FREE LAW JOURNAL

VOLUME 3, NUMBER 2 - APRIL 18, 2007

ISSN 1712-9877

In this issue :

The Free Law Journal results of a merger with the Eastern European Law Journals. It builds upon this previous success and aims at providing the freedom of publishing juridical research from everywhere and on all subjects of law. Its goal is to promote respect of the rule of law and the fair application of justice by sharing juridical research in its pages.

Academics, post-graduate students and practitioners of law are welcome to submit in the academic section their articles, notes, book reviews or comments on any legal subject, while undergraduate students are welcome to publish in our student section. The list of fields of law addressed in these pages is ever-expanding and non-restrictive, as needs and interests arise. If a field is not listed, the author simply needs to propose the article and the field believed of law applicable; we will insure to create and list it.

We accept articles in English, French, Bosnian, Bulgarian, Croatian, Czech, Finnish, German, Greek, Hungarian, Icelandic, Inuktitut, Italian, Latin, Polish, Portuguese (both Brazilian and European), Romanian, Russian, Serb (both Latin and Cyrillic), Slovenian, Spanish and Turkish.

Articles not in English are provided with a synopsis to explain their content. Articles of exceptional quality, or requested to be, can be translated into English and/or French. All of this is the measure of freedom we provide.

The material submitted for publication remains copyrighted to the author. If the author has interest in publishing elsewhere after having published in our pages, no permission to do so will be necessary. The author remains in full control of his or her writings. Articles of superior value will be considered for incorporation in collective works for publishing.

We always accept submissions. To submit, please read the submission guidelines or ask us any question at: FLJ@FWPublishing.net .

List of subject addressed
(as it currently stands - modified as need arise)

Administrative Law	**Family law**	**Private International Law**
Admiralty law	**History of Law**	**Private law**
Antitrust law	**Human Rights Law**	**Procedural law**
Alternative dispute resolution	**Immigration Law**	**Property law (Public)**
Anti-Terrorism	**Intellectual Property Law**	**International Law (See International Law (Public))**
Bankruptcy	International trade law	**Refugee Law**
Business Law	Patent	**Religious law**
Canon Law	Trademark Law	***Islamic Law (Sharia)***
Civil Law	**International Humanitarian Rights Law**	Qur'an
Common Law	Laws of Armed Conflicts	Sharia
Comparative Law	Laws of war	***Jewish law (Halakha)***
Constitutional Law	War Crimes Law (Belgium)	Hebrew law (Mishpat Ivri)
Contract Law	**International Law (Public)**	Talmud
(Consuetudinary law)	Diplomatic Relations	Taqlid
Obligations	Jus Gentium	***Christian (other than Canon Law)***
Quasi-contract	Treaties Law	Twelve Tables
Corporations law	**Labor law**	**Roman Law**
Criminal Law	Law and economics	**Sacred text**
Organised Crime	**Law and literature**	**State of Emergencies Laws**
Criminal Procedure	**Medical Law**	**Space law**
Cyber Crime Law	Public Health Law	**Tax law**
Penal law	Public Law	**Technology law**
Cyber law	Malpractice	**Torts Law**
Election law	Mental health law	Quasi-delict
Environmental law	**Military law**	**Trusts and estates Law**
European Law	**National Legal Systems -** (Laws of any national legal system that is not of a precise category)	Liens
Evidence Law	Nationality and naturalisation Laws	**Water law**
	Natural law	**Zoning**
	Philosophy of Law	

Free World Publishing is a partner of the Free European Collegium, provider of web-based, e-learning education in matters related to the European Union.

All mail correspondence can be made with the editorial board at 82-146 Stewart Street, Ottawa, Ontario, K1N 6J7 Canada, while electronic correspondence can be made through FLJ@FWPublishing.net .

Cited as (2007) 3(2) Free L. J.

ISSN 1712-9877

FREE LAW JOURNAL SUBMISSION GUIDELINES

Important. The following is not meant to discourage from submitting; only to ensure quality. If your article conforms to your own national standard of writings, we accept all and any format as long as arguments are justified by footnotes or endnotes. Never hesitate to submit an article : if there is a need for improvement, we will inform you and we will always remain open for re-submissions.

1. Academics, Post-Graduate Students and Practitioners of law are all welcomed to publish their book reviews, comments, notes and articles.

2. All legal subjects are considered for publication, regardless of the legal tradition, national or international field of expertise. The only limit to the extend of our publishing would be content that is illegal in national legislation (i.e. enticement to hatred) or against international norms (i.e. promoting genocide).

3. Articles are welcomed in English, French, Bosnian, Bulgarian, Croatian, Czech, Finnish, German, Greek, Hungarian, Icelandic, Innuktikut, Italian, Latin, Polish, Portuguese (both Brazilian and European), Romanian, Russian, Serb (both Latin and Cyrillic), Slovenian, Spanish and Turkish. Note that our staff is limited and therefore we use "Word Recognition Processors" to communicate in some languages. Nonetheless, this does not prevent understanding articles submitted in these language and we are not interested in measuring every word of your article: simply in publishing your writings. Therefore, we will review the general content, but leave with you the precise sense and meaning that you want to convey in your own language. If translation is desired by the author, we then submit it for translation to a translator.

4. Their is no defined system of reference (footnotes or endnotes) demanded. As long as you justify your argument through references (author and work), we accept all writings respecting your own national standards. Exceptions: For Canadians, the Canadian Legal Guide to Citation is recommended but not mandatory. For Americans, referencing is expected to be in accordance with Harvard University's The Bluebook, A Uniform System of Citation. Any breach of copyrights is the sole responsibility of the author.

5. The author retains the copyrights to his or her writings. As articles are unpaid for, ownership remains within your hands. We act as publishers and caretaker. Nothing prevents you from publishing elsewhere. You may even decide to have the article taken off this site if another publisher desires to buy the rights to your article.

6. We reserve ourselves the right to edit the content or length of the article, if at all necessary.

7. We do not discriminate in any way. Our aim is to bring under one roof perspectives from everywhere and everyone. Never hesitate to submit.

8. If you desire information or desire to submit, do not hesitate to contact us at : FLJ@FWPublishing.net.

EDITORIAL

Welcome to the last number of the second volume of the Free Law Journal, a print and electronic journal aiming at promoting respect of the rule of law and the fair application of justice everywhere through the sharing of juridical research.

The Free Law Journal's first issue was a definitive success in terms of scope and reach, registering a very high volume of consultation on the web and orders of paper copies. This signals a definitive interest in getting to know the legal research produced everywhere and to share this knowledge.

As such, this permits us to reach our first and foremost objective to promote the rule of law. Knowledge is definitely part of the application of this objective and we see a clear desire from people all over the world to gain access to this knowledge in order to foster the fair application of justice for all.

Therefore, welcome and we hope that our contributions to legal research and knowledge will expand through your written contributions.

Sincerely,

Louis-Philippe F. Rouillard
Editor-in-Chief, Free World Publishing Inc.

A PARLIAMENT ON A WRONG TRACK: THE PRACTICE OF PARLIAMENTARY INQUIRY BY THE TURKISH PARLIAMENT

DR. OZAN ERGÜL[1]

ABSTRACT

No one would have imagined that the setting up of a parliamentary inquiry committee in the Turkish Grand National Assembly (TGNA) on 7 December 2005 assigned to "investigate the events that happened in Hakkari central province and cities of Yüksekova and Şemdinli" would underpin one of the deep political and judicial crises ever lived in Turkey. Complicated events that culminated in the disbarment of a public prosecutor underpinned the criticisms arguing the incompatibility of a parliamentary inquiry with a continuing judicial investigation on the same subject or event.

1. Conceptual Framework and Regulations Concerning Parliamentary Inquiry

Parliaments are accepted as rendering at least two basic functions. While legislation is one of them, the other is the control of the executive branch.[2] The Turkish Constitution of 1982 is not an exception to this understanding of the parliamentary functions and stipulates both functions. Apart from the legislative function, the supervisory powers of the

[1] Ph.D., Ankara University School of Law, Department of Constitutional Law

[2] KLAUS VON BEYME, PARLIAMENTARY DEMOCRACY 72 (Macmillan Press 2000).

Parliament over the executive are regulated in Articles 98, 99 and 100 of the 1982 Constitution.

In the first paragraph of Article 98 of the 1982 Constitution, "*questions*" that may be asked to Prime Minister and the Ministers are regulated which is placed under the heading "*Ways of Collecting Information and Supervision by the Turkish Grand National Assembly*".[3] In the second paragraph of this article "*parliamentary inquiries*" are regulated and the third paragraph is designated for "*general debates*". In the subsequent Articles 99[4] and 100[5] of the Constitution, "*motions of censure*" and "*parliamentary investigations*" are stipulated respectively.

---

[3] Article 98 of the Constitution reads as follows:

The Turkish Grand National Assembly shall exercise its supervisory power by means of questions, parliamentary inquiries, general debates, motions of censure and parliamentary investigations. A question is a request for information addressed to the Prime Minister or ministers to be answered orally or in writing on behalf of the Council of Ministers.

A parliamentary inquiry is an examination conducted to obtain information on a specific subject.

A general debate is the consideration of a specific subject relating to the community and the activities of the state at the plenary sessions of the Turkish Grand National Assembly.

The form of presentation, content, and scope of the motions concerning questions, parliamentary inquiries and general debates, and the procedures for answering, debating and investigating them, shall be regulated by the Rules of Procedure.

[4] Article 99 of the Constitution reads as follows:

A motion of censure may be tabled either on behalf of a political party group, or by the signature of at least twenty deputies.

A motion of censure shall be circulated in printed form to members within three days of its being tabled; inclusion of a motion of censure on the agenda shall be debated within ten days of its circulation. In this debate, only one of the signatories to the motion, one deputy from each political party group, and the Prime Minister or one minister on behalf of the Council of Ministers, may take the floor.

Together with the decision to include the motion of censure on the agenda, the date for debating it will also be decided; however, the debate shall not take

For the aim of conceptual clarification, first the difference between the *"parliamentary inquiry"* and *"parliamentary investigation"* should be set forth.[6] *"Parliamentary*

---

place less than two days after the decision to place it on the agenda and shall not be deferred more than seven days.
In the course of the debate on the motion of censure, a motion of no-confidence with a statement of reasons tabled by deputies or party groups, or the request for a vote of confidence by the Council of Ministers, shall be put to the vote only after a full day has elapsed.
In order to unseat the Council of Ministers or a minister, an absolute majority of the total number of members shall be required in the voting, in which only the votes of no-confidence shall be counted.
Other provisions concerning motions of censure, provided that they are consistent with the smooth functioning of the Assembly, and do not conflict with the above-mentioned principles are detailed in the Rules of Procedure.

[5] Article 100 of the Constitution reads as follows:
Parliamentary investigation concerning the Prime Minister or other ministers may be requested through a motion tabled by at least one-tenth of the total number of members of the Turkish Grand National Assembly. The Assembly shall consider and decide on this request with a secret ballot within one month at the latest.
In the event of a decision to initiate an investigation, this investigation shall be conducted by a commission of fifteen members chosen by lot on behalf of each party from among three times the number of members the party is entitled to have on the commission, representation being proportional to the parliamentary membership of the party. The commission shall submit its report on the result of the investigation to the Assembly within two months. If the investigation is not completed within the time allotted, the commission shall be granted a further and final period of two months. At the end of this period, the report shall be submitted to the Office of the Speaker of the Turkish Grand National Assembly.
Following its submission to the Office of the Speaker of the Turkish Grand National Assembly, the report shall be distributed to the members within ten days and debated within ten days after its distribution and if necessary, a decision may be taken to bring the person involved before the Supreme Court. The decision to bring a person before the Supreme Court shall be taken by a secret ballot only by an absolute majority of the total number of members.
Political party groups in the Assembly shall not hold discussions or take decisions regarding parliamentary investigations.

[6] Although we prefer the term *"parliamentary inquiry"* for the measure regulated in the second paragraph of Article 98 of the Constitution, we should

investigation" is a powerful supervisory measure of the parliament over the Council of Ministers, and in certain ways, parliamentary investigation as regulated in the Turkish Constitution, resembles the impeachment in the United States.

The aim of the investigation sustained by a special committee is to ascertain the criminal responsibility of the Prime Minister or individual ministers, and at the end of the investigation General Assembly decides whether or not to impeach the Prime Minister or the ministers concerned. Prime Ministers and individual ministers may be impeached because of the misgivings and offences, which are in relation with their offices. In case the Assembly impeaches a minister, the Constitutional Court *(Yüce Divan)* tries him/her.[7] This quasi-judicial investigation procedure quite resembles the one stipulated in Article 44 of the German Constitution, as both Constitutions pave the way for a criminal investigation procedure carried on by special parliamentary committees.[8]

---

note that there is not a consensus on the terms used for indicating the two parliamentary powers as *"parliamentary inquiry"* and *"parliamentary investigation"* in English. For instance, ÖZBUDUN prefers the term *"parliamentary investigation"* for the measure defined as *"an examination conducted to obtain information on a specific subject"* in the second paragraph of the Article 98. (Ergun Özbudun, *Constitutional Law* in INTRODUCTION TO TURKISH LAW 36, T.ANSAY and D. WALLACE (eds.) (Kluwer Law International, Fifth Ed., 2005). However, in the official translation of the Turkish Constitution which can be reached from the website of TGNA at <www.tbmm.gov.tr> the term *"parliamentary investigation"* is used for the power of the Parliament regulated in Article 100 of the Constitution.

[7] Vahit Bıçak & Zühtü Aslan, *Constitutional Law: Turkey* in INTERNATIONAL ENCYCLOPEDIA OF LAWS 85, R. BLANPAIN (Gen. Ed.) (Kluwer Law International, offprint, 2004); Özbudun 36 (2005).

[8] Volker Röben, *Federal Constitutional Court Defines the Power of Parliamentary Minorities in the Constitutionally Established Parliamentary Committees,* Para. 2 &3 HTML Offprint from: German Law Journal web site www.germanlawjournal.com (2002).

On the other hand, as regulated by the Constitution, "*a parliamentary inquiry is an examination conducted to obtain information on a specific subject*" (para.2 of Article 98). Apparently, there seems to be no limit for performing a parliamentary inquiry in terms of subject matters. However, a parliamentary inquiry shall be relevant either to the legislative or control function of the parliament.[9] This is not only important for illustrating the nature of the parliamentary inquiry, but also for protecting the border between the two powers of the state, i.e. legislative and judicial powers. Therefore, theoretically, any parliamentary inquiry pursuing such goals unrelated with these two specific functions of the Parliament is not acceptable. For instance, a parliamentary inquiry aiming the questioning of a judicial discretionary power or a judgment is not in the scope of parliamentary inquiry. However, in the second part of this work, we will deal with the problem of compatibility of "*parliamentary inquiry*" with judicial investigation, especially when these are continued concomitantly and on the same subject or event.

When coming to the regulations of the Standing Orders of the Parliament (Articles 104 and 105 of the Standing Orders), first we should note that the relevant provision (para.3 of Article 104) refers to the regulations concerning "*general debate*" for the procedure initiating a parliamentary inquiry. According to the relevant provision, the government, the political party groups in the TGNA or at least twenty deputies may submit a motion for "*parliamentary inquiry*". General Assembly holds the power to say the last word on the founding of a parliamentary inquiry upon such a motion. In case the Assembly accepts the motion, a parliamentary inquiry committee is to be established which reflects the composition of the incumbent parliament.

[9] ERDAL ONAR, MECLİS ARAŞTIRMASI [Parliamentary Inquiry] 6-8 (Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara, 1977).

Indeed, there is not so much to tell as to the powers of the inquiry committees. In Article 105 of the Standing Orders, some state authorities are enumerated, for instance, local governments, universities, banks and professional organizations, which the "*inquiry committee may require information from*". Inquiry committees may also consult specialists pursuant to Standing Orders (para. 4 of Article 105). However, "*state and commercial secrets are out of the jurisdiction of the committees*" (para. 5 of Article 105). There is no regulation in the Standing Orders or in any other special law, empowering the inquiry committees with subpoena power or with any other power that would be conceived as an intervention to the individuals' rights. On the other hand, Turkish committees enjoy no measures like the "contempt of Parliament" or "contempt of Congress" unlike its counterparts in Britain and USA. Therefore, it is not surprising to hear that some people conform to the invitation of the parliamentary inquiry committees, "only because they respect the courtesy rules". However, the administrative officials seem to be obeying to the invitations of these committees, probably thanks to some degree of intimate coercion.

In the Standing Orders, a time limit is also envisaged for the parliamentary inquiry committees. According to the Standing Orders, "*inquiry committee shall finish its report within the three months*" and "*a committee which can not finish its work within three months may be granted a final one month for finishing its report*" (para. 2 of Article 105).

The loose character of the powers that are vested in the inquiry committees should not mislead one to conclude that parliamentary inquiries are totally aimless. As to the importance of parliamentary inquiries in making legislation, it should not be ignored that all the deputies do not have sufficient information for proposing a bill or for performing a better parliamentary debate during the legislative procedure over a bill. Therefore, a parliament may well feel the need for gaining information on a

specific subject, so that a better legislation may be proposed or more useful debates may be sustained in order to make the legislation better during the parliamentary debates that take place both at the parliamentary commissions and at the General Assembly. The need of gaining information for prospective legislations has been the main reason for most of the parliamentary inquiries.[10] Undoubtedly, the parliament may choose to gain information not only for making a decision on the need of a prospective legislation, but also to see if there is a necessity for amending an existing legislation.

The other case that the Parliament would need to initiate a parliamentary inquiry is the situation where the parliament performs its supervisory authority over the executive body. In the event that the parliament considers a negligence or misconduct of the Council of Ministers related with a public service or a public policy, the parliament may initiate a parliamentary inquiry in order to gain information on the issue. This would make it possible for the Parliament to decide on the faith of the executive body by way of an interpellation (motion of censure). Although a committee report indicating to the deficiency of the executive body has no direct effect on the faith of the Council of Ministers

[10] Mentioning some subjects of the parliamentary committees assigned to carry out inquiries during the previous term of the Turkish Parliament (the 22nd term) would be interesting. The subjects to be investigated can also be assessed as a proof to show that how the inquiries might help to shape the legislative incentives: "*The Inquiry Committee Assigned To Investigate The Reasons, and the Social and Economic Dimensions of Corruption and to Determine the Preventive Measures To Be Taken*", "*The Inquiry Committee Assigned to Investigate The Problems Of The Citizens Living Abroad and To Determine The Preventive Measures To Be Taken*", "*The Inquiry Committee Assigned To Investigate the Parliamentary Immunity*", "*The Inquiry Committee Assigned To Investigate The Problems of Potato Farmers and Producers, and To Determine The Preventive Measures To Be Taken*", and lastly "*The Inquiry Committee Assigned To Investigate The Effects of Fuel Smuggling To The People, Environment and Economy and To Determine The Measures To Be Taken*".

as a whole or of the individual ministers, such a report might be the first step of an interpellation motion which would end the office of the incumbent Council of Ministers.

Even the acceptance of the legislative and the control functions of the Parliament as the sole reasons for initiating a parliamentary committee can not prevent the emergence of concerns regarding the compatibility of parliamentary inquiry with a judicial investigation where the subject of these two are identical. In other words, theoretically a parliamentary inquiry can be initiated on a subject, on which a judicial investigation is already commenced.

In cases where such a judicial procedure is initiated, parliamentary inquiry can also be set up only depending on the condition that parliamentary inquiry shall conform to the aim of gaining information for a prospective legislation or fulfilling its supervisory power over the executive body. The parliamentary committee shall neither question the judicial investigation, nor put himself in the place of judiciary when investigating the subject or the event. However, this is not something that can be avoided easily, especially, in cases where a judicial procedure is initiated for investigating a criminal event. In these cases, however, the constitution stipulates further regulations in order to prevent the intervention of the parliament to the use of judicial powers, but this time in the name of protecting the independence of the judiciary.

2. Likely Coincidence of a Parliamentary Inquiry and a Judicial Investigation. Rules for Co-existence?

The general understanding that a parliamentary inquiry shall be commenced either for the aim of gaining information for prospective bills or for controlling the government, actually, has been a reply to the concerns that expressed the probable

coincidence of a parliamentary inquiry with a judicial investigation on the same subject or event.

The 1982 Constitution, like its predecessor 1961 Constitution, has provisions in order to prevent such conflicts between the legislative body and the judiciary. Undoubtedly, such an aim is also useful in protecting the principle of separation of powers and independence of the judiciary. Since the influence of the political actors on the judiciary is a likely event, such provisions may be considered as more than essential. Being aware of this fact, the framers of the 1982 Constitution has put specific provisions in the third paragraph of Article 138 of the Constitution which regulates the "*Independence of the Courts*". The third paragraph of Article 138 reads as follows: "*No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial.*"

Apparently, such a provision seems to be preventing almost all legislative activities aiming to gain information on specific subjects when they overlap with the use of judicial power. The first attempt to clarify the content of this provision was made by the Constitutional Court in 1970. This judgment of the Court has been accepted as determining the borders between the judicial power and the parliamentary activities. With this judgment, the Court had found the setting up of an 'investigation' committee compatible with a judicial procedure ongoing concomitantly, of course depending on some conditions. Since the 1982 Constitution has the same provision as the former Constitution of 1961, this judgment of the Court still deserves attention. However, we should note that the number of the relevant Article was 132 in 1961 Constitution.

According to the Constitutional Court: "*The provision set forth in the third paragraph of Article 132 only forbids to ask questions, hold debates or make statements in relation with the exercise of judicial power concerning a case under trial. In other words, the*

limits set for the legislative debates determined by the third paragraph are only about the use of judicial powers that are exercised concerning a case under trial. (...) The Constitution is harmonious as a whole. Some provisions of the Constitution shall neither be conceived as hindering the functions of other provisions or failing them. Therefore, the legal opinions claiming that a provision aiming the protection of the independence of the courts obstruct the constitutional supervisory powers and the judicial duties of the Turkish Grand National Assembly are not acceptable."[11]

Although the subject of this judgment was a *"parliamentary investigation"*, the rationale of the decision is valuable for the ones struggling to draw a plausible line with the parliamentary activities and judicial investigations including *"parliamentary inquiries"*.[12] Those who followed the rationale of the Constitutional Court claimed that a parliamentary inquiry might well be compatible with an ongoing judicial investigation even though they aim to investigate the same subject or event.

In addition, some arguments can be found in support of this understanding during the debates that took place in the Assembly of Representatives that drafted the 1961 Constitution. Some of the representatives insisted that incorporating the phrase as *"exercise of judicial power"* into the relevant Article 132 of the 1961 Constitution (counterpart of Article 138 in the 1982 Constitution)

---

[11] Judgment of the Constitutional Court, 18 July 1970, E. 1970/25, K. 1970/32, Journal of the Constitutional Court Judgments, Vol. 8, pp. 360-361. Since the case was on a controversy related to a "parliamentary investigation", but not a "parliamentary inquiry", the Court mentions about the use of "judicial duties" of the Parliament.

[12] ONAR, *supra* note 9, at 100-101; ŞEREF İBA, ANAYASA VE SİYASAL KURUMLAR [Constitution and Political Institutions] 104 (Turhan Kitabevi, Ankara, 2006); Habip Kocaman, *Yargıya İntikal Eden Olaylarda Yasama Kısıtı [Legislative Constraints on the Events Before Judiciary]*, 1 Yasama Dergisi 5, 14-17 (2006).

is more convenient, in order to create room for parliamentary activities, including "questions, general debates and making statements". According to these representatives, if only the term "*a case under trial*" had been accepted as the criteria for determining the limits for parliamentary activities, there had been hardly anything that the parliament could do for the events on which a judicial trial had been started.[13]

At this point, the terms "*judicial power*" and "*a case under trial*", as they appear in the relevant Article 138, needs further elaboration. For this aim, the position of the procuracy and its investigative powers should be clarified in comparison with the judiciary. In Turkish context the structural foundation of the procuracy is controversial, but elaboration of this controversy stands beyond the purpose of this work. However, when trying to figure out the position of the procuracy, a relation may be built in support of the independence of the procuracy like the one granted to judiciary. In Turkish law system, prosecutors hold the monopoly of accessing to courts in the criminal law matters, like in many other law systems.[14] Therefore, any influence exercised on the procuracy, which holds the duty to investigate the criminal event pursuant to criminal law procedure, would culminate in an affected judicial trial. So, any attempt exercised to influence the procuracy would make the independence of the judiciary meaningless. Now, we can briefly survey the controversial events that underpinned the parliamentary inquiry, as applied by the Parliament.

3. The Crises Underpinned by the Activities of a Parliamentary Inquiry Committee

[13] Kocaman, *supra* note 12, at 11-14.

[14] Anne van Aaken & Eli Salzberger & Stefan Voigt, *The Prosecution of Public Figures and the Separation of Powers. Confusion within the Executive Branch-A Conceptual Framework*, 15 Constitutional Political Economy 261, 262 (2004).

It had been only a while since the bombings in Hakkari and Yüksekova had occurred when a bookseller owned by a former PKK[15] member was bombed on 9 October 2005. TGNA, considering the shocks caused by the bombings, decided to set up an inquiry committee in order *"to investigate the events that happened in Hakkari central province and cities of Yüksekova and Şemdinli"* upon the proposal of some deputies from the opposition parties, namely Peoples' Republican Party and Motherland Party. Pursuant to the decision of the General Assembly, an inquiry committee was established on 23 October 2005 and it started to work on 7 December 2005. However, at the same time Chief Prosecutor of Van province that had the jurisdiction of investigation, started investigating the same event, and Public Prosecutor Ferhat Sarıkaya was assigned to investigate the bombing event in Şemdinli. There were two suspects caught, two noncommissioned officers, in relation with the bombings of the bookseller.

The two investigations, i.e. investigation by the parliamentary inquiry committee and the judicial investigation by the public prosecutor, were continuing concomitantly. At the beginning there was no opposition to the establishment of a parliamentary inquiry committee. However, when the prosecutor disclosed his indictment on 3 April 2006 a shock wave surrounded the country. First, the prosecutor accused the Commander of the Land Forces for forming a criminal gang. According to the prosecutor, "illegal group's activities included blowing up the bookstore in Şemdinli with the aim of provoking the government into blocking further freedoms for Kurds, thus jeopardizing EU membership talks".[16] However, the accusations were reportedly based on the testimony of a single person. Second, the only witness, on whose testimony the accusations were grounded, had also appeared previously in

[15] A Separatist Kurdish Terrorist Organization.
[16] *Court says senior officers involved in Şemdinli Bombing*, Turkish Daily News, 19 July 2006.

the parliamentary inquiry committee as a witness. Third, accusations for Land Forces Commander had hardly any relation with the events that were under investigation, i.e. bombing of a bookseller. Additionally, because the commander and the other army officers were subject to special criminal procedure, the accusations related with them should be sent to the Office of the General Commander in Chief. Fourth, the indictment was one hundred pages long and it contained some parts that dealt with the problems of Turkish politics, like consolidation of democracy, with explanations referring to center-periphery dichotomy, a term used in political science. Looking at the indictment, some lawyers even claimed that the prosecutor did not write the indictment himself, and an expert of political science should have written at least some parts of it.[17]

On the other hand, the relation between the parliamentary inquiry committee and the prosecutor became obvious, parallel to the growing tension of controversies. The members of the inquiry committee, who represented the opposition parties, accused the Chair of the Committee, who was a member of the majority party, for supplying the prosecutor some documents without the consent of the Committee members or informing the Speaker of the Parliament. The Chair confessed that he had done so, but claimed that it was within his discretion. Additionally, he claimed that the prosecutor had demanded the documents.[18] Actually, there is no rule in the Constitution or Standing Orders that ensure the confidentiality of the activities of the Committee. The

---

[17] *Savcı Kendisi Yazmalıydı [The Prosecutor Should Have Written It Himself]*, interview with Criminal Law Professor Uğur ALACAKAPTAN, Milliyet (Daily News Paper), 3 April 2006. Some journalists also share this opinion. For instance, Cüney Ülsever wrote, "the part of the indictment that has Büyükanıt's name is so disjointed from the rest of the text that it is obvious it was attached afterwards", see *It is not the prosecutor who is punished*, Turkish Daily News, 25 April 2006.

[18] *Tutanak Skandalı [The Records Scandal]*, Milliyet (Daily News Paper), 9 March 2006.

most important one of these documents was the records of a witness, who accused the Land Forces Commander before the Committee. This witness was invited to the committee by a majority member to supply information. However, in his testimony, there was hardly anything related to Şemdinli bombing. What makes his testimony interesting is that he also gave a testimony to the prosecutor, and some parts of his testimony were incorporated in the indictment which paved the way for accusing the army officers. When the relation between the Chair of the Committee and the prosecutor was proved many people accused the prosecutor for acting politically and therefore abusing his authority.

Another Consequence of this relation between the parliamentary committee and the procuracy happened to be the questioning of the nature of the parliamentary inquiry. Minister of Justice Cemil Çiçek[19] and Deputy Prime Minister Mehmet Ali Şahin[20] claimed that a parliamentary inquiry was incompatible with an ongoing judicial investigation on the same event and therefore the parliamentary committee should be abolished. Comments on the event also came from the judiciary side. The incumbent Chief General Prosecutor Nuri Ok accused the prosecutor of the Şemdinli case for acting improperly and being politically biased.[21] The former General Prosecutor Sabih Kanadoğlu also accused the prosecutor for violating his authorities and claimed that no parliamentary inquiry shall be initiated to investigate an event, which is already under the investigation of judicial authorities including the preliminary investigation of procuracy.[22]

[19] *Çiçek: Komisyon doğru değil [Çiçek: The Committee is Improper]*, Milliyet (Daily News Paper), 8 March 2006.
[20] *Şahin'den savcı ve komisyona uyarı[Warning for the prosecutor and the committee from Şahin]*, Milliyet (Daily News Paper), 11 March 2006.
[21] *Ok'tan sert çıkış [Severe Reaction from Ok]*, Milliyet (Daily News Paper), 8 April 2006.
[22] *Yargının işlevine saldırı var [There is an attack against the function of the judiciary*], Milliyet (Daily News Paper), 26 March 2006.

Additionally, the incumbent Chief Judge of Council of State[23] and the former Chief Judge of Supreme Court of Appeals Sami Selçuk[24] set forth that the way the prosecutor acted would not be approved.

On the other hand, there were people who supported the acts of the Chair of the Committee and the prosecutor. Among these one deserves mentioning who is the Speaker of the Parliament Bülent Arınç. He said, in one of his declarations, that there was nothing improper with the parliamentary inquiry committee.[25]

Although the contribution of the political actors to this scandalous event was obvious, only the public prosecutor had to pay the price. On 20 April 2006, Supreme Board of Prosecutors and Judges disbarred prosecutor Ferhat Sarıkaya upon the report of the Inspectors of the Justice Ministry Inspections Board.[26] The disbarment decision was taken six against one vote and among the others it is understood that the prosecutor was found guilty for acting on purpose and abusing his authority.[27] The prosecutor's appeal to the disbarment was rejected and his disbarment became final on 8 October 2006.

Meanwhile, Van court found the noncommissioned officers guilty and sentenced to prison for thirty-six years. The events that took place in relation with the Şemdinli case have been an issue of interest also for the politicians of European Union (EU). This is

---

[23] *Bu iddianameyi tasvip etmek mümkün değil [It is impossible to approve this indictment]*, Milliyet (Daily News Paper), 9 March 2006.
[24] *Former top judge calls for change of mentality in judiciary*, Turkish Daily News, 14 June 2006.
[25] *Arınç: Hukuka aykırılık bulunmuyor [Arınç: There is nothing illegal]*, Milliyet (Daily News Paper), 10 March 2006.
[26] *So, Sarıkaya is sacked* and *Van Prosecutor Disbarred for Büyükanıt Indictment*, Turkish daily News, 21. April 2006.
[27] *Olay Savcıya İhraç [The prosecutor is disbarred]*, Milliyet (Daily News Paper), 8 April 2006.

not a surprise as Turkey has started off for the EU membership process. The EU side was especially concerned with the position of the military in the Turkish politics and were expressing that this was something degrading for the Turkish democracy. Therefore, the verdict of the court sentencing the officers pleased the Turkey-EU Parliamentary Committee Joint Chairman Joost Lagendijk. In addition, Lagendijk expressed that they "hoped to see those individuals and institutions behind the guilty would be tried, too."[28] However, the General Prosecutor of Supreme Court of Appeals challenged the court's decision on the grounds that "the decision was based on a deficient investigation and violation of judicial procedure".[29] Pursuant to criminal procedure law, 1st Division of Supreme Court of Appeals will asses the merits of the prosecutor's argument.

Whatever the final decision on the case will be, it is a fact that the only one who should pay the price should not be the public prosecutor. However, the actors of the other side of this event were composed of politicians and nothing could be done for them. Therefore, although his abuse has been verified, arguments set forth for the clarification of the aim of this heavy penalty given to the prosecutor deserves attention. According to one journalist, namely Cüneyt Ülsever, "it was not the prosecutor who was really punished that day but the government itself, which was believed by some to be involved in a conspiracy against Land Forces Commander General Yaşar Büyükanıt". We should note that, Büyükanıt against whom an organized opposition was carried on, became the General Commander in Chief of the Armed Forces in last August.

The parliamentary inquiry committee gave its report to the Speaker of the Parliament on 18 April 2006. It is interesting

[28] *Officers Sentenced to 39 Years,* Turkish Daily News, 21 June 2006.
[29] *Top prosecutor challenge court's Şemdinli Ruling,* Turkish Daily News, 17 October 2006.

though that, the committee stated in the draft report that they assess the struggle of the public prosecutor to accuse the commanders as a "fantasia."[30]

CONCLUSION

The Şemdinli case proves that the present line drawn theoretically for the "*parliamentary inquiry*" falls short to prevent the intervention of political actors to the judicial process. However, drawing a clear line is also a very hard task. On the other hand, when there is a continuing criminal investigation, it is not plausible to claim that parliamentary inquiry may be continued without any intervention to the use of judicial power. Since "judicial power" is a wide term in the sense it is used in the criminal procedure, it is hardly possible if not impossible to imagine any attempt of a parliamentary committee that would not be conceived as an intervention to the use of judicial power. For instance, inviting someone who would also give testimony as a witness to the prosecutor would plausibly create pressure on that witness. Additionally, while setting up inquiry committees for some criminal events and not doing so for many others would cause the judiciary to assume the likely pressure of political figures.

In conclusion, we propose that Standing Orders of the Turkish Parliament should be amended as soon as possible to prevent such controversies in the future. In this regard, the Rules of Procedure of the French National Assembly would be inspiring for two reasons. First, according to the procedural rules of the French Assembly concerning parliamentary inquiries, a parliamentary inquiry may be commenced only on matters concerning public service or the conduct of state enterprises.

[30] *Komutanı Suçlamak Fantezi [It is a fantasia to accuse the commander]*, Milliyet (Daily News Paper), 12 April 2006.

Undoubtedly, this regulation restricts the issues for parliamentary inquiry and therefore hinders the coincidence of a parliamentary inquiry with a judicial investigation. Second, Minister of Justice is informed on the motions of inquiry. In case a judicial investigation is commenced on the same facts as this inquiry, the committee shall terminate its assignment upon the informing of the Speaker of the Parliament.[31]

After the experience of Şemdinli case, a legal framework like the French rules would be more protective for the independence of the judiciary in the Turkish context. This would not be useful only for preventing the intervention of the political figures to the judicial power, which put the independence of the judiciary in jeopardy, but would also prevent judicial figures from pursuing political aspirations.

[31] France: Parliament, Olivier JOUANJAN, in CONSTITUTIONAL LAW-INTERNATIONAL ENCYCLOPEDIA OF LAWS, Prof. Dr. A. ALEN (ed), 147 (Kluwer, 1999, Volume 3). The relevant provisions are envisaged in Articles 145-2 and 145-3 of the Rules of Procedure of French National Assembly, which can be reached at the official web site of Assembly at http://www.assemblee-nationale.fr.

JUVENILE JUSTICE SYSTEM IN TURKEY

DR. DEVRIM GÜNGÖR* &
GÜNEŞ OKUYUCU ERGÜN **

INTRODUCTION

The matter of how children committing crime are to be tried in our country has been addressed by various laws that are general and private in nature. The reason for these children to be subjected to a separate trial and punishment regime is that protection of these people against the adverse effects of the trial process and getting the society win them again is more important than it is for others.

The Act of Child Protection (will be hereinafter briefly referred to as ACP) numbered 5395 was issued with the aim of meeting the requirement to protect and to secure the rights of the children who need protection as well as those dragged to committing crime.

In terms of the Turkish law, a child is a person, who has not completed the age of 18. Again, in the Turkish Criminal Code (will be hereinafter briefly referred to as TCC), the lower limit for criminal liability has been determined to be twelve years of age.

*** Research Assistant at Ankara University, Turkey, Faculty of Law, Department of Criminal and Criminal Procedure Law; Ph.D in Criminal Law at Ankara University, Turkey; LLM in Criminal Law at Ankara University, Turkey; LLM in International Criminal Law at University of Teramo, Italy.**

**** Research Assistant and Ph.D Candidate at Ankara University, Turkey, Faculty of Law, Department of Criminal and Criminal Procedure Law; LLM in Criminal Law at Ankara University, Turkey.**

According to this, a person who had not completed the age of twelve at the time s/he committed the crime, does not have any criminal liability. However, the security measures stipulated in the ACP may be decided to be applied about these persons who do not have criminal liability. Within this context, child adjudication, in principle, covers the trial procedures applied to persons between the ages of 12 and 18.

In this study, we will try to briefly address the matter of trying children in Turkish law in light of positive regulations.

I. Regulations Regarding Criminal Trials against Children

The ACP numbered 5395 and dated July 3, 2005, was enacted in order to regulate the procedures and principles concerning the protection of the children in need of protection or dragged to committing crime and the security of their rights and well being.

The said Act was prepared to replace the Act of Foundation, Jurisdiction and Procedure of Child Courts by annulment. Pursuant to article 2 of the currently effective ACP, which sets forth the scope of this Law, "This act covers the provisions concerning the procedures and principles regarding the measures to be taken about the children in need of protection and the security measures about the children, who are dragged to committing crime, and those related to the foundation, duties and authorities of child courts."

As it can also be understood from the above explanations, in principal, criminal trial procedures against children are aimed to be regulated in the ACP. However, article 42 of the ACP refers to the Code of Criminal Procedure (will be hereinafter briefly referred to as CCP), the Turkish Civil Code and the Code of Civil Procedure for situations about which no provisions are

stipulated in this act.

When the provisions of the ACP regulating the adjudication of children are examined, it is seen that these provisions only regulate the matter in general terms and they stipulate the application of the CCP, which is in the nature of a general code and which arranges the adjudication of adults, for details. Therefore, even though there is a separate law for regulating the procedures concerning the adjudication of children, since the subject law refers to the TCC, which regulates the adjudication of adults, for many situations, it is not possible to say that the regulations concerning the adjudication of children in terms of the Turkish law are stipulated by an entirely independent law.

II. MEASURES STIPULATED FOR CHILDREN THAT DO NOT HAVE CRIMINAL CAPABILITY OR CONSIDERED TO BE INCAPABLE OF COMMITTING CRIME

1. THE AGE OF CRIMINAL CAPABILITY

Pursuant to article 31 of the TCC, a child, who had not completed the age of 12 at the time s/he committed the crime does not have any criminal liability. No criminal prosecution may be initiated about these children; however, security measures unique to children may be applied.

If those children, who had completed the age of 12 however not the age of 15 at the time they committed the crime, cannot perceive the legal meaning and consequences of the crime they committed or if their ability to direct their behaviors have not sufficiently developed, they will not have any criminal liability. However, security measures unique to children may be applied about these children. In case of the existence of the perception about the legal meaning and consequences of the crime

committed and the ability to direct behaviors regarding the subject crime, a judgment for imprisonment from twelve to fifteen years, if the crime requires heavy life imprisonment punishment, and from nine to eleven years, if it requires life imprisonment, will be rendered for these persons. Half of the time to be served in other punishments will be deducted and in this situation, the duration of imprisonment penalty to be decided for each crime committed may not exceed seven years. About the children who had completed the age of 15 however not the age of 18 at the time they committed the crime, a judgment for imprisonment from eighteen to twenty four years, if the crime requires heavy life imprisonment punishment, and from twelve to fifteen years, if it requires life imprisonment, will be rendered. One third of the time to be served in other punishments will be deducted and in this situation, the duration of imprisonment penalty to be decided for each crime committed may not exceed twelve years.

2. MEASURES STIPULATED FOR CHILDREN THAT DO NOT HAVE CRIMINAL CAPABILITY

A. Security Measures Unique to Children; Protective and Supportive Measures

a. In General

As also stated above, even though criminal prosecution is not initiated about those younger than 12 years old, security measures stipulated as unique to children in the ACP may be applied. ACP stipulates in its article 11 that the *protective and supportive measures* provided in this act would be considered as security measures unique to children in terms of the children dragged to committing crime, who do not have criminal liability and sets forth the said protective and supportive measures in its article 5. According to this article, "Protective and supportive measures are those to be taken in

the subjects of consultancy, education, care, health and accommodation towards ensuring the protection of the child primarily in his/her own family environment." These have been stated in the 1st paragraph of article 5 as the "*consultancy measure*", "*education measure*", "*care measure*", "*health measure*" and "*accommodation measure*". Again in the same paragraph, each measure has been explained in sub-paragraphs.

b. Consultancy Measure

Pursuant to the act, the *consultancy measure* is the measure taken towards guiding people responsible for child care in child raising and children in solving their problems related to their education and development.

c. Education Measure

The *education measure* is a measure that aims to ensure that the child attends to either a daytime or boarding school; a vocational or art acquisition course with the aim of acquiring a job and a profession or that s/he is placed with a professional master or in enterprises belonging to the public or the private sector.

d. Care Measure

The *care measure* ensures that the child benefits from official or private care homes or foster parent services of is placed in one of these institutions in case the person responsible for looking after him/her cannot, for any reason whatsoever, fulfill this duty.

e. Health Measure

The *health measure* includes temporary or continuous medical care and rehabilitation services required for the protection and treatment of the physical and mental health of the child and providing treatment for those using addictive substances.

f. Accommodation Measure

With the *accommodation measure*, persons with children who do not have any place to live or pregnant women whose lives are at risk are provided with suitable shelters.

Pursuant to the 2nd paragraph of article 5, identities and addresses of those about whom accommodation measure is taken, will be kept confidential upon their request.

According to the 3rd paragraph of the said article, on the other hand, if it is determined that the child is not in danger or that even though s/he is not in danger, this danger can be eliminated through his/her parents or guardian or the person responsible for his/her care and protection, the child will be delivered to these persons. At the same time, one of the measures stated in the first paragraph may be decided about the child.

g. Urgent Protection

The Act specifies the institution of "*urgent protection*" in its article 9. According to this, in case a situation, where the child must be urgently taken under protection, exists, after the child is taken under care and protection by the Social Services and Child Protection Agency, the Agency applies to the judge of the child court in order for a decision of urgent protection to be taken within five days following the arrival of the child to the

Agency. The judge decides on the request within three days. The judge may decide in the direction of keeping the place where the child is placed confidential and establishing personal connection when necessary. A decision for urgent protection may be rendered provided that it is limited with a maximum of thirty days. During this period, the Agency conducts a social investigation about the child. If as a result of the investigation conducted, the Agency decides that a precautionary decision is not necessary, it will inform the judge about its decision in this direction and the services it will provide. Whether to deliver the child to his/her family or to take another measure that is deemed appropriate will be decided by the judge. If the Agency decides that a precautionary measure should be taken, on the other hand, it will request from the judge that a judgment in the direction of a protective and supportive measure be rendered.

B. Postponement the Initiation of the Public Prosecution and Suspension of the Announcement of the Judgment

a. In General

In addition to these, the ACP has stipulated two opportunities as the "*postponement of the initiation of public prosecution*" and "*suspension of the announcement of the judgment*" in its articles 19 and 23. In the existence of the conditions specified in the said articles, the initiation of public prosecution may be postponed or the announcement of the judgment may be suspension with the aim of preventing the adverse effects that could be caused by the prosecution or conviction decision about the children.

b. Postponing the Initiation of the Public Prosecution

Article 19 stipulates that in situations where the Act requires between and including three months and two years imprisonment or administrative fine for the subject crime, if the conditions specified in this article exist, initiation of the public prosecution may be postponed, however, in terms of the child who had not completed the age of fifteen at the time the crime was committed, the upper limit of this imprisonment will be applied as up to (and including) three years. According to the subject article, following the collection of evidence by the Public Prosecutor, if the conditions stipulated in the first paragraph this article exist altogether, it will be possible to postpone the initiation of public prosecution.

Conditions required by the law for postponement, on the other hand, are: 1) the child should not have been convicted from a intentional crime, previously, 2) the investigation conducted should lead to the belief that the suspect will refrain from committing another crime if the initiation of public prosecution is postponed, 3) the postponement of public prosecution should be more beneficial than its initiation in terms of the suspect and the society, 4) it should be possible for the loss incurred by the victim and the public as a result of the committed crime to be completely eliminated through refunding, returning to the condition before the crime or compensation. Pursuant to article 19, in order for the initiation of the public prosecution to be postponed, all of these conditions must exit together; in other words, according to article 19, these are cumulative conditions. Nevertheless, the ACP stipulates that the 4th condition specified above might not be sought for in case the economic status of the child or his/her family is not suitable.

Enforcement of the decision regarding the postponement of the public prosecution depends on its approval by the judge of the child court. Decision with this regard is given within five days.

The duration of postponement has been determined as 5 years in the ACP and it has been stipulated that if the child is not sentenced to imprisonment for a intentional crime s/he commits during this period, a decision stating that there is no need for a prosecution will be rendered. If, on the other hand, the child is sentenced to imprisonment for an intentional crime s/he commits during this period, then the public prosecution will be initiated. Statute of limitations will not be applied for the duration of the postponement.

Again, the 4th paragraph of article 19 states that decisions regarding the postponement of public prosecution will be recorded in a system established for these decisions, and these records may only be used for the purpose indicated in this article upon the request of the Public Prosecutor, the judge or the court in connection with an investigation or prosecution.

c. Suspension of the Announcement of the Judgment

Pursuant to article 23, if the punishment determined as a result of the trial held based on the crime with which the child is accused, is up to and including maximum three years imprisonment or administrative fine, the court may decide to suspend the announcement of the judgment. It is possible to appeal against this decision. Conditions sought for rendering a decision in the direction of suspension the announcement of the judgment, are: 1) the child should not have been convicted from a intentional crime, previously, 2) the belief that the child would not commit a crime again should have been established, 3) a judgment for punishment should be deemed unnecessary based on the personal characteristics of the child and his/her attitude and behavior during the hearing, 4) it should be possible for the loss incurred by the victim and the public as a result of the committed crime to be completely eliminated through refunding, returning to the condition before the crime or compensation. If the amount of the loss incurred by the

public cannot be determined, a sum of money in the amount to be deemed appropriate by the court will be deposited in the treasury of the Ministry of Finance at once. However, this condition might not be sought for in case the economic status of the child or his/her family is not suitable.

Pursuant to the 3rd paragraph of the same article, if a decision in the direction of suspension of the judgment is rendered, the child is subjected to a supervised freedom measure for a period of five years. During this period, it may be decided that the child attends to an education institution, is forbidden to go to certain places and obliged to attend certain places or fulfill another liability that may be deemed appropriate. The statute of limitations for the case stops during this period of supervision.

If the condition that requires the elimination of the loss incurred by the victim or the public cannot be fulfilled, suspension of the judgment may be decided by imposing one of the following obligations on the suspect during the term of his/her supervised freedom:

a) Complete removal of the loss incurred by the victim or the public as a result of the committed crime through payment in monthly installments.

b) If the amount of the loss incurred by the public as a result of the committed crime cannot be determined, depositing a money in the amount to be deemed appropriate by the court in the treasury of the Ministry of Finance in monthly installments.

If the child is not sentenced to imprisonment due to an intentional crime s/he committed and behaves in compliance with the obligations during the supervised freedom period, it is decided that the case be abated.

On the other hand, in case the child is sentenced to

imprisonment because of an intentional crime s/he committed or behaves contrary his/her obligations during the supervised freedom period, then the court announces the judgment it previously suspended. However, the court may deduct up to half the duration of the punishment determined about the child by taking the state of fulfilling obligations in consideration.

Decisions to suspend the announcement of the judgment will be recorded in a system established for these decisions, and these records may only be used for the purpose indicated in this article upon the request of the Public Prosecutor, the judge or the court in connection with an investigation or prosecution.

III. UNITS RESPONSIBLE DURING THE STAGES OF INVESTIGATION AND PROSECUTION IN CHILD ADJUDICATION LAW AND THEIR DUTIES

1. IN GENERAL

Foundation, duties and authorities of Child Courts have been specified in the first section of the 3rd part of the ACP and the duties and authorities of Public Prosecutors and the police and those of social workers have been given in the second and third sections of the same part, respectively.

2. CHILD COURTS

There are two types of Child Courts, namely *the Child Court* and *the Child High criminal court*.

A. THE CHILD COURT

Pursuant to article 25, the Child Court consists of a single judge. These courts are established in all provincial centers. In

addition, they may also be established in districts to be determined taking the geographical situations and work loads of regions, by obtaining the approval of the Supreme Council of Judges and Public Prosecutors. In places where it is required by the work load, more than one chamber of child courts may be established. These chambers are numbered. The Public Prosecutor does not attend the hearings held at child courts. Public Prosecutors, in places where these child courts are located, may appeal against the decisions of the subject courts.
In terms of the crimes covered in the field of the basic criminal court and the criminal court of peace, the child court handles the lawsuits to be filed about children who are dragged to committing crime.

B. THE CHILD HIGH CRIMINAL COURT

Child high criminal courts consist of a chairman and a sufficient number of members and these courts convene with the presence of the chairman and two members. These courts are established in places to be determined taking the geographical situations and work loads of regions, by obtaining the approval of the Supreme Council of Judges and Public Prosecutors. In places where it is required by the work load, more than one chamber of child high criminal courts may be established. These chambers are numbered.

The child high criminal court handles cases related to the crimes committed by children and covered within the duty area of the child high criminal court.

These courts and the judge are assigned to take the measures specified in this Act and other laws. Pursuant to article 26 of the ACP, public prosecutions initiated about children are heard in courts established with this Act as a rule. Exceptions to this rule have been specified in article 17. The situation where children commit crimes in participation with adults has been

stipulated in the said article 17 and this situation will be examined in detail below.

In compliance with the Act, judges and Public Prosecutors from among those educated in the field of child psychology and social services are appointed to work at child courts by the Supreme Council of Judges and Public Prosecutors. In such appointments, having been specialized in the field of child law constitutes a reason for preference and those, who volunteer and who have previously worked in such duties are considered in priority (art 28).

3. THE CHILD BUREAU

Article 29 stipulates the creation of a child bureau in chief public prosecutor's offices and appointment of sufficient numbers of Public Prosecutors from among those educated in the field of child psychology and social services by the Chief Public Prosecutor. Here again, having been specialized in the field of child law will be a reason for preference and those, who volunteer and who have previously worked in such duties will be considered in priority.

The child bureaus established as determined are assigned to work in collaboration with the relevant public institutions and organizations and nongovernmental organizations in order to carry out the investigation processes about the children dragged to committing crime, ensure that the required measures are taken without any delay, and to provide the necessary support services needed by the children, who are in need of protection, crime victims or dragged to committing crime, who need education, jobs or shelters or who suffer from adaptation problems and they are responsible for informing the institutions and organizations assigned to protect the children about such situations. In situations where delays will cause problems, these duties may also be performed by Public

prosecutors who are not assigned in the child bureau.

4. CHILD UNITS ESTABLISHED WITHIN THE POLICE FORCE

Security duties about children will be performed by child units to be established within the police force rather than general security forces. However, in situations where the performance of police duties concerning children by child units is not possible, this duty may also be performed by the units of the police force, which are responsible for security activities related to adults (art. 31)

When a process regarding the children who are in need of protection or dragged to committing crime is started, the child unit of the police, is obliged to inform the parents or guardian of the child or the person who is responsible for taking care of the child, the bar and the Social Services and Child protection Agency and the representative of the relevant institution if the child is staying at an official institution. However, relatives who are suspected to have abused or solicited the child in committing the crime will not be provided with information. When the child is at the police station, s/he is allowed to be accompanied by one of his/her relatives.

The personnel assigned in the child units of the police, are provided with training in subjects such as the child law, prevention of child crime, child development and psychology and social services, by their own institutions.

5. SOCIAL WORKERS

As required by article 33 of the ACP, the Ministry of Justice appoints sufficient numbers of social workers at courts from among those, who had at least four years of higher education.

Those who have master's degree in the field of children and family problems and child law and prevention of child crime will be preferred in this appointment. In situations where these social workers are nonexistent, there is an actual or legal obstacle preventing the performance of the duty by these workers or another specialty branch is required, employees of other public institutions and organizations or self-employed persons, who possess the qualities specified in the first paragraph may be appointed as social workers.

The duty of social workers is to immediately perform social investigation about the child they are assigned to, to submit the reports they prepared to the authority that assigned them, to be present while the statement of the child is taken or during his/her interrogation, and to perform other duties assigned by child courts and judges within the scope of this Law. Those concerned are obliged to provide assistance and information requested about the child during the works of social workers (ACP, art. 34).

What is meant by social investigation is an examination showing the individual characteristics and the social environment of children covered within the scope of this Act that is ordered to be performed by courts, judges or Public Prosecutors when necessary. The social investigation report is taken in consideration by the court while deciding on the ability of the child to perceive the legal meaning and consequences of the crime s/he committed and to direct his/her behaviors about this crime. If a social investigation about the child is not ordered by the child court or the judge, the grounds for not requesting such an investigation must be indicated in the judgment (ACP,art. 35).

Judges and Public Prosecutors to be assigned at courts as well as social workers and supervision officials working in the branch directorates of supervised freedom and assistance center, will be provided with training in subjects such as the

child law, social services, child development and psychology. Those appointed at courts will be provided with in-service training in order to help them get specialized in their fields and improve themselves. The personnel assigned in the child units of the police are trained in certain subjects such as the child law, prevention of child crime, child development and psychology and social services, by their own institutions.

IV. MEDIATION IN CHILD ADJUDICATION

Pursuant to article 24 of the ACP, mediation is possible related to the children dragged to committing crime for crimes, the investigation and prosecution about which depends on the filing of a complaint, those committed intentionally and require imprisonment or fine, the lower limit of which does not exceed two years or crimes committed by negligence. In terms of the children who had not completed the age of fifteen at the date of the crime, the lower limit of imprisonment punishment is applied as three years. Yet article 73 of the TCC introduces mediation only in terms of crimes, the investigation and prosecution about which depends on the filing of a complaint, and requires the condition that the victim of the crime is either real person or a private law legal personality. Whereas the ACP facilitates and expands the opportunity for mediation in crimes covered within the scope of this Act, by allowing mediation in terms of children for crimes committed intentionally and require imprisonment or fine, the lower limit of which does not exceed three years or crimes committed by negligence along with those, the investigation and prosecution about which depends on the filing of a complaint. This constitutes an important difference in terms of mediation opportunities provided to adults and children.

Since the ACP does not have a detailed provision about how the mediation will be realized, due to the general reference in article 42, to the CCP, provisions of the CCP will be applied

with this regard and thus article 24 of the ACP and articles 253 and 254 of the CCP, which stipulate mediation will have to be evaluated together.

Pursuant to the CCP, mediation is possible during both investigation and prosecution stages. During the stage of investigation, the mediation is realized by the Public Prosecutor and during the stage of prosecution; this duty is performed by the court.

Article 253 of the CCP regulates the procedure of the investigation to be carried out by the Public Prosecutor. According to this, depending on the state of the investigation and in situations where the Code allows for mediation, the Public Prosecutor invites the offender in compliance with the procedures stipulated by this Code and asks whether or nor s/he accepts the responsibility of the subject crime. If the offender accepts the crime and to pay the entire amount or a major part of the material and spiritual loss that arose from such crime or to correct the damages, the situation will be notified to the victim or his/her legal counselor, if any. If the victim states by his/her free will that s/he will reconcile when the entire amount or a major part of the loss s/he incurred is paid, then the investigation will not be continued.

In case the offender and the victim cannot reach an agreement in choosing an attorney, in order to direct the mediation processes between the offender and the victim and to ensure reconciliation between the parties by bringing them together, the Public Prosecutor will request from the Bar that one or more attorneys be appointed as mediators. The mediator finalizes the mediation process within a maximum of thirty days starting with the date of application. The Public Prosecutor may extend this period for another thirty days, provided that this extension is for once only. Statute of limitations will stop during the term of the mediation. Mediation negotiations will be carried out in confidence. The

information, documents and explanations set forth during mediation may not be disclosed afterwards, unless it is permitted by the parties. If an agreement between the parties cannot be reached during mediation and lawsuit is filed as a result, the offenders having admitted to some events or the crime during mediation may not be presented as evidence against him/her at the court. The mediator will submit a report stating the processes s/he performed and his/her interventions towards ensuring reconciliation to the Public Prosecutor, within ten days. When the loss is eliminated as required by the reconciliation and the costs of the mediation process are paid by the offender, a decision stating that a prosecution is unnecessary will be taken.

Pursuant to article 254 of the CCP, if there is a crime that is subject to mediation following the initiation of the public prosecution, mediation processes may also be carried out by the court according to the procedure specified in article 253. If an agreement is reached, it will be decided that the case be abated.

V. SPECIAL REGULATIONS, PROCEDURES AND RIGHTS INTRODUCED IN TERMS OF THE LIMITATION OF CHILDREN'S RIGHTS DURING THE STAGES OF INVESTIGATION AND PROSECUTION

1. INVESTIGATION

Article 15 of the ACP stipulates special provisions for investigations to be realized about children. According to this, the investigation about the cild dragged to committing crime will be realized by the Public Prosecutor appointed in the Child Bureau. While the statement of the child is being taken or during other processes about the child, s/he may be accompanied by a social worker. In case it is deemed necessary during the investigation, the Public prosecutor may request from the judge at the child court that protective and supportive

measures about the child be taken.

2. KEEPING THE CHILD UNDER SURVEILLANCE

The Act stipulates in its article 16 that the children under surveillance will be kept in the child unit of the police and in a separate place from where the adults are kept in places where such unit does not exist.

3. CRIMES COMMITTED IN PARTICIPATION WITH ADULTS

Related to situations where children commit crimes with adults, article 17 of the ACP prohibits combination of crimes. In other words, if children commit crimes together with adults, the investigation and prosecution will be carries out separately. However, as an exception, if the proceedings are required to be carried out together, a decision for combination may be rendered at general courts for every stage of the trial, provided that the courts deem the subject combination appropriate. Lawsuits combined in this manner are heard in general courts. In situations other than those exceptional cases where combination of investigation and prosecution is required, while the necessary measures about the children may be applied, the child court may deem it necessary to wait for the result of the lawsuit at the general court in order for the adjudication of the child to be completed.

4. TRANSFER OF THE CHILD

Article 18 of the ACP prohibits the use of chains, handcuffs and similar tools on children, however allows the necessary measures to be taken by the police in obligatory situations, in order to prevent the child from escaping or any dangers that

may arise in terms of the lives and safety of the child or others.

5. JUDICIAL CONTROL

Judicial control measures that may be applied during the investigation and prosecution stages about the children dragged to committing crime have been specified in article 20 of the ACP and apart from those listed in the subject article, a reference has also been made to article 109 of the CCP and its has been stated that the judicial control measures listed in this article may also be applied. The judicial control measures specified in article 20 of the ACP are as follows:

a) Not leaving the boundaries of a determined environment.

b) Not being able to go certain places or being able to go to certain places only.

c) Not contacting certain persons and organizations.

The judicial control measures specified in article 109 of the CCP, on the other hand, may be listed as follows:

a) Not leaving the country.

b) Applying regularly to certain places determined by the judge, during specified periods.

c) Complying with the calls of authorities or persons determined by the judge and with the control measures related to their professional occupations or education when necessary.

d) Not using any or some vehicles and submitting the driving license when necessary, in return for a receipt.

e) Primarily with the aim of giving up the addiction of narcotic

or excitant substances and alcohol, being subject to and accepting treatment and examination measures including staying in hospital.

f) Depositing a certain amount as security, the payment terms of which will be determined by the judge upon the request of the Public Prosecutor by taking the financial conditions of the suspect in consideration.

g) Not possessing or carrying guns and submitting those possessed to the judicial safe when necessary, in return for a receipt.

h) Establishing real or personal security for the money, the amount and payment terms of which will be determined by the judge upon the request of the Public Prosecutor, in order to secure the rights of the victim.

i) Providing security that family obligations will be fulfilled and the alimony determined by the court will be regularly paid.

However, the 2nd paragraph stipulates that, in case no results are obtained from these measures or if these measures are not complied with, a decision for arrest may be rendered.

6. ARRESTING PROHIBITION

Article 21 of the ACP prohibits arresting for children, who have not completed the age of fifteen, due to such crimes that require imprisonment not exceeding five years. In other words, a decision for arresting may not be rendered for children, who have not completed the age of fifteen, due to such crimes that require imprisonment not exceeding five years.

7. ENFORCEMENT

The Law no 5275 on the Enforcement of Punishment and Security Measures (will be hereinafter briefly referred to as Enforcement Law) also includes special regulations unique to children that are different from those applied to adults and mentions *"closed punishment enforcement institutions for children"* and *"child training homes"* for children.

A. CLOSED PUNISHMENT ENFORCEMENT INSTITUTIONS FOR CHILDREN

According to this, pursuant to article 11 of the subject Law, *closed punishment enforcement institutions for children* are institutions based on education and training with obstacles preventing escape and internal and external security officials. Arrested children or children who are transferred from *child training homes* to closed punishment enforcement institutions due to disciplinary or other reasons are accommodated here. Children between the ages of twelve and eighteen stay in separate sections of these institutions, taking their genders and physical development stages in consideration. However, the 3rd paragraph of the same article stipulates that children could be placed in *closed punishment enforcement institutions* in case the institution required for them does not exist and if there are no separate units in *closed punishment enforcement institutions*, girls could be placed in a section within the *closed punishment enforcement institutions for women* or in sections allocated for them in other *closed punishment enforcement institutions*. The 4th paragraph, on the other hand, states that the principle of providing children with education and training in these institutions must be absolutely complied with.

B. CHILD TRAINING HOMES

Pursuant to article 15 of the Enforcement Law, *child training*

homes are facilities where the punishments applied to child convicts are enforced while they are also educated, helped to acquire a profession and reintegrated with the society. These institutions do not have obstacles preventing escape; and the security of the institution is provided under the surveillance and responsibility of internal security officials. Children who have completed the age of eighteen and who attend an education or training program, either inside or outside the institution, may be allowed to stay in these places until they complete the age of twenty one in order to help them complete their education. As a rule, child convicts staying in these institutions are not sent to *closed punishment enforcement institutions*. Only those children who are decided to be transferred due to disciplinary or other reasons may be sent to *closed punishment enforcement institutions*.

VI. GUARANTEES STIPULATED FOR THE PROTECTION OF CHILDREN

1. COMPULSORY DEFENSE COUNSELING

One of the most important opportunities provided for children in terms of the investigations and prosecutions carried out about them is the *compulsory defense counseling*. As a matter of fact, pursuant to article 150 of the CCP, if a suspect or accused, who has not completed the age of 18, does not have a defense counsel, appointing a defense counsel is compulsory without seeking for his/her request. The *compulsory defense counsel* appointed in this manner may also benefit from the rights granted to defense counsel and defendants in the CCP just as any other defense counsels. For instance, s/he may contact his/her client without any need for a power of attorney, examine the contents of the file including the stage of prosecution and obtain the documents s/he requests without any charges, etc.

2. THE OBLIGATION FOR THE CHILD UNIT OF THE POLICE FORCE TO INFORM THE PERSONS AND INSTITUTIONS STIPULATED BY LAW ABOUT THE SITUATION WHEN A PROCESS IS INITIATED ABOUT CHILDREN

As also indicated above, when a process regarding the children who are in need of protection or dragged to committing crime is started, the child unit of the police, is obliged to inform the parents or guardian of the child or the person who is responsible for taking care of the child, the bar and the Social Services and Child Protection Agency and the representative of the relevant institution if the child is staying at an official institution. However, relatives who are suspected to have abused or solicited the child in committing the crime will not be provided with information.

3. THE RIGHT OF THE CHILD TO BE ACCOMPANIED BY ONE OF HIS/HER RELATIVES DURING HIS/HER STAY AT THE POLICE

Pursuant to article 31 of the ACP, when the child is at the police station, s/he is allowed to be accompanied by one of his/her relatives.

4. THE RIGHT OF CHILDREN TO BE ACCOMPANIED BY A SOCIAL WORKER WHILE THEIR STATEMENTS ARE BEING TAKEN OR DURING THEIR INTERROGATION

Pursuant to article 34 of the ACP, a social worker is required to be present while the statement of a child is being taken or during his/her interrogation.

5. THE RIGHT TO BE PRESENT AT THE HEARING

Again parallel with the provisions specified above, it is stipulated in article 22 of the ACP that the parents, guardian, the social worker appointed by the court, the family looking after the child or the representative of the relevant institution if the child is staying in an official institution may be present at the court during the hearing. In the same manner, it is also stated that the Court or the judge may require the presence of a social worker during the interrogation of the child or any other processes about him/her.

6. THE RIGHT FOR NOT BEING PRESENT AT THE COURT DURING THE HEARING IF IT IS REQUIRED IN TERMS OF THE CHILD'S INTEREST

Another important regulation unique to children is specified in article 22, which stipulates that, in case it is required for the interest of the child, s/he may be removed from the courtroom and that it may be deemed unnecessary for a child, whose interrogation has already been made to be present at the courtroom.

7. COMPULSORY CLOSED HEARING

Another provision introduced to protect child suspects is the compulsory closed hearing stipulated in article 185 of the CCP. According to this, if the defendant has not completed the age of 18, the hearing is held closed and the judgment is announced at the closed hearing. Pursuant to article 187 of the same Code, the contents of a closed hearing may not be published through any means of communications. The court may allow some persons to be present at a closed hearing. In such a situation, the said persons are warned that they shall not disclose the issues that require the hearing to be closed and the subject warning is recorded in the minutes.

CONCLUSION

Many laws and primarily the Constitution, contain provisions regarding the protection of children in our country. Provisions that regulate the adjudication of children, on the other hand, are principally included in the ACP numbered 5395, the CCP and the Turkish CCP.

The provisions included in the subject laws aim to protect children dragged to committing crime from the negative impacts of the criminal trial process as much as possible and to reintegrate these children within the society. When the provisions of the ACP are examined, it is determined that the persons, who commit crimes in childhood are accepted as those dragged to commit crime for social and economic reasons rather than simply criminals. Such approach of the subject Act is considered to be positive in terms of showing that children cannot be prevented from committing crime merely by judicial measures.

LA RESPONSABILITÀ CONTRATTUALE NEL DIRITTO ROMANO

DR. NADI GUNAL *

La responsabilita contrattuale in diritto romano é una tema difficile e delicato. Ci sono tante diverse opinioni dei giuristi. Sulla questione dei confini della responsabilità contrattuale in diritto romano segue l'opinione di Cannata esposta nel libro *Sul problema della responsabilità nel diritto privato romano*[1]. ll debitore non ha eseguito una prestazione accessoria. Si può pensare alla violazione dell'obbligo accessorio di eseguire tempestivamente la prestazione principale, al caso di un venditore che ha fatto la *traditio* di una *res aliena* o di una cosa menomata da vizi occulti, dando luogo al sistema complesso dei rimedi giuridici volti a far valere la responsabilità contrattuale del venditore[3].

Al pensiero di Talamanca, il risarcimento del danno è dovuto sia quando la prestazione è ancora possibile sia quando è divenuta impossibile per fatto imputabile al debitore: nel caso di impossibilità sopravvenuta non imputabile al debitore, l'obbligaziòne si estingue e subentra il problema della ripartizione del rischio contrattuale[1]. Nel diritto romano classico e giustinianeo, sebbene in due precedenti lavori specifici concernenti la responsabilità contrattuale, trattandosi tuttavia della responsabilità del creditore pignoratizio[4] e del comodatario[5]. Sulla responsabilita contrattuale ci sono i studi pubblicati da Cannata, Cardilli[2] e Molnar[3].

***Ankara University, Faculty of Law-Turkey.**

[1] TALAMANCA, M.: Istituzioni di diritto romano, Milano 1990, s. 659.

[2] CARDILLI, R.: L'obbligazione di "praestare" e la responsabilità contrattuale in diritto romano (II sec aC - II sec dC), Milano 1995, del quale vedi pure l'obligation de "praestare" et la responsabilité contractuelle en droit romain, in RIDA, 3e sèrie 43 (1996) pp 81-132.

[3] MOLNAR, I.: Die Haftungsordnung des romischen Privatrechts, Szeged 1998, concernente anche la responsabilità extracontrattuale; ANKUM, H.: "La responsabilita' contrattuale nel diritto romano classico e nel diritto Giustinianeo",

I criteri d'imputazione dell'impossibilità sopravvenuta si distinguono in soggettivi ed oggettivi, che danno rispettivamente luogo alla figura della responsabilità soggettiva o oggettiva. Si possono differenziare due tipi di responsabilità oggettivà: nel primo, il debitore risponde sulla base del nesso causale fra la condotta tenuta ed il perimento della cosa; nel secondo, la responsabilità è affermata senza prendere in considerazione tale nesso, ma soltanto in base al modo in cui la cosa è perita.

La classificazione è elaborata dalla dottrina moderna, ma si attaglia alle figure romane del *dolus e* della *culpa,* da una parte, e della *custodia,* dall'altra[4]. Accanto al *dolus* ed alla *culpa,* i giuristi classici conoscono anche la *custodia.* Si tratta di un criterio oggettivo di determinazione della responsabilità, nonostante i tentativi ricorrenti in dottrina di trasformarlo in un criterio soggettivo, sviluppo, nell'epoca postclassica.

La responsabilità per *custodia* nel diritto classico è un criterio oggettivo nel senso che il debitore risponde in relazione al modo in cui è divenuta impossibile la prestazione. A partire dagli inizi del principato, si rispondeva per *custodia,* soltanto se la consegna fosse impedita dal fatto che la cosa era stata sottratta clandestinamente, a cui per tempo si equiparò la fuga dello schiavo.

Il medesimi accostamento dolo-colpa ricorre peraltro in materia contrattuale in alcuni famosi testi di Ulpiano (D. 50.17.23 e D. 13.6.5.2.).

> «Alcuni contratti ammettono soltanto il dolo, alcuni dolo e colpa. Solo il dolo, deposito e precario. Dolo e colpa il mandato, il comodato, la vendita, il pegno manuale, la locazione...: in questi è pure rilevante la diligenza. La società e la comunione di cose ammettono dolo e colpa. Tutto ciò,

---

Diritto romano e terzo millenio, Copanello 2000, p. 135.

[4] TALAMANCA, s. 659.

> beninteso, se nel concludere il singolo contratto non si sia espressamente convenuto diversamente (in più o in meno), tranne per quel che Celso ritiene invalido, e cioè se si sia convenuto che non si presti il dolo: ciò è in contraddizione con un giudizio di buona fede: e così ci regoliamo. Nessuno è responsabile per gli eventi e le morti che toccano gli animali e che han luogo senza colpa, le fughe, gli incidenti, le inondazioni, gli attacchi dei predoni»[5].

Celso ha sottolineato, come ci informa Ulpiano in D. 50.17.23, che non è valida una convenzione con la quale una parte sia esonerata da responsabilità per dolo; una tale convenzione sarebbe contraria alla *bona fides*[6]

Il criterio più leggero di responsabilità contrattuale è il *dolus*[7]. È senza dubbio un criterio soggettivo. Si tratta del comportamento cosciente e intenzionale di un contraente che rende totalmente o parzialmente impossibile l'adempimento della sua obbligazione. Questo criterio è applicato a tutti i contraenti indipendentemente dal contratto concluso[19].

Il *dolus,* sotto l'influenza cristiana, è considerato un comportamento molto riprovevole. Con Cannata[53] e Molnar[54] sono dell'avviso che non ci sono molte differenze fra il diritto classico e il diritto giustinianeo. Abbiamo potuto ricostruire il diritto classico in grande misura interpretando i testi del Digesto che non sono rimaneggiati o lo sono solo modestamente[8].

---

[5] D. 50.17.23 Ulpianus, (1. 29 ad Sabinum)

[6] KOSCHAKER, AYİTER, K.: Roma Hususi Hukukunun Ana Hatları (The Principles of Roman Law), Ankara 1975, p. 197.

[7] Vedi su questo grado di responsabilità R ZIMMERMANN, The Law of Obligationis Roman Foundations ofthe Civilian Traditi/m, Cape Town 1990 e Oxford 1996, pp 208-210 e MOLNAR, Die Haftungsordnung, cit, pp 87-97, Uno studio molto ampio sul dolo è stato pubblicato in olandese da Lter BEEK, Dolus, Een semantisco-juridische stadie, 2 vol Nijmegen 1999; ZIMMERMAN, R.: The Law of Obligations, Cape Town 1996, p. 664.

[8] ANKUM, p. 144.; CANNATA,C.A.: Ricerche Sulla Responsabilita' Contrattuale nel Diritto Romano,Milano 1966,p.27. ; Di MAJO,A.: "Diligenza e Buona Fede nella Responsabilita' Contrattuale" , Radici e Prospettive dell'esperienza Giuridica

La seconda categoria di responsabilità contrattuale é la culpa. La valutazione della *culpa* poteva, invece, variare anche all'interno delle obbligazioni di *dare,* a seconda dei vari contesti in cui questo criterio era adoperato. La regola, non si teneva conto della consapevolezza dell'esistenza del vincolo obbligatorio, purché il perimento della cosa fosse avvenuto ad opera del debitore che avesse agito volontariamente o negligentemente. Nelle fonti si distingue tre tipi di *culpa*[9].

(a) La nozione fondamentale di *culpa* e che ha il campo di applicazione più vasto è la colpa-negligenza. In seguito negligenza, cioè mancanza di *diligentia*[10] (diligenza), un debitore rende totalmente o parzialmente impossibile l'adempimento della sua obbligazione. Un grande numero di giuristi si sono pronunciati per la loro responsabilità a seguito di un tale comportamento riprovevole. La colpa-negligenza è il criterio generale applicato a prestazioni che non hanno un carattere tecnico[11]. Nelle fonti si parla di *culpa* o *diligentiam praestare.* I giuristi hanno usato quest'ultima espressione in casi in cui si tratta di una colpa omissiva: il debitore avrebbe dovuto compiere atti positivi.

Quando le parti hanno entrambe un interesse nel contratto, generalmente la loro responsabilità è per colpa. Il campo di applicazione è ancora più ampio. Nessun giurista lo ha formulato così, ma si può argomentare che ogni contraente fosse responsabile per *dolus* e *culpa* quando non vi fosse argomento per una responsabilità meno grave, cioè soltanto per dolo, come nel caso del

---

Contemporenea,Convegno Internazionale Copanello 3-7 Giugno 2000, p. 167.

[9] BURDICK, W.: The Principles of Roman Law and Their Relation to Modern Law, New Jersey, 2004, p. 414; KARADENİZ ÇELEBİCAN, Ö.: Roma Hukuku (Roman Law), 10. Ed., Ankara 2004, p. 259; KOSCHAKER, P.l, AYİTER, p. 194 .

[10] BURDICK, p. 415; LEE, R.W.: The Elements of Roman Law, 4. Ed., London 1956, p. 288; MARTINI, R.: Appunti di "Istituzioni di Diritto Romano", Siena 1993, p. 242.

[11] Qualche autore anche avrebbe affermato la responsabilita del tutore per culpa e neglegentia. CEYLAN GUNES. S.: Roma Hukukundan Günümüze Velayet-Vesayet Hukuku (Guardianship From Roman Law till Today), Ankara 2004, p. 120.

depositario[12], o per una responsabilità più grave, cioè anche per *custodia*[13], come nel caso del comodatario. Che questa responsabilità per *culpa* sia di origine postclassica, come si pensava correntemente nella romanistica di circa mezzo secolo fa[14]. Anche l'idea difesa dal de Robertis[15] che la *culpa* come criterio di responsabilità sia stata applicata per la prima volta da Modestino non è accettata (giustamente) da altri studiosi[16].

(b) II secondo tipo di responsabilità per *culpa* è la colpa-imperizia, che è applicata quando la prestazione ha un carattere tecnico. In questi casi il contraente è responsabile quando non ha eseguito la sua obbigazione in conformità al modello dell'esperto diligente *(artifex diligens).* Quando il *fullo* ha lavato, il *saranator* rammendato o il medico ha operato in un modo che non è quello in cui un lavandaio, sarto o medico diligente lo avrebbe fatto, è responsabile per *imperitia.* Secondo Celso (Ulp. D. 19.2.9.5), l'*impentia* è un tipo di *culpa.* Anche questa *culpa* non è puramente soggettiva: qui il comportamento del debitore è paragonato con il modello dell'esperto accurato[17].

(c) Una terza categoria di *culpa*[30] che si trova con meno frequenza nelle fonti è «la violazione di un limite contrattuale». Questo aspetto è trattato in alcuni testi dei giuristi da Labeone fino ad Ulpiano. Per il caso in cui qualcuno ha dato in prestito ad un amico l'argenteria da tavola da utilizzare per ospiti a pranzo, e poi Pamico-comodatario se l'è portata in viaggio, Gaio (D. 13.6.18 pr.) afferma che la violazione del limite contrattuale comporta per il comodatario la responsabilità più grave, cioè anche per *vis maior.* Il fenomeno è abbastanza frequente, l'uso

[12] Gai. Ins. IV 182.
[13] CANNATA, C.A.: La Responsabilità Contrattuale, in Derecho Romano de Obligatàones Homenaje Murga Gener, Madrid 1994, p 163: «Quello della custodia è un criterio puramente oggettivo»
[14] ARANGIO-RUIZ, V.: Responsabilità Contrattuale in Diritto Romano, Napoli 1958.
[15] ROBERTIS DE F.M.: La Responsabilità Contrattuale nel Diritto Romano dalle Origini a tutta l'età Postclassica, Bari 1996, p. 316-320.
[16] La recensione di A METRO, IVRA 45, 1994, p. 142.
[17] ANKUM, p. 145.

della parola *culpa* è però più raro[18].

Nelle fonti si riscontrano tre diversi criteri d'imputazione dell'inadempimento: il dòlo, la colpa (cui si correlano le categorie della *diligentia* e delle *neglegentia),* e la *custodia:* i primi due sono criteri soggettivi, il terzo oggettivo. *Dolus, culpa* e *custodia* fissano in mòdo diverso i limiti della responsabilità del debitore: si pone, dunque, il problema di quali criteri applicare nei singoli rapporti. In D. 50. 17. 23, di Ulpiano, si trova una specifica trattazione riguardante i rapporti obbligatori tutelati da *iudicia bonaefidei.* Come parametro per stabilire il ricorrere *della culpa,* i giuristi classici si riferiscono sicuramente a quella che i medievali avrebbero chiamato la *diligentia diligentis*[19]. Per essi, la *diligentia quam suis* non rientrava nell'ambito *della culpa:* in alcuni *bonaefidei iudicia,* in cui si rispondeva soltanto per dolo (ad es., nell'acro *depositi),* la giurisprudenza del I-II sec. d.C. considerava che fosse in dolo il debitore che, nell'adempimento del'obbligazione, non adibisse la stessa cura e la stessa diligenza che poneva nei propri affari. In D. 16. 3. 32, ciò era sostenuto da Nerva e Celso, che parlavano, al proposito, di una *culpa,* mentre, all'interno della stessa scuola proculiana, Proculo andava in avviso contrario.

Questa teoria faceva sì che il debitore particolarmente diligente rispondesse, in un rapporto in cui il criterio d'imputabilità era limitato al dolo, in modo più accentuato che in base alla semplice *diligentia diligentis,* la cui violazione dava luogo alla *culpa in abstràc*to. L'abolizione della *custodia* come criterio indipendente di responsabilità. La *custodia* è inquadrata sotto la *culpa* e la *diligentia.* La *diligentia, quam suis* era, invece, quella che il singolo debitore usava nello sbrigare i propri affari, coincidesse con la *diligentia diligentis,* ne fosse inferiore o superiore. È un fenomeno che ha avuto inizio nel periodo postclassico[20]. In molti

[18] Pomp. D. 13.7.23 e Ulp. D. 13.6.5.7.
[19] MARTINI, p. 241.
[20] CANNATA, La responsabilità contrattuale, p. 177-178; MOLNAR, Die Haftungsordnung, p. 199.

luoghi della legislazione giustinianea, la *custodia* è definita come *exacta o exactissima diligentia custodiendae rei* (Inst. 3.14.2; D. 13.6.5.9; D. 13.6.18 pr.; D. 44.7.1.4, etc)[21]. In molti testi questa locuzione ha preso il posto della parola *custodia,* in molti altri è stata semplicemente conservata. In numerosi testi del Digesto di origine classica le soluzioni originarie (e dunque classiche) sono state conservate. Soprattutto è detto spesso che il debitore non sarà responsabile in casi di *vis maior*[22].

La responsabilità nascente da atti giuridici che, nella nostra ottica, possono essere considerati come contratti di diritto patrimoniale, s*tipulatio,* dei contratti reali e consensuali, non rientreranno in questa relazione la gestione d'affari, il *legatum per damnationem* e la restituzione della dote. Un fenomeno che dovrebbe particolarmente richiamare l'attenzione del civilista moderno è la grande varietà delle soluzioni sulla responsabilità contrattuale rilevabile nei testi dei giuristi classici. Come tutti i romanisti sanno, queste soluzioni dipendono dei tipi di azioni che sanzionano i differenti contratti, nella quale rientra la *condictio certae rei* che spetta al creditore in una *stipulatio* di *certa res.* Si tratta di un actio *stricti iuris* che ha una *formula* con *intentio certa.* Il giudice deve condannare il convenuto a pagare il valore dello schiavo *(quanti ea res est).* Il punto di partenza fu che il convenuto dovesse essere liberato quando l'oggetto dell'obbligazione non esisteva più. Inizialmente la causa della scomparsa della cosa promessa non aveva importanza. Poiché questo stato del diritto fu considerato poco soddisfacente, i *veteres,* nel loro ruolo «notarile», hanno, probabilmente già nel III sec. a.C, suggerito allo *stipulator* di farsi promettere dal debitore non solo *servum Stichum dari* ma anche *per eum non stare, quo minus daret,* cioè che l'impossibilità di trasferire la proprietà dello schiavo non gli sarebbe imputabile.

L'obbligazione non può essere adempiuta più in seguito al venir meno del suo oggetto; ma se l'impossibilità sopravvenuta della pre-

[21] BURDICK, p. 416; LEE, p. 288; MARTINI, p. 241.
[22] KASER, Das Römische Privatrecht, München 1975, p. 353.

stazione è imputabile al debitore, l'obbligazione è «perpetuata»[23]. Il debitore dovrà pagare il valore della cosa dovuta quando il trasferimento di proprietà della medesima è divenuto impossibile in seguito ad un atto positivo compiuto consapevolmente da lui o per qualunque causa ove egli abbia coscientemente e colpevolmente ritardato l'adempimento della prestazione[24].

Il vero terreno su cui i giudici hanno avuto un grande potere discrezionale di emettere sentenze in conformità alle opinioni dei giuristi è quello dei *indicia bonae fidei.* I giuristi devano pareri in materia di responsabilità contrattuale in numerosi casi[25].

I giudici si sono orientati su questi pareri nelle loro sentenze. E in tal modo è stata elaborata una grande quantità di norme sulla responsabilità contrattuale. Una libertà parallela dei giudici e una parallela creatività concernente la responsabilità contrattuale è esistita per le azioni pretorie con *formulae in factum conceptae* poste a tutela dei contratti di *depositum, commodatum* e *pignus,* nonché del *receptum nautarum, cauponum* e *stabulariorum*.

Cannata[26] ha dimostrato che i giuristi preclassici ed i giuristi

[23] CANNATA, C.A.: "Perpetuatilo obligationis", in Seminarios Complutenses de Derecho Romano 4, 1992 , pp 49-56; A differenza del diritto antico, l'impossibilità di adempiere l'obbligazione in seguito alla morte dello schiavo non significa la fine dell'obbligazione ma una modifica del suo con tenuto, che è ormai diventato il valore dello schiavo Questo obbligo è perpetuo, durerà fino alla litis contestati dell'azione del creditore, fino alla liberazione del debitore in seguito al pagamento volontario del valore del bene o fino alla sua remissione tramite acceptilatio Paolo (D45.1.91.6): "novari atitem an possit haec obligatio, dubitationis est, quia ncque hominem qui non est neque pecuniam quae non debetur stipulati possumus". I giuristi parlano però della perpetuatio obligationis e riconoscono in questi casi come possibile un´ acceptilatio (Paul D. 45 1 91 6) e, almeno Giuliano e Paolo, anche una novatio quando le parti hanno così voluto (Paul D 45 1 91 6) Apparentemente esiste un´ obbligazione a pagare il valore della cosa non più esistente.

[24] Quando i giuristi parlano in rapporto a questo tema di culpa del promissor, non si tratta della colpa-negligenza Secondo KASER, M.: DAS Rómische Privatrecbt, I, München 1971, p. 506.

[25] BURDICK, p. 416; LEE, p. 288.

[26] CANNATA, Sul problema della responsabilità, pp. 123-136.

classici stabilivano che i partners contrattuali dovessero *praestare* qualcosa di complementare alle loro obbligazioni principali di *dare* o di *facere*. Così i giuristi hanno scritto per esempio che il venditore deve *praestare ì'habere licere* della cosa venduta, e deve *praestare servum sanum esse.* In questo modo hanno creato in molti casi obblighi contrattuali accessori. Per la nostra ricerca ha grande importanza che i giuristi abbiano stabilito che i contraenti devono in casi differenti *dolum* o *dolum abesse praestare, culpam* o *culpam abesse praestare* o *diligentiam* o *custodiam praestare.* In questa maniera i giuristi hanno fatto impegnare i contraenti in differenti casi a differenti tipi di responsabilità contrattuale. I contraenti tenuti a *dare* o a *facere,* debbono in tal modo anche assicurare alle loro controparti questi diversi gradi di responsabilità. La parola *praestare* non si trova nelle *formulae.* Gaio (Inst. 4,2) e Paolo (D. 44.7.3 pr.) menzionano però *praestare* accanto ai termini *dare* e *facere* quando indicano il contenuto delle obbligazioni. Da alcuni testi in materia di compravendita emerge ancora un altro concetto di *dolus*[27]. La responsabilità del comodatario che usa gratuitamente una cosa altrui è conforme al principio dell'interesse che ha guidato in un certo modo i giuristi classici in questo campo.

Nel tardo-antico, la responsabilità per *custodia* perde la fisionomia classica di criterio oggettivo d'imputazione dell'impossibilità sopravvenuta della prestazione e diventa anche un criterio soggettivo, come mostra la modificazione di alcuni testi chiave, in cui la *custodia* viene reinterpretata come *diligentia exacta* — od *exactior; exactissima — custodiendae rei od in custodiendo.* Il regime di questa *diligentia in custodiendo* non presupponeva quanto sembra, un grado particolarmente elevato di diligenza, bensì comporta una presunzione di colpa, con la conseguente inversione dell'onere della prova.

[27] CANNATA, Sul problema della responsabilità, pp 68-81; MOLNÀR, Die Haftungsordnung, pp. 145-183; BURDICK, p. 416; LEE, p. 288.

"TOPLUMSAL CİNSİYET, HUKUK VE OSMANLI KADINLARI"

DİDEM ÖZALPAT

ABSTRACT

The subject of the article is "GENDER, LAW AND OTTOMAN WOMEN ". The woman, surrounded with prejudices predominant in the society for centuries and rules and roles imposed to her in the social system, has been the object of a single- polarised world which is determined and directed by the male subject. The man, representing the superior and dominant element in all forms of power which appeared in the forms of political, economic and legal power in the social system, also reinforced his power due to the incorporation of the patriarchal structure of the social tissue by the religious texts.

How the status of Ottoman women was defined in Islamic law and customary law theory in Ottoman Empire before and after Tanzimat period is the basic question to be tackled in the article. By examining the legal and social status of the Ottoman women, it is intended to demonstrate how the legal and social status of Ottoman women was influenced by the religion and gender-biased culture.

A. TANZİMAT ÖNCESİNDE OSMANLI HUKUKU VE TATBİKATINDA KADIN

1. Giriş

Osmanlı devlet anlayışının en önemli özelliği padişahın ülke içinde en yüksek otorite ve yasama, yürütme ve yargı kuvvetine tek başına sahip olmasıdır. Osmanlı egemenlik anlayışında ülkeyi tek kişinin yönetmesi esası kabul edilmiştir. Hükümdar devleti

oluşturan üstün iktidarın sahibidir.[1] Bu bölümde,üstün iktidar tarafından belirlenen örfi hukukla birlikte mahkemelerin uygulamalarıyla şekillenen yaşayan hukukta kadının hukuksal statüsü incelenecektir.

2. Osmanlı Pozitif Hukukunda Genel Olarak Kadın

Osmanlı İmparatorluğu'nda İslâm hukukunun uygulandığı şer'i hukuk ile özellikle idare, teşkilat hukuku ve kamu müesseseleri alanlarında eski Türk devletlerinin devlet teşkilatının temeli olan yasa geleneği[2] veya fethedilen ülkelerde varolan vergi teşkilat ve usullerini korumak amacı gibi nedenlerle gelişen, fıkıh kitapları içindeki şer'i hukuk normlarından farklı olarak kanunlarla düzenlenen örfi hukuk Osmanlı hukukunun temelini oluşturmuştur.[3]

İlk Osmanlı sultanları hukuki kurallar vazederken fıkıh bilginlerine danışıyorlardı. Ancak Osmanlı tarihinin sonraki dönemlerinde, özellikle Fatih Sultan Mehmet'ten sonra[4], İmparatorluk içinde en yüksek otorite olarak askeri, idari ve dini yetkiler ile yasama, yürütme ve yargı kuvvetlerini bünyelerinde toplayan Osmanlı padişahlarının yasama yetkisi hükümdarın üstünlük ve iktidarına dayalı Roma kamu hukukunun da etkisiyle yönetsel konularda Sultan'a özgü sayılmıştır.[5]

---

[1] GÜRİZ, Adnan, ***Hukuk Başlangıcı,*** Siyasal Kitabevi Yay., 4. B. Ankara 1994, s.173.

[2] Daha fazla bilgi için bkz. İNALCIK, Halil, ***Osmanlı İmparatorluğu Toplum ve Ekonomi Üzerinde Arşiv Çalışmaları, İncelemeler,*** Eren Yay., İstanbul 1993, s.321-322.

[3] BARKAN, Ömer Lütfi, ***XV ve XVI inci Asırlarda Osmanlı İmparatorluğunda Zirai Ekonominin Hukuki ve Mali Esasları,*** I. Cilt, İstanbul Üniversitesi Edebiyat Fakültesi Türkiyat Enstitüsü Neşriyatı, İstanbul 1943, s.XVI-XVII; AKPINAR, Turgut, ***Türklerin Din ve Hukuk Tarihi,*** İletişim Yay., İstanbul 1999, s.184.

[4] İNALCIK, Halil, ***"Türk Tarihinde Türe ve Yasa Geleneği"***, Doğu-Batı Dergisi, Yıl:4, Sayı:13, 2000-01, s.163.

[5] BARKAN, Ömer Lütfi, ***"Türkiye'de Sultanların Teşrii Sıfat ve Salahiyetleri ve Kanunnameler"***, İ.Ü.H.F.M, Cilt:12, 1946, s.713; İnalcık, a.g.m., s.163.

Hukuksal sistemde şer'i hukuk ve örfi hukuk olarak beliren düalist yapılanmanın çeşitli sebepleri vardır. Şer'i hukukun teşkilatlı bir devlet idaresinin ihtiyaçlarını karşılayamaması sebeplerin başında gelir.[6] Bu durumun bir sonucu olarak, çeşitli din ve milliyette tebaaya hükmeden padişahlar, Ortaçağa hakim hukukun şahsiliği ilkesine uyarak, farklı din ve milliyete mensup ülkelere özel hukuk alanında özerklik vermekle birlikte, kamu hukukuna ait konularda devletin siyasi menfaatlerine uygun realist bir tutumla, takdir ve tazir hakları veya kamu menfaatleri prensibine dayanarak yeni nizamlar kurma imkanını bulmuşlardır. İslâm hukukçuları da Şeriatın aksini emretmediği ve kamu yararının gerektirdiği alanlarda, örf ve âdetlere uyarak veya kanun koyma yoluyla devlet teşkilatında ve idare usullerinde sultanların düzenleme yapmalarını onaylamışlardır.[7]

Osmanlı kanunnamelerinde idare hukuku, istisnai olarak anayasa hukuku konuları, eşya hukukunun miri araziye ilişkin konuları, askeri hukuk, ceza hukukunun tazir suç ve cezaları ve bazı özel hukuk konuları düzenlenmiştir.[8]

Kanunnamelerle düzenlenen hukuk sahasının doğrudan doğruya şer'i hukukun düzenlediği konulardan ayrılması sayesinde, kutsal hukukun zamanın gerisinde kalan ve devlet idaresinin ihtiyaçlarını karşılamayan hükümleri kolaylıkla ortadan kaldırılabilmiştir.[9] Şer'i hukuk tarafından sınırları kesin biçimde çizilmiş olan evlenme, boşanma ve miras usulleri ile insanın toprağı veya evi üzerindeki tasarruf hakları ve bu gibi gayrimenkullerin alımı, satımı ve kiraya verilmesi gibi fıkhın

---

[6] BARKAN, Ömer Lütfi, ***"Osmanlı İmparatorluğu Teşkilat ve Müesseselerinin Şer'iliği Meselesi"***, İ.Ü.H.F.M, Cilt: 11, 1945 s.204.

[7] BARKAN, ***"Osmanlı İmparatorluğu Teşkilat ve..."***, s.205.

[8] AKGÜNDÜZ, Ahmet, ***Osmanlı Kanunnâmeleri ve Hukuki Tahlilleri,*** 1. Kitap, Fey Vakfı Yay., İstanbul 1990, s.45.

[9] Mecellenin düzenlenmesi sırasında, aynı mezhebe mensup ulemanın rey ve içtihadları arasından o dönemde halkın ihtiyaçlarına en uygun olanın seçilerek, padişahın hatt-ı hümayunuyla bir medeni kanun kitabı tedvin edilmesi (Bu konuda bkz. BARKAN, ***XV ve XVI. Asırlarda Osmanlı İmparatorluğunda***...s.XLV.) Sultanların yasama yetkilerinin genişliğini göstermek bakımından büyük bir önemi haizdir.

muamelat kısmını ilgilendiren konular çeşitli yöntemlerle hükümsüz hale getirilmiştir.[10]

Osmanlı hukukunda şer'i hukuk-örfi hukuk ayrımına örnek gösterilebilecek konulardan biri, miri arazilerin mirasçılara intikali konusudur. Osmanlı toprak düzeninde miri tarım arazisinin[11] hukuki rejimi, mülk tarım arazilerinden farklıdır. Miri tarım arazisinde farklı bir hukuki rejimin kabulü, bu arazinin miras yoluyla intikalinin de farklı olmasına neden olmuştur. Özel mülkiyetin konusu olan tarım arazileri İslâm miras hukuku kurallarına göre intikal etmesine rağmen, miri tarım arazisi padişah iradesine dayanan ferman, kanun ve nizamlarla tayin edilen normlara göre intikal etmiştir. Temelinde arazinin iyi işlenmesini sağlama ve küçük parçalara ayrılmasını önleme endişesi olan bu hukuki rejimle[12] ,şer'i hukukun arazi konularına uygulanması arzu edilmeyen İslami mülkiyet ve miras hükümleri de köylerde ortadan kaldırılıyordu.[13]

Bu hukuki rejimle kız evlatları aleyhine kanuni bir eşitsizlik yaratılmıştır. İmparatorluğun kuruluşunda 1567 tarihine kadarki devrede, miri arazinin intikal hakkı sadece erkek evlada ait olup, kız evlat bu hakkın dışında tutulmuştur.[14] 935/1528 tarihli Bolu Livası kanundaki "ve mütevaffâ raiyetin oğulları ataları yerlerine müşa ve müşterek mutasarrıf iken biri fevt olsa oğlu kalsa hissesi oğluna intikal eder..."[15] hükmü de arazinin ivazsız olarak erkek evlatlara intikal ettiğini göstermektedir.

957/1567 tarihinde intikal konusunda yapılan bir değişikle, babanın arazisinin tapu ile kız evlada geçmesi kabul edilmiştir.

---

10 BARKAN, ***"Türkiye'de Sultanların Teşrii Sıfat ve...",*** s.715.

11 "Miri tarım arazisi, kuru mülkiyetin devlete ait olduğu, tasarruf hakkının ise çiftçilere bir sözleşme ile süresiz ve mirasçılara intikal etmek üzere Devlet tarafından verilen arazidir." CİN, Halil, **Eski ve Yeni Türk Hukukunda Tarım Arazilerinin Miras Yoluyla İntikali,** A.Ü.H.F. Yay., Ankara 1979, s.35.

12 CİN, ***Eski ve Yeni Türk Hukukunda...,*** s.35-36.

13 BARKAN, ***"Türkiye'de Sultanların Teşrii Sıfat ve...",*** s.716.

14 CİN, ***Eski ve Yeni Türk Hukukunda...,*** s.55.

15 BARKAN, ***XV, ve XVI inci asırlarda Osmanlı İmparatorluğunda ...,*** s.30.

"975 Cemaziyelâhirinin 27. gününde bigaraz müslümanlar takdir eylediği tapu ile yer verilmesi buyurulmuştur. Ve kız, baba bir erkek karındaşlarından takdim olunmuştur."[16] Arazi erkek evlatlara ivazsız olarak geçerken, kız evlada tapu misli ile intikal etmektedir.

1846-47 tarihi ise, miri tarım arazisinin miras yoluyla intikalinde kadın lehine önemli değişikliklerin yapıldığı bir tarihtir. Önceki dönemlerde kız evladın araziyi işleyemeyeceği düşüncesiyle kız evlada intikal hakkı tanınmamışsa da, zamanla bu usulün doğru olmadığı anlaşılmış; kız evlat da "babanın arazisinde" erkek evlatla eşit hisselere sahip olmuştur.[17]

Erkek evlat ve kız evlat sadece babanın arazisini iktisap edebiliyordu. Ananın arazisi erkek evlada tapu misli ile intikal ederken, kız evlat tapu hakkına da sahip değildir. 1847 tarihli resmi tebliğiyle anaya ait miri arazinin de erkek ve kız evlada ivazsız olarak intikal etmesi kabul edilmiştir: *"Evlâdı inasın dahi hakkı veraseti araziye duhullerine müsaade-i seniye erzan buyrulduğu misillü taifei nisa üzerinde olan arazi-i mirî yenin dahi, babadan olduğu gibi anadan dahi oğluna ve kızına meccanen intikal eylemesine dahi ruhsatı seniye... buyrulmuş..."*[18]

Bir mülk üzerinde aile üyelerinin faydalanması amacıyla kurulan ailevi vakıflarla da, Kuran'ın miras sistemine karşı özel bir mülk ve miras rejimi yaratılmıştır.[19] İslâmiyetten önce kadının mirastan hiçbir pay almadığı yukarıda belirtilmişti. Kuran-ı Kerim'in koyduğu yeni miras kurallarını benimsemeyen kimseler için vakıflar bir araç olmuştur. Vakıfla, vakıf mallarının gelirlerinden kız ve erkek çocuklarına eşit hisseler bırakılabildiği gibi, kız evlatlar tamamıyla mahrum da edilebilirlerdi. Çünkü vakfedilen mal şahsın mülkiyetinden çıkıyor, dolayısıyla İslâm

[16] CİN, ***Eski ve Yeni Türk Hukukunda...,*** s.56.
[17] CİN, **Eski ve Yeni Türk Hukukunda...,** s.59.
[18] CİN, ***Eski ve Yeni Türk Hukukunda...,*** s.60.
[19] BARKAN, ***"Türkiye'de Sultanların Teşriî Sıfat ve..."***, s.716.

miras hükümlerine tâbi olmuyordu.[20]

Osmanlı kanunnamelerinde düzenlenen diğer bir hukuk disiplini ceza hukukudur. Osmanlı kanunnamelerinin en eskisi olan Fatih Sultan Mehmet Kanunnamesi, İslâm hukukunu temel almış ve İslam hukukunun kavramlarını kullanmıştır. Bu Kanunnamede, baş vezirlik makamı, mali esaslar gibi konuların yanı sıra ceza hukuku da düzenlenmiş; Hadd cezalarının dönemin şartlarına uymadığı ileri sürülerek, bu cezaların yerine dayak atma veya suçlunun ekonomik durumuna göre belirlenen para cezaları gibi tazir cezaları düzenlenmiştir. Bu hükümler hükümdarın yasama yetkisi ile şer'i hukuku tamamlamanın ötesinde, şer'i hukuku aşan bir niteliği de haizdirler.[21]

Osmanlı ceza kanunnamelerinin zina ile ilgili maddeleri şer'i hükümlerle çelişmektedir.[22] Fatih Sultan Mehmet[23], Kanuni Sultan Süleyman[24] ve Yavuz Sultan Selim devri ceza kanunnamelerinin zina suçunu düzenleyen maddelerinde, zina yapanlara para cezası verileceği belirtilmiştir. Yavuz Sultan Selim Kanunnamesi'ndeki zina ile ilgili madde şöyledir:

"Bir kimsenin zina yaptığı şeran sabit olursa o kimsenin geliri 1000 akçe veya daha fazla olursa bu da mahkemece tesbit edilmiş, bir suçu da yoksa böyle zengin kimselerden 400 akçe ceza alınır. Aynı şartları haiz orta halli birisinden 200 akçe, fakir olanından 40 akçe ceza alınır. Çok daha yoksul olandan ise 30 akçe alınır. Eğer zina yapan kimse ergen ve zenginse 100 akçe, orta halli ise elli akçe, fakirse otuz akçe alınır. Zina yapan

---

[20] ANSAY, ***Hukuk Tarihinde İslâm...,***s.140; ÜÇOK-MUMCU-BOZKURT, s.124.; AKYILMAZ, s.53.

[21] SCHACHT, ***İslâm hukukuna...,*** s.99.

[22] Karşı görüş için bkz. AKGÜNDÜZ, ***Osmanlı Kanunnameleri...,*** 1. Kitap, s.131-132.

[23] Bu Kanunnamenin zina ile ilgili maddeleri için bkz. ÜÇOK, Coşkun, ***"Osmanlı Kanunnamelerinde İslâm Ceza Hukukuna Aykırı Hükümler",*** A.Ü.H.F.D, Cilt: 4, Sayı:1-4, 1947, s.52-53.

[24] Bu Kanunnamenin zina ile ilgili maddeleri için bkz. ***Türk Hukuku Tarihi Araştırmalar ve Düşünceler Belgeler,*** Köyhocası Matbaası, Ankara 1935, s.36-38.

kimse şayet kadınsa ve zenginse ondan da zengin erkekten alınan ceza alınır. Orta halli kadın orta halli erkeğin verdiğini, fakir kadın da fakir erkeğin verdiği akçeyi ceza olarak verir. Zinayı evli kadın yaparsa ceza ücretini kocası verir. Eğer kadının malı ve kocası da varsa ve zina yapmışsa köftehorluk kınlığı diye zengininden 100 akçe, orta hallisinden 50 akçe, fakir olanından 30 akçe alınır. Bekâr bir kız, zina yaparsa onun da cezası ergen erkeğin cezasının aynısıdır. Aynı işlemi köle ve cariye yapsa diğer serbest erkekle serbest kadından alınan cezanın yarısı alınır..."[25]

Bu Kanunname hükmünde zina cezasının, suçluların mali durumlarına göre tespit edildiği görülmektedir. İslâm hukukunda tazir cezasında suçlular sosyal durumlarına göre dörde ayrılırlar ve en yüksek sosyal sınıftaki suçluya en az ceza verilir. Hadd, Kısas ve Diyet cezalarında ise, suçlular arasında mali ve sosyal bakımdan bir ayırım yapılmamış; suçluların kadın veya erkek, hür veya köle olmaları cezaların tespitinde etkili olmuştur. Kanunnamelerde cezaların tespitinde suçluların mali durumlarının göz önünde bulundurulması İslâm ceza hukukuna aykırıdır. Ayrıca kanunnamelerde tespit edilen para cezaları, diyet cezasından başka mali cezayı ve tazir cezalarının arasında para cezalarını kabul etmeyen İslâm ceza hukukunun ana prensiplerine de aykırıdır.[26]

Kanunnamedeki bu hüküm ile İslâm ceza hukukunda zina suçu için belirlenen recm veya sopa cezalarının kaldırılmış olup olmadığı açık olmasa da, suçun ispatının İslâm ceza hukuku kurallarına göre yapılacağı kesin olarak belirtilmiştir.[27]

Recm cezası, Osmanlı tarihinde bir kere uygulanmıştır. 1680 yılında İstanbul'da Aksaray semtinde oturan bir kadının, kocası

---

[25] ***Yavuz Sultan Selim Kanunnamesi,*** Konuşma Diline Çeviren: Hadiye Tuncer, Tarım Orman ve Köyişleri Bakanlığı Yay., Ankara 1987, s.11-12.

[26] ÜÇOK, ***"Osmanlı Kanunnamelerinde İslâm Ceza Hukukuna..."***, Cilt:4,1947, s.60.

[27] ÜÇOK, ***"Osmanlı Kanunnamelerinde İslâm Ceza hukukuna...",*** Cilt:4, 1947, s.61.

seferdeyken, ipekçilik yapan bir Yahudi ile zina yaparken yakalandığı iddia edilmiştir.[28] Rumeli Kadıaskeri Beyâzî-zade Ahmet Efendi'nin verdiği hüccet, sadrazama iletilmiş; sadrazamın padişaha sunduğu telhise yazılan hatt-ı Şerif ile ölüm cezası kesinleşerek uygulanmıştır. Bu olay, o dönemdeki tarihçiler arasında kınanmıştır. *"Ve Beyâzî-zâde Efendi'nin daha önce hüccet verdiği recm ahvali dahi şaşılacak işlerdendir. Zira Osmanlı Devleti'nin zuhurundan bu ana kadar gelmiş adaletli ve izzetli sultanların zamanlarında ve eski devletlerin hiçbirisinde vuku bulmadığı, günümüzde herkesin malumudur. Böylece akıbeti çirkin bir iş için fetva vermede asla çekinmemesi herkesin kalbinin kırılmasına neden olmuştur."*[29]

Zina suçuna para cezası verilmesi ise, bazı görevlilerin zengin olma hırsıyla birleşince, bu kanun maddeleri görevlilerin çıkar dolu amaçlarına hizmet eder olmuştur. 1516 tarihli Eflâklara ait Adaletname, para cezası kanunlarının kötüye kullanıldığının örneklerinden biridir:

"Voyvodalar... taife-i Eflâk'ın ve gayrin kızlarına ve dul kalmış gelinlerine türlü türlü iftira edüp, sen hamilesin deyü tutub köyden köye gezdürüb... vilâyet kadıları elbette sancakbeğine ilâm edüb men' ve def'etdüreler."[30]

XV.yüzyıl sonlarından itibaren Osmanlı Sultanları kendi yetkilerine dayanarak hukuki kurallar koymuşlardır. Bu düzenlemeler ise, özel hukuktan çok kamu hukuku alanında yapılmıştır.[31] Kamu hukuku alanında dogmatik yorum devrin ihtiyaçlarını karşılamada yeterli görülmemiş, bu alanda deneysel tarihsel yaklaşım mecburi olarak kabul edilmiştir.[32] Özel hukuk alanı prensip olarak şer'i hukuk tarafından düzenlenmişse de, uygulamada Osmanlı hükümdarları tek yetki sahibi olmuştur. [33]

---

[28] ORTAYLI, İlber, ***Osmanlı Toplumunda Aile,*** Pan Yay., İstanbul 2000, s.78.

[29] DEMİR, Aydoğan, ***"Kanunî'nin Bir Fermanı Vesileyle Zina Üzerine Düşünceler",*** Tarih ve Toplum, , Cilt:29, Sayı:169, Ocak 1998, s.9.

[30] DEMİR, s.11.

[31] GÜRİZ, Adnan, ***Hukuk Felsefesi,*** A.Ü. H.F. Yay., Ankara 1996, s.435.

[32] İNALCIK, ***"Türk Tarihinde Türe ve...",*** s.163.

[33] GÜRİZ, Hukuk Felsefesi, s.437

3. Şer'iye Sicilleri ve Fetvalar Işığında Osmanlı Kadını

Mal, mülkiyet, din, toplumsal cinsiyet, çocuklar, boşanma, mehir ve evlilik hakkında bilgiler içeren şer'iye sicilleri, Osmanlı kadının toplumsal ve hukuksal statüsünü aydınlatan zengin bir malzemedir. Bu siciller, Osmanlı toplumunun sosyo-ekonomik yapısını yansıttığı için farklı sınıf ve dinsel-etnik kimliğe mensup kadınları, diğer Osmanlı hukuk kaynaklarından daha iyi temsil etmektedir.[34]

Foucault'a göre, iktidar kullanımının her zaman düzenin temeli ve koruyucusu olan kurallar sistemine yansıması dolayısıyla, hukuk sisteminin çözümlenmesi genellikle toplumsal iktidarı kullanan özne ya da özneler hakkında da fikir vermektedir. Bu nedenle, Osmanlı hukuk sistemi içinde şer'iye sicilleri hak ve borçlara ehil olma iktidarına sahip Osmanlı kadınının uygulamada hak arama iktidarını ne oranda kullandığını göstermesi bakımından da önemlidir. Faroghi, Jennings ve Gerber gibi araştırmacıların Ankara, Kayseri ve Bursa mahkemeleriyle ilgili verileri, Osmanlı hukuk sisteminde kadının hak arama hususunda aktifliğini göstermektedir.[35]

17. yüzyıl Bursası'nda kadınlar bizzat mahkemeye çıkıp, haklarını özgürce savunmuşlardır. Bursa şer'iye sicillerinde yer alan bir kayda göre, 1683 yılında bir kadın kendisine ait olan dükkanı gasp ettiğini iddia ettiği bir şahsı dava etmiştir. Bir başka davada ise, bir kadın evine zorla girip değerli eşyalarını çaldığını iddia ettiği bir şahsa dava açmıştır.[36] Diğer bir örnekte, Bursa yakınlarındaki Hamidler köyünden iki kadın, babalarından kalan tarım arazisini vakıf yöneticisinden satın alan bir kimseye dava

---

[34] BAER, Marc David -Fatma Müge GÖÇEK, ***"18.Yüzyıl Galata Kadı Sicillerinde Osmanlı Kadınlarının Toplumsal Sınırları", Modernleşmenin Eşiğinde Osmanlı Kadınları,*** Editör: Madeline C.ZILFI, Çev: Necmiye Alpay, Tarih Vakfı Yurt Yay., İstanbul 2000, s.49-50.

[35] BAER-GÖÇEK, s.59.

[36] GERBER, Haim, ***"Social and Economic Position of Women in an Ottoman City, Bursa, 1600-1700",*** Internatinoal Journal of Middle East Studies, Vol:12, 1980, s.233.

açmış; tapu bedelini ödemek ve araziyi almak için öncelik hakkına sahip olduklarını iddia etmiş; bu hususta şeyhülislamdan aldıkları fetvayı da mahkemeye sunmuştur.[37]

17. yüzyıl Bursası'nda kadınlar ailelerinin üyelerine mallar satmış ve onlardan mallar satın almışlardır. 1693'te bir kadın oğluna dut bağını satmıştır. 1649'da bir adam karısına 8000 akçe değerinde ev satmış ve kadın peşin olarak evin değerini ödemiştir; bir başka benzer örnekte ise, 1625 yılında Bursa'da oturan bir adam evini ve iki bağını karısına satmıştır. Yine 1916 yılında bir kadın bir fırıncıya 3600 akçe borç vermiştir. Ayşe Hatun Hacı Mustafa'dan 2200 kuruş gibi yüklü miktarda borç almıştır.[38]

1546 tarihli İstanbul vakıfları Takrir Defteri'ne göre, İstanbul'da o tarihte kurulmuş olan 2517 vakfın 913'ü (%36) kadınlara aittir.[39] 1770-1840 yılları arasında Halep şer'iye mahkemesine kayıtlı 468 vakıftan 241'i (%51) kadınlar tarafından kurulmuştur.[40] Kadınların kurduğu vakıfların malvarlığının 172'si (%71) mesken mülklerinden, 46'sı (%19) ticari mülklerinden, 8 (%3) arsadan oluşmaktadır. Kadınlar vakfettikleri gayrimenkullerin çoğunu miras yoluyla elde etmeyip satın almışlardır.[41]

Bütün bunlar kadınların vakıf kurma, karz, alım-satım akitleri gibi her türlü hukuki işlemi özgürce yaptıklarını ve miras ya da miras dışı yollarla edindikleri malvarlığı üzerinde tasarruf hakkına sahip olduklarını göstermektedir. [42]

İslâm hukukunda evlenme medeni bir muamele olup, dini bir karakter taşımaz. Evlenme akdi evlenecek tarafların veya kanuni

---

[37] GERBER, s.235; AKYILMAZ, s.59-60.
[38] GERBER, s.233-234.
[39] AYDIN, M.Akif, ***"Osmanlı Toplumunda Kadın ve Tanzimat Sonrası Gelişmeler"***, Sosyal Hayatta Kadın Tartışmalı İlmi Toplantılar Dergisi, Ensar Neşriyat, İstanbul 1996, s.144.
[40] MERIWETHER, Margaret L., ***"Yeniden Kadınlar ve Vakıf Üstüne, 1770-1840", Modernleşmenin Eşiğinde Osmanlı Kadınları,*** Editör: Madeline C. ZILFI, Çev. Necmiye Alpay, Tarih Vakfı, Yurt Yay., İstanbul 2000, s.126.
[41] MERIWETHER, s.127-128.
[42] AYDIN, ***"Osmanlı Toplumunda Kadın...",*** s.145.

veya rızai temsilcilerinin iki şahit huzurunda evlenme iradelerini açıklamalarıyla geçerli bir şekilde kurulur. Ancak evlenme akdinin hiçbir resmi veya dini bir şahsın katılımı olmaksızın yapılması uygulamada evlenmenin ispatı hususunda önemli güçlüklere ve haksızlıklara yol açmıştır.[43] Bu gibi sebeplerle, özellikle Kanuni Döneminden itibaren nikahlar ya mahkemelerde kadılar tarafından ya da mahkemelerin verdikleri izinname usulüyle naipleri tarafından kıyılmıştır.[44]

Ebusuud Efendi'nin fetvalarında da, padişahın evlenme akdi için izinname alma usulünü emrettiği anlaşılmaktadır. *"Hakim marifetsiz nikah olunmaya" deyu emr-i padişahî vârid olmuş iken, hâkim marifetsiz nikah sahih olur mu? "Elcevap: Olmaz, meğer nizâ ve husumet olmaya", "Hind, izn-i kâdî yok iken, birkaç kimse huzurunda "kızım Zeyneb-i sagîreyi, kardeşim Amrın oğlu Bekr-i sagîre verdim" deyip Amr "Bekir için Zeynebi alıp kabul ettim dese nikâh olur mu? "Elcevap: İzn-i hâkimle olmak emrolunmuştur" "zeyd Hind-i bâligayı, babası Amr izinsiz nikâh eylese, Amr, râzı olmasa, nikâhı feshe kâdir olur mu? "Elcevap: Olur"*[45]

Ancak Mudurnu şer'iye sicillerindeki kayıtlara göre, zaman içerisinde bu uygulamanın işleyişindeki aksaklıklar sebebiyle şikayetler artmış ve bu durumu ortadan kaldırmaya yönelik buyuruldularda, işlerin kanun dairesinde yürütülmesi kadı ile diğer devlet görevlilerinden istenmiştir. Bolu mütesellimi Şakir Mustafa Efendi'nin imzasıyla Mudurnu, Dodurga, Pavlı, Kıbrıscık, Gerede, Avlak, Dörtdivan, Çağa ve Mengen kazaları kadılarına 1816-1817 yılında yazılan emirde de nikah akdinin usulüne uygun yapılması ve sicile kaydı şart koşulmuştur.[46]

---

43 CİN, ***İslâm ve Osmanlı Hukukunda ...,*** s.137.

44 AYDIN, ***"Osmanlı Toplumunda Kadın...",*** s.145.

45 DÜZDAĞ, Ertuğrul, ***Şeyhülislâm Ebussuûd Efendi Fetvaları Işığında 16. Asır Türk Hayatı,*** Enderun Kitabevi, İstanbul 1972, s.37-38; CİN, İslam ve Osmanlı Hukunda..., s.283.

46 SARI, Hüseyin, ***"Şer'iye Sicillerine göre II. Mahmud Döneminde Mudurnu'da Nüfus Hareketleri ve Toplumsal Hayattan Bir Kesit",*** OTAM, Sayı:7, Ankara 1996, s.179-181.

Hanefi mezhebinde geniş bir akraba zümresine, velâyetleri altındaki küçük erkek ve kız çocuklarını evlendirme yetkisi verilmiştir. İslâm, "evlenmede cebir hakkı" adını alan bu yetkinin kötüye kullanılmasını önlemek için, veli veya vasisi tarafından evlendirilen kişiye buluğa erdikten sonra evliliği feshettirebilme yetkisini tanımıştır. Küçükler tarafından kullanılan bu seçim hakkına "hıyar-ül bülûğ" adı verilmiştir.[47]

Velisi tarafından evlendirilmiş küçük kızın, buluğa erdikten sonra evliliği feshettireceğini şahitler huzurunda beyan etmediği takdirde seçim hakkını kaybedeceği; velisi tarafından evlendirilen erkek çocuğun ise, buluğa erdiği anda fesih hakkını kullanma zorunluluğu olmadığı ve fesih iradesini beyan etmedikçe fesih hakkının hayatı boyunca devam edeceği öngörülmüştür.[48]

İslâm hukuk teorisinde küçük kız çocuğuna tanınan bu hak, Osmanlı hukuk pratiğinde kadınlar tarafından çok fazla kullanılmamıştır. Bursa şer'iye sicillerinde, biri annesi diğeri hakimin tayin ettiği vasi tarafından evlendirilen iki kadın seçim hakkını kullanarak nikahlarını feshetmişlerdir.[49]

Osmanlı toplumunda yaygın bir uygulama olmayan ve İslâm hukukunda ancak eşler arasında adaleti sağlama koşuluyla kabul edilen taaddüd-ü zevcada (çok kadınla evlilik) Kuzey Türkleri arasında ve Rumeli'de hemen hemen hiç rastlanmazken, Anadolu'da da dar bir sosyal kesime has bir olgu olduğu görülmektedir.[50]

1545-1659 tarihleri arasında Edirne Askeri Kassamı'na ait tereke defterlerine kayıtlı 1516 yeniçeriden 103 tanesi (%7) iki, 6 tanesi (%1'den az) üç kadınla evlidir. II. Beyazıd Dönemine ait tereke defterlerindeki kayıtlara göre, 172 erkekten 6'sı (%3.48) birden fazla eşle evlidir.[51] Haim Gerber, 17.yüzyıl Bursa şer'iye

[47] CİN, ***İslâm ve Osmanlı Hukukunda...,*** s.87; CİN-AKGÜNDÜZ, Cilt:2, s. 78.
[48] CİN, ***İslâm ve Osmanlı Hukukunda...,*** s.87; CİN-AKGÜNDÜZ, Cilt:2, s. 78.
[49] AKYILMAZ, s.30.
[50] ORTAYLI, ***Osmanlı Toplumunda ...,*** s.87.
[51] AYDIN, ***"Osmanlı Toplumunda Kadın...",*** s.145.

sicillerinde 2000 erkekten sadece 20'sinin iki veya daha fazla kadınla evli olduğunu tespit etmiştir. Gerber'e göre poligami, en azından Bursa'da sadece teoride varolmuştur.[52]

Araştırma sonuçları, yönetici sınıflar arasında çok kadınla evliliğin yaygın olduğunu göstermektedir. Buna karşılık, gelir düzeyi düşük halk tabakalarında ve köylerde poligami oranı düşüktür.[53]

Osmanlı uygulamasında talak veya muhalaa şeklindeki boşanmalar, mahkeme defterlerine nikah kayıtlarından daha düzenli bir biçimde kaydedilmiştir. Böylece boşanma ile doğan hakların ispatı mümkün olabilmiştir.[54] İslâm hukukunda kocanın tek taraflı irade beyanıyla karısını boşama imkanı olmasına rağmen, 17.yüzyıl ve 18.yüzyıl mahkeme kayıtlarında boşanmanın bu en sık rastlanan türüne genellikle rastlanmamaktadır. Taraflar ancak kendi aralarında anlaşamayıp mahkemeye başvurdukları zaman, 18.yüzyıl mahkeme kayıtlarında "talak"ın bazı sonuçları görülebilmektedir.[55] Talak ile ilgili kayıtların büyük bir bölümünde de, iddet nafakası, mehir veya nafaka-i hızânet gibi boşanma ile doğan hakları elde etmek için mahkemenin müdahalesinin istendiği görülmektedir.[56] "*Anadolu vilayetinin, Çorum kasabasındaki Çepni mahallesinden olup şu anda İstanbul'da tahta minare mahallesinde oturan bu belgenin sahibi Satılmış kızı Emine, Şer'i Mecliste eski kocası Yunus Oğlu Abdurrahman huzurunda şöyle ikrar ve dava eyledi: Abdurrahman bu belgenin yazıldığı günün bir önceki gecesinde oturduğum evden bana "çık git kahpe, seni boşadım" dedi. Bazı eşyalarımı vererek beni çıkardı ve boşadı. Zimmetinde olan 3000 akçe mehr-i müeccelimi isterim, deyince durum Abdurrahman'a soruldu. O söylediklerini ikrar etti..."; "Beşiktaş*

---

[52] GERBER, s.232.
[53] ORTAYLI, ***Osmanlı Toplumunda...,*** s.87; AKYILMAZ, s.34.
[54] AYDIN, ***"Osmanlı Toplumunda Kadın..."***, s.146; AKYILMAZ, ***a.g.e.,*** s.43.
[55] ZILFI, Madeline C., ***" "Geçinemiyoruz"***: ***18.Yüzyılda Kadınlar ve Hul", Modernleşmenin Eşiğinde Osmanlı Kadınları,*** Editör: Madeline C. ZILFI, Çev: Necmiye Alpay, Tarih Vakfı Yurt Yay., İstanbul 2000, s.257.
[56] AKYILMAZ, s.43; ZILFI, s.257.

kasabası mahallelerinden Ayas Paşa mahallesinde oturan Ahmet oğlu Muhammed huzurunda kocası Muhammed'in kendisini ilâm tarihinden itibaren 10 ay önce bain talâk ile boşadığını, zimmetinde 800 akçe mehr-i müecceli ve 240 akçe de iddet nafakası ve ev masrafı olmak üzere 1040 akçe alacağı olduğunu iddia ve talep etmiştir. İddiası adı geçen Muhammed'in ikrarı ile sabit olunca 1040 kuruş meblağı ödemek üzere kocası aleyhine karar verilmiştir."[57]

17. ve 18.yüzyıllarda İstanbul, Suriye, Kıbrıs, Mısır, Filistin kadı sicillerinde sıkça rastlanan bir başka boşanma türü de "hul"dur. Hul, kadının kocasına vereceği bir bedel karşılığında tarafların anlaşarak evlilik birliğine son vermeleridir.[58] Ancak Çatalcalı Ali Efendi'nin verdiği fetvalardan derlenen "Fetavay-ı Ali Efendi" Mecmuasında da görüleceği gibi, bu anlaşmayı kadının yanı sıra kadının velisi, anası, babası vb. gibi kimseler de yapabilmektedir.[59] *"Zeyd'in Zevcesi yetişkin Hind'in karındaşı Amr, Hind'in izinsiz Hind'in mehri üzerine Zeyd ile boşanma üzerine anlaşıp mehri kendi malından garanti ettikten sonra, Hind öğrendikleri sonra, Hind öğrendikte kabul etmese, boşanma anlaşması gerçekleşir mi?" "Elcevap: Gerçekleşir."*[60]

18.yüzyıl İstanbul şer'iye sicillerindeki kayıtlar pek çok kadının hul yöntemini kullanarak boşandığını göstermektedir. 1742-1745 yılları arasında her ay on ila on iki kadın şer'i mahkemelerden biri olan İstanbul Bâb mahkemesine hul davası için müracaat etmiştir.[61]

1156 yılının Sefer ayında (27 Mart-24 Nisan 1743) Abdullah kızı Ayşe, kocasının da hazır bulunduğu duruşmada, ilişkilerinin iyi olmadığı gerekçesiyle boşanmak istediğini bildirmiştir. Bunun karşılığında, kocasının kendisine borcu olan 2500 akçelik mehr-i

---

57 AKYILMAZ, dpn. 144, s.43.
58 ZILFI, s.259.
59 ART, Gökçen, ***Şeyhülislam Fetvalarında Kadın ve Cinsellik,*** Çivi Yazıları Yay., İstanbul 1996, s.128.
60 ART, s.130.
61 ZILFI, s.262.

müeccel ile iddet nafakasını almayacağını beyan etmiş; kocası da kadının bu teklifini kabul etmiştir.[62] Bir başka davada, Mustafa kızı Saliha, kocası Esseyyid Ali Çelebi ile ilişkilerinin iyi olmadığını ileri sürüp, boşanma karşılığında 3000 akçelik mehir ve iddet nafakasından vazgeçtiğini beyan etmiştir.[63]

İslâm hukukunda kadına evliliğe son verme imkanını veren boşanma yöntemlerinden biri de fesihtir. İslâm hukukunda, hastalık ve kusur, nafakanın ödenmemesi, gaiplik ve terk, fena muamele ve geçimsizlik gibi sebeplerle adli boşanma kabul edilmiştir. Osmanlı Devleti'nin resmi mezhebi olan Hanefi mezhebinde sadece kocada bulunan belirli cinsi kusur ve hastalıklar boşanma sebebidir. Hanefi hukukçusu İmam Muhammed'in akıl hastalığı, cüzzam ve alaca hastalığını da boşanma sebebi olarak kabul eden görüşü bile, kadıların Hanefi mezhebi içerisinde en sahih görüşü uygulamak zorunda olmaları nedeniyle 1916 yılına kadar uygulanmamıştır.[64]

Sünni-Hanefi İslâm, kocaları kaybolan veya kocaları tarafından terk edilen, nafakasız bırakılan veya fena muameleye maruz kalan kadına evlilik birliğine son verme seçeneği vermeyince, diğer kazaî boşanma imkanlarını dolaylı olarak kullanarak veya birtakım hukuki zorlamalar ve hukuk dışı yollarla kadınların önlerine konan hukuki set aşılmaya çalışılmıştır.[65]

Kocaları geçimlerini sağlayacak nafakayı bırakmadan kaybolan kadınlar XVI.yüzyıl ortalarına kadar kadıya başvurarak, diğer mezheplerin kabul ettiği fesih imkanından dolaylı bir şekilde yararlanmışlardır. Bu sebebe dayanarak kadınların boşanmasına hükmedemeyen Osmanlı kadıları, bu gibi durumlarda Şafii mezhebinden nâibler tayin etmiş ve onların kendi mezheplerine göre verdikleri kararlarla kadınları mağdur olmaktan kurtarmıştır. Ancak bu usul, XVI.yüzyıl ortalarında

62 ZILFI, s.263.
63 ZILFI, s.264.
64 CİN-AKGÜNDÜZ, Cilt:2, s.116; AYDIN, ***Osmanlı Hukukunda Kazaî....***, s.4.
65 AYDIN, M. Âkif , ***Osmanlı Hukukunda Kazâî Boşanma "Tefrik",*** Ayrı Basım, İstanbul 1986, s.10.

yasaklanmıştır.[66]

Yine XVII. yüzyıla ait Kayseri şer'iye sicillerindeki kayıtlara göre, Kayseri kadısı karısına fena muamele eden kocaya şartlı talak teklif etmiştir. Koca bu şartı ihlal ederse mahkeme kararına gerek olmaksızın boşanma gerçekleşmiş olacaktı. Bu yolla kadına bir boşanma imkanı yaratılmıştır.[67]

B. TANİZMAT DÖNEMİNDE OSMANLI KADINI

1. Genel Olarak

3 Kasım 1839 günü Gülhane Hatt-ı Hümayunu'nun ilanıyla başlayan ve 1876 yılına kadar devam eden dönem "Tanzimat Dönemi" olarak adlandırılmaktadır. Tanzimat Fermanı'nın ilan edildiği 1839 yılında Osmanlı devletinin siyasi ve ekonomik durumu şöyledir:

"... Bir kere ülke olarak önemli bir küçülme söz konusudur. Cezayir, Yunanistan, Besarabya, Karadeniz'in güneydoğu kıyıları ve Osmanlı Kafkasyası kesin olarak ayrılmış, Sırbistan ve Memleketey'in Osmanlı camiasıyla bağları adamakıllı zayıflamış Mısır yönettiği bölgelerle birlikte başına buyruk durumuna gelmiştir. Mısırla mücadele uğrunda önce Rusya'nın uyduluğu kabul edilmiş, daha sonra, ve belki çok daha tehlikeli olarak, ülkenin hayati iktisadi menfaatleri Batı'ya peşkeş çekilmiştir. 1838'de Osmanlı-İngiliz Ticaret sözleşmesi Osmanlı ülkesini açık Pazar durumuna düşürdüğü için iktisadi iflas demekti. Nizip muharebesi ise askeri iflası duyurmaktaydı. Bu iki iflas yarı sömürgecilik haline doğru atılmış büyük adımlardı..."[68]

II. Mahmut Döneminde yönetilenlerin durumunda da köklü

66 CİN-AKGÜNDÜZ, Cilt:2, s.110; AYDIN, ***Osmanlı Hukukunda Kazâî...***, s.5.
67 AYDIN, ***Osmanlı Hukukunda Kazâî...***, s.9.
68 KUNT, Metin et al, ***Türkiye Tarihi (3) Osmanlı Devleti 1600-1908***, Yayın Yönetmeni: Sina Akşin, Cem Yayınevi, İstanbul 1990, s.119.

değişiklikler yapılmamıştır. Yönetici sınıf için kulluk sistemi devam etmektedir.[69] II. Mahmut 1836 yılında İstanbul'daki köle pazarlarını kaldırmışsa da bu ticaretin yapılması evlerde ve bazı hanlarda devam etmiştir.[70] Erkek egemenliğinin ve bu egemenliği pekiştiren Ortodoks İslâm'ın baskısı altındaki kadınlar da kötü durumdadır.[71] II. Mahmut Döneminde kadınların Sa'dâbâd, Karaağaç, Bahariye, Davud Paşa, Çırpıcı ve Veli Efendi Çeşmesi mahalleleri gibi mesire yerlerine girmesi yasaklanmış; kadınların çarşı ve pazarda edâlı bir şekilde dolaşmamaları, giyim ve kuşamlarına dikkat etmeleri; Ramazan-ı Şerif'te kadınların teravihe kalmak bahanesiyle camilerde toplanmamaları; saat dörde-beşe kadar mahalle aralarında dolaşmamaları emredilmiştir.[72]

1831 yılında Anadolu ve Rumeli'de yapılan ilk nüfus sayımında sadece erkek nüfusun sayımı yapılmıştır. Yeniçeri ordusunun yerine yeni bir ordunun kurulması, yeni vergi kaynaklarının ve askerlik yapacak halkın sayısının bilinmesini gerektiriyordu. Ekonomik kaynakları ve askeri gücü sağlayacak da erkek nüfustur.[73] Bu nedenle, 1831 nüfus sayımıyla imparatorluğun Rumeli ve Anadolu gibi iki büyük parçasının İslâm ve Hıristiyan erkek nüfusu belirlenmiştir.[74]

Tanzimat Dönemini başlatan Gülhane Hatt-ı Hümayunu da Osmanlı İmparatorluğu'nun sosyal, hukuki, ekonomik, siyasi ve kültürel yönlerden travma yaşadığı bu dönemde ilan edilmiştir. Ferman'da 150 yıldır birbirlerini izleyen karışıklıklar ve çeşitli nedenlerle Şeriata ve yasalara uyulmaması devletin eski gücünü

---

[69] TANÖR, Bülent, ***Osmanlı-Türk Anayasal Gelişmeleri,*** Yapı Kredi Yay., 4.B. İstanbul 1999, s.76.

[70] BOZKURT, Gülnihal, ***Osmanlı Devletinde Köle Ticaretinin Önlenmesi İçin Yapılan Çalışmalar,*** XI. Türk Tarih Kongresi'nden ayrı basım, XI. Türk Tarih Kurumu Basımevi, Ankara 1994, s.1500-1501.

[71] Tanör, s.76.

[72] KURT, İsmail, ***"Kadınlarla İlgili Fermanlar,"*** Sosyal Hayatta Kadın, Ensar Neşriyat, İstanbul 1996, s.312.

[73] KARAL, Enver Ziya, ***Osmanlı İmparatorluğunda İlk Nüfus Sayımı 1831,*** T.C. Başvekâlet İstatistik Umum Müdürlüğü, Ankara 1943, s.10-11.

[74] Karal, s.21.

kaybetmesinin sebebi olarak gösterilmiş, ardından devletin kötü gidişini önlemek ve iyi bir biçimde yönetilmesi için bazı yeni kanunların çıkarılmasının gerekli görüldüğü belirtilmiştir. Yeni kanunlarla can güvenliği, ırz ve namus ve malın korunması, vergi toplanması; halkın askere alınıp silah altında tutulması süresi gibi hususlar düzenlenecektir. Devletin tebaası Müslümanlarla diğer uluslar, bu haklardan tam yararlanacaklardır.[75] Müslümanlarla gayrimüslimler arasındaki eşitliği tesis eden bir belge olarak yorumlanan Tanzimat Fermanı, eşitliği özgür ve erkek Osmanlı uyruklarına özgü bir hukuk normu olarak kabul ediyordu. Dönemin Tanzimat, Islahat ve Adalet Fermanlarında da kadından, eşitlik ve diğer reformlar çerçevesinde söz edilmez. Tanzimat Fermanı'nın ilan edilmesiyle başlanan yeni ve laik yasaların kabul edilmesi sürecinde kadın, hukuksal metinlerde en az yer verilen toplumsal öznedir.[76] Ancak Tanzimat Dönemi, hukuksal platformun aksine, sosyo-kültürel sahada yaşanan değişimle üst ve orta sınıf kadının kamusal alana girişini hazırlayan çok önemli bir dönem olmuştur.[77]

2. Tanzimat Döneminde Osmanlıda Kadın

Tanzimat Döneminde girişilen bütün reformlarda "eski"nin tamamen ortadan kaldırılmadığı görülmektedir.[78] Batı dünyasına karşı verilen varolma mücadelesi sırasında İmparatorluğun yönetim kadrolarınca planlanan reformlar, doğal olarak devrimci nitelik taşımazlar. Eskiye daha dönük olarak gerçekleştirilen değişimlerdir. Tasarlanan tüm reformlar, devleti kurtarmaya yönelik ve başlangıçta pragmatik bir niteliğe sahiptir.[79] Tanzimat

---

75 Haklar Antolojisi..., s.646-647.

76 ALPKAYA, Gökçen, ***"Tanzimat'ın "Daha Az Eşit Unsurları: Kadınlar ve Köleler"***, OTAM, Yıl: 1, Sa: 1, Ankara 1990, s.1-2.

77 ORTAYLI, İlber, ***İmparatorluğun En Uzun Yüzyılı,*** Hil Yayın, İstanbul 1983, s.182.

78 TÜRKÖNE, Mümtazer, ***Osmanlı Modernleşmesinin Kökleri,*** Yeni Şafak Kitaplığı Yakın Tarih Dizisi, İstanbul 1995, s.21.

79 KÜÇÜK, Mehmet, ***"Gericilik Bilincinin Doğuşu Olarak Osmanlı-Türk Modernleştirilmesi",*** Doğu-Batı, Yıl:4, Sayı:13, 2000-2001, s.255-256.

Döneminde devletin teokratik yapısının değiştirilmemesinin altında yatan neden, devleti kutsallaştıran dinsel öğretiyle, dinden güç alan ve meşruiyetini dine dayayan devlet arasındaki uyumun korunmak istenmesidir. Çünkü devlet ile din arasındaki bu uyum yüzyıllardır, Batı'da örneği olmayan bir istikrar ve barış dünyasını yaratmıştır.[80] Bu uyumun bozulması ise, devletin meşruiyet temellerini sarsacağı gibi, devletin geleceğini de tehlikeye sokacaktı. Siyasette, kültürde ve eğitimde olduğu gibi, hukuk ve adli düzenlemelerde de gelenekle modernlik bir arada varolmuştur.[81]

Tanzimat Fermanında yer alan can, mal, namus dokunulmazlığı gibi ilkelerin pratiğe geçirilmesi, şer'i hukuktan bağımsız bir ceza hukuku alanının düzenlenmesini zorunlu kılıyordu.[82] 1840 tarihinde kabul edilen Ceza Kanunnâme-i Hümayûnu'nda, Tanzimat'ın eşitlik prensibi kabul edilmiş; cinsiyete bağlı bir ayrım yapılmamıştır. 1840 tarihli Kanunnâme'nin hukuki eşitliği düzenleyen 1. maddesi şöyledir: *" Bundan böyle herkes huzur-u şer ve kanunda (Şeriat ve kanun huzurunda) ve mevadd-ı hukukiyede (hukuki meselelerde) yeksan ve siyyan (bir ve eşit) olacak ise de her bir sınıfın zâbıt ve rüesasına itaat ve inkıyad ve her halde usul-ü edebiyeye riayet etmeleri ve vazifesinden hariç şeylere teşebbüs etmemeleri lazimeden olmakla buna muhalif hareketle bulunanların suçuna göre tekdir ve terbiyeleri icra oluna."*[83]

1858 tarihli Ceza Kanunu'nda ise, cezaların uygulanmasında kadınlar ile erkekler arasında bir fark olmadığı; ancak bazı cezaların uygulanmasında kadınların özel durumlarının göz önünde bulundurulacağı belirtilmiştir. 1858 tarihli Ceza Kanunu'nun 43. maddesine göre; *" Mücâzat-ı kanuniyede*

---

80 MAHÇUPYAN, Etyen, ***"Osmanlı Dünyasının Zihni Temelleri Üzerine",*** Doğu-Batı, Yıl:2, Sayı:28, 1999, s.52.

81 TÜRKÖNE, s.21.

82 BERKES, Niyazi, ***Türkiye'de Çağdaşlaşma***, Bilgi Yayınevi, İstanbul 1973, s.196.

83 AKGÜNDÜZ, Ahmet, ***Mukayeseli İslâm ve Osmanlı Hukuku Külliyatı,*** D.Ü.H.F. Yay., Diyarbakır 1986, s.818.

nisânın (kadınların) zükûrdan (erkeklerden) farkı yoktur. Ancak bazı cezaların suver-i icraiyesinde onların hususiyet hallerine riayet olunmak lazım gelir."[84] Hamile kadının çocuğunu doğurana kadar idam edilememesi yasada kabul edilen tek özel durumdur.(m.18).[85]

1858 tarihli Ceza Yasası'nın yürürlüğe girdiği ilk biçiminde zina suçu düzenlenmemişse de dolaylı yoldan ağır bir yaptırıma bağlanmıştır. Yasanın 188. maddesine göre, bir kimse zevcesini veya mahreminden birini bir şahıs ile cinsel ilişki sırasında görüp de ikisini birden öldürürse mazur sayılır ve üç aydan üç yıla kadar hapis cezasıyla cezalandırılır. (md.190).[86] 3 yıl sonra Kanun'da yapılan bir değişikle, (md.201) zina kadın ve erkek için suç sayılmış; fakat erkeğin zinası ile kadının zinasında suçun ispatı ve verilecek ceza bakımından eşitlik ilkesine aykırı olarak farklı ölçütler saptanmıştır. Zina yapan kadın üç aydan az ve iki yıldan çok olmamak üzere hapisle cezalandırılırken, zina yapan erkeğin sadece para cezasıyla cezalandırılacağı kabul edilmiştir. Kadının zinası suçüstü durumunda, suç ortağının haremde bulunması ve kadın tarafından yazılmış belgelerin varlığı halinde sabit olurken; erkeğin zinası ancak zinanın erkeğin karısıyla oturduğu evde yapılması ve karısının şikayet etmesi durumunda suç olarak kabul edilmiştir.[87]

1869 yılında kabul edilen Tabiiyet-i Osmaniye Kanunnamesi, müslim-gayrimüslim ayrımı yapmadan Osmanlı vatandaşının kimliğini belirleyen ilk uyrukluk düzenlemesidir. Tabiiyet-i Osmaniye Kanunnamesi'nde, Osmanlı vatandaşı kadının yabancı bir erkekle evlenmesi durumunda uyrukluğunu kaybedip kaybetmeyeceği dolaylı bir biçimde düzenlenmiştir. Kanunnamenin 7. maddesine göre: "*Tebaa-i Devleti Aliyyeden iken ecnebi ile tezevvüç eden kadın zevcinin vefatı tarihinden üç sene zarfında istida ederse tabiiyet-i asliyesine ric'at edebilir.*" Bu maddeden çıkan sonuca göre kadın, yabancı bir erkekle

84 AKGÜNDÜZ, ***Mukayeseli İslâm...,*** s.840.
85 AKGÜNDÜZ, ***Mukayeseli İslâm...,*** s.838; ALPKAYA, s.3.
86 ALPKAYA, s.4; AKGÜNDÜZ, ***Mukayeseli İslâm...,*** s.863.
87 ALPKAYA, s.4; AKGÜNDÜZ, ***Mukayeseli İslâm...,*** s.865.

evlendiğinde Osmanlı uyrukluğunu kaybetmektedir.[88]

1822'de yayınlanan Buyrulduda, sünni Osmanlı kadınlarının İranlılarla evlenmesinin yasak olduğu hatırlatılmıştır. Ancak metnin sonlarında "böyle meçhulunesep olan eşhasa kız verip alırlar" ifadesinin kullanılması, yasağın sadece kadınları değil erkekleri de kapsadığının altını çizmektedir.[89] Bilindiği gibi, Şeyhülislam Kemalpaşazade'nin Şiilerin müslüman sayılmayacağı fetvasını Yavuz Sultan Selim'e vererek onun Safevilere savaş açmasını kolaylaştırması Osmanlı kadınlarının İranlı erkeklerle evlenme yasağını da beraberinde getirmiştir.

Buyruldu-i Âli'den 52 yıl sonra 1874 yılında çıkarılan Nizamnamede, mezhep ve kadın - erkek ayrımına yer verilmeksizin Osmanlı uyrukları ile İran uyrukları arasındaki bütün evliliklerin kesinlikle yasaklandığı belirtilmiştir. Nizamnamenin 3. maddesine göre, Osmanlı uyruklu bir kadının bir İranlıyla evliliğinden doğan çocukları ile kadın Osmanlı vatandaşı sayılacaklar; vergi ve askerlik yükümlülüklerini ifa edeceklerdir. Bu maddede, yasağa karşın yapılmış evliliklerin Tabiiyet-i Osmaniye Kanunnamesinin 7. maddesinin kapsamı dışında tutulacağı açıkça kabul edilmiştir.[90]

1858 tarihli Arazi Kanunnamesi, Osmanlı miras sisteminde bir dönüm noktasıdır. İslâm miras hukuku kurallarına göre, murisin kız ve erkek çocuğu birlikte mirasçı oldukları zaman, kız çocuğu erkek evladın hissesinin yarısını alır. 1858 tarihli Arazi Kanunnamesi ise, önceki kanuni düzenlemelerin aksine, miri arazinin intikalinde kadın ile erkeği eşit kabul etmiştir. Bu Kanuna göre, murisin kız evlatları erkek evlatları gibi miri arazinin intikalinde eşit hisseler alırlar. Murisin erkek çocukları yoksa diğer uzaktan erkek akrabaların varlığı da kız çocuklarının

---

88 AYBAY, Rona, ***Kadının Uyrukluğu Üzerinde Evlenmenin Etkisi,*** A.Ü.S.B.F. Yay., Ankara 1980, s.64-65; KURNAZ, Şefika, ***Cumhuriyet Öncesinde Türk Kadını (1839-1923)***, T.C. Başbakanlık Aile Araştırma Kurumu Başkanlığı Yay., 2. B., Ankara 1991, s.32.

89 AYBAY, s.70; Kurnaz, s.32.

90 AYBAY, s.71; Kurnaz, s.32; ALPKAYA, s.2.

mirastan pay almasını engellemez. Ancak 19.yüzyıl şer'iye sicillerindeki kayıtlar bu kuralla bağlı kalınmadığını ve kız çocuklarına İslami kurallara göre erkeğin aldığı hissenin yarısının verildiğini göstermektedir.[91]

1868-1876 yılları arasında kitaplar halinde hazırlanarak yürürlüğe giren Mecelle'de, borçlar hukuku ağırlıkta olmak üzere, eşya ve yargılama hukuku düzenlenmiştir. Mecelle şahsın hukuku, vakıf, aile, miras hukuku ile ilgili hükümleri içermediği için gerçek bir medeni kanun niteliğini taşımamaktadır.[92]

Mecelle Batı yasa tekniği ile düzenlenmişse de, gerçekte tamamen İslâm özel hukuk kurallarını ihtiva eder.[93] Örneğin, Mecelle'nin 1685.maddesine göre, özel hukuk davalarında şahitlerin sayısı iki erkek ya da bir erkekle iki kadındır ve erkeklerin bulunmasının mümkün olmadığı yerlerde yalnız mal ile ilgili konularda kadınların şahitliği kabul edilir.[94] Yine Mecelle'nin çevre ile ilgili maddeleri (md.1207-1209) kadının yaşam alanının sınırlı ve dar mekanlarla kuşatıldığını göstermektedir. Kadınlara ait yerler olarak bilinen (makrar-ı nisvân) mutfak, kuyu başı ve avluların bir başka evden görülmesi "zarar-ı fahiş" olarak kabul edilmiş ve zararın giderilmesi emredilmiştir.

Bu tür hükümler, 19.yüzyılın ikinci yarısında Osmanlı hukuku ve uygulamasında kadının toplumdaki kapalı, sosyal hayattan kopuk durumunun sürdüğünü bir kez daha göstermektedir.

---

91 ORTAYLI, İlber, ***"Ottoman Family Law and the State in the Nineteenth Century"***, OTAM, No:3, 1990, s.328.

92 BOZKURT, Gülnihal, ***Batı Hukukunun Türkiye'de Benimsenmesi Osmanlı Devleti'nde Türkiye Cumhuriyeti'ne Resepsiyon Süreci (1839-1939),*** TTK Yay., Ankara 1996, s.161.

93 ÜÇOK-MUMCU-BOZKURT, s.291; ARSEBÜK, Esat, ***Şahıs Aile Hukuku,*** A.Ü.H.F. Yay., Ankara 1938, s.47.

94 ÖZTÜRK, Osman, ***Osmanlı Hukuk Tarihinde Mecelle,*** İslâmi İlimler Araştırma Vakfı Neşriyatı, İstanbul 1973, s.398.; KAŞIKÇI, Osman, ***İslâm ve Osmanlı Hukukunda Mecelle,*** OSAV, İstanbul 1997, s.301.

C. II. MEŞRUTİYET DÖNEMİNDE OSMANLI'DA KADIN

1. Genel Olarak

Yüzyıllar boyunca dört duvar arasında kapatılarak sadece "âlet-i zevk" ve "âlet-i hizmet" olarak görülüp, eğitim hakkı elinden alınmış Osmanlı kadınının yazgısı Tanzimat'la birlikte değişmeye başlamıştır. Toplumda "okuyan kız büyücü olur" zihniyetinin zamanla değişimi ve ülkenin geleceğini inşa edecek vatansever erkeklerin cahil anneler tarafından yetiştirilemeyeceği düşüncesiyle kız çocukları için de okullar açılmıştır.[95] Tanzimat'ın en büyük başarılarından birisi kız çocukları için kız rüştiyelerinin açılması olmuştur. II. Mahmut'un çabalarıyla kendileri için açılan mahalle okullarında sadece geleneksel bir eğitim gören kız çocukları, Tanzimat Döneminde sanat okulları ve kız öğretmen okullarının açılmasıyla meslek sahibi olma yolunda ilk adımı atmışlardır.[96]

Yürürlükteki aile hukuku ve evlenme geleneklerinin sorunlar yarattığının bilincinde olan Tanzimat Döneminin yöneticileri, geleneksel evliliği düzenlemek için bazı ferman ve tenbihler de çıkarmıştır. Ferman ve tenbihlerde evlenme sırasında yüklü masrafların yapılmasını önlemek amacıyla başlık ödeme yasaklanmıştır.[97]

Tanzimat Dönemindeki bütün gelişmeler, kadınların, içinde bulundukları durumu görmelerini, aydınlanmalarını ve daha iyi bir konuma gelmeyi amaçlamalarını sağlamış; çıkardıkları kadın dergileri, kurdukları derneklerle II. Meşrutiyet Döneminde kadınların verdikleri mücadelelere bir alt zemin oluşturmuştur. II. Meşrutiyet Dönemi, iktidardaki İttihat ve Terakki Partisi'nin büyük desteğiyle, kadın sorunu da dahil olmak üzere özgürlük sorununun tüm biçimleriyle tartışıldığı bir dönem olmuştur. Bu

---

[95] TOSKA, Zehra, ***"Çağdaş Türk Kadını Kimliğinin Oluşumunda İlk Aşama Tanzimat Kadını",*** Toplum ve Tarih, Cilt:21, Sa: 124, 1994, s.6.
[96] BERKES, s.204.
[97] ORTAYLI, ***İmparatorluğun En Uzun....,*** s.183.

dönemde İslâmcı, Batıcı ve Türkçü düşünce akımları kadın sorununa farklı açılardan yaklaşmıştır.[98]

1908 Devriminin yarattığı özgür ortamda ilk önce Batıcılar, kadınların toplumsal statüsünü, peçe ve çarşaf konularını, kadınların eğitim sorunlarını eleştirmişlerdir. O dönemde yayınlanan yazılardaki ortak yargılardan biri de şudur: Osmanlı Devleti'nin geriliğinin nedeninin, baskı altındaki kadınların toplumsal statüsünün düşüklüğüne bağlanmasıdır.[99] Kadın konusunda en radikal Batıcı çizgiyi temsil eden Selahittin Asım'a göre kadınların ağlanacak durumlarının nedeni, örtünme, poligami, talak, miras gibi konuları düzenleyen şer'i hukuk ve geleneklerdir.[100]

İslâmcı yayınlarda ise örtünme (tesettür), kızların okutulması gibi konular tartışılan konuların başında gelir. Meşrutiyeti şer'i düzeninin devamı olarak yorumlayan İslâmi kesim, kadınların toplumsal statüsünü etkileyen gelişmeleri yeni rejimin söylemine ters düşen faaliyetler olarak nitelendirmiştir. Örneğin, Muhammed Abduh, kızların okutulmasını savunmakla birlikte, kız çocuklarının Fransızca, piyano ve ses dersi veren okullara gitmemeleri gerektiği görüşünü savunmuştur.[101]

Türkçü düşünce akımının en önemli temsilcisi Ziya Gökalp ise, kadının özgürleşmesinin ancak hukukta, eğitimde ve ekonomide yapılacak reformlarla mümkün olabileceğini savunmuştur.[102] Gökalp'a göre, kadınlar da erkekler gibi eğitim hakkından yararlanmalı; ekonomik özgürlüklerini kazanmalı;[103] evlilik ve mirasta erkekler gibi eşit haklara sahip olmalıdır.[104] Ziya

---

98 CAPORAL, Bernard, ***Kemalizmde ve Kemalizm Sonrasında Türk Kadını (1919-1970)***, Türkiye İş Bankası Yay., Ankara 1982, s.77.
99 BERKES, s.390.
100 CAPORAL, s.88.
101 BERKES, s.392-393.
102 BERKES, s.394.
103 SHAW, Stanford J./ Ezel Kural SHAW, ***Osmanlı İmparatorluğu ve Modern Türkiye,*** C.2, E Yay., İstanbul 1983, s.365.
104 SHAW/SHAW, s.369.

Gökalp'in ardından bu konuları işleyen Türkçü yazarların yayınları, İslâmi görüşü savunanlar tarafından yoğun bir muhalefetle karşılaşmıştır.[105] Bu tepkiler sokağa da sıçramış, kadınlara karşı saldırı ve hareket boyutlarına kadar varmıştır. Bu olayların Aydın'da artması üzerine, yetkililer bir karar almıştır. Bu karara göre, "bir kadınla konuşurken suçüstü yakalanan kişiye 100 kuruş para cezası verilecek, kadına ise falaka cezası verilecektir".[106]

Tanzimat Dönemiyle başlayan I. Meşrutiyet Döneminde ivme kazanan kadın meselesi, II. Meşrutiyet'te İttihat ve Terakki Partisi'nin hukuku laikleştirme politikasıyla birleşince evlenme ve boşanmada kadının lehine bazı hukuki düzenlemeler yapılmıştır.

2. II. Meşrutiyet Döneminde Osmanlı Pozitif Hukukunda Kadın

1330/1914 tarihli Sicil-i Nüfus Kanunu'nun 26.maddesinde, Müslüman halkın nikâhlarının hakim veya nâipler, gayrimüslim vatandaşların nikâhlarının ruhani reisleri veya yetkili vekilleri tarafından kıyılması kabul edilmiştir. Koca akdin icrasından sonra imama, papaza veya hahama onaylatıp mühürlettiği ilmühaberi nüfus memurları bulunan yerlerde iki hafta, bulunmayan yerlerde ise iki ay içinde nüfus idarelerine verecektir. Yine aynı Kanunun 29.maddesi ile koca iki şahit huzurunda yetkili makamlardan aldığı talâk ilmühaberini nüfus idarelerine vermekle yükümlü tutulmuştur.[107]

1916 yılında kabul edilen iki irade-i seniye ile evliliğin feshine yol

---

105 BERKES, s.394.

106 GÜZEL, Şehmus: ***"Tanzimat'tan Cumhuriyete Toplumsal Değişim ve Kadın"*** Tanzimat'tan Cumhuriyete Türkiye Ansiklopedisi, C.3, s.860.

107 ÜNAL, Mehmet, ***"Medeni Kanunun Kabulünden Önce Türk Aile Hukukuna İlişkin Düzenlemeler ve Özellikle 1917 Tarihli HUKUK-İ AİLE KARARNAMESİ",*** A.H.F.D., Cilt:34, Sa: 1-4, Ankara 1978, s.207.

açabilecek sebepler genişletilmiştir. Balkan ve I. Dünya Savaşlarında, cepheye gidip kaybolan veya şehit olduğu haberi gelmeyenlerin sayısı çoğalmış ve aileler yoksulluk içine düşmüşlerdir. Geride kalan eşlerin Hanefi mezhebine göre, kocalarının yaşıtları ölünceye veya kocaları doksan yaşına gelinceye kadar evli kabul edilmesi sosyal, ahlâki ve iktisadi problemlere neden olmuştur. Bu nedenle, 29 Rebiü'l-Âhır 1334/5 Mart 1916 tarihli irâde-i seniye ile kocaları geçimlerini sürdürecek nafakayı bırakmadan kaybolan kadına hakime başvurarak evliliklerinin feshini isteme hakkı verilmiştir.[108]

17 Cemaziye'l-Evvel 1334/23 Mart 1916 tarihli ikinci irâde-i seniyye ile kocaları akıl hastalığı, cüzzam, alaca hastalığı gibi hastalıklara yakalanan kadınlara boşanma hakkı verilmiştir. Ancak bu tip hastalıklara yakalanan eşin iyileşme ümidi varsa hâkim boşanmayı bir sene erteler, bu müddet sonunda koca iyileşmez ve kadın boşanma talebinde ısrar ederse hakim eşleri boşar.[109]

II. Meşrutiyet'ten sonra Mecelle tadillerini gerçekleştirmek üzere kurulan Hukuk-i Aile Komisyonu, İslâm, Hıristiyan ve Musevi aile hukukunu göz önünde bulundurarak 157 maddeden oluşan Hukuk-i Aile Kararnamesi'ni hazırlamıştır.[110] HAK, Sadrazam ve Parlamento'nun onayından geçmeden, şeyhülislam tarafından Padişaha sunulmak suretiyle 1 Ocak 1918 tarihinde yürürlüğe girmiştir.[111] HAK, aile hukukuna ilişkin bütün meseleleri değil, evlenme ve boşanma ile ilgili konuları düzenlemekteydi. Kararnamenin en önemli özelliklerinden biri, Hanefi mezhebinin yanı sıra diğer mezhep ve müçtehitlerin görüşlerinden yararlanılarak hazırlanmış olmasıdır.[112]

Kararnamenin kadının hukuki statüsünü etkileyecek en önemli

---

[108] AYDIN, ***Osmanlı Hukukunda Kazâî...,*** s.10; AYDIN, ***"Osmanlı Toplumda Kadın ve..."***, s.152.
[109] AYDIN, ***Osmanlı Hukukunda Kazâî...,*** s.10-11.
[110] CİN-AKGÜNDÜZ, Cilt:2, s.66.
[111] ÜNAL, s.210.
[112] CİN-AKGÜNDÜZ, Cilt:2, s.67.

maddeleri şunlardır:

1. Kararname nikâhların mahkemenin kontrolünde kıyılma geleneğini devam ettirerek, evliliğin nikâh akdi yapılmadan önce ilan edilmesi şartını getirmiştir. HAK md.33'e göre: "Akdin nikâhın icrasından evvel keyfiyet ilân olunur."[113]

2. HAK, ilk defa evlenecek erkek ve kadın için yaş sınırı getirmiştir. Evlenme ehliyetini kazanabilmek için aranan yaş sınırı erkeklerde 18, kızlarda 17'dir (HAK md.4). 18 yaşını doldurmamış erkek ve 17 yaşını doldurmamış kız çocukları, baliğ olduğunu beyan ile hakime müracaat ederek evlenmesine müsaade edilmesini isteyebilir. Hakim, müracaat eden erkek veya kadını gerekli fiziki olgunluğa sahip görürse evlenmeye müsaade eder. Kadın için ayrıca velisinin izni de gerekir (HAK md.5-6).[114] Kararnamede on iki yaşını bitirmemiş erkek çocukları ile dokuz yaşını bitirmemiş olan kız çocuklarının hiç kimse tarafından evlendirilemeyeceği kabul edilerek, o zamana kadar yürürlükte olan kurallardan farklı olarak evlenme için bir alt yaş sınırı konulmuştur (HAK.md.7).[115]

3. Nüfusun arttırılması, fuhuşun önlenmesi ve kadın nüfusun erkek nüfusundan fazla olması gibi sebeplerle HAK, poligami pratiğini kaldırmamış ise de *" üzerine evlenmemek ve evlendiği surette kendisi veya ikinci kadın boş olmak şartıyla bir kadını tezevvüc sahih ve şart mutebirdir"* hükmüyle sınırlamıştır. (HAK.md.38)[116] Özellikle bu madde, tutucu kesimin büyük tepkisini çekmiştir.

Kararname, bazı tutucu Müslümanların ve yargı yetkisi ellerinden alınan başta Rum Ortodoks kilisesi olmak üzere gayrimüslimlerin siyasi baskıları sonucunda 20 Ramazan 1337/1919 tarihli muvakkat bir kanunla kaldırılmıştır.[117]

---

113 AYDIN, "***Osmanlı Toplumunda Kadın ve...",*** s.153.
114 CİN, ***İslâm ve Osmanlı Hukukunda...,*** s.294.
115 AYDIN, "***Osmanlı Toplumunda Kadın ve...",*** s.153.
116 CİN, ***İslâm ve Osmanlı Hukukunda...,*** s.301.
117 CİN-AKGÜNDÜZ, Cilt:2, s.68.

Ziya Gökalp'in "YENİ HAYAT" diye nitelendirdiği II. Meşrutiyet Dönemi, Batı kökenli feminizm akımı ve bu dönemde doğan düşünce akımlarının etkisiyle Osmanlı'da kadın-erkek eşitliği ekseninde yapılan tartışmaların gündemi belirlediği bir dönem olmuştur.[118] Bu dönemin atmosferinden etkilenen Osmanlı devlet adamları, pozitif hukukta değişiklik yapmak zorunda kalmışlardır. Ancak hukuki düzenlemeler, İslâm hukukunun genel prensiplerinden uzaklaşmaksızın Hanefi mezhebinin yanında diğer mezheplerin içtihatlarından yararlanmak suretiyle yapılmış; hukuki yapıda radikal reformlar yaparak hukuki sistemi kökten değiştirme yoluna gidilmemiştir.[119] Bu ölçüye uymayan yeni kurallar ise büyük tepki görmüş ve 1917 tarihli HAK gibi hayatiyet kazanamamıştır.

KAYNAKÇA

AKGÜNDÜZ, Ahmet: **Mukayeseli İslâm ve Osmanlı Hukuku Külliyatı**, D.Ü.H.F. Yay., Diyarbakır 1986.

AKGÜNDÜZ, Ahmet**: Osmanlı Kanunnâmeleri ve Hukuki Tahlilleri,** I. Kitap**,** Fey Vakfı Yay. İstanbul 1990.

AKPINAR, Turgut: **Türkler'in Din ve Hukuk Tarihi,** İletişim Yay., İstanbul 1999.

ALPKAYA, Gökçen: "**Tanzimat'ın Daha Az eşit Unsurları: "Kadınlar ve Köleler",** OTAM, Yıl:1, sa:1, Ankara 1990.

ANSAY, Sabri Şakir: **Hukuk Tarihinde İslâm Hukuku,** Yeni Cezaevi Basımevi, Ankara 1946.

ARSEBÜK, Esat: **Şahıs Aile Hukuku,** A.Ü.H.F. Yay., Ankara 1938.

ART, Gökçen: **Şeyhülislam Fetvalarında Kadın ve Cinsellik**, Çivi Yazıları Yay., İstanbul 1996.

AYBAY, Rona: **Kadının Uyrukluğu Üzerinde Evlenmenin Etkisi,** A.Ü.S.B.F. Yay., Ankara 1980.

AYDIN, M.Akif: **Osmanlı Hukukunda Kazai Boşanma,**

[118] GÖLE, Nilüfer, ***Modern Mahrem,*** Metis Yay., İstanbul 1998, s.57.
[119] AYDIN, ***"Osmanlı Toplumunda Kadın ve...",*** s.154.

Osmanlı Araştırmaları V, Ayrı Basım, İstanbul 1986.

_____: **Osmanlı Toplumunda Kadın ve Tanzimat Sonrası Gelişmeler,** Sosyal Hayatta Kadın Tartışmalı İlmi Toplantılar Dergisi, Ensar Neşriyat, İstanbul 1996,

BARKAN, Ömer Lütfi: "**Osmanlı İmparatorluğu Teşkilat ve Müesseselerinin Şer'iliği Meselesi",** İ.Ü.H.F.D., Cilt:11, 1945. s.204.

: "**Türkiye'de Sultanların Teşrii Sıfat ve Salahiyetleri ve Kanunnameler",** İ.Ü.H.F.D., Cilt:12, 1946, s.713.

: **XV ve XVI. Asırlarda Osmanlı İmparatorluğunda Zirai Ekonominin Hukuki ve Mali Esasları, I.C.,** İ.Ü.E.F. Türkiyat Neşriyatı, İstanbul 1943.

BAER, Marc David / Fatma Müge GÖÇEK: "**18. Yüzyıl Galata Kadı Sicillerinde Osmanlı Kadınlarının Toplumsal Sınırları",** Modernleşmenin Eşiğinde Osmanlı Kadınları, Editör: Madeline C., Zilfi, Çev: Necmiye Alpay, Tarih Vakfı Yurt Yay., İstanbul 2000, s.49-50.

BERKES, Niyazi: **Türkiye'de Çağdaşlaşma,** Bilgi Yayınevi, İstanbul 1973.

BOZKURT, Gülnihal: **Batı Hukukunun Türkiye'de Benimsenmesi, Osmanlı Devleti'nden Türkiye Cumhuriyeti'ne Resepsiyon Süreci (1839-1939),** TTK Yay., Ankara 1996.

: **Osmanlı Devletinde Köle Ticaretinin Önlenmesi İçin Yapılan Çalışmalar,** XI. Türk Tarih Kongresi'nden Ayrıbasım, Türk Tarih kurumu Basımevi, Ankara 1994.

CAPORAL, Bernard: **Kemalizmde ve Kemalizm Sonrasında Türk Kadını** (1919-1970), Türkiye İş Bankası Yay., Ankara 1982.

CİN, Halil: **Eski ve Yeni Türk Hukukunda Tarım Arazilerinin Miras Yoluyla İntikali,** A.Ü.H.F. Yay., Ankara 1979.

_____: **İslâm ve Osmanlı Hukukunda Evlenme,** Selçuk Üniversitesi Yay., Konya 1988.

DEMİR, Aydoğan: "**Kanuni'nin Bir Fermanı Vesilesiyle Zina Üzerine Düşünceler",** Tarih ve Toplum, C:29, Sa:169, 1998, s.8-9.

DÜZDAĞ, Ertuğrul: **Şeyhülislam Ebussuûd Efendi Fetvaları Işığında 16. Asır Türk Hayatı,** Enderun Kitabevi,

İstanbul 1972.
GERBER, Haim: "**Social and Economic Position of Women in an Ottoman City, Bursa, 1600-1700",** Internatinoal Journal of Middle East Studies, Vol:12, 1980, s.232-235.
GÖLE, Nilüfer: **Modern Mahrem,** Metis Yay., İstanbul 1998.
GÜZEL, Şehmus: "**Tanzimat'tan Cumhuriyet'e Toplumsal Değişim ve Kadın",** Tanzimat'tan Cumhuriyet'e Türkiye Ansiklopedisi, III.C, s.860.
GÜRİZ, Adnan: **Hukuk Felsefesi**, A.Ü.H.F.Yay., Ankara 1996.
İNALCIK, Halil: **Osmanlı İmparatorluğu Toplum ve Ekonomi Üzerine Arşiv Çalışmaları, İncelemeler,** Eren Yay., İstanbul 1993.

KARAL, Enver Ziya: **Osmanlı İmparatorluğunda İlk Nüfus Sayımı 1831,** T.C. Başvekâlet İstatistik Umum Müdürlüğü, Ankara 1943.
KAŞIKÇI, Osman: **İslâm ve Osmanlı Hukukunda Mecelle,** OSAV, İstanbul 1973.
KUNT, Metin et al.: **Türkiye Tarihi (3) Osmanlı Devleti 1600 - 1908,** Yayın Yönetmeni: Sina Akşin, Cem Yay., 1990.
KURNAZ, Şefika: **Cumhuriyet Öncesinde Türk Kadını (1839-1923),** T.C. Başbakanlık Aile Araştırma Kurumu Başkanlığı Yay., 2. B., Ankara 1991.
KURT, İsmail: "**Kadınlarla İlgili Fermanlar",** Sosyal Hayatta Kadın, Ensar Neşriyat, İstanbul 1996, s.312.
KÜÇÜK, Mehmet: **"Gericilik Bilincinin Doğuşu Olarak Osmanlı-Türk Modernleştirilmesi",** Doğu-Batı, Yıl:4 Sa:13, 2000-2001, s.255-256.
LEVY, Reuben: **The Social Structure of Islam,** published by the Syndıcs of the Cambridge University Press, 1969.
MERIWETHER, Margaret L.: "**Yeniden Kadınlar ve Vakıf Üstüne, 1770-1840",** Modernleşmenin Eşiğinde Osmanlı Kadınları, Editör: Madeline C.Zilfi, Çev: Necmiye Alpay, Tarih Vakfı Yurt Yay., İstanbul 2000, s.126.
ORTAYLI, İlber: **İmparatorluğun En Uzun Yüzyılı,** Hil Yay., İstanbul 1983.
: **Osmanlı Toplumunda Aile,** Pan yay., İstanbul 2000.
:"**Ottoman Family Law and The State in the**

Nineteenth Century", OTAM, no:3, 1990, s.328.
ÖZTÜRK, Osman: **Osmanlı Hukuk Tarihinde Mecelle,** İslami İlimler Araştırma Vakfı Neşriyatı, İstanbul 1973.
SARI, Hüseyin: "**Şer'iye Sicillerine Göre II. Mahmud Dönemi'nde Mudurna'da Nüfus Hareketleri ve Toplumsal Hayattan Bir Kesit",** OTAM, Sa:7, Ankara 1996, s.179-181.
SCHACHT, JOSEPH: **İslâm Hukukuna Giriş,** Çev: Mehmet Dağ-Abdülkadir Şener, A.Ü.İ.F. Yay., Ankara 1977.
SHAW, Stanford J. / Ezel Kural SHAW : **Osmanlı İmparatorluğu ve Modern Türkiye,** 2.C., E Yay., İstanbul 1983.
TANÖR, Bülent: **Osmanlı-Türk Anayasal Gelişimleri,** Yapı Kredi Yay., 4.B., İstanbul 1999.
TOSKA, Zehra: "**Çağdaş Türk Kadını Kimliğinin Oluşumunda İlk Aşama Tanzimat Kadını",** Toplum ve Tarih, Cilt:21, Sa:124, 1994, s.6.
Türk Hukuk Tarihi Araştırmalar ve Düşünceler Belgeler, Köy Hocası Matbaası, Ankara 1935.
TÜRKÖNE, Mümtazer: **Osmanlı Modernleşmesinin Kökleri,** Yeni Şafak Kitaplığı Yakın Tarih Dizisi, İstanbul 1993.
ÜÇOK-Coşkun: **"Osmanlı Kanunnamelerinde İslâm Ceza Hukukuna Aykırı Hükümler",** A.Ü.H.F.M., C:3, 1946, s.134.
ÜNAL, Mehmet: "**Medeni Kanunun Kabulünden Önce Türk Aile Hukukuna İlişkin Düzenlemeler ve Özellikle 1917 Tarihli Hukuk-i Aile Kararnamesi",** A.Ü.H.F.D, Cilt:34, Sa:1-4, Ankara 1978, s.207.
YAVUZ Sultan Selim Kanunnamesi, Konuşma Diline Çeviren: Hadiye Tuncer, Tarım Orman ve Köyişleri Bakanlığı Yay., Ankara 1987.
ZILFI, Madeline C.: " "**Geçinemiyoruz" 18.Yüzyılda Kadınlar ve Hul, Modernleşmenin Eşiğinde Osmanlı Kadınları",** Editör: Madeline C.Zilfi, Çev: Necmiye Alpay, Tarih Vakfı Yurt Yay., İstanbul 2000, s.257.

A PARLIAMENT ON A WRONG TRACK: THE PRACTICE OF PARLIAMENTARY INQUIRY BY THE TURKISH PARLIAMENT

DR. OZAN ERGÜL[1]

ABSTRACT

No one would have imagined that the setting up of a parliamentary inquiry committee in the Turkish Grand National Assembly (TGNA) on 7 December 2005 assigned to "investigate the events that happened in Hakkari central province and cities of Yüksekova and Şemdinli" would underpin one of the deep political and judicial crises ever lived in Turkey. Complicated events that culminated in the disbarment of a public prosecutor underpinned the criticisms arguing the incompatibility of a parliamentary inquiry with a continuing judicial investigation on the same subject or event.

1. Conceptual Framework and Regulations Concerning Parliamentary Inquiry

Parliaments are accepted as rendering at least two basic functions. While legislation is one of them, the other is the control of the executive branch.[2] The Turkish Constitution of 1982 is not an exception to this understanding of the parliamentary functions and stipulates both functions. Apart from the legislative function, the supervisory powers of the Parliament over the executive are regulated in Articles 98, 99 and 100 of the 1982 Constitution.

In the first paragraph of Article 98 of the 1982 Constitution,

[1] Ph.D., Ankara University School of Law, Department of Constitutional Law
[2] KLAUS VON BEYME, PARLIAMENTARY DEMOCRACY 72 (Macmillan Press 2000).

"*questions*" that may be asked to Prime Minister and the Ministers are regulated which is placed under the heading "*Ways of Collecting Information and Supervision by the Turkish Grand National Assembly*".[3] In the second paragraph of this article "*parliamentary inquiries*" are regulated and the third paragraph is designated for "*general debates*". In the subsequent Articles 99[4] and 100[5] of the Constitution, "*motions of censure*" and

[3] Article 98 of the Constitution reads as follows:

The Turkish Grand National Assembly shall exercise its supervisory power by means of questions, parliamentary inquiries, general debates, motions of censure and parliamentary investigations. A question is a request for information addressed to the Prime Minister or ministers to be answered orally or in writing on behalf of the Council of Ministers.

A parliamentary inquiry is an examination conducted to obtain information on a specific subject.

A general debate is the consideration of a specific subject relating to the community and the activities of the state at the plenary sessions of the Turkish Grand National Assembly.

The form of presentation, content, and scope of the motions concerning questions, parliamentary inquiries and general debates, and the procedures for answering, debating and investigating them, shall be regulated by the Rules of Procedure.

[4] Article 99 of the Constitution reads as follows:

A motion of censure may be tabled either on behalf of a political party group, or by the signature of at least twenty deputies.

A motion of censure shall be circulated in printed form to members within three days of its being tabled; inclusion of a motion of censure on the agenda shall be debated within ten days of its circulation. In this debate, only one of the signatories to the motion, one deputy from each political party group, and the Prime Minister or one minister on behalf of the Council of Ministers, may take the floor.

Together with the decision to include the motion of censure on the agenda, the date for debating it will also be decided; however, the debate shall not take place less than two days after the decision to place it on the agenda and shall not be deferred more than seven days.

In the course of the debate on the motion of censure, a motion of no-confidence with a statement of reasons tabled by deputies or party groups, or the request for a vote of confidence by the Council of Ministers, shall be put to the vote only after a full day has elapsed.

"*parliamentary investigations*" are stipulated respectively.

For the aim of conceptual clarification, first the difference between the "*parliamentary inquiry*" and "*parliamentary investigation*" should be set forth.[6] "*Parliamentary*

In order to unseat the Council of Ministers or a minister, an absolute majority of the total number of members shall be required in the voting, in which only the votes of no-confidence shall be counted.

Other provisions concerning motions of censure, provided that they are consistent with the smooth functioning of the Assembly, and do not conflict with the above-mentioned principles are detailed in the Rules of Procedure.

[5] Article 100 of the Constitution reads as follows:

Parliamentary investigation concerning the Prime Minister or other ministers may be requested through a motion tabled by at least one-tenth of the total number of members of the Turkish Grand National Assembly. The Assembly shall consider and decide on this request with a secret ballot within one month at the latest.

In the event of a decision to initiate an investigation, this investigation shall be conducted by a commission of fifteen members chosen by lot on behalf of each party from among three times the number of members the party is entitled to have on the commission, representation being proportional to the parliamentary membership of the party. The commission shall submit its report on the result of the investigation to the Assembly within two months. If the investigation is not completed within the time allotted, the commission shall be granted a further and final period of two months. At the end of this period, the report shall be submitted to the Office of the Speaker of the Turkish Grand National Assembly.

Following its submission to the Office of the Speaker of the Turkish Grand National Assembly, the report shall be distributed to the members within ten days and debated within ten days after its distribution and if necessary, a decision may be taken to bring the person involved before the Supreme Court. The decision to bring a person before the Supreme Court shall be taken by a secret ballot only by an absolute majority of the total number of members.

Political party groups in the Assembly shall not hold discussions or take decisions regarding parliamentary investigations.

[6] Although we prefer the term "*parliamentary inquiry*" for the measure regulated in the second paragraph of Article 98 of the Constitution, we should note that there is not a consensus on the terms used for indicating the two parliamentary powers as "*parliamentary inquiry*" and "*parliamentary investigation*" in English. For instance, ÖZBUDUN prefers the term

investigation" is a powerful supervisory measure of the parliament over the Council of Ministers, and in certain ways, parliamentary investigation as regulated in the Turkish Constitution, resembles the impeachment in the United States. The aim of the investigation sustained by a special committee is to ascertain the criminal responsibility of the Prime Minister or individual ministers, and at the end of the investigation General Assembly decides whether or not to impeach the Prime Minister or the ministers concerned. Prime Ministers and individual ministers may be impeached because of the misgivings and offences, which are in relation with their offices. In case the Assembly impeaches a minister, the Constitutional Court *(Yüce Divan)* tries him/her.[7] This quasi-judicial investigation procedure quite resembles the one stipulated in Article 44 of the German Constitution, as both Constitutions pave the way for a criminal investigation procedure carried on by special parliamentary committees.[8]

On the other hand, as regulated by the Constitution, *"a parliamentary inquiry is an examination conducted to obtain information on a specific subject"* (para.2 of Article 98). Apparently, there seems to be no limit for performing a parliamentary inquiry in terms of subject matters. However, a

---

"parliamentary investigation" for the measure defined as *"an examination conducted to obtain information on a specific subject"* in the second paragraph of the Article 98. (Ergun Özbudun, *Constitutional Law* in INTRODUCTION TO TURKISH LAW 36, T.ANSAY and D. WALLACE (eds.) (Kluwer Law International, Fifth Ed., 2005). However, in the official translation of the Turkish Constitution which can be reached from the website of TGNA at <www.tbmm.gov.tr> the term *"parliamentary investigation"* is used for the power of the Parliament regulated in Article 100 of the Constitution.

[7] Vahit Bıçak & Zühtü Aslan, *Constitutional Law: Turkey* in INTERNATIONAL ENCYCLOPEDIA OF LAWS 85, R. BLANPAIN (Gen. Ed.) (Kluwer Law International, offprint, 2004); Özbudun 36 (2005).

[8] Volker Röben, *Federal Constitutional Court Defines the Power of Parliamentary Minorities in the Constitutionally Established Parliamentary Committees*, Para. 2 &3 HTML Offprint from: German Law Journal web site www.germanlawjournal.com (2002).

parliamentary inquiry shall be relevant either to the legislative or control function of the parliament.[9] This is not only important for illustrating the nature of the parliamentary inquiry, but also for protecting the border between the two powers of the state, i.e. legislative and judicial powers. Therefore, theoretically, any parliamentary inquiry pursuing such goals unrelated with these two specific functions of the Parliament is not acceptable. For instance, a parliamentary inquiry aiming the questioning of a judicial discretionary power or a judgment is not in the scope of parliamentary inquiry. However, in the second part of this work, we will deal with the problem of compatibility of *"parliamentary inquiry"* with judicial investigation, especially when these are continued concomitantly and on the same subject or event.

When coming to the regulations of the Standing Orders of the Parliament (Articles 104 and 105 of the Standing Orders), first we should note that the relevant provision (para.3 of Article 104) refers to the regulations concerning *"general debate"* for the procedure initiating a parliamentary inquiry. According to the relevant provision, the government, the political party groups in the TGNA or at least twenty deputies may submit a motion for *"parliamentary inquiry"*. General Assembly holds the power to say the last word on the founding of a parliamentary inquiry upon such a motion. In case the Assembly accepts the motion, a parliamentary inquiry committee is to be established which reflects the composition of the incumbent parliament.

Indeed, there is not so much to tell as to the powers of the inquiry committees. In Article 105 of the Standing Orders, some state authorities are enumerated, for instance, local governments, universities, banks and professional organizations, which the *"inquiry committee may require information from"*. Inquiry committees may also consult specialists pursuant to Standing Orders (para. 4 of Article 105). However, *"state and commercial secrets are out of the jurisdiction of the committees"* (para. 5 of

[9] ERDAL ONAR, MECLİS ARAŞTIRMASI [Parliamentary Inquiry] 6-8 (Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara, 1977).

Article 105). There is no regulation in the Standing Orders or in any other special law, empowering the inquiry committees with subpoena power or with any other power that would be conceived as an intervention to the individuals' rights. On the other hand, Turkish committees enjoy no measures like the "contempt of Parliament" or "contempt of Congress" unlike its counterparts in Britain and USA. Therefore, it is not surprising to hear that some people conform to the invitation of the parliamentary inquiry committees, "only because they respect the courtesy rules". However, the administrative officials seem to be obeying to the invitations of these committees, probably thanks to some degree of intimate coercion.

In the Standing Orders, a time limit is also envisaged for the parliamentary inquiry committees. According to the Standing Orders, "*inquiry committee shall finish its report within the three months*" and "*a committee which can not finish its work within three months may be granted a final one month for finishing its report*" (para. 2 of Article 105).

The loose character of the powers that are vested in the inquiry committees should not mislead one to conclude that parliamentary inquiries are totally aimless. As to the importance of parliamentary inquiries in making legislation, it should not be ignored that all the deputies do not have sufficient information for proposing a bill or for performing a better parliamentary debate during the legislative procedure over a bill. Therefore, a parliament may well feel the need for gaining information on a specific subject, so that a better legislation may be proposed or more useful debates may be sustained in order to make the legislation better during the parliamentary debates that take place both at the parliamentary commissions and at the General Assembly. The need of gaining information for prospective legislations has been the main reason for most of the parliamentary inquiries.[10] Undoubtedly, the parliament may

[10] Mentioning some subjects of the parliamentary committees assigned to carry out inquiries during the previous term of the Turkish Parliament (the 22nd term)

choose to gain information not only for making a decision on the need of a prospective legislation, but also to see if there is a necessity for amending an existing legislation.

The other case that the Parliament would need to initiate a parliamentary inquiry is the situation where the parliament performs its supervisory authority over the executive body. In the event that the parliament considers a negligence or misconduct of the Council of Ministers related with a public service or a public policy, the parliament may initiate a parliamentary inquiry in order to gain information on the issue. This would make it possible for the Parliament to decide on the faith of the executive body by way of an interpellation (motion of censure). Although a committee report indicating to the deficiency of the executive body has no direct effect on the faith of the Council of Ministers as a whole or of the individual ministers, such a report might be the first step of an interpellation motion which would end the office of the incumbent Council of Ministers.

Even the acceptance of the legislative and the control functions of the Parliament as the sole reasons for initiating a parliamentary committee can not prevent the emergence of concerns regarding the compatibility of parliamentary inquiry with a judicial investigation where the subject of these two are identical. In other words, theoretically a parliamentary inquiry can be initiated on a

---

would be interesting. The subjects to be investigated can also be assessed as a proof to show that how the inquiries might help to shape the legislative incentives: *"The Inquiry Committee Assigned To Investigate The Reasons, and the Social and Economic Dimensions of Corruption and to Determine the Preventive Measures To Be Taken"*, *"The Inquiry Committee Assigned to Investigate The Problems Of The Citizens Living Abroad and To Determine The Preventive Measures To Be Taken"*, *"The Inquiry Committee Assigned To Investigate the Parliamentary Immunity"*, *"The Inquiry Committee Assigned To Investigate The Problems of Potato Farmers and Producers, and To Determine The Preventive Measures To Be Taken"*, and lastly *"The Inquiry Committee Assigned To Investigate The Effects of Fuel Smuggling To The People, Environment and Economy and To Determine The Measures To Be Taken"*.

subject, on which a judicial investigation is already commenced. In cases where such a judicial procedure is initiated, parliamentary inquiry can also be set up only depending on the condition that parliamentary inquiry shall conform to the aim of gaining information for a prospective legislation or fulfilling its supervisory power over the executive body. The parliamentary committee shall neither question the judicial investigation, nor put himself in the place of judiciary when investigating the subject or the event. However, this is not something that can be avoided easily, especially, in cases where a judicial procedure is initiated for investigating a criminal event. In these cases, however, the constitution stipulates further regulations in order to prevent the intervention of the parliament to the use of judicial powers, but this time in the name of protecting the independence of the judiciary.

2. Likely Coincidence of a Parliamentary Inquiry and a Judicial Investigation. Rules for Co-existence?

The general understanding that a parliamentary inquiry shall be commenced either for the aim of gaining information for prospective bills or for controlling the government, actually, has been a reply to the concerns that expressed the probable coincidence of a parliamentary inquiry with a judicial investigation on the same subject or event.

1982 Constitution, like its predecessor 1961 Constitution, has provisions in order to prevent such conflicts between the legislative body and the judiciary. Undoubtedly, such an aim is also useful in protecting the principle of separation of powers and independence of the judiciary. Since the influence of the political actors on the judiciary is a likely event, such provisions may be considered as more than essential. Being aware of this fact, the framers of the 1982 Constitution has put specific provisions in the third paragraph of Article 138 of the Constitution which regulates the "*Independence of the Courts*". The third paragraph of Article 138 reads as follows: "*No questions shall be asked, debates held,*

or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial."

Apparently, such a provision seems to be preventing almost all legislative activities aiming to gain information on specific subjects when they overlap with the use of judicial power. The first attempt to clarify the content of this provision was made by the Constitutional Court in 1970. This judgment of the Court has been accepted as determining the borders between the judicial power and the parliamentary activities. With this judgment, the Court had found the setting up of an 'investigation' committee compatible with a judicial procedure ongoing concomitantly, of course depending on some conditions. Since the 1982 Constitution has the same provision as the former Constitution of 1961, this judgment of the Court still deserves attention. However, we should note that the number of the relevant Article was 132 in 1961 Constitution.

According to the Constitutional Court: "*The provision set forth in the third paragraph of Article 132 only forbids to ask questions, hold debates or make statements in relation with the exercise of judicial power concerning a case under trial. In other words, the limits set for the legislative debates determined by the third paragraph are only about the use of judicial powers that are exercised concerning a case under trial. (...) The Constitution is harmonious as a whole. Some provisions of the Constitution shall neither be conceived as hindering the functions of other provisions or failing them. Therefore, the legal opinions claiming that a provision aiming the protection of the independence of the courts obstruct the constitutional supervisory powers and the judicial duties of the Turkish Grand National Assembly are not acceptable."*[11]

[11] Judgment of the Constitutional Court, 18 July 1970, E. 1970/25, K. 1970/32, Journal of the Constitutional Court Judgments, Vol. 8, pp. 360-361. Since the case was on a controversy related to a "parliamentary investigation", but not a "parliamentary inquiry", the Court mentions about the use of "judicial duties" of the Parliament.

Although the subject of this judgment was a "*parliamentary investigation*", the rationale of the decision is valuable for the ones struggling to draw a plausible line with the parliamentary activities and judicial investigations including "*parliamentary inquiries*".[12] Those who followed the rationale of the Constitutional Court claimed that a parliamentary inquiry might well be compatible with an ongoing judicial investigation even though they aim to investigate the same subject or event.

In addition, some arguments can be found in support of this understanding during the debates that took place in the Assembly of Representatives that drafted the 1961 Constitution. Some of the representatives insisted that incorporating the phrase as "*exercise of judicial power*" into the relevant Article 132 of the 1961 Constitution (counterpart of Article 138 in the 1982 Constitution) is more convenient, in order to create room for parliamentary activities, including "questions, general debates and making statements". According to these representatives, if only the term "*a case under trial*" had been accepted as the criteria for determining the limits for parliamentary activities, there had been hardly anything that the parliament could do for the events on which a judicial trial had been started.[13]

At this point, the terms "*judicial power*" and "*a case under trial*", as they appear in the relevant Article 138, needs further elaboration. For this aim, the position of the procuracy and its investigative powers should be clarified in comparison with the judiciary. In Turkish context the structural foundation of the procuracy is controversial, but elaboration of this controversy stands beyond the purpose of this work. However, when trying to figure out the position of the procuracy, a relation may be built in

[12] ONAR, *supra* note 9, at 100-101; ŞEREF İBA, ANAYASA VE SİYASAL KURUMLAR [Constitution and Political Institutions] 104 (Turhan Kitabevi, Ankara, 2006); Habip Kocaman, *Yargıya İntikal Eden Olaylarda Yasama Kısıtı [Legislative Constraints on the Events Before Judiciary]*, 1 Yasama Dergisi 5, 14-17 (2006).

[13] Kocaman, *supra* note 12, at 11-14.

support of the independence of the procuracy like the one granted to judiciary. In Turkish law system, prosecutors hold the monopoly of accessing to courts in the criminal law matters, like in many other law systems.[14] Therefore, any influence exercised on the procuracy, which holds the duty to investigate the criminal event pursuant to criminal law procedure, would culminate in an affected judicial trial. So, any attempt exercised to influence the procuracy would make the independence of the judiciary meaningless. Now, we can briefly survey the controversial events that underpinned the parliamentary inquiry, as applied by the Parliament.

3. The Crises Underpinned by the Activities of a Parliamentary Inquiry Committee

It had been only a while since the bombings in Hakkari and Yüksekova had occurred when a bookseller owned by a former PKK[15] member was bombed on 9 October 2005. TGNA, considering the shocks caused by the bombings, decided to set up an inquiry committee in order "*to investigate the events that happened in Hakkari central province and cities of Yüksekova and Şemdinli*" upon the proposal of some deputies from the opposition parties, namely Peoples' Republican Party and Motherland Party. Pursuant to the decision of the General Assembly, an inquiry committee was established on 23 October 2005 and it started to work on 7 December 2005. However, at the same time Chief Prosecutor of Van province that had the jurisdiction of investigation, started investigating the same event, and Public Prosecutor Ferhat Sarıkaya was assigned to investigate the bombing event in Şemdinli. There were two suspects caught, two noncommissioned officers, in relation with the bombings of

[14] Anne van Aaken & Eli Salzberger & Stefan Voigt, *The Prosecution of Public Figures and the Separation of Powers. Confusion within the Executive Branch-A Conceptual Framework*, 15 Constitutional Political Economy 261, 262 (2004).

[15] A Separatist Kurdish Terrorist Organization.

the bookseller.

The two investigations, i.e. investigation by the parliamentary inquiry committee and the judicial investigation by the public prosecutor, were continuing concomitantly. At the beginning there was no opposition to the establishment of a parliamentary inquiry committee. However, when the prosecutor disclosed his indictment on 3 April 2006 a shock wave surrounded the country. First, the prosecutor accused the Commander of the Land Forces for forming a criminal gang. According to the prosecutor, "illegal group's activities included blowing up the bookstore in Şemdinli with the aim of provoking the government into blocking further freedoms for Kurds, thus jeopardizing EU membership talks".[16] However, the accusations were reportedly based on the testimony of a single person. Second, the only witness, on whose testimony the accusations were grounded, had also appeared previously in the parliamentary inquiry committee as a witness. Third, accusations for Land Forces Commander had hardly any relation with the events that were under investigation, i.e. bombing of a bookseller. Additionally, because the commander and the other army officers were subject to special criminal procedure, the accusations related with them should be sent to the Office of the General Commander in Chief. Fourth, the indictment was one hundred pages long and it contained some parts that dealt with the problems of Turkish politics, like consolidation of democracy, with explanations referring to center-periphery dichotomy, a term used in political science. Looking at the indictment, some lawyers even claimed that the prosecutor did not write the indictment himself, and an expert of political science should have written at least some parts of it.[17]

---

[16] *Court says senior officers involved in Şemdinli Bombing*, Turkish Daily News, 19 July 2006.

[17] *Savcı Kendisi Yazmalıydı [The Prosecutor Should Have Written It Himself]*, interview with Criminal Law Professor Uğur ALACAKAPTAN, Milliyet (Daily News Paper), 3 April 2006. Some journalists also share this opinion. For instance, Cüney Ülsever wrote, "the part of the indictment that has Büyükanıt's name is so disjointed from the rest of the text that it is obvious it was attached

On the other hand, the relation between the parliamentary inquiry committee and the prosecutor became obvious, parallel to the growing tension of controversies. The members of the inquiry committee, who represented the opposition parties, accused the Chair of the Committee, who was a member of the majority party, for supplying the prosecutor some documents without the consent of the Committee members or informing the Speaker of the Parliament. The Chair confessed that he had done so, but claimed that it was within his discretion. Additionally, he claimed that the prosecutor had demanded the documents.[18] Actually, there is no rule in the Constitution or Standing Orders that ensure the confidentiality of the activities of the Committee. The most important one of these documents was the records of a witness, who accused the Land Forces Commander before the Committee. This witness was invited to the committee by a majority member to supply information. However, in his testimony, there was hardly anything related to Şemdinli bombing. What makes his testimony interesting is that he also gave a testimony to the prosecutor, and some parts of his testimony were incorporated in the indictment which paved the way for accusing the army officers. When the relation between the Chair of the Committee and the prosecutor was proved many people accused the prosecutor for acting politically and therefore abusing his authority.

Another Consequence of this relation between the parliamentary committee and the procuracy happened to be the questioning of the nature of the parliamentary inquiry. Minister of Justice Cemil Çiçek[19] and Deputy Prime Minister Mehmet Ali Şahin[20] claimed

---

afterwards", see *It is not the prosecutor who is punished,* Turkish Daily News, 25 April 2006.

[18] *Tutanak Skandalı [The Records Scandal]*, Milliyet (Daily News Paper), 9 March 2006.

[19] *Çiçek: Komisyon doğru değil [Çiçek: The Committee is Improper]*, Milliyet (Daily News Paper), 8 March 2006.

[20] *Şahin'den savcı ve komisyona uyarı[Warning for the prosecutor and the committee from Şahin]*, Milliyet (Daily News Paper), 11 March 2006.

that a parliamentary inquiry was incompatible with an ongoing judicial investigation on the same event and therefore the parliamentary committee should be abolished. Comments on the event also came from the judiciary side. The incumbent Chief General Prosecutor Nuri Ok accused the prosecutor of the Şemdinli case for acting improperly and being politically biased.[21] The former General Prosecutor Sabih Kanadoğlu also accused the prosecutor for violating his authorities and claimed that no parliamentary inquiry shall be initiated to investigate an event, which is already under the investigation of judicial authorities including the preliminary investigation of procuracy.[22] Additionally, the incumbent Chief Judge of Council of State[23] and the former Chief Judge of Supreme Court of Appeals Sami Selçuk[24] set forth that the way the prosecutor acted would not be approved.

On the other hand, there were people who supported the acts of the Chair of the Committee and the prosecutor. Among these one deserves mentioning who is the Speaker of the Parliament Bülent Arınç. He said, in one of his declarations, that there was nothing improper with the parliamentary inquiry committee.[25]

Although the contribution of the political actors to this scandalous event was obvious, only the public prosecutor had to pay the price. On 20 April 2006, Supreme Board of Prosecutors and Judges disbarred prosecutor Ferhat Sarıkaya upon the report of the Inspectors of the Justice Ministry Inspections Board.[26] The

[21] *Ok'tan sert çıkış [Severe Reaction from Ok]*, Milliyet (Daily News Paper), 8 April 2006.
[22] *Yargının işlevine saldırı var [There is an attack against the function of the judiciary*], Milliyet (Daily News Paper), 26 March 2006.
[23] *Bu iddianameyi tasvip etmek mümkün değil [It is impossible to approve this indictment]*, Milliyet (Daily News Paper), 9 March 2006.
[24] *Former top judge calls for change of mentality in judiciary*, Turkish Daily News, 14 June 2006.
[25] *Arınç: Hukuka aykırılık bulunmuyor [Arınç: There is nothing illegal]*, Milliyet (Daily News Paper), 10 March 2006.
[26] *So, Sarıkaya is sacked* and *Van Prosecutor Disbarred for Büyükanıt*

disbarment decision was taken six against one vote and among the others it is understood that the prosecutor was found guilty for acting on purpose and abusing his authority.[27] The prosecutor's appeal to the disbarment was rejected and his disbarment became final on 8 October 2006.

Meanwhile, Van court found the noncommissioned officers guilty and sentenced to prison for thirty-six years. The events that took place in relation with the Şemdinli case have been an issue of interest also for the politicians of European Union (EU). This is not a surprise as Turkey has started off for the EU membership process. The EU side was especially concerned with the position of the military in the Turkish politics and were expressing that this was something degrading for the Turkish democracy. Therefore, the verdict of the court sentencing the officers pleased the Turkey-EU Parliamentary Committee Joint Chairman Joost Lagendijk. In addition, Lagendijk expressed that they "hoped to see those individuals and institutions behind the guilty would be tried, too."[28] However, the General Prosecutor of Supreme Court of Appeals challenged the court's decision on the grounds that "the decision was based on a deficient investigation and violation of judicial procedure".[29] Pursuant to criminal procedure law, 1st Division of Supreme Court of Appeals will asses the merits of the prosecutor's argument.

Whatever the final decision on the case will be, it is a fact that the only one who should pay the price should not be the public prosecutor. However, the actors of the other side of this event were composed of politicians and nothing could be done for them. Therefore, although his abuse has been verified, arguments set forth for the clarification of the aim of this heavy penalty given to

---

Indictment, Turkish daily News, 21. April 2006.

[27] *Olay Savcıya İhraç [The prosecutor is disbarred]*, Milliyet (Daily News Paper), 8 April 2006.

[28] *Officers Sentenced to 39 Years*, Turkish Daily News, 21 June 2006.

[29] *Top prosecutor challenge court's Şemdinli Ruling*, Turkish Daily News, 17 October 2006.

the prosecutor deserves attention. According to one journalist, namely Cüneyt Ülsever, "it was not the prosecutor who was really punished that day but the government itself, which was believed by some to be involved in a conspiracy against Land Forces Commander General Yaşar Büyükanıt". We should note that, Büyükanıt against whom an organized opposition was carried on, became the General Commander in Chief of the Armed Forces in last August.

The parliamentary inquiry committee gave its report to the Speaker of the Parliament on 18 April 2006. It is interesting though that, the committee stated in the draft report that they assess the struggle of the public prosecutor to accuse the commanders as a "fantasia."[30]

CONCLUSION

The Şemdinli case proves that the present line drawn theoretically for the *"parliamentary inquiry"* falls short to prevent the intervention of political actors to the judicial process. However, drawing a clear line is also a very hard task. On the other hand, when there is a continuing criminal investigation, it is not plausible to claim that parliamentary inquiry may be continued without any intervention to the use of judicial power. Since "judicial power" is a wide term in the sense it is used in the criminal procedure, it is hardly possible if not impossible to imagine any attempt of a parliamentary committee that would not be conceived as an intervention to the use of judicial power. For instance, inviting someone who would also give testimony as a witness to the prosecutor would plausibly create pressure on that witness. Additionally, while setting up inquiry committees for some criminal events and not doing so for many others would cause the judiciary to assume the likely pressure of political figures.

[30] *Komutanı Suçlamak Fantezi [It is a fantasia to accuse the commander]*, Milliyet (Daily News Paper), 12 April 2006.

In conclusion, we propose that Standing Orders of the Turkish Parliament should be amended as soon as possible to prevent such controversies in the future. In this regard, the Rules of Procedure of the French National Assembly would be inspiring for two reasons. First, according to the procedural rules of the French Assembly concerning parliamentary inquiries, a parliamentary inquiry may be commenced only on matters concerning public service or the conduct of state enterprises. Undoubtedly, this regulation restricts the issues for parliamentary inquiry and therefore hinders the coincidence of a parliamentary inquiry with a judicial investigation. Second, Minister of Justice is informed on the motions of inquiry. In case a judicial investigation is commenced on the same facts as this inquiry, the committee shall terminate its assignment upon the informing of the Speaker of the Parliament.[31]

After the experience of Şemdinli case, a legal framework like the French rules would be more protective for the independence of the judiciary in the Turkish context. This would not be useful only for preventing the intervention of the political figures to the judicial power, which put the independence of the judiciary in jeopardy, but would also prevent judicial figures from pursuing political aspirations.

[31] France: Parliament, Olivier JOUANJAN, in CONSTITUTIONAL LAW-INTERNATIONAL ENCYCLOPEDIA OF LAWS, Prof. Dr. A. ALEN (ed), 147 (Kluwer, 1999, Volume 3). The relevant provisions are envisaged in Articles 145-2 and 145-3 of the Rules of Procedure of French National Assembly, which can be reached at the official web site of Assembly at http://www.assemblee-nationale.fr.

THE PROBLEMS OF WOMEN AND JUSTICE

DR. GÜLRIZ UYGUR[♣]

Some feminists criticise the conceptions of justice, since these conceptions are not capable of addressing the problems of women. This article aims to demonstrate that a reasonable conception of justice can cover the problems of women. To this end, I put the emphasis on the Rawlsian justice. As a well-known thinker with his conception of justice, John Rawls is aware of women's problems especially those in the family. Since it is important to ensure justice in the family connected with women's equality, Rawls's conception of justice is appropriate to attain justice within the family.

Key Concepts: Justice, gender, Rawls, care, gender justice.

INTRODUCTION

In this article, I will examine the problems of women in the context of *John Rawls's* conception of justice. In respect of justice, these problems are concerned with sexual discrimination.

Will Kymlicka says, "sexual discrimination is commonly interpreted as the arbitrary or irrational use of gender in allocating social benefits or positions. For example, it is discriminatory to refuse to hire a woman for a job if gender has no rational relationship to the task being performed."[1]. Gender has different meanings among the feminists. For example, *Susan M. Okin* says "gender-by which I mean the deeply entrenched

♣ Associate Professor in Philosophy of Law, University of Ankara, Faculty of Law.

[1] Will Kymlicka, "Introduction", in Will Kymlicka, **Justice In Political Philosophy,** Vol.II, Edward Elgar Publishing, Cambridge 1992, p.xix.

institutionalisation of sexual difference..."[2]. Feminists have different opinions about the elements having role in the construction of gender. Some feminists insist on the biological differences, while others consider gender as a social construction.

In this article, I will examine sexual discrimination with a view to allocating Rawlsian primary goods. Some feminists, for example *Elizabeth MacKinnon*, argue that this approach is inadequate in the issue of inequality. They are right to think that arbitrary allocation of goods between sexes is not alone adequate to explain the issue of inequality between sexes. Sexual inequality is almost concerned with actual sexual difference: When sexual difference arises, social positions connected with it serve to increase sexual inequality[3]. In my opinion, however, it is impossible to provide fair positions between sexes, unless basic institutions of society are designed with the aim of eliminating sexual discrimination. Thus, this is the first condition of fair basic institutions. This condition requires evaluating the moral equality between sexes. But this does not mean that justice does not contain sexual difference, since the just basic structure of a society does not allow to women's subordination.

JUSTICE AND CARE

Some feminists agree that the conception of justice should be expanded to capture women's subordination. Nevertheless, others argue that the conception of justice is inadequate to explain women's problems. They regard justice as a male notion[4]. These feminists want to construct ethics according to differences of women and insist on the ethics of care instead of justice. *Carol Gilligan* and *Nel Noddings*, who endeavour to articulate a women's perspective in ethics place caring at the center of moral life. According to *Ruth Groenhout*, caring means: "Women's

[2] Susan M. Okin, **Justice, Gender, and The Family**, Basic Books, New York 1989, p.6.
[3] Kymlicka, 1992, p.xx.
[4] Kymlicka, 1992, p.xxi.

moral reasoning, *Noddings* and *Gilligan* argue, is marked by a concern for maintaining and nurturing relationships, rather than by a concern protecting individual rights or obeying abstract ethical principles. This concern for relationships they termed caring"[5].

Caring and justice have different characteristics. One of the important differences is articulated by *Gilligan* who contrasts the ethics of care, contextuality, and concern for others with the ethics of justice, rights, and rules[6]. An important feature of the ethics of care is its approach to persons as relational and as interdependent. In fact, it defines persons as partly constituted by their relations with others and put emphasis upon caring relations[7].

According to Virginia Held "... an ethic of justice focuses on issues of fairness, equality, and individual rights, seeking impartial and abstract principles that can be applied consistently particular cases. Individual persons are seen as instances of the general and timeless conception of person. In contrast, the ethics of care focuses on attentiveness to context, trust, responding to needs, and offers narrative nuance; it cultivates caring relations. Persons are seen as enmeshed in relations and unique. An ethic of justice seeks fair decisions between competing individual rights and interests. The ethics of care sees the interests of carers and cared-for as importantly shared. While justice protects equality and freedom from interfence, care values positive involvement with others and fosters social bonds and cooperation"[8].

---

[5] Ruth Groenhout, "The Virtue of Care: Aristotelian Ethics and Contemporary Ethics of Care", in Cynthia A. Freeland, **Feminist Interpretations of Aristotle**, Penssylvania State University, Pennsylvania 1998, p.184.
[6] Susan M. Okin, "Reason and Feeling in Thinking about Justice", in Henry S. Richardson-Paul J.Weithman, **The Philosophy of Rawls**, Garland Publishing, New York 1999, p.291.
[7] Virginia Held, "Care and Justice in the Global Context", Ratio Juris, Vol.17, 2004, p.143.
[8] Held, 2004, p.144.

About the other differences, *Onaro O'Neill* says, "justice is concerned with institutions, care and other virtues with character, which is vital in unmediated relationships with particular others. The central difference between the voices of justice and care is not they reason in different ways. Justice requires judgements about cases as well as abstract principles; care is principled as well as responsive to differences. Justice matters for impoverished providers because their predicament is one of institutionally structured poverty which cannot be banished by idealizing an ethic of care"[9].

O'Neill is right to think that justice is concerned with institutions. But I, following *Otfried Höffe*, distinguish political justice from individualistic justice[10]. The former is concerned with institutions, the latter with character. Then, *O'Neill* and other feminists are talking about only political justice, not individualistic justice. This distinction is important, since we may give priority to caring or to justice as far as character is concerned. But concerned with political institutions, we must regard justice as primary virtue of institutions. *Rawls,* who claims primacy of justice, says:

"Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant or economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."[11]

This opinion has several reasons. The primary reason is concerned with the concept of justice *per se*. Traditionally, justice is thought together with the political institutions and law. For example, in the relationship between law and morality, the nature

[9] Onora O`Neill, Justice, "Gender, and International Boundaries", in. Martha C. Nussbaum and Amartya Sen, **The Quality of Life**, Clarendon Press, Oxford 1995, p.311.
[10] Otfried Höffe**, Political Justice**, Polity Press, Cambridge 1995, p.32.
[11] John Rawls**, A Theory of Justice**, Harvard University Press, Cambridge 1994, p.3.

of law is explained by justice and not by other virtues. Moreover, justice is comprehensive; namely, it includes other values concerned with political institutions, for example freedoms, rights and equality. Then, any adequate conception of justice gives place care orientations -the notion of concern for others- as coherent with other requirements. This means that ethics of justice and ethics of care are not two contrasting ethics; justice, like care, is concerned with thinking of the interests and well-being of others, who may be very different from ourselves[12].

In respect of difference between caring and justice, *Joan Tronto* argues that the ethic of justice is universalistic, while the ethic of care is contextual[13]. Related with this opinion, I want to stress *Onora O`Neill*'s views on theories of justice. She distinguishes the idealized theories of justice from the relativized ones. Idealized theories of justice are liberal universalistic justice, which stress the need to abstract from the particularities of persons and take no account of differences between men and women. On the other hand, relativized theories of justice form the principles of justice in line with the discourse and traditions of actual communities[14]. This justice is not universalistic and may seem more adequate to explain women's needs and experience than idealized theories of justice. But there is a dilemma concerning the both theories of justice. *O'Neill* explains this:

"Justice, it is argued, needs more than abstract principles: it must guide judgements that take account of actual contexts and predicaments and of the differences among human beings. Relativized principles of justice meet this demand: but since they are rooted in history, tradition, or local context, they will endorse traditional sexism or nationalism. Any relativism tends to prejudice the position of the weak, whose weakness is mirrored and partly constituted by their marginalization in received ways of thought and by their subordination and oppression in

[12] Okin, 1989, p.15.
[13] Kymlicka, 1992, p.xxi.
[14] O'Neill, 1995, p.302.

established orders. Yet idealizing approaches do no better. Where relativist approaches are uncritical of established privilege, idealized approaches are uncritical of the privileges from which they abstract."[15]

To solve this dilemma, a conception of justice is formed in accordance with both universalistic and contextual factors. This justice is close to Aristotelian ethics rather than Kantian ethics. Feminists, who see justice as inadequate criticizes liberal conceptions of justice based on Kantian ethics, arguing that these theories are abstract, namely, they take no account of many features of agents and societies[16] and they apply to individuals considered in abstraction from specific identities, commitments, and circumstances[17]. Thus, they disregard the differences between women and men.

Nevertheless, this abstract consideration of justice seems to have legitimate reasons. One of the most important reasons about the above-mentioned blindness to difference is the traditional image of justice, which should guarantee impartiality[18]. Another reason is equal treatment, which is also related with justice. It is possible to see these reasons and others in the Rawlsian justice.

RAWLSIAN JUSTICE

Rawlsian justice is based on Kantian ethics and is an example of abstract liberal justice. This conception of justice's primary aim is to discover the principles of justice, which are subject to consensus in the pluralistic liberal society. In short, Rawlsian principles of justice concern the question of how one can live with people who have different voices. *Rawls* did not move from the differences, but similarities between people. Thus, Rawlsian justice is not constructed according to the differences between

[15] O'Neill, 1995, p.304.
[16] O'Neill, 1995, p.309.
[17] O'Neill, 1995, p.310.
[18] O'Neill, 1995, p.304.

women and men. Does this mean his conception of justice is not concerned with the problems and characteristics of women?

Rawls gives place to the problems of women in his conception of justice. According to him:

"A long and historic injustice to women is that they have borne, and continue to bear, an unjust share of the task of raising, nurturing, and caring for their children. When they are even further disadvantaged by the laws regulating divorce, this burden makes them highly vulnerable"[19].

This statement shows that *Rawls* interested in the problems of women and we see this in the Rawlsian justice in two ways.

A. RAWLSIAN JUSTICE AND CARE

Firstly, as mentioned above, if we wish non-exclusion of women from the realm of moral subjects, we must not neglect moral qualities that are related to them. For this purpose, we must give place to care orientations in the conception of justice. Although Rawlsian justice is rationalistic, individualistic and an abstract conception of justice, it includes care orientations, *i.e.* responsibility and concern for others[20]. This means that his conception of justice is expanded to the ethics of care. On the writings about *Rawls*, *Okin* stressed this point.

The sense of justice is essential for the Rawlsian justice. According to *Rawls*, a well-ordered society, which is designed in accordance with the principles of justice, will be stable only if its members continue to develop a sense of justice. The sense of justice is important to show that Rawlsian justice is concerned with the notions of care and empathy. According to *Okin*, the

[19] John Rawls, **The Law of Peoples**, Harvard University Press, Cambridge, 2000, p.160.
[20] Okin, 1999, p. 274

sense of justice and the capacity for empathy that enable to see things from the perspectives of others are related to each other. She says:

"...this capacity -the capacity for empathy- is essential for maintaining a sense of justice of the Rawlsian kind. For the perspective that is necessary for maintaining a sense of justice is not that of the egoistic or disembodied self, or of the dominant few who overdetermine "our" traditions or "shared understandings", or (to use *Nagel's* term) of "the view from nowhere," but rather the perspective of every person in the society for whom the principles of justice are being arrived at"[21].

Rawls, following Kantian ethics, distinguishes reason from feelings, and do not give any place to the latter in the formulation of his principles of justice. Kantian ethics requires reason rather than the feelings in the foundations of morality[22]. Nonetheless, while explaining the moral development, *Rawls* gives place to feelings such as benevolence and empathy for the development of a sense of justice[23]. One wonders whether feelings have an important role in the formulation of his principles of justice in addition to the reason. To find out this, we must examine *Rawls*'s idea of original position.

Rawlsian justice is an example of social contract theory. *Rawls* constructed his conception of justice according to this theory. One of the important elements of this theory is the idea of natural position. Likely, *Rawls* gives place to an idea of original position in which the principles of justice are attained[24]. Original position

[21] Okin, 1989, pp.21-22.
[22] Okin, 1999, p.274.
[23] Okin, 1999, p.282.
[24]On the other hand, feminist criticisms of Rawls's work generally concern his account of the original position. According to Marion Smiley, the most important feminist claims against Rawls's original position are these: "first, ... that methodology underlying Rawls's Original Position –individuation and abstraction- priviliges men over women by undermining the values of care and relationship; second, that individuals behind the Veil of Ignorance cannot produce principles of justice that are powerful enough to challenge the

is a hypothetical device of representation. An important feature of this position is the veil of ignorance. Owing to the veil of ignorance, the parties in the original position have limited information. For example, the parties do not have any information on people's race, ethnic group, sex, gender and various native endowments such as strength and intelligence[25]. Thus, the veil of ignorance ensures that groups in the original position could think from the position of everybody; this requires empathy and capacity to listen to others[26]. For example, in the absence of knowledge of sex, they must adopt principles of justice from the point of women and men.

On the other hand, *Rawls* is an equalitarian liberal thinker. For this reason, his conception of justice includes requirements of social justice. For example, Rawlsian justice contains two principles of justice. His second principle of justice is related to social justice, which requires empathy to others. Thus, we may conclude that Rawlsian justice is connected with care orientations from certain aspects.

B. RAWLSIAN JUSTICE AND PROBLEMS OF WOMEN

Secondly, I will examine Rawlsian justice as to whether it gives place to the problems of women. In order to explain this issue, I will examine *Rawls*'s conception of justice in two parts. The first part is concerned with the selection of principles of justice. The

patriarchal family; and third, that Rawls's insistence on a Veil of Ignorance takes away from black women and other women of color in particular the racial and cultural identies necessary to both their moral agency and their personal integrity". (Marion Smiley, "Democratic Citizenship V. Patriarchy: A Feminist Perspective on Rawls", Fordham Law Review, Vol.72, 2004, p.1601).

[25] John Rawls, **Political Liberalism**, Columbia University Press, New York, 1996, pp. 24-25.

[26] Okin, 1999, pp.288-289.

other is concerned with the application of these principles in a well-ordered society.

As mentioned above, *Rawls* uses social contract theory to construct his conception of justice. His idea of original position explains that how the principles of justice are selected. The veil of ignorance, which is an essential element of original position, conceals from the groups all knowledge of their individual characteristics. For example, the groups behind the veil of ignorance are not able to know the sex of which they represent.

Knowledge of one's sex is behind the veil of ignorance. This means that obvious principles of sexist doctrines would be unfair and irrational. *Rawls* exactly wants that differences do not have a role in the selection of the principles of justice. This opinion has had several reasons. Firstly, *Rawls* wants to ensure impartiality and equality in the original position, since the principles of justice could only be attained in a fair position. Secondly, *Rawls* claims that sex, culture, religion and others are contingent and morally irrelevant characteristics. In other words, social institutions are not designed according to these characteristics.

Both of these two reasons provide that principles of justice are not attained in favour of men; namely, these principles do not favour either men or women, but both. These principles are applied to basic structure of the liberal democratic society. Thus, Rawlsian social institutions are not designed on the basis of sex.

On the other hand, the principles of justice also do not allow sex discrimination. These principles are:

1. Each person has an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for all.

2. Social and economic inequalities are permissible provided that they are (i) to the greatest expected benefit of the least

advantaged; (ii) attached to positions and offices open to all under conditions of fair equality of opportunity[27].

Equality, which is included in the principles of justice, is liberal equality. This equality presupposes the sameness between sexes, not the differences. For this reason, Rawlsian justice is criticized in that it does not reflect the actual differences between the sexes. As mentioned above, the actual inequality between sexes arises from differences. But *Rawls*'s second principle of justice is capable of not allowing the subordination of women. For example, like *Okin*, it is possible to think women, in the framework of the Rawlsian justice, as the least advantaged group in the society. Thus, social and economic inequalities could be designed to improve the position of women in the society. Rawls says "if men, ..., have greater basic rights or greater opportunities than women, these inequalities can be justified only if they are to the advantage of women and acceptable from their point of view"[28].

Concerning the application of the principles of justice, *Rawls* says that these principles apply to the basic structure of the society. The problem connected with this arises as to whether this basic structure also includes family. Family has an important role regarding the problems of women, since the subordination of women is observed in the family life. In other words, injustices concerning women arise in the family life. Thus, if we do not allow injustices for women in the society, we must reform the family life. As *Okin* says, "until there is justice within the family, women will not be able to gain equality in politics, at work, or in any other sphere"[29]. Following this idea, I claim that any adequate conception of justice must provide fair conditions in the family. Thus, connected with the Rawlsian justice, I say that until the principles of justice do not apply to the family, women do not gain equality.

---

[27]Rawls, 1996, p.271.

[28] Rawls, **Justice as Fairness: A Restatement**, Ed.Erin Kelly, Harvard University Press, Cambridge 2003, p.65.

[29] Okin, 1989, p.4.

While *Rawls*'s thoughts about family is argue not clear in the first writings, in his later writings, he explicitly puts forward his thoughts about the connection between the family and the basic structure. *Rawls* says: "The family is part of the basic structure, since one of its main roles is to be the basis of the orderly production and reproduction of society and its culture from one generation to the next."[30]. *Rawls*, like *John Stuart Mill*, thinks that the male despotism in the family is not compatible with the requirements of the democracy. Particularly, his conception of democracy and his principles of justice can be invoked so as to reform the family[31].

As regards *Rawls*'s views about citizenship, citizens must have a sense of justice and political virtues, since these are important to support just political and social institutions. It is connected with family's role, which contributes to the moral development of citizens. *Rawls* claims that the basic structure is limited with these requirements[32]. On the other hand, whether principles of justice apply to the family, *Rawls* says these principles apply directly to the basic structure and indirectly to family life[33]. This subject is concerned with whether these principles secure equal justice for women and their children.

However, *Rawls* says that principles of justice do not only apply to family life, but also to the internal life of many other associations. *Rawls* thinks that these associations may want to apply their own conception of justice to their internal life. *Rawls* wants to construct his conception of justice for pluralistic democratic society. Thus, his conception of justice gives place to different conceptions of justice. Moreover, Rawlsian justice is a political justice, which is constrained politically. This means that his conception of justice is not interested in internal life of the associations.

[30] Rawls, 2000, p.157.
[31] Rawls, 2000, p.160.
[32] Rawls, 2000, p.157.
[33] Rawls, 2000, p.158.

On the other hand, there is a relationship between *Rawls*'s principles of justice and family. This relationship is built through applying the principles of justice indirectly to family life. These principles impose constraints to the family as with the other institutions within the basic structure[34]. As mentioned above, the first principle is concerned with equal basic rights and liberties and the second is concerned with social and economic inequality. The first principle envisages the provision of equal rights and liberties to all citizens who are the members of family. Thus, women have equal rights as men. The second principle of justice implies opportunities. Women have these too. According to *Rawls*, these principles ensures women's equality and independence[35]. In other words, the principles of justice secure women's equality and independence through constraining family life.

Rawls establishes a connection between political domain and non-political domain through principles of justice. Since these principles, which apply directly to the basic structure, constrain the various associations within that structure, political and non-political domains are not disconnected with each other. Thus, various associations within the basic structure, including the family, must respect equal rights and liberties as citizens[36]. In other words, since women's equal rights are secured with the principles of justice, no family may violate these rights. *Rawls* says, "...gender distinctions limiting those rights and liberties are excluded"[37]. Rawlsian principles of justice restrict non-political or private domains that maintain male despotism.

But there is a problem in comparing the family with other associations. Rawls regards the family as one of the associations within the basic structure of society[38]. The family is different from

[34] Rawls, 2000, p.159.
[35] Rawls, 2000, p.159.
[36] Rawls, 2000, pp.160-161.
[37] Rawls, 2000, p.161.
[38] Rawls, 2003, p.163.

the other associations. As Martha C. Nussbaum rightly stated, "... if the family is part of the basic structure, how can it also be a voluntary institution , analogous to a church or a university? The institutions of the basic structure are those whose influence is pervasive and present from the start of a human life. The family is such an institution; universities and churces (except as extentions of families) are not. For adult women, membership in a family may be voluntary (though this is not always clear), and Rawls's protection of their exit options may suffice to ensure their full equality. But children are simply hostages to the family in which they grow up, and their participation in its gendered structure is by no means voluntary. Rawls does not adress this deep problem, nor, in talking about civic education, does he comment on the extent to which he would favor compulsory public education when families wish to withdraw their children from the public culture"[39].

On the other hand, one may object Nussbaum, since Rawls regards children not only as members of the family, but also as society's future citiziens. For this reason, through the principles of justice it is possible to "impose constraints on the family on behalf of children"[40]. Rawls says "... parents should follow some conception of justice (or fairness) and due respect in regard to each of their children, but, within certain limits, this is not for political principle to prescribe. Of course, the prohibition of abuses and the neglect of children, and much else, will, as constraints, be a vital part of family law. But at some point society has to trust to the natural affection and goodwill of parents"[41]

On the other hand, one may say that Rawlsian justice is not sufficient to solve the problems of women in the family, since his principles apply indirectly to the family. It is true that Rawlsian justice provides protection against domestic violence, marital

[39] Martha C. Nussbaum, "Rawls and Feminism", in. Samuel Freeman, **The Cambridge Companion to Rawls,** Cambridge University Press, Cambridge 2003, p. 504.
[40] Rawls, 2003, p.165.
[41] Rawls, 2003, p.165.

rape, and incest. But it is arguable whether this supports only minimal justice in the family and may allow other injustices. For example, *Amy R. Baehr* says that *Rawls* is not against comprehensive doctrines based on sexist modules. According to her, *Rawls* regard as reasonable the doctrines, which advocate that women exclusively take on private duties in the family such as child care, care for the elderly, cooking, and cleaning[42].

Baehr is right about *Rawls*'s thoughts. However, there should be made a distinction. Connected with the gendered division of labour in the family, Rawlsian conception of justice does not form this division, except that one does accept this division voluntarily. Thus, one may accept fully voluntarily the unequal division of labour in the family[43]. Rawls justifies this division by having recourse to basic liberties, including the freedom of religion. Moreover, *Rawls* accepts gendered division of labour provided that it is a voluntary division of labour. This is concerned with one important element of Rawlsian justice, namely autonomy. Thus, one may say that Rawlsian justice aims to reduce involuntary division of labour. But, at this point, we must consider the effects of social pressures on the choices of women.

On the other hand, gendered division of labour in the family is capable of increasing women's inequality or disadvantaged position. *Rawls* accepts that a basic cause of women's inequality is their greater share in the bearing, nurturing, and caring for children in the traditional division of labour within the family[44]. Thus, to ensure women's equality requires to equalize their share of labour in the family or to compensate them for it. As regards how this should be done, a common proposal is: "as a norm or guideline, the law should count a wife's work in raising children (when she bears that burden as is still common) as entitling her to an equal share in the income that her husband earns during

[42] Amy R. Baehr, "Toward a New Feminist Liberalism: Okin, Rawls, and Habermas", in Henry S. Richardson-Paul J.Weithman, **The Philosophy of Rawls**, Garland Publishing, New York 1999, p.303.
[43] Rawls, 2000, pp.161-162.
[44] Rawls, 2000, p.162.

their marriage. Should there be a divorce, she should have an equal share in the increased value of the family's assets during that time."[45]. Thus, *Rawls*'s ideas about gendered division of labour in the family do not mean that women's equal rights are unsecured.

However, one may find inadequate Rawls's ideas regarding housewives, since the problem is not concerned with sharing husbands' earnings, but structural division of labour underlying gender injustices. In other words, it concerns structural division between paid employment and unpaid family work[46]. But Rawls is aware of this problem and acknowledges that by saying: "the crucial question may be: what precisely is covered by gender-structured institutions?"[47]

CONCLUSION

Feminist criticisms of justice are not concerned with justice itself. In fact, they are concerned with a particular conception of justice: liberal conception or theory of justice. Rawlsian justice is an example of liberal conception of justice. In this article, I endeavoured to show that this conception is suitable for solving the problems of women.

In the Rawlsian conception of justice, men and women are fully equal as citiziens. That means "that they must be treated equally not only in such matters as voting and political participation; they must also be treated equally in distributing all primary goods"[48].

[45] Rawls, 2000, p.163.
[46] Iris Marion Young, "Taking the Basic Structure Seriously", Symposium/John Rawls and the Study of Politics, Vol.4, 2006, p.93.
[47] Rawls, 2003, p.167.
[48] Martha C. Nussbaum, "The Enduring Significance of John Rawls", Chronicle of Higher Education, 00095982, 7/20/2001, Vol. 47, Issue 45.

For this reason, in allocating primary goods, Rawlsian justice does not allow sexual discrimination.

However, implications of Rawls's conception of justice for women's equality may not seem satisfactory. For example, MacKinnon criticizes liberal doctrine of equal rights and sees that doctrine as a means of male supremacy[49]. According to MacKinnon, this doctrine does not capable of solving women's problems within a patriarchal society.

It is true that framework of patriarchal society does not permit women's freedom and equality and social pressures shape women's choices. For this reason, unless we eliminate social pressures, we cannot speak of genuine free choices for women[50].

Concerning gender inequality, Rawls's theory implies that the state must seek to create substantive, not merely formal, equality[51]. According to Rawls, if principles of equal liberty and a principle of fair equality of opportunity are properly applied, they would be enough to secure equality and independence of women. In other words, Rawlsian justice calls for rules, which reduce women's inequality or disadvantaged position in the society. Thus, one may say that Rawls's conception of justice is not blind to the oppression of women in the society.

[49] Elizabeth Brake, "Rawls and Feminism: What Should Feminists Make of Liberal Neutrality", Journal of Moral Philosophy, 2004, p.294.
[50] Brake, 2004, p.295.
[51] Brake, 2004, p.293.

FREE LAW JOURNAL

The Free Law Journal results in 2005 of the merger of the Eastern European Law Journals into one journal and of the acquisition of the EELJs by the Free European Collegium, through its publishing arm, Free World Publishing Inc.

The Free Law Journal aims at the widest diffusion of legal research by academicians, practitioners and post-graduate students from across the world. It publishes in English, French, Bosnian, Bulgarian, Croatian, Czech, Finnish, German, Greek, Hungarian, Icelandic, Inuktitut, Italian, Latin, Polish, Portuguese (both Brazilian and European), Romanian, Russian, Serb (both Latin and Cyrillic), Slovenian as well as Spanish, all in electronic and print format.

These publications are the property of *Free World Publishing*, partner and publishing arm of the Free European Collegium, a higher learning institution based in Ottawa, Canada and with administrative offices in Budapest, Hungary. For all concerns and details please consult our web site at www.FWPublishing.net.

Free Law Journal
ISSN 1712-9877

Free European Collegium