на 3 гласа, а остали чланови Сената-само 1, чиме је повређен основни постулат једнакости.Доживотно би постао саветник оно лице које је три пута узастопно било бирано у Савет, сваки пут у трајању од три године. Сенат је имао надлежност у погледу избора војвода, финансирању војске,општој буџетској области, као и међународне ингеренције- право објављивања рата и закључења мира.
Судску власт врше искључиво судови, које су у окрузима чинили двојица судија и губернатор-управник округа. Губернатор је истовремено и шеф управе у округу
«Основе..» су биле веома озбиљан покушај ограничавања Карађорђеве власти, озбиљнији утолико што је долазио с аруске стране. Иако га је потписао и тиме званично пристао на његову садржину, Карађорђе је у потаји прижељкивао да покровитељ , цар Александар, исти не потпише. Тиме би стекао двоструку корист- остала би му целокупна власт а он сам не би могао бити оглашен јединим кривцем за неуспех овог уставног пројекта. Тако се заиста и десило, јер су «Основе...» донекле потврдиле већ постојеће стање у устаничкој Србији. Са друге стране, предвиђено ограничење Карађорђеве власти је цар Александар сматрао унутрашњим питањем нове српске државе, у које није имао права да се меша. Родофиники је наведено питање решио на такав начин јер је приликом доласка у Србију прво контактирао вождову

опозицију. Нашао се усред оштрих сукоба, што му је отежало даљи боравак и понекад (веома искрена) настојања да помогне стварање државне управе[34].

[33] Стојан Новаковић: *Уставно питање и закони Карађорђева времена*, Београд, 1907, стр 22.
[34] Један период се у историографији означава као период Родофиникиновог и Карадјордјевог савладарства. Родофиникинов утицај је био толики да је, половином октобра 1807, на састанку у Голубињу, онемогућио

Родофиникинов уставни пројекат је представљао увођење монархизма на мала врата. Проблематично би било остварење ове замисли ,јер је у Србији наступио прекид континуитета српске државности и Душановог монархизма. Српски народ је вековима живео у државно-правној изолацији, упућен једино на исламско право и заостали феудални систем. Европа се управо подизала против самодржаца и монархије; америчке државе су се решиле британских стега 1776. године; Француска буржоаска револуција је прокламовала начела легалитета, једнакости и слободе; слични покрети су били у току у осталим европским земљама. Нова монархична власт у Србији би се разликовала од руске , због елемената искључиво српске самоуправе. Али, то би било недовољно за опстанак. Са друге стране су се налазили српски интелектуалци-аустрофили, који су пропагирали слободу од владара и покоравање закону, као једином правом господару.

Такође, помало је нејасно увођење племства у Србију, као лоше копије руског система. Феудални односи, који би били подлога тој политичкој новини, су били фактичким путем укинути самим почетком устанка. Совјет, тј у Родофиникиновом пројекту он с еназива Саветом, би представљао базу русофила и главно противтежиште Карађорђевој власти.[35]

Уставни акт из 1808.године

Крајем 1808. дошло је до уставних реформи у Србији. Родофиникин , иако иницијатор, је сада био уклоњен из законодавног рада. Наиме, предлагао је увођење кнеза (уместо вожда),Народног суда,и владе са више министарстава и конзисторије. Совјет би задржао досадашње функције, а чинили би га најпознатији устаници. Такође, намеравао је да српску цркву стави под окриље руског синода. Ово је за Србе било потпуно неприхватљиво, посебно што су већ имали лоших искустава са грчим свештенством. Србија би се, према плану Родофиникина, простирала између Дрине и Тимока, а на југу с градовима Новим Пазаром, Скопљем, Нишом до саме Софије. Таква Србија би имала сопствену судску организацију, а Порти би давала минималан данак. Српски суверенитет би био вишеструко нарушен, давањем данка Турској и руским законодавство, као и радом руског и француског конзула у Сенату.[36]

Нови уставни акт је донет 28.новембра 1808, а путем расписа, објављен тек 14.децембра 1808. године[37].Овим актом су утврђени органи врховне и локалне власти у устаничкој држави. Карађорђе са потомством је признат за првог и врховног предводника Србије[38]. Врховна власт је припадала «Господару Ђорђу Петровићу», који ју је имао вршити заједно са Совјетом и преко Совјета. Заповести од општег значаја су морале бити извршене у интегралној верзији, без обзира на евентуално противљење мерама које садрже. Свако

измирење устаника са Портом и постизање сепаратног српско-турског мира. У томе су му свесрдну помоћ пружили владика београдски- фанариот Леонтије и тадашњи секретар Совјета Стефан Живковић. Стојан Новаковић: *Васкрс државе српске*, стр. 46.

[35] Драгослав Јанковић: Историја државе и права 19. века, Научна књига, Београд, 1958, стр.6-41.

[36] *Први српски устанак*, текст непознатог аутора, доступан на http://www.vj.yu/vojna_istorija

[37] Стојан Новаковић: *Уставно питање и закони Карађорђева времена*, Београд, 1907, стр.47.

[38] Ибид,стр. 47-48., Никола Бура, наведено дело, стр. 80-81.

супротстављање и непослушност су се сматрали издајом, а њени починиоци непријатељима народа те бити и најстрожије кажњени.
Такође, изражена је и воља за потврђивањем хијерархије власти, јер сваки чиновник мора знати « одкуд ће заповест примати и и кому ће одговор за свашто давати»[39]. Једини овлашћен за издавање заповести је Карађорђе, с тим да Совјет добија, поред судске , и функцију извршног органа. Совјет преноси заповест команданту нахије, што се даље прослеђује до непосредних извршилаца. Установљена је одговорност у повратном правцу, како и доликује централизованој пирамиди власти и строгој субординацији власти. Овим актом је Карађорђева власт још више ојачана, а власт Совјета још више ограничена будући да се исти одређује за врховни суд. Признањем наследности његовој породици, Карађорђе је установио монархизам, који , на жалост, није реализован.[40]Значајно је и исказивање самосталности државе у пуном смислу, јер се нигде не спомиње покровитељство Русије, нити се говори о било каквом односу према Аустрији и Турској.

Треба напоменути да је уставни акт, у виду уговора закљученог између Карађорђа и Совјета први писани правни акт, донет у току трајања Устанка, који су потписале обе (уговорне) стране. Материјалноправни аспект овог акта је свакако значајнији, будући да је њиме у потпуности укинута кнежинска самоуправа, уведена ферманом из 1793. године. Неки историчари намећу као решење овој скоро невероватној чињеници то што су у време доношења овог акта, у Совјету биле присутне већином Карађорђеве присталице.

Акт из 1808.године има конституциону природу, из више разлога. Овим је Србија иступила из турског режима, али и потпуно слободно, без утицаја представника великих сила донела акт о унутрашњем уређењу државе. Као акт правне еманципације устаничке Србије, представљао је основу и за акте донете 1811. године.

Уставни акти из 1811. године

Доношењу уставних аката из 1811. године претходила је вишемесечан логистичка припрема Карађорђа и његових савезника. Највише је томе томе допринело Карађорђево неразумевање руске дипломатије у Србији, јер је истовремено подржавала његову опозицију и покрет за ослобођење Србије на чијем се челу он налазио. Уставна реформа суштински није ништа посебно променила изузев што је на веома елегантан и виспрен начин неутралисала Карађорђеве највеће противнике(без бојазни да се тиме замери Русији) и њему самом учврстила власт до граница апсолутизма[41]. Овако је завршена дуготрајна борба присталица идеје с јаком централном влашћу и заговорника нахијске аутономије .

[39] Ибид, члан 2 наведеног акта; Владимир Ћоровић. *Карађорђе и Прави српски устанак*,стр.86-87.
[40] О томе сведочи и круна, на замишљеном печату Карађорђевом, а све у скалду са традицијом средњовековне српске државе. Радош Љушић:*Династијска знамења*, текст објављен у Гласу јавности, 6.маја 2001. године.
[41]« Миленко Стојковић се тада с депутацијом налазио у Букурешту да од Руса измоли војску и новога руског агента наместо К. К. Родофиникина П. Добрњац, тада заповедник града Кладова, није хтео поћи у Београд без руске војске и Миленка. Хајдук-Вељко, који је против планова Карађорђевих и Младенових могао, по бурној својој нарави, нешто учинити, уклоњен је из Београда лукавством, јер је добио глас да су Турци ударили на Бању, те Вељко са својим момцима отрчи на границу». Стојан Новаковић: *Васкрс државе српске* , стр. 102;Владимир Ћоровић: *Карађорђе и Први српски устанак*,стр.87-88; Стојан Новаковић: *Уставно питање и закони Карађорђева времена*, Београд, 1907, стр.78 .

Без формалне промулгације, потврђен је уставни акт из 1808. године и то путем размене заклетви [42]између Карађорђа и старешина, што с есматра својеврсном уставном основом. Као наследна тековина породице установљена је монархијска власт Карађорђа на ослобођеној територији. Међу главним замислима била је и уништавање угледа појединих старешина у народу тиме што ће, због високих државних функција , бити под Карађорђевом инстанционом контролом. У супротном, тј. у случају одбијања функције, као у случају кривичног дела издаје, следило је прогонство из земље . Нахије којима су командовали биле би разбијене н амање управне јединице, којима би било лакше управљати путем људи оданих Карађорђу. Даље, установљавањем Попечи-тељства и Великог земаљског суда коначно би био расформиран Совјет , чија је надлежност остала једино потврђивање командантових одлука и старање о њиховом спровођењу.Тако је и учињено на заседању Скупштине ,која је трајала од 8-11, јануара 1811.године.

Исказивањем бескомпромисне подршке Карађорђу и његовим потомцима Совјет је потврдио његову решеност да установи династичко начело. Посебно о томе сведочи чл.2. заклетве, коју су положили чланови Совјета Карађорђу. Наиме, под претњом за издају било је забрањено и размишљати о другој личности на функцији предводника српског народа, докле год је њега самог и његовог потомства.Он је суверени државни орган, а сви остали стоје у строгој субординацији у односу на њега. Он је последња инстанца за изрицање најтежих казни, као што су смртна казна или доживотни затвор, а истовремено има и једини право помиловања.

Заузврат томе, Карађорђе се обавезао на поштовање Совјета као институције и прихватиосарадњу са њим на пољу унутрашње и међународне политике. Исто је установљено и у погледу изрицања најтежих казни, док је право помиловања задржао себи као искључиву надлежност.Избор чиновника у државној управи вршио је Совјет, док је Карађорђе потврђивао исти потписом и печатом.[43] Такође, поновљена је решеност устаника да се покоре Русији, руском цару и законима, као припадницима истоверног, словенског народа. Актима донетим крајем 1811. године регулисани су односи свих власти, а војводама наређено да организују пошту, уреде цивилне и свештеничке судове и пошаљу војнике на обуку. Уследила је уредба о организовању и раду магистрата, а на крају су се све присутне старешине заклеле вожду да ће поштовати донете прописе.

На основу наведеног, Карађорђе је 11. јануара 1811. издао указ о Правитељствујушчем совјету и о његовим дужностима. Овим указом је у потпуности укинута кнежинска самоуправа чији су реликти још увек егзистирали, првенствено у плановим Родофиникина. ПОред тога , извршена је централизација државних послова, а саветници су морали да изборе место у Совјету не од народа, већ стицањем наклоности Карађорђа. Установљен је принцип јединства власти, доведен до искључивости.
Велики земаљски суд, је преузео и последњу компетенцију Совјета ,те се може сматрати да је моментом ступања на снагу овое одлуке , Совјет у смислу 1805. године, био деградиран,

[42] Треба нагласити да међусобна размена заклетви, практикована приликом доношења последњих аката у устаничкој држави, представља врсту уговора
[43] Стојан Новаковић: *Уставно питање и закони Карађорђева времена*, стр. 90-93.

непотребан , те укинут. Остало је само име Совјета те и Карађорђево обавезивање на «верност Совјету треба прихватити као формализам.[44]

Седам уставних аката донетих 1811. године представља врхунац самосталне државотворне делатности устаника.Међутим, било је јасно да је за међународно признање овакве државе потребан виши степен свести и признања од стране великих сила. Слабо познавање међународних односа, указивање поверења, налик на клацкалицу- Аустрији или Турској , је битно изменило и ток устанка а ли и његову суштину. Непрестане борбе аустрофилске и русофилске струје су само убрзавале крај ослобођеној држави

Наведено је само убрзало пропаст Устанка поред све оштријих сукоба устаничких вођа и посебно против Карађорђа. Изгледало је као да је све повраћено у стање пре 1804. године. Изузев, свечаног признања Порте у осмом члану Букурешког уговора да се Србима даје њихова унутрашња аутономија. Последњи покушаји устаника да с еизборе за повољнији положај Србије, нису успели. Турска је очекивала српско потпуно покоравање, а не листу нових-старих захтева. Устаници су тако тражили да границе Србије остану непромењене и да нико нема право да с емеша у послове српске државе, да постојећа државна управа остане,и да сами чувају и бране царске градове. Наведено ј ебило у супротности са одредбом Букурешког мировног уговора, којим с еСрбији одузимају сви елементи државни и враћају с е у стање пре устанка.[45]

Историчари 20 и 21. века, посматрају Први српски устанак у конктексту грађанских револуција, које су у том периоду потресале Европу. Иако су успели да неутралишу феудални поредак , Срби су делимично обновили своју државу, макар у ограниченом облику (аутономном).Потпуна национална интеграција није остварен, јер интересима великих сила није одговарало постојање јаке националне државе у југоисточној Европи[46]

Епилог

Модерне државе, са примесама демократског уређења или без њих, посматране као политичке творевине настајале су као "творевине силе" и претензија на престиж, у погледу којих су били овлашћени само најмоћнији у хијерархихи власти. Сходно томе, тако и нестају- силом[47]. Основни мотив Првог српског устанка јесте било не само ослобођење од турског режима , већ и од турског наслеђа. Након вишевековне егзистенције на овим просторима, постављено као искључиво у односу на припаднике других нација,представљено је као тековина феудализма, која је стога изискивала беспоговорно поштовање. Устаничка држава је била покушај превазилажења наведеног. То се посебно

[44] Стојан Новаковић: *Васкрс државе српске*, стр.58; Радош Љушић: *Вуков Правителствујушћи Совјет*, стр.214-215.
[45] Никола БУра, наведено дело, стр 109.
[46] Ђорђе Рандељ:*Срби за слободу, Европа за рачуницу*, Интернет новине сербске, доступно на *www.SrpskaDijaspora.info*

[47] Зоран Обреновић: *Феноменологија равнодушности* , политички месечник Context, na *www.kontekst.co.yu*

види у постепеном укидању кнежинске самоуправе, као турске установе и реликта једног доба.

Руски утицај је током трајања Устанка био изразит , понекад и пресудан. Њена подршка је била дискретна на почетку устанка , да би присуство Родофиникина означило веома директан приступ проблему. Српски устаници су Русији беспоговорно веровали и поштовали , као славјанску, православну, хришћанску државу. Ове претензије постоје још од скупштине у Оструженици, одржане 1804. године, на којој су први пут истакнути захтеви за потпуно ослобођење и успостављање , тј. обнову српске државе. За руском помоћи се посегнуло након што су Аустријанци, пословично неутрални, и иначе Наполеонови савезници против Русије, ускратили пружање исте.[48]Наиме у страху од турске војне надмоћи, устаници су сматрали да им може помоћи једино заштита неког хришћанског владара. Илузије о вечном савезништву саруске стране су распршене осмом тачком Букурешког мировног уговора, којим се Русија обавезала да натера устанике да се врате под турску власт. До краја устаничке државе чињени су покушаји да се градови очувају као слободни од турске власти. Са друге стране, Турци су тражиливраћање на стање пре 1804.године, што такође није било у складу са одредбама уговора.. Калкулисање са интересима српског народа у конкретном случају се завршило неповољно по српски народ, будући да је држава нестала, настрадалих је било на обе стране, привреда је била уништена. Русија је пристајањем на осму тачку наведеног уговора признала сопствену грешку , те да се мешала у унутрашње питање једне суверене државе.

Под устаничком државом се овде подразумева «правна личност која чином фактичког настанка постаје члан међународне заједнице.» Или теоријски-правно гледано, територија на којој обитава извесно становништво, а које се покорава одговарајућој (па и фактичкој, апстрактно схваћеној) власти. ДРжава је у том контексту постојала од момента установљања првих органа власти на ослобођеним теирторијама. Свака даља реорганизација постојећег уређења стремила је ка уситњавању и гранању чиновничког апарата. Све је то учињено из крајње практичних разлога, највише зато што су старешине биле заокупљене ратовањем, али и својим личним сукобима око превласти у новоствореној држави.

Остаје још једно значајно питање, терминолошке природе: да ли Први српски устанак треба посматрати као буну, устанак, или револуцију? Сам почетак Устанка јесте био буна- против дахијског терора, притужба на неправилан и неправедан рад турских државних органа. У овоме с еможе препознати право на жалбу, иначе гарантовано у свим декларацијама права као човека и грађанина, проистеклим из Француске буржоаске револуције. Од момента када је устанак добио национални призвук, и безмало верску , православну ,компоненту, прерастао је у својеврсну грађанску и социјалну револуцију , какву до тада није забележио модерни свет. Стога је исправно тврђење Светозара Марковића, да је Први српски устанак имао више слојева, и да су и његови ефекти далеко премашили «оквире културног препорода, социјалног преврата и националног ослобођења»[49] Револуција означава кореницу промену државно-правног поретка; овај Устанак је био много више од тога. Корените

[48] Милован Ристић: Народне скупштине у Првом српском устанку,Просвета Београд, 1954, стр.27
[49] Радош Љушић: Тумачења српске револуције (у историографији 19. и 20. века), Српска књижевна задруга, Београд, 1992, стр. 17-18.

промене су извршене у свим областима друштвеног живота, са тенденцијом раскида са наметнутим системом вредности.

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THE CONCEPT OF TRUST AND SOME REMARKS ON ITS ADMISSIBILITY UNDER TURKISH LAW

by

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INTRODUCTION

Having their roots from English law and forming part of legal systems of the countries governed by the British in earlier centuries, especially those of which have been deeply influenced by common law due to their geographic, historic and political closeness, e.g. USA, Canada, Australia, New Zealand and India, the trusts have also been gradually introduced to the systems of many civil law countries which are not familiar with the concept of trust as a result of the conflicts involving trusts that arose as a matter of private international law in their jurisdictions[1]. Although it is virtually impossible to determine exactly neither the number of trusts nor the total sum of trust funds all over the world, it is unquestionable that the trusts play an important role in economic, social and legal sense in United Kingdom and the other countries[2].

In the early twentieth century the legal historian and Equity jurist, F.W. Maitland had regarded trusts as follows: "If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely the development from century to century of the trust idea"[3].

Another author, P. Lepaulle, emphasizes the importance of trust by mentioning that, "Trusts are used to build, so to speak, a bridge from the present to the future, from the land of abstractions to the field of concrete realities. If a man wants to leave a property to unborned grandchildren, or to a corporation to be formed, or he has … a generous but vague aspiration towards the establishment of world peace, and wants to devote his fortune to its realization after his death, he will, in a common law country, create a trust"[4]

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[1] D.J. HAYTON, The Law of Trusts, 3rd ed., Sweet&Maxwell, London 1998, p. 1; L. THEVENOZ, Trusts in Switzerland: Ratification of the Hague Convention on Trusts and Codification of Fiduciary Transfers, Schulthess, Zurich 2001, p. 184; A.J. OAKLEY, Parker&Mellows, The Modern Law of Trusts, 8th ed., Sweet&Maxwell, London 2003, pp. 14-15.

[2] J.D.HEYDON&P.LLOUGHLAN, Cases and Materials on Equity&Trusts, 5th ed., Butterworths, Sydney 1997, p. 544; HAYTON, op.cit., p. 2; OAKLEY, op.cit., p. 502. It is not ascertainable to identify the number of the trusts as there is no register of trusts although there is a register of charitable trusts on which over 170,000 charities are registered other than exempt and excepted charities which certain tax privileges are applied: HAYTON, op.cit., pp. 15-16; C. DE WULF, The Trust and Corresponding Institutions in the Civil Law, Bruylant, Bruxelles 1965, p. 29; OAKLEY, op.cit., pp. 494-495.

[3] In Selected Historical Essays, 1936, p. 129. He continued that it was "an institute of great elasticity and generality; as elastic, as general as contract": G.MOFFAT&G.BEAN&J.DEWAR&M.MILNER, Trust Law Text and Materials, 3rd ed., Butterworths, London 1999, p. 1; HAYTON, op.cit., p. 2; L.A. WRIGHT, "Trusts and the Civil Law-A Comparative Study", University of Western Ontario Law Review, Vol.6, 1967, pp. 114-127, at p. 114.

[4] P. LEPAULLE, "Civil Law Substitutes for Trusts", Yale Law Journal, Vol. 36, No.8 (1926-1927), pp. 1126-1147, at p. 1144.

The aim of this article is to examine the main characteristics and the historical development of the concept of trust which has a vital importance and is widely applied in the UK and the other countries which are under the influence of the British law and by this way to analyse this concept from the perspective of the Turkish civil law in which trust is recognised by neither Turkish doctrine nor practice.

1. THE FUNDAMENTAL FEATURES AND DEFINITION OF TRUST

One of the basic characteristics of trusts is that they don't have legal personality. Thus, they are not capable of owning property, having legal capacity to sue and be sued like an individual or a company which are legal entities. In order to establish a trust a property must be subject to trust so that it is given under the authority of trustee who owes fiduciary duties to the beneficiaries[5]. The fiduciary obligations[6] owed by the trustees are either compelled by the terms of the trust or by law. These obligations including management of the trust property for the benefit of beneficiaries or for charitable or other permitted purposes involve the trustees in personal liabilities in contract and in tort when dealing with third parties. It is not possible that the trust property to be used as a part of trustee's own assets such as on divorce, bankruptcy or on his death. Actually, the main characteristic of trust is that the trust assets should be isolated from trustee's own assets, forming a separate fund which is called the trust *corpus*[7]. In case the trustee wrongfully transfers the property which is the subject of trust in its original or transformed form to a third party who is a purchaser with notice of trust the trust assets can be traced and recovered[8].

The trustee and beneficiary have split ownership granting specific rights and powers to them in the trust property, namely legal title and equitable title respectively. In other words the trustee, as the owner at law has legal title and the beneficiary as the owner in equity has an equitable title. It is

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[5] P. HEFTI, "Trusts and Their Treatment in the Civil Law", American Journal of Comparative Law, Vol.5, No.1-4 (1956), pp. 553-576, at p. 558; HAYTON, op.cit., p. 3; THEVENOZ, op.cit., p. 186; R. PAISLEY, Trusts, W. Green, Edinburgh 1999, p. 4. The trust property passes automatically by the right of survivorship *(ius accrescendi)* to the other trustees surviving in case of a trustee's death. Unless he has appointed more trustees, the property will be held by his personal representative on his death and this representative should appoint new trustees: R.A. PASCAL, "Some ABC's about Trusts and us", Lousiana Law Review, Vol.13, No.4 (1952-1953), pp. 555-568, at p. 560; HAYTON, op.cit., p. 4; HEFTI, op.cit., p. 554.

[6] Fiduciary obligations can be defined as obligations to act with loyalty and good faith which are owed by a person to another person in dealings which affect the latter, who is called the principal: J.E. PENNER, The Law of Trusts, Butterworths, London 1998, p. 13; PAISLEY, op.cit., p. 1; DE WULF, op.cit., p. 31; HEFTI, op.cit., p. 558. "Anglo-American Law speaks of a fiduciary relationship in the case of a trust, this involves no fiduciary relationship in the sense of the civil law, but a relationship no different than arising, for example, between a company and its management. Hence, the civil law should not blindly confuse the trust with the right vested in the fiduciary": HEFTI, op.cit., pp. 558, 561.

[7] HEFTI, op.cit., p. 562; THEVENOZ, op.cit., p. 191; HAYTON, op.cit., p. 4; PENNER, op.cit., pp. 13-14; WRIGHT, op.cit., p. 115.

[8] PENNER, op.cit., pp. 13-14; HAYTON, op.cit., p. 4; WRIGHT, op.cit., p. 115; P. LEPAULLE, "Reflections on the Expansion of Trusts", The American University Law Review, Vol.6, No.1 (1957), pp. 40-46, at p. 42. In cases where there is a breach of trust the trustee must compensate any loss occurred in the trust fund. The breach of trust can result from many different instances such as using the trust property for improper purposes, making an improper investment, paying the wrong person instead of the beneficiary or failing to exercise proper prudence in performing a duty, *mala fides*, etc.: DE WULF, op.cit., p. 30.

important to mention that both trustee's and beneficiary's rights are alike except that the former's right is recognised by common law while the latter's by Equity[9].

The settlor's rights are terminated after the settlor, establishing the trust, granted the trust property to the trustees for the beneficiaries. The trustee's duty is to take the beneneficiary's interest into account rather than the settlor's because the trustee can only be enforced by the beneficiary, not by the settlor when a valid trust is established[10]. The trustee, having a legal title on the assets held on trust, is entitled to all the legal rights and powers related to the property, eg, he has the right to make investments on the assets including the right to buy and sell the trust property or in case of the trust property's being occupied by invaders he has the right to expel them. However, the basic obligation of a trustee is to act devoted to the terms of the trust, namely taking reasonable care of trust property and act in the best interest of the beneficiaries. Thus, the trustee can exercise his powers within his personal fiduciary obligations[11].

At this point it is necessary to examine in general the legal rights and duties that beneficiary and trustee have respectively. The beneficiary's right against trustee is a personal right *(ius in personam)* which grants the former to expect the trustee perform his duties in a compatible way with his responsibilities. As a matter of fact the trustee's fiduciary obligation is to use his powers over the trust assets in the best interest of the beneficiary[12]. That the trustee complies with his duties results in beneficiary's receiving the benefits under the trust deed. Thus, in an income trust the beneficiary holds the right to receive the income generated by the investment against the trustee whose duty as mentioned above is to make this payment of income to the beneficiary. The beneficiary's right to be paid an income at certain times actually resembles the right of a creditor. In that sense the beneficiary is free to assign this right to third parties[13]. However, it is important to bear in mind that as the equity appreciates the beneficiary as the owner of the trust property, beneficiary's right is beyond a transferable personal right which consists of being paid his benefit in accordance with the trust terms but a proprietary right *(ius in rem)* in the trust property itself which depends on the existence of the trust property[14]. Understanding this dependence is of great

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[9] A.N. WHITLOCK, "Classification of the Law of Trusts", California Law Review, Vol.1, No.3 (1912-1913), pp. 215-221, at p. 215; PENNER, op.cit., p. 19; HEFTI, op.cit., pp. 554-557; MOFFAT&BEAN&DEWAR& MILNER, op.cit., p. 11; WRIGHT, op.cit., p. 115. It's obvious that the rights of the trustee, when considered legally and practically, can't be described as those of an owner. In fact having only certain rights of ownership under specific conditions, being never allowed enjoying the property, the trustee, has the right neither to use the trust *res* nor enjoy the profits as well as not having any right to destroy the *res*, give it away or sell it except within strict limits: LEPAULLE, op.cit., 1957, p. 42.

[10] HEFTI, op.cit., p. 556; HAYTON, op.cit., p. 4; THEVENOZ, op.cit., p. 187; N.G. JONES, "Uses, Trusts and a Path to Privity", Cambridge Law Journal, Vol.56, No.1 (1997), pp. 175-200, at p. 184.

[11] PENNER, op.cit., p. 18; THEVENOZ, op.cit., p. 189; HEFTI, op.cit., p. 554; WRIGHT, op.cit., p. 115. The general fiduciary duty of the trustee can be sub-categorised as "administrative" and "dispositive" duties. Administrative duties are related to trustee's power to make contracts and to maintain the value of the trust property (trust *corpus*) or "trust fund". Dispositive duties compel the trustee to use the trust property to the best interest of the beneficiaries that the settlor had intended: PENNER, op.cit., pp. 18-19; E. CAMPBELL, Changing the Terms of Trusts, Butterworths, London 2002, p. 5. Acting as a *bonus pater familias* is the trustee's main duty while administering the trust property: DE WULF, op.cit., p. 30.

[12] HEFTI, op.cit., p. 562; WHITLOCK, op.cit., pp. 215-216; PENNER, op.cit., p. 21; PASCAL, op.cit., p. 560.

[13] J.G. RIDDALL, The Law of Trusts, 5th ed., Butterworths, London 1996, p. 393; THEVENOZ, op.cit., p. 244; PENNER, op.cit., p. 21; DE WULF, op.cit., p. 27.

[14] P. TODD, An Introduction to the Law of Trusts, Financial Training, London 1986, p. 12; PENNER, op.cit., p. 21; RIDDALL, op.cit., p. 1; JONES, op.cit., p. 198. The beneficiary has the right to trace the trust property against the

importance in order to work out the nature of the proprietary character which lasts only during the presence of the trust property and is effective as long as the trust property exists, eg, if the trust property is stolen or destroyed without the fault of the trustee and the property cannot be found, the personal duty of the trustee to administer the property compatibly with the terms of the trust no more exists because there is no property that can be a subject of fiduciary's rights under the trust deed and he is no longer an owner of any trust property. In other words the disappearance or loss of the trust property results in the evaporation of the trust as well as the beneficiary's right[15].

The constant relationship between the trustee and the beneficiary is based on the establishing of the trust. The agreement between the settlor and the trustee under the trust deed specifically gives the trustee, the power to pay himself out of the fund for his services and expenses as a result of his holding and managing the trust fund[16]. This agreement also grants extensive enforceable rights to the beneficiaries who can neither provide consideration for the arrangement nor be party to the arrangement[17]. The concept of contract under English law which has some narrowness and weakness due to its being based on the necessity of both parties to provide consideration for other party's promise in order to be enforceable was defeated and made flexible by the usage of trust concept which is an institute of great elasticity and generality. Besides, it confers the opportunity of having rights on unborn or unascertained persons under a trust deed for their benefit. Due to its very flexible nature, which is very easily created, operated and terminated the trust is much more practical than a company[18]. As a result of the elasticity and generality that the trusts contain, many trusts arose from contractual arrangements in order to form collective investment schemes, namely a unit trust or debenture trust or a pension fund in which the payers at the same time can be a settlor or beneficiary or even a trustee[19].

Like any of other functional institutions, trusts, can be referred for inequitable aims. Because of this reason it is natural that the arrangements on trust with the aim of overcoming the claims of the settlor's creditors or wife or dependants may be set aside. Besides, if a particular type of trust is

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purchaser having the notice of the trust if the trust property has been transferred in breach of trust: DE WULF, op.cit., p. 30.

[15] PENNER, op.cit., p. 21.

[16] Despite the fact that while performing his duty a considerable loss of time and much personal inconvenience may be involved, the trustee's duty which depends on general rule of equity is to administer his trust gratuitously. Today the mentioned principle has lost its meaning in practice and a reasonable compensation is often settled by agreement or by court decision: DE WULF, op.cit., p. 30.

[17] HAYTON, op.cit., p. 5. Although generally the owner is thought to be in the best position to provide convenient management for his own property (As the old proverb puts it: "no one is better served than by himself"), in some trusts granting a maximum of efficiency on the administered trust property to the beneficiary is aimed. However, it is not also very unusual to see that the settlor may not rely on the beneficiary's capacity which he considers as under the standard. The beneficiary's being really under the standard may be the result of genetic deficiency, or lack of experience, or other circumstances that influence the beneficiary's competency: LEPAULLE, op.cit., 1927, pp. 1132-1133; K.M.NORRIE&E.M.SCOBBIE, Trusts, Green/Sweet&Maxwell, London 1991, p. 7.

[18] D. CHALMERS, Introduction to Trusts, The Law Book Company Limited, London 1988, p. 12; HAYTON, op.cit., p. 5; JONES, op.cit., p. 195.

[19] LEPAULLE, op.cit., 1957, p. 42; HAYTON, op.cit., p. 5; MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 8. The settlor is able to form a trust for his own benefit as a beneficiary or appoint himself as a trustee: DE WULF, op.cit., p. 27; NORRIE&SCOBBIE, op.cit., p. 2.

used to unfairly avoid or minimise tax liabilities, then fiscal legislation is enacted to prevent this avoidance[20].

Although the fundamental features of the trust have been mentioned above, there is no statutory[21] definition of the trust which reflects all the rules related to the concept. Thus, it is commonly agreed that no definition of a trust has been designed which is extensive and beyond criticism. Regarding the fact that the rules relating to the trust have been developed by the courts over the centuries, it is only possible to furnish a description of the trust containing the rules on the features of it rather than giving a definition[22].

In 1985, the Hague Conference on Private International Law adopted a "Convention" namely "Convention on the Law Applicable to Trusts and on their Recognition"[23]. In Article 2 of the Convention the statements mentioned are as follows:

> "For the purposes of this Convention, the term 'trust' refers to the legal relationships created – *inter vivos* or on death- by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics:

a) the assets constitute a separate fund and are not a part of the trustee's own estate,

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[20] HAYTON, op.cit., p. 3. According to the rules of morality that have been developed by English law, in cases the trust violates the law or the public policy it is void. Besides if a trust is established as a result of mistake, fraud, undue influence, misrepresentation or duress, it is avoidable: DE WULF, op.cit., p. 29; L.A. SHERIDAN, The Law of Trusts, 12th ed., Barry Rose Law Publishers, London 1993, pp. 125 et seq.

[21] In the United Kingdom two acts have been enacted as a legistative intervention on trusts, namely Trustee Act 1925 and the Trustee Act 2000 which intervene the matters of appointment and removal of trustees and the administrative duties and powers of trustees: OAKLEY, p. 21; J.MOWBRAY&L.TUCKER&N.LE POIDEVIN&E.SIMPSON, Lewin on Trusts, 17th ed., Sweet&Maxwell, London 2000, p. 8.

[22] CHALMERS, op.cit., p. 1; RIDDALL, op.cit., p. 265; HAYTON, op.cit., p. 6. Usually both the legislature and the courts have not been concerned with giving a definition on trust. Also generally the Anglo-American authors have presented an attitude on characterising trusts rather than giving a definition: THEVENOZ, op.cit., p. 186. "The most basic legal concepts are often not easy to define with complete precision, and trusts are no exception": S. GARDNER, An Introduction to the Law of Trusts, 2nd ed., Oxford University Press, Oxford 2003, p. 1. For some attempts to define, see: MOWBRAY&TUCKER&LE POIDEVIN&SIMPSON, op.cit., pp. 4 et seq.; W.A.WILSON&A.G.M.DUNCAN, Trusts, Trustees and Executors, 2nd ed., W. Green under the auspices of Scottish Universities Law Institute, Edinburgh 1995, pp. 19 et seq.

[23] This Convention took effect on 1 January 1992 between Australia, Italy and the United Kingdom. Canada, the Netherlands and Malta joined as the first three members. The Convention also binds China for matters concerning Hong Kong. Cyprus, the United States of America and France have also signed but not yet ratified the Convention. This Convention entered into force in Luxemburg on 1 January 2004 to make its financial marketplace more attractive to leading foreign trustees: http://www.hcch.net/e/status/stat30e.html (23.06.2004); THEVENOZ, op.cit., p. 180; H. KÖTZ, "The Hague Convention on the Law Applicable to Trusts and their Recognition", in D. HAYTON, Modern International Developments in Trust Law, Kluwer Law International, London 1999, pp.37-48, at p. 39. In the Convention it is not proposed to discuss the meaning of trusts. "It is assumed that the reader will know a trust when he sees it as he would know an elephant when he saw it": A. SHIPWRIGHT, Trusts and UK Taxation, Key Haven Publications, London 1992, p. 6. For the full text of the Convention, see: http://www.hcch.net/e/conventions/text30e.html (23.06.2004).

b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee,

c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust."

It is provided in Article 11 that a trust created in accordance with the applicable law[24] "shall be recognised as a trust". It is then stated in the preceding paragraphs:

"Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity.

In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular:

a) that personal creditors of the trustee shall have no recourse against the trust assets,

b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy,

c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death,

d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum."

2. A BRIEF HISTORICAL DEVELOPMENT OF TRUST

The trust, which is the descendant of the English law concept of "equity", has its origins from the institution of "use"("to the use of")[25] that was applied in the Middle Ages. Due to the fact that the

[24] Principally the settlor is free to choose the law (Art. 6, par.1). However, this choice is ineffective if the chosen law does not provide for trusts or the category of trusts in question (Art.6, par.2). Where this is the case, or where the settlor did not make a valid choice of law, the Convention designates the law "with which (the trust) is most closely connected" (Art.7, par.1). The law applicable to the trust governs "the validity of the trust, its construction, its consequences, and the administration of the trust" (Art.8, par.1): THEVENOZ, op.cit., p. 197; M. LUOPI, Trusts: A Comparative Study, Cambridge University Press, Cambridge 2000, pp. 348 et seq.

[25] The expression comes from the Latin *ad opus*. WRIGHT, op.cit., p. 115; MOFFAT&BEAN&DEWAR& MILNER, op.cit., p. 25; PENNER, op.cit., p. 7; JONES, op.cit., p. 176. Under the use land was transferred by common law

King was the owner of all the land, common law was not familiar with personal ownership. Thus, under the feudal system the King's major supporters were granted certain types of tenure in estates, consisting of serious and heavy incidents as well[26]. The hierarchical system of "tenures" of land involved different "tenants" having rights in the same land. This was actually a pyramidical taxation system which placed the King at the top, the person practically possessed the land at the bottom and many other people namely "mesne lords" in between. Basically the profits of the land which had been produced by the first tenant at the bottom were passed upward one step above in the form of different kinds of "rent services" until it reached the King. Feudal landholding was a complex mixture of personal relationship manifested particularly in the subordination of tenant to lord through homage, incidents and services such as the knight service which requires the obligation to provide knights or money for arms, or socage which requires the obligation to provide agricultural products[27].

Due to the demise of feudalism vital changes occurred in the landholding system of feudal features and therefore the applicability of "uses" increased. As a result the personal relations between lords and tenants consisting of specific rights and duties of land began to diminish, eg, services such as providing knights for armies and agricultural products in certain tenures were being replaced with money payments. Besides, the lord lost the control over the personality of his tenants as feudal tenants began to acquire the right to pass the land to their eldest son and even to transfer it *inter vivos* against the lord's consent[28]. At the period when the development of "uses" was continuing, the feudal incidents also surprisingly survided and were even strengthened in spite of the fact that the services began to lose importance. The main reason was that, in the late Middle Ages due to the periods of rapid inflation, replacement of the value of services with fixed sums of money became meaningless and intolerable. The incidents supported by the profits from land did not suffer from inflation and they continued to constitute tax sources for the king on the landholding. The "use" became apparent in the thirteenth century was the result of those economic environment as well as the social changes like the foreign wars and significant centralisation of royal authority[29].

The "use" was based on split ownership, namely legal ownership (based on common law seisin) in the feoffee to the use and the equitable ownership (based on the Court of Chancery's enforcement of the personal obligation of the use) in the *cestui que use*[30]. In feudal system in order to keep large estates in land it was allowed to inherit the land according to the rules of primogeniture rather than allowing the land being passed by will. This resulted in the passing of the entirety of a man's rights in land to his eldest son which meant that it was not possible for the owner of land to pass his landed wealth to all of his children on his death. It was also problematic for many reasons when land was intended to be transferred for benefits of certain religious orders[31]. However, the dispositions were not restricted while the tenant was alive (*inter vivos*). Therefore, it was possible

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conveyance, to A (the feoffee to the use), the modern trustee, to the use of B (the cestui que use), the modern beneficiary: CHALMERS, op.cit., p. 8.

[26] HAYTON, op.cit., p. 10; MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 25; TODD, op.cit., p. 4.

[27] MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 25; PENNER, op.cit., p. 7; LEPAULLE, op.cit., 1957, p. 42.

[28] MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 25; TODD, op.cit., p. 5.

[29] MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 26; OAKLEY, op.cit., p. 4.

[30] P.H. PETTIT, Equity and the Law of Trusts, 9th ed., Butterworths, London 2001, p. 14; CHALMERS, op.cit., p. 8; HEFTI, op.cit., p. 557.

[31] PENNER, op.cit., p. 7; MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 25.

for the feudal tenant A to transfer the property to X, Y and Z as co-owners. Such a transfer resulted in the passing of the absolute ownership and it wouldn't be beneficial to A to transfer the land in this way because he would lose all rights in it. The use was applied to transfer the property to X, Y and Z to the use of someone A wanted to benefit such as his widow for life, all of his children, an order of Franciscan monks, etc. Under the common law X, Y and Z gained the ownership by transfer and received all the rights and feudal duties of their estate. Thus, they were entitled to exercise all the rights related to the land without regarding A's wishes as the words "to the use of" were absolutely disregarded by common law. However, that to allow X, Y and Z to take the benefit of the land themselves would be unfair was thought by the Chancellor by taking into consideration that they only got it in order to benefit the person or persons A wished, called the "*cestui que use*" or the "*cestuis que usent*" if there were more than one. Therefore, the Chancellor's enforcement of the use, assuring that X, Y and Z were using the land according to the use A dictated, made available for A to create a will of land efficiently. In other words, A would be able to provide the land's being held by the "feoffee to uses" (X, Y and Z) for the benefit of person or persons he wished[32]. On the other hand, as mentioned above within the pyramidical structure of the feudal system of landholding which had the sovereign as the absolute owner of all land from whom all title derived, every tenant owed a number of incidental duties such as wardship, marriage, reliefs, forfeiture and escheat to the title-holder above him. However, as many of these incidents could be avoided by transferring the land to the use of more than one feoffee, the use began to be operated to avoid the rules of feudal tenure mentioned. By this way it was possible to pass the benefits of the land to those who were not legally entitled to hold the property such as religious orders and minors, rather than passing the benefits to those who would inherit under the rules of primogeniture[33].

Under equitable rules in cases fair decisions were not reached due to the defects of the common law or common law courts resulting from the lack of an appropriate procedure or writ, the King, being the fountain and source of justice (*fons et origo justitiae*) was appealed. Therefore, the appeals were directed to the Chancellor, King's closest adviser and powerful minister who was qualified to advice on these matters of conscience and equity due to his civil law and canon law knowledge[34]. In the cases which were brought before him, called "suits" rather than "actions" used at common law, where he was appealed by the suitor to adjust the injustices resulting from the inflexible common law applications in that specific case, the Chancellor applied his judicial duty by practicing a quasi-judicial function[35]. The orders made under the Chancellor's authority resulted in the offender's

[32] J.B. AMES, "Origin of Uses and Trusts", Harvard Law Review, Vol.21, No.4 (1907-1908), pp. 261-274, at p. 265; WRIGHT, op.cit., p. 115; PENNER, op.cit., p. 8; OAKLEY, op.cit., p.1; CHALMERS, op.cit., p. 8. A specific case of this application was a knight's vesting his estate in a friend so that he would hold it "to the use of" the knight and the knight's lady and children until his return when he was going off to the Crusades. The land would be unprotected against third parties in case of the knight's being away without having vested his estate in his friend because it would only be possible for an adult male to claim the rights to possession against the third parties. There was no remedy in the common law courts if the friend who was accepted as the owner of estate under common law refused to transfer the estate back to the knight upon his return. As common law did not enforce such trusts which depended entirely upon the good faith of the trustee, the knight could only apply to the King referring the equitable rule that the "friend" should be forced to retransfer the estate to him: HAYTON, op.cit., p. 11; HEFTI, op.cit., p. 553; MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 27; OAKLEY, op.cit., pp. 3-4.

[33] CHALMERS, op.cit., p. 8; WRİGHT, op.cit., p. 115, MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 27; PENNER, op.cit., p. 9; TODD, op.cit., p. 7.

[34] CHALMERS, op.cit., p. 4; HAYTON, op.cit., p. 11; MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 27.

[35] PENNER, op.cit., p. 2; CHALMERS, op.cit., p. 4; MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 27; OAKLEY, op.cit., p. 2.

being committed to prison until they were followed in case of any failure to obey[36]. Gradually the Chancellor's quasi-legal activity turned into a different and autonomous court, namely the Court of Chancery which was a court applying "equity" in order to adjust the inflexible applications of common law rules[37].

As well as recognising legal estates in land as it was done in the common law courts, the Chancellor also forced the legal estate owner to use his legal ownership for the benefit of the beneficiaries because in equity the beneficiaries were the ones to benefit entirely from the estate in the hands of legal owner. Thus, beneficiaries could have equitable estates which were similar to the legal estates. In other words the Court of Chancery acted on the conscience of feoffee to the use in order to carry out the requirements of the use in accordance with the general principles of equity without acting directly against the land itself (right *in rem*). By this way equity proceeded against the conscience of the individual feoffee to the use to comply with his personal obligations (proceeding *in personam*) to the *cestui que use* rather than interfering with the common law seisin of the feoffee to the use[38].

The "use" concept's being known as the "trust" depends on the enactment of the Statute of Uses 1535. As previously mentioned, the subsequent effect of the use was that it was used by a very large amount of landlords due to its extremely reducing the feudal duties. However, as the effect of the use was not so favourable on the crown, the supreme landlord, Henry VIII in need of money had The Statute of Uses enacted by the parliament in order to prevent the tax losses of the crown. By his efforts in that period the ancient concept of Feudalism turned into a new form called "fiscal feudalism"[39]. Therefore, by the Statute 1535 the use was "executed"[40], that is, where A, B and C

[36] TODD, op.cit., p. 6; HAYTON, op.cit., p. 11; MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 27.

[37] HEFTI, op.cit., p. 553; PENNER, op.cit., p. 2; HAYTON, op.cit., p. 11; CHALMERS, op.cit., p. 4; MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 28. Eventually, in the Earl of Oxford's Case in 1615 it was held that in case of a conflict between the rules of equity which were applied by Court of Chancery and the rules of common law that were applied by common law courts, the former would prevail: HEFTI, op.cit., p. 553; PENNER, op.cit., pp. 4-5; HAYTON, op.cit., p. 11; CHALMERS, op.cit., p. 5. The judges have been applying both common law and equity in the same court at the same time since 1875 by a statute: CHALMERS, op.cit., p. 5; TODD, op.cit., p. 13; HAYTON, op.cit., p. 11; PENNER, op.cit., p. 5. Due to the administrative impracticality of the dual court system which resulted in different courts' dealing with the same cases in different ways, the Parliament abrogated the division between the Courts of Common Law and the Court of Chancery by the Judicature Acts 1873-75 and established one High Court. As a result of that the judges would apply the rules of both common law and equity according to the nature of the case before them and in the case of a conflict the rules of equity would prevail: PETTIT, op.cit., p. 7; PENNER, op.cit., p. 5; TODD, op.cit., p. 13.

[38] HAYTON, op.cit., p. 12; TODD, op.cit., p. 8. One way of characterising the use (or equitable estate) is to qualify it as a kind of "structured gift", ie, A vests the property in X, Y and Z to the use of someone to whom he wants to give the property (beneficiary) due to his being prevented from conveying it to the beneficiary by the common law rules of property, especially the primogeniture rule of feudal times. Another way of characterising the use is to qualify it as a kind of feudal tax-avoidance mechanism. The feudal tenants had the advantage to increase the value of their land as they could separate it in part from their feudal incidents, namely the ones operated upon inheritance, by transferring the benefit of land by way of use: PENNER, op.cit., p. 9.

[39] MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 29; TODD, op.cit., p. 9; HAYTON, op.cit., p. 12; PENNER, op.cit., p. 10.

[40] "Executing the use" means to convert the beneficiary's equitable rights under the use into legal title. In other words the effect of the statute was to "execute all uses" by recognising the "real" ownership of the *cestui que use* who was deemed seised of the land: MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 29; OAKLEY, op.cit., p. 5; CHALMERS, op.cit., p. 9.

(the feoffees to uses) held land to the use of X (the *cestui que use*) the legal estate was taken out of A, B and C and vested in X. By that way the feudal incidents would be leviable on his death[41].

Nevertheless, there were two different cases which the Statute of Uses had no application. First of all, as the doctrine of common law seisin only applied to real property, the statute did not apply to leaseholds or chattels. Secondly, the statute did not apply to active uses that arose in circumstances where the feoffee to the use carried out active duties for the use rather than acting as a mere passive actor of the equitable estate to the *cestui que use*[42].

After the Statute was enacted, a conflict on accepting to put one use upon another, the use upon a use, occurred between the lawyers. The transfer mechanism under a use upon a use was "to A and his heirs to the use of B and his heirs to the use of C and his heirs". The Court of Chancery, accepting it as excessive, did not recognise the second use. In common law, in Jane Tyrrel's case (1557), was held a similar decision in which the legal estate was executed to B and the second use to C was ignored. Later on, however, the Court of Chancery recognised that the legal estate executed in B was subject to the second use to C, in 1634 (35) in Sambach v. Dalston case which was the starting-point for the recognition of the second use. At the beginning of the 18th century, as the second use was commonly enforced the "enforced" use came to be known as the trust to distinguish it from the "executed" use. The usual practice for conveying land was expressed as follows: "unto and to the use of B and his heirs in trust for C". Therefore, in practice, the legal estate was held by one person, the trustee, and the equitable estate was enjoyed by another, beneficiary[43].

Over the years X's equitable interest became enforceable not only against the trustee or a donee from the trustee but as a proprietary interest against anyone having the property other than a *bona fide* purchaser called traditionally as "Equity's darling" who gained it for value without notice of the trust[44]. At the beginning, only the land and cash which were thought to be the main source of wealth would be a subject of a trust fund. When other forms of property such as shares in companies, antiques, paintings became also significant sources of wealth, the trust became a suitable instrument for holding those properties without the need of referring to other common law concepts like agency, bailment or guardianship[45].

Today trusts which have their roots from the feudalism of medieval times still exist, although the feudalism does not. The basic reason for most private trusts is the same as before; to provide property, which can't be transferred by law, for loved ones simply by transferring legal title, eg, someone who wants to safeguard his prodigal child gives money for his living expenses to a trustee, or, someone who wants to leave one person the dividends and another person the other rights on his

[41] MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 29; OAKLEY, op.cit., p. 5; TODD, op.cit., p. 9; CHALMERS, op.cit., p. 9; HAYTON, op.cit., p. 12; PENNER, op.cit., p. 10. Later in 1540 the Statute of Wills which made it possible to devise land by will at common law was enacted as a result of a rebellion: HAYTON, op.cit., p. 12; MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 29.
[42] CHALMERS, op.cit., p. 9; MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 30.
[43] MOFFAT&BEAN&DEWAR&MILNER, op.cit., p. 30; CHALMERS, op.cit., p. 9; HAYTON, op.cit., p. 12.
[44] HEFTI, op.cit., p. 557; HAYTON, op.cit., p. 13; PENNER, op.cit., pp. 23 et seq.; THEVENOZ, op.cit., pp. 193, 255 et seq.
[45] TODD, op.cit., p. 2; HAYTON, op.cit., p. 14; JONES, op.cit., p. 192.

shares by inheritance, gives the shares to a trustee as he cannot divide the legal title of shares. Besides, today many trusts are generally applied with the aim of tax avoidance[46].

3. SOME REMARKS ON ADMISSIBILITY OF TRUST UNDER TURKISH LAW

Under Turkish Civil law which is a part of the Continental European Law system it is not possible to find a legal institution which exactly corresponds to the common law trust which is primarily based on the duality of law and equity. Based on a single, self-contained legal system, the Turkish Law is not familiar with such a dual system of law. This unfamiliarity is derived from the unavailability of the concepts of legal and equitable rights. Turkish Civil law, which is based on Roman law, recognises ownership as an abstract concept in absolute terms. In other words ownership of property requires the owner to have all ownership rights including rights of management (*usus*), enjoyment (*fructus*) and disposition (*abusus*). There can be only one owner of an asset except co-ownership which provides that each co-owner's absolute ownership right of the undivided fragment is on the entirety of the asset. Having its roots on the concept of absolute ownership of Roman Law, the civil law systems like Turkish law have neither needed for an additional equity jurisdiction nor any feudal doctrine of assets. Under Turkish civil law, with specific exceptions, it is only possible for persons rather than the owner to have proprietary (real) rights over the owner's assets, regarded as rights *in rem* which can be defined as definitive and closed (the so called *numerus clausus*) and required to get registered, eg, servitudes, mortgages, usufructs etc.

Under Turkish law of persons dealing with tutorship and curatorship we can observe the concept of administering other person's property. Similarly, an independent property comes into existence in case of official administrations such as bankruptcy and testamentary execution in the law of succession. In other words under Turkish civil law the bankrupt's and decedents' estates become separate estates and the bankrupt and the heirs remain entitled to those assets. However, their right to dispose is restrained as it passes to the statutory representative who is called administrator in case of bankruptcy and the testamentary executor in law of succession. Nevertheless, the representative's ability to perform is limited by law or by the will, for example, in the case of bankruptcy, satisfaction of creditors, and in the case of testamentary execution, performance of the orders of the deceased[47]. Thus, unlike the trustee in a trust relationship, the statutory representative neither becomes the owner of the property nor has any proprietary rights on it.

It is known that there are some certain concepts of civil law which originated from the Roman law concepts, such as *fiducia*[48]. The concept of *fiducia* compels the owner to transfer the ownership to

[46] PENNER, op.cit., p. 10; DE WULF, op.cit., pp. 142 et seq.; GARDNER, op.cit., p. 7; OAKLEY, op.cit., p. 6; B. COURTNEY, Trust Taxation Manual, 3rd ed., Butterworths, London 1993, p. 3. The advantage, which remains valid for the modern day trust, is that "purchases were things notorious and trusts were things secret": CHALMERS, op.cit., p. 8.

[47] In these cases, the Anglo-American Law applies to the trust or originally proceeded therefrom: HEFTI, op.cit., p. 569; HAYTON, op.cit., p. 8; LEPAULLE, op.cit., 1927, pp. 1133 et seq.

[48] In French law the concept of a patrimoine affecté which is a gathering of assets and liabilities designated for a specific aim such as making payments to the creditors of an insolvent person may be regarded as an alternative to the legal personality. In other words a similar institution is set up in the French Civil Code referring "La fiducie", a written "contract by which a settlor transfers all or part of his assets to a fiduciary who, while keeping these assets separate from his own private property, uses them for a specific purpose benefiting one or more beneficiaries in accordance with

the fiduciary. In this case the fiduciary makes a promise to use the property in a specific way and return it back to the owner or an agreed third party. The rule that only personal remedies can be applied against the fiduciary results in an unsatisfactory conclusion in case of fiduciary's wrong selling of the property or bankruptcy[49].

Depending on the doctrine of consideration and the privacy of a contract, the common law concept of contract is extensively narrower than the Civil law concept of contract. Under English law in order to sue on a contract the party should provide something by way of consideration as his part of the bargain. However, in Continental European Civil law system which is also effective in Turkey, "cause" or "*causa*" is essential to form a valid contract. A contract may be gratuitous or for value and there can be a contractual *stipulatio per alterum*, that is, for the benefit of a third party which the third party may enforce. Due to the elasticity of the contractual system of Turkish law, a trust concept which is existent under British Law as a result of the specific needs of that system has not arisen. Although the Civil law concept of contract is quite comprehensive to cover the trust arrangement in which the trustee who accepts to hold the trust property for beneficiaries receives the property from the settlor, the rights under a contract in Civil law is particularly personal compared to proprietary rights, which means that they cannot be enforceable against the trustees' creditors or wrongful third parties who have transferred the trust property from the trustees[50].

As an alternative it is possible to consider especially the charitable purpose trusts as foundation which is formed by the dedication of a fund to a specified purpose with an appropriate organisation for its administration forming a legal entity. There are also specific similarities between these two

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the terms of the contract". The property of the fiduciary is separated as private and fiduciary property. His fiduciary property is safeguarded from creditors if their claims are not related to the management of the property, but the beneficiaries have no right to trace fiduciary property: HAYTON, op.cit., p. 10. According to this view, property becomes separate and is designated to a specific purpose. The claims of the beneficiaries are against patrimoine affecté, rather than the trustee. Such a trust, in which the trustee is primarily administrator, is attributed to rights and duties against third parties. Generally this view identifying the trust, contrarily to its nature, as a legal personality has not been approved: HEFTI, op.cit., p. 557.

[49] In Germany since the insufficiency of the Romanistic *fiducia* was identified, the Germanic fiduciary relationship which is called the Treuhand was developed. The Treuhand gives the settlor an added safeguard against creditors of the Treuhander in case the Treuhander goes bankrupt. In spite of the purifications and improvements over the *fiducia*, the Treuhand is still substantially different from the common law trust: WRIGHT, op.cit., p. 119. However, in Turkish Civil law any concept similar to Treuhand does not exist.

[50] In 1970 the Swiss Federal Supreme Court in its decision in the case of Harrison v. Crédit Suisse (A.T.F. 96, 1970, II, 79. JdT 1971, I, 329) applied the trust of Swiss assets held by a Zurich bank as trustee through the law of obligations, identifying the matter as a mixed contract consisting of mandate, of donation, of a fiduciary transfer of property, and of a contract for the benefit of a third party. It was also decided that Harrison's trust was not void or voidable as such mixed contract could be given effect in Switzerland. This decision protected Harrison's Zurich trust from being set aside and the property from being claimed as sole legatee under his will by Harrison's wife. However, if the trustee became bankrupt or the property wrongfully came into the hands of third parties, it would give no proprietary rights to the beneficiaries under the trust: THEVENOZ, op.cit., pp. 201-202; HAYTON, op.cit., pp. 14-15; A.E. VON OVERBECK, "Switzerland", in John Glasson, The International Trust, Jordans, Bristol 2002, pp.547-563, at pp. 548-549. However, after The Swiss Statute on Private International Law, which came into force on 1 January 1989, the contractual approach followed by the Federal Court in the Harrison case could no longer prevail. For recent decisions about trust held by the Federal Court, see: VON OVERBECK, op.cit., pp. 549 et seq. In Switzerland since a foundation can be constituted, or a testamentary execution can be ordered, but a trust cannot be constituted according to Swiss law, those trusts can only participate in domestic legal commerce as a foreign legal system regards as subject to its control: HEFTI, op.cit., p. 576; VON OVERBECK, op.cit., p. 552.

institutions in their structure. For instance, the purpose of the foundation is parallel to that of the trust; thus the distinction of private and charitable trusts is akin to the distinction of private and public foundations. The independent character naturally exists in the foundation so that its administration and enjoyment are split. Neither the trust nor the foundation establishes contractual relationships but both are formed by unilateral act of the settlor or the founder. The beneficiary is like the destinataire, whereas the trustee is like the council or curator of a foundation. The most specific difference between trust and foundation, however, is that while foundation has legal personality, trust has not. The foundation, due to its legal personality, is the holder of its assets and performs its rights and duties through the council or curator acting as its organs. As mentioned above, in case of trust however, the appointed trustee acts as a holder of the trust property exercising the rights and performing the duties that are related to the trust.

It was recognised by the "Hague Recognition of Trusts Convention" that the civil law countries' efforts in order to deal with the powers of trustees, the nature of the interests of beneficiaries in the trust property and the relative positions of the settlor, trustees and beneficiaries haven't obtained compatible and practical solutions. The Hague Convention (Art. 11) requires civil law states to recognise the trust as such rather than to try to transpose it into some analogous civil law concepts. The main purpose of the Convention is to set up common principles on the law of trusts between states and to deal with the vital issues concerning their recognition. Therefore, assisting civil law countries which are unfamiliar with the trust concept in treating trust issues that arise within their jurisdiction is aimed by the Convention. As a result, this Convention assists the Civil law states which adopted the Convention to recognise the trust as a matter of private international law although there is no special provision to oblige them to introduce it into their own domestic law. However, there is no statement on the split of legal and equitable ownership concepts in Article 2 of the Convention[51]. Although Turkey is a member of the Hague Conference, it has not signed the Convention on the law applicable to trusts and on their recognition. Because of this reason, when a dispute regarding the trust is held before Turkish courts, the applicable law to the issue will be determined according to the Turkish private international law rules.

CONCLUSION

The trust is the offspring of the English concept of "equity" and has its origins from the institution of "use" in feudal times. After the Statute of Uses 1535 the "use" concept has been transformed to a new concept now being known as the "trust". The trusts are of great importance in English law and in other countries governed by the British in earlier centuries, especially those of which have been deeply influenced by common law due to their geographic, historic and political closeness. The trusts have also been gradually introduced to the systems of many civil law countries which are not familiar with the concept of trust as a result of the conflicts on trusts that arose as a matter of private international law in their jurisdictions.

There is no statutory definition of the trust which reflects all the rules related to the concept. Regarding the fact that the rules relating to the trust have been developed by the courts over the

[51] CAMPBELL, op.cit., p. 110; OAKLEY, op.cit., pp. 854 et seq.; HAYTON, op.cit., p. 15; THEVENOZ, op.cit., p. 180; PETTIT, op.cit., p. 24; LUOPI, op.cit., p. 330.

centuries, it is only possible to furnish a description of the trust containing the rules on the features of it rather than giving a definition which is extensive and beyond criticism. The trusts do not have legal personality. They are not capable of owning property, having legal capacity to sue and be sued. In order to establish a trust a property must be subject to trust so that it is given under the authority of trustee who owes fiduciary duties to the beneficiaries. The trustee's fiduciary obligation is to use his powers over the trust assets in the best interest of the beneficiary. As the equity regards the beneficiary as the owner of the trust property, beneficiary's right is not only a personal right (*ius in personam*) against the trustee which consists of being paid his benefit in accordance with the trust terms but also a proprietary right *(ius in rem)* on the trust property itself which confers on him the right to trace the trust property in the hand of a purchaser with notice of trust. The trust assets should be isolated from trustee's own assets, forming a separate fund called the trust *corpus* which cannot be used as a part of trustee's own assets such as on divorce, bankruptcy or on his death. The trustee and beneficiary have split ownership granting specific rights and powers to them on the trust property, namely legal title and equitable title respectively. In other words the trustee, as the owner at law has legal title and the beneficiary as the owner in equity has an equitable title. However, it is obvious that the beneficiary has the substance of the ownership both legally and practically. The concept of contract in English law which has some narrowness and weakness due to the necessity of consideration was defeated and made flexible by the usage of trust concept which is an institute of great elasticity and generality. Thus, the trust, which can be created, operated and terminated easily, is much more practical than a company.

Under Turkish civil law there is no legal institution which exactly corresponds to the common law trust which is primarily based on the duality of law and equity. Based on a single, self-contained legal system, the Turkish law which is a part of Continental European law system does not recognise such a dual system of law. The unfamiliarity is derived from the unavailability of the concepts of legal and equitable rights. The Turkish civil law, based on Roman law, recognises ownership as an abstract concept in absolute terms.

In 1985, the Hague Conference on Private International Law adopted a "Convention" called "Hague Recognition of Trusts Convention" on the applicable law to trusts and on their recognition. The main purpose of the Convention is to set up common principles on the law of trusts between states and to assist civil law countries which are unfamiliar with the trust concept in treating trust issues that arise within their jurisdiction. However, this Convention has not been signed by Turkey yet.

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THE MARRIAGE UNDER THE RULES OF ROMAN LAW

by

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Among the Roman people, the family was undoubtedly in the first place of a community of cult. It was founded on marriage, and the aim of the marriage was to produce legitimate progeny and to ensure the continued existence of the family. The word "marriage" signifies, "*matrimonium*" in latin language. This word is partly derived from *mater* (mother). The emphasis on motherhood suggests that the Romans regarded marriage as an institution for the production of legitimate children.

The nature of Roman marriage, in classical period, was somehow different from the modern marriages. The institution of marriage was fundamental to Graeco – Roman society. The roman jurist Modestinus expressed the traditional roman ideology of marriage as a jointly agreed upon, lifelong union of two people[1]. In other words, the joining of man and woman, a partnership in the whole life and a sharing of human and divine rights[2].

D. 23. 2. 1., *Modestinus* (*Regularum*, lib. 1):
" ***Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio***."
" Marriage is the union of a man and a woman, a partnership for life involving divine as well as human law."

The fact that no formal requisities were necessary was expressed by the Roman jurists in several ways. The decisive factor was mutual agreement to contract marriage, the "*consensus*". Both parties had to agree. The consummation of the maritial act was not decisive either but might of course be of some importance for the upholding of the *affectio maritalis*[3] which meant a consensus to live lifelong as husband and wife between the couples. In other words, *affectio maritalis* was the intension to be husband and wife and will to marry[4].

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[1] Mario TALAMANCA, Istituzioni di Diritto Romano, Dott. A. Giuffrè Editore, Milano, 1990, p. 131; Rudolph SOHM, The Institutes, Gaunt Holmes Beach Publishing Co., 3. Ed., Florida, 1994, p. 452; H. John ROBY, Roman Private Law, Lawbook Exchange Union, New Jersey, 2000, p. 127; C.W. WESTRUP, Introduction to Early Roman Law, University Press, London, 1934, p. 5; Keith BRADLEY, Discovering the Roman Family, Oxford, 1991, p. 4.

[2] F. H. LAWSON, The Roman Law Reader, New York, 1969, p. 50; Pasquale VOCI, Istituzioni di Diritto Romano, Dott. A. Giuffrè Editore, 5. Ed., Milano, 1996, p. 519.

[3] Pietro BONFANTE, Corso di Diritto Romano, Vol.: I, Dott. A. Giuffrè Editore, Milano 1963, p. 256; LAWSON, op.cit., p. 50.

[4] According to Turkish Civil Law, the status of husband and wife begins with the enactment of marriage (evlenme). Because of the importance of the family as an institution of society and due to the effect of marriage on persons who are not parties to the contract of marriage, the marriage and its enactment are specially regulated in the Turkish Civil Code (TCC). Marriage is legally considered as a contract. Conditions similar to those required for a valid contract, including the aggrement of the parties, are necessary for a valid marriage.

I- FORMAL REQIREMENTS OF MARRIAGE

A roman civil law marriage (*matrimonium iustum*) had to satisfy various requirements. The parties had to be in a certain age and they had to consent. Besides these rules, they had to have *conubium* and the marriage had to be free of bars and impediments.

The marriage of a son had potentially more serious legal consequences than that of a daughter. An absolute veto over a son's marriage, but not that of a daughter, would be understandable within the context of Roman society. However, the better view is that Augustus' dispensation provision did apply to sons since it refers to the wrongful prevention of children from marrying[5].

D. 23.2.19., *Marcianus* (*Institutionum*, lib. 16):
"***Qui liberos quos habent in potestate iniuria prohibierunt ducere uxores vel nubere, vel qui dotem dare non volunt ex constitutione divorum.Severi et Antonini, per proconsules praesidesque provinciarum coguntur in matrimonium collocare et dotare. Prohibere autem videtur et qui condicionem non quaerit***."
"People who wrongfully prevent their children in their power from marrying, or who refuse to provide a dowry for them in accordance with the *constitutio* of the deified *Severus* and *Antoninus*, can be forced by proconsuls and provincial governor's to arrange marriages and provide dowries for them. Those who do not try to arrange marriages are held to prevent them."

1) AGE

The minimum age required for marriage, was that of puberty[6]. In early law a physical examination of the parties was involved, but eventually the ages were fixed. It was thought that the attainment of puberty was fourteen for boys and twelve for girls[7]. May be, the reason of young age for girls was because, the brides should have prefarably been virgins while getting married[8]. If a woman had been married before that age the marriage would not have become legitimate until then[9]. Since Roman women in all periods tended to marry early, there were many examples of girls who married at or even before the age of twelve[10].

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[5] Andrew BORKOWSKI, Textbook on Roman Law, Blackstone Publishing Co., United Kingdom, 2001, p. 114.
[6] In Tuskish Civil Law, as a rule, a person who has completed the age of eighteen and has sufficient mental capacity to make fair judgements (capable of distinguishing between right and wrong) are allowed to marry. In exceptional cases, however the age of marrige is reduced to seventeen for both boys and girls, with the consent of the parents of both parties or the guardian (TCC. Art. 124/1). Under extreme situations and for good and sufficient cause, consent to marry can be given by the compenent judge if both the bride and the bridegroom are at least 16 years of age (TCC. Art. 124/2).
[7] Iust. Ins. 1, 10; BONFANTE, op.cit., p. 266.
[8] BORKOWSKI, op.cit., p. 121.
[9] Andreas WACKE, "Manumissio matrimonii causa: le mariage d'affranchies d'après les lois d'Auguste", Revue Historique de Droit Français et Étranger, Vol. 67, Paris 1989, pp. 413-428, at p. 414; BORKOWSKI, op.cit., p. 223; The view of marriage as a means of increasing the birth rate was one particularly emphasised by Augustus. He imposed a duty to marry on men aged between 25 and 60, and on women between 20 and 50. The lex Papia Poppaea AD. 9, penalised the unmarried and and the childless: unmarried men age between 25 and 60, and unmarried women between 20 and 50 could take nothing under a will, while married persons without children could only take half.
[10] John EVANS, War, Women and Children in Ancient Rome, London 1991, p. 8

D. 23. 2. 4., *Pomponius* (*Sabinum*, lib. 3):
"***Minorem annis duodecim nuptam tunc legitimam uxorem fore, cum apud virum explesset duodecim annos***."
"A girl who was less than twelve years when she married will not be a lawful wife until she reaches that age while living with her husband."

2) CONSENT

The consent of the parties for marriage was important. There must have been the *consensus* of the parties to get married[11]. It was necessary to get consent to be married because the couples had to have *affectio maritalis*, which meant intension to enter marriage and live lifelong together under this marriage contract. The consent of both parties was required if they were *sui iuris*. If they were not, consent of their father, or other family superior, was also requisite and if the grandfather was the head of the family, the father's consent was also requiste to the marriage of his son. If the father or the grandfather was mad, the consent of the other was sufficient and parental consent might be given after the marriage.

As it is mentioned before, without the will of the parties, it would not be possible to get married. Thus, *paterfamilias* could not compell his son to marry. If so, without the consent of the bridegroom, the marriage would be null and void.

D. 23. 2. 21., *Terentius Clemens* (*Legem Iuliam et Papiam*, lib. 3):
"***Non cogitur filius familias uxorem ducere***."
"A son-in-power can not be compelled to marry."

The *paterfamilias* had important rights concerning the marriage of his child[12]. *Paterfamilias* had to give his consent for the ones who were under his power. However, the *paterfamilias* retained the right to refuse consent to marry:

D. 23. 2. 2., *Paulus* (*Edictum*, lib. 35):
"***Nuptiae consistere non possunt nisi consentiant omnes, id est qui coeunt quorumque in potestate sunt***."
" Marriage can not take place unless everyone involved consents, that is, those who are being united and those in whose power they are."

The parties had to have the capacity to consent at the time of the marriage. If either party was in *potestas*, the consent of the *paterfamilias* was required. If the parties were *sui iuris*, the bridegroom did not require anyone's consent, the bride might need permission from her guardian[13].

[11] VOCI, op.cit., p. 520; Riccardo ORESTANO, "La Struttura Giuridica del Matrimonio Romano", BIDR, Vol. 48, Milano, 1941, pp. 88-133, at p. 89.
[12] PAVESE, op.cit., p. 44.
[13] BORKOWSKI, op.cit., p. 121.

D. 23. 2. 5., *Pomponius* (*Sabinum*, lib. 3):
"***Mulierem absenti per litteras eius vel per nuntium posse nubere placet, si in domum eius deduceretur: eam vero quae abesset ex litteris vel nuntio suo duci a marito non posse: deductione enim opus esse in mariti, non in uxoris domum, quasi in domicilium matrimonii***."
"It is settled that a woman can be married by a man in his absence, either by letter or by messenger, if she is led to his house. But where she is absent she can not be married by letter or by messenger because she must be led to her husband's house, not her own, since the former is, as it were, the domicile of the marriage."

The distinctive mark of marriage was the wife's being led into the house of her husband[14]. There she was received with an offer of water and fire. This could be done in the absence of the husband, and required only a message or letter from him. The marriage rested on concent, not on maritial intercourse.

In Constantine's time, and indeed throughout Roman antiquity, no ceremony or certificate was necessary to prove a marriage valid according to Roman law[15]. The validity of marriage was based on the desire of both parties to be married and on the absence of any legal hindrances to marriage, such as prohibitions based on kinship or social status[16]. But, sometimes the individuals and their families would want to have a ceremony and to make a written record of the marriage, in case the marriage was later dissolved by divorce or the death of one partner.

3) *CONUBIUM*:

A roman civil law marriage required that both parties should have *conubium*, the *ius civile* right to enter such a union. Although the Roman citizens had *conubium*, the non-citizens did not have unless it was specially granted. In an other words, a marriage where one or both of the parties lacked *conubium* could not be a *ius civile* marriage, but was nevertheless recognised as a valid marriage, governed by the *ius gentium*. *Conubium* was a positive requirement which exists normally only between persons belonging to the same legal order, so that, a part from special previleges, a union between a Roman and a foreigner could not be *matrimonium iustum*[17].

Although both marriages were valid, it was important that, in a *ius gentium* marriage the children took the status of their mother rather than their father. They were *sui iuris* since *potestas* did not

[14] BONFANTE, op.cit., p. 258.
[15] In Turkish Civil Law, the persons legally eligible to celebrate marriages should determine that the requirements for a valid marriage exist prior to performing the ceremony. Only civil marriages performed by authorised marriage officers are allowed in Turkey and this is safeguarded by the Constitution (Co9nst. Art. 174 No: 4). The celebration formalities commence with the submission of the necessary documents by the parties to the marriage office at the place where thet are residing (TCC. Art. 134). If no impediment exists the marriage may be celebrated within six months without repeating preliminary formalities (TCC. Art. 139). The marriage ceremony is performed by the marriage officer. The ceremony must be performed in the presence of two witnesses who are of age. The authorised person asks the parties the same question that whether, they are willing to marry each other. Upon hearing affirmative answers, he then declares the marriage to be enacted (TCC. Art. 142). But the marriage is deemed enacted from the moment when the parties have expressed their intension to marry.
[16] Evans Judith GRUBBS, Law and Family in Late Antiquity, Oxford, 1999, p. 55.
[17] LAWSON, op.cit., p. 52; Gaius 1, 59-61.

arise in such a marriage and there was no relationship. Besides the wife could not be under the legal control (*manus*) of her husband.

If one of the parties, mistakenly thought to be a citizen, lacked citizenship, the marriage could not be regarded as a Roman civil law marriage. However, legislation in the early Empire allowed in such cases, whereby the non-citizen was entitled to citizenship on proof that a child had been born to the marriage. This converted the marriage from a *ius gentium* union to a *ius civile* one. The same consequence resulted if a citizen, mistakenly thought not to be a citizen, married a spouse without *conubium*: proof that a child had been born to the marriage converted the union into a civil law marriage[18].

II- TYPES OF MARRIAGES

As early as the Twelve Tables there were two types of marriages for Roman women. The former kind of marriage, which is known as strict marriage, was an institution of the civil law in the tecnical sence of term the *manus* marriage (*cum manu*) which let the woman enter her husband's authority. By this marriage the wife assumed the status of a daughter, a sister to her children (*filiae loco*)[19] in his household. Three forms of marriage transferred the bride from the *potestas* of her father to the authority (*manus*) of her husband. These were *usus*, *confarreatio* and *coemptio* which would be described below.

The other form of marriage, which was known as a "free marriage", was an institution of the *ius gentium*. Aliens were therefore disqualified from concluding marriages with *manus*. The marriage was possibile without *manus* (*sine manu*), and by the way it was valid. This left woman under the supervision of her father or guardian. The children of the marriage followed their mother, they did not pass into the *potestas* of their own father and become member of his family. A wife *in manu* shared her husband's property with his children in potestate, while in a marriage *sine manu* the wife had no claim to his estate at all[20].

The development of *manus* was completed as early as the Republic. *Manus*, which had once been the foundation of the Roman law of marriage, became a mere accessory, the absence of which in no way affected the validity of a marriage. During the Empire informal free marriages definately superseded marriages with *manus*. *Coemptio* and *confarreatio* disappeared. *Usus* had lost its effect, and the *trinoctium* was therefore no longer required[21].

1) FREE MARRIAGE

In free marriage, the wife was legally independent and her husband did not have any legal power over her. A free marriage was created by the cohabitation of the parties, provided that they regarded

[18] BONFANTE, op.cit., p. 265; BORKOWSKI, op.cit., p. 122.
[19] Sarah B. POMEROY, "Married Women in Rome", Ancient Society, Vol.: 7, New York, 1976, p. 216; Jane GARDNER, Women in Roman Law and Society, London, 1995, p. 11; TALAMANCA, op.cit., p. 148.
[20] EVANS, op.cit., p. 10; SOHM, op.cit., p. 456.
[21] SOHM, op.cit., p. 457.

themselves as man and wife. As soon as such a cohabitation began, the marriage came into existence. For *Ulpian*, the intention of the parties seems to have been more important than the fact of cohabitation:

D. 50. 17. 30., *Ulpianus* (*Sabinum*, lib. 34):
"***Nuptias non concubitus sed consensus facit***"
"Agreement and not sleeping together creates marriage."

This sentence from Ulpian signified that everything depended on the intention of the parties. If both woman and man decided to marry, they could get married. The *consensus* between the parties was important. In another sence, without *consensus* the marriage will not be valid.

By free marriage, the wife will not enter into the family of her husband. She remained an agnate of her original family[22]. She continued to stay in the power of her *paterfamilias* which she belonged to, from the begining. If she was *sui iuris*, she stayed under the guardianship of her *tutor*, like before.

Schulz suggested that *sine manu* marriage was invented because the groom's family wished to exclude the bride from inheriting in her family of marriage[23]. The free marriage did not give the husband any right over his wife's property. Her status was not affected by the marriage. However, Roman law had rules that prohibited gifts between spouses. According to Ulpian, this rule was given in order to prevent people from impoverishing themselves by means of gifts that are not reasonable, but beyond their means[24].

D. 24. 1. 1., *Ulpianus* (*Sabinum*, lib. 32):
"***Moribus apud nos receptum est, ne inter virum et uxorem donationes valerent. Hoc autem receptum est, ne mutuo amore invicem spoliarentur donationibus nontemperantes, sed profuso erga se facilitate***."
"As a matter of custom, we hold that gifts between husband and wife are not valid. This rule is upheld to prevent people from impoverishing themselves through mutual affection by means of gifts which are not reasonable, but beyond their means."

2) MANUS MARRIAGE

Manus marriage was very common in early law but gradually diminished in importance and frequency during the Republic and was falling into disuse by the second century B.C.[25]. As it was mentioned before, marriage was the union of man and woman. Therefore, such a union was not complete, according to early Roman law, unless the husband obtains the "*manus mariti*" which is

[22] BORKOWSKI, op.cit., p. 124; Gaius 1, 137.
[23] Andreas SCHULZ, Classical Roman Law, Oxford, 1951, p. 119; ARANGIO-RUIZ, op.cit., p. 435.
[24] TAMM, p. 47.
[25] WATSON, Alan, The Law of Persons in the Later Roman Republic, Oxford, 1967, p. 25.

the absolute power over the person of his wife[26]. The effect of this power was to bring the wife under the domestic authority of her husband and, at the same time, to constitute her a member of his household[27].

As a result, a wife would have acquired a daughter's rights if for any reason if she had entered her husband's authority (*manus*)[28]. Moreover, entry into *manus* marriage severed her former agnatic ties. She nomore belonged to the family as she was before marriage. She exchanged one family with another left the power of her *paterfamilias*[29].

A marriage took place generally accompanied by the *conventio in manum*[30], namely by the acquisition of the manus by the husband in the form of the *confarreatio* or by the *usus* or by the *coemptio*. In this way, the husband acquired not only the right to the ownership of his wife's dowry but also the guardianship of any patrimonial estate of which she might become the owner and, even perhaps, the administrator[31].

While it was customary for both men and women to be in power, only women fell into marital subordination (*manus*). Formerly,as it is mentioned before, there used to be three methods by which they fell into subordination: by usage (*usus*) , by sharing of bread (*confarreatio*) and by contrived sale (*coemptio*)[32]. A woman used to fall into marital subordination by usage if she remained in the married state for a continuous period of one year: for she was, as it were usucapted by a year's possesion, and would pass into her husband's kin in the relationship of a daughter[33].

At the time of the Twelve Tables marriage by usus was fully recognised and very frequently resorted to. By the Twelve Tables the early notion that there could be no marriage without manus, had already been abandoned. The Twelve Tables therefore provided that if any woman did not wish to become subordinate to her husband in this way, she would be absent herself each year for a period of three consecutive nights (*trinoctium*), and in this way she would interrupt the usage of each year[34]. It was obvious that this trinoctium of the Twelve Tables meant merely a symbolical interruption of the cohabitation. The "breaking" of the matrimonial cohabitation was a mere fiction

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[26] Federico Del GIUDICE & Sergio BELTRANI, Nuovo Dizionario Giuridico Romano, Esselibri-Simone Publishing Co., 2. Ed., Napoli, 1995, p. 346; CEYLAN (GÜNEŞ), Seldağ: Roma Hukukundan Günümüze Velayet Vesayet Hukuku, Ankara 2004, s. 71.
[27] SOHM, op.cit., p. 452.
[28] Paolo Federico GIRARD, Manuale Elementare di Diritto Romano (Translated by: Carlo LONGO), Milano, 1909, p. 161; EVANS, op.cit., p. 9; UMUR, Ziya: Roma Hukuku, İstanbul 1990, s. 169; ÇELEBİCAN KARADENİZ, Özcan: Roma Hukuku, Ankara, 1986, s. 165.
[29] BORKOWSKI, op.cit., p. 125.
[30] Feliciano SERRAO, Diritto Privato Economia E Società Nelle Storia Di Roma, Napoli, 1984, p. 185; GIRARD, op.cit., p. 162; VOLTERRA, op.cit., p. 763; Vincenzo ARANGIO-RUIZ, Istituzioni di Diritto Romano, 4. Ed., Napoli, 1937, p. 435; Matteo MARRONE, Istituzioni di Diritto Romano, Italy, 1989, p. 333; TALAMANCA, op.cit., p. 131; Gaius 1, 148; Iust. Ins. 1, 10.
[31] Lelia Cracco RUGGINI, "Juridical Status and Historical Role of Women in Roman Patriarchal Society", KLIO, Vol. Band 71, 1989, Berlin, pp.604-619, at p. 607.
[32] Ateneo PAVESE, Corso Di Diritto Romano Della Famiglia, Pavia, 1908, p. 44; BONFANTE, op.cit., p. 262; GARDNER, op.cit., p. 12.
[33] EVANS, op.cit., p. 10; Gaius 1, 110.
[34] RUGGINI, op.cit., p. 607; Gaius, 1, 110; SOHM, op.cit., p. 454; BORKOWSKI, op.cit., p. 125; EVANS, op.cit., p. 10; POMEROY, op.cit., p. 216; GARDNER, op.cit., p. 13; GIRARD, op.cit., p. 165; ARANGIO-RUIZ, op.cit., p. 435.

which was employed for the sole purpose of preventing manus mariti from arising. So it was clear that there could be marriage without *manus*. What the parties desired was, indeed, to marry, but to marry without *manus* and it was the desire that the Twelve Tables sanctioned and gave effect to.

Women fell into maritial subordination through a certain kind of sacrifice made to Jupiter of the Grain, in which bread of coarse grain is employed, for which reason it was also called the sharing of bread[35]. *Confarreatio* took its name from the use of a cake made of spelt (*far*) in a sacrifice made to Jupiter[36]. Many other things, furthermore, had to be done and carried out to create this right, together with the saying of specific and solemn words in the presence of ten witnesses[37]. These ceremonies had the effect of formally uniting a man and woman for all sacrificial purposes, and consequently for lifelong companionship, and of placing the woman at the same time, for the two things were considered inseperable, *in manum mariti*[38].

Although no ceremony needed to fillfull a marriage, it was usually concluded by means of an ancient traditional ceremony representing a purchase of the bride. In other words, women could fall into maritial subordination also through contrived sale, on the other hand by means of mancipation. This was a sort of imaginary sale; for in the presence of not less than five adult Roman citizens as witnesses, and also a scale –holder, the man to whom the woman becomes subordinate "buys" her[39]. This was called *coemptio*[40].

In the case of a *coemptio*, the husband's right to matrimonial cohabitation was the result of the power which he acquired over the wife; conversely, in the case of a *confarreatio*, the power acquired by the husband over his wife was the result of the right to matrimonial cohabitation which the ceremony of *confarreatio* conferred upon him. *Coemptio* was the ordinary form in which any Roman citizen, whether patrician or plebeian, might contract a marriage. *Confarreatio* was a special form of marriage confined to the patricians.

In *manus* marriage, the husband exercised a power and control over the wife, like the *potestas* of a father over his child. In this sence, the wife was regarded as her husband's daughter in certain respects. The marriage with *manus* which was charactired by its peculiar and rigorious effects on the person and property of the wife, was part of the specifically Roman *ius civile*. She could not own property except for very personal belongings. Aliens were therefore debared from marriages with *manus*, nor could they avail themselves of the forms by which such marriages were concluded.

3) PROHIBITED MARRIAGES

There were cases which the Roman citizens must have refrained from marrying. Marriage could not be contracted between people in the relations of parent and child, nor did the capacity to enter a Roman law marriage exist between them, for instance father and daughter, or mother and son, or

[35] PAVESE, op.cit., p. 46; GIRARD, op.cit., p. 164.
[36] GARDNER, op.cit., p. 12.
[37] Gaius, 1, 112.
[38] SOHM, op.cit., p. 453.
[39] Gaius, 1, 113.
[40] PAVESE, op.cit., p. 45; GIRARD, op.cit., p. 164.

grandfather and grantdaughter[41]. If their relationship as parent and child was based on adoption, they still could not marry; the same applied even after the adoptive tie was broken[42].

D. 23. 2. 53., *Gaius* (*Edictum provinciale*, lib. 11):
"***Nuptiae consistere non possunt inter eas personas quae in numero parentium liberorumue sunt, siue proximi siue ulterioris gradus sint usque ad infinitum.***"
"There can be no marriage between those in the categories of parents and children whether they are related in the first or more distant degrees *ad infinitum*."

Marriages forbidden by public morals were deemed incestuous[43]. Such were the marriages of parents with children or even with step-mothers and step-children and marriages of brothers and sisters. In these cases both parties, in other cases usually only the man could be prosecuted criminally. The marriage was null and the children were regarded as having no father and being *vulgo concepti* or *spurii*[44].

D. 23. 2. 39., *Paulus* (*Plautium*, lib. 6):
"***Si quis ex his, quas moribus prohibemur uxores ducere, duxerit, incestum dicitur committere***."
"If someone marries a woman whom he is morally obliged not to, he is said to be commit incest."

Marriage was obviously forbidden between brother and sister, whether they had the same father and mother or are siblings with one common parent[45]. There could be no marriage during the currency of the adoptive relationship between the adoptive sister and brother[46]. But the marriage was possibile when the adoptive tie was broken by her emancipation[47].

It was also forbidden to marry mother- in- law, daugter- in- law, step-daughter or step mother, even if the marriage was ended and they were no more mother or daughter[48]. Step-mother meant, father's wife and daughter-in-law was the son's wife and a step daughter was, a wife's daughter by another husband. It might be said that, a man could not marry his grandfather's or great-grandfather's wife.

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[41] In TCC. Art. 129/1, it is written that marriage between close relatives, such as between a parent and a child or other descendants, between a sister and brother, between a person and his or her aunt orr uncle, between parent or other ancestor, child or other descendant of the husband and the wife is prohibitted.
[42] ROBY, op.cit., p. 128; Gaius, 1, 60.
[43] As it is mentioned in TCC. Art. 132, there is a waiting period for women before getting married if this will not be their first marriage. Married women whose marriage has been dissolved can not marry before the expiration of three hundred days from the date of dissolution. This rule was put into force to protect the unborn children of the previous marriage.
[44] Gaius, 1, 64; The word spurii comes from the Greek "sporaden" meaning "scattered arround" or perhaps from the initialletters of the latin "*sine patr fili*" (sons without father).
[45] D. 23. 2. 39., *Paulus* (*Plautium*, lib. 6): " *Sororis proneptem non possum ducere uxorem, quoniam parentis loco ei sum.*"
D. 23. 2. 39., *Paulus* (*Plautium*, lib. 6): "I can not marry my sister's great-grand daughter, because I am in the position of a parent to her."; ROBY, op.cit., p. 129; The Emperor *Claudius* however married his brother's daughter (*Agrippina*), and therefore an exception was made in favor of such a marriage, but not extended to sister's daughter.
[46] According to TCC. Art. 129/3, an adoption parent is not allowed to marry his or her adopted child.
[47] Gaius, 1, 61.
[48] Gaius, 1, 63.

The term daughter in law included not only a son's wife, but also the wife of a grandson or great-grandson[49].

An other form of prohibited marriage was which was enacted by mad people. Mad persons[50] could not contract marriage, but madness supervening did not dissolve a marriage[51]. In the time of the Emperor *Augustus* some restrictions in the freedom of marriage were passed[52]. The statutory rules were especially aimed at concerving and furthering the Roma upper-class, the senatorial class. It was prohibitted to marry prostitutes, freed persons or actresses[53].

D. 23. 2. 42. 1., *Modestinus* (*Ritu nuptiarum*):
"***Si senatoris filia neptis proneptis libertino vel qui artem Iudicram exercuit cuiusue pater materve id fecerit, nupserit, nuptiae non erunt.***"
"If the daughter, granddaughter or great-granddaughter of a senator marries a freedman or someone who was an actor, or whose father or mother were actors, the marriage will be void."

A senate's decree under *M. Avrelius* and *Commodus* prohibitted any guardian from marrying his ward, lest he should thereby evade or restrict his liability to account for the management of her property. On this ground a guardian's heir, as well as his son and grandson were debared from the marriage and, if the guardian was under power, the father was debared also. The prohibition applied to caretakers (*curators*) and lasted until the ward was twentysix years old. Such marriages were null: a guardian or caretaker contracting them was *infamis*, and liable to accusation for adultery[54].

D. 23. 2. 59., *Paulus* (*Adsignatione libertorum*):
"***Senatus consulto, quo cautum est, ne tutor pupillam vel filio suo vel sibi nuptum collocet, etiam nepos significatur.***"
"The senatus consultum, which provides that a tutor can not arrange a marriage between her and his son or marry her himself, also applies to grandsons."

[49] D. 23. 2. 14. 4., *Paulus* (*Edictum*, lib. 35); ROBY, op.cit., p. 129.
[50] The person who does not have the capacity to act properly or has mental illness or certain sicknesses enumarated in TCC. Art. 145 constitute a bar to marriage.
[51] ROBY, op.cit., p. 131.
[52] There are also restrictions in TCC..For instance, monogamy is one of the essencial principles of Turkish family law. A second marriage can not be entered into unles the first is terminated.
[53] ROBY, op.cit., p. 130; Ditlev TAMM, Roman Law, DJOV Publishing Co., Denmark, 1997, p. 47; WACKE, op.cit., p. 414.
[54] Lucetta DESANTI, "Costantino e ill matrimonio fra tutore e pupılla", BIDR., Vol. 28, Milano 1986, pp.443-463, at p. 452; ROBY, op.cit., p. 131; D. 23. 2. 36., *Paulus* (*Quaestionum*, lib. 5).

BIBLIOGRAPHY

ARANGIO-RUIZ, Vincenzo : Istituzioni di Diritto Romano, 4. Ed., Napoli 1937

BRADLEY, Keith : Discovering the Roman Family, Oxford 1991

BONFANTE, Pietro :Corso di Diritto Romano, Dott. A. Giuffrè Editore, Vol.:I, Milano 1963

BORKOWSKI, Andrew : Textbook on Roman Law, Blackstone Publishing Co., United Kingdom 2001

CEYLAN (GÜNEŞ), Seldağ: Roma Hukukundan Günümüze Velayet Vesayet Hukuku, Ankara 2004

ÇELEBİCAN KARADENİZ, Özcan : Roma Hukuku, Ankara, 1986

DESANTI, Lucetta : "Costantino e il matrimonio fra tutore e pupilla", BIDR Vol.: 28, Milano 1986, p. 443-463

GIRARD, Paolo Federico : Manuale Elementare di Diritto Romano (Translated by: Carlo LONGO), Milano 1909

GIUDICE, Del Federico, BELTRANI, Sergio : Nuovo Dizionario Giuridico Romano, Esselibri-Simone Publishing Co., 2. Ed., Napoli 1995

GORDON, W. M., ROBINSON, O. F. : The Institutes of Gaius, Duckworth Publishing Co., England 1997

GRUBBS, J. Evans : Law and Family in Late Antiquity, Oxford 1999

LEE, R. W. : The Elements of Roman Law, Sweet and Maxwell Publishing Co., 4. Ed., Great Britain 1956

MARRONE, Matteo : Istituzioni di Diritto Romano, Italy 1989

ORESTANO, Riccardo : La Struttura Giuridica del Matrimonio Romano, BIDR. Vol.: 48, Milano 1941, p. 88-133

PAVESE, Ateneo : Corso di Diritto Romano della famiglia, Pavia 1908

POMEROY, Sarah B. : "Married Women in Rome", Ancient Society Vol.: 7, New York 1976, p. 215-227

ROBY, H. John : Roman Private Law, Lawbook Exchange Union, New Jersey 2000

RUGGINI, Lelia Cracco : "Juridical Status and Historical Role of Women in Roman Patriarchal Society", KLIO, Band 71 1989, Berlin, p. 604-619

SANFILIPPO, Cesare : Istituzioni di diritto romano, Rubettino Publishing Co., Messina 1996

SCHULZ, Andreas : Classical Roman Law, Oxford 1951

SERRAO, Feliciano : Diritto privato economia e società nelle storia di Roma, Napoli 1984

SOHM, Rudolph : The Institutions, Gaunt Holmes Beach Publishing Co., 3. Ed., Florida 1994

TALAMANCA, Mario : Istituzioni di Diritto Romano, Dott. A. Giuffrè Editore Milano 1990

TAMM, Ditlev : Roman Law, DJOV Publishing Co., Denmark 1997

UMUR, Ziya : Roma Hukuku, İstanbul 1990

VOCI, Pasquale : Istituzioni di Diritto Romano, Dott. A. Giuffrè Editore, 5. Ed., Milano 1996

WACKE, Andreas : "Manumissio matrimonii causa: le mariage d'affranchies d'après les lois d'Auguste", Revue historique de droit français et étranger Vol.: 67, Paris 1989, p. 413-428

WATSON, Alan : Studies in Roman Private Law, Hambledon Press, London 1991

: The Law of Persons in the Later Roman Republic, Oxford 1967

WESTRUP, C.W. : Introduction to Early Roman Law, Oxford University Press, London 1934

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REORGANIZATION OF AN INSOLVENT DEBTOR - AN ALTERNATIVE OR THE IMPERATIVE -

by

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Introduction

A possibility to perform the reorganization of an insolvent debtor is one of the novelties predicted by the new Law of the Insolvency Procedure of the Republic of Serbia[1]. This institution has been introduced instead of the institution of the forced compounding with the creditors which was predicted by the former law. Namely, The Article No 128, of the new law predicts a whole range of measures for the realization of the reorganization plan, among which there are: the postponed payment, the allowance of the payment by installments, the change of the term of expiration, the change of the interest rate and the full or partial release of debt. The latter was a characteristic of the effect of the concluded forced compounding with the creditors.

Reorganization was primarily regulated as an institution by The Law of Insolvency of The United States of America from 1978, from which it was further overtaken by the certain European insolvency laws[2].Chapter IX of this law, titled "Bankruptcy reorganization" provides for the fact that the judge could allow a term of 120 days to the debtor (the term could also be prolonged or shortened) to hand in a reorganization plan in order to avoid insolvency, providing that the plan has been accepted.

Reorganization implies that the creditors are settled both in the way and under the conditions predicted by the reorganization plan (The Insolvency law of the United States of America, Article No 1, point 4). In this way, a financial rehabilitation of the debtor is performed which improves its legal as well as its property status. However, there remains an obligation to settle creditors' assets. The function of reorganization is to substitute the forced compounding with creditors but it certainly does not exclude it. Along with this goes the Article No 128, point 11 of the law in question which provides for the

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[1] The Official Gazette of the Republic of Serbia, No 84/2004

[2] An example for this can be found in the German Insolvency law (*Insolvenzordnung*) from 1994, on the bases of which The Croatian Insolvency law was founded in 1996. At the beginning, it named reorganization as "transitioning" but it was changed by its modifications and supplementations in 1999 when it was called "insolvency plan". Montenegro issued its Law of the insolvency of economic companies in 2002, in which there exists a chapter named "reorganization". In the same year, Serbian Republic issued The Law of insolvency procedure which allows for this institution. However, the very law contains a text named "insolvency plan" which is defined as an agreement which was concluded by the insolvent debtor and the qualified majority of his creditors. The agreement deals with the modalities of debtors' reorganization, which should be confirmed by the competent court of law, and which also has the force of implementation to all the unprivileged creditors.

conversion of the debt into the share capital as one of the measures of the realization of the plan. Thus, the institution of conversion of claims into the permanent deposit in the procedure of the forced compounding with creditors in insolvency was accepted. It was built at the time of the implementation of The Law of the forced compounding, insolvency and liquidation[3]. Likewise, the new Law of Insolvency Procedure maintains the solution from the former Law of the overtaking of the debt as a separate financial recovery measure which can be overtaken at the appearance at court, apart from the reorganization procedure, where a suggestion of the claim of insolvency is being discussed.

The Aim of Reorganization and the Preconditions of its Implementation

The very term reorganization means an organizational and structural rearrangement. Since the goal to be accomplished is a financial recovery of a debtor, there have occurred certain dilemmas concerning whether the very term is adequate. In this context, in France, a term *redressement* (recovery, upbringing) is being used to point to the aim of the procedure-the maintenance of the company, its economic activity as well as its employments.[4] The process of reorganization begins by a check up of the economic and social balance, after which a further direction towards the recovery plan or the liquidation of the company is being decided upon. It leaves an opportunity to compound with creditors either forcedly or voluntarily. Which option is going to be chosen depends on the participants in the procedure.[5] If it is being estimated that the recovery is possible, the court of law decides upon a standard or a shortened procedure. According to the standard procedure, the period of observation is limited to six months. However, it could be extended to the maximum of twenty months, at the request of the insolvent manager, an authorized minister, or the very court of law. Still, the shortened procedure, which has been activated in 95% of the cases, is implemented in the situations when the company in question employs more than fifty employees and its yearly balance does not exceed twenty million francs.[6] A characteristic of this regime is a possibility that the period of observation lasts for four months with a possibility to extend it to eight months, under the condition that the insolvent manager in not changed. The recovery plan is being made by the debtor himself with the help of experts, while the final decision is being made by the court of law.[7] If the process of reorganization has failed, the court of law could make a decision to liquidate the company. In the cases when the financial status of a company is unlikely to be improved, the court of law could liquidate the company with no previous implementation of the reorganization plan. The evaluation of the inability to recover is

[3] More about this issue, see M. and Kozar, V.: *Stecaj i privatizacija*, Pravni zivot, 2004, p.224
[4] Ripert, G.- Roblot, R.: *Droit commercial*, vol. 2, Paris, 1996, p. 878; ibid Micovic, M.: *Reorganizacija ili redresman stecajnog duznikar*, Pravo i privreda, 2004, No5-8, p.649
[5] Apart from reorganization, German Insolvency law recognizes the institution of recovery, which allows for the debtor's transfer of business to a third person in order to successfully realize the started business and settle with the creditors; see: Failski, H.: *Insolvency Law in the Federal Republic of Germany*, 1994, p. 27
[6] See Micovic, m., ibid., p. 651
[7] Guyon, Y.: *Droit des affairs*, Paris, vol. 2, 1997, p. 140

conducted by the court of law having in mind the debtor's liabilities as well as its ability to conduct its activities undisturbed.[8]

When speaking about Norway, the greatest part of its legislation dealing with the matter of insolvency is based on two acts: The Debt Reorganization and Bankruptcy Act and The Act on Creditors' Access to Assets, both from 1984. The term bankruptcy contains both personal and corporate liquidation.

When a company faces financial difficulties and the insolvency becomes probable, the board of directors has to undertake the necessary steps towards recovery of its position without delay, according to the Norwegian Limited Companies Act and Norwegian Penal Code. Likewise, certain attempts in finding a new source off company's funding are being undertaken, negotiations concerning rehabilitation of debts are being held. In the case that these are not possible, the share holders are being suggested that the company be voluntarily liquidated and a complete settlement with the company's creditors made.[9]

Reorganization is conducted under the control of the persons named by the court of law. In order that a reorganization plan is accepted, it has to be voted for by at least 60% of the creditors with backlog of demands. If the majority of 60% cannot be obtained, the reorganization has failed and the court of law is declaring the insolvency.

The Bankruptcy code (USA), Reorganization, chapter 11, the reorganization plan means a financial restructuring which regulates the ways of settling with the creditors. They are given an opportunity to decide upon competitive plans of reorganization. If the creditors decide upon any of the suggested plans, it has to be confirmed by The Court of Insolvency before its implementation.[10] The creditors would be settled according to the accepted plan as soon as it becomes effective. Even the plan that has received judicial permission has to fulfill certain additional conditions in order to become effective.

According to chapter 11 of The USA Insolvency law, the declaration of the procedure is a volunteering activity undertaken by the company in order to protect its current business from due debts. The initiated process of reorganization immediately stops annuls all the debts of the company and stops all the legal processes started against it.[11] Likewise, the company maintains its regular business, providing for the pays and perks to its employees. This further means that the company is allowed to function in a customary way by continued collection of funds for settling the creditors.

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[8] Corre-Bolly, E.: *Droit des enterprisesen difficulte*, Paris, 2001, p. 63

[9] See *An Introduction to Competition Law in Norway-Insolvency Regulation in Norway*-an overview, available through Internet at http://A:/bank.in%20Norway.htm

[10] See *Supplier Questions and Answers Plan of Reorganization,* available through Internet at wwwpge.com/purchasing

[11] See *Extention of Debtors Exclusive Right to File a Plan –Understanding the Chapter 11 Process,* Fermald News Bulletin, September 27, 2002

After the process of reorganization has been started, there follow: forming of the board of creditors, preparing the report of the financial balance and plans, meetings of the creditors, making strategies for the implementation of the reorganization plan by managers and the board of directors, establishing of cooperation between managers and creditors, implementation of the reorganization plan.[12] Afterwards, the court decides upon one or more boards, in cooperation with the company, to present the interests of the creditors in the realization of the reorganization plan. The company is demanded to hand in the document containing its reorganization plan known as "the publication of the report". This document describes the contents of the plan and the ways of payment of the creditors' debts. It also provides creditors with the necessary information for accepting the plan. The federal regulations demand that the debtor to provide all the interested parts the announcement concerning the day of handing in of the objections about the truthfulness of the information presented in the report (at least 25 days in advance).Following this, there is an appearance in the court of law concerning the confirmation of the report as well as deciding upon the possible abjections by certain creditors or other interested parts.

Then, the date is chosen when the first appearance in court for the confirmation of the plan will be held. All the creditors authorized to vote for the plan are invited to appear in court. They have to declare whether they confirm the plan or not before the expiry of the deadline given by the court. Supposing that all the legal preconditions have been fulfilled, after being confirmed by the creditors, the plan becomes effective and the creditors' debts are being settled according with the plan. [13]

When speaking about Austria, there occurs an important question: whether Austria needed to accept the new system of corporate recovery based on chapter 11 of The Insolvency Law (USA).[14] Former to this question was the bankruptcy of the aircraft industry Ansett, which resulted in the enlargement in the number of the claims of insolvency based on the chapter 11. In order to answer this question, there was the presentation of the characteristics of insolvency defined in the chapter 11, The Insolvency Law of the USA.

Firstly, the claim for the declaration of insolvency is a decision that the company itself should make. Following the declaration of insolvency, the debtor company is left with 120 days to propose a reorganization plan to the Court of Insolvency which discusses the claims of the creditors and allows

[12] Tucker J. and Moore W.: *Accounts Receivable, Trade Debt and Reorganization*, Journal of Financial and Strategic Decisions, 2000, vol. 13, No 2; See *Understanding the Chapter 11 process*, Farmald News Bulletin, September 27, 2002. p. 2

[13] According to the research published at Harvard Business School, big companies have huge chances to be reorganized. Even 80-90% of the companies with the property worth more than 100 million dollars are being reorganized rather than liquidated. Certain famous companies could serve as good examples of a successful recovery: Texaco, Continental Airlines, etc. Some of them have succeeded in passing through the whole reorganizing process for little longer than four months. Others needed far more time, while certain needed even ten years. The aim was to remodel the companies for more profitable business.

[14] See Fisher T. and Martel J.: *Should We Abolish Chapter 11?* Evidence from Canada, CIRANO (Scientific Series) Montreal, 1996.

the company to continue its business. This time period could be prolonged by a decision of the court exclusively. If the plan of the debtor is not confirmed by the court during this time period, the creditors have 60 days to present an alternative plan of reorganization. During the period of 120 days, the debtor remains under the control of the court, except if the creditors give evidence that contribute the fact that an insolvent manager has to be named. The Court of Insolvency has an essential function in every step of the process of reorganization.

Still, the Chapter 11 has received numerous critiques. Firstly, the majority of the debtors fail in fulfilling the financial recovery policy in the long run. [15] According to the statistics data, only 6,5% of the debtors recover successfully.[16] Secondly, leaving the old government in function is "leaving the fox in charge of the chicken coop".[17] In another words, the persons that has been marked as responsible for the declaration of insolvency also appear as the persons who want to govern the company in the process of recovery. Thirdly, a corporative reorganization has proved itself to be more useful to the management of the company than to the very creditors.

After the collapse of the above mentioned Ansset, the opinions about the application of the American insolvency legislation (chapter 11) to the Australian regime of insolvency have split. The ones had the attitude that the above mentioned aircraft company could have been recovered if Australia had had the insolvency regime stated in the Chapter 11[18]. Along with this statement goes an often quoted example of the United Airlines Company which was successfully reorganized in this way. However, no one succeeded to explain correctly how the aircraft company Ansett could have been saved by the application of Chapter 11 of the Insolvency Law of the USA.[19] Above all, once again, it turned out to be that the application of the chapter in question has not brought about the desired goal because it resulted in a small number of successfully recovered companies in the long run with inappropriately huge expenses. Judging from the above mentioned, one could conclude that there is little chance that Australia accepts the regime of the insolvency based on the chapter 11 of the USA Insolvency Law.

Contrary to the forced liquidation, the goal of the reorganization procedure is to reconstruct business funds in such way so that the company could continue its business by guaranteed employments to its employees as well as the debts to its share holders and creditors. Reorganization proved itself to be

[15] Lightman, K.: Voluntary Administration: *The New Wave or the New Waif in Insolvency Law?*, InsolvLJ, 1994, 2 59, p. 72
[16] Jensen S.-Conklin: *Do Confirmed Chapter 11 Plans Consummate? The Results of a Study and Analysis of the Law*, 1992, Commercial Law Journal 297, p. 325
[17] Cowling, D.: *Australian Regime Has Proved Its Worth*, The Australian Financial Review, 9 December 2003
[18] More about the matter see in Sutherland. G.: *Australia Needs Chapter 11 code*, The Australian Financial Review, 11 December 2002
[19] It is interesting to say that, according to the questioning of the procedure stated in the chapter 11, the management of the Ansett thought that such a system would not have recovered this company. Nonetheless, certain of the solutions contained in this chapter were unacceptable for the Australian milieu.

more justifiable economically than liquidation because it maintains both the business and the property of the company. [20]

Subjects of reorganization

According to The Insolvency Procedure Law of the Republic of Serbia, the suggestion of the reorganization plan is being proposed by the authorized subjects: the debtor, the creditors, and the insolvent manager. Reorganization, the insolvency plan, could be useful to all the subjects it is related to both directly or indirectly. If the reorganization plan comes true, it means a survival of the insolvent debtor in economic life by avoiding the insolvency procedure. For the creditors, it means the better percentage of payment of his active debts than they could get by the division of the sold property of the insolvent estate. For share-holders and other investors, it is a guarantee that their investments would not be wasted. For the employees, reorganization means that their labour relations would not cease as an effect of the ex officio declaration of insolvency.

Even though reorganization represents an enlarged range of the insolvent debtor's recovery measures, it differs from the forced compounding with the creditors in the width of range of actions in the structure of the debtor. Forced compounding is only an "action with the appearance, not an action with the essence of debtors difficulties", because the status of the debtor remains unchanged even after the process of compounding has been finished. The only thing that the debtor is allowed is to fulfill his, in this way, diminished obligations. The debtor is given an opportunity, but whether he would take it depends on his economic knowledge. For this reason, the forced compounding with the creditors is not the most appropriate means for the financial recovery of the insolvent debtor.[21]

As a functional replacement for the forced compounding with the creditors, there appears the reorganization of an insolvent debtor which does not leave it out, as we have mentioned. The difference is the fact that the former law regulated the minimum amount of the debt to be written off as well as the deadlines for the fulfillment of the diminished obligations. Now, this is regulated by the reorganization plan.

Issuing of Reorganization Plan

[20] The American Supreme Court assumed an attitude that "the basic aim of reorganization is the prevention of debtor's liquidation together with the loss of business and the abuse of economic resources". More about the matter see LoPucki L.: *A Team Production Theory of Bankruptcy Reorganization, UCLA,* School of Law, Law&Econ Research Paper, April 2003, No 3-12

[21] See Velimirovic, M.: *Sadrzaj I dejstvo stecajnog plana,* Pravni zivot, 2003, No 11, p.30

The draft of the reorganization plan - A draft of a reorganization plan is issued by the authorized subjects, in the procedure before the competent court after the declaration of the insolvency. Usually, states the reasons of the economic subject's financial problems, the reorganization measures that should be taken, the funds for full or partial settling with the creditors as well as its dynamics, the description of the procedure of selling out of the property, the deadline for carrying out the reorganization plan, the names of the experts that would be hired, the amount of the financial compensation for their work as well as the work of the insolvent manager, the balance of the state and success during the previous five years, the projected balance of success for the next five years, the estimated amount of money that could be obtained after the sale of the debtor's property, the date of the beginning of the reorganization plan (Article No 127 of the Law).

All the creditors can vote for the reorganization plan proportionally to the amount of their active debts (Article No 132, Point 1).In cases when active debts are denied, the insolvent manager can estimate the amount of his active debts in order for him to participate in the voting. Judging from its characteristics, this institute largely resembles the forced compounding which contains two contradictory terms: agreement, as a military act of the qualified majority of the debtors and the insolvent debtor, and an obligation for those creditors who voted against the plan or abstained from voting. This gives this institute a character of *contradiction in adjecto,* which makes it different from all the others similar institutes.[22] The attitude of both legal theory and judicial practice is that the claims of insolvency of the creditors are not enough for a forced compounding with the creditors. The insolvent debtor, i.e. the insolvent manager as its legal counsel, must also agree with it. The insolvent judge must give the instructions for it.

The new Law of the Insolvency procedure (Article No 129, Point 1) regulates that the reorganization plan can be drafted by the insolvent debtor, the insolvent manager, the creditors that have at least 30 % of the secured active debts, as well as the persons who owe at least 30 % of the unsecured insolvent debtor's property. The authorizations of the creditors with the minimum of 30 % of the secured active debts as well as the creditors who have at least 30% of unsecured active debts to make a draft of the reorganization plan makes a very important novelty in relation with the solution offered in the former Law of the Forced compounding with the creditors, insolvency and liquidation (Article No 18, Point 1), which stated that the procedure of forced compounding with the creditors is declared at the claim of the insolvent debtor who fulfills the legal preconditions for the declaration of insolvency. The process could be declared at the claim of the creditors, if the debtor has agreed with it (Article 18, Point 2). The new Law of the Insolvency Procedure, however, does not demand the acceptance of the debtor for the issue of the reorganization plan by the creditors. When the forced compounding with the creditors in the cases of insolvency is in question, the solution from the former law has been maintained. It says that the creditors or the debtor itself could claim the declaration of the forced compounding, i.e. of the reorganization plan (according to the new one), before the appearance in court to discuss the major division.

[22] More about the matter , see: Velimirovic, M., ibid. p. 31

Accepting the reorganization plan – Having received the reorganization plan, the court of law determines the date of the new appearance in court for its discussion in 20 days. The reorganization plan is considered confirmed if it is being accepted by all classes of creditors and if it corresponds with the regulations of this law.[23] If there has been more than one draft of reorganization issued, each is being put to voting during the same appearance in court. In the situation when there is more than one plan accepted, the court confirms the one proposed by the insolvent debtor. Contrary to this, if the proposed plan has not been accepted or it is not in accordance with the law, the court can allow an additional 30 days term for the proposing party to hand in the changed version. In the case when the changed version is not confirmed either, the insolvent debtor would be declared insolvent.

The accepted reorganization plan is being confirmed by the court which is in charge of the insolvency procedure. The function of the court is to provide for the protection of all the participants in this procedure, without a possibility of any kind of interference with it. This also means that the jurisdiction of the court is also restricted in the areas of interference with drafting of the plan, as well as with the possibility to force any of the participants to vote for the plan. Unless there are certain difficulties[24], the court would confirm the insolvency plan. The accepted and confirmed plan of reorganization has the force of execution which means that the debtor is obliged to act in accordance with it. In the case when the debtor acts contrary to the regulations of the plan, the court can order certain measures to eliminate the possible effects or order the implementation of the insolvency procedure.

Measures for Insolvent Debtor's Reorganization

The content of the plan is made of different measures used for the implementation of reorganization of the insolvent debtor. These can be carried out in isolation or combined with other measures to both consolidate financially the insolvent debtor and to fulfill the interests of the creditors. The measures that are component parts of certain insolvency laws do not limit the subjects concerning their overtaking, meaning that the subjects can carry out one or more measures both the ones regulated with

[23] Creditors are being divided into groups based on the right of priority of its active debts. It is being considered that the plan is accepted by the members of one group if it was voted by those creditors that have simple majority of active debts in relation to the whole amount of the creditors of that group. In order to prevent an obstruction in confirming the plan, The Law of the Insolvency Procedure of the Republic of Serbia states that a plan is considered confirmed if the majority of the voting groups accepts it, no matter of the neglecting of the group that is in the minority, under the condition that it does no harm to the creditors that would settle their claims in the process of insolvency. There can appear the creditors that are either favoured or disfavoured by this process (preferential and non-preferential creditors), so that they do not participate in deciding upon the reorganization plan. Still, there is a possibility that they give up their position, as the privileged creditors can also do, and put themselves into the group of the unprivileged ones. Thus, they get the right to take part in the confirmation of the insolvency plan; See Micovic, M., ibid, p. 651

[24] What is considered under the term difficulties is the inability to protect the interests of the debtor and its creditors as well as the violation of the insolvency procedure regulations. The function of the protection of insolvent debtor's property is to provide for the impossibility of putting the insolvent debtor in a position worse than in had been before the issuing of the plan. Still, the creditors are being protected by its refusing to confirm the reorganization plan if it has received any objections at the first appearance in court, i.e. if the creditors would be put in an unfavorable position by this plan.

the insolvency laws and the ones that are not. Thus, by the reorganization plan[25] one could foresee that the whole property or one its part is left to the creditor to continue the business. It could also foresee the sale of the property included in the insolvent estate or the transfer of such a property in order to compound with the creditors, the closing of the unprofitable plants or changing of the activity; the break or the changing of unfavorable contracts or rents; the postponing the debts or allowing payment in installments; changing the term of maturity, the interest rate, or other terms of the loan or the instruments of security; partial or complete forgiving of the debts; the implementation or a change of the Mortgage Law; the transformation of the unsecured into secured loans; loaning the unsecured property; transformation of the debt into share-capital; taking a new credit; providing a new investment; refusing and annulling of the legally questionable credits; setting of the due credits; firing of the employees; exchanging of the unsecured property for compounding with the creditors; changing and making amendments of the statute, general documents of the economy of the insolvent debtor as well as other documents concerning the foundation and government; joining or merging of two or more subjects; the transfer of the whole property or one of its parts to one or more existing or newly founded subjects; the abolishing or the issuing the new bonds by the insolvent debtor or any of the newly formed subject as well as other measures that are important for the realization of the reorganization plan.

The Law of Insolvency regulates the range of measures for the realization of the reorganization plan by the implementation of the method of nabrajanja , in a way that this has been regulated by the laws of other countries of the Former Socialist Federative Republic of Yugoslavia. Opposite to this, the French legislation regulates that according to a court decision, the financial recovery of the debtor can be done in two possible ways. According to the first way, the court overtakes the control over the business, while the second orders the cession, the selling of the debtor and its overtaking by a third subject.

Judging by the estimation about the existence of the ability of a financial recovery and a compounding with creditors, the court of law makes a decision about a continuation of debtor's business. Afterwards, the court names a person in charge of the implementation of the plan (this could be either the manager or a representative of the creditors), as well as the maximum10 years term for the implementation of the plan. The plan primarily states the term and the amount of the active debts to be paid to the creditors. It also determines the term and the amount of the settling with the creditors. When discussing the term, it can be determined by the court, while the percentage of the payment of the debt has to be agreed with the creditors. The court also determines the dynamics and the amount of the payment, while the first installment of the debt must be paid during the very first year of the plan implementation. The plan allows a possibility that the creditors can decide upon a shorter term of the payment, providing that they accept to receive a several percents smaller payment. Those creditors whose active debts do not exceede the amount of 1000 franks are being immediately paid out in full.[26]

[25]The Insolvency Law, Article No128
[26] More about the matter, see Guyon, Y., the above mentioned work, p. 294-299, Micovic, M., ibid, p. 655

Apart from the financial measures, the plan could also contain the measures concerning the reorganization of the debtor. Thus, the change of the statute and other documents concerning the foundation and the government can be foreseen. The aim of such an action is the change of the model of organization or the change of the founding funs. Likewise, it is possible to order a change of the one of the government members and at certain times to forbid the transfer of their shares and stocks. In order to provide for the payment of the active debts, the plan almost always prescribes the measures that are directly related to the debtor's property. For instance, what can happen is that selling out of seemingly unimportant things or business could have influenced its liquidity. However, if the court estimates that these things are important to the debtor in order to continue its activities, it can forbid their selling for a certain period of time which cannot be longer than the term of the implementation of the plan.[27] In order to decrease the business costs of the debtor, the reorganization plan can foresee firing of a certain number of employees as a special measure. Such a decision is made by the court after the consultations with the board of the company, the representatives of the employees as well as the state body in charge of the matter.

The one of the court's measures available in this situation putting through a partial or a complete cession, while which the court can decide that the debtor continues his activities in case of the partial cession. The very cession is being put through, based on an offer made by the interested persons. The offer must contain: the amount and the ways of payment (especially if the payment is not to be done in cash), the date of the cession's realization, the level of employment (the number of the employees to be fired and a social program), the measures of securing the regular payment of the obligations from the offer. The court accepts the best offer, i.e. the one that has the best conditions for the payment of the creditors' active debts and the maintenance of the employments. While choosing the best offer, the court has to provide for the interests of all the interested parts. Having in mind that the offer is accepted neither by the debtor nor the manager, but by the court of law, it could be said that the cession presents a kind of a one-sided engagement which draws its strength from a confirmation issued by the court.[28]

In order to make cession possible, the court should primarily state the debtor is not able to continue the business personally (out of either object or subject reasons).The cost of the cession does not have to cover the liabilities in full.[29] In the cases of the payment in installments, the cessionary must not sell the property he has acquired, unless the merchandise reserves are in question. This prohibition can be prolonged even after paying the price, if the court finds it necessary for the implementation of the plan.[30] If the cessionary does not fulfill his obligations, the court can decide to break the plan. In that case, the court names the insolvent manager and declares insolvency.

[27] See, Micovic, M.,ibid, p. 656
[28] See, Guyon, Y. ibid, p. 310
[29] Ibid, p. 310
[30] Corre-Brolly, ibid, p. 264

Conclusion

Reorganization presents a new institute which was firstly put into practice in Serbia by the issue of the new Insolvency Law. It forms a base for the survival of the insolvent debtor by bringing him back in life. On the one hand, it allows the continuation of the insolvent debtors business, no matter of the fact that there is an insolvency procedure led against it. On the other hand, it proved itself useful for the creditors, too, because it allows them to realize their active debts under more favorable conditions than in the process of insolvency. The presentation of reorganization plan is not obligatory, but still makes a legal action if is being accepted in the same way by all the groups of creditors. When the plan is confirmed, both the debtor and the creditor can benefit from it.

Reorganization plan gives a wider range of possibilities for the compounding with the creditors and for the insolvent debtor, concerning its existence in business relationships. One should bear in mind that the process or reorganization is not easy to put into practice, considering the financial state of the debtor as well as the strength in overcoming the difficulties by accepting the reorganization plan. Since this is a new institute in the legal system of Serbia and Montenegro, its implementation will shoe whether and to what an extent it is acceptable for our circumstances. One is certain – there are not any doubts concerning the variety of the possibilities it offers and which distinguish it from the other institutes in this field.

Despite the above stated arguments which contribute the reorganization as an institute, one should certainly keep in mind that this institute does not present a derogation and suppression of the other important goal of the insolvency procedure which is the dieing out of an economic subject which is no longer able to stand up to its economic demands. This is the context in which reorganization should be viewed - as an alternative to insolvency which has becoming an imperative, according to the needs of the modern society.