

Part II. Criminal Procedure Law in Turkey

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Chapter 1. Organization of Criminal Justice in Turkey

289. The rules of criminal procedure law, substantive criminal law, the administration of justice, the rights of the accused and the powers of the prosecution services are interconnected with each other; thus they constitute a “system of criminal justice”.

The Turkish Code of Criminal Procedure (*Ceza Muhakemeleri Usulü Kanunu CMUK*) was enacted on April 20, 1929, Act No. 1412. It was a translation of the 1872 German Code of Criminal Procedure, adopted with few changes. This Code was replaced by the Code of Criminal Procedure in 2005 (*CMK*).¹

The Turkish Penal Procedure Code adopted the “mixed system” of criminal procedure: the preliminary investigation and the preparation of the public prosecution are conducted in camera (Article 157, CMK), in accordance with the “inquisitorial system.” The trial inquiry stage is conducted publicly, in the presence of the accused, and orally, according to the accusatorial system.² It now regulates electronic interaction within criminal procedure (Article 38/A, CMK added by Law No. 6352 in 2012). The decisions and judgments as well as all interactions shall be signed by electronic signature (Article 38A/3 CMK).

1. A separate Law, of June 8, 1936, Act No. 3005, did provide a special procedure for “flagrant offences”. This Law was also abolished in 2005. Kunter & Yenisey & Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), 1198; K. Gülen, *Günümüzde Polis Vazife ve Salahiyet Kanununun Tatbiki* (Ankara. 1977), 215. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 500.
2. N. Güreli, “The Recent Development of Turkish Criminal Procedure and the Practice of the Turkish Judiciary,” *Annales de la Faculte De Droit D’Istanbul* XXIX, no. 45, Tome (1983): 113 149.

§1. CRIMINAL COURTS

I. Introduction

290. A sovereign country has three branches of power, one of which is the jurisdiction of independent courts. Taken as a whole, the jurisdictions of the different courts cover the entire territory of Turkey, with a few exceptions (*supra*, paragraph 86).

There exists a unity of jurisdiction. Within the State there is a single jurisdiction divided into branches: constitutional, civil and criminal. The law governs the field of jurisdiction of each branch.

The structure of the courts was designed along the French Model in 1879. There have been unsuccessful efforts for decades to change this system. Finally, in 2005, a new Code on Courts brought a major reform (*Adli Yargı İlk Derece Mahkemeleri ile Bölge Adliye Mahkemelerinin Kuruluş, Görev ve Yetkileri Hakkında Kanun; 2004–5235*).

The courts in Turkey are divided into ordinary courts and administrative courts. The Courts of ordinary jurisdiction are divided into two branches: civil¹ and criminal courts. The civil and criminal courts are different and separate.

Distinguishing the competence of the administrative courts and that of the ordinary civil courts is not easy. A special court, the Court of Conflicts, resolves conflicts between ordinary civil courts and administrative courts (*infra*, paragraph 299-I).

The total number of judges and prosecutors at the end of July 2013, including those in the administrative judiciary, was 13,145 (10,318 at the end of 2011), a quarter of whom were women. At the end of 2012, 34% of judges and 7% of prosecutors were women. There were 11.39 judges and 5.98 prosecutors per 100,000 people.²

The 2013 budget for the judiciary amounted to approximately €2.68 billion, roughly 0.45% of Turkey's GDP.

1. The lower courts of civil jurisdiction are the Courts of First Instance, Peace Court in Civil Matters (Justice of the Peace) and Commercial Courts, Execution Officers, Bankruptcy Officers and Investigation Authorities. The Investigation Authorities also act as judges in certain cases with the capacity to settle monetary disputes by means of summary procedures (T. Ansay & D.Wallance, *Introduction to Turkish Law*, 6th edition (Oceana New York, 2011), 211
2. European Commission, Turkey 2013 Progress Report COM(2013) 700 final.

291. *The Constitutional Court* has several functions. Besides its powers as the court that controls the laws adopted by Parliament, it may function as a criminal court of the first instance.

The Constitutional Court (*infra*, paragraph 300-IV) functions as the “Highest Criminal Court” if the accused is a high official (Article 148/3, AY) or if the case deals with the closing down of a political party.¹

1. In August 1993 the Constitutional Court closed down the People's Labor Party (HEP), a pro-Kurdish political party, on the grounds that it advocated separatism. Its successor, Democracy Parts (DEP), was investigated on the same charges.

292. Turkey has accepted the jurisdiction of the European Court of Human Rights¹ with respect to the ECHR (Article 25/2, IHAS).²

According to the amendment of Article 90 of the Turkish Constitution (2004–5170), International Conventions related to substantive human rights are superior if there is a conflict with the internal codifications.³

1. Yenisey & Cihan, *Menschenrechte im Strafverfahren, AIDP National Report* (Spain, 1993).
2. Kunter & Yenisey & Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), p. 1864.
3. O. Doğru, *Anayasa ile Karşılaştırmalı İnsan Hakları Avrupa Sözleşmesi ve Mahkeme Uç Tüzüğü* (İstanbul: Vedat Kitapçılık, 2010). O. Doğru, *İnsan Hakları Avrupa Mahkemesi İçtihatları* (2004–2008). M.S. Gemalmaz, *Ulusalüstü İnsan Hakları Belgeleri* (2010). R. Özmen, *İnsan Hakları Mevzuatı* (2010). S. Unal, *Turkish Legal System and the protection of Human Rights* (Ministry of Foreign Affairs Center for Strategic Research, Sam Papers No: 3/99, Ankara, 1999). Y. Ünver, *Adil Yargılanma Hakkı ve Ceza Hukuku* (Ankara: Seçkin Yayınları, 2004).

II. Categories of Criminal Courts

293. The criminal courts of first instance fall into three categories: general criminal

courts, special chambers (or sections) of the general courts and the criminal courts founded on a special statute. Investigating judges no longer exist in Turkey, as judicial inquiries were abolished in 1985.

A. General Criminal Courts

294. There are two categories of general criminal courts: Court of General Jurisdiction in Criminal Matters and Court of Assizes.¹

1. The jurisdiction of the courts was regulated by the Code of Application of the Penal Procedure Code Article 25. However in 2004 a law abolished this code and substituted it with the new Act on the Structure of Courts “2004-5235.”

295. *Peace Courts abolished in 2014.* Peace courts have been abolished in 2014 by Law No. 6545. The Code on Courts (2004-5235) Article 10, had widened the jurisdiction of this court to cases that deal with crimes carrying imprisonment up to and included two years, and it can impose criminal fines and security measures as well.¹ Only one judge was sitting in the Peace Court (Article 9/2, Law 2004-5235) and there was no public prosecutor present.²

1. Previously, the jurisdiction of the Peace Court in criminal matters was limited to cases of misdemeanors and some petty offenses listed by the repealed Code of Application of the Penal Procedure Code (Article 29).
2. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 509. A. Parlar & M. Hatipoğlu, *Sulh Ceza Davaları* (2009). A. Gündel, *Sulh Ceza, Ağır Ceza ve D.G.M. Davaları* (Ankara: Seçkin Yayınları, 1999).

296. *The Court of General Jurisdiction* is competent to hear cases that do not fall under the jurisdiction of other criminal courts (Article 11, Act of 2004–5235).¹

There is a Court of General Jurisdiction in each district and the court has one judge (Article 9/2, Law 2004–5235).² Beginning from May 2011 there was no public prosecutor present in the Court of General Jurisdiction for two years in order to speed up the procedure. The aim had been to allow prosecutors to concentrate on the investigation phase of the proceeding, and the collection of evidence, so that the trial proceedings could be conducted in a speedy way. This provisional regulation lapsed at the end of 2013, and the public prosecutors are back in the courtroom.

1. A. Parlar & M. Hatipoğlu, *Muzaffer, Asliye Ceza Davaları*, 2008. Gündel, *Ahmet, Asliye Ceza Davaları* (Ankara: Seçkin Yayınları, 2000).
2. M. Görgün, *Uygulamada Asliye Ceza Davaları* (1999).

297. *Court of Assize.* There are two associate justices and one president in this court (Article 9/3, Law 2004–5235).

The 2005 amendment has made a mixed system of jurisdiction of the Court of Assize (Article 12, Act 2004–5235 as amended by the Law 2005-5328). The 2014-6526 amendment included crimes to the jurisdiction which were regulated previously in the repealed Article 10 of the Anti-Terror-Act. Thus, together with repealing Article 10 TMK, the jurisdiction of the Court of Assize was extended to terror crimes and organized crimes.

This court has now jurisdiction on crimes that bring “aggravated life imprisonment,” “life imprisonment” and “imprisonment more than ten years.” Additionally, it has

jurisdiction over certain crimes which are listed in the Code: theft by force (Article 148 TCK), bribery by force (Article 250/1 and 2 TCK), forgery of official documents (Article 204/2 TCK), qualified swindling (Article 158 TCK) and fraudulent bankruptcy (Article 161 TCK), and except for Articles 318, 319, 324, 325 and 332 TCK, crimes regulated under second book, part four, section four, five, six and seven, and crimes regulated under the Anti-Terror-Act, No. 3713.

Jurisdiction of the Constitutional Court, the Court of Cassation as a first instance court, military courts, and juvenile courts have jurisdiction if the case would be tried before one of them and a Court of Assize (Article 12, Law No. 2004-5235, as amended by Law No. 2014-6526).

Courts for organized crimes and terror crimes (*infra*, paragraph 298-III) which were abolished in March 2014 had a wider venue as a specialized chamber of the Court of Assize until then.

B. Special Chambers of the General Criminal Courts

298. The Special Chambers of the General Courts include “press courts” (*infra*, I), “smuggling courts” (*infra*, II), “organized crime courts” (*infra*, III), and “traffic courts” (*infra*, IV).

I - Press Courts.

Within the Organization of Turkish Courts¹ there are special chambers of the general courts that have subject matter expertise (specialists) in some fields. For example, according to the new Press Code, the second chamber of the or the Court of General Jurisdiction is competent for offenses committed by the press (Article 27/2, Act 2004–5187) (*supra*, paragraph 178).

II - Smuggling Courts.

Since March 21, 2007, with the implementation of the “Combating Smuggling Act 2007” No. 5607 (KaçK), new courts dealing with smuggling have been operational. In cases of misdemeanors, the public prosecutor is empowered to rule on administrative fines. If the case is dealing with administrative confiscation in Article 14, KK, the Peace Court has jurisdiction upon the request of the public prosecutor. Legal remedies against these decisions are governed by the Act on Misdemeanors (Article 17/1, KaçK). In cases of “crimes” regulated in the “Combating Smuggling Act 2007,” cases shall be tried by “smuggling courts,” established by the “High Council of Judges and Prosecutors,” upon the request of the Ministry of Justice (Article 17/2, KaçK). If the crime is forgery of official documents in relation with smuggling, then the general section of the Court of Assize has jurisdiction. But if the crime is organized smuggling of narcotics, jurisdiction goes over to the court of the assize (repealed Article 250/1, CMK, as amended). Thus the scope of smuggling crimes that come before the criminal courts is quite limited.

III - The repeal of the terrorism courts.

There are no specialized courts for organized crimes and terror crimes, and no special procedural rules for such crimes in Turkey since the 2014-6526 amendment. The history of the establishment and subsequent repeal of special courts and the consequences (5 below) of repealing them are as follows:

1) State security courts of 1991.

State security courts dating back to 1991, dealing with terror crimes and crimes against the security of the state, have always been disputed in Turkey. Courts with special procedural rules have remained in the Turkish Criminal Justice System since then, with some changes in the structure and the name.

2) Organized Crime Courts of 2004.

The “Organized Crime Court” of repealed Article 250, CMK is a product of Act No. 5190, dated June 16, 2004, which repealed the State Security Courts and created a specialized Chamber of the Court of Assize. This court had collective jurisdiction in several cities over terror crimes, crimes against the integrity of the State and organized crimes.

3) CMK 250 courts of 2005.

This structure was transferred into the Penal Procedure Code as Articles 250, 251 and 252 in 2005.

4) Anti-Terror-Courts of 2012.

These courts were transformed to "Anti-Terror Courts" in 2012, and the Law No. 6352 dated 2.7.2012 repealed Articles 250, 251, 252 CMK. In this way, the establishment and jurisdiction of courts with special powers and public prosecutors were furnished with extended powers has been transformed to Anti-Terror Courts.

The new structure in the Anti-Terror Law did not include all the previous special powers of prosecutors and the special courts, and new judges were appointed by the High Council and Prosecutors for the established TMK 10 Courts (Article 10 TMK, as amended by Law No. 6352).

The provisional Article 2/2 of this Law, however, made an exception, and abolished special courts for high profile pending political cases against military commanders maintained their jurisdiction until a final verdict was reached. This exceptional regulation was the point of recent political discussions at the end of 2013 and in the first months of 2014. Critics argued that this last amendment related to abolishing the courts was motivated by the wish to avoid investigations initiated by the special empowered public prosecutors against the members of the ruling government.

5) Abolition of Anti-Terror Courts in March 2014.

Law No. 6526, dated 21/2/2014 went into force at 4th of March 2014. Article 19 of this Law repealed Article 10 of the Anti-Terror-Law (TMK), and Provisional Article 2/4 of Law No. 2012-6352 that gave jurisdiction to the abolished courts until they reached the final verdict.

Repealing Article 10 TMK has important consequences for the Turkish Criminal Procedure Law. There are no longer specialized courts for organized crimes and terror crimes, and no special procedural rules for such crimes.

The Provisional Article 14 of the Anti-Terror Act, added by Law No. 2014-6526 reads as follows:

“Provisional Article 14- On the date when this Law is entered into force, courts of assize carrying out their duties under provisional article 2 of the Law dated 2/7/2012 and numbered 6352 and courts of assize assigned under article 10 of Anti-Terror Law which is repealed by this Law shall be abolished.

The chief judges and member judges assigned to the abolished courts of assize and judges and Public Prosecutors assigned to the investigation of the offences within the scope of the Anti-Terror Law shall be appointed by the High Council of Judges and Prosecutors to other positions as deemed appropriate by taking into consideration their acquired rights within 10 days starting from the completion of turnover under paragraph 5.

The investigation cases carried out by the Public Prosecutors assigned under Article 10 of the Anti-Terror Law which is repealed by this Law shall be turned over to the competent Chief Public Prosecutors Offices on the date of entry into force of this Law.

The pending cases before courts of assize carrying out their duties under provisional article 2 of the Law numbered 6352 and courts of assize assigned under Article 10 of the Anti-Terror Law which is repealed by this Law shall be turned over to the competent and assigned court so as to resume the prosecution on the date of entry into force of this Law. The examination of the cases by the Chief Public Prosecutor's Office of Court of Cassation or the Chamber of Court of Cassation after decision by these courts of assize shall be continued.

Turnover proceedings under paragraphs three and four shall be concluded within fifteen days from the date of entry into force of this Law by the judges assigned to the courts of assize abolished by this Law and by the Public Prosecutors. Until the turnover process of the cases is concluded, to avoid inconvenience, the judges and courts in this new jurisdiction shall be competent to rule on protection measures concerning these turned over cases. Moreover, for the judgments in which justification has not yet been written down but on which the abolished courts have ruled, the justifications shall be written within at latest fifteen days from the date of entry into force of this Law. The archive and deposits of the finalized cases in these abolished courts and other documents shall be turned over to the court or courts to be defined by the High Council of Judges and Prosecutors and the subsequent proceedings and requests shall be carried out or ruled on by these courts.

The references in the legislation for the high criminal courts which are assigned under repealed paragraph one of article 250 of Criminal Procedures Code and paragraph one of article 10 of the Anti-Terror Law shall be deemed to be made to courts of assize and the reference to the members of these courts of assize shall be deemed to be made to Ankara courts of assize defined by the High Council of Judges and Prosecutors. The references to the offences within scope of paragraph one of article 250 of Criminal Procedures Code and the offences within scope of paragraph four of article 10 of the Anti-Terror Law shall be deemed to be made to the following offences laid down in the Turkish Penal Code:

a) To the offence of laundering value of property obtained from production and trade of drugs and stimulants committed for the purpose of actions of organization,

b) To the offences committed by using force and threat for the purpose of actions of an organization established to provide undue economic benefit,

c) To the offences laid down in Part Four, Five, Six and Seven of Section Four of Second Book (except articles 305, 318, 319, 323, 324, 325 and 332).

After the date of the entry into force of this Article, with regard to the pending cases related to offences within the scope of Article 10 of the Anti-Terror Law which is repealed by this Law, a suspension or dismissal decision shall not be rendered. In cases where the accused is a public official, and the opening an investigation against him requires a permission or a judgment, this requirement shall not be taken into consideration.

Judges and prosecutors at the repealed anti-terror-courts were appointed to regular courts of assizes within ten days, and pending cases at these courts were transferred to the regular Court of Assize at the place where the crime had been committed.

Decisions related to detention were rendered by judges and courts where the abolished courts are located (Article 1 of Law No. 6526, dated 21/2/2014). Under this provision, accused awaiting the decision of the Court of Cassation, and have been in custody more than five years, were released.

IV - Traffic Courts.

Some traffic offenses are subject to the jurisdiction of the Peace Court. In each district, one chamber of the Peace Court is appointed to deal with these offenses (Article 112, Act No. 2918 dated 1983).²

1. F. Yenisey, *Ceza Muhakemesi Hukukunda İstinaf ve Tekrar Kabulü Sorunu*, (İstanbul 1989), 9.

2. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 533.

C. Criminal Courts that Depend on a Special Statute

299. Some courts of special jurisdiction, such as the Constitutional Court, are formed by a specific Act.¹

I - Court of Conflicts.

If there is a conflict of competence between the ordinary courts and the military courts or administrative courts, the Court of Conflicts decides which court is competent.

II - Military Courts.

*Military Courts*² are formed according to Article 145 of the Constitution for military offenses.³ Military courts and military disciplinary courts shall only have jurisdiction for crimes committed by military personnel and related to military duties. By contrast, crimes against the security of state, the constitutional order and its functioning, allegedly committed by military personnel, shall be tried by civil courts only. Except in times of war, non-military persons shall not be tried by military courts.

The Military Court of Cassation monitors their decisions. The recent change has removed a reference to "the requirements of military service" which was previously a guiding principle for legal regulations on military issues (Article 156/4, AY). The Military Court of Cassation shall be independent.

Military Court of Cassation, and *Supreme Military Administrative Court* (Article 157, AY) are incorporated in the justice system of Turkey next to the *civilian Court of Cassation*, and thus the "multiplicity of supreme judicial authorities" is one of the characteristics in Turkey.

European Court of Human Rights addressed the issue of *multiplicity of supreme judicial authorities* in the case of *Nejdet Şahin and Perihan Şahin v. Turkey* (2010), and did not find a violation of fair trial principles (Article 6/1 ECHR), but emphasized the problem of conflicting case-law that would undermine the legal certainty.⁴

There are 12 military courts of the first instance in Turkey. They hear cases in a panel of three professional military judges. There are some defined cases, e.g., those punishable up to five years of imprisonment, dealt with by a single judge. The previous composition of a bench with one army officer and two career military judges has been amended after the ECHR decision *Fikret Doğan v. Turkey* (2001).

In cases where a civilian commits a crime in the peacetime together with a military service man, the crime will be investigated by civilian public prosecution and the prosecution shall be conducted by a civilian court, even if the crime is a military crime as defined in Military Penal Code (Article 2, CMK as amended by Law No. 5918 in 2009).

The new *Turkish Armed Forces' Discipline Law*, No. 6413, adopted on 31 January 2013, shall be applicable for peacetime, provides for conversion of disciplinary tribunals into administrative disciplinary committees, the abolition of solitary confinement and the strengthening of appeal mechanisms for disciplinary punishments. But the disputed *Law on Establishment and Powers of Disciplinary Courts*, Law No. 1964-477 remains to be in force for wartime.

III - Juvenile Courts.

Juvenile Courts were restructured in 2005. There are "Juvenile Courts" and "Juvenile Courts of Assize".

The Juvenile Courts are established in the center of each village, where there is one judge. The public prosecutor is not present at the court (Article 25/1, Act No. 2005–5395). This court acts as a "Court of General Jurisdiction", and as the "Peace Court" in juvenile matters (Article 26, Act No. 2005–5395).

"Juvenile Courts of Assize" consist of one president and a sufficient number of members. The court hears cases with one president and two members, and it has regional jurisdiction (Article 25/2, Act No. 2005-5395) within the same village (Article 27/2, Act No. 2005-5395) in cases that would originally fall under the competence of the Court of Assize (Article 26/2, Act No. 2005-5395).

Juvenile Courts were formerly regulated by the 1979 Act No. 2253. However, the actual functioning throughout the whole of Turkey was not complete. Only in five big cities Juvenile Courts have been established. Suspects from 11-15 years of age are tried in Juvenile Courts.

The "Protection of the Child Act" (Act No. 2005-5395) has extended the jurisdiction of the Juvenile Court to all persons until they attain the age of 18 (Article 3/1, Act No. 2005-5395).

Suspects under 18 years of age must have a lawyer (Article 150/2 CMK). Pretrial detention of a child is forbidden if the child is under the age of 15 and the alleged crime carries an imprisonment of less than five years as the upper level of punishment (Article 21, Act No. 2005–5395). The former Act of Juvenile Courts had foreseen a similar provision: the pre-trial detention of a child under 18 years of age was forbidden if the committed crime was punished by custody of less than three years (repealed Article 19/3 ÇMK).

IV - Family Courts.

Family Courts are competent civil courts to handle all matters arising from divorce applications, including settling the disputes. This new institution was established on January 9, 2003, by Act No. 4787, in order to strengthen the family unit and thereby prevent juvenile delinquency. If the settlement attempt fails, only then the Family Court decides on the merits of the case (Article 7 Act No. 4787). Family Court may order a child to be placed in another family if the members of his family are not fulfilling their duties toward their child (Article 6 Act No. 4787).

1. *The State Security Court (Devlet Güvenlik Mahkemesi)*, which has been repealed by Act 2004–5190, was created in 1983. The jurisdiction of this court was explained in Article 9 of the State Security Court Act (No. 2845). After the last amendment in 2001, there were only a few crimes that were subject to the State Security Court. The ordinary Court of Cassation was monitoring the judgments of the State Security Courts. There are no State Security Courts within the Turkish Criminal Justice System as of today.
2. Before this legislation, the first chamber of the Court of General Jurisdiction was appointed to deal with smuggling offenses (Article 26/2, repealed Act 2003.4926).
3. In cases where Parliament declares Martial Law, the Military Courts have jurisdiction as Martial Law Courts.
4. E. Svanidze. *A Comparative Analysis of Military Justice System in the Council of Europe Member States*, Council of Europe, 2012, p. 112.

D. High Courts of Legal Remedies

300. *High Courts of Legal Remedies.* The Turkish Criminal Justice System in reality offers at this time only one ordinary legal remedy: that is “cassation” (*infra*, II) against the final decisions of the trial courts (Act of Court of Cassation, No. 2797). The “legally” existing “Courts of Appeal” (*infra*, I) have not been formed yet as of March 2014.

I - Regional Courts of Appeal.

The Turkish Law previously did not recognize the remedy of appeal (*infra*, paragraph 408) in relation to the facts of the case.¹ The “Law on the Establishment, Duties and Powers of the Ordinary Courts of the First Instance and the Regional Courts” (2004–5235) intends to create such courts (*supra*, paragraphs 40, 294). The Courts of Appeal had been established during the Ottoman Empire in 1879, but were abolished in 1924. Since that time, there have been plenty of unsuccessful attempts to create these intermediate courts. Parliament, through the 2004 Reform, decided to establish the appeals courts, and it has regulated their structure in a separate Code (Law 2004–5235) and their rules of procedure in the new Penal Procedure Code (between Articles 272 and 285, CMK).

According to the “Law on the Establishment, Duties and Powers of the Ordinary

Courts of the First Instance and the Regional Courts” (2004-5235), Ordinary Regional Courts shall be founded regionally, based upon the geographical location and the case load, upon the decision of the High Council of Judges and Prosecutors, by the Ministry of Justice (Article 25, Act No. 2004-5235). Ordinary Regional Courts consist of an Office of Presidency, Assembly of Presidents, Chambers, Office of Public Prosecutor, Justice Commission of the Ordinary Regional Court and Directorships (Article 26, Act No. 2004-5235).

The Chambers of the Ordinary Regional Courts are divided into “civil chambers” and “criminal chambers.” There are at least three civil chambers and two criminal chambers at each Ordinary Regional Court. The High Council of Judges and Prosecutors is entitled to increase or decrease the number of the chambers according to the proposal of the Ministry of Justice. The Chambers consist of one president and a sufficient number of members (Article 29, Act No. 2004-5235).

As the restructuring of the courts requires a number of new highly qualified judges and personnel, as well as new buildings, the application of this new remedy (appeal; *istinaf*) within the Penal Procedure Code has been postponed until the courts are activated. It is not certain by now (March 2014) when the courts shall be activated and when the appeal procedure (*infra*, paragraph 409) shall be applicable. As of today, the provisions on revision (*temyiz*) (Articles 305-322) of the abolished Code of Penal Procedure dated 1929-1412 are still applicable in criminal matters (*infra*, paragraphs 410-418).

II - Court of Cassation.

At the present time, the Court of Cassation reviews all the petitions related to mistakes in the application of the law in final judgments of all trial courts in Turkey. The Supreme Council of Judges and Prosecutors elects the members.

After the amendment in 2/12/2014, by Law no. 6572, the Court of Cassation is comprised of twenty-three (was 21) chambers for civil matters, and twenty-three (was 11) chambers for criminal matters. According to the provisional Article 14 which has been added to Law on the Court of Cassation by Law 2014-6572, new elections has been done for the recently established civil and criminal chambers, and the First Presidential Chairmanship has been newly formed. Accordingly, as of the first days of January 2015, all chambers have been given new jurisdiction, and pending cases have been reassigned to the newly occupied chambers. The aim of these amendments may be the desire of changing judges at some chambers.

The CGK acts as the High Commission of the Court of Cassation. If, for example, the Attorney General (the Chief Prosecutor at the Court of Cassation; *Yargıtay Cumhuriyet Başsavcısı*) disagrees with the decision of the Chamber of the Court of Cassation, then the case is brought before the General Assembly.

With regard to the efficiency of the judiciary, the number of pending cases before the Court of Cassation was reduced by mid-2013, compared to mid-2012. The Council of State increased the number of cases it concluded in 2012 compared to the year before. With respect to first instance courts, the number of criminal cases pending in April 2013 increased as compared with the cases pending at the end of 2011, while the number of civil cases remained approximately the same.

III - Military Court of Cassation.

There is a Military Court of Cassation to review decisions and judgments rendered by the Military Courts (Article 156, AY). Members are selected by the President of the Republic from three candidates nominated by the Military Court of Cassation.

IV - Constitutional Court.

The 2012-5982 amendment in Constitution changed the structure of the Constitutional Court (Article 146, AY). The number of members of the Court increased from 11 to 17. Moreover, the draft no longer provided for substitute members, whereas originally the Court used to comprise 4 substitute members. According to the repealed provision, all 11 regular and 4 substitute members of the Court were elected by the President either among the candidates nominated by the high courts as well as the Council of Higher Education, or on its own discretion. Now, the new law provides that three judges of the Constitutional Court shall be elected by the Turkish Grand National Assembly, two of which from among the candidates nominated by the Court of Accounts and a third one from among the candidates nominated by the presidents of the bar associations. In addition, 14 members of Constitutional Court shall be elected by the President who shall wield his appointing power directly for 4 members and indirectly for 10 members. In particular, the President shall elect the former 4 members of the Constitutional Court on his own discretion among senior administrative officers, lawyers, judges and public prosecutors of the first degree, and reporting judges of the Constitutional Court. He shall elect the other constitutional judges from among the three candidates nominated by the following institutions: the Court of Cassation (3 members), the Council of State (2 members), the Military Court of Cassation (1 member), the Supreme Military Administrative Court (1 member), and the Council of Higher Education (3 members). According to the new rules, the members of the Constitutional Court shall serve for a single term of 12 years, without possibility of renewal.

Furthermore, the Constitutional Court, when functioning as Supreme Court, has the power to try high-ranking officials, including the President, members of the Council of Ministers, as well as judges and prosecutors of the high courts. According to the 2010 amendment, the Speaker of the Turkish Grand National Assembly and the Chief of Staff, the Commanders of the Land, Naval and Air Forces and the Commander of the Gendarmerie shall also be tried by the Constitutional Court in its capacity as the Supreme Court.

Finally, the constitutional amendment introduced a constitutional complaint procedure, which enables individuals to access to the Constitutional Court directly. There are three cumulative application conditions: a) One may apply to the Constitutional Court on the grounds that one of his fundamental rights and freedoms is violated by public authorities; (b) The concerned right or freedom, which is guaranteed by the Constitution, must be enumerated in the European Convention on Human Rights; (c) Before making the individual application, ordinary legal remedies must be exhausted. As of July 2014 the Court received 22677 applications and decided in 9683 cases including its judgments on the Twitter and YouTube access ban.

1. F. Yenisey, *Ceza Muhakemesi Hukukunda İstinaf ve Tekrar Kabulü Sorunu* (İstanbul: İstanbul Üniversitesi, 1989), 9.

III. Subject Matter Jurisdiction of the Courts

301. The courts cannot hear cases that are outside of their jurisdiction (*görev*).¹ The jurisdiction of the court is related to the public order, and its application is compulsory. Exceptionally, as a matter of procedural economy, a court of higher jurisdiction may not reverse a case from a lower court when the indictment has been approved (Article 5/1, CMK) under the belief that the higher court is powerful enough to furnish the accused from a lower court with sufficient protection.

Exceptionally, as a result of the joinder of cases, connected offenses are tried by a court of higher jurisdiction (Article 16, CMK).²

In cases of organized crime, the jurisdiction of the specialized chamber of the Court of Assize (*supra*, paragraph 298-III) was limited to the organized form of crimes; this court would refer cases of ordinary criminality at any stage of the procedure to the competent court (repealed Article 252/1-g, CMK). This provision no longer exists.

1. E. Yurtcan, *Ceza Yargılaması Hukuku*, 4. Bası (İstanbul, Kazancı, 1991), 85. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 508.

2. N. Kunter, "Fikri İçtima Sebebiyle Suçların Birleştirilmesi," İHFM (1948): I, II, 369.

IV. Venue

302. The courts of the Turkish Republic are competent for crimes committed in Turkish territory (Article 8, TCK). There are some exceptions for crimes committed outside of Turkish territory (*supra*, paragraph 87).¹ The Turkish Penal Procedure Code grants jurisdiction to only one court: "The trial of a criminal action shall be held in the place where the offense was committed" (Article 12/1, CMK). In cases of attempted offenses, the court of the place where the last act was committed has jurisdiction, and in cases of continuing offenses and of successive offenses (Article 43, TCK), the court of the place where the last crime was committed has jurisdiction.²

If the place where the crime was committed is not known, the court of the place where the accused was arrested, or, if he is not arrested, the court of the place of his domicile will have venue. If the accused does not reside in Turkey, the court where he last resided in Turkey will act as the venue (Article 13, CMK).

There are some exceptions to this rule. Juvenile Courts (ÇKK 25) (*supra*, paragraph 299-III) have a collective venue, as these courts have many cities under their jurisdiction. Therefore, a crime committed in one city may be tried in another location if there is no Juvenile Court in that particular city.

Turkey is divided in to 81 provinces (*il*) and each province has districts in it (*ilçe*). Each district is under the jurisdiction of the court of that district, and there is an office of chief public prosecutor in that district. As a consequence of this geographic division, every chief public prosecutor office has its own venue. If a crime has been committed in another place, the public prosecutor shall decide that he has no jurisdiction and send the case file to the district of jurisdiction. If there is a dispute between two public prosecutors, the nearest Court of Assize renders a final decision (Article 161/7 CMK as amended by Law 6217 in 2011).

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 516.

2. Aydın Okur, Derya, *Deniz hukukunda liman devleti yetkisi ve denetimi: gemi kaynaklı deniz kirliliğinin önlenmesinde değişen yetki dengeleri bağlamında liman devleti yetkisinin artan önemi* (2009).

303. Some special courts might have jurisdiction according to the status of the accused in the society. For example, if the *State President* must be tried, he or she will be tried by the Constitutional Court (Article 148/3, AY) (*supra*, paragraph 291) in its function as the “Highest Criminal Court”.

Crimes committed by State officials (*supra*, paragraph 174) form another exception. Under the “Act on the Adjudication of Civil Servants” (*Memurlar ve Diğer Kamu Görevlilerinin Yargılanması Hakkında Kanun*) of April 12, 1999 (No. 4483), the public prosecutor is not directly competent in such cases.¹ The supervisor of the alleged official makes the preliminary investigation and decides whether to give the public prosecutor permission to bring the case to the competent criminal court for that specific crime.

1. Formerly, local governmental commissions, and not the public prosecutor, were competent to bring the case to court under the 1913 Act, abolished in 1999 (*Memurin Muhakematı Kanunu*); S. Pınar, *Memur Suçlarında İdari ve Adli Soruşturma Yöntemi* (Ankara, 1984), 43. Ö. Tosun, *Memurların Suçlarında Özel Muhakeme Kuralları* (YD, January 1984), 9-32; A. Gökçe, *Memurların Yargılanmalarına İlişkin Yasada Öngörülen İtiraz Süresi ve Danıştayın İlginç Kararları* (YD 1981), no. 3, 255.

§2. LEGAL POSITION OF THE JUDGE

304. All judges are professionals.¹ There are no juries or laymen in the Turkish court organization.² Candidate judges and public prosecutors must complete a two-year training course (Act No. 3221, dated June 6, 1985). At the end of the training course, they must now pass a written examination (Act No. 3221 “2003-4781”, Article 10). Candidates who have passed the exam will be appointed according to the provisions of the Act on Judges and Prosecutors (Act No. 3221 “2003-4781”, Article 11).³

The judge has an active role in the criminal proceedings.⁴ The aim of criminal proceedings is to reveal the factual truth. The judge takes the initiative in finding the factual truth and is not bound by the evidence submitted by the parties. The judge has the right to interrogate the accused and the civil party (claimant), appoint experts and call for witnesses if he considers it necessary.

The Turkish Judiciary is independent.⁵ Article 132 of the Constitution provides that “no organ, office, agency or individual may give orders or instructions in connection with the discharge of the judicial power concerning a case on trial.” *The Supreme Council of Judges and Prosecutors* (Article 159, AY) provides for the independence of the judges (*supra*, paragraph 27). In its *Çıraklar and Incal* decision, the European Court of Human Rights regarded the participation of a military judge on the panel and a military public prosecutor as a violation of the independence of judges. These judgments resulted in an amendment to the Constitution and to the Act on State Security Courts (DGMK), but did not prevent further judgments finding that Article 6 had been violated, such as the ECHR decision *Sadak and others v. Turkey* of July 17, 2001. Upon this decision, the Constitution and procedural laws have been amended as well (*supra*, paragraph 298-III).

Judges may not be dismissed but may resign. They need not retire until they reach the age of 65.

1. Hancı, İ. Hamit, *Hekimin Yasal Sorumlulukları ve Hakları* (Toprak Ofset Matbaacılık, 1999). M. Özen, *Hakimin Cezai Sorumluluğu* (Ankara: Seçkin Yayınları, 2004).
2. M. Kapani, *İcra Organı Karşısında Hakimlerin İstiklali* (Ankara, 1956), 7; N. Kunter, "Türkiye'de Kaza Kuvveti," İHFM XXV (1960): sy 1-4; U. "Azrak, *Yargı ve İdare*," İHFM XXXIV (1969): Sy. 1-4.
3. Examinations for attorneys were due to begin in 2006, but the Law so providing has been repealed before entry in force (*supra*, paragraph 23). As for the year 2007, there were 6260 Judges and 3860 Prosecutors in Turkey. The number for 2008 is: 6444 Judges and 4003 Prosecutors (Turkey's Statistical Yearbook 2008, 145). In order to increase the number of judges and prosecutors, the government made an amendment in Law No. 4954 by "the Decree in Force of Law" (*Kanun Hükmünde Kararname KHK/650*), dated 26 Aug. 2011, and made it possible to be appointed as a judge or prosecutor, after a one-year training course; this provision shall be applicable for five years.
4. E. Cihan, *Hakim Unsuru Açısından Ceza Davalarının Uzamasının Sebepleri* (İstanbul: Atatürk Sempozyumu, İstanbul Üniversitesi, 1981), 73.
5. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 538.

305. *Impartiality*. The Turkish Penal Procedure Code provides some specific rules to safeguard the impartiality of judges.¹ The offices of prosecution and the trial are separate.² CMK Article 22 forbids the judge from judging his own case if he was injured by the accused or if he is a relative of the parties, as well as if he has been active in the same case as a prosecutor, an investigative police officer, a defender of the accused or of the victim; or if he was summoned as a witness or has delivered an opinion as an expert (Article 22, CMK).³ If the judge was active during the trial at the first instance, he is barred from acting in the higher court's trial either during the opposition examination or during the appeal procedure at the Court of Cassation (Article 23, CMK). However, according to the case law of the Court of Cassation, the judge who has decided to arrest the accused during the preliminary investigation is not considered as having made an opinion about the innocence or guilt of the accused.⁴

There is a new ground for exclusion of the judge: If the judge has previously participated in the decision-making of the first instance judgment of someone who is subsequently subject to a retrial (CMK 311), he cannot be on the court panel deciding the merits of the case in the retrial (Article 23/3, CMK).

1. E. Günay, *Yargısal Görevlerinden Dolayı Hakimlerin "Tazminat" Sorumluluğu ile Hakimlere, C. Savcılarına ve Avukatlara Karşı İşlenen Hakaret Suçları* (Ankara: Seçkin Yayınları, 2000).
2. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 548.
3. The exclusion of the Public Prosecutor is not regulated in Turkish Law (E. Yurtcan, *Ceza Yargılaması Hukuku*, 3. Bası (İstanbul, Beta, 1987), 109).
4. F. Yenisey, *Uygulanan ve Olması Gereken Ceza Muhakemesi Hukuku, Hazırlık Soruşturması ve Polis*, 3. Baskı (İstanbul, Beta, 1993), 62.

§3. THE PUBLIC PROSECUTION SERVICE

306. The Public Prosecution Service has a quasi-judicial, quasi-administrative function.¹ According to regulations relating to the organization of the courts, there is a Chief Public Prosecution Office attached to each Court of General Jurisdiction in every district, with a Chief and public prosecutors under his supervision (Article 30, Act 2004-5235). There shall also be a separate Chief Public Prosecutor at the level of the Appeal

Courts after the Court of Appeal on facts and law shall be running (Article 40, Act 2004-5235).

All offenses are prosecuted in the name of the State. The Public Prosecution Office represents the executive branch of the government.²

The private prosecution³ of offenses laid down by Article 344 of the repealed Penal Procedure Code has not been incorporated into the New Code. For these crimes only the injured party could prosecute; the public prosecutor did not have any power.

The public prosecutor has the duty of making the necessary investigation in order to decide whether it is necessary to file a public prosecution, and if there are “factual findings which indicate that a crime has been committed” (Article 160/1, CMK).

If the preliminary investigation, based on sufficient evidence, justifies the opening of a public prosecution, the public prosecutor submits an indictment to the competent court by making an accusation (Article 170, CMK). However, the case shall be opened only if the court accepts the indictment (Article 175/1, CMK).

According to the old law, the Minister of Justice was entitled to give an order to the Chief Public Prosecutor to initiate a public prosecution for a certain case (Article 148/3, CMUK), and the Provincial Governor would request the Public Prosecutor to initiate a public prosecution. This nevertheless did not oblige the Public Prosecutor to sue. These powers have not been included in the new Penal Procedure Code.

Practical arrangements at courthouses and during trials regarding judges, prosecutors and the defense do not guarantee that the principle of equality of arms is respected or perceived to be. This continues to cloud the perception of the impartiality of judges.

1. M. Önder & S. Önder, *Savcıların Teşkilat İçindeki Yerleri ve Görevleri* (Ankara: Yarı Açık Cezaevi Basımevi, 1968).
2. O. Tosun, *Türk Suç Muhakemesi Hukuku Dersleri, Muhakemenin Yürüyüşü*, Cilt 2 (İstanbul, 1976), 10.
3. Z. Özbulak, *Şahsi Dava ve Savcı, AdD* (1936), 565.

307. At the Court of General Jurisdiction there was public prosecutor between 2011 and 2014. The 2014-6572 Law extended this situation until 31.12.2019 by adding the Provisional Article 9 to CMK. There was no Public Prosecution Office attached to the recently abolished Peace Court¹ (Article 188/2, CMK).

The Chief Public Prosecution Office of the Organized Crime Courts had a special jurisdiction with respect to organized crime (repealed CMK 250 until 2012, after the amendment in TMK 10 by Law no. 2012-6352). In March 2014, however, Terrorism Courts and the related public prosecution positions were abolished, and special prosecutors lost their special powers. Now, each public prosecutor has general jurisdiction only in his region.

The Attorney General at the Court of Cassation brings cases at this court. He is not the superior of the other public prosecutors (*supra*, paragraph 299-II).

1. S. Keyman, *Ceza Muhakemesinde Savcılık* (Ankara, 1970), 216; O. Tosun, *Hazırlık Soruşturması* (İstanbul: Ümit Doğanay Armağanı, 1983), 91; C. Koyuncu, *Savcısının Takdir Yetkisi, AdD* (1985/4), 87.

308. According to the old Law, the public prosecutor had to be the leading person during the Preliminary Investigation (Article 154, repealed CMUK).¹ However, in reality, the police played the dominant role. The police learned of the offenses by denunciation or complaint of the victim and made all the necessary investigations. The Public Prosecutions Office was informed of these offenses when the police submitted their reports to the Prosecutor.² The 1992 amendment had the purpose of redressing this situation. The police had the obligation to report all offenses immediately (Article 154/2, repealed CMUK).

As this situation did not render control over the police investigation effective, the 2004 Legislature decided to put the judicial police under the orders of the public prosecutor. According to the new Penal Procedure Code, the police have no authority to conduct any investigation unless there is a specific order of the Public Prosecutor (Article 160/1, CMK). The provision of the old Penal Procedure Code, which entitled the police to investigate in urgent cases (Article 156, CMUK) does not feature in the new Code.

1. The Ministry of Justice issued an Ordinance on Jan. 12, 1978, ordering the Public Prosecutors to make the necessary investigations personally (Alikashifoğlu & Doğu, *Son Değişiklikleriyle İçtihatlı Notlu Türk Ceza Kanunu ve Ceza Muhakemeleri Usulü Kanunu ile Polis Mevzuatı*, Seçkin, Ankara 1983, 194). There are also as of today regulations about personal investigation for crimes committed by children (Article 15, ÇKK).

2. Y.C. Biçer, *Savcılarının Zabıta ile İlişkileri Üzerine*, AdD (1971/12), 769–799.

§4. POLICE ORGANIZATION

309. The Police, in the broader sense of the word, are divided into two groups in Turkey: general police, and special police such as “traffic police” or “village lookouts”.¹ General police consist of those who are under the supervision of the Ministry of Interior, that is, the “military police” and “watchmen” or security men.²

The military branch of the police is regulated by the *Act on the Gendarmerie* (1983). It functions in places where the “municipalities” have not yet been formed. Ninety per cent of the geography and 50% of population are served by the Gendarmes. This percentage increases in summer months, when the populations of seacoast resorts increases significantly because of tourist influx.

Private security has been a new sector in Turkey since 2004 after the *Act on Private Security Services* No. 5188. There are 1270 security firms which give service to 46,688 private business establishments with 415,487 certified personnel.³

1. F. Yenisey, *Kolluk Hukuku* (İstanbul: Beta, 2009).

2. Kunter & Yenisey & Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), 347. S. Bakıcı, *Kolluk Mevzuatı* (2007). Gündoğan, Koç & Özbek, *Kolluk Görev ve Yetkileri Mevzuatı* (2007). A. Yıldız & S. Şimşek, *Ceza Yargılama ve Kolluk Mevzuatı* (2006).

3. C. Derdiman, *Tüm Yönleriyle Özel Güvenlik Hukuku ve Kişi Hakları* (İstanbul: Vedat Kitapçılık, 2010). A. Geleri, *Önleyici Polislik* (2009).

310. The police function in two capacities: as administrative police and as judicial police.¹

I - Administrative police.

In their duties as administrative police, they are under supervision of the Ministry of Interior.² In events when the police and gendarmerie are not able to suppress riots, the governor is entitled to ask for backup from the army (Act on the Administration of Cities, “*İl İdaresi Kanunu*” dated June 18, 1949, No. 5443, Article 11/d).

II - Judicial police.

In the exercise of their judicial duties, the police were under the supervision of the Public Prosecutor (Article 154, repealed CMUK). The Penal Procedure Code has put them under the order of the Public Prosecutor (Articles 160/1, 164, CMK).³ However, there are no special Criminal Police units (*adli kolluk*) within the police to make preliminary investigations. In Turkey, all the police forces are competent to fulfill judicial duties.⁴

The Regulation on the Judicial Police adopted in 2005 under Article 167 of the Penal Procedure Code has yet to be implemented in accordance with European standards. There are currently no judicial police units attached to prosecution offices. Prosecutors rely on police units working for the Ministry of the Interior and have to develop their capacity to guide police investigations effectively and keep strict control of police activity. On December 19, 2013, the Regulation on Judicial Police was amended, requiring the judicial police investigators to notify their police hierarchy about any criminal notices or criminal complaints. The Council of State suspended the implementation of this amendment on December 27 as contrary to judicial independence.

1. F. Yenisey, *Kolluk Hukuku* (İstanbul: Beta, 2009).
2. There is a branch of Turkish Police that is affiliated with INTERPOL (N. Bilecen, *Ceza Davalarında Usul ve Tatbikat*, 4. Bası (Ankara, Seçkin, 1982), 233.
3. Kunter & Yenisey & Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), 353.
4. B. İçişleri, *Polis 1991, Emniyet Genel Müdürlüğü Çalışmaları* (Ankara: Araştırma Planlama, Koordinasyon Daire Başkanlığı, 1993), 21. F. Erem, *Ceza Usul Hukuku*, 5. Bası (Ankara, 1978), 235.

311. In the Turkish police force, there are no “auxiliary officers of the public prosecutor” that occupy a special position between the police and the public prosecutor.¹ The current 2004 Court Organization Act does not include this office.

1. F. Yenisey, *Uygulanan ve Olması Gereken Ceza Muhakemesi Hukuku*, 3. Bası (İstanbul, Beta, 1993), 66. While Western European codes were being adopted, the German Code of Criminal Procedure was used, but the German Code on the Organization of the Courts was not. The old Code, which was applied in Turkey until June 1, 2005, that regulated the organization of the courts, was a translation of the French Code. It did not contain the institution of “auxiliary officers of the public prosecutor.”

§5. ACCUSED AND CIVIL PARTY

I. Introduction

312. The rights of the suspect or the accused and the rights of the victim are the backbone of criminal procedure.¹ The focus on the rights of the suspect or accused was reflected by the December 1992 amendment of the Turkish Code of Penal Procedure. This approach has been broadened by the legislature in 2004.

The victim may intervene in the public prosecution. The public criminal prosecution (Article 160, CMK) is a criminal claim; the “Private Rights Claim” (*infra*, paragraph 317) was an independent private claim but has not been copied into the new Code.²

1. F. Yenisey & E. Cihan, *Menschenrechte im Strafverfahren* (Spain: AIDP National Report, 1993); T. Demirbaş, *Ceza Hukuku Genel Hükümler* (Ankara: Seçkin, 2002), 463.
2. The previously existing right to commence an individual private prosecution (Article 344, CMUK), or private rights claim (Article 365, CMUK), was abolished by the Penal Procedure Code.

II. Legal Status of the Suspect, Accused and the Defense Counsel

313. The present Turkish Code of Criminal Procedure regulates the suspect’s rights during the preliminary investigation.¹

Defense counsel has unlimited access to the file of investigation. Limitations regarding protection of the confidentiality of investigations (Article 153/2, 3 and 4 CMK) were repealed in 2014 (Article 153 CMK, as amended by Law 2014-6526).

For example, the owner of the place or the possessor of the movable thing has the right to be present at searches and seizures (Article 120, CMK), and the lawyer of the person to be searched may not be prevented from being present during the search (Article 120/3, CMK). Suspects are entitled to have a defense lawyer present² during the police interview (Article 147, CMK) as well as to be interrogated by a judge and to have their lawyer present during the interrogation in cases of arrest (Article 91/6, CMK).³

The accused has a stronger position during the phase of inquiry in court. For example, he has the right to bring witnesses with him, the right to have a non-public hearing and the right of having the “last word” at the end of the inquiry.⁴ Also, the trial is public, and the impartiality of the judge is guaranteed by the Code (Articles 22/1, 23, CMK).

The statute of December 1992 (Act No. 3842) aimed to strengthen the accused’s rights in light of Articles 5 and 6 of the ECHR.⁵ In 1999, Act No. 4422⁶ limited rights of suspects for investigations related to profit-oriented organized crime (*infra*, paragraph 323). The repealed Penal Procedure Code did not contain any regulations relating to wire-tapping at that time. The Act No. 4422 was repealed by the Penal Procedure Code that includes provisions on interception of telecommunications (Article 135, CMK).

As regards access to justice, the 4th Judicial Reform Package loosened the conditions for granting legal aid and a hearing may be held, on request, to decide on the granting of such aid. A party may be partially or fully exempted from payment if the court considers that court expenses could cause them to be victimized. The Ministry of Justice website provides information on legal matters and the Ministry also publishes brochures providing information on procedures. Civil society organizations and Bar Associations contribute to raising awareness of citizens’ rights as regards access to justice.

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 141. C. Altıparmak, *AİHS ve İç Hukukumuz Çerçevesinde Müdafilik Kurumumuz* (İstanbul Barosu Dergisi cilt: 79, sayı: 2005/5). E. Doğan, *Sanık Hakları ve Müdafilik* (İstanbul: Beta, 2007). F.S. Mahmutoglu & S. Dursun, *Türk Hukuku’nda Müdafinin Yasaklılık Halleri* (Ankara: Seçkin, 2004).
2. P. Ölçer, “New Rules Regarding the Pre-Trial Right to Assistance in Article 6 ECHR: Salduz v. Turkey and 72 Further Decisions,” in *Criminal Law in the Global Risk Society*, ed. F. Yenisey & U. Sieber (Series of the Max Planck Institute for Foreign and International Criminal Law and

Bahçeşehir University Joint Research Group, Volume T 1, İstanbul 2011), 374.

3. N. Centel, *Ceza Muhakemesi Hukukunda Müdafî* (İstanbul: Kazancı, 1984), 127; Erem & Toroslu, *Türk Ceza Hukuku, Özel Hükümler*, 3. Bası (Ankara, 1978), 573; F. Erem, *Adalet Önünde Eşitlik* (YD 1981), 485.
4. S. Donay, *İnsan Hakları Açısından Sanığın Hakları ve Türk Hukuku* (İstanbul: İstanbul Üniversitesi, 1982), 28.
5. B. Öztürk, *Ceza Muhakemesi Hukukunda Koğuşurma Mecburiyeti, Hazırlık Soruşturması*, 9. Bası (Ankara: EYLÜL Üniversitesi, 1991), 54.
6. E. Cihan, “50. Yılda Ceza Muhakemesi Sijesi Olarak Sanığın Durumu ve Sorgusu,” *IHFİM* (1984/1–4): 133.

314. According to Article 160, CMK, the public prosecutor has to conduct the investigations and give orders to the judicial police in order to search the factual truth as the basis of a fair trial. The police must report to the public prosecutor all arrests and interrogations of and interviews with the suspect (Article 90/5, CMK). The regulations concerning pre-trial detention (*infra*, paragraph 345) and interrogation by the police are to be interpreted in the light of the provisions of Article 5 of the ECHR.

315. The Penal Code does not in general include criminal responsibility for legal persons, but only a liability which can result in measures (Article 60, TCK) (*supra*, paragraph 245). Special legislation, however, contains some provisions that allow sanctioning by closing down some “legal persons,” such as associations and political parties. In such cases, the public prosecutor is entitled to prosecute the “legal persons” together with the associated individuals. Accordingly, natural persons and persons in special circumstances and the legal persons have criminal liability.¹

1. M.E. Artuk, A. Gökçen & A. C. Yenidünya, *Ceza Hukuku Genel Hükümler, Birinci Kitap* (Ankara: Seçkin, 2002), 743; *İçel Suç Teorisi*, 2. Kitap (Beta, İstanbul, İkinci Bası, 2000), 59.

316. Some high State officials and attorneys¹ have the privilege of being tried in a higher court. While prosecuting a case, the public prosecutor must acknowledge this privilege (*supra*, paragraph 92).

1. N. Kunter, “Ceza Tatbikatında Amme Vazifesi ve Amme Hizmeti Tefriki ve Avukatın Durumu,” *IHFİM* (1947): XIII/2, 755–772; F. Erem, *Avukatlar Hakkında Soruşturma İzni*, ABD (1977/ 2) 264–265.

III. Legal Status of the Victim and Injured Person As Civil Party

317. The rights of the victim¹ as a civil party were not defined by the repealed Code. The victim of a criminal offense had only the right to intervene in the prosecution as a civil party during criminal proceedings. However, the civil party was entitled to claim damages during the criminal proceedings as well. This provision is not included in the new Code.²

The Penal Code includes a special subsection for the rights of the victim and person injured by the crime (Articles 233-236, CMK).

The civil party has the right to report the crime or to file a complaint about the committed crime (Article 158, CMK). Turkish Law differentiates between the informant (denouncer), who is reporting a criminal offense, and the civil party, who is the victim of or is injured by the crime. The victim and the person reporting the crime have the right to

give testimony about the crime and shall be summoned by the prosecutor, the judge or the court (Article 233/1, CMK).

The victim and the person who filed a complaint have the right to ask that the evidence of the crime be collected, to ask the public prosecutor to furnish them with copies of the documents included in the file of investigation (without violating the rule concerning secrets of the investigation) and to ask a lawyer appointed by the Bar Association to assist them if they do not have an attorney. This lawyer has access to the file under Article 153, CMK and the right to oppose the decision of the public prosecutor to drop the case (Article 234/1-a, TCK).

1. F.A. Sokullu, *Viktimoloji* (İstanbul: Beta, 2007), M. Açıközoğlu, *Ceza Hukuku Açısından Teori ve Uygulamada Mağdur Kavramı* (Ankara: Adil Yayınevi, 2000). S. Akdemir, *Ceza Hukukunda Mağdurun Korunması* (İzmir: Anadolu Matbaacılık, 1988). A.E. Akyazan, *Mağdurun Kovuşturma Evresindeki Hakları Kapsamında Soru Yönelme Hakkı* (Ankara, 2009). V.O. Özbek, *Ceza Hukukunda Suçtan Doğan Mağduriyetin Giderilmesi* (Ankara: Seçkin Yayınevi, 1999).
2. Compensation would only be awarded if the accused was convicted and the proceedings would not be prolonged by the order of compensation. A judge could not impose a compensation order on the accused that exceeded the claim of the victim (or injured party). The legal position of the injured party was inadequately regulated by the repealed Turkish Code. Neither the injured party nor his counsel could attend the hearing of the accused carried out by the police or by the prosecutor. The injured party could file a “Private Claim” (private criminal prosecution) (*infra*, paragraph 320) for offenses enumerated under Article 344 of the Penal Procedure Code. He could intervene in the public claim of the prosecutor as a “civil party” (*infra*, paragraph 320) pursuant to Article 365 of the Code of Penal Procedure (V.Ö. Özbek, *Ceza Hukukunda Suçtan Doğan Mağduriyetin Giderilmesi*, 1999).

318. “The Private Criminal Prosecution” was a formal complaint filed by the victim or his legal representative against the commission of a crime. This private prosecution was only possible for the offenses listed in the Code. The civil party claim could demand the punishment of the accused or compensation for the loss he had suffered as a result of the crime (Article 344, CMUK).¹

The Penal Code has abolished this legal institution. There are other means of achieving compensation for the losses of the victim within the new Criminal Justice System, such as mediation in relatively small matters (Article 253, CMK) (*supra*, paragraph 274). For this reason, other ways of asking compensation during a pending criminal trial have not been included.

1. The additional requirements (having suffered a loss and having reported the crime) are not included in the new Code.

319. The intervention in the public claim as an injured party is only possible during the inquiry in the court, and not during the preliminary investigation, as the intervention requires the existence of an official claim (Article 237, CMK).¹

1. S. Onursal, *Kamu Davasına Müdahale* (İstanbul, 1968). I. Şahbaz, *Ceza Yargılamasında Katılanın Temyiz Duruşmasında Yer Almaması* (Türkiye Barolar Birliği Dergisi sayı 51 Mart & Nisan 2004).

320. *Private rights claim.* Some criminal offenses are torts for which the wrongdoer bears civil responsibility and may be sued through a private claim. However, the Penal Procedure Code does not allow the civil party to claim compensation during a pending criminal case. Under the previous legislation, the injured party had had the right to claim

compensation as well in connection with the criminal proceedings.

Chapter 2. Powers of the State within the Criminal Investigation

§1. INTRODUCTION

321. The Public Prosecutor has the duty to investigate crimes (Article 160, CMK). There is an obligation to investigate if the Prosecution Service obtains information supported by facts. If the results of the investigation show that there is sufficient evidence, he must prosecute (Article 170/2). “Prosecutorial discretion” is a new concept of the new Code (Article 171, CMK).¹

A police officer investigates cases only when the prosecutor has ordered him to do so (Article 161/1, CMK).²

The duties and powers of the Public Prosecutor and Judicial Police begin at the same time as the preliminary inquiry, and they end with its closing. When an arrest has been made, however, a judge must decide on the limitation of individual liberty. Although the Public Prosecutor is in charge during the preliminary investigation, all investigative powers revert to the court when he submits the indictment to the court.

Before the 2004 legislation, police and prosecution powers to investigate offenders caught in the act or *in flagrante delicto* were broader. The new Penal Procedure Code does not include special powers for such crimes.

1. Kunter & Yenisey & Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), 724.
2. Çalışkur, *Suç Koşuşturması ve Teknik Yazılar*, İstanbul (1982), 41. According to the repealed legislation, exceptionally, the police officer had to undertake a prompt investigation, which he could not delay, and which was not contingent on any order from Prosecution Office (Article 156, CMUK). This issue is not regulated in the Penal Procedure Code, but still happens in practice.

§2. COVERT POLICING METHODS

322. *Covert investigations.* The Penal Procedure Code includes provisions for *interception of correspondence through telecommunication*, the *use of undercover agents* and *surveillance (infra, paragraph 323)*.¹ Covert policing methods and operations had been introduced to Turkey in 1999 by Law No. 4422, the repealed Code on Criminal Procedure did not contain any ruling on this subject.

I - Interception of correspondence through telecommunication.

1) Listening, recording and evaluation of electronic signals of correspondence through telecommunication.

By 2014-6545 amendments to CMK, *listening, recording and evaluation of electronic signals of correspondence through telecommunication* has been regulated as a distinct method of investigation (Article 135/1 CMK). Other two methods of covert investigation (*location of a mobile phone*; Article 135/5 and *metering of communications*; Article 135/6) has been differentiated.

Listening, recording and evaluation of electronic signals of correspondence through telecommunication are subject to the decision of the Court of Assizes In cases of peril in delay, the public prosecutor, may also decide.

There must be an investigation or prosecution conducted in relation to a crime and

strong grounds of suspicion *based on concrete evidence* indicating that the crime has been committed and there is no other possibility to obtain evidence. *Decisions according to this subsection shall be delivered unanimously by the Court of Assizes.*

In cases of opposition, the court that hears the motion of opposition must also decide unanimously (Article 135/1, CMK, as amended by Law No. 2014-6526, and soon later by Law no 2014-6545). *(The previous regulation was as follows: "The Judge of the Peace Court or, in cases of peril in delay, the public prosecutor, may decide to locate, listen to or record the correspondence through telecommunication or to evaluate the information about the signals of the suspect or the accused, if during an investigation or prosecution conducted in relation to a crime there are strong grounds of suspicion indicating that the crime has been committed and there is no other possibility to obtain evidence.)*

No one may listen and record the communication through telecommunication of another person except under the principles and procedures as determined in this article.²

In the aforementioned cases of peril in delay, the public prosecutor shall submit his decision immediately to the judge for his approval and the judge shall make a decision within 24 hours. In cases where the duration expires or the *Court of Assize* decides the opposite way, the measure shall be lifted by the public prosecutor immediately (Article 135/1, CMK; as amended by Law No. 2005-5353, and by Law No. 2014-6526).

The provisions contained in this article related to listening, recording and evaluating the information about the signals shall only be applicable for the crimes as listed below:

(a) The following crimes in the Turkish Penal Code: smuggling with migrants and human trafficking (Articles 79, 80, TCK), killing with intent (Articles 81–83, TCK), torture (Articles 94–95, TCK), sexual assault (Article 102, TCK, except for subsection 1), sexual abuse of children (Article 103, TCK), qualified theft (Article 142, TCK) and theft by using violence (Article 148, 149, TCK), producing and trading with narcotic or stimulating substances (Article 188, TCK), forgery of money (Article 197, TCK), *(forming an organization in order to commit crimes, Article 220, TCK, except for subsections 2, 7 and 8 has been deleted by Law No. 2014-6526)*, prostitution (Article 227, TCK) (as amended by Law No. 5353, and by Law No. 2014-6526), cheating in bidding (Article 235, TCK), bribery (Article 252, TCK), laundering of proceeds stemming from crime (Article 282, TCK), *disrupting the unity and integrity of the state (Article 302, TCK, as amended by Law No. 2014-6572)*, armed criminal organization (Article 309, 311, 312, 313, 314, 315, 316 TCK *as amended by Law No. 2014-6572)*, or supplying such organizations with weapons (Article 315, TCK), crimes against the secrets of the State and spying (Articles 328, 329, 330, 331, 333, 334, 335, 336, 337, TCK).

(b) Smuggling with guns, as defined in Act on Guns and Knives and other Tools, dated July 10, 1953, No. 6136, (Article 12).

(c) The crime of embezzlement as defined in Act on Banks, Article 22, subsections (3) and (4).

(d) Crimes as defined in the Combating Smuggling Act which carry imprisonment as punishment.

(e) Crimes as defined in Act on Protection of Cultural and Natural Substances, Articles 68 and 74 (Article 135/6, CMK).

When requesting the measure, the public prosecutor must prepare a document, or a report, indicating the identity of the owner, or the person who is utilizing this line (Article 135/2, CMK, incorporated by Law No. 2014-6526).

The decision that shall be rendered according to the provisions of CMK 135/1 shall include the nature of the charged crime, the identity of the individual, upon whom the measure is going to be applied, the nature of the tool of communication, the number of the telephone, or the code that makes it possible to identify the connection of the communication, the nature of the measure, its extent and its duration. The decision on the measure may be given only for a maximum duration of two months; this period may be extended for one month. In cases of organized crime, committed within the activities of such organizations extensions totaling up to a maximum three months may be added to the regular periods, not more than one month for each time (Article 135/4, CMK, as amended by Law No. 2005-5353, and by Law No. 2014-6526).

2) Location of a mobile phone.

The location of a mobile phone may be established upon the decision of the judge, or in cases of peril in delay, by the decision of the public prosecutor, in order to be able to apprehend the suspect or the accused. The decision related to this matter shall include the number of the mobile phone and the duration of the interception. The interception shall be conducted for a maximum of *two (previously it was three) months*; this period may be extended for *one month* (Article 135/5, CMK, as amended by Law No. 2014-6326).

3) Metering of correspondence through telecommunication.

Law dated 12.12.2014, No. 6572 designed the metering of correspondence through telecommunication as a distinct method of covert investigation (Article 135/6 CMK). The justice of the peace is entitled to ask the service providers to give details about the correspondence through telecommunication of a suspect.

4) Confidentiality.

Decisions rendered and interceptions conducted according to the provisions of this Article shall be kept confidential while the measure is pending (Article 135/7 CMK).

II - Individuals who enjoy the privilege of refraining from testimony and office and domicile of a defense attorney.

The communication of the suspect or the accused with individuals who enjoy the privilege of refraining from testimony as a witness shall not be recorded. In cases where this circumstance is revealed after the recording has been conducted, the conducted recordings shall be destroyed immediately (Article 135/3, CMK, as amended by Act 2005-5353).

In connection with investigations related to the suspect or the accused, Article 135 shall not be applied for telecommunication devices in the office, dwelling and domicile of a defense counsel (Article 136, CMK).

III - Enforcement of decisions, destroying the contents of the communication.

The decision rendered according to Article 135 shall be enforced by the officials of the institutions that provide the telecommunications service immediately, in cases where it is

requested in writing by the public prosecutor or by the judicial police official who has been empowered by the public prosecutor to locate, listen to or record the correspondence through telecommunication and to implant the relevant devices; if this request is not fulfilled, use of force is permitted. The beginning and ending date and time of the interaction and the identity of the individual who is enforcing the decision shall be put into the records (Article 137/1, CMK).

The recordings that are produced according to Article 135 shall be decoded by individuals who are been appointed by the public prosecutor and shall be transcribed into written form. Recordings in a foreign language shall be translated by a translator into the Turkish language.

In cases where there is a decision rendered about not prosecuting the suspect, or where the judge does not give his approval according to the first subsection of Article 135, the application shall be terminated immediately by the public prosecutor. In such cases the recordings shall be destroyed within 10 days under the supervision of the public prosecutor and this event shall be recorded into the files.

In addition, if the interceptions have been destroyed, the office of the public prosecution shall inform the related individual in writing not more than 15 days after the date of the end of the investigation phase, about the reasons, context, duration and the outcomes of the measure, that the recordings related to locating and listening have been destroyed (Article 137/4, CMK).

IV - Coincidental evidence.

If a search or seizure reveals a piece of evidence that is not connected to the current investigation or prosecution, but there are reasonable grounds of suspicion that another criminal offense was committed, those items shall be immediately secured and the public prosecutor shall be informed thereof.

If during the interception of correspondence through telecommunication, a piece of evidence has been obtained that is not related to the ongoing investigation or prosecution, but raises the suspicion that a crime that is listed in Article 135/6 has been committed, this evidence shall be secured and this circumstance shall be immediately notified to the office of Public Prosecution (Article 138, CMK).

V - Blocking of Internet Access.

Act on Regulation of Internet Publications and Combating Crimes Committed by Publication on Internet (İnternet Ortamında Yapılan Yayınların Düzenlenmesi ve bu Yayınlar Yoluyla İşlenen Suçlarla Mücadele Edilmesi Hakkında Kanun), dated May 4, 2007, No. 5651, aims to regulate the obligations and responsibilities of internet service providers. In cases where there is sufficient suspicion that crimes listed in Article 8 of this Act has been committed, a judge may order a restriction of internet access.³

In cases where there is *sufficient suspicion* that a listed crime has been committed by the publication on the internet of contents prohibited under Article 8/1, the Justice of the Peace or the court may rule on a ban on this website (Article 8/2, Law No. 2007-5651). It has been argued that more than 32,000 sites were not accessible in Turkey, and the application of this provision was disproportionate in scope and duration continued.

A restrictive interpretation by the judiciary of Article 216 of the Turkish Penal Code, on provoking the public to hatred and hostility has led to a number of public figures being convicted for critical remarks on religion. Pianist and composer *Fazıl Say* was handed down a suspended ten-month prison sentence in the court of the first instance for insulting religion on Twitter.

The Law on the Internet, which limits freedom of expression and restricts citizens' right of access to information, needs to be revised in line with European standards. Law No. 2014-6518, however, made amendments extending the scope of the ban: whoever is offended in his private life by a publication in the internet, may request the Telecommunication Authority (TIB) to ban the publication. The complaining party must identify the URL address, and state openly his identity, and how his private life has been violated. TIB then informs the newly established *Association of Service Providers* (Article 6/A), and the Association enforces the ban within 4 hours (Article 9/A-3). The complaining party has to request the Justice of the Peace within 24 hours to give a decision about the ban on internet access. If the complaining party doesn't apply to the Justice of the Peace, or if the Justice of the Peace does not make a decision within 48 hours, the ban shall be lifted (Article 9/A-5 Law No. 5651, as amended by Law No. 6518 in February 2014).

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 404.
2. N. Meran, *Adli ve Önleme Amaçlı İletişimin Denetlenmesi (Telefon Dinleme, SMS, MMS, e-mail İzleme)*, *Gizli Soruşturmacı, Teknik Takip* (Ankara: Adalet Yayınevi, 2009).
3. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 425.

323. *Undercover investigator and surveillance.*

I - Undercover Investigator.

As long as it is not a provocation to crime, the Court of Cassation tolerates covert police methods (Article 139, CMK).¹ Pseudo-buying of narcotics (a drug-sting operation), for example, is allowed if the seller has already committed such crimes before. If however, a person would be committing this crime for the first time upon the offer of the secret agent, such a method is illegal because it amounts to entrapment.² In cases where there are strong indications of suspicion *based on concrete evidence (included by Law No. 2014-6526)* that the crime under investigation has been committed, and if there are no other available means of obtaining evidence, the court of assizes, and in cases of peril in delay, the public prosecutor, may decide to empower a public servant to act as an undercover investigator (Article 139/1, CMK). Decisions according to this Article shall be delivered unanimously by the Court of Assizes. In cases of opposition, the court dealing with the opposition also must decide unanimously (Article 139/1 CMK, as amended by Law No. 2014-6526).

The identity of the investigator may be changed. He is entitled to engage in legal interactions and transactions with this identity. In cases where it is necessary to produce and maintain the identity, the needed documents may be prepared, altered and used.

The decision related to the appointment of the undercover investigator and other documents shall be secured by the related office of the Public Prosecution. Even after the end of his mission, the identity of the undercover investigator shall be kept a secret.

The undercover agent is entitled to conduct every kind of investigation related to the criminal organization, the activities for which he has been appointed, as well as investigations related to crimes committed within the activities of this criminal organization.

The investigator shall not commit a crime while fulfilling his duty. He shall not be held responsible for crimes being committed by the criminal organization which he has been appointed to investigate.

Personal information obtained through appointing an investigator shall not be used except during the criminal investigation or prosecution for which he has been appointed.

The provisions of this article shall only be applicable for the crimes listed below:

(a) The following crimes at the Turkish Penal Code: producing and trading with narcotic or stimulating substances (Article 188, TCK), forming an organization in order to commit crimes (Article 220, TCK except for subsections 2, 7 and 8), forming armed organizations (Article 314, TCK) or supplying weapons for such organizations (Article 315, TCK).

(b) Smuggling weapons as defined in the Act on Fire Arms and Knives as well as Other Tools (Article 12).

(c) Crimes as defined in the Act on Protection of Cultural and Natural Substances, Articles 68 and 74 (Article 139/7, CMK).

II- Surveillance with technical means.

If there are strong indications of suspicion *based on concrete evidence* that crimes listed below have been committed, and if there is no other available means of obtaining evidence, the activities of the suspect or the accused, conducted in fields open to the public and his working places, may be subject to surveillance by technical means, including voice and image recording. Decisions on surveillance with technical means shall be delivered unanimously by the Court of Assizes. In cases of opposition, the court dealing with the opposition also must decide unanimously (Article 140/2, CMK, as amended by Law No. 2014-6526).

(a) Crimes regulated in the Turkish Penal Code: smuggling migrants and human trafficking (Articles 79, 80, TCK), killing with intent (Article 81, 82, 83, TCK), trading in narcotic or stimulating substances (Article 188, TCK), forgery in money (Article 197, TCK), forming an organization with the aim of committing crimes (Article 220, except for subsections 2, 7 and 8, TCK), prostitution (Article 227, subsection 3, TCK) (as amended by Act No. 5353), cheating in bidding (Article 235, TCK), bribery (Article 252, TCK), laundering of property proceeds stemming from crime (Article 282, TCK), armed organization (Article 314, TCK), or providing arms for such organizations (Article 315, TCK), crimes against the secrets of the State and spying (Articles 328, 329, 330, 331, 333, 334, 335, 336, 337, TCK).

(b) Smuggling weapons as defined in the Act on Fire Arms and Knives as well as Other Tools (Article 12).

(c) Crimes as defined in Combating Smuggling Act that require the punishment of imprisonment.

(d) Crimes as defined in the Act on Protection of Cultural and Natural Resources, Articles 68 and 74 (Article 140/1, CMK).

Surveillance with technical means shall be ordered by the Court of Assize, and in cases where there is peril in delay, by the public prosecutor.³ The decisions rendered by the public prosecutor shall be submitted for the approval of the Court of Assize within 24 hours.

The decision related to the surveillances with technical means may be rendered for a maximum of 3 weeks (*previously it was 4*). This time limit may be extended for one week, if needed. The Court of Assize, however in crimes related to the ones committed within the activities of an organization, is entitled to extend this period several times for not more than one week each, not exceeding an additional 4 weeks, if needed (Article 140/3 CMK, as amended by Law No. 2014-6526).

The evidence obtained shall only be used for investigations or prosecutions of the crimes listed above, and shall not be used outside of this scope; and the evidence shall be immediately destroyed under the supervision of the public prosecutor, if it is not useful for the criminal prosecution.

The provisions of this article shall not be applied within the dwelling of an individual (Article 140/5, CMK).

1. A.E. Akyazan, *5271 Sayılı CMK'da Yeni Müesseseler: Gizli Soruşturmacı ve Teknik Araçlarla İzleme* (Türkiye Barolar Birliği Dergisi sayı 62, Ocak & Şubat 2006). V.O. Özbek, *Organize Suçlulukla Mücadelede Kullanılan Gizli Görevlinin Görevin Gerektirdiği Suçlar Bakımından Cezalandırılabilirliği* (Ankara: Yetkin, 2003). N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 416. İ. Şahin, *Teknik Araçlarla İzleme*, Seçkin, Ankara 2014.
2. F.S. Akıncı, *Polis, Toplumsal Bir Kurum Olarak Gelişmesi* (İstanbul: Polis Alt Kültürü ve İnsan Hakları, 1990), 168. Since 1999 and even more so since 2005, the Turkish Police have legal tools to combat organized crime. These include wire tapping (Article 135, CMK; repealed ÇASÖMK Article 2) and surveillance (Article 140, CMK) and the use of undercover agents (Article 139, CMK). Not included are the criminal investigation of registers and computer data, which was recognized by repealed ÇASÖMK Article 4, but was not included in the new CMK. If there are strong indications that assets belonging to individuals who are under suspicion of being involved in organized crime, have also been involved, then many kinds of movable and immovable goods may be seized (Article 138, CMK).
3. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 418.

§3. THE POWERS TO STOP AND SEARCH

I. The Powers to Stop and Check

324. There is no special provision in the Code of Penal Procedure that gives the police the power to stop and check people.¹ However, there is a provision in the Police Act (Article 4A, PVSK) that permits the police to stop and ask someone for identification. If the person is without identification or there is suspicion that a false identity is being used, the police have the power to arrest this person until his identity is cleared up or to detain him for up to 24 hours.

1. Eryılmaz, M. Bedri, *Türk ve İngiliz Hukukunda ve Uygulamasında Durdurma ve Arama* (Ankara, Seçkin Yayınları, 2003).

325. *The power to stop and ask for identification arises when there are reasons to*

believe that a crime has been committed or that a danger must be averted (administrative or judicial police function).

In cases of alleged breach of duty by the police, if they are acting in an administrative capacity, such as regulating traffic on a highway, they are subject to a special procedure (*supra*, paragraph 174) applied to State officials. However, if the police duty was related to a judicial police function, such as arresting a suspect, then the Public Prosecutor prosecutes them *ex officio*.

II. The Powers to Search Persons, to Perform a Bodily Examination, and to Inspect the Crime Scene

326. Search and seizure law is closely related to the right to privacy and to family life.¹ Amendments to the Constitution by Act 4709 require a written court order, or in urgent cases a written order of the superior, authorized by an Act (AY “2001–4709,” Articles 20 and 21). The grounds on which to issue a search warrant are listed in the Constitution. The written order of the superior must be approved by a judge within 24 hours.

1. S. Aksoy, *Önleme ve Koruma Tedbiri Olarak Arama* (Ankara: Seçkin, 2007). V.O. Özbek, *Ceza Muhakemesi Hukukunda Koruma Tedbiri Olarak Arama* (Ankara: Seçkin Yayınevi, 1999).

327. *Preventive search.* Preventive searches are governed by the Police Act (Article 9, PVSŞ as amended in “2002-4771” and in “2007-5681”).¹ Before conducting the preventive search the decision of the judge must be obtained; in case of emergency, the superior administrative authority has jurisdiction to give a written order for a preventive search. This does not include the chief of the police; only the governor of a city is entitled to give orders to take such steps.

Searching individuals and their luggage in airports is an exception and is considered a preventive measure necessary to avert danger at airports and borders (Act No. 5442 dated 1949, added Article 2 on August 29, 1996, by Act No. 4178).

Search during an arrest is another exception. The police may conduct a search of the individual for the sake of his or her own protection.²

1. The governor was entitled to give orders to the police to conduct preventive searches in necessary cases when the public order or rights of individuals were at risk (Article 9/1, PVSŞ “1980–2261”). Since 1985, the police have had the power to search persons in order to prevent harm to others. According to an amendment to Article 9 of the Police Act, a highly ranked police official may order a search of the person if there are facts that indicate that danger exists or that violent acts will be committed. However, after the 2001 amendment to Article 20 of the Constitution by Act No. 4709, the Police Act is restricted. Today, any search without a court order or, in urgent cases, a written order of the provincial governor, is illegal (Article 9, PVSŞ “2002-4771”).
2. If offenders were caught in the act, the repealed Code No. 3005 allowed the police to carry out searches. This power to search during arrest is now regulated at the Search Regulations for the Police (Article 6/3, *Arama Yönetmeliđi*).

328. *Mental examination of the suspect.* When an expert has recommended that the accused be given a mental examination during the preliminary investigation, the Justice of the Peace (and, where the proceedings are more advanced, the competent court) may order the accused to be placed under examination in an official institution. A warrant against drug and alcohol addicts can be issued at any stage of the proceedings.

Where the accused has no legal representation, legal representation must be appointed

for him by the Court (Article 74/2, CMK).

329. Physical Bodily Examination.

I - Physical bodily examination of the suspect or the accused, and taking samples.

In order to obtain evidence of a committed crime, the judge or the trial court by its own motion, or upon the request of the public prosecutor or the victim; and in cases where there is peril in delay, the public prosecutor may issue an order to conduct an internal physical bodily examination¹ on the suspect or the accused, or to take samples from his body, such as blood or like biological samples, as well as hair, saliva or nail samples.² It is also possible to utilize these provisions after the suspect has been officially accused and thus has the legal status of an *accused*. The decision of the public prosecutor shall be submitted for the approval of the judge or the court within 24 hours. The judge or the court shall issue its decision within 24 hours. Unapproved decisions shall be invalid, and evidence so obtained shall not be used (Article 75/1, CMK).

The internal physical bodily examination or an intervention in order to take blood or similar biological samples from the body may only be conducted, if it shall not create a danger of harm to the subject's health.

The internal physical bodily examination or taking blood or similar biological samples from the body shall only be undertaken by a medical doctor or by another member of medical profession.

Any examination of the genital organs or anus shall be deemed as internal physical bodily examination.

There shall be no internal physical bodily examination undertaken related to crimes that carry imprisonment of less than two years; in these instances, it is also forbidden to take blood or similar biological samples from the body, as well as hair, saliva, nail.

The decisions ruled according to this article by a judge or the court may be subject to a motion of opposition.

Alcohol tests and taking blood samples according to special provisions in the Police Act shall not be prevented by this regulation.

II - The physical bodily examination on, and taking samples from, third parties.

The judge or the court upon the request of the public prosecutor or on their own motion or, in cases of peril in delay, the public prosecutor, may decide to conduct external or internal physical bodily examination on the victim or take blood or similar biological samples from the body of the victim, as well as hair, saliva and nail samples in order to obtain evidence of a crime, so long as this shall not create a danger to the subject's health and there is no surgical intervention. The decision of the public prosecutor shall be forwarded to the judge or the court for approval within 24 hours. The judge or the court shall give their decision within 24 hours after it has been submitted to him. This period is not applicable for other investigative measures that are submitted for approval. Unapproved decisions shall be invalid, and evidence so obtained shall not be used (Article 76/1, CMK).

In cases where there is the consent of the victim, obtaining a decision according to the

rules as mentioned in the subparagraph one is not required.

Where there is a need to determine the parentage of a child, a decision according to the rules in Article 76/1, CMK is required in order to conduct this research.

The witness may refrain from bodily examination or giving body samples upon the grounds of their right to refrain from testimony. If the individual is a child or mentally ill, the decision to refrain shall be made by his legal representative. In cases where the child or the mentally ill person is capable of understanding the legal meaning and consequences of taking the witness-stand, his view on the subject shall also be asked. In cases where the legal representative is the suspect or accused, then the judge must make the decision. However, evidence of the crime obtained in this way shall not be used as evidence in the further stages of the lawsuit unless the legal representative who is not under criminal charges as a suspect or an accused gives his consent.

Judge or court decisions rendered under this provision may be subject to opposition.

Upon her request and if it is possible, the physical bodily examination of a female shall be conducted by a female medical doctor.

1. Kunter & Yenisey & Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), 1569.
2. F.S. Mahmutoğlu, "Beden Muayenesi ve Vücuttan Örnek Alınması," in *Criminal Law in the Global Risk Society*, ed. F. Yenisey & U. Sieber (Series of the Max Planck Institute for Foreign and International Criminal Law and Bahçeşehir University Joint Research Group, Volume T 1, Istanbul 2011), 393.

330. *Molecular-genetic Tests.* Molecular-genetic tests shall be conducted on the material obtained through interactions described in Articles 75 and 76, only if it is necessary to determine the family connections or to determine if those body samples are related to the suspect or to the accused or to the victim. Tests that are outside of the scope of these aims are forbidden (Article 78/1, CMK).

Permitted tests mentioned in paragraph one may also be conducted on other body parts, that have been found and seized, and their owner's identity is not known. The second sentence of the paragraph one shall apply accordingly.

Molecular-genetic tests according to Article 78 shall only be conducted upon a judge's order. The ruling shall also contain the name of the expert appointed to conduct the test (Article 79, CMK).

An expert may be selected from the officially appointed experts or from the individuals who are required to act as an expert or from officials who are not attached to the investigating or prosecuting authorities, or from officials belonging to an objectively separate structural branch of the investigating or prosecuting authority. These individuals are obliged to take all suitable organizational and technical precautions in order to prevent illegal conduct of molecular-genetic tests and so that unauthorized third parties may not obtain knowledge about the outcomes. The items subject to test shall be delivered to the experts without labeling them with the name, family name, address and date of birth of the person from whom the items originate.

The outcome of the analysis of samples obtained according to Articles 75, 76 and 78 are considered as personal data and shall not be used for another purpose. The individuals

who have access to the files shall not disclose the information to unauthorized persons (Article 80/1, CMK).

As soon as the prosecution ends (the time limit for opposing the decision to drop the prosecution is exhausted, or the opposition has been overturned, or the court gives a final judgment on acquittal, or a judgment is rendered on not punishing the accused and those judgments are made final), the samples and information shall be destroyed immediately in the presence of the public prosecutor. This destruction shall be documented and its documentation shall be kept in the file.

331. Fixing the Identity in a Physical Way. If the committed crime requires a maximum prison term of two years or a more severe punishment, upon the order of the public prosecutor, a picture shall be taken, measurement of the body shall be made, fingerprints or palm prints shall be taken, special marks on the body, that would enable the recognition of the suspect, shall be made or the accused shall be registered. A voice sample and a video film shall be produced as well, and inserted into the file where the interactions related to the investigation and prosecution are kept (Article 81, CMK).

In cases where the prosecution ends (time limit for opposing the decision to drop the prosecution is exhausted, or the opposition has been rejected, or the court gives a final judgment on acquittal or a judgment is rendered on not punishing the accused and those judgments are made final), related records shall be removed from the files and be destroyed in the presence of the public prosecutor. This action shall be documented.

332. Judicial Inspection of the Crime Scene. Judicial inspection of the crime scene shall be conducted by the trial court or by a member of the court who was delegated to perform that task, or by the court that has been asked to perform a specific legal duty by a letter of rogatory, and if there is peril in delay, by the public prosecutor (Article 83, CMK).

The minutes of the judicial inspection shall contain information about the existing facts and the absence of the evidence of the crime that might to be expected to exist according to the special circumstances of the situation.

The suspect, the accused and the victim and their defense counsel and representatives may be present during the judicial inspection (Article 84, CMK).

In the event that a witness or expert is unable to be present at the trial, or it would be difficult for him to appear because he is living a far distance away, the provisions of CMK 180, first paragraph about delegating another court shall apply during his hearing. If the presence of the suspect or the accused may prevent one of the witnesses from testifying truthfully, it may be ruled that the suspect or the accused shall be removed from the courtroom during this interaction.

The individuals who have the right to be present during this interaction shall be informed of the date of the scheduled interaction in advance of the due day. If the suspect or the accused is in custody, the trial court may decide that he may be present during the judicial inspection only if it is necessary. This includes the case where the court consists of a single judge.

333. Showing the Crime Scene. The public prosecutor is entitled to conduct a crime scene visit with the suspect, if the suspect has already given some information about the crime of which he is suspected.¹

The chief of the judicial police was also empowered to conduct a crime scene visit with the suspect, if the crime was related to a crime that is mentioned in Article 250 Subsection 1, CMK (Article 85, CMK). After the amendments in 2012, Article 250 CMK has been abolished, and in March 2014, when Article 10 TMK has been abolished as well, this power no longer exists.

The defense counsel may also be present during the crime scene visit by the suspect, if this does not delay the investigation. Crime scene visit by the suspect shall be documented as regulated in Article 169, CMK.

1. A. Karagülmez, *Yer Gösterme İşlemi ve 5271 Sayılı Ceza Muhakemesi Kanunu'nun 85. Maddesinin İncelenmesi* (Türkiye Barolar Birliği Dergisi, sayfa 62, Mart & Nisan 2005).

§4. THE POWERS OF ENTRY, SEARCH AND SEIZURE

I. The Powers of Entry and Search

334. *Judicial search.* When there are "*reasonable grounds*" for suspecting that the person is carrying or hiding evidence of an offense or that he has committed a crime, he and his premises may be searched (Article 116, CMK, as amended by Law No. 2014-6572). The 2014-6526 amendment had introduced the wording "*strong suspicion based on concrete evidence*" in February, but soon after, Law No. 2014-6572 went back to the original wording "*reasonable grounds*" in December.

Consent search is forbidden. Even if an occupant grants permission, the police are not entitled to enter the house and conduct a search. On November 23, 2003, the 10th Chamber of the High Administrative Court held that the right to privacy cannot be waived by the individual, and consequently consent to a search is not valid.

335. *Search conducted in a domicile.* Only a court may order entry into a domicile. Entering the domicile of the suspect and conducting a search therein is regulated by two factors: first, to arrest the suspect, and secondly to seize evidence (Article 116, CMK). Search at night is exceptional.

The Code provides the limited power of entry to search the domiciles of persons who are not under suspicion (Article 117, CMK).

If there are reasonable grounds to believe that the person to be arrested or the evidence to be seized are in the domicile, then the police are entitled to enter, after a written order of the public prosecutor or judge. In this case the order of the public prosecutor must be submitted for subsequent approval to the justice of peace. This limitation does not apply if the suspect is arrested in the domicile of a third party or if he enters it during hot pursuit (Article 118/2, CMK).

However, if the offender is caught in the act of committing an offence, the police have a duty to enter the domicile (Articles 13 and 20, PVSK).

Formerly, universities were considered immune from police entry. In 1973, however, there was an amendment to the Police Act that gave the Police the right to enter university buildings if there was a report of crimes being committed there (Article 20, PVSK).

336. The power to enter public buildings and search therein is larger. However, at night this power is limited. There is an exception to the rule only if the offender is caught in the

act, or if entry is necessary to recapture an escaped arrestee or prisoner (Article 118/2, CMK).

A written report is to be made upon entry into a domicile or other premises. The report should provide the place and time of the entry if seizure was made and a detailed description of the seized items (Article 121, CMK).

337. Search of computers, computer programs and transcripts, copying and provisional seizure. Upon the request of the public prosecutor during an investigation with respect to a crime, the judge shall issue a decision authorising the search of computers and computer programs and records used by the suspect, the copying, analyzing, and textualization of those records, if it is not possible to obtain the evidence by other means, and *if strong suspicion based on concrete evidence is existing* (Article 134/1 CMK, as amended by Law No. 2014-6526).

If computers, computer programs and computer records are inaccessible, as the passwords are not known, or if the hidden information is unreachable, then the computer and equipment that are deemed necessary may be provisionally seized in order to retrieve and to make the necessary copies. Seized devices shall be returned without delay in cases where the password has been determined and the necessary copies are produced.

While enforcing the seizure of computers or computer records, all data included in the system shall be copied. A copy of those copied data according subsection 3 shall be produced and be given to him; this exchange shall be recorded and signed (Article 134/4 CMK, as amended by Law No. 2014-6526).

It is also permissible to produce a copy of the entire data or some of the data included in the system, without seizing the computer or the computer records. Copied data shall be printed on paper and this situation shall be recorded and signed by the related persons.

II. The Powers of Seizure

338. Seizure of movable goods.

I - Obtaining evidence or securing the confiscation.

Two kinds of goods may be seized: anything that can serve as evidence, and goods to be confiscated (e.g., weapons that were used in committing the offense, or goods that are prohibited, like illegal drugs). If the possessor gives up such goods with his consent, they will be kept in custody. If there is no consent, the State has the power to seize them through use of adequate force (Article 123, CMK).

II - Items exempted from seizure.

Some items are exempted from seizure. The State is not empowered to seize goods that are in possession of persons who have the right to withhold information about such goods and testimony according to Articles 45 and 46 of the Code of Penal Procedure (Article 126, CMK). Communications between defense counsel and client (Article 154, CMK) and printing machines used by the press (Article 30, AY) are also exempt from seizure.

III - Decision on seizure.

Only a judge is entitled to order the seizure of goods. During the preliminary investigation, a Justice of the Peace is entitled to give an order for seizure of goods. After

prosecution has begun (i.e., the approval of indictment according Article 175, CMK), the court decides. If the prosecutor or his assistants have seized the items without a court order, the judicial approval must have been obtained within 24 hours (before 2001 it was three days) (Article 127/3, CMK). If the ruling of the judge cannot be obtained within 48 hours, the seizure becomes null and void (Articles 20, 21, AY).

339. Seizure of immovable property and on rights and accounts receivable. The items listed in Article 128/1, CMK, belonging to the suspect or the accused, *that have been concretely specified*, may be seized in cases where there are strong grounds of suspicion tending to show *based on concrete evidence* that the crime under investigation or prosecution has been committed and that these items have been obtained from this crime which is included in the list in Article 128/2, CMK.

Prior to the decision on seizure, a report must have been obtained, that such property has been aquired by committing a crime. This report shall be prepared within 3 months; if special circumstances necessitate, this time period may be extended for 2 more months, if requested.

The decision on seizure according Article 128 CMK shall be rendered by the Court of Assize unanimously; in case of objection to the decision, examining court also makes the decision unanimously (Article 128/9, CMK, as amended by Law No. 2014-6526).

Items listed in Article 128/1, CMK are as follows: a) Immovable goods, b) Transport vehicles of land, sea or air, c) All kinds of accounts in banks or other financial institutions, d) All kinds of rights and accounts receivable by real or juridical persons, e) Valuable documents, f) Shares at the firm where he is a shareholder, g) Contents of the rented safe, h) Other valueables belonging to him.

Even in cases where these immovables, rights, accounts receivable and other values or belongings are in possession of individuals other than the suspect or the accused, the seizure is also permitted.

Crimes listed in Article 128/2, CMK are as follows:

a) The following crimes as defined in the Turkish Penal Code: Genocide and crimes against humanity (Arts. 76, 77, 78, TCK), Smuggling migrants and human trading (Arts. 79, 80, TCK), Theft (Arts. 141, 142, TCK), Aggravated theft (Arts. 148, 149, TCK), Breach of trust (Article 155, TCK), Forgery (Arts. 157, 158, TCK), Fraudulent bankruptcy (Article 161, TCK), Producing and trading of narcotic or stimulating substances (Article 188, TCK), Forgery of money (Article 197, TCK), *(Forming an organization in order to commit crimes Article 220 TCK has been repealed by Law No. 2014-6526)*, Forgery in public bids (Article 236, TCK), Forgery in fulfilling of obligations (Article 236), Embezzlement (Article 247, TCK), Bribery by force (Article 250, TCK), Bribery (Article 252, TCK), Crimes against state security (Arts. 302, 303, 304, 305, 306, 307, 308, TCK), Crimes of an armed organisation (Article 314, TCK), or supplying such organisations with arms (Article 315, TCK), Crimes against state secrets and spying (Arts. 328, 329, 330, 331, 333, 334, 335, 336, 337, TCK),

b) Smuggling weapons as defined in the “Act on Firearms and Knives as well as Other Tools” (Article 12),

c) Embezzlement as defined in the Banking Act (Article 22/3 and 4),

d) Crimes as defined in the Combating Smuggling Act that carry imprisonment as punishment,

e) Crimes as defined in Arts. 68 and 74 of the Act on Protection of Cultural and Natural Values.

A decision on the seizure of an immovable shall be enforced by placing a note in the title. A decision on the seizure of vehicles operating on land, sea and air shall be enforced by placing a note in the title, where they are registered. A decision on the seizure of accounts at banks and other financial institutions shall be enforced by immediately informing the bank or financial institution by technical communication means. The related decision shall also be notified to the bank or financial institution separately. The interactions at the bank account, aimed to make the decision of seizure ineffective, which are conducted after the decision has been rendered, are void.

A decision on the seizure of shares at a firm shall be enforced by notifying the administration of the related firm and the head of the commerce title by technical communication means immediately. Notice of the related decision shall also be sent to the bank or financial institution separately.

A decision on the seizure of rights and accounts receivable shall be enforced by immediately notifying the related real or juridical person by technical communication means. The related decision shall also be notified to the real or juridical person separately.

In cases where there are violations of the requirements set forth in the decision on seizure, Article 289 of the Turkish Penal Code related to the “misusing of the power of protection” shall apply.

§5. THE POWERS OF ARREST

340. An arrest deprives the accused of his personal freedom when he is caught red-handed.¹ It can be made without a written order of a court.² Turkish law sharply distinguishes between “arrest” (*yakalama*) and “pre-trial detention” (*tutuklama*). Pre-trial detention always requires a written order of a magistrate.³

The powers of arrest are now regulated by Article 90, CMK which contains quite detailed provisions. Any citizen may arrest an offender during the commission of the crime, or during hot pursuit, if in the meantime the offender might escape or not be identifiable (Article 90/1, CMK).

The public prosecutor shall be immediately informed about the arrest, and the police shall act upon the orders of the public prosecutor (Article 90/5, CMK). The public prosecutor may issue an order for police custody, if there is "concrete evidence that indicates the suspicion of the committed crime" (Article 91/2 CMK, as amended by Law No. 2014-6526).

1. M.B. Eryılmaz, *Arrest and Detention Powers in Turkish and English Law and Practice in the Light of the European Convention on Human Rights* (Boston: Martinus Nijhoff Publishing, 1999).
2. A. Karagülmez, *Tutuklama Nedenleri ve Tutuklama İsteminin Reddi Kararına İtiraz Konusunda 5271 Sayılı CMK'nın İncelenmesi* (Türkiye Barolar Birliği Dergisi, sayı 58 sayfa 120, Mayıs & Haziran 2005).
3. I. Şahbaz, *Avrupa İnsan Hakları Sözleşmesinde Kişi Özgürlüğü ve Güvenliği* (Türkiye Barolar Birliği Dergisi, sayı 58 sayfa 163, Mayıs & Haziran 2005).

2. N. Centel, *Ceza Muhakemesi Hukukunda Tutuklama ve Yakalama* (İstanbul: Beta, 1992), 17; O. Apaydın, “Kişi Güvenliğine İlişkin Sorunlar, Habeas Corpus,” İBD (1980/54): 12.
3. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 316.

341. *Police custody.* If the arrest is related to a crime while the offender was committing it, the arrested person will be brought to a Justice of the Peace within 24 hours for interrogation. He will be immediately taken to the appropriate court if a prosecution has already been instituted (Article 91/1, CMK).

The time necessary to bring him before the judge is not included in the 24-hour requirement, but it may not exceed 12 hours (Article 91/1, CMK, as amended in 2005–5353). The 24-hour period of deprivation of liberty for crimes committed by three or more persons may be prolonged up to four days by a written order of the public prosecutor if the collection of evidence becomes difficult. However, the prolongation shall be given for one day each time and may not exceed four days altogether (Article 91/3, CMK).

The suspect must be informed of his rights by the police during the arrest and if he requests so, he has the right to have his counsel present during the interrogation (Article 150/1, CMK). For children and for suspects of crimes carrying imprisonment at the lower level of more than five years, there is an obligation to appoint a lawyer if the suspect does not already have one (Article 150/2, and 3 CMK).

The Justice of the Peace interrogates and can release the arrested person if he or she determines that pre-trial detention was not necessary or if the reasons for arrest no longer exist. There is a requirement that an appointed defense lawyer be present during this interrogation (Article 91/6, CMK).

342. A remedy against arrest (Article 91/4, CMK) was introduced in 1992: the arrested person or his lawyer, his legal representative, his first and second degree relatives or his spouse have the right to demand a decision from the Justice of the Peace against the written order from the public prosecutor relating to the prolongation of the arrest period or on the legality of the arrest as such.

The Justice of the Peace reviews the file and gives his decision immediately or, at the latest, within 24 hours. He may reject the application if he considers the arrest or prolongation period to be justified, or he may order that the arrested person be brought to the public prosecutor together with the documents relating to his investigation (Article 91/4, CMK).

If the arrest (or the pre-trial detention) was unconstitutional, the arrested individual may claim damages under Article 141, CMK.¹ The State is responsible for compensation, but it may recover the cost from the officer who had conducted the illegal arrest according the rules of a civil claim now (AY “2001-4709,” Article 19).

1. A. Parlar & F. Yıldırım, *Açıklamalı - İçtihatlı Silahlı Çeteler ve Terör Suçları ile Haksız Yakalama ve Tutuklamaya İlişkin Tazminat Davaları* (2001).

343. If the arrested person is to be released because the time limit on the arrest has run out or because the Justice of Peace has ordered his release, the same person may not be arrested for the same actions again, unless there is new and sufficient evidence against him. To arrest the suspect again, the public prosecutor must provide a written order

(Article 91/5, CMK).

§6. JUDICIAL CONTROL, SECURITY DEPOSIT AND PRE-TRIAL DETENTION

I. Judicial Control and Security Deposit

344. Judicial control and security deposit. The Turkish Penal Procedure Code has initiated a new legal barrier to deprivation of liberty through pre-trial arrest in the form of *judicial control and security deposit*.

I - Judicial Control.

In cases where the grounds as regulated in Article 100 CMK are present, which would have resulted in arrest, a decision to put the suspect under judicial control may be rendered, instead of arresting him, if the conducted investigation is about a crime that carries a punishment of imprisonment of maximum three years or less (Article 109/1, CMK).¹

Also in cases where the Code restricts pre-trial arrest, the provisions of judicial control may still be applicable. Judicial control in Article 109 CMK is designed for reducing the number of pre-trial detentions in Turkey and provides for an opportunity for the suspect to remain under a controlled liberty, where he has to obey some restrictions put by the judge on his life style. Before crimes carrying a penalty of more than 3 years of imprisonment was out of the scope of judicial control. Recent amendments have abolished this limitation and thus made judicial control applicable all sorts of crimes (Article 109, CMK as amended by Law 6352 in 2012).

The same law added 3 more restrictions to the previously existing ones: The judge may order the suspect not to leave his home, or not to go out of the boundaries of a district or may prohibit him from entering places or districts, as determined by judge.

Judicial control includes one or more obligations imposed on the suspect as stated below:

- (a) to not travel outside of the country;
- (b) to regularly appear in person at places for periods that will be specified by the judge;
- (c) to obey the calls of authorities or persons specified by the judge and, when necessary, fulfill the measures of control with respect to professional activities or issues of continuing education;
- (d) not being able to drive any or some vehicles and, when necessary, leaving his driving license in the office of the registry in return for a receipt;
- (e) obeying and accepting the measures of medical diligence, treatment or examination, including being hospitalized for withdrawal from dependency on narcotics, stimulating or evaporating substances and alcohol;
- (f) to deposit an amount of money as a safeguard, which shall be determined by the judge upon the request of the public prosecutor, after taking into account the financial conditions of the suspect, and whether it shall be paid by more than one installment and

the period of payment;

(g) no to be permitted to have or to carry weapons and, when necessary, to leave the guns to the judicial depositary in return for a receipt;

(h) to provide real and personal guarantees for the availability money to assure rights of the injured party; the judge upon the request of the public prosecutor shall specify the amount and the payment period of the money;

(i) providing assurance that he shall pay alimony regularly, pursuant to the judicial decisions, and that he shall fulfill the obligations towards his family (Article 109/3, CMK);

(j) in cases where the suspect is subject to the measures mentioned in subparagraph 3(a) and (f), the upper limit mentioned in subparagraph one shall not apply.

(k) the judge may order the suspect not to leave his home, or

(l) not to go out of the boundaries of a district or

(m) may prohibit him from entering places or districts, as determined by judge.

In the application of the obligation mentioned in subsection (d), the judge or the prosecutor may permanently or temporarily allow the suspect to drive vehicles in his professional activities.

Time periods that are spent under judicial control are not considered as restriction of freedom and shall not be subtracted from the punishment. This provision shall not apply to subparagraph 3, subsection (e).

In cases where the arrested individual has been released because the upper limits of pre-trial detention have been exceeded, provisions about judicial control may be applied without taking into account the time limits requirement mentioned in subparagraph one (Article 109/7, CMK).

II - Judicial control decision and the competent authorities to issue the decision.

The suspect may be taken under judicial control in every phase of investigation upon the request of the public prosecutor and with the decision of the Judge of the Peace in Criminal Matters (Article 110/1, CMK).

During the application of judicial control, upon the request of the public prosecutor, the judge may put the suspect under one or more new obligations, may partly or completely revoke the obligations that constitute the content of the control, or may alter the obligations or temporarily exempt the suspect from obeying some of them.

The provisions of this article and Article 109 are applicable at every stage of the prosecution phase by the judicial authorities with subject matter jurisdiction and venue, when it is deemed necessary.

III - Repealing of the judicial control order.

Upon the request of the suspect or the accused, the judge or the court may render a decision under the second paragraph of Article 110 within 5 days, after obtaining the opinion of the public prosecutor (Article 111/1, CMK). The decision on judicial control may be subject to a motion of opposition.

The judicial authority having proper venue may immediately issue a pre-trial arrest warrant with respect to the suspect or the accused who voluntarily fails to comply with the conditions of judicial control, regardless of the duration of the custodial penalty that may be inflicted upon him (Article 112, CMK).

IV - Security deposit.

The security that shall be deposited by the suspect or accused shall guarantee the following points. First, it shall ensure the presence of the suspect or accused during all the procedural interactions, during the execution of the judgment and during the fulfillment of other obligations he may be required to fulfill. Second, the security shall be used to make the following payments in the following order: the expenditures that any intervening party has made, security for compensating the damages that occurred through the offense and for restitution; in cases where the suspect or the accused is prosecuted because he did not pay the alimony, public expenses or criminal fines (Article 113, CMK).

The decision that obliges the suspect or the accused to deposit a security shall include each portion separately covered by the security.

In cases where the suspect or the accused consents, the court or public prosecutor may issue an order upon the request of the victim or recipient of the alimony, the portion of the security to be paid to them in advance that would cover the losses of the victim or the sum that constitutes the alimony (Article 114/1, CMK).

If there is a final court judgment in favor of the victim or the alimony recipient, related to the events that constitute the substance of the investigation or prosecution, then the payment may be ordered even if there is no consent of the suspect or the accused.

In cases where a convict had fulfilled all the requirements as laid down in paragraph 1 of Article 113, then the security deposit that would guarantee the obligations listed in said Article 113 paragraph 1, subsection (a) and the portion of the security that is specified in the decision, which is to be rendered according to the second paragraph of the same Article, shall be returned to him (Article 115/1, CMK); the second portion of the remaining security that was not paid to the victim of the crime or alimony recipient shall be returned to the suspect or accused, as well as in cases where a decision of non-prosecution or acquittal had been rendered. Otherwise, except in the absence of a good reason, the security shall be transferred to the State treasury as income.

In cases of a conviction, the security shall be used in accordance with the first paragraph of the subsection (b) of Article 113. The remainder shall be returned.

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 366.

II. Pre-trial Detention

345. *Pre-trial detention* is the accused's deprivation of liberty upon a "warrant of pre-trial detention" issued by a judge. There is no compulsory detention in Turkish Law, and the public prosecutor has no authority to issue a decision about the pre-trial detention of the accused.¹

The provisions of the Code of Penal Procedure relating to the pre-trial detention were altered in 1992 (Act No. 3842). These regulations have applied to every suspect since the

August 2003 amendment by Act No. 4928.²

The Justice of the Peace during the preliminary investigation (Article 94, CMK) or the court of competent jurisdiction during the trial stage (Article 101, CMK) is entitled to issue a warrant of pre-trial detention if there is *persuasive concrete evidence* (Article 100/1, CMK, as amended by Law No. 2014-6526) of a person's guilt and sufficient facts indicating that he will escape³, or facts regarding prior behavior sufficient to conclude that he will try to destroy evidence, influence witnesses to give false testimony, or unjustifiably influence or bribe experts.⁴

However, in some cases the Code allows the judge to issue a warrant of pre-trial detention on a strong suspicion of guilt and presumption that the other requirements are self-evident. This is only possible if the investigated crime is one of the crimes as listed in the Code (Article 100/3, CMK).⁵ This method of listing only very severe crimes in this provision aimed to reduce the incarceration rates. However, the application of this *catalog crimes* went the other direction and in cases of a suspicion of such a crime, judges started to rule only on the strong suspicion without considering the danger of fleeing or obscuring evidence.

After the June 2011 elections, there were chosen members of Parliament, who were under custody before and during the elections, but the courts did not release them. There are ongoing political discussions for reaching consensus to change the regulations related to pre-trial detention.

The legal presumption that foreigners tend to escape has been abolished.

Pre-trial arrest regulations and application of the pre-trial detention in Turkey has been one of the major legal disputes in the last few years. In order to reduce the number of incarcerations, the minimum length of imprisonment punishment that carries a pre-trial detention has been extended to up to two years again in 2012 (Art 100/4 CMK, as amended by Law, No. 6352). According to the recent amendment, if a crime carries only a judicial fine, or imprisonment term up to two years in upper level, pre-trial detention shall not be applied.

Implementation of the 3rd Judicial Reform Package adopted in July 2012 led to an increase in the use of judicial control (rather than detention) by more than 50% between the end of 2011 and 30 April 2013. This increase partly reflects the new forms of judicial control introduced in the 3rd package, e.g. prohibitions on leaving the house or a certain location, or on visiting a specific place or area. The 3rd package also led to the release of a significant number of detainees; in the case of juveniles, however, it was reported that the absence of a proper monitoring system led to relatively fewer releases.

Subsequent to the adoption of the 4th Package, the Court of Cassation has been reviewing first instance court decisions on the basis of the new provisions. The Committee of Ministers of the Council of Europe noted with satisfaction developments regarding re-opening of judicial proceedings and decided to continue supervision of the *Hulki Günes v. Turkey* group of cases under the standard rather than the enhanced procedure. As regards the *Demirel v. Turkey* group of cases, the Committee welcomed the efforts made by the Turkish authorities in the context of the 3rd and 4th Packages to align Turkish legislation and practice with Convention requirements, noted with

satisfaction statistical information demonstrating that there is a significant decrease in the period of detention on remand and an increase in the use of preventive measures as an alternative to detention, and invited the Turkish authorities to continue providing information on developments in judicial practice.

1. F. Yenisey, "Vorläufige Festnahme und Untersuchungshaft im türkischen Strafrecht," Report submitted to the Symposium held Sept. 24–28, 1990, in Poland: Human Rights and Pre-Trial Detention, in F. Dünkler & J. Vagg, "Untersuchungshaft und Untersuchungshaftvollzug," *Waiting for Trial, Freiburg i.Br.* (1994): 729–748. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 337. F. Gölcüklü, *Ceza Davasında Şahıs Hürriyeti* (Ankara, 1958), 27. A.K. Yıldız, "Ceza Muhakemesi Hukukunda Tutuklama ve Adli Kontrol," in *Criminal Law in the Global Risk Society*, ed. F. Yenisey & U. Sieber (Series of the Max Planck Institute for Foreign and International Criminal Law and Bahçeşehir University Joint Research Group, Volume T 1, İstanbul 2011), 631. V. Gültaş, *5271 sayılı Ceza Muhakemesi Kanununun Işığı Altına Tutuklama* (2006).
2. The crimes mentioned in the Anti-Terrorism Act of 1991 were subject to the provisions of the Code of Penal Procedure before the 1992 amendment. For those detained under the Anti-Terrorism Act, and those detained within the region under a state of emergency, falling under the jurisdiction of State Security Courts, these regulations did not apply (Article 31, Act No. 3842 dated 1992).
3. This legal obligation foreseen by the Code is not being fulfilled in general by judges while deciding the pre-trial arrest. As explained by many judges, the reason for this neglect is preserving impartiality. If a judge writes detailed motives of his pre-trial decision, furnished with accompanying facts, they fear they will be rejected as a judge who has formed an opinion against the suspect, if they act in the trial as well. However, we do not agree with this explanation, as it is a Constitutional provision that all decisions of the judiciary must be furnished with motives based on facts (Article 141/3, AY).
4. M. Albayrak, *Tutuklu ve Hükümlü El Kitabı* (Ankara: Adalet Yayınevi, 2007). V. Gültaş, *5271 Sayılı Ceza Muhakemesi Kanununun Işığı Altına Tutuklama ve Kanun Yolları* (2008). A.S. Sürücü, *İnsan Hakları Avrupa Mahkemesi Kararlarında ve Türkiye’de Tutuklama* (2010), N. Centel, *Ceza Muhakemesi Hukukunda Tutuklama ve Yakalama* (İstanbul: Beta, 1992), 38.
5. According to the repealed Code, if the crime carried a penalty of not less than seven years imprisonment, or if the accused had no domicile or home or could not identify himself, there was no need of proving the other grounds of pre-trial arrest.

346. The deprivation of liberty through pre-trial detention for crimes carrying judicial fines, or imprisonment of not more than 2 years is forbidden (Article 100/ 4, CMK, as amended by Act 2005–5353, and by Law No. 6526). Children under the age of 15 may not be arrested for crimes carrying imprisonment up to five years at the upper level (Article 21, ÇKK).¹

1. According to the repealed Penal Procedure Code, crimes involving punishment up to six months imprisonment was prohibited on this age group. However, if the crime provoked public anger or if the accused had no domicile or no home or could not identify himself, he was arrested and placed in pre-trial detention (Article 104/3, repealed CMUK).

347. *Rights of the suspect.* The requirement of proportionality of the pre-trial detention to the probable punishment (Article 104/4, CMUK) has been added by 1992 legislation (Act No. 3842), and is still one of requirements of pre-trial arrest: "in cases where the pre-trial-arrest is not proportional to the punishment or security measure, the judge may not render a decision in this respect" (Article 100/1, CMK).

Before the Justice of the Peace issues a warrant for pre-trial detention, he may consult

the file¹ and must interview the suspect, who must be present. A pre-trial detention warrant *in absentia* has been excluded by the current Code. If the suspect requests it, his counsel may be present during this interview without the need for a prior written power of attorney. But even if the suspect did not ask for a lawyer, there is a mandatory defense lawyer appointed on his behalf (Article 101/3, CMK).² The public prosecutor and the defense lawyer have the right to make arguments before the decision.

The police must inform the relatives of the person in detention about the fact that he was placed in police custody (Article 13, “2002-4771”, PVSK).³ Before so informing the relatives, the police must check with the public prosecutor (Article 95, CMK; Article 128, repealed CMUK “2002-4744”). If the accused has been taken before the judge, he can immediately inform his relatives or “any other individual” and talk to them in person, if the judge so orders (Article 107/2, CMK; Article 107, repealed CMUK “2002-4744”).

1. M.R. Erdem, *AİHM Kararları Işığında Tutuklu Sanık Bakımından Hazırlık Soruşturması Dosyasını İnceleme Hakkı* (Dokuz Eylül Hukuk Fakültesi Dergisi Cilt 6 sayı: 1, sayfa 67).
2. According to the repealed Code, if the accused was not present, the judge decided upon the request for pre-trial detention submitted by the prosecutor in a closed session, after a review of the report in the absence of the accused (Article 106, repealed CMUK). In such cases, the public prosecutor issued a warrant of arrest on the decision of pre-trial detention of the magistrate (Article 131, repealed CMUK) and the police would arrest the accused when executing the court decision. The new Code does not include a court decision in order to arrest the suspect if he is not present. At the moment of arrest, the decision of the judge would be handed to the accused (Article 106/3, repealed CMUK) and he would be informed that he has the right to contest the court decision (Article 106/4, repealed CMUK).
3. The exception of “danger to the investigation if relatives are informed” was abolished in 2002.

348. *Arrest order.* Since the “pre-trial arrest decision” in the absence of the suspect has been abolished by the new Penal Procedure Code, there is a substitute decision: the arrest order (Article 98, CMK).¹

Suspects who have been arrested upon an arrest order, shall be brought in front of the competent judge or court within 24 hours at the latest (Article 94/1, as amended by Law No. 2014-6526). In cases where he has been arrested in another location, he shall be brought to the nearest justice building, and the competent judge or court shall interrogate the suspect by means of voice and image transfer (Article 94/2, as amended by Law No. 2014-6526).

As pre-trial detention is a restriction of personal freedom before a final judgment of the trial court about the guilt of the accused, it requires a written decision of a judge, furnished with motives. Detailed motives of most of the decisions, however have not been satisfactory in the past. For this reason, the legislature made an amendment to Article 101 CMK by Law No. 6352 in 2012. According to this amendment, a judge must clearly write in any decision about pre-trial detention, extension of detention or any decision related to pre-trial detention, facts and related evidence which indicate the strong suspicion that the suspect has committed the crime, and reasons of pre-trial arrest, such as likelihood of escape or obscuring of evidence, and that in that particular case, pre-trial detention is in proportion to the gravity of the allegedly committed crime (Article 101/2, CMK as amended by Law 6352).

1. If the accused had been taken into custody pursuant to the warrant of pre-trial detention of the

judge, he was brought immediately, or at the latest, within 24 hours, before a competent judge. This judge interviewed him and determined whether to continue the detention (Article 108/1, repealed CMUK). The time required to bring the accused to the nearest court was not included in this 24-hour period (Article 108/2, repealed CMUK).

III. The Continuation of Pre-trial Detention

349. Since 1992, there has been a time limit for pre-trial detention. The maximum time for the preliminary investigation was originally 6 months.¹ This period has been extended up to one year for crimes outside of the jurisdiction of the Court of Assize, but it may be extended for 6 months, if necessary (Article 102/1, CMK). In cases where the crime is under the jurisdiction of the Court of Assize, the maximum period of detention is two years, but it may be extended to a maximum of three years (Article 102/2, CMK). The decision regarding the extension shall be rendered after taking the opinions of the public prosecutor, the suspect or the accused, and of the defense counsel (Article 102/3, CMK).

In cases of political organized crime (crimes against the security of the State as defined in repealed Article 250/1-c, CMK, the period of detention was longer (Article 252/2, CMK).²

The maximum period of detention pending trial is 6 months. This period may be extended 4 more months, if necessary. In cases where the crime is under the jurisdiction of a Court of Assize, the maximum period of pre-trial detention is 2 years. This period may be extended for 3 more years, which makes a total of 5 years of pre-trial detention.

If the crime was under the provision of the Anti-Terror Law, it was possible to double this period, up to 10 years (Article 10/5, TMK). The Constitutional Court had abolished this provision related to extension in 2013, and in 2014, Article 10 TMK was repealed.

1. According to the repealed legislation, if the official claim had been put forward, the time limit was two years or until the decision of the court (Article 110/1, repealed CMUK). According to this regulation, the decision of pre-trial detention lost its legal value when the requisite time had run out. However, for crimes carrying penalties of imprisonment of more than seven years or of the death penalty, if the official claim was not put forward or the final judgment was not given within the time limitations, the accused could be further kept in pre-trial detention, or he could be released on bail (Article 110/2, repealed CMUK).
2. Stating a maximum duration of the pre-trial arrest in the Penal Procedure Code caused problems for crimes against the state or against the constitutional order of the state. Due to the difficulties in conducting the trial within a reasonable time, the judgments could not be rendered for many years, or in many cases, after the judgment of the court of the first instance has been rendered, the case is still pending at the Court of Cassation for several years because of the heavy caseload of this court. In order not to release dangerous accused, the maximum duration of pre-trial arrest as regulated in Article 102, CMK, was applied double for such crimes. For practical reasons, the application of this provision on maximum duration of pre-trial arrest (Article 102, CMK) had been suspended until Dec. 31, 2010. In beginning of January 2011 the time limitation for pre-trial arrest was in force and some 100 very dangerous persons convicted at the trial level and waiting for the decision of the Court of Cassation upon an appeal for more than 10 years, have been released under judicial control. In March 2014, however, limitation of duration of pre-trial arrest was dropped to maximum 5 years and more people were released.

350. I - Examination of pre-trial detention.

During the preliminary investigation, the continuation of pre-trial detention¹ will be examined every 30 days by the Justice of the Peace at the request of the Public Prosecutor (Article 108/1, CMK). During the trial, the court must make this examination during each

session on its own initiative (Article 108/3, CMK).

During this periodical control of pre-trial detention each 30 days, in order to determine if the circumstances related to pre-trial detention have been changed or not, the suspect and his defense attorney must be present; it cannot be conducted on examination of the file (Article 108/1 CMK as amended by 6459 in 2013). The judge must hear the suspect and/or his lawyer when reviewing, on a monthly basis as provided for by the law, whether the conditions for continued detention are met. Previously, the judge based his decision on the opinion of the prosecutor, of which neither the suspect nor his lawyer were informed.

II - Enforcement of detention.

Obligations of unconvicted prisoners are regulated in the Code of Enforcement of Punishments (Article 116, CGIK). Provisions of this Code, which are contained in the Articles 9, 16, 21, 22, 26-38, 34-53, 55-62, 66-76, 78-88 (*amendment by KHK/650 in 2011*), are applicable to the unconvicted prisoners on remand. If the prisoner's status of detention on remand is in accordance with the contents of the provision, it will be applicable.

Provisions below are applicable on unconvicted prisoners in High Security Closed Penal Enforcement Institutions: suspension of execution of imprisonment term because of an illness; entrance and registration into a prison facility; instruction of convicted prisoners and their relatives and concerned; following the rules of security programs and health maintenance; protection of establishments and furniture; keeping the doors closed and preventing contacts; keeping personal goods in rooms and outlying areas; search; the quality and application conditions of disciplinary measures; disciplinary measures except postponement of conditional release; condemnation; depriving from participation of some activities; denying the fee-paid work; hindering or restricting of correspondence or communication tools; secluding; disciplinary measures applicable to child convicted prisoners; disciplinary inquiry; repetition of activities requiring disciplinary measures; enforcement and abolition of disciplinary measures; measures applicable by the directorate; using of compulsory tools; earning rewards; grievance and objection; transfers; transfer depending on disciplinary reason; transfer depending on necessary grounds; transfer depending on disease reason; measures applicable during transfers; the right to meet an attorney-at-law and a notary; participating in cultural and artistic activities; freedom of speech; utilizing the library; rights of utilizing the periodical or transitory publications; rights of communication through phone; utilizing radio, television broadcasting and internet; rights of receiving and sending letters, fax and telegraph messages; right to accept gifts sent from outside at certain dates as mentioned in this Code; freedom of religion and right of conscience; requests of examination and treatment; nutrition of convicted prisoners; determining the improvement regime; number of convicted prisoners and security measures to be taken; educational programs; benefiting from education; examination and treatment; health inspection; forwarding to hospital; disease hindering enforcement; rejection of nutriment and drinks served; visit; visits to foreign inmates; essentials of visits and meetings; gymnastics; library and participating in courses.

In cases where one of his kin, including a person of the second degree consanguinity or

affinity relationship by marriage, or spouse dies, the unconvicted prisoner may be given a permission up to two days, travel time excluded, to participate in the funeral ceremony, accompanied by an external security force official.

Permission shall be granted during the investigation phase by the public prosecutor who leads the investigation, and during the prosecution phase by the judge or the court in charge of the prosecution, if there is no concern in respect of the well-being of the investigation or the prosecution and in respect of security (Article 116, CGIK, added paragraph by Law No. 2011-6217; amended by KHK/650 in 2011). Wording in Law No. 2011-6217 was: "mother, father, spouse, fellow or child". KHK/650 changed these words as "*including the second degree, death of one of his consanguinity or affinity relationship by marriage kin, or spouse*".

1. N. Centel, *Ceza Muhakemesi Hukukunda Tutuklama ve Yakalama* (İstanbul: Beta, 1992), 107.

351. Challenging the Decisions in Pre-trial Detention

I - Objection.

The accused person and the Public Prosecutor may an objectin before a higher court against the judge's order or the court's decisions related to detention or maintenance of pre-trial detention (Article 267, CMK). The decisions rendered on opposition are final. However, if the higher court decided to place the accused in pre-trial detention on the opposition, there is a further remedy of opposition (*infra*, paragraph 406) against this decision (Article 271/4, CMK).

If there is a decision rendered by a judge or court related to detention, this decision is subject to opposition. If the judge or court asks the opinion of the public prosecutor prior rendering a decision in the course of the opposition procedure, it is now mandatory to notify this opinion to the suspect, accused, or their defender. Suspect, accused, or defender may submit their view within three days (Article 270/2, added by Law No. 6459 in 2013).

II - Compensation for illegal arrest and detention.

Unlawful detention may lead to claim for compensation (Article 141, CMK).¹ In cases where a judge or prosecutor causes damages of an arrestee by personal fault, unjust deed or by other forms of responsibility, the claim of damages may only be addressed to the state. State shall pay damages and asks later he individual judge or prosecutor to pay back (Article 141, CMK as amended by Law 2014-6545).

III - Individual application to the Constitutional Court.

The Constitutional Court deals with applications regarding detention or length of proceedings while the case is still pending at first-instance level, following the same approach as that of the ECHR. In its decision in the *Hasan Uzun v. Turkey* case, the ECHR declared the application inadmissible. The Court reiterated that the rule of the exhaustion of domestic remedies was an indispensable part of the functioning of the ECHR mechanism. Having examined the main aspects of the individual application to the Constitutional Court, the ECHR found that the Turkish Parliament had entrusted the Constitutional Court with powers that enabled it to provide, in principle, direct and speedy redress for violations of the rights and freedoms protected by the ECHR.

By end August 2013, the Constitutional Court received more than 6,700 applications. It rejected or found inadmissible 2,155 of them, whereas work on more than 300 others was continuing. The majority of the applications related to alleged violations of Article 5 (Right to liberty and security) and Article 6 (Right to a fair trial) of the ECHR. The first decisions were made in July 2013 on applications regarding length of trial and of detention.

IV - Population of non-convicted prisoners.

As of 10 June 2013, detainees constituted around one-fifth of the prison population (as compared with one-half at the end of 2006), the vast majority of whom were detained for up to a year and a very small proportion for more than three years. The number of detainees accused of crimes falling under Article 100 of the Penal Procedure Code dropped significantly in the first half of 2013, as compared with both 2011 and 2012. This Article covers the so-called catalogue crimes, which include those tried in the context of high-profile cases such as the KCK and the *alleged deep-state criminal network Ergenekon*.

As a result, there was a significant decrease in detention-on-remand periods and an increase in the use of preventive measures as an alternative to detention, both overall and for crimes falling under Article 100 of the Penal Procedure Code. However, the maximum duration of detention on remand, as provided for by law and interpreted by courts, remained excessive.

1. S. Baytar, *Koruma Tedbirlerinden Doğan Zararın Karşılanması* (Türkiye Barolar Birliği Dergisi, sayı 61, Kasım & Aralık, 2005).

§7. THE WARRANT OF ATTACHMENT

352. The suspect, the victim or the witness must be present in person during an interview by the judge, the prosecutor or the police. In the event the person invited did not appear and give testimony does not appear as requested, the court issues a formal summons known as a warrant of attachment to be served on non-appearing person.

The judge has the power to issue a warrant of attachment against a suspect or accused, if there are sufficient reasons to issue a warrant of pre-trial detention (Article 146/1, CMK). In addition the public prosecutor may issue a written order to the police to bring the arrested person or the accused, together with relevant documents, to the office of the public prosecutor (Article 146/5, CMK as amended 2006–5560).

§8. POWERS TO INTERVIEW THE ACCUSED AND WITNESSES

I. Interviewing the Accused

353. According to the 1992 regulations, special provisions apply during the interview of the accused by the police and the public prosecutor, as well as during the interrogation by the judge (Article 148, CMK).¹

The interviewer must ask for and write down the person's identity. The interviewed person must give correct answers regarding his identity.

The suspect or the accused must be advised of the offense they are suspected of.

The suspect's right to counsel will be acknowledged: he has the right to engage counsel

on his behalf. If he cannot afford to retain counsel, he may demand a lawyer appointed by the Bar Association of that district.

If the suspect demands a lawyer appointed by the Bar Association, that lawyer may be present during the interview on the condition that this causes no delay in the investigation. There is no requirement for a written power of attorney for the requested lawyer. Furthermore, the interviewed person is entitled to inform his or her relatives about the arrest if he wishes to do so. He must also be advised of this right (*supra*, paragraph 347).

The interviewed person must be advised that he has the legal right to be silent. He will be given notice that he may demand collection of exculpatory evidence that would favor him. Questions about his personal status will be asked.

An official report of the interview will be prepared. This report must contain the following: (a) the place and date where the interview took place; (b) the names and positions of the persons who were present during the interview, including the identity of the interviewed person; (c) a statement about carrying out the above-mentioned requirements of the interview and whether any were not completed along with the reasons for that; (d) a statement of the facts and a statement that the official report has been read by the interviewed person and by his defense lawyer, if he was present, and that they have signed the report; and (e) if they did not sign the report, the reasons for their refusal (Article 147, CMK).

1. E. Cihan, "Ellinci Yılda Ceza Muhakemesi Süjesi Olarak Sanığın Sorgusu," IHFM (1984/ 1–4): 139–146; F. Gölcüklü, "Sanık Gerçeği Söylemeye Mecbur mudur?," AUSBFD (1954/4): no. IX, 121–146; C. Şahin, *Hazırlık Soruşturmasında Sanığın Kolluk Tarafından Sorgulanması* (Konya: Doktora Tezi, 1993). T. Demirbaş, *Sanığın Hazırlık Soruşturmasında İfadesinin Alınması* (İzmir, 1996).

354. *Illegal methods of interview.* The Turkish Code of Criminal Procedure lists the methods of interviewing suspects that are not allowed (Article 148, CMK). The testimony during the interview must be given freely. The use of torture, drugs given by force, stress or pressure tactics, fraud, physical violence or force, and devices that influence free will are forbidden (Article 148/1, CMK).¹ The person being interviewed may not be offered illegal promises (Article 148/2, CMK).

Evidence that has been obtained through illegal means is excluded, even if the individual gives his consent (Article 148/3, CMK) (*infra*, paragraph 394).

If, during the police questioning, there is no defense counsel present, and the accused denies his testimony later at court, such testimony cannot be taken into account as evidence for forming the judgment (Article 148/4, CMK). This provision is an innovation of the Turkish Legislature, which was enacted prior to the *Salduz v. Turkey* decision of the ECHR. Unfortunately, in cases where the defense attorney is not experienced, or did not provided the suspect with sufficient legal advice, a confession in the presence of the lawyer at the police station may still be used as very strong evidence against the accused later at the trial.

If the police have interviewed a suspect once, and later there is a need for further questioning, the police are not empowered to re-interview the same person for the same investigation (Article 148/5, CMK).

1. O. Tosun & N. Gürelli, “Heyecan Göstergesiyle Yalanın Bulunması ve Ceza Hukuku,” IHFM, no. XXX (1964): 3; S. Kaymaz, *Yasak Sorgu Yöntemi Olarak Aldatma* (Yargıtay Dergisi, Cilt 24, 1998), 73.

II. The Interviewing of Witnesses

355. Individuals have a public duty to testify if they have been summoned.¹ Witnesses served with a summons are obliged to comply. They must appear and give testimony. An individual who refuses to do so without reason has to pay the costs² as estimated by the judge (Article 44/1, CMK) (*infra*, paragraph 391-I).³

1. N. Şensoy, *Cezada ve Hukukta Şahitlik* (İstanbul, 1952), 8.
2. According to the repealed legislation, it was a light fine (Article 45, repealed CMUK).
3. A. Önder, “Ceza Muhakemeleri Usulü Hukukunda Şahitlikten Çekinme Hakkı,” IHFM XXIX, no. 4 (1963): 4, 876–932; T.T. Yüce, *Meslek Adamının Tanıklıktan Çekinme Hakkı* (YD 1980/ VI, 1–2), 51–62; K. İçel, *Gazetecilerin Tanıklıktan Çekinme Hakları* (Ceza Hukuku ve Kriminoloji Mecmuası, Cilt 1, sayı 1), 37.

Chapter 3. Phases of the Penal Process

§1. PHASES AND SECTIONS OF THE TURKISH PENAL PROCESS

356. The Penal Procedure Code foresees a penal process in two phases (Article 2/1-e and f, CMK): the *investigation phase* (*soruşturma evresi*) and the *prosecution phase* during the court inquiry (*kovuşturma evresi*). German Law allows a phase in the criminal court proceedings where a decision about opening the trial session is made (*Zwischenverfahren*). There is no such phase under Turkish Law, but this decision is integrated into the first phase: the indictment submitted to the court must be approved by the same court (Article 175/1, CMK).

The *preparatory inquiry*, until 1985, was divided into two parts: the preliminary investigation (*hazırlık soruşturması*) and the judicial inquiry (*ilk soruşturma*). The judicial inquiry¹ was abolished in 1985; the preliminary investigation remains. Turkish legal theory divides the preliminary investigation into two parts: the “Initial Investigation” (*başlangıç soruşturması*) and the “Short Investigation” (*kısa soruşturma*). At the moment the public prosecutor issues an official charge against the accused by a written indictment or a warrant of arrest from a magistrate, the Initial Investigation ends and the Short Investigation begins.²

Between the “investigation phase” and the “prosecution phase,” there is an “intermediate phase”, which consists of a decision-making about the admission of the charges (Article 174, CMK). This “intermediate phase” starts with the submission of the indictment to the court, and ends when the court makes a decision on admitting the case to go to trial (Article 175/1, CMK). The court is also entitled to reverse the indictment (Article 174, CMK).

The *court inquiry* is divided into three parts: “Preparation of the Trial Session,” “Course of the Trial” and “Conclusion of the Final Judgment.”

1. A. Önder, *Die Gerichtliche Voruntersuchung im Türkischen Strafverfahrensrecht* (Münster, 1955).
2. Kunter & Yenisey & Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), 1181.

§2. THE PREPARATORY INQUIRY: INVESTIGATION PHASE

I. Characteristics

357. The Code calls the first phase of criminal process the “investigation phase” (Article 160, CMK). Investigations during the preparatory inquiry are written, non-adversarial and, in principle, secret (Article 157, CMK). However, the attorney of the accused is entitled to see all the records in the file and make free copies of them (Article 153, CMK).

All legal interactions conducted during the investigation and prosecution shall be recorded, signed, with complete identification of the participants (Article 169/2, CMK). In crimes against the state and in terror crimes, however, the complete identity of law enforcement officers shall be replaced by their service numbers (Article 169/7 CMK, included by Law No. 2014-6526 after the terrorism courts were abolished).

II. The Beginning of the Preliminary Investigation

358. When a public prosecutor is informed of the occurrence of a crime, he is required to undertake an investigation in order to determine whether there is a necessity for commencing a prosecution (Article 160/1, CMK). According to these rules, the preliminary inquiry begins when the public prosecutor or the police start to investigate a case.¹ The police must investigate upon the order of the public prosecutor, and even in urgent cases they have no power to begin an investigation on their own initiative. According to Article 332 of the Turkish Penal Procedure Code, there is an obligation to answer, within 10 days, the written questions of the public prosecutor related to matters of investigation. If a civil servant fails to do so, he or she can be punished (Article 257, Penal Code).

1. B. Öztürk, *Ceza Muhakemesi Hukukunda Koğuşturma Mecburiyeti, Hazırlık Soruşturması*, 9. Bası (Ankara: Eylül Üniversitesi, 1991), 52.

359. Under Turkish Law, private individuals are not obliged to report a criminal offense. However, there are some exceptions to this rule. It is a crime not to report a crime that is presently being committed (Article 278/1, TCK); it is as well with regard to a crime already committed, in which there are still consequences that could be minimized upon the reporting of it (Article 278/2, TCK). State officials must report criminal offenses they have learned of that relate to their duties. Failing to do so is a crime (Article 279, TCK).

The identity of the person who gives information to the police may not be kept secret from the accused. Since it is not mentioned in the Code of Penal Procedure, Turkish scholars are of the opinion that the police must reveal the identity of the informant to the accused.¹

There are some provisions in the field of crimes against the State and profit-oriented organized crime (*infra*, paragraph 381) that give the judge discretion to keep the identity of the witness out of the court records (Article 58/2, CMK; Article 20, TMK). Informants and investigators are also protected.

1. O. Tosun, *Türk Suç Muhakemesi Hukuku Dersleri, Muhakemenin Yürüyüşü*, 2. Cilt (İstanbul, 1976), 13.

III. The Right to Prosecute

360. In the Turkish system of Penal Procedure, the public prosecutor has a duty to prosecute criminal cases (Article 170/2, CMK), however there are some recent exceptions to this rule (Article 171, CMK) (*infra*, paragraph 372).¹

The public prosecutor does not have a monopoly on prosecution. The Treasury and some other agency officials are also competent to prosecute.² Private individuals who have been injured through crimes may intervene in a criminal case (Article 237, CMK).

The Prosecutor's Office is a hierarchical institution under the Ministry of Justice (*supra*, paragraph 306); however the Prosecutor's Office conducts investigations independently. The use of personnel in the Prosecutor's Office is interchangeable, with one prosecutor being easily substituted for another.

The public prosecutor attached to the Court of Cassation is designated the Attorney General. However, the Minister of Justice, by a "written order," can ask him to make an "extraordinary appeal by way of Cassation" (*infra*, paragraph 421) to the Court of

Cassation (Article 309, CMK).

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 444.
2. Y. Hızlı, *Türk Vergi Hukukunda Kaçakçılık Suçu* (Ankara, 1984), 20; K. Mutluer, *Vergi Ceza Hukuku* (Eskişehir, 1979), 5.

361. Public prosecutors have jurisdiction over investigations related to offenses committed within the local district of the Court of First Instance (Article 12, CMK). If that court does not have jurisdiction over a specific case, the prosecutor also has no jurisdiction to prosecute.

IV. Conditions of Criminal Prosecution

362. The public prosecutor may only bring a case to the court of competent jurisdiction if the conditions of the criminal prosecution required by law are present. For example, some offenses can only be prosecuted upon the complaint of the injured person or with the permission of the authorized State office.¹

Furthermore, immunities (*supra*, paragraphs 92-98) are obstacles to prosecution. In such cases, the prosecution depends on the fulfillment of the precondition that the complaint has been made or permission has been obtained, or that parliamentary immunity has been lifted by the Parliament.²

1. N. Kunter, *Şikayetin Mevzuu*, IHFM (1950), 460; T. Taner, *Ceza Muhakemeleri Usulü*, 3. Bası (İstanbul, 1955), 94; D. Tezcan, "Türk Hukukunda Diplomatik Yargı Bağışıklığı," BMTDY (1985): 141; B. Öztürk, *Uygulamalı Suç Muhakemesi Hukuku*, Cilt 1, 9 (Ankara: Eylül Üniversitesi, 1987), 25.
2. Kunter & Yenisey & Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), 650.

V. Closing of the Preliminary Investigation

363. The public prosecutor concludes the preliminary investigation as soon as the level of information is sufficient to enable prosecution. Only the public prosecutor has the discretion to decide whether the investigation is complete.¹ The public prosecutor must be satisfied with the outcome of the investigation. There is no direct review of this decision. The lawyer for the accused, during the preliminary investigation, has had the right to consult the file with no limitation (Article 153 CMK, as amended by Law 2014-6526). In this indirect way, the defense has gained a measure of control over the situation.

If the public prosecutor considers that additional investigations should be undertaken in a given case, he may order the police to conduct further investigations.

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 442. T. Kitapçioğlu, *Ceza Muhakemesi Hukukunda Soruşturmanın Sonuçlandırılması*, Legal, İstanbul 2014,

364. For closing the preliminary investigation, there are four options:

- (1) The public prosecutor may decide to drop the prosecution (*infra*, paragraph 365).
- (2) He may prepare an indictment (*infra*, paragraph 373) for the appropriate court if it appears that there is sufficient evidence against the accused.
- (3) For crimes prosecuted upon the claim of the victim and that carry imprisonment of

less than one year, he may suspend the opening of the public case for five years (Article 171/2, CMK) (*infra*, paragraph 372).

(4) He may also consider his own subject matter jurisdiction (*supra*, paragraph 301) or the existence of a preliminary dispute such as venue (*supra*, paragraph 302). If he concludes that such facts exist, he may temporarily stop the prosecution. In such cases, the file will be sent to the competent district or court.

A. Dropping the Prosecution

365. If no criminal offense was committed, if there was insufficient evidence or if the right to prosecute no longer exists, the Public Prosecutor may decide to drop the prosecution (Article 172, CMK).¹

An investigation must be re-opened within three months if the ECHR finds that the decision for non-prosecution has been taken as a result of an ineffective investigation.

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 485.

366. *Dropping the prosecution under the principle of opportunity.* When it came into force in 2005, the Turkish Penal Procedure Code did not allow the prosecutor to suspend the prosecution under certain conditions.¹ There was only the possibility to have discretion whether to prosecute or not. In cases where the requirements for the application of the provisions of effective remorse, that "lift the punishment as a personal ground" (e.g., Article 221/2, TCK), or the provisions of "personal impunity" (e.g., Article 22/6, TCK) are met, the public prosecutor may render the *decision that there is no ground for prosecution* (Article 171/1, CMK). In such cases, where the public prosecutor has utilized the power of discretion on the issue of not bringing a public claim, opposition against the decision of the public prosecutor is not admitted (Article 173/5, CMK). The 2006-5560 legislation broadened this provision (*infra*, paragraph 372).

1. The only example under the repealed Penal Code was that of the kidnapper who married the girl he kidnapped. He could only have been prosecuted after the marriage was abolished and after being found at fault (Article 434, repealed TCK).

367. *End of the right to prosecute; Statute of limitations for prosecution.*

I - Loss of right to prosecute.

If the State has lost the right to prosecute, the public prosecutor may not proceed. Some of the causes that end the right of prosecution or set aside punishments (*infra*, paragraph 452) are contained in the Penal Code. These include: death of the accused, amnesty, statute of limitations, withdrawal of the complaint¹ and friendly settlement by the way of mediation (accused pays all losses and fines) (*infra*, paragraphs 272, 274).

The death of the accused terminates public prosecution (Article 64, TCK). Amnesty (*infra*, paragraph 454) terminates public prosecution and sets aside the punishment together with all its consequences (Article 65/1, TCK). A pardon sets aside, reduces or changes the punishment (Article 65/2, TCK). Where initiation of legal prosecution for an offense is subject to the injured party filing a complaint, the public prosecution shall be discontinued if the injured party waives his complaint (Article 73, TCK). According to Article 7/1 of TCK, no one may be punished for an act that, although a felony or misdemeanor at the time of its commission, is no longer such under subsequent law. In

this case, if a punishment has been already imposed, it shall not be executed.

II - Statute of limitations for prosecution.

Statute of limitations for prosecution implies that the duty (and even the right) of the State to prosecute a perpetrator expires after a certain lapse of time.

1) Exceptions.

With the exception of some very serious crimes, all crimes are subject to the statute of limitations.² These serious crimes include: crimes committed abroad against the Turkish nation and State (Articles 247-345, TCK) carrying aggravated life imprisonment, or life imprisonment or a prison term of more than 10 years (only *statute of limitation for prosecution* is exempted; Article 66/7, TCK); genocide (Article 76/4, TCK); crimes against humanity (Article 77/4, TCK); organized crime of genocide and crimes against humanity (Article 78/3, TCK); and military high treason (Article 49/B, Military Penal Code).

2) Time Limits.

The time limits for the prosecution of crimes depend on the seriousness of the crime (Article 66/1, TCK), where the maximum imprisonment term shall be taken into account. The court takes them into consideration *ex officio* (Article 72/2, TCK).

The statute of limitations applies the following system (Article 68/1, TCK):³ Crimes for which the law imposes aggravated life imprisonment become statute-barred after 40 years (Article 68/1-a, TCK); crimes for which the law imposes life imprisonment become statute-barred after 30 years (Article 68/1-b, TCK); crimes for which the law imposes 20 years or more of imprisonment become statute-barred after 24 years (Article 68/1-c, TCK); crimes for which the law imposes imprisonment of more than five but less than 20 years become statute-barred after 20 years (Article 68/1-d, TCK); crimes for which the law imposes up to five years imprisonment or judicial fine become statute-barred after 10 years (Article 68/1-e, TCK).

There are special regulations for children who have been taught to commit crimes; if the child was in the age group of 12–15 when the crime was committed, time limits in the statute shall be discounted by half; if the child was in the age group of 15–18, by two-thirds (Article 66/2, TCK).

3) Statute of Limitations for Misdemeanors.

The special Act for Misdemeanors (Articles 20–21, KK)⁴ sets time limits for prosecution: five years for misdemeanors carrying an administrative fine of 100,000 TL and more (Article 20/2-a, KK); four years for misdemeanors carrying an administrative fine of 50,000 TL and more (Article 20/2-b, KK); three years for misdemeanors carrying an administrative fine of less than 50,000 TL (Article 20/2-c, KK); eight years for misdemeanors carrying an administrative fine depending on the seriousness of the deed (Article 20/3, KK).

If the misdemeanor at the same time constitutes a crime, the statute of limitations for prosecution of crimes applies (Article 20/5, KK).

Time starts to run when the act as defined as a misdemeanor has been committed or the

result of this act had occurred (Article 20/4, KK).

4) Beginning Point of Time Limit for Prosecution.

For completed crimes, time begins to run on the date of the commission of the crime; for attempted crimes, on the date of perpetration of the last criminal act; and for continuing and successive (continued) crimes, on the date when the last crime was committed (Article 66/6, TCK). If there are several crimes committed by the accused, the statute of limitations for prosecution shall be determined according the existing evidence in the file, regarding the reasons for aggravating the punishment (Article 66/3, TCK).

For crimes committed against children by their parents or by a person who has oversight of this child, the period indicated in the statute of limitations starts when the child attains 18 years of age (Article 66/6, TCK). There is a special regulation related to marriage: the time limit for prosecution shall start to run from the final judgment on the annulment of the wrongful marriage (Article 230/4, TCK).

The provision in the Penal Code applies to retrials: if there are grounds for re-opening of a trial (Article 311, CMK), and the competent court gives a decision about giving leave to the request of re-opening (Article 318, CMK), then the time for prosecution for that particular crime starts to run de novo (Article 66/5, TCK, as amended by Act 2005–5377).

5) Suspension of Statute of Limitations.

In cases where initiating an investigation or prosecution depends on the permission or decision of another organ (e.g., in cases of discrediting Turkish Nation, etc. the investigation shall be suspended until the the Minister of Justice makes a decision on permission; Article 301/4, TCK), or if the suspect is a fugitive and there is a decision about his status (Article 247, CMK), time limits for prosecution are suspended until this obstacle has been lifted (Article 67/1, TCK). There are other examples of suspension of the running of the statute of limitations, such as *prosecution of members of the Parliament* (Article 83/3, AY); *of soldiers* for alleged crimes carrying imprisonment up to two years (Article 20/1, 5, AsCK), until the end of the office. In case of *delay of payment of mediated damages* (Article 253/19, CMK); *suspended prosecution* (Article 171/2, CMK) and *delayed announcement of the judgment* (Article 231/5, CMK), the statute of limitations shall be tolled.

6) Interruption of Statute of Limitations.

The time period mentioned in the statute of limitations is interrupted (*zamanaşımının kesilmesi*) upon: the interview by the public prosecutor or questioning⁵ by the judge of one of the suspects or accused (Article 67/2-a, TCK); the issuance of a pre-trial arrest warrant⁶ against one of the suspects or accused (Article 67/2-b, TCK); the preparation of an indictment related to a crime (Article 67/2-c, TCK); and the judgment of conviction against at least one of the accused (Article 67/2-d, TCK).⁷

In cases where the statute of limitations period has been interrupted, the time for prosecution starts to run again but may be extended by one-half the amount of the time limit as foreseen in the law for this particular crime (Article 67/4, TCK). If there is more than one ground for interruption, the last one will be taken into account (Article 67/3, TCK).

1. If the person who is authorized to put forward a claim because of the crime (*suç hakkında yetkili olan kimse*) does not demand prosecution (*şikayette bulunmama*) within six months, no investigation and prosecution can be started (Article 73/1, TCK). If the claimant who was injured by the crime (*suçtan zarar gören*) withdraws his claim (*şikayetten vazgeçme*), the case is dismissed (Article 73/4, TCK). In such cases, the consent of the accused is required (Article 73/6, TCK). However, if the withdrawal occurs after the judgment has become final, this does not affect the execution of the penalty. Individuals who have suffered losses because of the crime cannot file a civil claim if they had explicitly declared, while withdrawing the claim in view of prosecution, that they would not enforce their personal rights (Article 73/7, TCK).
2. T. Demirbaş, *Ceza Hukuku Genel Hükümler* (Ankara: Seçkin, 2002), 627.
3. According to the repealed Penal Code, crimes for which the law imposed the death penalty and lifelong imprisonment became statute-barred after twenty years. Crimes for which the law imposed at least 20 years of imprisonment became statute-barred after 20 years. Crimes for which the law imposed imprisonment of more than five but less than twenty years became statute-barred after 20 years. Crimes for which the law imposed not more than 20 years or fine provided for imprisonment became statute-barred after twenty years. Crimes for which the law imposed more than one month light imprisonment or more than 30 TL light fine became statute-barred after two years. All other punishable acts were statute-barred after six months (Article 102, repealed TCK).
4. According to the repealed Penal Code, which did include misdemeanors, crimes for which the law imposed more than one month light imprisonment or more than 30 TL light fine became statute-barred after two years. All other punishable acts were statute-barred after six months (Article 102, repealed TCK).
5. The questioning by the judge after the judgment has been reversed by the Court of Cassation is not considered as a ground for interruption of the statute of limitation.
6. An arrest warrant issued by a foreign court based on Interpol request of Turkish authorities shall interrupt the statute of limitation (S. Tellenbach, "Begnadigung, Amnestie, Aufhebung der Strafbarkeit in der Türkei," in *Nationales Strafrecht in rechtsvergleichender Darstellung, Teilband 5*, ed. Sieber & Cornils (Berlin, 2010), 709).
7. Time started to run on the date of the perpetration of the last criminal act, and for continuing and successive offenses on the date the situation ended or the series of successive offenses ended (Article 103, repealed TCK).

368. *Mediation, pre-payment of a criminal fine and suspended prosecution.*

I - Mediation.

Mediation was regulated in the Penal Code, as one of the grounds for dismissal of a case (Article 73, TCK). The amendment in 2006 repealed this provision. However, an agreement on mediation leads to dropping of a criminal investigation and bars prosecution, if the losses of the victim are compensated to the full extent (Article 253, CMK) (*supra*, paragraph 274).

II - Pre-payment of criminal fine.

According to Article 75 of TCK, save for crimes that fall under the procedure of mediation, the public prosecutor *must* offer to an accused for any offense punishable by a fine, or by imprisonment of not more than three months, a friendly settlement order on pre-payment of a judicial fine (*supra*, paragraph 272).¹ If the accused pays the proposed fine, the prosecution must be dismissed.² If the accused does not pay the fine, then the prosecutor may prosecute.³ If an offense subject to friendly settlement comes to the court by mistake, then the court must offer the accused an opportunity to pay the fine before proceeding to trial.

III - Suspended prosecution and delayed announcement of judgment.

In cases of “suspended prosecution” under Article 171/2 CMK, if the suspect fulfills the requirements and obligations imposed on him by the Public Prosecutor, there shall be no prosecution and the case shall be dropped. The same effect of “dropping the prosecution” is achieved under the “delayed announcement of the judgment” (Article 231/2, CMK), if the accused cooperates with the court-ordered obligations (*infra*, paragraph 366).

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 462.
2. Unifying decision of Court of Cassation Apr. 11, 1983, 2/2, Savaş – Mollamahmutoğlu, TCK Yorumu, 1677.
3. K. İçel et al., *İçel Yaptırım Teorisi*, 3. Kitap (İstanbul, Beta, 2000), 430.

369. According to Article 66 of TCK, the prosecution will be dismissed upon the lapse of the time periods (*infra*, paragraph 455) provided by the Code.¹ If the punishment was set aside due to a lapse of time pursuant to the Code, the right to prosecute ends.

1. N. Kunter, *Ceza Davası Zamanaşımının Durması*, IBM (1948/IV), 178.

370. According to Article 223/7 of the Turkish Code of Penal Procedure, a final judgment of a criminal court bars further prosecution for the same crime against the same person. A second case will not be admitted. Generally, the final decisions of the Turkish courts, as well as the final decisions of foreign courts, have the same effect. In cases of illegal drug exportation from Turkey, if the offender was tried by a foreign court, the Court of Cassation will not apply the *ne bis in idem* rule (*supra*, paragraph 85), and it will consider the crime as committed in Turkey through application of Article 3 of TCK.¹

1. F. Yenisey, *Milletlerarası Ceza Hukuku, Ceza Yargılarının Milletlerarası Değeri ve Mevzuatı* (İstanbul: Beta, 1988), 245.

B. Objection to Dropping Prosecution

371. If the public prosecutor decides to drop the prosecution, and new evidence surfaces, the injured party who had filed the complaint of the crime to the Prosecution Office has the right to seek a decision of the *justice of the peace* at nearest Court of Assize by means of an objection (Article 173, CMK as amended by Law No. 2014-6545), (Article 172/2, CMK). Facts and proof that justify the opening of an official claim must accompany the objection (Article 173/2, CMK). The requirement that the petition must be signed by an attorney has been repealed.

If the grounds set out in the petition are not sufficient to justify the commencement of a public prosecution, the *justice of the peace* at nearest Court of Assize will refuse the petition. After such a refusal, a public prosecution may only be opened if there are newly discovered facts or new evidence, and the Court of Assize has rendered a decision in this respect (Article 173/6, CMK).

If the *justice of the peace* at nearest Court of Assize is of the opinion that the petition is valid, he will order the commencement of a public prosecution. The Public Prosecutor must comply with this decision (Article 173/4, CMK).

C. Suspension of Prosecution under Some Conditions

372. *Suspension of prosecution.* Under the Turkish Penal Procedure Code the

prosecutor may suspend the prosecution under certain conditions for crimes that are prosecuted upon the claim of the victim and are punished with imprisonment by up to one year (Article 171/2, CMK). Crimes that fall under the mediation procedure are an exception.

In order to suspend the prosecution, the following requirements have all to be fulfilled:

- the suspect has not been convicted previously with an imprisonment;
- the conducted investigation reveals that in case of a non-prosecution, the suspect will refrain from committing further crimes;
- that the suspension of prosecution is more in favor of the society and of the suspect, if compared to a prosecution;
- the losses of the victim or society may be recovered to the full extent (Article 171/3, CMK).

Furthermore, the public prosecutor is entitled to stop the prosecution only when the conditions of criminal prosecution (*supra*, paragraph 362) have not been met and there is no possibility that they will be fulfilled.

D. Bill of Indictment: Approval and Reversal of Indictment

373. The public prosecutor must prosecute (with few exceptions) if there is sufficient evidence of a crime. The principle of legality forces the prosecutor to do so, with a few minor exceptions (Article 170/ 2, CMK). If the Prosecutor is of the opinion that there are sufficient grounds for commencement of a public prosecution, he prepares a Bill of Indictment and submits it to the court (Article 170, CMK). When the Bill of Indictment is ready and is signed by the authorized prosecutor, then the court that shall decide on the merits of the case, shall investigate the validity of the indictment and rule to approve it (Article 175/1, CMK). Thus the prosecution of the official case begins. At the same time, an inquiry in court begins as well (*supra*, paragraph 358).

The Bill of Indictment must contain a description of the relevant offense and should describe the facts and circumstances that may increase or reduce the punishment. The identity of the accused must also be mentioned (Article 170, CMK); if not, it may be reversed by the court (Article 174, CMK).

374. *Return of indictment.* Since 2005, the court is entitled to return an indictment under the provisions of Penal Procedure Code.¹ The trial court shall examine the whole document related to the investigation phase within 15 days of the delivery of the indictment and investigation documents, and in cases where the following missing parts and errors are discovered, shall return the indictment with a decision thereof, describing them and returning it to the public prosecutors' office:

- (a) The indictment was produced in violation of the provisions of Article 170 CMK.
- (b) The indictment was produced without collecting evidence that would prove the crime with certainty.
- (c) The indictment was produced in crimes that are, according to the file of investigation, clearly falling under the provisions of “the settlement of the case on the payment of the fine,” or “mediation,” without applying these mentioned procedures

(Article 174, CMK).

The indictment shall not be returned because of errors in the legal description of the crime.

In cases where the indictment has not been returned within the 15-day time limitation, as indicated in subsection one of Article 174, it shall be considered as accepted.

If an indictment has been returned, the public prosecutor shall complete the missing points and correct the errors as shown in the decision and if there is a no situation that requires the issuing of a decision to not prosecute, he shall issue a new indictment and send it to the court. The indictment shall not be returned again based on reasons that had not been indicated in the first decision.

A public prosecutor may file a motion of opposition against the decision to return the indictment.

Very few indictments were rejected by the courts, which sometimes led to trials taking longer, as evidence had still to be collected. All of this also applies to high-profile cases.

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 489.

§3. THE INQUIRY IN COURT

I. General Characteristics

375. The inquiry in court is public and adversarial. During the trial, all procedural transactions are submitted orally, and the court examines the accused, witnesses and experts.¹ The Judge has an active role in the inquiry in court, and he must have direct access to all evidence. The trial is held without interruption in the presence of the judges who will formulate the judgment of the court, but it may be interrupted for a reasonable time (Article 190/1, CMK). The trial is conducted in the presence of the accused (Article 193/1, CMK). There are some exceptions to this rule if the crime is punishable by judicial fine or confiscation (Article 195, CMK).

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 617.

376. The court must give its opinion on the facts directly and immediately. All the proceedings conducted in the preliminary investigation should be repeated in court and are open to the parties' criticism. A confession from the accused to the police where his lawyer was not present is not considered evidence if he revokes it (Article 148/4, CMK). In reality, however, the court relies to a great extent on the file prepared during the preliminary investigation, and it only makes further investigation if there are some discrepancies in the testimony or proffered evidence.

377. The inquiry in court is public (Article 182, CMK). However, in cases involving public morals or public security, the whole trial or a part thereof may be held in closed session. The court has discretion to decide whether the inquiry shall be public or not, and this decision will be declared in a public session (Article 182/ 2, CMK). The decision on a closed inquiry and the final judgment of the court will always be declared in a public session (Article 182/3, CMK). In such cases, the verdict will be pronounced in an open session (Article 182/3, CMK).

There is an obligation to hold a closed session if the case involves a child under 18

years of age. In such cases, the verdict will be pronounced in a closed session (Article 185, CMK).

Publication of trials conducted in closed sessions is forbidden (Article 187/2, CMK; Article 19, BasK). Publication of the contents of an open trial may also be forbidden by a decision of the court, if it is against national interests, or if it is of a nature that may provoke the committing of crimes, etc. (Article 187/3, CMK).

There is a restriction on voice and image recordings at the court buildings and within the court room (Article 183, CMK).

378. The rules that govern the procedures of different criminal courts are generally the same. For Military Courts, however, there is a special Code of Criminal Procedure (Act No. 353). There are slight differences between the procedures in courts dealing with serious crimes (*supra*, paragraph 298-III) and the procedures in the Peace Court. In addition, the structures of the courts are different. An indictment was not served on the accused by the Peace Court prior to 1999 (Article 208/2, repealed CMUK). The Constitutional Court repealed this provision and required service.¹

1. Decision of the Constitutional Court dated July 14, 1998, E. 1997/41, K. 1997/47, RG. Mar. 24, 1999/ No. 23649.

379. Formerly the Justice of the Peace was entitled to order a sanction directly if the crime was within the jurisdiction of the Peace Court (Article 386, repealed CMUK). This power of the “Penal Order of the Peace Court” was limited to fines, light imprisonment up to three months, prohibition from exercising a profession and confiscation of goods, whether as single sanctions or all at once.

The Penal Procedure Code does not include the penal order of the Peace Court.¹ Rather, there are other new legal concepts in the field of minor crimes, such as mediation (Article 253, CMK; *supra*, paragraph 274), suspension of prosecution (Article 171/2, CMK; *supra*, paragraph 372), delayed announcement of the judgment (Article 231/2, CMK; *infra*, paragraph 397-II) and suspension of imprisonment (Article 51, TCK; *supra*, paragraph 283).

1. Light imprisonment was to be turned into a fine (*supra*, para. 267) according to the “Code of Enforcement of Punishments” (Article 386, repealed CMUK). The Justice of the Peace ordered the sanction in the form of a judgment of the court. In the “judgment,” he mentioned that the accused had the right to appeal this written penal order within eight days (Article 388, CMUK). If there was an appeal, the procedure required a trial inquiry. Only if the inflicted sanction was “light imprisonment” did the court make a public inquiry applying the general rules of trial sessions (Article 390/1, repealed CMUK). The defense attorney of the accused could be present in the sessions (Article 390/2, repealed CMUK). If the sanction was other than “light imprisonment,” the court decided the appeal in closed session and upon the file. The court that had jurisdiction in this matter was the President of the Court of General Jurisdiction, and the rules applied during this procedure were set out in Arts. 301, 302 and 303 of the repealed Penal Procedure Code (Article 390/3, repealed CMUK).

II. Inquiry in the Absence of the Accused’ and Fugitives’: Default Judgment (*in absentia* Proceedings)

380. Book 5, section 1 of the Turkish Code of Penal Procedure deals with the “Inquiry in the Absence of the Accused and Fugitives”, (Articles 244–248). The new provisions do not allow the court to render a judgment against the absent accused or fugitive, but

only to force him to appear before the court. If the accused has been questioned by the court once, however, the court may come to a judgment even if the accused does not appear at the later phases of the trial (Article 194/2, CMK).

I - Inquiry in the absence of the accused.

This legal instrument has been criticized by academics and is now restricted, but is also extended to “fugitives” (*infra*, II) by the recent legislation.¹ In criminal procedure, the word “absence” (*gaiip*) has a technical meaning. The accused is considered absent² if his whereabouts are not known or if he is in a foreign country and summoning him to a competent jurisdiction appears not possible or inappropriate (Article 244/1, CMK). In such cases, the Turkish criminal law no longer allows an inquiry in the absence of the accused,³ and the court only may conduct investigation in order to collect and preserve evidence (Article 244/2, CMK). The defense counsel or the spouse of the accused has the right of presence during such an investigation.

In such cases, the court publicly announces the accused’s obligation to appear (Article 245, CMK) and may grant him immunity from pre-trial arrest (Article 246/1, CMK). There is no immunity if the accused is convicted, imprisoned, and tries to escape (Article 246/2, CMK).

II - Inquiry in Absence of the Fugitives.

The new law has introduced a new legal concept: an individual who hides himself in Turkey or abroad in order to escape a prosecution pending against him is called *fugitive* (Article 247/1, CMK).

There are some crimes, listed in Article 248, CMK, where the court serves a summons to the known address of the accused against whom there is a prosecution pending. If the accused does not comply with the summons, the court can order his arrest. If this does not help, then the court may decide to publish in a newspaper that if he does not appear within 15 days, his belongings and rights within Turkey shall be seized temporarily (Article 246/2, CMK).

The court may render a pre-trial arrest warrant *in absentia*⁴ against the fugitive accused (Article 248/5, CMK), but may also grant him an immunity from pre-trial arrest (Article 246/1, CMK). Of course, such immunity loses its effect if the accused is convicted of a crime and sentenced to imprisonment or tries to escape (Article 246/2, CMK).

1. Kunter & Yenisey & Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), 1275; B. Öztürk, *Suç Muhakemesi Hukukunda Gaiplik ve Gaiplerin Muhakemesi* (İstanbul, 1984) 137; E. Yurtcan, *Tutuk Sanığın Varestede Tutulmuş Olması Durumunda Gıyabında Hüküm Verilmesi Yasaya Aykırı Değildir* (Yasa Hukuk Dergisi, 1978), 1185; Akın, *Gaiplerin Yargılanması, AdD* (1983/3), 473.

2. The accused was considered absent if his domicile was not known, if he was in a foreign country and summoning him to a competent jurisdiction appeared not possible or if it was strongly believed that a summons would not have a positive result (Article 269, repealed CMUK).

3. In the past it was possible to make a trial inquiry if the subject of the litigation was a crime that might be punished with a fine, confiscation of goods or both (Article 270/1, repealed CMUK).

4. This is an exception to the new rule, that the suspect or the accused must be present if the decision on pre-trial arrest is rendered (Article 101, CMK).

III. The Inquiry in Court of Assize and the Inquiry in Court of General Jurisdiction

381. The general Code of Penal Procedure is valid for all types of courts. Only a few exceptions are applied relating to the type of crime or the status of the accused. Different procedural rules to be applied at the courts dealing with organized crime are abolished in 2014 by Law no 6526 (repealed Article 10, TMK).

The inquiry in court is divided into three phases: preparation of trial session (*infra*, paragraph 382), the trial itself (*infra*, paragraph 383) and the conclusion of the trial with a judgment (*infra*, paragraph 395).

A. Preparation of Trial Session

382. For the preparation of the trial session, the President of the Court schedules a date for the inquiry (Article 175/2, CMK). There must be at least one week between the day on which the summons was served and the day on which the accused must appear (Article 176/4, CMK). The court (no longer the public prosecutor) sends the summons to the accused (Article 36, 176/1, CMK) and to his counsel (Article 176/3) to appear on the given date.

An indictment, together with the summons, shall be served on the accused (Article 176/1, CMK).¹

If the accused is not under arrest, there must be a notice of the trial date in the served summons. In this notice, the court mentions that the accused will be brought by force or be arrested if he does not appear at the trial (Article 176/2, CMK).

If the accused is in pre-trial detention, he will be summoned to the trial according to Article 35/3 of the Penal Procedure Code. If the accused is arrested he will be brought to the Court Clerk's room, where the Clerk has the duty to ask him if he requires defense counsel during the trial (Article 176/3, CMK).

The President of the Court has the right to subpoena witnesses, call experts or make further investigation of facts of the case at this stage (Article 180/2, CMK).

1. The indictment was not served in matters tried by the Peace Court (Article 208/2, repealed CMK). This regulation of the Code was criticized and was abolished in 1999.

B. Trial Session

383. The inquiry begins with checking whether the witnesses and experts are present.¹ After that, the identity and personal status of the accused is verified. Then the indictment is read, and the accused is questioned according to Article 147 of the Turkish Code of Penal Procedure (Article 191/2-c, CMK). During the reading of the indictment and questioning of the accused, the witnesses are not allowed to be present in the courtroom.

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, . Bası 7 (İstanbul, Beta, 2010), 631.

384. During the trial procedure at the Court of General Jurisdiction and at the Court of Assize, the prosecution must be present (Article 188, CMK). The accused is in principle obliged to be present (Article 193/1, CMK), but there are some exceptions to this rule.

All phases of final investigation (trial) are conducted in the presence of the defendant, including all formalities of procedure, especially the proof of guilt (Article 216, CMK). The Turkish Code provides for an exception only in cases where light sentences are

involved, that is, where the offense is punishable by confiscation alone or in combination with some other sanctions (Article 195, CMK); the trial may proceed even if the defendant does not appear in court.

A defendant may be excused from attending trial, except where the crime carries a serious punishment (five years of imprisonment at the lower level) (Article 196/2, CMK). If such motion is granted, and the defendant has not been questioned as to the principal facts of the case, then he must be questioned by letters rogatory (Article 196, CMK). If the punishment provided in the Penal Code for this crime is more than five years of imprisonment at the lower level, the accused must be present at the courtroom.¹

In addition, the defendant may send defense counsel in cases where the defendant's presence is not necessary (Article 197, CMK).

1. Cass. CGK Mar. 23, 2010 (2009/10–245-2010/62).

385. After the accused has been questioned, evidence is presented to the court (*infra*, paragraph 387). If the accused was not present, and he was not questioned, the presentation of the evidence is nevertheless not postponed.¹ The presented evidence will be explained to the accused when he returns (Article 200, CMK).

After each presentation of evidence or after hearing a witness, the public prosecutor, defense counsel and the *lawyer representing the victim* may ask direct questions to the accused, to any intervenor, to the witness and to the expert (Article 201, CMK). This is a new approach of the new Penal Procedure Code, to give leave to ask questions directly. The repealed legislation allowed only questions suggested to and posed by the presiding judge. When direct questions have been asked to each witness, the President of the Court asks the accused whether he has anything to say (Article 215, CMK).² This type of questioning is a kind of *cross-examination*.³

The Penal Procedure Code was amended in January 2013 to allow defendants to conduct their defense in a language of their preference other than Turkish at certain stages of the judicial process even if they can express themselves adequately in Turkish. In recent years, some accused Turkish citizens with Kurdish origin refused to talk Turkish during pending trials for political reasons, even though they are very fluent in Turkish language and had studied at Turkish educational institutions. Such political trials caused an amendment at Article 202 CMK by Law No. 6411 in 2013.

The new paragraphs added to Article 202 give to the accused an option to choose the language in which they can express themselves best. If the accused selects for his oral arguments any language other than Turkish, he must choose an interpreter from the list of certified translators. The cost of translation shall not be paid by the state.

When the presentation and discussion of evidence is complete, the public prosecutor, the injured (civil) party and the accused have the right to be heard. The public prosecutor has the right to respond to the accused and the accused and his attorney have the right to reply to the public prosecutor. The accused always has the right of the last word (Article 216/3, CMK). Even if the accused has a defense attorney, he personally has the right to the last word.

The trial ends with the issuing of the judgment.

1. A. Önder, *HUMK 150 ve CMUK 378, 379 ve 380. Maddeleri Muvacehesinde Tarafların, Avukatın ve Mudafin Söz Söyleme ve Savunma Serbestliği*, *AdD* (1948), IXL, 1034–1051; S. Alpaslan, *Anglo-Amerikan Hukukunda Mahkemeye Saygısızlık Suçu ve Türk Hukukundaki Durum*, *IHF* 1974/XL, 1–4, 243–287.
2. T.T. Yüce, *Alman ve Türk Ceza Muhakemeleri Usulünde Savunma Hakkı*, *AdD* (1960/11), 1017–1028.
3. A.E. Akyazan, *Karşılaştırmalı Hukukta ve Türk Hukukunda Doğrudan Soru Yönelme (Çapraz Sorğu)* (Ankara, 2009). G. Arıkan, *Çapraz Sorğu İçin Hazır mıyız?* (Ankara Barosu Dergisi sayı, 2005/4).

C. Evidence

1. Principles of Evidence Law

386. The main principles of evidence¹ are based on the Continental European system.² The court must undertake a complete investigation to determine the factual truth. The court is not dependent on the evidence of the prosecutor, the accused, or the other parties. Witnesses can also be called on the court's own initiative.

The court is obliged to explain the means of proof included in the verdict, as well as to provide the analysis used to include or exclude such proof (Article 230, CMK).

1. A. Parlar, M. Hatipoğlu & Y.E. Güngör, *Açıklamalı – İçtihatlı Ceza Muhakemesi Hukukunda Deliller Çapraz Sorğu ve İspat* (2005).
2. S. Belgesay, *Kanuni ve Takdiri Deliller ve Temyiz Mahkemesinin Delilleri Takdiri* (Ankara, 1938), 11; S. Belgesay, *Hukuk ve Ceza Mahkemesinde Deliller* (İstanbul, 1960), 7. I. Üzülmez, *Türk Hukukunda Suçsuzluk Karinesi ve Sonuçları* (Türkiye Barolar Birliği Dergisi, sayı 58 sayfa 41, Mayıs & Haziran 2005).

387. The accused is presumed innocent. As a consequence, there is no obligation for him to prove that he is innocent. In contrast, the judge has the obligation to search for the factual truth, and only if he is convinced that the accused is guilty may he convict him. Thus, neither the public prosecutor nor the accused has the burden of proof in Turkish Law. If the accused or the public prosecutor points out any factual aspect that is necessary to decision during the course of criminal proceedings, the trial court has the obligation to determine the factual truth.

A defendant can never be under a duty of self-incrimination; the right to remain silent is guaranteed (*supra*, paragraph 353).

388. Law does not define the means of proof. Everything may be considered as evidence insofar as it is reasonable. The court considers the evidence freely in order to discover the factual truth. There is a “freedom of evidence.” However, that evidence should have been obtained lawfully (Article “2001–4709” 38, AY; Article 217/2, CMK) (*infra*, paragraph 394), and the concerned parties should discuss all the evidence during trial.

389. The judges may use only the evidence, documents and statements presented and discussed at the open trial to reach their conclusions and form the judgment of the court (Article 217/1, CMK).

Judicial presumptions are not accepted in Turkish Criminal Procedure.

2. Means of Proof

390. *Physical evidence.* Official police reports of the interrogation of the accused are not considered evidence in court. Only the written record during the hearing before the judge may be considered evidence (Article 209, CMK).¹ However, some special codes (e.g., Article 119, KTK) give the police the right to make some drawings of the scene of the crime. In such cases, the official police reports acquire the character of evidence.

1. Kunter & Yenisey & Nuhođlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), 1392.

391. *Witness.*

I - The testimony of witnesses.

Testimony in court is considered evidence.¹ There is no age limit for a witness in Turkish Criminal Procedure Law. However, the accused is not entitled to give testimony as a witness on his own behalf.

Eyewitnesses to a crime have a duty to testify. However, the law provides that the family members of the accused may refuse to act as witnesses (Article 45, CMK).

The President of the Court has the right to question witnesses (Article 59, CMK). The accused and the parties may also directly ask a specific question to the witness (Article 201, CMK). The President has discretion over such requests. There is now a possibility of direct examination and cross-examination of witnesses by the defense lawyer and the public prosecutor; so far, however, this provision is rarely applied.²

Informers who give testimony about individuals attempting to endanger the constitutional order of the State will be rewarded, and their identity will be kept secret during the trial (Article 58/2, CMK; Added Article 1 of Act No. 1481, dated August 15, 1971). Statements of anonymous witnesses are permitted in some cases, for example by Article 19/4 the Combating Smuggling Act 2007.³

A scientific expert⁴ is considered a witness; his scientific opinion is not a witness testimony, but an explanation of factual findings (*infra*, paragraph 393).

II - Witness protection.

There is a Witness Protection Act since 2007, Act No. 5726.⁵ Witnesses of crimes carrying punishment of more than 10 years of imprisonment and more than two years imprisonment of organized crimes as well as all kind of terror crimes may be protected (Article 3, Act 2007–5726).

1. Kunter & Yenisey & Nuhođlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), 1346.
2. The European Court of Human Rights found in the *Sadak and Others* Judgment of July 17, 2001 that the accused having no opportunity to ask questions of a witness who made statements against them during the preliminary investigation was a violation of Article 6.
3. S. Erman, *Kaçakçılık* (İstanbul, 1981), 616; Gökçe, *Cezada Kanıt Deđerlendirmesi* (Yasa Hukuk Dergisi, 1979), 520; S. Selçuk, *Kanıtların Toplanması* (YD 1977/3), 57.
4. Y. Deryal, *Türk Hukukunda Bilirkişilik* (2004).
5. A.E. Akyazan, *Türk Hukukunda Tanıkların Korunması* (Ankara: Afşarođlu Matbaası, 2010).

392. The confession of the accused is generally considered a ground for mitigated

punishment. Some special legislation contains provisions about either not punishing or mitigating the punishment of the accused, if the confession would be useful in solving the crime (Articles 93, 110, 168, etc., TCK).

393. *Expert opinion* is not considered evidence in Turkish Law.¹ According to the Code of Penal Procedure, the court must ask the opinion of the scientific expert if the matter relates to technical points or to special knowledge (Article 62, CMK). It is forbidden for the court to ask experts their opinion about matters related to law.²

1. Kunter & Yenisey & Nuhuğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), 1397; N. Gürelli, *Türk Ceza Muhakemesi Hukukunda Bilirkişilik* (İstanbul: İstanbul Üniversitesi, 1967), 95.
2. N. Gürelli, *Ceza Muhakemesinde Bilirkişilik Kurumuna İlişkin Meseleler* (İstanbul: Doğanay Armağanı, İstanbul Üniversitesi, 1982), 65; S. Dönmezer, *Mecburi Ehlihibre*, IHFM.X, 1–2, 415.

3. Exclusion of Evidence

394. The exclusionary rule did not exist in Turkish Penal Law until 1992. This deficiency in Turkish Law was much criticized by scholars.¹ According to the repealed Turkish Code of Penal Procedure (Article 254/2, CMUK as amended in “1992–3842”) “illegally obtained evidence by investigating and prosecuting authorities would be disregarded when reaching a verdict”; it was thus “excluded.”²

The concept of the exclusionary rule³ was broadened in 2001 by adding a subparagraph to the Constitution: “Items obtained in violation of an Act, may not be used as evidence at court” (Article 38/7, AY “2001–4709”).

The new Penal Procedure Code also includes provisions in this respect, but the wording is slightly different: “The court may only use legally obtained evidence while making a decision on the guilt” (Article 217/2, CMK). Illegally obtained evidence may not be put forward during the discussions at the main trial (Article 206/ 2-a, CMK), and the court has to dismiss such evidence, furnishing reasoning for exclusion (Article 230/1-b, CMK). If any illegally obtained evidence has been used to form the judgment, the Court of Cassation will overrule the verdict (Article 289, CMK).

As a result of these regulations, even the slightest breach of a “law” or “act” will result in the exclusion of evidence.⁴

If forbidden interviewing methods (*supra*, paragraph 354) were used, the statement or confession obtained as a result of such methods is excluded by the Code. The consent of the interviewed person does not cure the illegality (Article 148, CMK; Article 135a/2, repealed CMUK as amended in “1992–3842”).

1. O. Tosun, *Ceza ve Medeni Muhakeme Hukuku Açısından Hukuka Aykırı Yollarla Elde Edilen Delillerin İspat Kuvveti* (İstanbul, 1976), 12; Bıyıklı, *Ceza Muhakemesi Hukuku ve Kanıtların Toplanmasında Doğruluk Kuralı* (YD 1977/III), 85; F. Erem, *Usul Hiyleleri* (YD 1977/III), 171; S. Selçuk, *Kanıtların Toplanmasında Yasallık, Dürüstlük ve Total Ceza Adaleti* (YD 1977/3), 113.
2. O. Gürakar, *Ses ve Görüntü Kayıtlarının Delil Değeri* (Prof. Dr. Çetin Özek Armağanı, Galatasaray Üniversitesi Yayını, 2004). V. Bıçak, *Improperly Obtained Evidence: A Comparison of Turkish and English Laws* (Ankara: Yardımcı, 1996). V. Bıçak, *Usulsüz Ulaşılan Delillerin Akıbeti*; <www.bilkent.edu.tr>, 2005.
3. B. Öztürk, *Yeni Yargıtay Kararları Işığında Delil Yasakları* (Ankara, 1995); V. Bıçak, *Improperly Obtained Evidence* (Ankara, 1996); S. Kaymaz, *Ceza Muhakemesinde Hukuka Yıkırı (Yasak)*

Deliller (Ankara, 1997); Kunter & Yenisey & Nuhoglu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18 (Bası, İstanbul, 2010), 1411.

4. E. Şen, *Türk Ceza Yargılaması Hukukunda Hukuka Aykırı Deliller Sorunu* (İstanbul, 1998).

D. Conclusion of Trial and Judgment of the Court

395. After conducting the inquiry according to regulations (*supra*, paragraph 382) as prescribed by the Code, the President of the Court announces that the inquiry is completed and concludes the session (Article 223/1, CMK). Afterwards, the court holds a closed session in private chambers to discuss the outcome of the inquiry.

There is no jury in Turkish Criminal Law, not even in the Court of Assize. Therefore, there is no distinction between the verdict and the sentence. Before reaching the judgment, the court must decide whether the proven facts constitute a criminal offense. If not, the accused will be acquitted. If the court decides that it has been proven that the accused committed a crime, and there are no grounds to justify the acts, the accused is pronounced guilty and convicted. Afterwards, the court determines (*supra*, paragraph 248) the punishment.

E. The Categories of the Judgments of the Trial Court

396. The trial court may issue the following categories of judgments¹ at the end of the trial: “*acquittal*” (Article 223/2, CMK); “*no ground for punishing on the grounds of lacking culpability*” (Article 223/3, CMK); “*no ground for punishing*” (Article 223/4, CMK); “*conviction*,” in cases in which the facts are proven (Article 223/5, CMK); “*conviction*” in cases where the facts are proven and the accused is mentally ill, security measure instead of punishment, or security measure and punishment (Article 223/6, CMK); “*rejection of the case*,”² (Article 223/7, CMK); and dismissal or “*dropping of the case*” (Article 223/8, CMK).

If there is a ground for dismissing the case or setting the punishments aside pursuant to the Penal Code, (*infra*, paragraph 452), or if it is obvious that the conditions of criminal prosecution will not be realized, the court dismisses the case.

“*Suspension of proceedings*” is no longer considered a “judgment.” If the prosecution depends on a precondition to proceed with the prosecution (*supra*, paragraph 362), and this precondition has not been fulfilled, the court may suspend the proceedings and wait until the fulfillment of the precondition according to the repealed law (Article 253/4, repealed CMUK).

A *Human Rights Compensation Commission* started working in February 2013 following adoption of the relevant legislation in January. This is a domestic remedy concerning length of judicial proceedings and non-enforcement or delayed enforcement of judicial decisions that Turkey was required to put in place under a pilot ECHR judgment, confirmed by a subsequent decision of the Strasbourg Court. It is expected to reduce by around 4,000 the number of pending cases against Turkey at the Court.

1. E. Günay, *Uygulamalı Ceza Davalarında Hüküm Kurma Esasları ve Hükümün Bozdurulması* (2006).
2. Kunter & Yenisey & Nuhoglu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18. Bası (İstanbul, Beta, 2010), 1489.

397. *Conviction and “delayed announcement of the judgment.”*

I - Conviction.

A “conviction” is comprised of two parts: the decision of the court and the reasons for this decision. Normally, the decision of the court and its reasons will be read aloud at the same time and written into the minutes of the proceedings.¹ However, sometimes the reasons may be read afterwards. The law permits the court to prepare it for three days (Article 231, CMK).

The judgment must contain the category of the decision, the numbers of the Articles of the Penal Code that were applied, the duration or extent of the sanction and notice about the possible legal remedies provided by law against the judgment (Article 232, CMK).

According to Article 230 of the Code of Criminal Procedure and Article 61 of the Penal Code, the reasons for the decision must be laid down accurately. Here, the proven facts should be discussed. The mere mentioning of the related article of the Penal Code is not considered a valid reason.

II - “Delayed announcement of the judgment”

Delayed announcement of the judgement (Article 231/5-14, CMK) is a regulated in Turkish Criminal Procedure Law since 2006. Act of 2006–5560 added new subsections to Article 231, which were amended in 2008 by the Act No. 5728 and in 2010 by the Act No. 6008.

In cases where at the end of the trial, the accused is sentenced by imprisonment of two years or less, or a fine, the court may decide to delay the pronouncement of the judgment. The provisions related to mediation are preserved. Delaying the pronouncement of the judgment means that the judgment that has been produced shall not have legal effect for the accused (Article 231/5, CMK, as amended by Act 2006–5560).

In order to be able to render “the decision on delaying the pronouncement of the judgment,” the following requirements must have been fulfilled: the accused must not have been convicted for a crime of intent previously, the court must consider the special qualities of the personality of the accused and his behavior during the main trial, and the court has to reach the belief that the accused shall not commit further crimes.

In addition the damage to the victim or the public, due to the committed crime must have been repaired to the full extent by giving back the same object, by restoring the circumstances as they were before the crime had been committed, or by paying the damages (Article 231, CMK as amended by Act 2006–5560).

In cases where the accused does not consent, there shall be no decision on delaying the pronouncement of the judgment rendered (Article 231/6, CMK, added by Article 7 of Act dated July 22, 2010, No. 6008).

If the court decides to delay the pronouncement of the judgement, the judgement cannot include suspension of execution of an imprisonment term of less than 1 year, or conversion of a short-term imprisonment into alternative sanctions (Article 231/7, CMK, as amended by Act 2006–5560).

In cases where a decision on delaying the pronouncement of the judgment has been

rendered, the accused shall be subject to a probation term for five years. The court may decide that the accused shall be subject to an obligation of probation, not exceeding one year:

(1) In cases where he has no profession or skill, the court may decide that he shall take part in an education program in order for him to obtain a profession or a skill.

(2) In cases where he has a profession or a skill, the court may decide that he shall work for a fee in a public institution or in a private place, under the supervision of another person who performs the same profession or skill.

The court may decide that he shall be prohibited from going to certain places, that he shall be obliged to visit certain places, or to fulfill another obligation which shall be determined by the discretion of the court.

During the period of probation, the statute of limitations for prosecution shall be interrupted by the probation measure (Article 231/8, CMK, as amended by Act 2006–5560).

In cases, where the accused is not able to fulfill the requirement that is mentioned in subsection (c) of subparagraph 6 immediately, the court may decide as well that the pronouncement of the judgment shall be delayed under the requirement that the accused pays the damages of the public or the victim to the full extent in monthly installments. (Article 231/9, CMK, as amended by Act 2006–5560).

In cases where there has been no intentional crime committed during the period of probation and the obligations related to the measures of controlled liberty (probation), the judgment, of which the pronouncement had been delayed, shall be annulled, and the court shall render the decision on dismissing the case (Article 231/10, CMK).

In cases where the accused has committed a new intentional crime during the period of controlled liberty (probation), or has violated the obligations related to the controlled liberty, the court shall pronounce the judgment. However, the court may evaluate the circumstances related to the accused who was not able to fulfill the obligations imposed on him, and may decide that the portion of the punishment which may be determined up to one-half of the original one shall not be executed, or if the requirements are present, to suspend the imprisonment, or to convert the punishments in the judgment into alternative sanctions, thus forming a new judgment (Article 231/11, CMK).

The decision on delaying the pronouncement of the judgment may be subject to opposition.

Decision related to “the delaying the pronouncement of the judgment” shall be recorded in a specified data bank for this purpose. These recordings may only be utilized for the purpose mentioned in this article, if it has been requested by the public prosecutor, the judge, or the court, in relation to an investigation or prosecution (Article 231/13, CMK).

The provisions of this article related to the “the delaying the pronouncement of the judgment” shall not be applied for crimes that are mentioned in the “reform laws,” protected by the provisions of Article 174 of the Constitution (Article 231/ 14, CMK, as amended by Act No. 2008–5728) (*supra*, paragraph 10).

The amendment in 2008 done by Law No. 5728 extended the one-year imprisonment term up to 2 years (Article 231/5 CMK as amended by Law No. 5728). This amendment had an unexpected consequence on the whole criminal justice system, because courts have understood this as a *substantive criminal law provision*, not as a pure *procedural clause*. For this reason they applied the *ex post facto law principle* of the Penal Code to all finalized cases carrying less than 2 years imprisonment, and these cases have all been reopened in subsequent years. This is one of the causes of delays in Turkish Criminal Justice System.

1. N. Kunter, *Yargılama Makamlarında Dağılan Oyların Toplanması Sorunu* (YD 1983/ Temmuz, 354); Duman, *Savcının Müzakereye Katılması*, IBD (1983/57), 471; Metin, *Ceza Mahkemelerinde Gerekeçeli Hüküm Sorunu ve Tekniği*, AdD (1985/5), 68.

§4. ENFORCEMENT OF FINAL CRIMINAL JUDGMENTS

398. The enforcement of criminal judgments was regulated in Book Eight of the repealed Penal Procedure Code. These provisions have been transferred into the Code on Enforcement of Punishments and Security Measures (CGIK).

Only final convictions (*res judicata*) may be enforced (Article 20, CGIK). The public prosecutor enforces final judgments. The President of the Court or the judge that handed down the conviction approves the final judgment by his signature.

Enforcement of foreign judgments is regulated by Act No. 3002 (*infra*, paragraph 443).

399. The enforcement of custodial punishments (*infra*, paragraph 441) will be postponed if the convicted person is mentally ill (Article 16, CGIK). Other illnesses constitute a ground for postponing the execution of the custodial punishment if they are likely to place the sentenced person in a life-threatening situation (Article 16/2, CGIK).

Except for imprisonment longer than three years, the execution of custodial punishments may be postponed at the request of the sentenced person if its immediate execution would harm him or his family, as this is outside the purpose of the punishment (Article 17/1, CGIK).

400. If the convicted person does not appear at the request of the Public Prosecutor, or if there is suspicion that he will flee, then the Public Prosecutor will issue an arrest warrant (Article 20/1, CGIK).

Chapter 4. Legal Remedies

§1. GENERAL PRINCIPLES

401. According to Turkish doctrine, legal remedies in Turkish criminal procedure are divided into two categories: ordinary legal remedies and extraordinary legal remedies.¹

Ordinary legal remedies are based on court judgments that are not final (not *res judicata*). Extraordinary legal remedies apply against court judgments that are final and enforceable (*res judicata*).²

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 735.

2. E. Yurtcan, *Kesin Hüküm* (İstanbul, 1987), 25.

402. Legal remedies can be divided according to the categories of judicial decisions. There are no legal remedies against measures taken by the public prosecutor and police.¹ The only exception to this rule is petitioning the Justice of the Peace (*supra*, paragraph 343) to overturn or check an arrest or rule against the prolongation of police custody. This was introduced into Turkish Law in 1992 (Article 91/3, CMK; Article 128, repealed CMUK).

With respect to decisions of magistrates, there is the legal remedy of “opposition”. With respect to judgments of the trial courts, one can seek relief from the Court of Cassation. If the Code provides no exceptions, there is no legal remedy against court orders rendered during the course of the trial.

1. C. Özek, “Yargının İdari Denetimi,” in *Atatürk’ün 100* (İstanbul: Doğum Yılı Kutlama Kolokyumu, İstanbul Üniversitesi, 1981), 115.

403. Some general requirements apply to all legal remedies. The first one is interest. Only the party who has interest in the review of the decision may apply for a remedy: the acquitted person has no interest in a legal remedy if the acquittal is based on the facts of the case.

Ordinary legal remedies have devolutive effect. A different court must try the action when a legal remedy has been invoked.

The petition for a legal remedy has a suspensive effect, and the original judgment of the trial court does not become final or *res judicata*.

There are requirements for applications for legal remedies. The appropriate court may only judge the case on the request of parties. Exceptionally, in the Court of Appeal or the Court of Cassation (for the time being), there is an automatic review if the court has ordered imprisonment exceeding 15 years (Article 272, CMK; Article 305/1, repealed CMUK).

404. If a party does not apply for a legal remedy (review), the judgment becomes final. However, if the Court of Cassation quashes the last judgment of the trial court because of a mistake in punishment, then the non-appealing party benefits from the decision (Article 306, CMK; Article 325, repealed CMUK).

405. If the accused alone had requested the petition for review to the Court of Cassation, or if the Public Prosecutor put one forward on his behalf, and the judgment of the trial court is quashed by the Court of Cassation, then the trial court is not empowered

to increase the sentence in the new trial (Article 307/4, CMK; Article 326, repealed CMUK).

§2. ORDINARY LEGAL REMEDIES

I. Opposition

406. Opposition is generally applicable against magistrates' decisions if it is not excluded by regulation. Opposition is not available against the judgments of the court, however. Challenging decisions of the court is only possible in instances where explicitly provided by the Code.¹

The high magistrate (the judge of the Court of General Jurisdiction for the decisions of the Justice of Peace) who hears the opposition has the power to examine both the facts and the applicable law and will give his opinion in the form of a new decision on the case.

1. N. Gürelli, *İtiraz Kanunuyolu* (İstanbul: Ceza Adaleti İlkeleri Sempozyumu, İstanbul Üniversitesi, 1973), 63.

407. In case of an opposition, the magistrate may change his previous decision (Article 268/1, CMK).¹

The decisions of the following magistrates, if not contrary to the Code and not rendered during the trial session, are subject to opposition: those of the judge who is representing the court for a certain action, the judge of another venue who had been asked by the court to take some action (such as witness hearing), the President or a member of the Court of General Jurisdiction, and the justice at the Peace Court (Article 268/3, CMK).

The decision of the court ordering the pre-trial detention is an exception to the general rule that decisions of the court are not subject to opposition (Article 271/4, CMK).²

1. According to the repealed legislation, if the remedy provided is so-called urgent opposition (within a week), the judge who rendered the opposed decision did not have the power to give a new decision on the related case (Article 304/4, repealed CMUK). In such cases, only the high magistrate could give a new decision if the former decision was illegal.
2. Under prior laws "continuation of the pre-trial detention" (added in 1992), "decisions related to confiscation" (*haciz*) and "court decisions related to third parties" (Article 298, repealed CMUK) were also subject to opposition. The new Code does not include these provisions.

II. Appeal on Fact and Law

408. *Appeal on fact and law (istinaf)*.

I - Definition.

The motion of appeal on fact and law has not entered into force as of March 2014. Therefore the following will apply when the courts are activated in the future.

Judgments related to a custodial penalty of 15 years and more shall be inspected by the Regional Court of Appeal on Facts and Law by its own motion (Article 272/1, CMK).

Decisions of the court rendered prior to the judgment and constituting a basis for the judgment, or decisions against which no other legal remedy has been foreseen by the Code, may be attacked in connection with the appealed judgment on fact and law (Article 272/2, CMK).

For judgments recognising judicial fines up to two 2,000 lira (2,000 included), and judgments of acquittal rendered for crimes that require a criminal fine not above 500 days as the upper level of the punishment, the law did not provide a legal remedy (Article 273, CMK) (for the current situation, *see infra*, paragraph 409).

For the future application there has been an amendment in Article 272/3-a in 2011 by Law No. 6217, opening the way of appeals of law and facts for convictions to fines which have been converted from imprisonment: if the original conviction was a prison term, and it has been converted to a judicial fine, such a fine shall be open to appeal on fact and law.

II - Motion of appeal on fact and law and its time limit.

A motion of appeal on fact and law shall be lodged within seven days after the pronouncement of the judgment by a petition submitted to the court that rendered the judgment, or by making a declaration to the clerk of the court. This declaration shall be taken into the records, and the record shall be approved by the judge. In respect of the accused who is under arrest, the provisions of Article 263 shall apply.

If the judgment has been pronounced in the absence of the individuals who have standing in the law to appeal on fact and law, the period starts running on the date of notification.

Public prosecutors attached to the Criminal Courts of General Jurisdiction may appeal on fact and law against the decisions of Peace Court in Criminal Matters in their district of jurisdiction; public prosecutors attached to the Courts of Assizes may appeal against judgments of Criminal Courts of General Jurisdiction and of Courts of the Peace in their district of jurisdiction. The above-mentioned public prosecutors may file a motion of appeal on fact and law within seven days after the judgment arrives at the office of the public prosecution in that judicial district.

Failure to submit the grounds for the application in the petition or declaration shall not prevent the admissibility of the application of the following parties: the accused, the intervening parties, the individuals who had filed a petition of intervention and their request was not ruled upon or was denied, or, finally, of the individuals who had suffered damages that would entitle them to intervening party status.

The public prosecutor shall submit the grounds for filing a motion of appeal on fact and law together with the written petition, writing them clearly, together with the reasoned justification. The petition of the public prosecutor shall be notified to the parties. The parties may submit their responses in this respect within seven days after the date of the notification (Article 273, CMK).¹

III - Running of the period of appeal on fact and law during the period of restitution.

The accused is entitled to ask restitution against judgments rendered against him in his absence. During the period of restitution, the period of appeal on fact and law runs as well. If the accused files a motion on restitution, he must file a separate motion of appeal on fact and law. In such cases, interactions related to the petition of appeal on fact and law shall be suspended until a decision about the request of restitution has been rendered (Article 274, CMK).

IV - Denial of the motion by the court that rendered the judgment.

The court that has rendered the attacked judgment is entitled to deny the motion with a decision for the following reasons: if the petition was submitted after the expiry of the legal period, if the judgment is not open to appeal or if the party that had filed the motion lacks standing.

The public prosecutor or the parties who filed a motion of appeal on fact and law may ask the Regional Court of Appeal on Facts and Law to rule on this issue within seven days after the notification of the decision on denial. In such cases, the file shall be sent to the Regional Court of Appeal on Facts and Law. This shall not be a ground to suspend of the execution of the judgment (Article 276, CMK).

If the petition of appeal on fact and law is not rejected by the court that rendered the judgment in accordance with the Article 307, then the petition of appeal or a copy of the record about the application will be given to the other party. The opposite party is entitled to give its response within seven days after the date of notification.

If the opposite party is the accused, then he may give his response with a declaration, which shall be included in the record by the court recorder. After the response has been handed over or the fixed time limit for this purpose has expired, the file of the lawsuit shall be submitted to the Office of the Chief Public Prosecution of the Regional Court of Appeal on Facts and Law, in order to be given to the Regional Court of Appeal on Facts and Law. The provisions of Articles 262 and 263 are reserved (Article 277, CMK).

V - Duties of the public prosecutor at the Regional Court of Appeal on Facts and Law.

When the file arrives to the Office of the Public Prosecution of the Regional Court of Appeal on Facts and Law, it is inspected, a legal opinion of that office is prepared and the entire file, together with the legal opinion is handed over to the criminal chamber of that court. Also handed over are attached documents and evidence required to be given if there are any. The legal opinion, which has been prepared by the Office of the Chief Public Prosecution of the Regional Court of Appeal on Facts and Law, shall also be given to the parties (Article 278, CMK).

If the Regional Court of Appeal on Facts and Law considers after the pre-inspection of the file that it lacks jurisdiction, it makes a formal decision to submit the file to the competent court. If it considers that the petition was not timely or the decision could not be appealed, or if the petitioner does not have the right to file this motion, the court denies the petition of the appeal on facts and law (Article 279, CMK).

VI - The inspection at the Regional Court of Appeal on Facts and Law and prosecution.

The Regional Court of Appeal on Facts and Law, after inspecting the notification of the legal opinion of the Office of the Chief Public Prosecution, the file and the evidence submitted together with the file, renders the following decisions:

- to deny the petition of appeal on facts and law on the merits, if it establishes that the judgment bears no illegality in respect to procedure or to substantive law, that there is no missing evidence or the interactions were complete, and that the evaluation in

respect to the proof is adequate;

- to set aside the judgment and send the file to the court of first instance whose judgment has been set aside, or to a different court of first instance within its district of jurisdiction, which the court deems appropriate, if it establishes that there is a ground of illegality in the judgment of the court of the first instance; and
- to annul the judgment of the court of the first instance, to make a new trial and to start with the preparations of the main hearing in other instances (Article 280, CMK).

The president of the Regional Court of Appeal on Facts and Law, or a member of the court appointed by him, shall determine the day of the main hearing (Article 175, CMK) and make the necessary calls. The summons to the accused shall include the warning that failure to appear at the main hearing of the lawsuit opened upon his petition will lead to inadmissibility.

The court decides on hearing the witnesses and experts that are deemed necessary and conducts judicial inspection (Article 281, CMK).

VII - Exceptions during the main hearing.

If the main trial is opened, the provisions related to the main hearing and judgment of this Code apply:

The inspection report of the member who has been appointed previously to review the whole written file and produce a report shall be read, as well as the final judgment of the court of first instance, which is provided with reasons. The transcripts of the witnesses, the transcripts of the preparatory works by the Regional Court of Appeal on Facts and Law itself, if it has conducted such investigation, the transcripts of the judicial inspection, and submissions and reports of experts will also be read. Witnesses and experts whose hearing at the main trial at the Regional Court of Appeal on Facts and Law are deemed necessary shall be summoned (Article 282, CMK).

If the petition of appeal on facts and law was determined in favor of the accused, the newly rendered judgment shall not contain a heavier sanction than that determined by the former judgment (Article 283, CMK).

Against the decisions and judgments rendered by the Regional Court of Appeal on Facts and Law, there is no right to *insist*, which is given against decisions of the Court of Cassation (*infra*, paragraph 418-X). Provisions related to opposition and appeal on law are reserved (Article 284, CMK).

¹ C. Şahin, *Ceza Muhakemesi Hukuku –I-*, Seçkin, Ankara 2014), 248.

III. Ordinary Way of Cassation

A. Provisions of the Repealed Penal Procedure Code Still Applicable in March 2014

409. “The Ordinary Way of Cassation” (*temyiz*) regulates the party’s petition to the Court of Cassation for quashing the last judgment of the trial court.¹ Only violation of the law can be argued in this legal remedy (Article 307, repealed CMUK).

Since there are no “appeals” courts, hearing cases on fact and law, an interesting state of affairs has existed in Turkish Law since June 1, 2005: the provisions of the repealed Penal Procedure Code related to the ordinary way of cassation are applicable as the only

legal remedy against judgments rendered by the courts. We shall first explain (*infra*, paragraphs 410–417) the provisions of the repealed law, then (*infra*, paragraph 418) the provisions of the new Code.

According to the repealed but still applicable provisions of CMUK, the cassation appeal is regulated as follows. At the request of any party involved in a case, the Ordinary Way of Cassation is awarded against the last decisions of trial courts, as listed in Article 253 of the repealed Turkish Code of Penal Procedure. If the conviction is related to deprivation of liberty for 15 years or more, however, then the Court of Cassation examines the case automatically (Article 305/1, repealed CMUK).

Some trial court final judgments cannot be brought up for review to the Court of Cassation: these include convictions involving fines up to TRY 2 million,² acquittal judgments requiring a maximum fine of TRY 15 million and judgments for which a review has been precluded by the Penal Procedure Code or other Law (Article 305/2, repealed CMUK). In such cases, ordinary review to the Court of Cassation does not apply. However, there is the possibility of an Extraordinary Appeal (*infra*, paragraph 421) pursuant to Article 343 of the Penal Procedure Code (Article 305/3, repealed CMUK).

1. S. Keskin, *Ceza Muhakemesi Hukukunda Temyiz Nedeni Olarak Hukuka Aykırılık* (Istanbul: Alfa Basım Yayım Dağıtım, 1997).
2. There is no right to appeal against criminal fines up to 2,000.000 lira according Article 305/1 of the repealed CMUK, which is still currently applicable as of March 2014. Closing the way of appeal against convictions involving *criminal fines commuted from a short-term imprisonment* has been considered against the principles of the Constitution and been abolished in 2009 (Decision of the Constitutional Court dated July 23, 2009, E. 2006/65, K. 2009/114). The Law dated March 31, 2011, No. 6217 opened the way of appeal in law for criminal fines commuted from imprisonment (*supra*, paragraph 222) regardless of the amount of it. However, there shall soon be a similar problem under the way of *appeal in fact and law* (Article 272/3-a, CMK), when its application shall start (*infra*, paragraph 408).

410. The ordinary petition for review must be made within one week of the decision given to the Clerk of the Court where the judgment was rendered (Article 310, repealed CMUK).¹

Exceptionally, the Public Prosecutor attached to the Court of General Jurisdiction may appeal judgments of the Peace Court within a month after receipt of the judgment by the Clerk of Court (Article 310/3, repealed CMUK).

1. N. Centel, “Ceza Muhakemesi Hukukunda Eski Hale Getirme,” IHFM (1985): 197; Dalamanlı, *Kanunlarda Süreler ve Mahkemelerin Görevleri* (Istanbul: Kazancı, 1984), 10.

411. The petition should be directed to the Registrar in writing or orally, upon which a record will be made and signed by the petitioner. According to Turkish law, there is no obligation to state the grounds for the petition. Two words are sufficient: “I appeal.”

412. The trial court determines whether the requirements for an appeal are sufficient, and rejects them if they are not. If admissible, it sends the entire record (or file) to the Court of Cassation after asking the opinion of the other parties (Article 315, repealed CMUK).

The Court of Cassation also examines the necessary requirements for a review and the

subject (the main objection) if all the requirements are fulfilled (Article 317, repealed CMUK).

The Court of Cassation will only examine the file. An adversary session will be allowed only if the crime is an offense to be tried by the Court of Assize, and the Court of Cassation orders it on its own initiative, or if the accused applies for it (Article 318/1, repealed CMUK).

413. The examination by the Court of Cassation is not limited to the issues raised by the appellant. The court has the power to examine the whole file and may quash the judgment because of a fundamental error in law made by the trial court that could have changed the outcome of the judgment and that was not known to the parties (Article 320, repealed CMUK).

The problem of *res judicata* on those matters not objected to in the petition for review does not exist in Turkish Law.

The second limitation to examination is critical: only the mistakes in the application of the law are reviewed. The factual findings are excluded from examination.

414. There are four types of decisions of the Court of Cassation: quashing the judgment of the trial court, rejecting the petition, rendering a new judgment and dismissing the case.

415. The Court of Cassation has the power to quash the judgment of the trial court (Article 321, repealed CMUK) and return the record to the same trial court or to another court of equal jurisdiction (Article 322/2, repealed CMUK).

Once the record is sent back, the trial court must seek the opinion of the parties concerned about the quashed decision (Article 326/1, repealed CMUK). It then has two options. The first is to accept the error and begin a new trial. Since the first judgment is invalid, at the end of the second trial, a new judgment will be given by the trial court that is subject to ordinary review in the Court of Cassation. The authorized chamber of the Court of Cassation will examine this decision.

The second option is to “insist” on the first judgment, arguing that there was no mistake in law.¹ This “insisting” decision on the first judgment may be appealed again. If not appealed, the first judgment rendered by the trial court becomes final and *res judicata*.

If the parties appeal the “insisting” decision to the Court of Cassation, the General Criminal Assembly of the Court of the Cassation will examine this case. The decisions of the General Criminal Assembly are final and the trial court has no further right of “insisting” upon the original judgment (Article 326, repealed CMUK).

1. N. Kunter, “Türk Muhakeme Hukukunda İsrar Hakkı,” IHFM, no. 455-47 (1981): 173.

416. The Court of Cassation can reject a petition if it does not meet the necessary legal requirements. In this case, the judgment of the trial court becomes final and *res judicata*. However, the Public Prosecutor of the Court of Cassation, the Attorney General, has the power of an “extraordinary opposition” (*infra*, paragraph 420) to the decision of the Court of Cassation.

417. The Court of Cassation does not have the power to deal with factual findings of

the case, and for this reason it may not interfere with the judgment itself. The Court of Cassation may only quash the judgment of the trial Court if it determines that there are mistakes of law. However, in exceptional cases, as provided by the Code, where the mistake can be set aside without considering the facts, the Court of Cassation can correct the judgment on its own initiative without quashing the decision (Article 322, repealed CMUK).

If the grounds for dismissal and setting aside of punishments (*infra*, paragraph 450) are present, the Court of Cassation is entitled to dismiss the case.

B. Provisions of the New Penal Procedure Code Related to the appeal on law

418. The provisions of the new Penal Procedure Code are not in force yet (March 2014). When the Regional Courts of Appeal are formed, the provisions regarding legal remedies are to change. Below are the future regulations on appeal on points of law.

I - Judgments which may be appealed on law.

With the exception of reversal judgments, judgments rendered by Criminal Chambers of the Regional Court of Appeal on Facts and Law may be appealed on law.

The following decisions, however, are exempted from appeal on law:

(1) decisions of custodial penalties of up to five years, and decisions denying appeals on facts and law against any kind of fines;

(2) judgments rendered by criminal chambers of the Regional Court of Appeal on Facts and Law related to punishments of up to five years custodial penalty, that do not alter the characteristics of the offense and the final punishment as described in the judgment of the court of first instance;

(3) all kinds of decisions of the Regional Court of Appeal on Facts and Law confirming decisions of the court of first instance, that are in agreement with the nature of the offense and impose a custodial penalty of up to two years;

(4) decisions of the Regional Court of Appeal on Facts and Law that do not alter the nature of the offense in connection with the sentence rendered by the court of first instance, which only imposed a fine;

(5) judgments rendered by the Regional Court of Appeal on Facts and Law, that do not alter the decision of the court of first instance in relation to confiscation or forfeiture or in relation to a judgment that deems it not necessary to rule so;

(6) where the judgment of the Regional Court of Appeal on Facts and Law was an acquittal on appeal on facts related to offenses that require custodial penalty for 10 years (including the 10th year), or that require various fines in connection with the decisions of acquittal rendered by the court of first instance and decisions of denial of motions for appeals of facts;

(7) decisions of the court of first instance reversed by the Regional Court of Appeal on Facts and Law, in relation to striking a law suit, or dismissal of a law suit, or a decision not to punish, or a postponement of the prosecution or sentencing, because of marriage; and

(8) decisions of the Regional Court of Appeal on Facts and Law, which contain more than one sentencing decision, as long as they stay within the limits of the above-mentioned rules (Article 286, CMK).

Decisions given before the judgment, which form the basis for the judgment, or the decisions against which no other legal remedy had been foreseen, may be appealed together with the judgment (Article 287, CMK).

II - Ground for appeal on law.

An appeal on law may be filed only on the ground that the judgment has violated the law. The failure to apply a legal rule, or its erroneous application, is a violation of the law (Article 288, CMK).

Although they may not have been mentioned in the petition or declaration of appeal on law, the following points are considered absolute violations of the law and will be invoked ex officio:

- (1) The court did not convene in the way prescribed by law.
- (2) A judge who is by law prohibited from participation in judicial functions participated in the decision-making process.
- (3) A judge concurred in passing judgment, although he had been challenged because of substantial doubt concerning his impartiality, and the challenge was accepted or unlawfully rejected.
- (4) The court established its jurisdiction to hear a prosecution case in violation of the law.
- (5) Court hearings occurred in the absence of the public prosecutor or of individuals whose presence is required by law.
- (6) There occurred a violation of the principles of an open trial by failure to pronounce the judgment openly.
- (7) The judgment did not include good reasons (Article 230, CMK).
- (8) The decision of the court restricted the right of the defense on points that were relevant to the judgment.
- (9) The judgment was based on illegally obtained evidence (Article 289, CMK).

Violation of the rules in favor of the accused does not give the public prosecutor the right to have the judgment reversed (Article 290, CMK).

III - Motion of appeal and the time limit.

A motion of appeal on law must be filed within seven days of the pronouncement of judgment, either by submitting a petition to the court or by making a declaration to the registrar and having him prepare the necessary documents. The declaration will be included in the records and approved by the judge. The provision of Article 293, CMK related to the accused under arrest takes precedence.

If the judgment has been pronounced in the absence of the individuals who have the right to appeal on law, the period for appeal begins to run from the date of the notification

(Article 291, CMK).

For judgments not in favor of the accused, pronounced in his absence, in connection with the motion for restitution, the provisions of Article 305 shall apply. (Article 292, CMK).

A petition of appeal on law, filed within the foreseen period, prevents the judgment from becoming final. If the judgment and its motives have not been explained to the appealing public prosecutor or the parties, the motives shall be communicated within seven days after the Regional Court of Appeal on Facts and Law has knowledge of the appeal on law (Article 293, CMK).

IV - Motives for an appeal on law.

The public prosecutor or the parties filing a motion of appeal on law must indicate in their petition or declaration the legal aspects (Article 294, CMK) on which they base their request for the judgment to be reversed.

If the petition for appeal on law or the declaration do not contain the grounds, the appealing party shall submit an additional petition to the Regional Court of Appeal on Facts and Law within seven days. This term starts with the expiry of the period set for submission of a petition or with the notification of the decision of the judgment. The public prosecutor shall openly state in his petition of appeal whether the appeal had been put forward in favor or against the accused.

If the appeal is filed by the accused, the additional petition must be signed by the accused or by his lawyer before submission. If the accused does not have a lawyer, he may declare his motives for appeal on law to the registration clerk, who will take them on record. The record must be approved by the judge.

V - Denial of a motion of appeal by the court that rendered the decision on grounds of inadmissibility.

The Regional Court of Appeal on Facts and Law whose judgment has been appealed shall rule on denial of the petition of appeal if the petition was submitted after the expiration of the legal limit, if a judgment that cannot be appealed was appealed, or if the person had no standing.

The public prosecutor or the parties who make the appeal may request from the Court of Cassation within seven days after the notification of the order, a ruling on this issue. In these cases, the file shall be sent to the Court of Cassation. However the execution of the judgment shall not be postponed on this ground (Article 296, CMK).

Notification and answer pertaining to the appeal and appellate brief, duties of Office of Chief Prosecutor, occur at the Court of Cassation. A copy of the petition of appeal on law or the appellate brief regarding the appellate request, which the Regional Court of Appeal on Facts and Law has not rejected, under the provisions of Article 296, CMK shall be issued to the opposing party. The opposing party shall submit the written answer within seven days.

If the opposing party is the accused, he may also submit his answer of declaration to the Court Registrar who prepares the record accordingly. After the answer has been submitted, or the time limit for an answer has expired, files pertaining to the case shall be

forwarded by the Office of Public Prosecution at the Regional Court of Appeal on Facts and Law to the Office of the Chief Public Prosecution at the Court of Cassation.

If the legal opinion of the Chief Public Prosecution at the Court of Cassation contains views that may be unfavorable, or if the parties file a motion of appeal on law, the related chamber will notify the accused or his defense lawyer, as well as the intervening parties or their representatives. The related party may respond in writing within one week after the notification. The notifications will be valid (according to the rule in Article 35 of the Act on Notifications) if they are to the address that is included in the file.

VI - Rejection petitions of appeal on law by the Court of Cassation.

If the Court of Cassation determines that the petition of appeal has not been submitted in time, a declaration has not been made, the judgment cannot be appealed, the individual appealing does not have standing, or the appellate petition or the appellate declaration does not contain grounds for appeal, then the request for appeal shall be rejected (Article 298, CMK).

VII - Inspection conducted through a main hearing.

The Court of Cassation inspects judgments of offenses that impose custodial punishment for 15 years or more and the death penalty by conducting a hearing either upon the request made in the petition of appeal of the accused or on its own motion if it deems that adequate. The day of the main hearing shall be notified to the accused and to his lawyer, if he so requests. The accused has the right to be present at the main hearing or may be represented by his lawyer.

If the accused is under arrest, he cannot request to be present at the main hearing (Article 299, CMK).

Before the main hearing, the report prepared by the member of the court appointed for this mission or by the examination judge shall be explained to the members. If necessary, the members may examine the files additionally. The hearing shall start after these issues have been resolved.

During the main hearing, the Chief Public Prosecutor at the Court of Cassation or the Public Prosecutor from the Court of Cassation in charge on his behalf, the accused, the intervening party and their counsels, will present their claims and defenses. The party who made the request for appeal speaks first. In any case, the accused has the last word (Article 300, CMK).

The Court of Cassation inspects only the points indicated in the appellate petition or in the appellate brief, and the facts declared in the appellate petition or appellate brief, if the appellate request is based on procedural matters (Article 301, CMK).

VIII - Rejection of the appellate request upon merits, or reversal of judgment, by the Court of Cassation.

If the findings of the Court of Cassation about the judgment of the Regional Court of Appeal on Facts and Law are in accordance with the law, the petition of appeal shall be rejected.

Otherwise, the Court of Cassation may reverse the contested judgment on the basis of

violations of law affecting the judgment that are pointed out in the appellate petition and the appellate brief. Reasons for reversal shall be shown separately in the written judgment.

If the judgment is quashed because of the reasons shown in the appellate petition or the appellate brief, even if they were not expressly declared in the appellate petition and the appellate brief, all the findings regarding the violations of law regarded by the Court of Cassation shall be shown in the written judgment.

If the violation of law causing the judgment to be quashed stems from procedures that are regarded as the basis of the judgment, they shall also be quashed.

Provisions of Article 289 shall have precedence (Article 302, CMK). If a judgment was reversed because a violation of law applied to the facts had been determined as the basis of the judgment, the Court of Cassation shall rule on the merit of the case and also shall correct the violations of law in the judgment. This occurs in the following cases:

- A decision for an acquittal or dismissal of the case, or for a fixed punishment with no certain minimum or maximum limits, is necessary.
- The Court of Cassation concurs with the view of the Office of the Chief Prosecution at the Court of Cassation to apply the minimum degree of punishment prescribed by law.
- The number of the article of the provision was written incorrectly, even though the nature, characteristics and punishment of the crime determined in court was correct.
- In situations where a law that went into effect after the judgment reduces the punishment, and in the determination of the court's punishment of the accused, the reason for the decrease was not accepted at the trial court, then a reduced sentence of the crime shall be required. In situations where according to a new law the act is no longer considered a crime, no punishment at all shall be imposed.
- No deduction, or a wrong deduction, was made in determining the punishment, which is to be given according to the suspect's date of birth and the date of the crime, which were established openly.
- A material error was made in determining the duration or the amount of the punishment, which is to be given at the end of maximizing and minimizing.
- The sentencing was for less or more because of non-consideration of the provisions of Article 61 of TCK (Article 303, CMK).

The file regarding the decisions given according to the first paragraph of Article 333 or Article 334 shall be forwarded by the Court of Cassation to the Office of Court of Cassation Chief Prosecutor, in order to be send to the Regional Court of Appeal on Facts and Law that gave the judgment.

The Regional Court of Appeal on Facts and Law shall give the file, within seven days from the date of the file's arrival from the Court of Cassation, to the Office of Chief Prosecutor of the Regional Court of Appeal on Facts and Law, in order to be forwarded to the court of the first instance in charge of necessary interactions.

Except in cases of Article 334, the Court of Cassation shall forward the file to the Regional Court of Appeal on Facts and Law whose judgment had been quashed, or to

another Regional Court of Appeal on Facts and Law, to be reviewed and decided again.

If the judgment was quashed because the court, in violation of the law, considered itself in charge or having authority, then the Court of Cassation forwards the file to the court that effectively is in charge and having authority (Article 304, CMK).

IX - Pronouncement of judgment by the Court of Cassation.

The judgment shall be pronounced in accordance with the provisions of Article 243. If there is no possibility to do so, the ruling shall be made within seven days from the ending of the hearing (Article 305, CMK).

If the judgment was quashed in favor of the accused, because of a violation of sentencing law, and this is applicable to the other defendants who have not put forward a request for appeal, they also shall benefit from the reversal of judgment, as if they themselves had filed the motion for appeal (Article 306, CMK).

X - Procedures of the court to which the case is referred.

The Regional Court of Appeal on Facts and Law that is to retry the case upon the decision of reversal of the Court of Cassation shall ask the related individuals for their responses regarding the reversal.

If notification to the addresses shown in the file of the accused or of the intervening party and their lawyers was not possible, or even if the notification was achieved but their arguments against the reversal could not be taken because they did not show up to the main hearing, then the main hearing will continue, and the case will be concluded in their absence. However, if the punishment to be inflicted on the accused is more severe than it was in the quashed judgment, then the accused must be heard in any case.

The Regional Court of Appeal on Facts and Law has the right to insist on its former judgment if the Court of Cassation decides to quash. However, the decisions rendered by the Penal CGK are not subject to such insistence (shall be final).

If the motion of appeal on law was filed only by the accused, or by the Office of Public Prosecution on his behalf or by individuals mentioned in Article 292, then the punishment included in the new judgment cannot be more severe than the previous judgment (Article 307, CMK).

XI - Legal remedies against a final judgment.

Anyone who claims that his or her fundamental rights have been violated can apply to the Constitutional Court if other domestic remedies have been exhausted. The 2010 constitutional amendment introduced a new legal remedy of individual petition to the Constitutional Court. Relevant legislation entered into force in September 2012, and the Constitutional Court started receiving individual applications.

Another option is to file a complaint with the Ombudsman. The Ombudsman Institution became operational following a period of intensive work and began receiving applications in April 2013, including a number related to the *Gezi Park* protests.

Next step is an individual application with the European Court of Human Rights.

§3. EXTRAORDINARY LEGAL REMEDIES

419. The new Penal Procedure Code includes three extraordinary legal remedies: opposition of the Attorney General (*infra*, paragraph 420), “reversal in the interest of the administration of justice” (*infra*, paragraph 421) and “re-opening of a trial” (*infra*, paragraph 422).

I. Extraordinary Opposition of the Attorney General

420. The Chief Public Prosecutor at the Court of Cassation is entitled to file a motion of opposition with the General Assembly of the Court of Cassation in Criminal Matters within 30 days after the date when the final judgment was rendered. He may also do so if he had filed a request on the correction of the judgment after the related decision of the chamber had been handed over to him (Article 308, CMK).¹

The extraordinary way of legal remedy has been amended in 2012 by Law No. 6352, which added two more paragraphs to Article 308, CMK. In case of a petition, the file shall be sent to the Chamber of the Court of Cassation, which has rendered that decision. The Chamber is entitled to change its original decision, if it deems the opposition is well-founded; otherwise the Chamber shall send the file to the General Assembly of the Court of Cassation (Article 308/2 and 3, CMK added by Law No. 6352, in 2012).

1. U. Alacakaptan, “Temyiz Mahkemesi Başsavcılığının Ceza Genel Kuruluna Yaptığı İtiraz Hükümün Kesinleşmesine Engel Olur mu,” AUHFD (1967/47), 1–4, 287–292.

II. Extraordinary Appeal by Way of Cassation

421. The Minister of Justice has the power to give a written order to the Attorney General to seek review of a final judgment of the court of first instance, or any decision of a magistrate that is *res judicata*, if this judgment of the court or judicial decision was not previously reviewed in any way by the Court of Cassation (Article 309, CMK) and this review is designed to improve the law and unify the application of the law in the country.¹ This extraordinary legal remedy is accepted as in the best interest of the law and cannot affect the interests of the accused.²

I - Reversal in the interest of justice.

If the Minister of Justice finds out there has been an illegality in a decision or a judgment that had been final without being inspected by an appeal on fact and law or an appeal on law only, he will request a reversal by the Court of Cassation.³ The request shall be submitted to the Chief Public Prosecutor’s Office at the Court of Cassation and shall mention the legal grounds.⁴

The Chief Public Prosecutor at the Court of Cassation will write down these grounds without altering them. He shall submit his writing, which includes a reversal petition, to the related penal chamber of the Court of Cassation. The penal chamber of the Court of Cassation shall reverse the decision or judgment in benefit of the administration of the justice if the submitted grounds are founded:

- If one of the reasons described in Article 223, and the essence of the dispute, is not resolved, the judge or the court that rendered the decision will do the required inspection and exploration and consequently render the adequate decision.
- If the grounds of reversal are related to procedural issues but did not render a decision on the essence of the dispute, or are related to issues affecting the rights of the defense,

then the judge or the court shall rule adequately and render a judgment according the outcome of the new trial. This judgment shall not impose a penalty which is heavier than the one in the original judgment.

- If the grounds of reversal are related to points that resolve the essence of the dispute, and are related to one of the judgments other than a conviction, this does not have an unfavorable outcome and does not require new adjudication (Article 309/4-c, CMK).
- If the grounds of reversal require the reversal of the penalty or require a lighter penalty, then the Chamber of the Court of Cassation directly rules on either lifting the punishment or on the more lenient punishment (Article 309/4-d, CMK).

In cases where a judgment of reversal has been rendered under the provisions of this Article, there shall be no right to insist (Article 309/5, CMK).

II - Motion by the Chief Public Prosecutor at the Court of Cassation in favor of the criminal justice system.

The Chief Public Prosecutor at the Court of Cassation is entitled to file a motion of appeal in favor of the criminal justice system by his own motion only in cases as shown in Article 309. If the Minister of Justice appealed in accordance with Article 309, this power may not subsequently be exercised by the Chief Public Prosecutor at the Court of Cassation repeatedly (Article 310, CMK).

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. Bası (İstanbul, Beta, 2010), 771.
2. N. Kunter, “Olağanüstü Kanun yolunda Reform,” in *Ceza Adaleti Reformu İlkeleri Sempozyumu* (İstanbul: İstanbul Üniversitesi, 1973), 110; O. Tosun, “Temyiz Kararlarına Karşı Kanun yolları,” in *Ceza Adaleti Reformu İlkeleri Sempozyumu* (İstanbul: İstanbul Üniversitesi, 1973), 123–151.
3. C. Akkaya, *Kanun Yararına Bozma ve Yargıtay C. Başsavcısının İtiraz Yetkisi* (Ankara: Kartal Yayınevi, 2007).
4. C. Akkaya, *Kanun Yararına Bozma ve Yargıtay C. Başsavcısının İtiraz Yetkisi* (2007).

III - Re-opening a Trial that Had Concluded with a Final Judgment

422. In cases of major miscarriages of justice, the Code provides for the possibility of commencing a new trial in order to revise the sentence (“revision of sentences”).¹ If there is new evidence or a substantial error in fact, then a trial that had ended with a final judgment may be re-opened (Article 327, repealed CMUK).

1. A. Önder, “Muhakemenin Yenilenmesi ve Dirilmesi,” in *Ceza Adaleti Reformu İlkeleri Sempozyumu* (İstanbul Üniversitesi, 1973), 7–62; A. Önder, *Muhakemenin İadesinde Yeni Olay*, IHFM, XXXI, s. 1–4; E. Özgen, *Ceza Muhakemesinin Yenilenmesi* (Ankara, 1968).

423. There are two categories of reasons for a new trial. The first is related to the re-opening of the trial in favor of the sentenced person. The second is related to the grounds for a re-opening against the interest of the convicted (Article 330, repealed CMUK).

In 2003, a specific ground for a new trial in favor of the convicted individual was created following a judgment of the European Court of Human Rights (Article 327(a), repealed CMUK, as amended “2002–4771”). Before the 2003 amendment, if the gravity of the violation of Convention rights required a new trial, the CGK would decide to open a new trial based on the same subject matter if monetary compensation could not restore the damages resulting from the violation. The new remedy came into force on August 3,

2003 (Article 7, Act No. 4771 of August 3, 2002).

Act No. 4763 of 2003 repealed Article 327/a CMUK and added a new paragraph (6) to Article 327 repealed CMUK. This amendment introduced an automatic ground to reopen if the European Court of Human Rights found a violation of convention rights. The applicant at the ECHR must file the petition with the Turkish courts within a year of the ECHR's final decision.

The re-opening of the trial on this ground is applicable to final decisions of ECHR at the time when this Act was put into force (January 23, 2003) and to those future decisions related to petitions filed with ECHR after January 23, 2003.

Law No. 2013-6459 extended the time limit for individual applications to the European Court of Human Rights: where the ECHR has rendered a final decision related to a criminal court decision finding a violation of human rights, and this final judgment is pending at the Committee of Ministers of Council of Europe as of 15.6.2012, the re-opening of the trial is not permitted. Those who fall into this category, have been given a provisional right for three months to file a motion of re-opening of trial (Provisional Art 2 to CMK, added by Law No. 6459, Article 21, in 2013).

The same Law has introduced a new concept of *re-opening of investigation* for cases where the European Court of Human Rights rendered a final judgment that an investigation had been dropped without conducting an efficient investigation, if there is a request within three months after the judgment is made final. In such cases a new investigation shall be initiated (Article 172 CMK, as amended by Law No. 2013-6459).

424. The petition to reopen the trial must be filed with the court that has rendered the final decision. This court investigates the petition and re-opens the trial if it determines that there are sufficient grounds for believing factual mistakes were made. At the end of the new trial, the court is empowered to cancel its first judgment (Article 341, repealed CMUK). The new sanction may be more severe than the first one. However, if the petition was submitted by the convicted person alone, the penalties cannot be increased.

425. The provisions on the "new trial" under the new Penal Procedure Code are explained below:

I - Grounds for a new trial in favor of the convicted individual.

A lawsuit concluded with a final judgment must be tried again in favor of the convicted individual, by granting him a new trial, in the following situations:

- if any document used at the main hearing that had an effect on the judgment was false;
- if it is discovered that any witness or expert heard under oath testified or used his vote deliberately or negligently against the convicted individual, contrary to the facts, in a way that affected the judgment;
- save for fault caused by the convicted individual personally, if any of the judges who participated in the judgment had been in fault in executing his duties, and this requires a criminal prosecution or conviction;
- if the judgment of the criminal court was based upon a judgment given by a civil court, and this judgment was reversed by another judgment which became final;

- if new facts or new evidence have been produced, which when taken into consideration solely or together with the evidence previously submitted, are of the nature to require the acquittal of the accused or the conviction to a lighter penalty because of different legal provision would apply; or
- if a final judgment of the European Court of Human Rights has established that the criminal judgment violated the Convention on Protecting the Human Rights or its Protocols. Under the new legislation in 2013, a final ECtHR judgment constitutes grounds for re-opening a case before the High Military Administrative Court.

In such cases, a motion for a new trial may be filed within one year after the date of the final judgment of the European Court of Human Rights. This provision is only applicable for the finalized judgments of the European Court on Human Rights on or after the date of February 4, 2003 (Article 311, CMK).

II - The grounds for a new trial against the interests of the accused or the convict.

A lawsuit that has concluded with a final judgment may be retried against the interests of the accused or convicted person by way of a new trial in the following situations:

- if a document submitted in favor of the accused during the main hearing that had affected the outcome of the judgment was false;
- if any of the judges who had participated in the decision-making had been in (criminal) fault in favor of the accused or convict person while performing his judicial duties; or
- if the accused, after being acquitted, has made a reliable confession in front of a judge (Article 314, CMK).

III - Postponement or stay of execution.

A motion for a new trial does not hinder (*ertelemez*) the execution of the judgment. However, the court may rule on the postponement or stay of execution of the judgment (Article 312, CMK).

IV - Events that do not bar a new trial.

The execution of the judgment or the death of the convicted individual does not bar a motion for a new trial. The spouse of the deceased, his ascendants, descendants and siblings are entitled to file a motion for a new trial. If there are no such individuals, the Minister of Justice is also entitled to file a motion for a new trial (Article 313, CMK).

V - Motion for a new trial inadmissible.

A new trial for the changing of the penalty is inadmissible if the change is to be made within the limits of the same article of the Penal Code.

If there is any other possibility to cure an error, the new trial will not be admitted (Article 315, CMK).

VI - Conditions for admissibility of petitions of a new trial that rely on a crime.

A motion for a new trial, supported by an allegation of crime, is only admissible if there has been a conviction because of this conduct. Exceptionally, a motion is admissible when existing strong evidence supporting a conviction was not obtained or when lodging of a criminal prosecution was impossible, or actions were discontinued.

The provisions of this article do not apply in cases as regulated in Article 311, subparagraph No. (5) (Article 316, CMK).

VII - Provisions applicable to the motion of a new trial.

The general provisions applicable to motions for legal remedies are also applicable on the motion for a new trial. Decisions on the admissibility of the petition for a new trial are rendered without opening a main hearing (Article 318, CMK).

VIII - Inadmissibility of the petition for a new trial, and interactions to be conducted, if admissible.

The petition for a new trial is denied as inadmissible if it is not made in accordance with the procedures set forth by the statute, or if no legal ground to justify a new trial has been submitted, or if no supporting evidence had been produced.

Admissible petitions for a new trial are notified to the public prosecutor and the other interested party. They can submit their answers, if they have any, within seven days.

The decisions rendered on the basis of this article may be subject to a motion of opposition (Article 319, CMK).

IX - Collection of evidence.

If the court declares that the petition for a new trial is admissible, it may delegate a member of the court to collect evidence. He may interact with courts or use letters rogatory. The court is also entitled to do this on its own.

During the collection of evidence by the court or by a member of the court delegated to accomplish a certain mission or when a court has been asked to perform an action by a letter rogatory, rules related to investigation apply.

When the collection of the evidence is complete, the public prosecutor and the individuals against whom there is a pending judgment are invited to submit their opinions and considerations within seven days (Article 320, CMK).

X - Denial of the petition for a new trial on the basis of having no ground, otherwise declaring admissible.

If the grounds for a new trial are not sufficiently justified, or if it turns out that in the specific case they had no influence on the outcome of the judgment, the motion for a new trial is denied without opening a main hearing. In the other event, the court grants a new trial and opens a main hearing.

Decisions given according to this article may be subject to a motion of opposition (Article 321, CMK).

XI - Inspection of the motion for a new trial without opening a main hearing.

If the convicted individual is dead, the court does not open a new main trial. It decides after collecting all the necessary evidence on the acquittal of the convicted, or rejects the petition for a new trial. In other cases, the court also acquits immediately, without opening a main hearing, upon positive advice of the public prosecutor.

When it acquits, the court at the same time annuls the previous judgments. If the individual who filed the motion for a new trial so requests, the decision on the annulment

of the previous judgment may be published in the Official Gazette, as well as in other newspapers under the courts discretion, and the costs of the publication may be borne by the State treasury (Article 322, CMK).

XII - Judgment to be rendered at the end of the renewed main hearing.

At the conclusion of the main hearings, the court either approves the previous judgment, or it annuls the judgment and renders a new decision about the lawsuit.

If the motion for a new trial had been filed in favor of the convict, the new judgment cannot impose a heavier penalty than the previous judgment.

In case of acquittal at the end of the proceedings, damages will be recovered according the provisions in Articles 141–144, CMK (Article 323, CMK).

Volker Krey

German Criminal Procedure Law

Volume 1: Basics – Prosecution
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Part Two: Parties to the Proceedings

Chapter 1: Prosecution Authorities

– Criminal Courts, Public Prosecution, Police Authorities –

§ 3 Criminal Justice

59 Even if the main burden may rest on the shoulders of the police officers and the public prosecutors as part of the **executive** – from a legal point of view, the judges as members of the judiciary are the decisive protagonists within the administration of penal justice.

I. Exclusive Competence of Judges; Rights and Duties of the Judges

1. Exclusive Competence of Judges, Art. 92 GG

Pursuant to Art. 92 GG, the *»judicial power is entrusted to the judges«*. This provision is an expression of the principle of separation of powers: In Art. 92 and other provisions of the GG concerning the *»judicature«* (Art. 93 et seq) an independent judicature is established. In this respect, not only those duties expressly assigned to the judicial power by the GG belong to the judicature. Rather, the *»traditional core areas«* of the judicature – **civil and criminal jurisdiction** – are judicial power in the sense of Art. 92 GG¹. Thus, penalties for crimes, i.e. prison sentences and fines, can only be imposed by a judge².

Example 14: An act authorizing the public prosecution to punish minor misdemeanors by imposing fines in the sense of §§ 40 et seq StGB would be void according to Art. 92 GG.

Clarification: Punishing **administrative offences** with fines pursuant to the OWiG belongs to the responsibility of administrative authorities (executive)³. This does not violate Art. 92 GG since the imposition of penalties for criminal offences is not affected⁴.

2. Rights and Duties of the Judges

a) Independence of Judges, Art. 97 GG

60 Judges are no civil servants. The independence is of central importance for the activity of judges as members of the third power. This judicial independence is one of the most important elements of a state under the rule of law.

(1) Material Independence (Art. 97 subs. 1 GG)

This provision reads: *»The judges are independent and only subject to the law«*.

¹ BVerfGE 22, 49, 77 et seq; E 27, 18, 28.

² BVerfGE 22, 49, 80; E 22, 125, 130; Krey, StPO 1, Rn 162 et seq.

³ §§ 35 et seq OWiG; see Krey, AT 1 (= Vol. I), Rn 22, 23.

⁴ BVerfGE 22, 49, 77 et seq; E 27, 18, 28; Krey, StPO 1, Rn 165 et seq.

(a) The material independence, guaranteed by this provision, means **freedom from instructions** while exercising judicial power⁵. In this respect, jurisdiction covers both, the clarification of the issue of fact (investigation of the facts by taking evidence and weighing the proofs) and the answering of the issue of law relevant for the decision (judicial legal finding by statutory interpretation or by filling legal gaps and thereby amending the law).

On the one hand, Art. 97 subs. 1 GG protects the judge against the executive, especially against **instructions of the administration of justice**

– e.g. by the president of the court and/or the ministry of justice –.

On the other hand, the material independence is also applicable within a panel of judges like criminal chambers and criminal appellate court divisions: Naturally, its **presiding judges** are not allowed to prescribe the other judges (associated judges) how to decide on the respective issue on law or fact.

Finally, the protection against instructions of **parliaments** is also affected: Even though the judge is bound by statutes and law (Art. 20 subs. 3 GG) since he is subject to the law (Art. 97 subs. 1 GG), the first power is not authorized to instruct the judge by a parliamentary resolution to decide the case at hand in a certain way.

(b) The material independence in judicial activity firstly concerns the **decision-making** by judgement or order/decision, particularly the:

– conviction, acquittal, termination of proceedings by **judgement** (§ 260 StPO).
– opening of the main proceedings respectively refusal to open the trial, out-of-trial termination of the proceedings because of final impediments to an action, suspension of the proceedings in petty cases etc. by court **decision** (§§ 203, 204; 206 a; 153 subs. 2 StPO).

Secondly, exercising judicial power does not only refer to the judge's *»activity of deciding«* as core area of his function⁶, i.e. to decide the respective case. Rather, the protection of Art. 97 subs. 1 GG also covers the *»substantive and procedural decisions only serving, preparing or succeeding the decision-making«* as closely associated area of the judge's decision⁷. This holds especially for the:

– timing of the main trial (§ 213 StPO)⁸;
– interruption of the trial and its suspension (adjournment), § 228 StPO;
– judge's power of maintaining order in the courtroom (§§ 176 et seq GVG)⁹;
– conduct of hearing, § 238 StPO.

⁵ BVerfGE 14, 56, 59; KK-Pfeiffer, § 1 GVG Rn 4; Schilken, Rn 466.

⁶ BGH St 47, 105, 110; Pfeiffer (see Fn 5), Rn 6; Schilken, Rn 467.

⁷ BGH (see Fn 6); Krey, StPO 1, Rn 173; Pfeiffer (see Fn 6); Schilken (see Fn 6).

⁸ See Fn 7.

⁹ Danners, p. 5–8 with further references; Krey (see Fn 7); Schilken (see Fn 6).

62 (c) In contrast, the »area of formal/external order« of exercising judicial power does not belong to official acts carried out in judicial independence¹⁰. This area of formal/external order covers especially¹¹:

- wearing the prescribed official attire (robe) during the main trial;
- punctuality in carrying out the dates set down for trial;
- observing statutory periods and dates (e.g. § 275 subs. 1 StPO).

However, the decision of the pre-trial judge (examining judge) to call in the recording clerk (§ 168 s. 2 StPO) does not belong to the area of formal/external order. Rather, the decision about the way of recording in court

– calling in a recording clerk or using a tape recorder by the judge (§§ 168 s. 2, 168 a subs. 4 s. 2 StPO) – is a question of the record's reliability. This decision belongs to the »associated area« of the investigatory acts of the pre-trial judge and is thus made in material independence¹².

63 (d) Apart from his judicial duties the judge has also duties as part of the non-judicial administration of justice where Art. 97 subs. 1 GG does not apply. Examples for the latter are¹³:

- education of students (»practical training during vacation«);
- practical education of graduates of the First State Examination in Law;
- statement on draft laws by order of the court's president.

(e) In the field of judicial activity (Rn 61) the material independence means that measures of supervision regarding the content of judicial decisions are inadmissible¹⁴. On the contrary, measures of supervision are admissible as far as official conduct in the »area of formal/external order« (Rn 62) and in the field of the non-judicial administration of justice is concerned.

64 **Example 15:** The criminal judge S arouses the displeasure of the president of the court.

- (a) S has suspended (adjourned) the main trial because of continual illness of a counsel. The trial must therefore be started again¹⁵.
- (b) S has missed the time limit for completing the judgement and placing it on file (§ 275 StPO). Thereby, he has caused an absolute ground for appeal on law (§ 338 no. 7 StPO).
- (c) S is often unpunctual at the beginning of fixed trials.

In all three cases, the court's president as part of the non-judicial administration of justice initiates (disciplinary) proceedings of supervision against S. This is correct for **examples 15 b and c**, because S has only violated official duties out of his genuine judicial activ-

¹⁰ BGH Z 46, 147; 90, 41, 45; KK-Pfeiffer, § 1 GVG Rn 6; Krey, StPO 1, Rn 174 et seq; Schilken, Rn 469.

¹¹ Krey (Fn 10) with further references; Schilken (Fn 10).

¹² KK-Wache, § 168 Rn 4; Krey (Fn 10), Rn 170, 171, 177; Meyer-Göfner, § 168 Rn 3.

¹³ Dienstgerichtshof für Richter Hamm (i.e. Disciplinary tribunal for judges, City of Hamm) DRiZ 1974, 232 et seq; Krey, StPO 1, Rn 178–180.

¹⁴ BGH DRiZ 1978, 185; KK-Pfeiffer (Fn 10); Schilken, Rn 469; § 26 subs. 1 DRiG.

¹⁵ Meyer-Göfner, § 228 Rn 3. For the suspension of the trial see § 228 subs. 1 StPO.

ity, so that Art. 97 subs. 1 GG is not affected (Rn 62). By contrast, in **example 15 a** the president of the court violates Art. 97 subs. 1 GG since the execution of judicial power by S is concerned (Rn 61 at the end).

(2) Personal Independence (Art. 97 subs. 2 GG)

Personal independence serves the protection of material independence. **Economic fears due to threatening loss of position** could undermine the legally granted freedom from instructions¹⁶. However, Art. 97 subs. 2 GG is unsatisfactory in two different ways:

The most appropriate guarantee of personal independence is the **appointment for life**. In German statute law, this appointment for life is the normal case (§ 28 subs. 1 DRiG), yet, it is not expressly guaranteed in Art. 97 subs. 2 GG. This constitutional provision covers in sentence 1 both, temporarily appointed judges and judges appointed for life¹⁷. Moreover, judges on probation (§ 12 DRiG) respectively **commissioned** judges (§ 14 DRiG) do not have such a personal independence – and, as a consequence, also the economic basis of the material independence is lacking¹⁸. The provisions of the DRiG trying to do justice to this problem (§§ 12 subs. 2, 16, 28 subs. 2, 29) are not guaranteed in Art. 97 subs. 2 GG.

(3) Independence of the Criminal Judge in Cases of Complete Overtaxing?¹⁹

The criminal justice is – at least in the sphere of AG (lower district court) and LG (higher district court) – absolutely insufficiently equipped with personal and material resources; the criminal courts are completely overtaxed. This means a violation of the employer's duty of care and welfare maintenance to the trial judges as well as a disregard of the constitutional command to guarantee an administration of criminal justice that is equipped in a way which allows to work effectively. What then is the use of the finest constitutional guarantee of the criminal judge's independence, if there are unreasonable working conditions at the trial courts, if floods of criminal proceedings and the burden of settlement do almost not allow to settle the proceedings in an accelerated and thorough way.

In the face of such an overtaxing the trial judges are, to a great extent, dependent on informal agreements (deals) in order to avoid *extensive evidence-taking*. Additionally, they are dependent on decisions becoming final by appeal waivers in order to reduce the burden of *making detailed reasons for the written judgement*. In fact, the necessity of such strategies severely affects the judge's independence.

The merciless burden of settlement on the trial judges is increased by **rigid statutory periods** which are imposed by law in order to expedite the proceedings, e.g.:

- §§ 121, 122 StPO (pre-trial custody exceeding a period of six months);
- § 275 StPO (time limit for the completion of the written judgement).

¹⁶ KK-Pfeiffer, § 1 GVG Rn 5.

¹⁷ BVerfG E 4, 331, 345; E 18, 241, 255; Schilken, Rn 474.

¹⁸ BVerfG E 4 (see Fn 17); E 14, 156, 162 et seq; Achterberg in: BK, Art. 92 Rn 292; Schilken, Rn 475.

¹⁹ See Kühne, Rn 110 with Fn 6; Schmidt-Jortzig, NJW 1991, 2377 et seq.

²⁰ As for §§ 121, 122 StPO see Rn 40; as for § 275 StPO see Rn 62, 64.

These provisions do not have any parallels in other fields of justice. They are, to some extent, improperly »over-strict« and sometimes interpreted too rigidly by superior courts.

b) Judge's Binding by Statutes and Law (Art. 20 subs. 3 GG)

67 According to Art. 20 subs. 3 GG, the judge »is bound by statutes and law« (*»Bindung an Gesetz und Recht«*). This binding effect, laid down in Art. 20 subs. 3 GG, founds (in principle) a prohibition of rebellion against constitutional statutes, i.e. a prohibition of judicial development of the law *contra legem*²¹. In its core, this prohibition is based on the principle of democracy, the principle of separation of powers, and the rule of law in its specifications »certainty of the law« and »protection against arbitrariness«²².

— On the other hand, the judge is in principle not bound by precedents. However, there exist some exceptional provisions like § 31 subs. 1 BVerfGG, § 358 subs. 1 StPO. —

c) Command of Loyalty to the Constitution and Duty to be Politically Moderate

The judge's duty of loyalty to the constitution is ruled in § 9 no. 2 DRiG which postulates: »Only someone who guarantees that he will stand up any time for the free democratic constitutional system in the sense of the German Constitution shall be appointed to the judgeship.«

Furthermore, the duty to be politically moderate is imposed in § 39 DRiG for protecting the general public's trust in the judge's independence and impartiality: »In and out of office, also during political activities, the judge has to behave in such a way that the trust in his independence will not be endangered.«

The command of loyalty to the constitution shall keep away anti-constitutional extremists from judgeship; the command to be moderate shall tame political and/or religious fanatics.

II. The Statutorily Competent Judge: Jurisdiction of the Criminal Courts

68 Art. 101 subs. 1 s. 2 GG guarantees the constitutional principle of the statutorily competent judge (*gesetzlicher Richter*): »No one shall be deprived of his statutorily competent judge.« This constitutional principle establishes the duty of the legislator to regulate the judicial competence as precisely as possible and to fix

- which court (*AG, LG, OLG* or *BGH*);
- which panel of judges (e.g. at the *AG*: the *criminal judge* as a single judge or the *Schoffengericht*, the latter being a criminal court consisting of one professional judge and two lay judges); and
- which judge

²¹ Additionally, this prohibition is based on Art. 97 subs. 1 GG (Rn 60).

²² *Krey*, JZ 1978, 361, 428, 465 et seq; *Krey* ZStW 1989, 838, 865 et seq; *Krey* JR 1995, 221 et seq.

is competent for deciding the case at hand (jurisdiction to adjudicate)²³.

This constitutional principle is served by the provisions of the GVG and the StPO²⁴ regarding the functional, substantive and local jurisdiction of the courts/panels of judges as well as the distribution of responsibilities among the judges.

I. Functional jurisdiction

The functional jurisdiction concerns the question in which function the criminal court and its panel of judges take action, i.e. it determines which court/panel of judges serves as **first instance** and which as **appellate instance**²⁵.

The structure of the courts in criminal matters consists of **four stages**, comprising:

Firstly the *Amtsgerichte (AG)* as lower district courts. In this respect the *AG* serves, with its panels »criminal judge« (single judge) and »*Schoffengericht*« (mixed bench of 1 professional judge and 2 lay judges), only as court of first instance.

Secondly the *Landgerichte (LG)* as higher district courts. The *LG* has a double function: Its higher criminal chambers serve as first instance, its lower criminal chambers as appellate instance for appeals on facts and law (Rn 11 Example 5).

Thirdly the *Oberlandesgerichte (OLG)* as courts of appeals. The *OLG* has a double function, too: Its criminal divisions are primarily final appeal courts (for appeals on law); however, the *OLG* has also competences as first instance.

Fourthly the *Bundesgerichtshof (BGH)* as federal supreme court of justice being a pure final appeal court.

— This shall be clarified by diagrams 1 and 2 as well as Rn 71 et seq.²⁶ —

²³ *BVerfGE* 40, 356, 360 et seq.

²⁴ The proceedings in juvenile courts (*JGG*) are left aside.

²⁵ The term »functional jurisdiction« is disputed. Like the author: *Kiziane*, Rn 119 et seq; *Wolff*, § 12 I, II; *dissenting: Roxin*, 7/1–8, treating this matter in the scope of »substantive jurisdiction«. Differentiating: *Beulke*, Rn 38; *Meyer-Groschner*, Rn 2, 8, 9 vor § 1.

²⁶ Concerning the competence of courts as **instance for complaint**, see: § 73 GVG (*LG*), § 121 subs. 1 no. 2 GVG (*OLG*), § 135 subs. 2 GVG (*BGH*).

69 Diagram 1: Panels of judges at the lower district court (AG); legal remedies

legend: ● = professional judges ○ = lay judges (Schöffen)

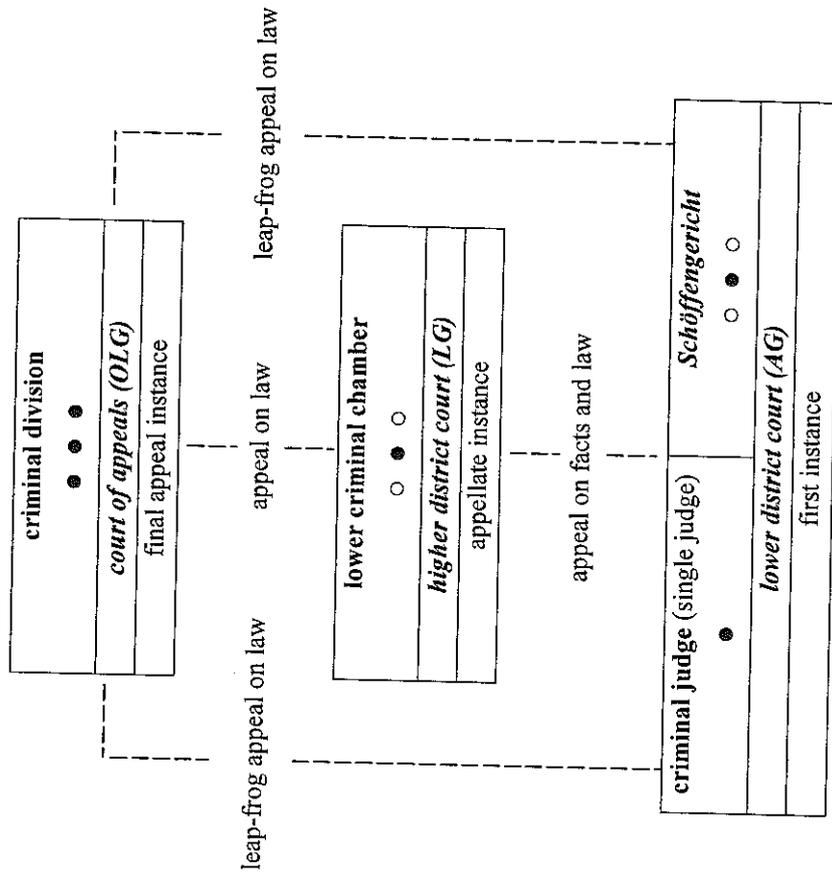
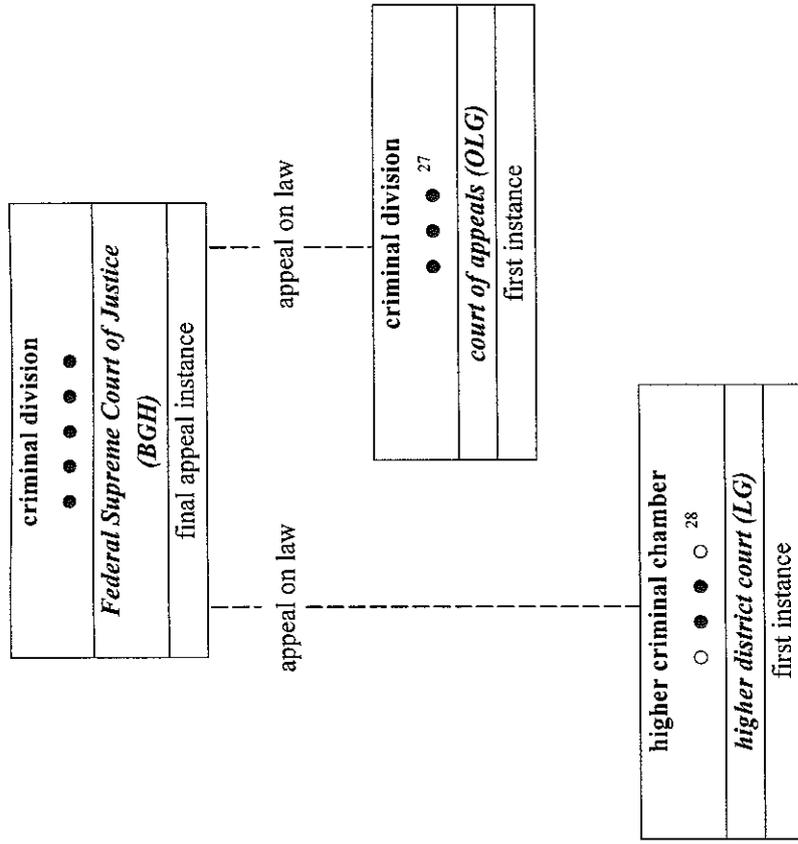


Diagram 2: Panels of judges at LG and OLG (first instance); legal remedies

legend: ● = professional judges ○ = lay judges (Schöffen)



a) First Instance: Courts and Panels of Judges

(1) AG: The panels of judges at the AG (Rn 68) are the criminal judge and the Schöffengericht (mixed bench of judges). The criminal judges (single judges) are judges at the AG, § 25 GVG. The Schöffengericht consists of one professional judge (judge at the AG) as presiding judge and two lay judges (Schöffen).

²⁷ Concerning the composition of five professional judges in exceptional cases, see Rn 73.

²⁸ Regarding the composition of three professional judges and two lay judges in exceptional cases and regarding the specific criminal chambers like the Schwurgericht etc. see below, Rn 72, 72a.

Out-of-trial, the presiding judge of the *Schöffengericht* decides alone (§ 30 subs. 2 GVG).

Example 16: The presiding judge of the *Schöffengericht* decides about the opening of the main proceedings (§§ 199 et seq StPO) without participation of the lay judges.

Pursuant to § 29 subs. 2 GVG, a second professional judge can be called in. In cases of appeals against judgements of such an «enlarged *Schöffengericht*», the lower criminal chamber (Rn 69) of the higher district court as appellate instance has to be enlarged as well by a second professional judge, § 76 subs. 3 GVG. Nevertheless, this appellate instance remains a lower criminal chamber, just as the enlarged *Schöffengericht* legally remains a *Schöffengericht*.

72 (2) LG: Here, the panel of judges of the first instance is the higher criminal chamber. Out-of-trial, this chamber decides by three professional judges without participation of lay judges (§ 76 subs. 1 GVG). For the trial, § 76 subs. 2 s. 1 provides: »When opening the main proceedings, the higher criminal chamber decides that in the main trial the chamber shall be composed of two professional judges, including the presiding judge, and two lay judges²⁹, unless the criminal chamber is competent as »*Schwurgericht*« [Rn 72a; mixed bench of three professional and two lay judges] or else the participation of a third professional judge seems to be necessary with regard to extent or difficulty of the respective criminal matter.«

That decision does not lie in the discretion of the three professional judges (§ 76 subs. 1 GVG); but they do have a latitude of interpretation which cannot be reviewed by the final appeal court. However, in cases of objective arbitrariness (unjustifiable wrong decision) of the higher criminal chamber the ground for appeal on law in § 338 no. 1 StPO is given³⁰. According to the legislator's intention the composition of two professional judges and two lay judges shall be the rule³¹. This is corrected by the *BGH* with the questionable thesis, »in cases of doubt« the three-judges-composition should enjoy preference³².

2a Beside the general higher criminal chamber there are also particular higher criminal chambers (specific criminal chambers) at the *LG* (Rn 70) as further panels of first instance:

- *Schwurgericht* (§ 74 subs. 2 GVG, competent for capital crimes);
- state security chamber (§ 74 a GVG);
- chamber for business offences (§ 74 c GVG).³³

As already mentioned, in the main trial the *Schwurgericht* is always composed of three professional judges and two lay judges. By contrast, the composition of the other specific criminal chambers corresponds to the composition of the general higher criminal chamber (Rn 70, 72).

²⁹ See Rn 70.

³⁰ *BGH* St 44, 328, 333 et seq; *BGNStZ* 2004, 56.

³¹ *Meyer-Göfner*, § 76 GVG Rn 3; see also *BGH* St 44, 328, 331.

³² *BGNStZ* 2004, 56.

³³ The juvenile division of the higher district court in criminal matters (§§ 33, 33 b JGG and § 74 b GVG) shall be left out of consideration.

In fact, §§ 74 subs. 2, 74 a and 74 c GVG merely concern a »legal distribution of responsibilities« among the panels of the *LG*³⁴. The priority regulation in § 74 e GVG (see Rn 82) is only a technical means for solving conflicts of competence³⁵.

(3) OLG (Rn 68): Panel of first instance is the criminal division (three professional judges); however, the opening of the main proceedings of first instance is to be decided by the criminal division with a composition of five professional judges (§ 122 subs. 1, subs. 2 s. 1 GVG). During the main trial, the criminal division is, as a rule, composed of three professional judges (Rn 70).

There to, § 122 subs. 2 s. 2 GVG determines: »When opening the main proceedings, the criminal division decides that in the main trial the division shall be composed of three judges ... unless the participation of two more judges seems to be necessary with regard to extent or difficulty of the respective criminal matter.«³⁶

b) Appellate Courts (Appellate Instance; Final Appeal Instance)

The appeal leads to the factual and legal review of the appealed judgement (Rn 23). In contrast, the appeal on law can only be filed on the ground that the judgement was based on a violation of law (§ 337 StPO).

(1) Appellate Instance (Rn 69)

The appeal is only admissible against judgements of the *AG* (§ 312 StPO). Appellate instance is the lower criminal chamber of the *LG* (§ 76 subs. 1 GVG) which is, in the main trial, composed of one professional judge as presiding judge and two lay judges³⁷. Out of the main trial the presiding judge decides alone.

(2) OLG as Final Appeal Court (Rn 69)

(a) The appeal on law against judgements of the *AG* is admissible as »leap-frog appeal«, § 335 StPO. Responsible for deciding on the leap-frog appeal is the criminal division of the *OLG* deciding in a composition of three professional judges (§ 335 subs. 2 StPO, §§ 121 subs. 1 no. 1 b, 122 subs. 1 GVG).

(b) In the same composition the criminal division of the *OLG* decides on the appeal on law against appellate judgements of the *LG* (lower criminal chamber, § 333 StPO in connection with §§ 121 subs. 1 no. 1 b, 122 subs. 1 GVG).

(3) BGH as Final Appeal Court (Rn 70)

The appeal on law before the *BGH* is admissible against first-instance-judgements of the *LG* and the *OLG*. The criminal divisions of the *BGH* are composed of five professional judges³⁸.

³⁴ *BGH* St 27, 99, 104.

³⁵ *Meyer-Göfner*, § 74 e GVG Rn 1; *KK-Tolkdorf*, § 209 a Rn 1.

³⁶ According to the intention of the legislator the composition of three judges shall be the rule. Besides, the explanations given to § 76 subs. 2 s. 1 GVG (Rn 72 with Fn 30–32) are also true for § 122 subs. 2 s. 2 GVG. – Concerning the *BeyOBLG* see below, Fn 41. –

³⁷ Exception: § 76 subs. 3 GVG; see Rn 71 at the end.

³⁸ §§ 135 subs. 1, 139 GVG. – The *BGH* is seated in Karlsruhe (however, its 5th Criminal Division is seated in Leipzig). –

– Regarding the *OLG*, *OLG* and *BGH* as instances for complaints see Rn 68 Fn 26. –

2. Subject Matter Jurisdiction (Substantive Jurisdiction)

75 The subject matter jurisdiction concerns the distribution of criminal cases to the different panels of first instance³⁹ (criminal judge as a single judge, *Schöffengericht* [Rn 68]; higher criminal chamber respectively specific criminal chambers of the *LG*; criminal division of the *OLG*). Thus, the subject matter jurisdiction deals with the question to which of these panels the public prosecution shall file the bill of indictment (§§ 170 subs. 1, 199, 200 subs. 1 s. 2 StPO).

a) Subject Matter Jurisdiction of the Different Courts of First Instance

– In Principle: Jurisdiction of the Lower District Court (*AG*) –

According to § 24 subs. 1 GVG, the *AG* is always substantively competent, unless one of the exceptions laid down in § 24 subs. 1 no. 1–3 is applicable.

76 (1) Exceptions of the Jurisdiction of the AG pursuant to § 24 subs. 1 no. 1 GVG

(a) *Subject matter jurisdiction of the LG according to §§ 74 subs. 2 respectively 74 a GVG:*

§ 74 subs. 2 s. 1 no. 1–26 GVG concerns the matters of the *Schwurgericht*, competent for capital crimes (Rn 72, 72a). Along with the commitment of the respective felonies as perpetrator, also its participation, its attempt and the attempted participation (§ 30 StGB, e.g. attempted instigation) are covered⁴⁰.

– However, according to § 74 subs. 2 s. 2 GVG the subject matter jurisdiction of the *OLG* (§ 120 GVG) takes priority over the jurisdiction of the *Schwurgericht*. –
§ 74 a subs. 1 GVG establishes the jurisdiction of the *LG*'s state security chamber – unless the *OLG* is materially competent pursuant to § 74 a subs. 2 GVG –.

(b) *Subject Matter Jurisdiction of the OLG (Rn 70, 73) according to § 120 GVG*⁴¹

In a quantitative view, the first-instance jurisdiction of the *OLG* is nearly irrelevant. In a qualitative view, serious crimes with politically explosive nature are concerned, e.g.:

- high treason, treason and other political crimes (§ 120 subs. 1 no. 2, 3 GVG);
- terrorism (§ 120 subs. 1 no. 6 GVG);
- Code of Crimes against International Law⁴² (§ 120 subs. 1 no. 8 GVG).

§ 120 subs. 2 GVG is by its nature a »dynamic provision of jurisdiction« (see below, Rn 78). In order to preserve Art. 101 subs. 1 s. 2 GG (Rn 68), the criminal division of the

³⁹ Kühne, Rn 125; Roxin, 7/1.

⁴⁰ Krey, StPO I, Rn 217 with Fn 5; Meyer-Göfner, § 74 GVG Rn 5.

⁴¹ In Bavaria, instead of the three *OLG* (courts of appeals, see Rn 68), the *BayObLG* was competent as first instance and as final appeal instance; however it was disestablished in 2006 (Meyer-Göfner, A 2 EG GVG, § 9 Rn 1).

⁴² Act of June 26th, 2002, BGBl. I, p. 2254 (*Völkerstrafgesetzbuch*; see Rn 58).

OLG – and the *BGH* as final appeal court – reviews whether or not the federal attorney general has rightly affirmed the »specific importance of the case at hand«⁴³.

(2) Exceptions of the Jurisdiction of the AG according to § 24 subs. 1 no. 2 GVG

This provision is based on the *AG*'s limited power to impose sanctions (§ 24 subs. 2 GVG): If in a particular case a higher sanction than a four year prison sentence or one of the measures of correction and prevention enumerated in § 24 subs. 1 no. 2 GVG is expected, the *AG* cannot be materially competent due to § 24 subs. 2 GVG, because this court (Rn 71) is not empowered to impose such severe sanctions.

This expectation of the sanction is a prediction that is to be reviewed by the court⁴⁴.

(3) Exceptions of the Jurisdiction of the AG according to § 24 subs. 1 no. 3 GVG

Instead of the *AG*, the *LG* is materially competent pursuant to this provision, »if the public prosecution submits the bill of indictment to the *LG* because of the

- specific need of protection of victims being considered as witnesses,
- specific extent of the case or
- specific importance of the case«.

Despite certain objections, this »dynamic provision of jurisdiction« is compatible with the guarantee of the legally competent judge (Rn 68)⁴⁵.

§ 24 subs. 1 no. 3 GVG seems to delegate the decision on the subject matter jurisdiction to the public prosecution. However, this provision allows the following **constitutional interpretation** (Rn 37, 38) guaranteeing its conformity with Art. 101 subs. 1 s. 2 GG:

The public prosecution has no discretionary power. Rather, the prosecutor has to interpret the indefinite legal term »specific importance« and to file the bill of indictment to the *LG* if such importance is affirmed. This decision of the public prosecution is reviewed by the trial court.⁴⁶

After opening of the main proceedings, the specific importance of the case at hand can no longer be reviewed (so called »*perpetuatio fori*«); this holds for both, the *LG* as well as the final appeal court. The **appeal on law** can only be based on the **arbitrary affirmation** of that specific importance, respectively its negation. Only such an arbitrariness in reviewing § 24 subs. 1 no. 3 GVG by the trial court establishes a violation of § 338 no. 4 StPO (violation of the principle of the legally competent judge)⁴⁷.

The mentioned explanations of the alternative »specific importance of the case« apply *mutatis mutandis* to the alternatives »specific need of protection ...« and »specific extent«.

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Example 17: – Further clarification of § 24 subs. 1 no. 3 GVG –

The public prosecution justifies the affirmation of the legal elements of § 24 subs. 1 no. 3 GVG by referring to the following circumstances of the particular case:

⁴³ *BGH* St 46, 238, 255.

⁴⁴ *KK-Hannich*, § 24 GVG Rn 4.

⁴⁵ *BVerfG* E 9, 223, 227, 229; *BGH* St 9, 367, 369; *Meyer-Göfner*, § 24 GVG Rn 5 with further references; dissenting *Herzog*, StV 1993, 609, 612.

⁴⁶ See *BVerfG* and *BGH* (see Fn 45); *Meyer-Göfner*, § 24 GVG Rn 7.

⁴⁷ *Meyer-Göfner*, § 338 StPO Rn 32, § 24 GVG Rn 10 with further references.

- (a) The extent of the infringement of the law and the effects of the criminal offence.
 (b) The increase of the act's wrong/injustice due to the position of the accused in public life.
 (c) The interest in the speedy clarification by the final appeal court of an important legal question being relevant for many similar cases.⁴⁸
 (d) The specific difficulty of finding-out the truth giving rise to a very long duration of the proceedings.
 (e) Protection of witnesses: A child as victim of a sexual offence shall be spared a second trial court.⁴⁹
 (f) The difficulty of legal questions being relevant for the court's decision.

The aspects mentioned in **example 17 (a)-(c)** can establish the »specific importance of the case«⁵⁰. Concerning **example 17 (d)**, the alternative »specific extent of the case at hand« is applicable⁵¹. Cases like **example 17 (e)** are intended by § 24 subs. 1 no. 3 GVG in its alternative »specific need of protection of victims being considered as witnesses«⁵². In **example 17 (f)** the public prosecution is at fault⁵³.

b) Subject Matter Jurisdiction of the Various First-Instance Panels at the Lower and Higher District Court (AG, LG)⁵⁴

80 (1) Lower District Court: »Schöffengericht« (Rn 68) or Single Judge?

If the first-instance jurisdiction of the lower district court (AG) is given (Rn 76 et seq.), it has to be clarified, whether the bill of indictment is to be filed at the »Schöffengericht« or at the **criminal judge as single judge**⁵⁵. This question is regulated by statute law as follows: The jurisdiction lies with the *Schöffengericht* unless the single judge is materially competent according to § 25 GVG. The exceptions of the general jurisdiction of the »Schöffengericht«, laid down in this provision, only apply to misdemeanors (§ 12 subs. 2 StGB).

Thus, the *Schöffengericht* is always the competent panel if **felonies** are concerned. In cases of **misdemeanors** it has to be clarified whether § 25 GVG is given. If this is to be answered in the negative, it remains with the rule the *Schöffengericht* being competent.

⁴⁸ In cases of judgements of the LG, the BGH is the final appeal instance (Rn 70, 74).

⁴⁹ If the bill of indictment is filed at the AG, there would exist an appellate instance as second trial court; Rn 69, 73, 74.

⁵⁰ BGH St 47, 16, 19 et seq; KK-Hannich, § 24 GVG Rn 6; Meyer-Gößner, § 24 GVG Rn 8.

⁵¹ Amending the law by this alternative in 2004 was appropriate.

⁵² The insertion of this alternative was necessary due to BGH St 47, 16, 19, 20.

⁵³ Meyer-Gößner (see Fn 50).

⁵⁴ The OLG has only one first-instance panel (criminal division); Rn 70, 73.

⁵⁵ Rn 69, 71.

(a) *Subject Matter Jurisdiction of the Single Judge according to § 25 no. 1 GVG*
 § 25 no. 1 GVG requires firstly, a **private prosecution offence** (§ 374 StPO) as charged act; secondly, a prosecution of the act in the **way of private prosecution** by the aggrieved party (victim) as private prosecutor and not by the public prosecution according to § 376 StPO.

(b) *Subject Matter Jurisdiction of the Single Judge according to § 25 no. 2 GVG* **81**

The criminal judge as single judge is competent if the »expected prison sentence does not exceed two years«.

This prognostic decision of the public prosecution at the time of filing the charge is to be reviewed by the single judge in the interlocutory proceedings (§§ 199 et seq StPO). Did the expected prison sentence not exceed two years when deciding to open the main proceedings, the competence of the single judge remains even if it turns out during the trial that the sentence being appropriate with respect to guilt will exceed the two years limit (§ 25 no. 2 GVG)⁵⁶. In such cases the single judge as panel of the lower district court has the full court's power of sentence resulting from § 24 subs. 2 GVG (prison sentence up to 4 years)⁵⁷.

(2) *Higher District Court (LG): Higher Criminal Chamber or Specific Criminal Chamber?* **82**

As already mentioned, the **higher criminal chamber and specific criminal chambers** are the first instance panels at the higher district court (Rn 70, 72, 72 a). If the **subject matter jurisdiction** of the higher district court is given according to § 24 subs. 1 with § 74 subs. 1 GVG, the bill of indictment has to be filed at the higher criminal chamber, unless one of the specific criminal chambers is competent pursuant to §§ 74 subs. 2, 74 a, 74 c GVG. These specific criminal chambers have the following rank according to § 74 e GVG:

1. *Schwurgericht* (Rn 72);
 2. chamber for business offences;
 3. state security chamber.
- All of them take priority over the general higher criminal chamber (§ 74 subs. 1 GVG)⁵⁸.

c) Joinder of Connected Cases (§§ 2-5 StPO)

For efficient criminal proceedings, § 2 StPO allows the joinder of connected cases **83** which separately would be under the jurisdiction of *panels of different rank*: These connected cases may be charged jointly at the panel of *superior rank*.

– The first instance panels have the following rank: 1. Criminal division of the OLG (Rn 73); 2. *Schwurgericht* (Rn 72); 3. chamber for business offences; 4. state security chamber; 5. higher criminal chamber; 6. *Schöffengericht* (Rn 68); 7. single judge⁵⁹. – § 2 StPO relates to **acts in the procedural sense** and not in the substantive one⁶⁰. The act in the procedural sense (§ 264 StPO) is subject of the criminal proceeding against the accused.

⁵⁶ KK-Hannich, § 25 GVG Rn 7; Meyer-Gößner, § 25 GVG Rn 3, 4 with further references; OLG Düsseldorf NSIZ 2002, 83 with further references.

⁵⁷ See Fn 56.

⁵⁸ Meyer-Gößner, § 74 e GVG Rn 1.

⁵⁹ KK-Pfeiffer, § 2 Rn 5. – See already, Rn 69, 70, 76, 82. –

⁶⁰ KK-Pfeiffer, § 2 Rn 2, § 3 Rn 3; Meyer-Gößner, § 2 Rn 2, § 3 Rn 2, 3.

It encompasses his whole behavior as far as it constitutes, from a natural point of view, a closed/unified happenings of life with the events specified in the charge⁶¹. In this respect, it is irrelevant whether only one or several actions in the sense of §§ 52, 53 StGB (act in the substantive sense) are concerned.

84 The term »**connection**« is defined in § 3 StPO:

(1) Personal connection is given »when a person is accused of more than one criminal offence«, referring to acts in the procedural sense.

Example 18: The accused is charged with attempted murder and attempted robbery (in a less serious case), the latter committed some days earlier.

The attempted murder would have to be charged at the *Schwurgericht* (Rn 72, 72 a), § 74 subs. 2 s. 1 no. 4 GVG; in contrast, the attempted robbery would belong to the jurisdiction of the *Schöffengericht* (Rn 68, 69), §§ 24, 25 GVG⁶². According to §§ 2, 3 alt. 1 StPO, both offences can be charged at the *Schwurgericht* by joinder of connected cases.

For clarification: If the accused is charged with only one act in the procedural sense, constituting several acts in the substantive sense – either in coincidence/concurrence of offences (§ 52 StGB) or in plurality of deeds (§ 53 StGB) –, §§ 2 et seq. StPO are not applicable: A joinder of connected cases is not necessary, a separation is not possible, since one and the same act in the procedural sense is *ipso iure* one and the same subject of the criminal proceedings⁶³.

85 (2) Substantive connection is given if, in the case of one act in the procedural sense⁶⁴, »more than one person is charged as perpetrator, participator (instigator respectively aider and abettor) or is charged with obstruction of criminal prosecution or handling stolen goods« (§ 3 alt. 2 StPO). If, in such a case, first-instance panels of different rank are competent, all persons concerned can, nevertheless, be charged at the same panel according to §§ 2, 3 StPO.

Example 19: A is charged with murder, B with attempted obstruction of criminal prosecution in favor of A. Pursuant to §§ 2, 3 StPO both, A and B, can be indicted at the *Schwurgericht* (Rn 72, 72 a)⁶⁵.

d) Reviewing the Subject Matter Jurisdiction ex officio

86 Thereto § 6 StPO determines: »At all stages of the proceedings the court has to review his subject matter jurisdiction ex officio.« This provision clarifies that the subject matter jurisdiction is a procedural requirement⁶⁶.

⁶¹ BGH St 45, 211; KK-Engelhardt, § 264 Rn 3; Meyer-Göfner, § 264 Rn 2; Roxin, 20/5.

⁶² Explanation: In case of § 249 subs. 1, 2 with §§ 22, 23 StGB (attempted robbery), the jurisdiction of the LG (§ 24 subs. 1 no. 2, 3 GVG) does not exist for lack of a serious felony. The single judge is never competent for felonies (§ 25 GVG).

⁶³ KK-Pfeiffer, § 3 Rn 2; Krey, StPO 1, Rn 244-246; Meyer-Göfner, § 3 Rn 2 with further references.

⁶⁴ KK-Pfeiffer (see Fn 63); Meyer-Göfner, § 3 Rn 3 with further references.

⁶⁵ Example according to Roxin, 7/12.

⁶⁶ BGH St 18, 79, 81 (GS).

However, this rule is restricted by § 6 a StPO for specific criminal chambers (Rn 87 at the end, 88 at the end, 89).

In cases of lacking subject matter jurisdiction, certain provisions of the StPO allow the referral to the competent panel in order to enable efficient criminal proceedings: This referral shall avoid suspensions of proceedings⁶⁷:

(1) *Interlocutory Proceedings (Decision on the Opening of the Main Proceedings)*
The interlocutory proceedings (§§ 199–211 StPO) start with the charge by the public prosecution. At this stage of the proceedings, the panel to which the bill of indictment has been filed, reviews its subject matter jurisdiction.

(a) If the court's panel considers that a court's panel of lower rank has jurisdiction, the former shall open the main proceedings before the latter (§ 209 subs. 1 StPO) by binding decision⁶⁸.

Thus, e.g. the higher criminal chamber can open the main proceedings before the *Schöffengericht* (Rn 68) or the criminal judge as single judge.

(b) If the court's panel to which the bill of indictment has been filed, considers that a court's panel of higher rank has jurisdiction, it shall submit the files through the public prosecution to the higher court for decision (§ 209 subs. 2 StPO).

In this manner, e.g. the single judge acts towards the *Schöffengericht* (Rn 68) respectively towards the higher criminal chamber.

(c) Regarding the relation of the higher criminal chambers to the specific criminal chambers and the relation of the specific criminal chambers among each other, §§ 209, 209 a no. 1 StPO apply.

– Thus, the *Schwurgericht* (Rn 72, 72 a, 82) can open the main proceedings before the other specific criminal chambers and the higher criminal chamber⁶⁹. By contrast, the higher criminal chamber has to submit the files through the public prosecution to the specific criminal chambers for decision⁷⁰.

(2) *Main Proceedings – First Stage: Preparation of the Main Trial* –

According to §§ 203, 207 StPO, the court decides, whether or not main proceedings are to be opened. If, after opening the main proceedings, the court ascertains its lack of subject matter jurisdiction while preparing the main trial (§§ 213–225 a StPO), the following holds:

(a) According to § 269 StPO, the referral to a court of lower rank is excluded⁷¹.

⁶⁷ KK-Pfeiffer, § 6 Rn 1; see also BGH St 25, 309, 312.

⁶⁸ KK-Tolksdorf, § 209 Rn 12; Paeffgen in: SK, § 209 Rn 6. – Self-evidently, the court opening the main proceedings (§ 209 subs. 1 StPO) must have reviewed and confirmed that the sufficient suspicion required by § 203 StPO is given (Paeffgen). –

⁶⁹ KK-Tolksdorf, § 209 a Rn 4; Meyer-Göfner, § 209 a Rn 5.

⁷⁰ KK-Tolksdorf, § 209 a Rn 5; Paeffgen in: SK, § 209 a Rn 6.

⁷¹ KK-Tolksdorf, § 225 a Rn 2; Meyer-Göfner, § 225 a Rn 2. – **Exception:** § 225 a subs. 4 s. 1 with s. 2, if the defendant has raised the objection of § 6 a StPO (Meyer-Göfner, § 225 a Rn 2, 22, 23; KK-Tolksdorf, § 225 a Rn 2, 23, 25). –

(b) However, if the court, prior to the commencement of the main trial, considers that a court of **higher rank** has jurisdiction, it shall submit the files through the public prosecution to that court for decision (§ 225 a subs. 1 StPO)⁷².

In this manner, e.g. the single judge acts towards the *Schöffengericht* (Rn 68) respectively towards the higher criminal chamber.

(c) The jurisdiction of a specific criminal chamber with higher rank is no more reviewed *ex officio* (§ 6 a with § 225 a subs. 4 StPO).

88 (3) The Main Trial/ Main Hearing (§§ 226–275 StPO)

(a) Pursuant to § 269 StPO, the court is not allowed to refuse jurisdiction on the grounds that »the case should be brought before a court of lower rank«. This deviation from § 6 StPO (see Rn 86) serves the efficiency of criminal proceedings and is based on the consideration that the trial before an incompetent court of *higher rank* is not to the disadvantage of the defendant.

(b) If, after the commencement of the trial, the court deems a court of higher rank having subject matter jurisdiction, it shall refer the case to the competent court with binding effect (§ 270 subs. 1, 3 StPO).

This binding effect does not hold if the referral is based on arbitrariness, i.e. obviously contrary to law⁷³. The case is then referred back⁷⁴.

(c) As for the relation of the higher criminal chamber to the specific criminal chambers and the relation of the specific criminal chambers among each other, §§ 6 a, 270 subs. 1 s. 2 StPO apply: Thus, in contrast to § 269 StPO, **specific criminal chambers with higher rank** are allowed to refer the case to such with lower rank respectively to the higher criminal chamber – and *vice versa*⁷⁵. This referral has binding effect (§ 270 subs. 3 StPO), unless arbitrariness is given. However, in this stage of the criminal proceedings (main trial) such a referral is not made *ex officio*, but requires a timely **motion of the defendant pursuant to § 6 a StPO**.

89 (4) Appeal on Law (§ 338 no. 4 StPO)

(a) Based on sense and purpose of § 269 StPO (Rn 88), the decision of a panel with higher rank instead of the competent panel with lower rank cannot be challenged by an appeal on law⁷⁶.

However, this does not hold in case of arbitrariness as unacceptable wrong decision⁷⁷.

⁷² However, regarding § 24 subs. 1 no. 3 GVG the »*perpetuatio fori*« (Rn 78 at the end) is to be considered. So, the referral pursuant to § 225 a subs. 1 StPO is dropped; the same holds for § 25 no. 2 GVG. *KK-Tolkendorf*, § 225 a Rn 5; *Meyer-Göfßner*, § 225 a Rn 5.

⁷³ *BGH* St 45, 58, 61 et seq; *Meyer-Göfßner*, § 270 Rn 20.

⁷⁴ *BGH* (see Fn 73); *Meyer-Göfßner* (see Fn 73); dissenting *KK-Engelhardt*, § 270 Rn 26. *KK-Engelhardt*, § 270 Rn 16; *Meyer-Göfßner*, § 270 Rn 12.

⁷⁵ *KK-Engelhardt*, § 269 Rn 10; *Meyer-Göfßner*, § 269 Rn 8.

⁷⁶ *BGH* St 38, 212; *KK-Engelhardt*, § 269 Rn 9, 10; *Meyer-Göfßner* § 269 Rn 8, § 338 Rn 32.

(b) If, in contrast, a court with lower rank has decided instead of a court with higher rank, this lack of subject matter jurisdiction is to be taken into account *ex officio* (§ 6 StPO) by the final appeal court, provided that an admissible appeal on law is filed⁷⁸.

(c) Concerning specific criminal chambers of the *LG*, § 6 a StPO is to be considered: The lacking jurisdiction of the higher criminal chamber respectively of one of the specific criminal chambers (§§ 74 subs. 1, subs. 2, 74 a, 74 c, 74 e GVG) can only be challenged by appeal on law, if the timely motion of the defendant, required by § 6 a StPO, is given⁷⁹.

90 Case 3: – Change of the subject matter jurisdiction –

A is charged with dangerous bodily injury at the lower district court (*AG – single judge*). He had grossly injured his girlfriend F with a baton, and thereby hit her eye. In the **interlocutory proceedings** (§§ 199 et seq. StPO), it turns out that F has meanwhile gone blind in this eye. According to § 209 subs. 2 StPO, the criminal judge thus submits the files through the public prosecution to the *Schöffengericht* (Rn 68) for decision. The *Schöffengericht* takes over the case and opens the main proceedings. In the **main proceedings** it turns out that A had committed the strokes as means of a brutal attempt of rape: A had intended to break F's resistance by using the baton. Since A is previously convicted for dangerous bodily injury and rape, the *Schöffengericht* considers the subject matter jurisdiction of the higher district court (*LG*) – higher criminal chamber – to be given according to § 24 subs. 1 no. 2 GVG (Rn 77) and refers the case to the higher criminal chamber pursuant to § 270 subs. 1 StPO.

(a) Did the single judge as well as the *Schöffengericht* decide correctly?

(b) The higher criminal chamber is not to be about to take on the case; for it considers the *AG*'s power of sentence (§ 24 subs. 2 GVG, Rn 77) as sufficient.

(c) What can the higher criminal chamber do, if, shortly after the *Schöffengericht*'s decision to refer the case, F dies from the results of severe brain injury due to A's strokes?

91 Referring to case 3 (a): The single judge had to proceed pursuant to § 209 subs. 2 91

StPO (Rn 86), particularly because he never has subject matter jurisdiction in cases of **felonies**⁸⁰ (§ 25 GVG, Rn 80). The decision of the *Schöffengericht* (Rn 68), the higher criminal chamber being competent, is correct – at least **not arbitrary**, i.e. not constituting an obvious violation of law: In face of the seriousness of the felonies committed by A

– attempted rape by brutal force using a dangerous tool, serious bodily injury in the sense of § 226 subs. 1 StGB (blindness) –,

furthermore due to his relevant previous convictions for similar offences, the prognosis of a prison sentence of more than four years was appropriate, at least not indefensible.

Concerning case 3 (b): The *Schöffengericht*'s decision to refer the case has binding effect according to § 270 subs. 3 StPO, since it is not arbitrary (Rn 88).

⁷⁸ *KK-Engelhardt*, § 270 Rn 30; *Meyer-Göfßner*, § 270 Rn 27, § 338 Rn 32.

⁷⁹ *KK-Pfeiffer*, § 6 a Rn 13, § 338 Rn 68; *Meyer-Göfßner*, § 6 a Rn 16, § 338 Rn 33.

⁸⁰ In the case at hand: § 226 subs. 1 no. 1 (going blind) with § 18 StGB.

Regarding case 3 (c): The decision of the *Schöffengericht* to refer the case to the higher criminal chamber has the effects of an **order opening the main proceedings**⁸¹. Thus, the criminal case is pending before the higher criminal chamber. After F's death (causing bodily injury with fatal result, § 227 StGB), the *Schwurgericht* (Rn 72, 72 a) would actually be materially competent (§§ 74 subs. 2 s. 1 no. 8, 74 e GVG). However, pursuant to § 6 a s. 2 StPO, the higher criminal chamber would only be allowed to consider its subject matter incompetent, resulting from F's death, if A raises a timely motion (§ 6 a s. 3 StPO)⁸².

3. Local Jurisdiction (*forum*)

⁹² The subject matter jurisdiction is regulated in the GVG (§ 1 StPO), whereas §§ 7–21 StPO determine the *forum/venue* as local jurisdiction.

a) General Jurisdiction (General Cases of Local Jurisdiction)

- (1) As primary cases of general jurisdictions, the StPO regulates the following:
- *forum delicti commissi*/place of the commitment of the act (§ 7), concretised in § 9 StGB⁸³.
 - *forum domicilii*/place of residence (§ 8 subs. 1 StPO), substantiated in §§ 7 et seq BGB⁸⁴.
 - *forum deprehensionis*/place where the accused was arrested (§ 9 StPO)⁸⁵.
- In principle, these jurisdictions, also called main jurisdictions, are of equal value. Thus, the public prosecution may choose among them⁸⁶.
- (2) As secondary (subsidiary) cases of general jurisdictions, the StPO determines:
- The ordinary place of residence (§ 8 subs. 2 alt. 1); however, the places of pretrial custody and prison sentence are excluded.
 - The last domicile (§ 8 subs. 2 alt. 2).
 - The *forum* determined by the *BGH* according to § 13 a StPO.

b) Specific Jurisdiction (Specific Cases of Local Jurisdiction)

The most important example of specific jurisdiction is the *forum* regarding crimes against press laws, § 7 subs. 2 StPO; however, this *forum* merely substitutes the place of the act's commitment.

– According to the prevailing legal opinion, § 7 subs. 2 is not applicable by analogy to broadcast and television.⁸⁷

⁸¹ § 270 subs. 3 StPO.

⁸² See §§ 225 a subs. 1, subs 4, s. 1, 270 subs. 1 s. 2 StPO (see already Rn 87 at the end, Rn 88 at the end).

⁸³ See additionally §§ 10 and 10 a StPO.

⁸⁴ Additionally § 11 StPO.

⁸⁵ According to *BGH* St 44, 347 it is irrelevant here whether an **arrest warrant** against the accused is issued. Objections against this: *Meyer-Göbner*, § 9 Rn 2.

⁸⁶ However, for § 9 StPO this is disputed (see *Meyer-Göbner*, § 9 Rn 1 with further references).

⁸⁷ *KK-Pfeiffer*, § 7 Rn 7; *Meyer-Göbner*, § 7 Rn 7; *Rudolph* in: SK, § 7 Rn 8; **in dispute**.

The *forum* for state security matters also belongs to the specific local jurisdiction, §§ 74 a, 120 GVG.

c) Extraordinary Cases of Local Jurisdiction

Such jurisdictions are the following:

- Jurisdiction of connected cases (§ 13 with § 3 StPO).
- Jurisdiction by **determination of superior courts** in a jurisdictional conflict among several courts, in the case of negative jurisdictional conflict due to unappealable decisions of more than one court, in the case the competent court being prevented from exercising its judicial authority respectively in cases of an endangerment of the public security⁸⁸ (§§ 14, 15, 19 StPO).

d) Regulation of the Local Jurisdiction and Art. 101 subs. 1 s. 2 GG (Principle of the Statutorily Competent Judge)

If more than one court is locally competent pursuant to §§ 7 et seq StPO, the public prosecution may choose at which court it files the bill of indictment. According to the view of some legal scholars, this right of choice violates Art. 101 subs. 1 s. 2 GG⁸⁹. However, this view is to be rejected in compliance with the totally prevailing opinion, provided the public prosecution's decision being free from arbitrariness⁹⁰.

e) Principle of Priority, § 12 StPO

If, as usual, more than one local jurisdiction (*forum*) is given, no problems should arise due to the public prosecution's right of choice. There are also no problems, if the case is pending only before one of the locally competent courts. On the contrary, the situation that more than one of the locally competent courts have opened the main proceedings in the respective criminal case is in need of a statutory regulation⁹¹: Here, the principle of priority pursuant to § 12 subs. 1 StPO is applicable. In this respect, »*Eröffnung der Untersuchung*«, (i.e. opening the investigation) in the sense of § 12 StPO means the court's order to open the main proceedings⁹².

f) Reviewing the Local Jurisdiction by Trial Courts; Appeal on Law

Reviewing the local jurisdiction *ex officio* is limited by time, § 16 StPO. Lack of local jurisdiction gives only reason for an appeal on law (§ 338 no. 4 StPO) if the defendant has raised in time the motion of § 16 s. 3 StPO⁹³.

⁸⁸ The latter holds e.g. in cases of danger of massive unrest/riot risk; *Meyer-Göbner*, § 15 Rn 5.

⁸⁹ *Roxin*, 8/1 and *Rudolph* (see Fn 87), Rn 9 vor § 7, both with further references.

⁹⁰ *KK-Pfeiffer*, § 7 Rn 2; *Meyer-Göbner*, Rn 10 vor § 7; *OLG Hamm* NSZ-RR 1999, 16.

⁹¹ See *Meyer-Göbner*, § 12 Rn 1.

⁹² *Meyer-Göbner* (see Fn 91), Rn 3; *Roxin*, 8/4.

⁹³ *Rudolph* in: SK, § 16 Rn 13, *Wendisch* in: LR § 16 Rn 18.

4. Distribution of Responsibilities

a) Distribution of Responsibilities on Several Court's Panels with Same Rank

95 The court's internal schedule of responsibilities (§ 21 e GVG) belongs to the regulations serving the determination of the legally competent judge in the sense of Art. 101 subs. 1 s. 2 GG (Rn 68 et seq)⁹⁴. This schedule is drawn up in judicial independence by the court's presiding committee.

Example 20: Three *Schöffengerichte* (Rn 68) and eight single judges serve as panels at the lower district court (AG) in the city of X. At the higher district court (LG) in the same city there are one *Schwurgericht* (Rn 72), five higher criminal chambers and three lower criminal chambers (Rn 69, 70). The schedule of responsibilities of the AG X determines what criminal matters are to be distributed on which of the three *Schöffengerichte* respectively the eight criminal judges. The criterion for this distribution are usually the initial letters of the indicted accused. Correspondingly, the schedule of responsibilities of the LG X distributes the criminal matters of first instance on the five higher criminal chambers and the criminal matters of appellate instance on the three lower criminal chambers.

b) Distribution of Responsibilities within the Panels of Judges

— See § 21 g GVG (based on BGHZ 126, 63, Combined Joint Panels). —

III. Exclusion/Disqualification of a Judge; Challenge of a Judge

96 Besides independence, **impartial neutrality** is of essential importance for the judicial function. The aforesaid principle of the statutory competent judge (Rn 68), one of the so-called fundamental civil rights concerning court proceedings, demands the legal guarantee of such impartiality⁹⁵. This guarantee is served by the provisions regarding the exclusion and challenge of judges (§§ 22–31 StPO).

1. The Excluded/Disqualified Judge (*iudex inhabilis*)

Pursuant to §§ 22, 23 StPO, the judge is directly excluded by law without the requirement of a motion for challenge (§ 24 StPO).

— Nevertheless, such a motion is admissible, § 24 subs. 1 StPO. —

Thus, the exclusion is to be observed *ex officio*. If a court decision stating a judge to be excluded is passed upon a motion of challenge, this decision only has declaratory relevance⁹⁶.

a) Reasons for Exclusion under § 22 StPO

97 § 22, such as § 23 StPO, contains a concluding regulation.

⁹⁴ BVerfGE 18, 65, 69; E 18, 344, 349; E 18, 423, 425.

⁹⁵ BVerfGE 21, 139, 145 f; Krey, StPO 1, Rn 275 with further references.

⁹⁶ Meyer-Göbner, § 24 Rn 4.

(1) § 22 no 1 StPO (the Judge as Victim in the Case at Hand)

Only a judge whose rights are directly concerned by the criminal offence at hand is »aggrieved« in the sense of this provision⁹⁷. For example, this requirement is lacking if the defendant is charged with defamation of a trade union of which the judge is a member⁹⁸.

Where **all judges of a court** are insulted by the defendant⁹⁹, not everyone of them can be »aggrieved« in the sense of § 22 Nr. 1 StPO. Otherwise criminal offenders would be able to paralyze entire courts. In such cases it has to be taken into account whether the respective judge is directly and **individually** concerned¹⁰⁰.

Even if a judge is »aggrieved« by only one of several crimes the defendant is charged with, he is excluded from the entire criminal proceedings: The judge's exclusion holds for the entire subject matter of the proceedings, also where a joint order of connected cases is concerned (Rn 83)¹⁰¹.

(2) § 22 no 2 and 3 StPO (the Judge as Person Related by Blood or Marriage to the Victim or the Accused)

Engagement is no ground for exclusion; however it leads to a ground for challenge (§ 24 subs 2 StPO)¹⁰².

Not explicitly regulated is the case where the competent judge himself is the defendant, the indicted accused or the accused person (§ 157 StPO) respectively the perpetrator. Here, his exclusion can self-evidently be taken for granted (all-the-more argument / *argumentum a fortiori* based on § 22 no. 3 StPO); accordingly, the absence of an specific regulation is irrelevant¹⁰³.

(3) § 22 no 4 StPO (Prior Activities in the Case at Hand as Public Prosecutor, Police Officer or Attorney at Law respectively Defense Counsel)

The term »in the case at hand« is to be interpreted extensively: It covers the criminal proceedings from the beginning of the investigations to the final judgment, and even reopening proceedings (Rn 22, 23)¹⁰⁴. As criterion serves the unity of the main trial, even though its subject matter comprises several actions in the sense of substantive criminal law (§ 53 StGB) or several acts in a procedural sense (Rn 83). In case of joinder (Rn 83), the whole procedure is only **one** case in the sense of § 22 no 4 StPO¹⁰⁵.

⁹⁷ BGH St 1, 298; BayObLG NSiZ 1993, 347; KK-Pfeiffer, § 22 Rn 4.

⁹⁸ Krey (see Fn 95), Rn 277.

⁹⁹ Concerning the substantive requirements for such a defamation of a group of persons: Krey/Heinrich, Strafrecht, BT 1, 13th ed. 2005, Rn 392 et seq. 395–397 c with further references.

¹⁰⁰ Meyer-Göbner, § 22 Rn 8 with further references.

¹⁰¹ BGH St 14, 219; KK-Pfeiffer, § 22 Rn 17.

¹⁰² Meyer-Göbner, § 22 Rn 9.

¹⁰³ KK-Pfeiffer, § 22 Rn 7; Krey, StPO 1, Rn 279; Meyer-Göbner, § 22 Rn 3.

¹⁰⁴ BGH St 28, 262, 264.

¹⁰⁵ BGH St 28, 262, 263; Meyer-Göbner, § 22 Rn 17.

From today's point of view, this German system of mixed courts, consisting of professional and lay judges, is more appropriate and more efficient than the US jury trial system²¹⁷.

2. The Problem of Lay Judges' Knowledge of the Files

138 a) The principle of orality/oral proceedings (§§ 261, 264 StPO²¹⁸) as well as the principle of immediacy (§§ 250 et seq. StPO), both governing the main hearing, argue for the following usual practice in the administration of criminal justice: **The lay judges are not allowed to inspect the court's files.** They should form their opinion merely based on the outcome of the main hearing. According to the up to now prevailing opinion, this practice has been considered as legal requirement²¹⁹. Hence, the lay judges' knowledge of the files could cause **bias**²²⁰.

139 In this context, the fact that **professional judges** are allowed to have knowledge of the files is not relevant for lay judges. This is because presiding judges and such professional judges, acting as reporting judge, **need** to have knowledge of the files to be able to carry out their function. And other associated professional judges typically are already closer acquainted with the case by preliminary decisions like the order opening the main proceedings (§ 203 StPO). Furthermore, professional judges are trained to strictly separate the content of the files and the result of the main trial.

140 b) Indeed, the recent legal practice of the *BGH* has started to weaken the aforesaid legal position²²¹. Moreover, the latter is refused by the nowadays prevailing scholarly opinion²²². Both, *BGH* and legal scholars, refer amongst others to the alleged equal status of lay judges and professional ones²²³.

However, thereby unequal issues are inappropriately treated as equal ones (Rn 139). This reason alone argues for the up to now practice (Rn 138). In addition, incalculable consequential problems are threatening: When affirming a **right** of lay judges to know the files, it could be the next step to call for a respective **duty**. Such a call would disrupt the criminal procedure system and would not be realizable.

²¹⁷ *Grube* (see Fn 213; fundamentally); *Krey* (see Fn 216); *Wilhelmi*, Die Verfahrrensordnung... p. 15, 28, 29. Severely criticizing the US trial system: *Pizzi*, Trials without truth.

²¹⁸ »Trials« in the sense of these provisions is the **hearing**.

²¹⁹ *BGH* St 13, 73 et seq; *Beulke*, Rn 408 with further references; *Krey*, StPO 1, Rn 329; *Kühne*, ZRP 1985, 237 et seq. -

²²⁰ *Krey* and *Kühne* (Fn 219); *Paulus* in: *KMR*, § 31 Rn 3.

²²¹ *BGH* St 43, 36, 39.

²²² *KK-Hamisch*, § 30 GVG Rn 2; *Meyer-Göfßner*, § 30 GVG Rn 2 with further references; *Rieß*, JR 1987, 389, 391.

²²³ *BGH* (see Fn 221), p. 40; *Meyer-Göfßner* with further references.

§ 4 Public Prosecution

Besides the criminal courts, especially the public prosecution and the police are 141 part of the prosecuting authorities. Regarding the relationship between **public prosecution** and **criminal courts**, the position of the former has become more powerful – legally and factually. This shall be demonstrated by the following provisions:

– § 153 subs. 1 StPO: Suspension of the proceedings in cases of less serious criminal offences; *according to s. 2, in petty cases even without the court's consent*.

– § 153 a subs. 1 StPO: Suspension of the proceedings after compliance of conditions imposed upon the accused; *in cases of petty offences even without the court's consent, § 153 a subs. 1 s. 7 with § 153 subs. 1 s. 2 StPO*.

– §§ 153 c, 153 d, 153 f, 154 subs. 1, 154 a subs. 1, 154 b subs. 1–3, 154 e StPO: Non-prosecution of criminal offences respectively restriction of prosecution or refraining from proceedings, *in each case without the court's consent*.

– § 161 subs. 1 s. 1 StPO: Making all kinds of investigations. This provision serves as general clause for criminal investigations and additionally as »**small general clause for petty interferences**« like **short-term observation**¹.

– § 183 subs. 1, 2, § 230, § 248 a with § 259 subs. 2, § 263 subs. 4, § 266 subs. 2 etc., § 303 c StGB (criminal code): Criminal offences requiring the victim's demand for prosecution or, instead of such demand, *the public prosecutor affirming a special public interest in criminal proceedings*².

142 On the contrary, the position of the public prosecution has become significantly weaker compared to the power of the police authorities. In legal reality, the **police** has, to a great extent, developed to the master of the preliminary proceedings³. Additionally, its relevance in the course of fighting crime has also legally increased, particularly due to the admission of extensive competences and powers for »**crime prevention**« in State police laws⁴.

I. The Public Prosecution's Position in the System of Separation of Powers

1. Creation of the Public Prosecution as »Guardian of the Law« in the 19th Century

The old inquisitorial trial with its **identity of accuser and judge**⁵, regulated by the CCC (Rn 24), had already been fought against in the legal thinking of the Enlightenment of the

¹ See: *Beulke*, Rn 104 with further references; *Hilger*, NSIZ 2000, 561, 563, 564; *Krey*, Kriminalitätsbekämpfung ..., p. 648 et seq; *Leister*, p. 230 et seq, 234 et seq, 237 et seq; *Meyer-Göfßner*, § 161 Rn 1, 1 a; *Noizon*, p. 18 et seq, 22 et seq; *Pfeiffer*, § 161 Rn 1.

² *Krey*, StPO 2, Rn 135, 237.

³ *Beulke*, Rn 106; *Krey*, StPO 1, Rn 493–495; *Kühne*, Rn 135–137; all of them with further references.

⁴ *Krey*, Kriminalitätsbekämpfung ..., p. 634–636, 650, 652; *Kühne*, Rn 136, 371; thorough-ly *Noizon*.

⁵ *Krey*, StPO 1, Rn 53, 60–63, 335 with further references.

18th century (*Montesquieu* etc.). Following the French example, the **public prosecution** was introduced in Germany since mid of the 19th century. It was intended to serve as guardian of the law according to the postulates of the liberalism demanding the rule of law in criminal proceedings⁶.

- a) For this, the public prosecution was vested with extensive rights to give instructions to the police
 – today: §§ 161 subs. 1 s. 2 StPO, 152 GVG –;
 additionally the role of the police in criminal proceedings was legally reduced to a »dependent authority of the administration of criminal justice«
 – today: § 163 StPO –.
- b) Regarding the judiciary, the public prosecution was given the right to file appeals (on points of facts or law), also in favor of the defendant (today: § 296 StPO).

2. The Public Prosecution as Part of the Second Power (Executive)

144 In the system of separation of powers, the public prosecution belongs to the executive and is no part of the judicial power⁷: According to Art. 92 GG the judicial power is vested solely in the judges. Only the judges enjoy the independence guaranteed in Art. 97 GG (see above, Rn 60 et seq.); on the contrary, public prosecutors are civil servants bound by instructions⁸.

3. The Public Prosecution as Judicial Authority (Organ of the Administration of Criminal Justice)

145 In supreme court practice the public prosecution is described as »organ of the administration of criminal justice«⁹. The same description is used in the legal science; in this context the public prosecution is often rightly characterized as »judicial authority« (*Justizbehörde*)¹⁰. Like the courts, the public prosecution has to work towards finding-out the truth and coming to a just decision. The public prosecution's activity does not primarily aim at usefulness, security and order. Rather, it does directly aim at the realization and enforcement of law¹¹. According to its function the public prosecution is an autonomous (§ 150 GVG) organ of the administration of criminal justice and belongs to the »functional area of the judica-

⁶ Krey (see Fn 5), Rn 336 with further references; Rüping/Jerouschek, Rn 252.

⁷ BVerfG NSZ 2001, 382, 384; Krey (see Fn 5), Rn 338; Meyer-Göbner, Rn 5 et seq vor (i.e. preliminary note) § 141 GVG.

⁸ BVerfG E 32, 199, 216; BVerfG NSZ 2001 (see Fn 7); Krey, StPO 1, Rn 338 with further references.

⁹ BGH St 24, 170, 171; BVerfGE 32 (see Fn 8); see also BVerwG NJW 1961, 1496, 1497.

¹⁰ Beulke, Rn 88; Krey (see Fn 8), Rn 339–341; Kühne, Rn 130, 133; Roxin, § 10 Rn 8.

¹¹ Peters, § 23 II.

ture¹². Consequently, the public prosecution is rightly not assigned to the ministry of the interior but to the ministry of justice and thus deserves the description as **judicial authority**.

4. Is the Public Prosecution Bound by the Supreme Court's Practice within the Application Range of the Principle of Legality?

According to § 150 GVG, the public prosecution is »in its official activities independent from the courts«.

However, its function as **autonomous** organ of the administration of criminal justice does not exclude that the public prosecution may be forced by criminal courts to take action in certain cases. In this respect, it may be referred to:

- § 175 StPO (order to charge);
- § 207 subs. 3 StPO (submitting a new bill of indictment).

Whether, and if so, to what extent, the public prosecution is – despite § 150 GVG – bound by an established supreme court's practice, is in dispute.

a) The BGH's Standpoint

The BGH has decided in the year 1960¹³:

»If, according to the facts in the case at hand, there are sufficient grounds for the presumption that the suspect has fulfilled the legal elements of a criminal offence and will be convicted pursuant to established supreme court's practice, the police has to intervene, and the public prosecution has to file the bill of indictment with respect to the principle of legality, unless there exists an exception expressly provided by law.«

Thus, according to the standpoint of the BGH, the public prosecution's statutory duty to prosecute criminal offences (principle of legality – §§ 152 subs. 2, 160 subs. 1, 170 subs. 1 StPO –) means the following: Provided, the respective act in the case at hand is punishable pursuant to supreme court's practice, the public prosecutor is not allowed to refrain from prosecution and from charge with reference to his dissenting legal point of view.

To give reasons for the public prosecution being bound to leading cases, the BGH emphasizes among others:

- Otherwise both, the principle of legality and the separation of powers would be violated.
- Furthermore, the negation of such binding effect of leading cases would be contrary to the exclusive competence of judges according to Art. 92 GG (Rn 59, 144): The public prosecution could – due to its own legal point of view – obstruct the execution of duties and responsibilities of the criminal courts by waiver of charges.
- The law does not have a life of its own; rather, the independent judicial power is appointed to interpret/concretize the meaning of statutes.
- The public prosecutor who had to charge against his own legal conviction, could demonstrate his refusal of the respective established supreme court's practice in the main trial, especially by pleading for acquittal.

¹² Meyer-Göbner, Rn 6, 7 vor § 141 GVG.

¹³ BGH St 15, 155 et seq. Detailed analysis in Krey, StPO 1, Rn 343 et seq.

b) Legal Doctrine¹⁴

48 (1) Numerous authors follow the *BGH's* point of view¹⁵, giving the following additional arguments:

- The duty to charge according to § 170 subs. 1 StPO (principle of legality) requires the probability of conviction, for which the supreme court's practice is decisive as far as points of law are concerned¹⁶.
- For the purpose of protecting the exclusive competence of judges (Rn 59, 144, 147), the proceedings to force public charge by order of the court of appeals (§§ 172 et seq, 175 StPO) are not sufficient since only the »aggrieved party« can proceed with this action¹⁷.

(2) In contrast, a widespread scholarly opinion rejects such binding effect to leading cases, which the *BGH* holds as being given¹⁸. This scholarly opinion is largely based on § 150 GVG (see Rn 146), i.e. on the public prosecution's position as autonomous organ of the administration of criminal justice¹⁹. Additionally, the *BGH's* standpoint is characterized as questionable due to the uncertainty in many cases, whether or not an established supreme court's practice is given²⁰.

c) The Author's Point of View

49 The author's point of view has already been presented elsewhere²¹. Thus, a mere outlining must be sufficient. The following case shall clarify the author's opinion.

Case 8:²²

The medical doctor O has fallen terminally ill of very painful cancer. In order to avoid a slowly and harrowingly death of cancer, he commits suicide. His friend F, who is – at O's request – present when O departs his life, does not intervene respecting O's self-responsible death wish. The public prosecutor S refrains from charging F with omission to provide aid (§ 323 c StGB). He knows that from the *BGH's* point of view in every case of acute danger to life caused by suicide attempt an »accident« in the sense of § 323 StGB is given, i.e. the *BGH* affirms a duty to provide aid in such cases²³. However, S rejects this case-law, where

¹⁴ Closer analysis in *Krey* (see Fn 13), Rn 346–349.

¹⁵ *Beulke*, Rn 90; *KK-Schmidt*, § 170 Rn 6; *Kühne*, Rn 144, 145; *Ranft*, Rn 242; *Schlüchter*, Rn 61.1–64; apparently consenting *Meyer-Gößner*, Rn 11 vor (i.e. preliminary note) § 141 GVG.

¹⁶ *Schlüchter* (see Fn 15).

¹⁷ *Gössef*, § 3 a IV.

¹⁸ *Fezer*, 2/32 et seq; *Heilmann*, Rn 66; *Lesch*, chapter 2, Rn 66–68; *Roxin*, § 10 Rn 12; *Rüping*, Rn 68, 69.

¹⁹ *Roxin* (Fn 18).

²⁰ *Rüping* (Fn 18) refers to »changeovers« in supreme court's practice.

²¹ *Krey*, StPO 1, Rn 350–356 with further references.

²² Case according to *Lesch* (see Fn 18).

²³ *BGH* St 6, 147 et seq (*GS*), i.e. *BGH's* Joint Panel for Criminal Cases), 13, 162, 169; 32, 367, 375.

(obviously) a self-responsible suicide is given – following the prevailing scholarly opinion²⁴.

(1) Pursuant to the above-mentioned standpoint of the *BGH*, that the public prosecutor is bound to an established supreme court's practice (Rn 147), S was obliged to charge F with omission to provide aid resulting from the principle of legality (§§ 152 subs. 2, 160 subs. 1, 170 subs. 1). This official duty as public prosecutor has been violated by S. The *BGH* has convincingly justified the existence of such duty. Thus, S has committed a disciplinary offence²⁵, resulting in his disciplinary responsibility²⁶.

(2) On the contrary, by omitting to prosecute F, S has not committed the criminal offence »obstruction of criminal prosecution by omission« as misdemeanor in office (§§ 258, 258 a/13 StGB)²⁷. An established supreme court's practice cannot force the public prosecutor – with the effect of establishing punishment – to prosecute contrary to his own legal conviction²⁸, this is because in Germany there is no stare decisis system since case law has no binding effect like statute law.

(3) Summary: According to the standpoint of the *BGH* (Rn 147), in case 8 the public prosecutor S would have to expect a criminal charge with obstruction of criminal prosecution by omission. This is because S had a duty to prosecute F pursuant to §§ 152 subs. 2, 160 subs. 1, 170 subs. 1 StPO (principle of legality) since he is legally bound by the established supreme court's practice on § 323 c StGB (Rn 149).

On the contrary, following the scholarly opinion which dissents from the *BGH* (Rn 148 with Fn 18), S had no duty to prosecute F, since S did not consider F's behavior as criminal offence.

The author's standpoint is differentiating: On the one hand, the author holds an official duty of S to prosecute F as being given and, accordingly, assumes a disciplinary offence. On the other hand, the author negates the punishability of S under §§ 258, 258 a/13 StGB, because the public prosecutor's duty to obey leading cases (Rn 147, 150) cannot constitute his legal obligation to charge (§ 13 StGB) enforced by criminal penalties: In Germany, judge-made law/case law does not have the rank of statute law.

However, if the public prosecutor arbitrarily differs from the supreme court's practice, respectively if his divergent legal opinion is indefensible, his behavior may fulfill the legal elements of 258 a/13 StGB (obstruction of criminal prosecution by omission).

²⁴ Regarding this prevailing opinion see *Krey/Heinrich*, Rn 92–95 with further references.

²⁵ Concerning the term »disciplinary offence« see: § 77 BBRG; § 45 BRRG; § 85 LBG Rheinland-Palatinate.

²⁶ *Krey*, StPO 1, Rn 355; critically among others: *Kühne*, Rn 145 Fn 57; *Roxin*, § 10 Rn 12 at the end; *Rüping*, Rn 69 Fn 53.

²⁷ *Krey* (Fn 26), Rn 351–354; *Kühne*, Rn 145.

²⁸ *Krey* (Fn 26). – Insofar, I agree with the authors named above, Rn 148 (2) with Fn 18 –

5. The Public Prosecution: Being Bound by Leading Cases Beyond the Application Range of the Principle of Legality?

153 Pursuant to the prevailing and convincing opinion, the public prosecution can charge criminal acts even if not being punishable under established supreme court's practice, provided the public prosecution holds punishability as being given²⁹. This is the only way to correct case law which is not convincing from the public prosecution's point of view.

However, the public prosecution's procedure must be based on good reasons. This is because the indictment often results in severe consequences for the person concerned³⁰.

6. The Public Prosecution's Duty to Act Impartially

154 The image of the public prosecution is highly influenced by its function as accuser (formal accusation by filing the bill of indictment, § 170 subs. 1 StPO) and its role in the main trial (reading out the charge, § 243 subs. 3 StPO). Thereagainst, it is to emphasize:

In contrast to the adversarial trial (England/USA), the German public prosecution is in no way **adversarial party** (adversary towards the defendant) of the criminal proceedings³¹. Rather, it is as »guardian of the law« obliged to truth and justice. This **duty to impartiality** is particularly expressed in the following provisions:

- § 160 subs. 2 StPO (duty to investigate also *exonerative* circumstances).
- §§ 296 subs. 2, 359, 365 StPO (competence to file remedies also for the accused/defendant's *benefit* and to apply for reopening the proceedings *in favour* of the convicted person).

- § 170 subs. 2 StPO (duty to terminate the proceeding in case of lacking sufficient suspicion that the indicted accused has committed a criminal offence, § 203 StPO).

Furthermore, the public prosecutor has to apply an acquittal in his final speech (pleadings, § 258 StPO) when in the main proceedings the defendant's guilt is not proven³².

In Germany, the mentioned legal status has led to the dictum of the public prosecution being the »most impartial authority of the world«³³, which seems to be a little euphemistic in face of the law in action³⁴.

II. Structure and Organization of the Public Prosecution

I. §§ 141, 142 GVG

155 According to § 141 GVG a public prosecution shall *exist* at every criminal court. However, pursuant to its sense and purpose this provision only requires that for

²⁹ *Beulke*, Rn 89; *Krey*, StPO I, Rn 358 with case example and further references; *Meyer-Gofßner*, Rn II vor § 141 GVG; dissenting *Kühne*, Rn 143.

³⁰ *Krey* (Fn 29), Rn 359; *Kühne* (Fn 29).

³¹ *Krey* (Fn 29), Rn 361 with further references; *Meyer-Gofßner*, Rn 8 vor § 141 with further references; *Roxin*, § 10 Rn 9.

³² General opinion.

³³ For references see *Krey*, StPO I, Rn 361.

³⁴ See *Kühne*, Rn 138.

every court a certain public prosecution is *competent*³⁵. This conclusion is relevant for the lower district courts (*AG*), since the respective public prosecution at the superordinate higher district court (*LG*) is also competent for the *AG*. On the contrary, a public prosecution exists at every *LG*, at every *OLG* (court of appeals) and at the *BGH* (federal supreme court of justice):

- The office of the public prosecution at the *BGH* is held by the **federal attorney general** (*Generalbundesanwalt*) who is assisted by associated *federal attorneys general* (*Bundesanwälte*), § 142 subs. 1 no. 1 GVG.

- The public prosecution at the *OLG* is named **public prosecution general** (*Generalstaatsanwaltschaft beim OLG*), represented by the attorney general (*Generalstaatsanwalt*) as head of office³⁶.

- At every *LG* exists a public prosecution (*Staatsanwaltschaft beim LG*) represented by the district attorney (*Leitender Oberstaatsanwalt*) as head of office³⁷.

- As already mentioned, the duties and responsibilities of the public prosecution at the *AG* are carried out by the public prosecution at the superordinate *LG*³⁸.

Even *Amtsanwälte* (i.e. subordinate members of the district attorney's office being only competent for carrying out the public prosecution's role concerning less serious criminal offences at the lower district court – single judge → do not form a specific »public prosecution at the *AG*«. Rather, they are incorporated to the public prosecution at the *LG*³⁹.

In conclusion, authorities of the public prosecution are the **federal attorney general** at the *BGH* and the public prosecution general at the **State-courts of appeals** (*OLG*) respectively the public prosecution at the **State-higher district courts** (*LG*).

2. Monocratic Organization of the Public Prosecution (§§ 144, 145 GVG)

The public prosecution is structured hierarchically; it is a monocratic authority⁴⁰, 156 where every single public prosecutor acts as **representative** of the respective head of office (federal attorney general, attorney general, district attorney).

Nevertheless, the **effectiveness** of the public prosecutor's acts as representative is not affected by internal restrictions through superior's directives⁴¹.

Example 25: In spite of an interdicting official instruction by the head of office, the public prosecutor S agrees with the termination of the proceedings by the court in trial pursuant to § 153 a subs. 2 StPO (in casu: terminations of the proceedings after the de-

³⁵ *KK-Schoreit*, § 141 GVG Rn 2; *Meyer-Gofßner*, § 141 GVG Rn 2.

³⁶ In jargon among judges and public prosecutors: »*Generalk*«.

³⁷ Abbreviated: *LOSTA* (*Leitender Oberstaatsanwalt*). In the State of Berlin, the head of public prosecution at the higher district court is called »*Generalstaatsanwalt*« (*Meyer-Gofßner*, § 142 GVG Rn 7).

³⁸ *Meyer-Gofßner*, § 141 GVG Rn 2, § 142 GVG Rn 8.

³⁹ See: *KK-Schoreit*, § 142 GVG Rn 13; *Meyer-Gofßner*, § 142 GVG Rn 8.

⁴⁰ *KK-Schoreit*, § 144 GVG Rn 1; *Krey/Pföhler*, NSZ 1985, 145 with further references.

⁴¹ *KK-Schoreit*, § 144 GVG Rn 3 with further references; *Meyer-Gofßner*, § 144 GVG Rn 2.

b) The **internal** right to give instructions is additionally based on the mentioned structure of the public prosecution pursuant to §§ 144, 145 GVG (Rn 156 et seq). In the light of the **representative-model** (§ 144 GVG) and the head of office's **right to take over the proceedings** (§ 145 subs. 1 alt. 1 GVG, Rn 157) the internal right to give instructions goes without saying.⁵⁰

As public prosecutors do not act as representatives of the Minister of Justice and, moreover, the latter has no right to take over official acts of the public prosecution, the following conclusion is perfectly obvious: The internal right to give instructions is substantially stronger legitimated by law and therefore more extensive as the respective external right of the Minister of Justice.⁵¹

2. Limitations to the Right to Give Instructions

Usually legal scholars state: The limitations to the right to give instructions resulted from the **principle of legality** (Rn 150) and from criminal provisions serving its protection (§§ 258, 258 a in connection with § 13 StGB)

– obstruction of criminal prosecution, obstruction of criminal prosecution as official criminal offence, the latter as the case may be by omission,⁵² finally, corresponding with this principle, from the prohibition to prosecute innocent people (§ 344 StGB)⁵². In contrast, the field of the **principle of discretionary prosecution** (*Opportunitätsprinzip*, §§ 153–154 c StPO⁵³) was the real scope of the right to give instructions⁵⁴. This is correct, however, stating in greater detail seems to be necessary:

a) Also in the scope of the principle of discretionary prosecution where no duty to prosecute exists, the duty to obey statutes and law applies (art. 20 subs. 3 GG): In this field of the public prosecutor's **discretionary power** respectively his **latitude of interpretation**⁵⁵ instructions are unlawful as far as they would lead to an exercise of discretion, to be qualified as »exceeding discretion« or »abuse of discretion«, for instance due to violation of art. 3 GG (principle of equality)⁵⁶. The same holds in case of violation of comparable limitations to the

⁵⁰ *Krey/Pföhler* (see Fn 48), p. 145 et seq, 148.

⁵¹ *Krey/Pföhler* (see Fn 48); apparently sympathizing with the author's point of view *Kühne*, Rn 141; apparently dissenting the prevailing scholarly opinion: *Kunert* (see Fn 49), p. 915 et seq; *Roxin*, DRiZ 1997, 118 et seq.

⁵² *KK-Schoreit*, § 146 GVG Rn 7; *Meyer-Göbner*, § 146 GVG Rn 3.

⁵³ Additionally, § 376 StPO (principle of discretionary prosecution in *private prosecution* cases) and also criminal offences requiring the victim's demand for prosecution or, instead of such demand, the *public prosecutor affirming a special public interest in criminal proceedings* (Rn 141 at the end) are to be mentioned here; *Krey*, StPO 2, Rn 135, 236, 237 with further references.

⁵⁴ *Gössel*, § 3 A II; *Ranft*, Rn 237.

⁵⁵ There to in detail *Krey/Pföhler* (see Fn 48), p. 149, 150 with further references.

⁵⁶ *Beulke*, Rn 85; *Krey/Pföhler* (see Fn 55).

public prosecutor's latitude of interpretation⁵⁷. Besides, the lawfulness of instructions requires the head of office having sufficient information.

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b) By exception, even in the field of the **principle of legality** instructions can be admissible. The public prosecution's head of office is, e.g., allowed to instruct his subordinate public prosecutors to abide with a certain supreme court's practice.

c) As to the public prosecutor's petitions in his oral pleading/closing speech (§ 258 StPO), any instruction, to *plead for acquittal (or to plead for conviction) regardless of the result of the evidence taking in the main trial* would violate sense and purpose of §§ 261, 264 StPO⁵⁸; as a consequence such an instruction would be unlawful: Due to its duty to act impartially, the public prosecution it is bound by this result, as well (Rn 154).

3. General Instructions (Directives, Guidelines etc.)

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Special instructions to public prosecutors, regarding the case at hand, are rare. Rather, the main relevance of the **right to give instructions**, particularly the external one, inheres in the competence to give **general instructions**, e.g.:

- directives on criminal proceedings and on summary proceedings concerning administrative offences (RiStBV)⁵⁹,
- general guidelines regarding a reporting commitment in criminal matters.

Firstly, general instructions of the respective State Minister of Justice in States with more than one attorney general allow to provide for unitary criminal prosecution where the principle of discretionary prosecution (Rn 162 with Fn 53) applies⁶⁰. Secondly, common directives of all State Ministers of Justice allow a standardization of the public prosecution's activities all over Germany, be it in certain fields, be it in general⁶¹.

IV. Duties/Functions of the Public Prosecution

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The public prosecutor mainly has three functions:

- being master of the preliminary proceedings due to the legal standpoint;
- representing the prosecution in the main trial;
- acting as executing authority.

⁵⁷ *Beulke*, (see Fn 56); *Krey/Pföhler* (see Fn 55); *Ranft*, Rn 237, 238.

⁵⁸ *Beulke*, Rn 86; *KK-Schoreit*, § 146 GVG Rn 8, 9; *Meyer-Göbner*, § 146 GVG Rn 4; *Roxin*, § 10 Rn 11.

– The mentioned provisions lay down that the outcome of the main hearing is decisive for both, the result of the evidence taking and the judgement. –

⁵⁹ See above, Rn 27.

⁶⁰ *Kunert* (see Fn 49), p. 921 et seq. – case example in *Krey*, StPO 1, Rn 388 et seq. –

⁶¹ *Kunert* (see Fn 49), example: the mentioned RiStBV.

1. The Public Prosecution as Master of the Preliminary Proceedings

a) Beginning and Ending of the Preliminary Proceedings

(1) *The Preliminary Proceedings begin as soon as the public prosecution, the police, the customs or tax investigation takes actions, distinguishably aiming towards prosecuting someone for a felony or misdemeanor*⁶².

Therefore, initiating the preliminary proceedings is no exclusive right of the public prosecution. Moreover, a special initiating order is not needed⁶³. As an action in the sense of the definition above, the following may serve as examples:

- Interrogation of a person as accused⁶⁴.
- Arrest pursuant to § 127 StPO (i.e. arrest without warrant/provisional arrest).
- Order for physical examination of the accused pursuant to § 81 a StPO.

As long as the accused's identity is still unknown, the preliminary proceedings are initially conducted »against a person unknown«⁶⁵.

67 (2) *The preliminary proceedings end with the public prosecution's final order/order concluding the investigation*. Insofar there are three alternatives:

Firstly: Filing the bill of indictment, § 170 subs. 1 (with § 203) StPO

If the investigations give reason for a »sufficient suspicion« (§ 203 StPO), the public prosecution files a bill of indictment to the competent court.

- Apart from the bill of indictment, there is a second possibility for the charge: The public prosecution's application to pass a court's penal order (§ 407 subs. 1 s. 4 StPO)⁶⁶ -

Secondly: Termination of the proceedings for lack of reasonable suspicion (§ 170 subs. 2 StPO)

If a reasonable suspicion is lacking

- be it for factual reasons (the proofs do not allow the prediction of the conviction being probable), be it for legal reasons (the charged action is no criminal offence or no subject to prosecution due to procedural impediments like limitation of time) -, the public prosecution has to terminate the proceedings.

68 *Thirdly: Where, by exception, the principle of discretionary prosecution (Rn 162, 165) is in force, instead of the principle of legality (Rn 146, 147, 150), the public prosecution may drop the charge and terminate the criminal investigations pursuant to the legal requirements of the respective provision.*

⁶² Meyer-Göfner, *Einf.* Rn 60. - Compare § 397 subs. 1 AO (i.e. Tax Code) as declaratory settlement of this conclusion. -

⁶³ KK-Wache, § 160 Rn 14.

⁶⁴ As to the police: § 163 a subs. 4 StPO. As to the public prosecution: § 163 a subs. 1, 3 StPO.

⁶⁵ KK-Wache (see Fn 63); Krey, StPO I, Rn 392.

⁶⁶ Further forms of charge are: the oral supplementary charge in the main hearing, § 266 StPO (KK-Engelhardt, § 266 Rn 3); the oral charge in the main hearing of accelerated procedures (§§ 417, 418 subs. 3 s. 2 StPO).

This even holds where the public prosecution affirms reasonable suspicion⁶⁷.

(3) Conclusion: In law, the competence to terminate the preliminary proceedings lies in the hands of the public prosecution - not in the hands of the police.

b) Carrying out the Preliminary Investigations

69 *Firstly*, the public prosecutor can carry out in person the appropriate investigations 169 of the facts pursuant to § 160 StPO, e.g. by own examination of the accused, witnesses and experts (§§ 161 subs. 1 s. 1, 161 a, 163 a subs. 3 StPO).

Secondly, the public prosecutor can make the police carry out investigations of any kind by means of binding requests or orders (§§ 161 subs. 1 s. 1, 2 StPO, 152 GVG).

- This normal case of carrying out the investigations will be discussed later. -

170 *Thirdly*, the public prosecutor can make an application to the pre-trial judge under § 162 StPO requesting him to undertake certain investigative actions. This judge can only check on the legal admissibility of the requested investigation; as for the rest he is bound to the application⁶⁸.

On the one hand, § 162 StPO applies for actions requiring judicial authority.

This particularly holds for such criminal procedural interferences with civil rights which can be ordered only by the judge (like arrest warrant, § 114 StPO, or, if there is no »imminent danger«, telephone tapping, § 100 b StPO).

On the other hand the public prosecution can even request the pre-trial judge to carry out special investigation (§ 162 StPO), when the public prosecutor is competent to carry out the respective investigation in person, e.g. the examination of accused and witnesses⁶⁹.

Such request may be reasonable, be it only for legal grounds, which is particularly shown by §§ 254 and 251 subs. 2 StPO, §§ 153, 154 StGB; these provisions are based on the punishability of false testimony of a witness before a judge, in contrast to the lack of such punishability of false testimony before a public prosecutor.

c) The Public Prosecution as Master of the Preliminary Proceedings as against the Court

171 This role of the public prosecution is particularly expressed by:

- The public prosecution's right to withdraw the charge up to the opening of the main trial by the court (§§ 203, 207 StPO), § 156 StPO.

⁶⁷ Beulke, Rn 17; Krey, StPO 2, Rn 212; Kühne, Rn 583. - Considerably more than 50 per cent of all preliminary proceedings end by termination of the proceedings within the scope of discretionary prosecution (Rn 168) or under § 170 subs. 2 StPO (Rn 167); see Kühne, Rn 583. -

⁶⁸ Meyer-Göfner, § 162 Rn 14. - The compatibility with the principle of proportionality is also part of the legal admissibility (Rn 30-34); KK-Wache, § 162 Rn 17. -

⁶⁹ KK-Wache (see Fn 68); Meyer-Göfner, § 162 Rn 17; prevailing opinion, but in dispute.

- The competence to terminate the proceedings pursuant to § 170 subs. 2 StPO (Rn 167) without the court's participation.
- The above mentioned (Rn 141) possibilities to terminate the proceedings under the principle of discretionary prosecution without the court's consent.
- § 162 subs. 3 StPO (Rn 170 with Fn 68).

d) The Public Prosecution: *de iure* Master of the Preliminary Proceedings as against the Police

72 In this context, the public prosecutor's right to give instructions towards the police (§§ 161 subs. 1 s. 2 StPO, 152 GVG) and the lacking competence of the police to terminate the preliminary investigations (Rn 168) shall be referred to.

- For deeper discussion on the relation between public prosecution and police see § 5 of this textbook. -

2. The Public Prosecutor's Role as Accuser in the Main Trial

Insofar the reference to §§ 226 (with 338 no 5), 227, 240 subs. 2, 243 subs. 3, 244 subs. 3-6 with 245 subs. 2⁷⁰, 257 subs. 2, 258 StPO shall be sufficient.

3. The Public Prosecution as Executing Authority; Further Functions

73 a) Pursuant to § 36 subs. 2 StPO the enforcement of criminal court decisions is entrusted to the public prosecution; this is true e.g. for the following kinds of decisions:

- imposition of coercive fines or coercive detention pursuant to §§ 51, 70 subs. 1 StPO;
- arrest warrant according to §§ 112 et seq., 114 respectively § 230 subs. 2 StPO.⁷¹

In this context, the public prosecution is allowed to use the assistance of the police.

More important is the competence in the field of execution of sentence (Rn 14): The public prosecution is the **penal execution authority** under § 451 StPO⁷².

b) Further functions are the direction of the **federal register of previous criminal convictions** (*Bundeszentralregister*) in accordance with the Federal Register Act (*Bundeszentralregistergesetz*), Rn 26, and the **central public prosecution procedural register** (§§ 492 et seq. StPO), being in force in all 16 German States.

4. Questions of Competence

a) The Public Prosecution of the States

74 In principle, the public prosecution's tasks are carried out by the public prosecution of the respective **State**, being a consequence of Art. 30, Art. 83 GG and, moreover, expressed in §§ 141 et seq. GVG.

Thus, using the term »public prosecution« the StPO refers to the **State's public prosecution general at the OLG** and the **public prosecution at the LG**⁷³, unless the federal attorney general's competences are explicitly laid down by law (Rn 155).

⁷⁰ The **public prosecutor** is competent to make an application to take evidence as well.

⁷¹ Pfeiffer, § 36 Rn 3.

⁷² As to the execution of measures for correction and prevention see § 463 StPO.

⁷³ Concerning the **State's public prosecution** see above, Rn 155, 158, 159.

Concerning the local jurisdiction of the respective public prosecution's office see § 143 GVG with §§ 7 et seq. StPO, referring to the local jurisdiction of the criminal court where this public prosecution's office is established.

As far as a certain public prosecution, e.g. the district attorney's office at the *higher district court* (LG) *Trier*, is competent, its power is neither restricted to the respective district nor to the territory of the respective German State: The public prosecution Trier can take its applications under § 162 StPO (Rn 170) e.g. to the lower district court Cologne (AG Köln)⁷⁴.

b) Federal Attorney General (Rn 155, 158, 159)

Firstly, the Federal Attorney General's office acts as public prosecution at the Federal Supreme Court of Justice (BGH) in cases of appeal on law or complaints (§ 135 GVG).

Secondly, his office exercises the public prosecution's function in criminal cases where the State Courts of Appeals (OLG) act as *court of first instance* (§ 142 a subs. 1 StPO - Rn 70, 73)⁷⁵.

V. Exclusion and Challenge of Public Prosecutors?

Neither the StPO nor the GVG contains a legal regulation of this issue⁷⁶; both codifications only refer to judges. Thus, it is unsettled and controversial how to solve this problem.

1. The »Excluded/Disqualified« Public Prosecutor

The author's standpoint as to this issue has already been laid down thoroughly in a prior publication⁷⁷. Hence, the following brief statement may be sufficient:

a) §§ 22, 23 StPO as rule of the judge's exclusion/disqualification (Rn 96-107) neither hold directly nor by analogy for public prosecutors⁷⁸. These provisions are exhaustive as far as the missing applicability to public prosecutors is concerned. This insight is based on both, the wording of the law as well as its sense and purpose. Accordingly, there is no legal gap, being the first requirement for analogy of

⁷⁴ KK-Schoreit, § 143 GVG Rn 2; Meyer-Göfßner, § 143 GVG Rn 1.

⁷⁵ E.g. in cases of terrorism and treason, § 120 GVG.

With respect to transferring the criminal proceedings in such cases to the public prosecution of the States, see § 142 a subs. 2-4 GVG.

⁷⁶ BVerfGE 25, 336, 345; BGH NJW 1980, 845 and 1984, 1907 et seq; KK-Pfeiffer, § 22 Rn 16; Krey, StPO 1, Rn 404-408.

⁷⁷ Krey (see Fn 76), Rn 404-440.

⁷⁸ BGH (see Fn 76); Krey, StPO 1, Rn 407 with further references, Kühne, Rn 739 et seq; Meyer-Göfßner, Rn 3 vor § 22 with further references; prevailing opinion: Arguing for a »limited application of §§ 22 et seq StPO by analogy: Beulke, Rn 93, 94; Rüping, Rn 388.

the law. Furthermore, the equality of interests as second requirement is missing due to the differences between judges and public prosecutors as to their responsibilities and status.

176 b) §§ 141–145 GVG, ruling the role of the public prosecution, also do not offer a solution for our problem: Although § 145 GVG lays down the superior's right of **substitution** (see Rn 157), this provision does not regulate which requirements must be given to turn this mere right to substitute into a **legal duty** in cases where the concrete circumstances may constitute the fear that the public prosecutor is biased⁷⁹.

c) Furthermore, corresponding provisions of **State laws**

– § 7 AG GVG Lower Saxony, § 11 AG GVG Baden-Wuerttemberg⁸⁰ – do not constitute a regulation of the issue »excluded public prosecutor«. This is because there is no legislative authority of the States for **criminal procedure law** pursuant to Art. 74 subs. 1 no 1 GG with §§ 3, 6 EGVStPO⁸¹.

d) The **administrative procedure laws** of the German Federation and its States contain provisions concerning excluded and biased public servants⁸²; however, such laws are not applicable for criminal proceedings⁸³, neither directly nor by analogy⁸⁴.

177 e) Even the **principle of fair trial** does not offer a key to the solution of the problem of public prosecutors' *exclusion/disqualification* and *challenge due to fear of bias*⁸⁵. In Germany, this often cited procedural principle is, on the one hand, just synonymous to **criminal proceedings under the rule of law**. On the other hand, both principles cannot serve as a sufficient basis for a detailed catalogue of grounds for public prosecutors' exclusion⁸⁶. Indeed it shall be conceded: A fair criminal procedure law has to guarantee, that a public prosecutor cannot participate in criminal proceedings if he is evidently biased. This insight results from the public prose-

⁷⁹ *Krey* (see Fn 78), Rn 408 with further references.

⁸⁰ Thereto *Krey* (see Fn 78), Rn 410 with further references.

⁸¹ *Arlath*, NJW 1983, 207, 208; *Krey*, StPO 1, Rn 411 with further references; *Meyer-Göbner* (see Fn 78), with further references; dissenting *Schaiter*, p. 25 et seq.

⁸² *Verwaltungsverfahrensgesetz des Bundes* (VwVfG), i.e. Federal administrative procedure code (*Sartorius I*, no 100), §§ 20, 21. List of the States' administrative procedure codes to be found in *Sartorius I*, no 100 p. 1, Fn 2.

⁸³ § 2 subs. 2 no 2 VwVfG (Fn 82).

⁸⁴ *Krey* (see Fn 81), Rn 413; *Schaiter* (see Fn 81), p. 28; (nearly) undisputed.

⁸⁵ Left undecided by: *BVerfG* JR 1979, 28 with explanatory notes by *Brunns*; *BGH* NJW 1980, 845 et seq (thereto *Brunns*, JR 1980, 397 et seq); *BGH* NJW 1984, 1907 et seq (thereto *Arlath*, NJW 1985, 417). Referring to the fair trial-principle: *Arlath*; apparently sympathizing with this standpoint *Meyer-Göbner*, *Einl.* Rn 19 with **Rn 3 vor § 22**. Dis-senting among others: *Beulke*, Rn 93, 94; *Krey*, StPO 1, Rn 414 et seq, 417 et seq; pre-vailing opinion.

⁸⁶ *Krey* (see Fn 85), Rn 416.

cution's function as guardian of the law (Rn 143), from its obligation to act impartially (Rn 154) and from its duties (Rn 166–173) and competences⁸⁷. However, there is no answer to the question, in which cases an exclusion of a public prosecutor is obviously given.

f) Rather, this answer should be given by legal analogy⁸⁸ of both, the provisions on 178 the grounds for exclusion of judges (§§ 22, 23 StPO) and the ones of administrative officials (§ 20 VwVfG)⁸⁹; in addition one has to take into account the grounds for exclusion of defence counsels (§§ 138 a, 138 b StPO)⁹⁰. This standpoint results in the following **grounds for exclusion** of public prosecutors:

(1) The public prosecutor is strongly or sufficiently suspicious

– to have participated in the criminal offence at hand or

– to have committed an act, which in case of the accused's conviction would constitute accessoryship after the fact, obstruction of criminal proceedings, or receiving/handling stolen goods.

»All the more-argument« out of § 138 a subs. 1 no 1, 3, subs. 2 StPO: Even the defence counsel, being **support of the accused**, i.e. a partial organ of the administration of criminal justice, would be disqualified in cases of such involvement. Hence, the public prosecutor as an organ of the administration of criminal justice (Rn 154) being obliged to **objectivity**, has to be excluded a fortiori (even more)⁹¹.

(2) Furthermore, the public prosecutor is excluded if he

– himself is directly concerned (aggrieved) by the criminal offence or

– is relative of the victim respectively the accused.

This is based on § 22 no 2, 3 StPO, § 20 VwVfG by legal analogy.⁹²

g) *Special Cases: Qualified Prior Involvement; Public Prosecutor as Witness*

(1) *Qualified Prior Involvement as Ground for Exclusion*

Case 9: The First-Instance Judge as Prosecutor in the Appellate Instance?⁹³ 180

Judge R as single judge (Rn 69, 71) has sentenced the defendant A, who subsequently appeals on points of facts and law. R, who in the meantime has become public prosecutor

⁸⁷ As to such competences, see in particular Rn 141, 143, 154, 167–173.

⁸⁸ In the case of legal analogy (*Rechtsanalogie*), general legal principles are deducted from a **plurality** of single provisions and applied to cases not coming under any of these provisions; *Krey*, JZ 1978, 361, 365, with further references – In contrast, analogy of the law (*Gesetzesanalogie*) deals with the application of the corresponding **single** provision by analogy; *Krey* JZ 1978, 361, 365 and AT 1 (= Vol. 1), Rn 88, 89. –

⁸⁹ *Krey*, StPO 1, Rn 417, 418 et seq; further references in *Beulke*, Rn 94; left open by *Meyer-Göbner* (see Fn 85).

⁹⁰ *Krey* (see Fn 89), Rn 417, 418, 419. Left open by *Meyer-Göbner* (see Fn 85).

⁹¹ *Krey*, StPO 1, Rn 419, 421–424.

⁹² Prevailing opinion, at least consenting in the result, see among others: *Beulke*, Rn 93; *KK-Pfeiffer*, § 22 Rn 16, 16 c; *Meyer-Göbner*, Rn 3 vor § 22.

⁹³ Case according to *OLG Stuttgart* NJW 1974, 1394 et seq (with remarks by *Fuchs*).

tioned provision is a constitutional one, since the aforesaid legislative authority via **implied powers** (Rn 198) is given²⁷. This is because of the direct factual connection to the over-all regulation of pre-trial custody.

b) *Confiscation of a driving licence, § 94 subs. 3 StPO (with § 69 subs. 3 s. 2 StGB) and provisional withdrawal of permission to drive (§ 111 a StPO)*

Both interferences with civil rights primarily serve the general public's protection against further cases of drunk driving or other dangers caused by unqualified drivers²⁸; thus, in the first place **averting dangers** is intended. Accordingly, the Federal legislative authority as to the mentioned issues can only be based on the aforesaid *Annexkompetenz* (implied powers)²⁹.

00 The increasing intrusion of the Federal legislator into the State parliaments' legislative authority for the police task to avert dangers

– an intrusion by regulating police preventive matters in the **StPO** (Rn 197–199) – is accepted by the *BVerfG* with equanimity. This is questionable and ought to be reconsidered since it is about further reduction of the few remaining core areas of the States' legislative authority contrary to sense and purpose of Art. 30 and Art. 70 of the German Federal Constitution.

II. Structure and Organisation of the German States' Police

01 Official police authorities are the police headquarters (*Polizeipräsidien*), the State criminal investigation department (*Landeskriminalamt*) and the river police (§ 76 subs. 2 POG Rheinland Palatinat).

The common subdivision into **criminal police** and **constabulary/uniformed police** must not be misunderstood to that effect only the former being responsible for criminal investigation. Rather, the police function to prosecute criminal offences is carried out by both, the criminal police and the constabulary (§ 84 POG). Nevertheless, beyond traffic offences and petty crime, the role of the criminal police dominates. Moreover, for the public prosecution as master of the preliminary proceedings, the criminal police are the main point of contact.

III. Relation between Public Prosecution and Police

1. The Public Prosecution as Master of the Preliminary Proceedings from a Legal Standpoint

02 As already mentioned, only the public prosecution, but not the police, is authorised to terminate the preliminary proceedings (Rn 166–168). Furthermore the police

²⁷ *Krey*, StPO 2, Rn 290–293; agreeing, but not founded in detail, *BVerfG* (see Fn 26).

²⁸ *Meyer-Gößner*, § 94 Rn 10 with § 111 a Rn 15 and *BGH* St 22, 385, 393 (referring to § 94 subs. 3 StPO); *Meyer-Gößner*, § 111 a Rn 1; *Rudolph* in: SK, § 111 a Rn 1 and *BVerfG* NSZ 1982, 78 (referring to § 111 a StPO); in dispute.

²⁹ Insofar the persons and decisions cited in Fn 28 are not helpful.

take action, irrespective of the duty to prosecute crimes (principle of legality), merely as the »public prosecution's extended arm«, as the public prosecution's »legal mandatory«³⁰. This legal conception of the police's role in criminal proceedings is based on the regulations of the StPO³¹; insofar, particularly the following provisions may serve as examples:

– § 163 StPO (establishing only a provisional responsibility of the police³²);

– § 161 subs. 1 s. 2 StPO, § 152 GVG, (establishing the **public prosecution's right to give instructions** towards the police in the field of criminal prosecution; such instructions take priority over opposing instructions of police superiors³³).

2. The Police as Master of the Preliminary Proceedings from a Factual Standpoint?

In modern jurisprudence, on occasion even in court decisions, the thesis can be **203** found: *de facto*, the police were master of the preliminary proceedings³⁴.

– According to its personal and material resources the public prosecution was unable to carry out the criminal procedural investigations itself.

– Among public prosecutors, there typically was a lack of criminological/criminalistic expert knowledge; moreover the technical equipment required for criminal proceedings was concentrated at the police.³⁵

– In the great bulk of criminal proceedings the public prosecution was called in not until the ending of the police investigations: After such ending the police sent the files to the public prosecution. In principle, the latter then only decided, whether to charge or to terminate the proceedings (Rn 167, 168)³⁶.

3. Differentiating Point of View

The thesis *the police being master of the preliminary proceedings from a factual 204 standpoint* is firstly undifferentiated and secondly exaggerated.

a) Indeed, the above mentioned assertions (Rn 203) are correct: As to the immense number of petty and medium serious crimes the public prosecution in principle

³⁰ *BVerwG* NJW 1975, 893 et seq; *Meyer-Gößner*, § 163 Rn 1; *Rieß* in: LR, § 163 Rn 3, 3a; *Wohlers* in: SK, § 163 Rn 3.

³¹ *Goergen*, p. 88 et seq; *Krey*, StPO 1, Rn 470; *Rüping*, Rn 76.

³² *Ernesti*, NSZ 1983, 57, 61; *Krey*, Rn 471; *Meyer-Gößner* (see Fn 30).

³³ This is particularly relevant where **police superiors** aim at avoiding criminal prosecution due to political pressure or with consideration for influential politicians. In such a case the police officer who was »slowed down« by his superior should inform the public prosecution asking for an instruction (*Krey*, *Characteristic Features* ..., p. 597, 598, before 2).

³⁴ *Kühne*, Rn 135 with further references; likewise: *Hellmann*, Rn 137; *BVerwG* (see Fn 30).

³⁵ *Hellmann*, Rn 138; *Kühne*, Rn 135, 136; *Lillie*, ZStW 1994, 625 et seq.

³⁶ See Fn 35.

does not act as **investigating authority** but to some extent merely as permanent legal advisor of the police.

However, also in the field of such crimes the **public prosecution decides** whether to charge or to terminate the preliminary proceedings; in addition, public prosecutors can take over (accompany) the investigations at any time. Moreover, in comparison with the police the public prosecution has to a considerable extent more comprehensive powers, concerning the order to carry out **criminal procedural interferences with civil rights**³⁷. Besides, only the public prosecution is, in principle, authorised to make an application to the **pre-trial judge** requesting him to undertake certain investigative measures (Rn 170). Finally, accused persons and witnesses are obliged to answer a summons by the **public prosecution**; on the contrary, there is no comparable duty towards the police (§§ 161 a subs. 1, 163 a subs. 5 StPO). Correspondingly, there is a witness' duty to give evidence before the public prosecution, not before the police, which results from the mentioned provisions.

b) By the way, when considering criminal offenses not by their quantity, but by their severity, a different impression arises: From the beginning the public prosecution takes a dominant role within the scope of investigations concerning serious criminal offenses like:

- capital crimes;
- grave economic offenses;
- severe environmental crimes;
- other serious crimes causing a sensation³⁸.

4. The Police' Binding to Instructions of the Public Prosecution in Detail

a) Relation between § 161 subs. 1 s. 2 StPO and 152 GVG

As far as *Ermittlungspersonen der StA* (i.e. police officers specifically appointed by law for the task to assist the public prosecution, § 152 GVG) are concerned, the public prosecution can instruct these officers directly, § 152 subs. 1 GVG, without being obliged by law to ask their official police authority (Rn 201)³⁹. Such direct instructions are binding.

However, due to consideration for reasonable interests of the respective police authority the public prosecution should address their orders as **request to this authority**, provided there are no contradicting cogent reasons⁴⁰.

With respect to police officers who are no *Ermittlungspersonen der StA*, the public prosecution generally addresses its instructions via request to the police authority.

³⁷ Here, the reference to §§ 100, 100 b, 100 f subs. 4 StPO may be sufficient.

³⁸ *Krey*, StPO 1, Rn 495 with further references; *Rüping*, ZStW 1983, 894, 913 et seq.

³⁹ *OVG Hamburg* NJW 1970, 1699 et seq.; *Feszer*, 2/52/53; *KK-Schoreit*, § 152 GVG Rn 6, 14; *Meyer-Göbner*, § 152 GVG Rn 2.

⁴⁰ *Feszer* (see Fn 39); *Krey* (see Fn 38), Rn 497 et seq.; *Meyer-Göbner*, § 152 GVG, Rn 2, 3, § 161 StPO Rn 11.

By exception, in case of imminent danger the public prosecutor is allowed to give binding instructions (§ 161 subs. 1 s. 2 StPO) directly to individual police officers.⁴¹

b) Who is meant by the term »Ermittlungsperson der StA« under § 152 GVG?

This question is not only relevant with regard to the addressee of a binding instruction of the public prosecution (Rn 205). Rather, it is also relevant according to the numerous powers, which the criminal procedure code does not assign to »police officers« as such, but merely to the mentioned »Ermittlungsperson der StA« (Rn 205), even if only in case of *imminent danger*⁴².

(1) Which group of office holders is covered by the term »Ermittlungsperson der StA« (Rn 205) is primarily laid down in legal regulations (*Rechtsverordnungen*) of the German States, § 152 subs. 2 GVG.

- In principle, among the police officers, everyone is »Ermittlungsperson der StA«. However, there are some restrictions on first-line police officers; furthermore police officers being high in rank are excluded⁴³.
- Furthermore even office holders, not belonging to the police authorities, can be declared to »Ermittlungsperson der StA« by those regulations⁴⁴.

(2) In addition, in Federal statutes like

- Tax Code (§ 404 AO, regarding tax and customs investigators),
 - Federal Police Act (Federal police investigators),
 - *BKA-Gesetz* (i.e. act on the Federal Bureau of Criminal Investigations concerning *BKA's* police investigators),
- specific Federal prosecution officers are appointed to »Ermittlungsperson der StA«.

c) The Public Prosecution's Right to Give Instructions in Case of Collision between Criminal Prosecution and Averting Dangers

Case 11: - Prevention versus Repression -⁴⁵

Masked participants of a demonstration try to attack the Turkish consulate general in the German city of Mainz, throwing stones against police officers and the consulate building. Some officers are injured and the building is damaged. The public prosecutor X, who has just now arrived, wants to instruct the police officers who have the task to protect the consu-

⁴¹ *KK-Wache*, § 161 Rn 28; *Krey* (see Fn 40); *Meyer-Göbner* (see Fn 40).

⁴² See among others: §§ 127 subs. 2, 163 b subs. 1 StPO (»police officers«) compared to §§ 81 a subs. 2, 98 subs. 1, 105 subs. 1, 163 f StPO (»Ermittlungspersonen der StA«, see Rn 205).

⁴³ As to first-line police officers, such restrictions are based on lack of sufficient work experience; as to the high in rank officers, this exception is based on lack of working in the field as well as on reasons of status.

⁴⁴ States' regulation pursuant to § 152 subs. 2 GVG even include Federal officials; thereto *KK-Schoreit*, § 152 GVG Rn 10; *Krey* StPO 1, Rn 499 with Fn 117.

⁴⁵ Case according to *Krey* (see Fn 44), Rn 501 et seq.

late general, to detain the ringleaders. Y, head of the respective police operations, argues against it that such detainment was absolutely impossible as long as his police forces on site were totally busy with repelling the attack.

As to the public prosecutor's right to give instructions in case of collision between criminal prosecution and averting dangers, the following statement may be sufficient⁴⁶:

Where in the case at hand one of the two mentioned public tasks can only be carried out at the expense of the other one, there is such a **collision**. As the public prosecutor's right to give instructions towards the police only holds in the field of criminal prosecution, in cases like the one at hand the authority of the head of the respective police operation in order to avert dangers can conflict with the public prosecutor's right to give instructions.

(1) With regard to the legal question of the **decision-making authority amongst government bodies**, the issue of the solution of such a conflict is the following: **Who** decides finally binding if necessary, when public prosecution and police diverge⁴⁷? Since the concerned public responsibilities, criminal prosecution and averting dangers, are **equal** in their abstract ranking and since the same holds for the concerned governmental departments (Ministry of Justice and Ministry of the Interior/Home Office)⁴⁸, the respective German State's government has to decide ultimately.

In case of a – rarely occurring – conflict between the **Federal attorney general's** right to give instructions in the field of criminal prosecution and the authority of the head of the respective police operation of the **Federal police** in the field of averting dangers, the Federal government would have to decide. More precisely: Such decision is necessary where the Federal Minister of Justice (Rn 158, 159) and the Federal Minister of the Interior (responsible for the Federal police) are unable to agree.

Regarding severe conflicts between interests of criminal prosecution and averting dangers, like in case of (attempted) duress to free arrested terrorists by hostage-taking of prominent persons, in Germany always a crisis management group was formed to decide⁴⁹.

⁴⁶ There to: *AK-Achenbach*, § 161 Rn 17 et seq; *Beulke*, Rn 103; *Krey*, ZRP 1971, 224 et seq; *Krey*, StPO 1, Rn 501 et seq, 511, 514; *Krey/Meyer*, ZRP 1973, 1 et seq; *Rieß* in: LR, § 161 Rn 55.

– As to this collision see also »*Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren des Bundes und der Länder über die Anwendung unmittelbaren Zwangs durch Polizeibeamte auf Anordnung des Staatsanwalts*« (i.e. common directives of the German ministers/senators of justice and ministers/senators of the interior on the use of direct force by police officers under order of the public prosecutor), B. III. Published in: *Meyer-Gößner*, Anhang A 12, Anlage A. –

⁴⁷ See *Krey/Meyer* (see Fn 46).

⁴⁸ *Krey*, ZRP 1971, 224, 226 et seq with further references; *Krey/Meyer* (see Fn 46), p. 2.

⁴⁹ See amongst others: Case *Peter Lorenz* (*Krey*, ZRP 1975, 97 et seq; *Küper*, Darf sich der Staat erpressen lassen?, 1986, p. 14 et seq with further references); Case *Hanns Martin Schleyer* (*BVerfGE* 46, 160 et seq; *Küper*).

(2) From a substantive point of view it is about the question, which aspects are **209** decisive for the decision of such competence conflicts. Here, a weighing of the involved interests is essential: Do measures of averting dangers in *casu claim* priority at the cost of criminal prosecution or *vice versa*⁵⁰?

As far as non-deferrable measures are necessary at the scene and a high-level clarification (Rn 208) of the diverging orders of the public prosecutor and the head of the respective police operation would come too late, the concerned police officers, if necessary, may have to decide on their own about this question of priority⁵¹. However, a final right of the police to decide is not to be accepted.

(3) In case 11 the police could only take action to avert dangers, as long as it abstained from measures of criminal prosecution. Because the task of averting dangers (security of the consulate general) obviously dominated in the case at hand due to public international law obligations of Germany, the public prosecutor's right to give instructions concerning the immediate realisation of measures of criminal prosecution was of lower-rank.

d) Use of Direct Force by Police Under Public Prosecution's Instructions?

Concerning this question, it shall be left at two statements⁵²: **210**

(1) The public prosecution has no right to instruct the police to **make use of firearms against persons**⁵³. Such compulsory measure against escaping perpetrators is no genuine criminal procedural interference with civil rights. Rather, the regulation of this use (e.g. in § 64 subs. 1 no 3 POG Rhineland-Palatinate) is to a high extent based on police preventive aspects (dangerousness of the offender)⁵⁴. Hence, the authority to make use of firearms is rightly laid down in police laws and not a mere implied power (Rn 198) under § 127 StPO.

(2) The aforesaid final right of the **police to decide on the question of compulsory force under the »Common Directives«** (Rn 207 Fn 46, Rn 209) cannot be accepted in this generality. It contradicts the wording and the sense and purpose of §§ 161 subs. 1 s. 2 StPO, 152 GVG⁵⁵.

e) The Public Prosecutor's Right to Give Instructions and the Principle of Proportionality

Example 28: Public prosecutor S instructs the police to search a residential building on the basis of a search warrant issued by the court on application of S (§§ 102, 103, 105 StPO). **211**

⁵⁰ *Beulke* (see Fn 46); *Krey* und *Krey/Meyer* (see Fn 46); *Roxin*, § 10 Rn 33; Common Directives (see Fn 46), B. III.

⁵¹ *Krey* und *Krey/Meyer* (see Fn 46); in dispute.

⁵² More detailed with case example, *Krey*, StPO 1, Rn 504 et seq with further references.

⁵³ *Krey*, ZRP 1971, 224, 226 et seq; *Krey*, StPO 1, Rn 508; *Krey/Meyer*, ZRP 1973, 1; *Kühne*, Rn 150; see also *Meyer-Gößner*, § 161 Rn 13; highly disputed; dissenting e.g. *Roxin* (see Fn 50).

⁵⁴ *Krey*, ZRP 1971, 224, 226 et seq; *Krey* StPO 2, Rn 381.

⁵⁵ *Krey*, StPO 1, Rn 503, 509.

The building is occupied by political extremists suspected of dealing with heroine. The head of police department refuses the realisation of the instruction for reasons: *Such a police action could cause violent riots by the squatters' scene and would also encounter fierce resistance; thus the respective search would be disproportionate*⁵⁶.

The example at hand leads to the following question being in dispute: *Is the police allowed to refuse the realisation of the public prosecution's instructions under reference to the fact that otherwise resistance of the persons concerned and/or acts of revenge were threatening?*

212 Among the police authorities (Rn 211), there is the tendency to answer this question in the affirmative under reference to the **principle of proportionality**⁵⁷. This standpoint has to be rejected⁵⁸.

Firstly, violent resistance and/or acts of revenge are an absolutely typical risk in case of the realisation of criminal procedural compulsory measures (interferences with civil rights) like searching, detaining etc. Such typical attendant phenomena cannot affect the **public prosecution's right** to give instructions; otherwise it would be obsolete to a large extent. Rather, it is genuine part of the public prosecution's responsibilities to evaluate, whether or not the realisation of such compulsory measures is adequate as to threatening dangers of resistance and/or acts of revenge. In this context, such evaluation is binding on the police⁵⁹.

Secondly, cases of those threatening dangers are no examples for cases of collision between criminal prosecution and averting dangers, as discussed in Rn 207 et seq⁶⁰. Such collision did not concern the danger of fierce reactions to legal measures of criminal prosecution but »Janus-faced« (i.e. »double-faced«) constellations in which – independent of criminal procedural compulsory measures – tasks of averting dangers and of criminal prosecution has collided **from the beginning**.

Thirdly: If the police refuses to realise instructions of the public prosecutor, the public prosecution's office can react as follows:

- filing a disciplinary complaint and/or
- initiating criminal proceedings for **(attempted) obstruction of criminal prosecution in office by omission** (§§ 258, 258 a/13 StGB, Rn 151).

⁵⁶ Case according to *Krey*, StPO 1, Rn 511 et seq; *Krey* StPO 2, Rn 241 et seq; *Schultz/Leppin*, Jura 1981, 521.

⁵⁷ Thereto *Schultz/Leppin*, Jura 1981, 521 et seq.

⁵⁸ *Krey*, StPO 1, Rn 511–515 with further references; *Schultz/Leppin* (see Fn 57).

⁵⁹ *KK-Schoreit*, § 152 GVG Rn 18 at the end; *KK-Wache*, § 161 StPO Rn 33; *Krey*, StPO 1, Rn 513, 514; *Meyer-Göbner*, § 161 Rn 14; *Schultz/Leppin* (see Fn 57), p. 532 et seq.

⁶⁰ *Krey*, StPO 1, Rn 513, 514.

§ 6 Federal Bureau of Criminal Investigations and Federal Police

Although the police in principle belongs to the responsibilities of the 16 German States, there are two exceptions: the Federal Bureau of Criminal Investigations (*Bundes kriminalamt*, *BKA*) and the Federal Police (*Bundespolizei*, *BPol*) being Federal police authorities.

The latter was originally named *Bundesgrenzschutz* (i.e. Federal Border Guard), a denomination being more precise and less pretentious. In contrast, the current term Federal Police seems to be a further step to weaken the States' responsibilities in police matters.

1. Federal Bureau of Criminal Investigations (*BKA*)

Primarily, the Federal Bureau of Criminal Investigations (*BKA*) has responsibilities and powers in the field of **criminal prosecution** pursuant to the *BKA-act*¹, e.g. concerning internationally organized crime like:

- trafficking with drugs and weapons;
- terrorism (§§ 129 a, 129 b StGB).

Only secondly the *BKA* has functions and powers in the field of averting dangers (protection of members of the Federal constitutional organs, protection of witnesses etc.) under the *BKA-act*. Such preventive functions and powers have recently been amended to a great extent. Furthermore, under the *BKA-act*, the Federal Bureau of Criminal Investigations serves as:

- Federal central institution for the cooperation between the Federal and the States police authorities in criminal matters;
- Central Federal agency for police information and intelligence, and for the criminal police²;
- National central office for the cooperation with Interpol.

2. Federal Police (*Bundespolizei*, *BPol*)

In the first place, the Federal Police's function concerns averting dangers in certain fields under the *BPol-act*³; in this context, particularly border police, railway police and protection of air traffic are included.

Only in the second place, the Federal Police has some responsibilities and powers in the field of **criminal prosecution** pursuant to the *BPol-act*, especially regarding criminal offences such as illegal border crossing.

¹ *Bundes kriminalamtgesetz (BKA-Gesetz)*, published in: *Sartorius I*, no. 450.

² Thereto *Linke*, p. 280 et seq, 287 et seq.

³ *Bundespolizeigesetz*, published in: *Sartorius I*, no. 90.