PUBLIC ORDER INTERVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS

Dr. Öğr. Üyesi Gizem ERSEN PERÇİN[*]
Arş. Gör. Dilara BAYTAROĞLU[**]

ABSTRACT

The issue of recognition and enforcement of foreign court decisions in Turkish Law is regulated between the 50th and 60th articles of the Act on Private International and Procedural Law (MÖHUK) entered into force on 12.12.2007 and numbered 5718. In accordance with these regulations, one of the conditions required for achieving recognition or enforcement of a judgement of a foreign court in Turkey is; "These judgemets shall not manifestly contrary to the Turkish public order."

In our study, firstly the concept of public order in private international law and the scope of this concept will be mentioned, and then a brief information will be given about the criteria which are sought in the recognition and enforcement of foreign court decisions in Turkish private international law. Subsequently, it will be focused on the "public order" intervention and given detailed comparative information of which is the subject of our study. At this point, the theory of extenuated effect explaining public order intervention and the purpose of this intervention will be explained. Within the framework of the prohibition of revision, the boundaries of public order intervention and the limits of discretion of the judge shall be examined in the context of basic and procedural criteria. In the course of these examinations, in addition to the Turkish doctrine, the views of the German doctrine on the subject will be discussed and the theoretical knowledge will be tried to be concretized in the light of Turkish Supreme Court decisions.

Keywords: Recognition, Enforcement of Foreign Court Decision, Public Order, Prohibition of Revision, Theory of Extenuated Effect, Justified Decision

[*] İstanbul Aydın Üniversitesi Hukuk Fakültesi Milletlerarası Özel Hukuk A.B.D. Öğretim Üyesi, gizem@percinlaw.com, ORCID ID: 0000-0003-1724-4012

[**] İstanbul Aydın Üniversitesi Hukuk Fakültesi Milletlerarası Özel Hukuk A.B.D. Araştırma Görevlisi, dilarabaytaroglu@gmail.com, ORCID ID: 0000-0001-5714-4628
(Geliş Tarihi:15.04.2019 - Kabul Tarihi:27.06.2019)

YABANCI MAHKEME KARARLARININ TANINMASI VE TENFİZİNDE KAMU DÜZENİ MÜDAHALESİ

ÖZET

Yabancı mahkeme kararlarının Türk Hukukunda tanınması ve tenfizi, 12.12.2007 yürürlük tarihli ve 5718 sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Kanunu'nun (MÖHUK) 50. ve 60. maddeleri arasında düzenlenmiştir. Bu düzenlemelere uygun olarak, Türkiye'de bir yabancı mahkeme kararının tanınması veya tenfizi için gerekli şartlardan biri; "hükmün kamu düzenine açıkça aykırı olmaması" dır.

Çalışmamızda öncelikle milletlerarası özel hukuk bağlamında kamu düzeni kavramı ve bu kavramın kapsamı ele alınmış, ardından Türk mahkemesinde yabancı mahkeme kararlarının tanınması ve tenfizinde aranan koşullar hakkında kısa bir bilgi verilmiştir. Daha sonra çalışmamızın konusu olan "kamu düzeni" müdahalesi üzerinde durulmuş ve bu konuda detaylı ve karşılaştırmalı bilgiler verilmiştir.

Bu kapsamda, kamu düzeni müdahalesini ve bu müdahalenin amacını açıklayan "hafifletilmiş etki teorisi" incelenmiştir. Revizyon yasağı çerçevesinde kamu düzeni müdahalesinin sınırları ve hâkimin takdir yetkisi sınırları, temel ve usule dayalı kriterler bağlamında incelenmiştir. Konuyla ilgili Türk doktrininin yanı sıra, Alman doktrininin konuyla ilgili görüşleri tartışılmış ve Yargıtay kararları ışığında verilen teorik bilgiler somutlaştırılmaya çalışılmıştır.

Anahtar Kelimeler: Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi, Kamu Düzeni, Revizyon Yasağı, Hafifletilmiş Etki Teorisi, Gerekçeli Karar

I. THE CONCEPT OF PUBLIC ORDER IN PRIVATE INTERNATIONAL LAW

In the disputes involving the foreign element, which is the subject of private international law, the judge investigates the applicable law in accordance with the rules of conflict of laws, firstly characterizes the concrete conflict within the framework of legal concepts and determines the law applicable to the dispute[1]. The law determined by the rule of conflict of laws may be the law of the judge (lex fori) or foreign law. The application of foreign law is subject to the contradiction of the public order in terms of the judge's law (lex fori)[2].

In private international law, the meaning of public order is different compared to the meaning of domestic material law, but more it is limited by the terms of the scope[3]. Public order in domestic law is the rule arising from the public law that the parties must comply with. Essentially, they deal with the interests of society. It is not possible for the parties to determine any issue against these rules within the framework of free will[4]. If the public order in the sense of private international law is not contrary to the law of the judge (lex fori), the provision of the foreign law to a particular event does not necessarily mean the

---

1 **Tekinalp, Gülören** (2011) Milletlerarası Özel Hukuk Bağlama Kuralları, Extended 11th edition, İstanbul, Vedat Kitapçılık, p.52; **Yağcı, Salim Serdar** (2017) 'Milletlerarası Özel Hukukta Vasıflandırma', D.E.U Journal of Faculty of Law, V: 19, p.2637.

2 As It will be explained in more detail later, in addition to the fundamental rights and freedoms set forth in our constitutional arrangements, the case-law of the European Court of Human Rights (ECHR) should be taken into account in the context of public order intervention. See. **Şanlı, Cemal/ Esen, Emre/ Ataman Figanmeşe İnci** (2018) Milletlerarası Özel Hukuk, 6th Ed. Istanbul, Vedat Kitapçılık, footnote.131; **Celikel, Aysel/ Erdem, Bahadir** (2017) Milletlerarası Özel Hukuk, 14th Ed. Beta, p.138; **Tütüncübaşı, Uğur** (2014) Yabancı Çekişmesiz Yargı Kararlarının Turk Hukukunda Tanınması, Adalet, p.174; **Tarman, Zeynep Derya** 'Yabancı Mahkeme ve Hakem Kararlarının Türkiye'de Tenfizinde Karşılaşılan Sorunlara İlişkin Bazı Tespitler', Public and Private International Law Bulletin, V: 37, I: 2, p.811; **Hoffmeister, Frank /Kleinlein, Thomas** (2013) 'International Public Order', Max Planck Encyclopedia of Public International Law, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1430> l.a.d. 06.11.2018.

3 **Ekşi, Nuray** (2013) Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi, İstanbul, Beta, p.279; **Çelikel/ Erdem**, p. 139.

4 **Demir Gökyayla, Cemile** (2001) Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kamu Düzeni, Seçkin, p. 36; **Tanrıbilir, Feriha Bilge** (2010) '5718 Sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun'un Genel Hükümlerinde Yapılan Değişiklikler Üzerine', TBB Dergisi, S: 87, p. 195-227.

intervention of public order. The reason for this is that each state's legal system is created with different social economic and political aims[5]. In order to be able to speak of the violation of public order in the sense of private international law, the results of the foreign law applied must be clearly contradictory to the Turkish public order[6].

The definition of this concept is very important in terms of determining the violation of public order. However, it is very difficult to define public order with a general conceptual explanation. Because the concept, without the boundary[7], meaning and scope of time[8], depending on the space and the conflict with a general norm is not possible to determine the changes[9]. For this reason, it is not possible to reach a general definition of public order by counting the elements one by one, but various definitions can be made by doctrine and the jurisprudence of the court[10]. In the following, the definitions of public order in Turkish doctrine and jurisprudence will be mentioned and then definitions in foreign doctrine and jurisprudence will be mentioned.

Perhaps the most commonly mentioned and comprehensive definition about public order is took place in the decision of Supreme Court of Appeals

---

5 *"As a rule, the differences between legal systems do not connstitute an obvious fort he public order. However, there may be some exceptions to this rule. In some countries the civil death ve and "religious death" institutions have been accepted. In countries accepting these establishments, it is considered to be a fact of death when the person closes himself/herself to the church or is sentenced to life imprisonment,* **Ekşi**, p.285.

6 **Demir Gökyayla**, p.37.

7 For this reason, it is not possible to state as a limitation of the situations that are contrary to public order. For detailed information, see. **Akıncı, Ziya** (1994) Milletlerarası Ticari Hakem Kararları ve Tenfizi, Ankara, Vedat Publications, Ankara, p.160.

8 In Turkish law, the most obvious example of this is the acquisition of the Turkish Civil Code (MK) in 1926. With this law, innovations such as the prohibition of polygamy, the protection of the rights of the person and the realization of the divorce by court decision have revised the understanding of Turkish public order from the beginning. In French law, the issue of the variability of public order in terms of time is called the topicality of public order. See. **Demir Gökyayla**, p.29; See also. **Tiryakioğlu, Bilgin** (1996) Yabancı Boşanma Kararlarının Türkiye'de Tanınması ve Tenfizi, Ankara, p. 24 et al.

9 **Demir Gökyayla**, p. 23-24; **Çelikel/ Erdem**, p. 139; **Şanlı/ Esen/ Ataman-Figanmeşe**, p.72 et al.; **Tekinalp**, p.52.

10 **Nomer, Ergin** (2018) Milletlerarası Usul Hukuku, Beta, Istanbul, p. 123; **Dolunay, Ayhan** (2015) Türk Hukukunda ve Kıbrıs Türk Hukukunda Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi, On İki Levha Publishing, Istanbul, p.92.

dated 10.02.2012[11]. According to the decision, public order expressed as; "*...it can be drawn as basic values, general conception and morality of Turkish law….. the fundamental justice approach and the general politics on which the Turkish law is based on……. the fundamental rights and freedoms in the Constitution, the common principles of international law, the rules based on the principle of goodwill belonging to the private law…… society's civilization level, political and economic regime, human rights and freedoms protected in the country* [12]" In this regard, the expression serves as a guide to the Supreme Court of Appeal in the evaluation of public order violation[13].

There are various views on the doctrine about under which circumtances the foreign law will be considered as contrary to public order. According to Çelikel- Erdem: *"The rules of public order are all bases that provide a good service of public services in a country, security and public order of the state, and conformity with the principles of peace and ethics in the relations between individuals*[14]*."*

According to Şanlı: *"In order for a foreign decision to be considered as contrary to the Turkish public order, the provision and/or provisions in the decision must be contrary to the basic principles of the Constitution or the legal system (indispensable principles) and against the general customs and morals of Turkish society*[15]*."*

According to Tekinalp: by public order; *"the fundamental values of national law such as equality, protection of the family and personality are tried to be preserved*[16]*."*

---

11 E.2010 / 1, K. 2012/1, Date: 10.02.2012 (www.kazanci.com.tr).

12 The Supreme Court of Appeal 2. H.D., E.2007 / 16684, K.2008 / 16665, Date: 04.12.2008 (www.kazanci.com.tr). According to the decision, public order, improper application or misapplication of Turkish law does not constitute an obstacle to public order. In the case of violations of the values which constitute the basis of the Turkish legal order and which cannot be given up, it can be mentioned that public order is clearly violated. Inin; AYM., E.63-128, K.64-8, Date. 17.04.1964 (http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/cff72841-041c-4fd7-af60-1a929e43d2e8

13 **Demir Gökyayla**, p.26; For a similar definition, see. **Mutlu, Işıl Umut** (2003) Yabancı Hakem Kararlarının Tanınması ve Tenfizinde Kamu Düzeninin Etkisi, Ankara University Institute of Social Sciences, Ankara, Unpublished Master Thesis, p.20.

14 **Çelikel/ Erdem**, p.140;

15 **Şanlı/ Esen/ Ataman-Figanmeşe**, p.78.

16 By: **Dayınlarlı**, Kemal Public Order, p.8 et al; **Demir Gökyayla**, p.25.

According to Gürzumar, *"It is a set of legal, moral and conscientious principles that must be complied with in order for the society to live a peaceful and harmonious life*[17]*."*

According to Gökyayla: *"It is a set of rules that protect the basic structure and interests of society... and it is a general and comprehensive concept that is unidentifiable, trying to be embodied in the provisions of the law, at the discretion of the judge at the discretion, is deficient and unclear*[18]*."*

As a result, public order is "extensive, obscure, relative and variational[19]".In general, it is a set of representative rules that represent the basic values of the Turkish society and which highlight the social interests, are ambiguous in their meaning and scope, ultimately left to the discretion of the judge.

Another issue, internationaly associated to the concept of public order is related to the nature of the concept. Should public order considered as an exceptional rule as a "lex fori" application or as an independent binding rule? The international doctrine has two different approach to answer this question. According to the first view, where lawyers such as Mancini and Pillet are pioneers, the rules of lex fori should be applied to the conflict, instead of the rules of foreign law which are contrary to public order of lex fori[20]. According to the second view where Savigny is a pioneer, the rules of public order are not applied directly, and they are exceptions. It is possible to apply the relevant rules of the foreign law which are not contrary to public order of lex fori[21]. Applying the rules of lex fori should be the last solution.

---

17 **Demir Gökyayla**, p.32.

18 **Çelikel/ Erdem**, p.140; **Demir Gökyayla**, p.32.

19 By: **Dayınlarlı,** p.8 ff; **Demir Gökyayla**, p.25.

20 The idea of collecting all nations under the umbrella of a single Italian union, Mancini, stated that it is imperative to take into account the nationalism demands of people from different nationalities. For detailed information **J.Koster**, 'Public Policy in Private International Law', Yale Law Journal, V: 29, I: 7, p.750.

21 Savigny states that there are two types of law provisions. First one is for the interests of persons; the second is for the interests of society. A law provision which is contrary to the interests of the society will not be applied because it will be considered as contrary to public order. See. **Çelikel/ Erdem**, p.140.

II. SCOPE OF PUBLIC ORDER IN PRIVATE INTERNATIONAL LAW

It is not easy to determine the scope of public order also. The scope of public order has been evaluated from different perspectives in the private international law doctrine.

According to Ekşi, there are basically three elements within the scope of public order: *"First, conventions on human rights and fundamental rights and freedoms guaranteed by our Constitution. The second issue is the basic principles of law and the third point is the morality of Turkish society*[22]*."*

According to Demir Gökyayla: *"Contradiction to the basic values of Turkish law, the general conception and morality of Turkish law, the basic justice understanding behind the Turkish law, the general politics on which the Turkish laws are based, the basic rights and freedoms in the Constitution, the common principles in the international law, the principles of bona fides based on the principles of goodwill in private law, the principles of morality adopted by the civilized communities and the principles of justice, the principles of law, the civilization level of society, political regime, society's economic order, the basic human rights..."* is contrary to public order.

The Supreme Court of Appeal has determined the scope of public order in a decisions follows: *"The criterion that should be taken into consideration in determining the violation of the public order…… the basic values, general conception and morality, the basic justice approach of Turkish law…… and the basic politics of the law, the constitutional rights and freedoms, general principles of international law, bilateral agreements, common sense of morality and justice adopted by the developed societies, civilization level….the political and economic regime of the country*[23]*."*

It is not possible to determine the scope of public order in every case. Therefore, in every concrete case, the facts which violate the Turkish public order should be determined separately. However, the difficulty of this finding is obvious.

The scope of public order in terms of Act on Private International and Procedural Law (MÖHUK) is set out in Article 5 in terms of the determination

---

22 **Ekşi**, p.280.

23 E.2010 / 1, K.2012 / 1, Date: 10.02.2012 (www.legalbank.net).

of the law to be applied. The provision coincides with the provision of public order in German law. Pursuant to Article 6 of the German Private International Law Act (EGBGB); "It does not apply if applying the foreign law leads to conclusions that are clearly incompatible with the basic principles of German law and are not particularly compatible with fundamental rights[24]." Similarly, according to Article 5 of the MÖHUK;

"This provision shall not apply if the provision of the competent foreign law to a particular event is clearly contrary to the Turkish public order; Turkish law is applied when deemed necessary."

The first requirement for the application of this regulation is the existence of a provision contrary to public order. If the legal consequence of the application of foreign law violates the Turkish public order and conscience at an intolerable level, and according to expression of the law the violation of the law is "explicitly", the implementation of foreign law due to the disability of public order[25]. Here, the judge has a wide discretion. The judge can use his/her discretion to broaden the area of intervention of public order or he/she may narrow it down. In our opinion, the "explicit" statement contained in the judgment has very limited nature to the broad discretion. On the other hand, the fact that foreign law has a different legal arrangement compared to Turkish law which includes the same regulation does not provide any contradiction to Turkish public order. The search for a law that overlaps between foreign law and Turkish law cannot go beyond being inconclusive. The legislators of each state en-

---

[24] EGBGB Art.6: *"Eine Rechtsnorm eines anderen Staines ist nicht anzuwenden, wenn ihre Anwendung zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich."* According to the German doctrine, the aim is to compare the results of the implementation of German law with a foreign country law, which is targeted by the EGBGB m.6. It was stated that, in the event that the provisions of the foreign law applied to a particular event did not comply with the fundamental rights envisaged in German law, it constituted an indirectly enforceable reservation. See detailed explanations; **Özden, Bülent** (1993) Alman Mahkemelerinde Kamu Düzeni Kavramının Uygulanması, Journal of Comparative Law Studies of Istanbul University, I: 19, p. 101.

[25] **Ökçün, Gündüz** (1967) Devletler Hususi Hukukunun Kaynakları ve Kamu Düzeni, Ankara University, Ankara. **Çelikel/ Erdem**, p. 145; **Şanlı/ Esen/ Ataman Figanmeşe**, p. 75; **Tütüncübaşı**, p. 179.

visage the necessary arrangements within the framework of different legal, economic, political and social objectives. Therefore, the purely social rule differences should not require public order intervention[26].

The explicit contradiction of the result of applied foreign law to the Turkish public order requires application of Turkish law only when deemed necessary. Therefore, it is not always inevitable to implement Turkish law instead of foreign law which is impeded by Turkish public order. Failure to implement foreign law due to violations of Turkish public order shows the negative effect of public order. The application of a certain provision in Turkish law to a concrete case, which is contrary to public order, is explained by the positive effect of public order[27].

Another point that is effective in evaluating the scope of the concept of public order is the relationship between the parties of the case and the country where public order intervention is mentioned in disputes involving foreign element. In such cases that; one or both parties are Turkish citizens or the legal relationship intended to be held in Turkey the possibility of public order intervention increases[28]. It should be noted that in many decisions, the Supreme

---

[26] For example, the mas statute of limitations in the case-law of the Supreme Court of Appeal has not been regarded as an provision which requires the application of Turkish law directly. The fact that the statute of limitation prescribed by the foreign law is different from Turkish law, does not require Turkish public order intervention alone. The intervention in question is only in cases where the statute of limitations prescribed by the foreign law is too short or too long. See. **Şanlı/ Esen/ Ataman Figanmeşe,** footnote. 155; **Atakan, Arda** (2007) 'Kamu Duzeni Kavramı', MÜHF-HAD, V: 11, I: 1-2, p. 80.

[27] According to one view, the public order has been overwhelmed by the positive impact of public order. The main purpose of the public order is to preserve the basic principles of the country in which the proceedings take place. See about this opinion. **Demir Gökyayla**, footnote.72. Another point of view in the doctrine should not be a double distinction for the effect of public order. Public order has a one-way effect only for the implementation of the lex fori. See about this opinion. **Demir Gökyayla**, footnote. 68.

[28] In a previous decision of the Supreme Court of Appeal, the role of public order intervention was determined by taking into account the citizenship of the parties. According to the relevant part of the judgment, the case concerned the request of the husband and wife of the foreign nationality to be allowed to adopt their grandchildren according to national law. In the case, the plaintiffs were American nationals, and according to US law, they requested permission to adopt the submitted a certified copy of the Turkish legislation into Turkish. The court, which examined the national laws of the applicants, stated that the provisions on this matter did not comply with the Turkish law and rejected the request for violating the

Court of Appeal has made rather erroneous assessments, categorically counting the circumstances that require public order intervention, regardless of the legal nature and consequences of the relevant provision of foreign law. Areas such as "adoption[29]", "alimony[30]", and "wardship[31]" and are listed among the cases requiring direct Turkish public order intervention in some decisions[32].

Turkish public order. The fact that the plaintiffs adopt a child (grandson of his or her nationality) according to their national laws cannot be regarded as contrary to Turkish public order. If it is necessary to make the necessary examination within the framework of the national laws that the plaintiffs submitted and the result should be decided on the merits of the request, the rejection of the case with the reasons and thoughts that do not comply with the case is against the law and the law E.1983 / 5550, K.1983 / 5697, Date: 23.06.1983 (www.kazanci.com.tr); For decision, see. **Şanlı/ Esen/ Ataman Figanmeşe,** footnote. 136.

29 Supreme Court of Appeal 2. H.D. No. 3,193 / 5550, K. 1953/5697, Date. 23.06.1983; 2. H.D, E.2004 / 6944, K.2004 / 7910, Date: 15.06.2004; 2. H.D., E.2003 / 8317, K. 2003/9830, Date: 30.06.2003; For decisions, see. **Tarman, Zeynep Derya** (2011) 'Milletlerarası Evlat Edinme Hukukunda Kamu Düzeni Engeli', AUHFD, S: 2, s.333-365; **Şanlı/ Esen/ Ataman Figanmeşe**, footnote. 148.

30 For example, see Decisions. The Supreme Court of Appeal 2. H.D, E.1993 / 11964, K.1994 / 1059, Date: 02.02.1994; The Supreme Court of Appeal 2. H.D., E.3653, K.3604, Date.05.07.1965; Supreme Court of Appeal 2. H.D, E.380, K.3689, Date: 07.11.1955. For decisions, see. **Şanlı/ Esen/ Ataman Figanmeşe,** footnote. 149.

31 For example, see decisions. SupremeCourt of Appeal 2. H.D., E.2000 / 8043, K.2000 / 8641, Date: 23.06.2000; Supreme Court of Appeal 2. H.D, E.4443, K.17022, Date: 06.12.2005; For decisions, see. **Şanlı/ Esen/ Ataman Figanmeşe**, footnote. 151.

32 Perhaps the most controversial topic is the custodian. In its earlier judgments, the Supreme Court of Appeals stated that only one of the spouses had the right of custody as required by Turkish Civil Code art.336, and therefore the joint custody of the child's custody to both the mother and the father was considered to be against the Turkish public order. See. **Süzen, Begüm** (2015) 'Yabancı Mahkemelerden Verilen Birlikte Velayet Kararlarının Tenfizi', Bahçeşehir University Law Faculty Journal, V: 10, I: 133-134, p.29 ff; The opinion on the common custody being against the Turkish public order was valid until the decision of the 2nd Court of Appeal Civil Chamber. In its decision, the Court of Appeal ruled that it was not possible to say that joint custody arrangements were openly against the Turkish public order or that it violated the basic structure and fundamental interests of Turkish society. The 2nd Court of Appeal Civil Chamber., E.2016/15771, K. 2017/1737, Date: 20.02.2017 (www.kazanci.com.tr). Following the decision of the Court of Appeal, in the case of the termination of divorce, the principal custody of the parental custody is the exception to be given to one of the spouses. For the detailed explanations see also. **Apaydın, Eylem** (2018) 'Ortak Hayata Son Verilmesi Sonrası Ortak Velayet Hususunda Yasal Düzenleme Gereği', İnÜHFD, V: 9, I: 1, p.449. In our opinion, the abandonment of the understanding on joint custody is absolutely contrary to the Turkish public order. When the decisions of the Supreme Court of Appeal in Turkey before 2017 are examined, no clear information can be obtained about the reasons

CONCEPTS OF RECOGNITION AND ENFORCEMENT IN PRIVATE INTERNATIONAL LAW

As a rule, the jurisdiction, which is part of the sovereignty of states, is used within the borders of the country. In other words, states cannot exercise their jurisdiction in any other state. However, in some disputes, a court decision within the jurisdiction of a state must also have provisions and consequences within the jurisdiction of another state. In such a case, the court's decision depends on the recognition and /or enforcement of the decision to be made in the foreign state. Therefore, to mention the concepts of recognition and enforcement requires first of all to mention the two states[33].

The decisions made by a state court have ultimately two consequences. The first is the definitive decision and definitive evidence effect. The second is executability. A foreign court decision must be given "enforcement authority" (exaquatur[34]) in order to be able to give both a definite and executable effect. Recognition is the acceptance of a foreign court decision only in the state which recognizes the effect of a final judgment[35].

As can be seen, the recognition and enforcement of foreign court decisions are judicial procedures that produce different results. The recognition or enforcement of a foreign court decision will be determined according to the content of that decision

on which the common custody violates the Turkish public order. As a matter of fact, we believe that it is very difficult to defend that the joint custody institution which is established in accordance with the best interests of the child is contrary to public order. Fort he same opinion see also. **Çelikel/ Erdem**, p. 141.

33 In some federal states, the court decision of one state may require recognition to result in the other state. For detailed information, see**. Ekşi**, p. 2.

34 More explanations about the term "Exaquatur" see;, **Demir Gökyayla,** p. 39.

35 In the Law No. 2675, the enforcement of foreign court decisions of enforcement is defined in Article 34. According to the regulation, the recognition process is more narrow than the enforcement. Recognition seems to be a more extensive process. In the absence of the plaintiff's request to be seen in the form of recognition and both of them should be decided in one of the two to decide whether the decision is contrary to the procedure and the law and requires the distortion Supreme Court 13. HD, E.2001 / 9007, K.2011 / 11406, Date: 05.12.2001 (www.kazanci.com.tr). For decision, see. **Ekşi**, p. 10.

III. CONDITIONS FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS IN TURKISH PRIVATE INTERNATIONAL LAW

The recognition or enforcement of a foreign court decision, as explained in a supra-heading, differs in the impact of that foreign court decision. Therefore, the conditions for recognition or enforcement of a foreign court decision are not exactly the same. In the case of the enforcement of foreign court decisions according to MÖHUK (No. 5718), the conditions of "reciprocity[36]" are sought in addition to all the conditions required for recognition.

The fact that a foreign court decision may be subject to recognition or enforcement depends primarily on the provision of certain preconditions. These preconditions are defined as follows in Article 50 of MÖHUK;

"(1) The implementation of final judgements given according to the state law on civil cases by foreign courts in Turkey is depending on the judgments given by the competent Turkish court."

As to examine these preconditions one by one;

1) The decision subject to enforcement claim must be submitted by a foreign state court. In other words, except for the judicial organs of foreign states, for example, the decisions of the administrative bodies are not in this context. The exception is in Article 30 (2) of the Law on Population Services. According to the provision, if the administrative decisions of the foreign states of adoption are finalized according to the law of the state in which they are granted, it can be subject to recognition and enforcement. Moreover, in the Agreement on the Recognition and Enforcement of Decisions on the Obligation of Alimony, which is Turkey also a signatory, it was stated that the decisions given by the administrative authorities of the Contracting States could be recognized and enforced.

2) The decision should be related to civil cases. In the second criterion, the fact that the foreign court decision is related to the civil case means that the relationship to which the decision originates is to establish a private law relationship[37]. The parts related to personal rights of the criminal sentences given

---

[36] In the Article 24 of the Law No. 2675 on the recognition in MÖHUK, there was no requirement of observance of the rights of defense, in addition to the criterion of reciprocity. See. **Çelikel/ Erdem**, p. 723.

[37] **Eksi,** MOHUK m. 50 f.1, the expression of "civil cases may cause a wrong interpretation, including lawsuits arising from both private and public law, and in the text of the law, as in the case of the European Union regulations," cases related to civil and commercial matters de. it states. See**. Ekşi**, p. 120-122.

by the foreign state courts can be made subject to recognition and enforcement. (MOHUK Article 50(2))

3) The decision which is requested to enforce must be finalized by the foreign state court in which it was issued. Recognition-enforcement procedures cannot be applied for an unfinalized court decision. According to the doctrine, there are different views on what it means for a final judgment to be made by a foreign state court. According to an opinion, it is sufficient that the decision is finalized formally according to the law of the foreign state. According to another view, it is not sufficient the decision to finalized formally[38]. In addition, the decision must be finalized substantively[39]. Pursuant to Article 55 of MÖHUK, It was stated that; *"...the translation which was confirmed by the authorities of the country and that had been approved by the authorities of the country, should be submitted..."*

A court decision with these characteristics, it must be comply with Article 54 of the MÖHUK to enforce and also the essential conditions in Article 58 of the MÖHUK for recognition, and it is essential that can be able to adopt the basic conditions of the decision, so that Turkish courts can decide whether or not recognized by the Turkish courts.

Pursuant to Article 54 of MÖHUK, making desicion of enforcement by a component court is subject to the following conditions:

"a) "There is an agreement based on reciprocity between the Republic of Turkey and the state where the judgment given or in that state the existence of a legal provision enabling the enforcement of the proceedings from the Turkish court or an actual practice.":

In the recognition of foreign court judgments, reciprocity is not a demanded condition unlike enforcement; It refers to a general principle that the right of both citizens to benefit from certain rights is based on the mutual recognition of the same rights between Republic of Turkey and state of foreign judgments given where enforcement is requested[40]. There are three types of reci-

[38] **Demir Gökyayla**, p. 40-41; **Nomer, Ergin** (2010) 'Yabancı Çekişmesiz Yargı Kararlarının Tanınmasında Kesinleşme Şartı', Istanbul, Erdoğan Moroğlu's 65th Birthday Award, 2nd Ed., p. 911.

[39] **Şanlı/ Esen/ Ataman Figanmeşe**, p. 477.

[40] In Turkish law, the principle of reciprocity has been adopted in international conventions as well as in some other laws, except for MÖHUK. For example, the Law on Advocacy m.85 (g),

procity: the first is the "contractual reciprocity" that expresses the fact that reciprocity is born in accordance with a contractual relationship; the second is the "legal reciprocity" that expresses the state of the provision of certain rights for citizens of a given state through the law. The third is the actual reciprocity. Accordingly, the execution of the decision of the Turkish court with the same attribute in the State which has been made the desicion of requested enforcement[41].

b) The sentence is given in a subject not covered by the exclusive jurisdiction of the Turkish courts or the sentence was not made by a competent court of state, even though it had no real relationship with the case or the parties on condition that the defendant to object.

The concepts are "exclusive competence" and "excessive competence" included by MÖHUK Article 54(2) within the second condition of recognition and enforcement of foreign state court statements. In terms of the concept of exclusive competence, it expresses that only the Turkish courts have absolute authority to rule the case[42]. It should be noted that the "definite competence" rule pursuant to the Code of Civil Procedure (HMK) (No:6100) may not coincide with the cases establishing exclusive competence. It is also possible that both concepts have the same meaning in some cases. For example, cases arising from the immovable property are the definitive authority rule in the HMK (No. 6100), but it is also a rule that establishes the competence of Turkish courts in the sense of MÖHUK[43].

Another element mentioned in the article of the provision is related to definite competence. Article 54 of MÖHUK defined excessive competence as: *"..the sentence was not made by a competent court of state, even though it had no*

Labor Law, m.11 / II, Law on Foundations, art.2 / II. See detailed examples. **Celikel, Aysel/ Oztekin Gelgel, Günseli** (2018) Yabancılar Hukuku, 24. Ed., Beta, p. 66; **Arat, Tuğrul** (1964) 'Yabancı İlamların Tanınması ve Tenfizi', AÜHFD, C: 21, S: 1-4, s. 421-527.

41 **Şanlı/ Esen/ Ataman Figanmeşe** p. 481; **Çelikel/ Gelgel**, p. 68.

42 **Sevig, Vedat Raşit** (1996) Milletlerarası Özel Hukuk Alanında Yetki Anlaşmasının Varlığı, İHFM, S: 3, p. 188**; Çelikel/ Erdem**, p. 642; **Şanlı/ Esen/ Ataman Figanmeşe**, p. 490.

43 See also the statement that the very strict application of the exclusive jurisdiction in cases related to the same property of the immovable property may not be in the interest of the parties in some disputes in the ordinary course of life and may even aggravate their situation. **Erkan, Mustafa** (2012) 'Bir Tabu: Taşınmazın Aynına İlişkin Davalarda Münhasır Yetki', SÜHFD, V: 20, I: 1, p. 12 ff.

real relationship with the case or the parties on condition that the defendant to object." As can be seen, unlike the other conditions that have been described so far, the excessive competence will only be examined upon the objection of the defendant[44].

c) The provision shall not clearly contradict public order[45].

ç) In accordance with the laws of the country, the person to whom requested enforcement against has not been duly summoned or he was not represented in court or in contravention of these laws, the person shall be convicted in absentia and that this person did not appeal to the Turkish courts against the enforcement of claims based on any of the above matters

Failure to comply with right of defence in foreign court decisions shall be taken into account only on the objection of the party, as in the case of recognition and enforcement of excessive competence[46]. An opinion expressed in the doctrine argues that, failure to comply because of the right of defense in the category of fundamental rights should be taken into consideration by the judge ex officio[47].

A foreign court decision shall be stubled on recognition or enforcement due to the non-observance of the defense rights contained in subparagraph Article 54/Ç of MÖHUK may be on the issues mentioned in the provision. Violations that cause a breach of the right to defense but not included in the cases considered to be counted as restraint in Article 54/Ç of MÖHUK can be evaluated within the framework of the provision in article 54/C of MÖHUK[48].

Pursuant to Article 57 of MÖHUK, in order to accept the final judgment or definitive evidence effect of foreign court decisions, *"(1) The fact that foreign court proceedings can be accepted as definitive evidence or a definite provision*

---

44 See also the statements of the Turkish courts that it is not possible for them to control it, even if the status of love is in question. **Ekşi**, p. 277.

45 The following sections of our study are examined in detail.

46 **Doğan, Vahit** (2015) Milletlerarası Özel Hukuk, 5. Ed., Savaş Yayınevi, s. 206 vd; **Celikel, Aysel** 'Enforcement of Foreign Court Decisions by New Law' <http://dergipark.gov.tr/download/article-file/99838> l.a.d. 23.11.2018, p. 10.

47 For this view, see. **Huysal Burak** (2012) '6100 sayılı Hukuk Muhakemeleri Kanunu İle Getirilen Yenilikler Işığında Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi Konusunda Bazı Tespitler', V: 32, I: 1, p. 96.

48 **Şanlı, Esen, Ataman Figanmeşe**, p. 495; **Ekşi**, p. 308.

depends on the determination of the foreign enforcement by the court. It is envisaged that the paragraph (a) of the first paragraph of Article 54..." shall not be applied in recognition.

It is mandatory that the Turkish courts enforce a decision of a foreign court which fulfills the preliminary and essential requirements of the MÖHUK regarding the recognition and enforcement. However, the request for recognition or enforcement of a foreign court decision which does not meet the relevant requirements may be rejected[49]. In the event that the disputed case with the same parties and the case issue in the Turkish courts, in the case of the foreign court decision is not recognized or enforced, the relevant foreign court decision is considered as evidence[50].

IV. THE EXTENUATED EFFECT OF PUBLIC ORDER IN TERMS OF RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS

As stated above, the fact that the foreign court decision to recognized or enforced by the Turkish court is not contrary to the Turkish public order.

The adoption of the effect of foreign state law in the field of recognition and enforcement shall be limited by the intervention of public order, in accordance with the relationship between the social values in the enforcing state and the foreign court decision[51]. In this context, as far as national interests are concentrated, the impact area of public order intervention should be widened and narrowed to the extent that it becomes lighter[52]. The judge must maintain the balance of interest within the framework of discretionary power, and maintain the balance between the national interest which the public order intervention

---

[49] **Şanlı, Esen, Ataman Figanmeşe**, p. 480; See also. **Özkan, Işıl** (2008) 'Yargıtay İçtihatlarına Göre Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde "Uygulanan Hukuk" Denetimi', Prof. Dr. Turgut Akıntürk'e Armağan, Ankara, p. 249-276.

[50] In this respect, the decision of the Supreme Court of Appeals on 24.10.2001 is as follows: '... this is a such a case according to the request of the plaintiff. In theis case, the plaintiff did not ask for the recognition and enforcement of the plaintiff the evidence of non-infiltration could be endorsed as evidence, such evidence would be appreciated and assessed in conjunction with other evidence. The Supreme Court of Appeal Date: 24.10.2001 (www.kazanci.com.tr). For the decision, see. **Çelikel, Erdem,** p. 725.

[51] **Gökyayla**, **Demir,** p. 66.

[52] For example, "it exercised on the sale of real estate through a Turkish citizen in Turkey or delivered to the foreign parent or a child's serious economic obligations." See for examples. Demir Gökyayla, p. 66.

maintains and the interest of the foreign court. This interest balance is explained by the "Theory Of Extenuated Effect" in the doctrine.

The theory of the extenuated effect of public order was first originated from French law with the decision of Munzer dated 1964. In this decision it was stated that the decision of the competent foreign law applied to the concrete dispute necessitated public order intervention in accordance with the French law, not only for the whole of the incident, but also for the part of the public order. Foreign law which does not contradict French public order will continue to be implemented[53]. A legal status may be in accordance with the law of a person's national law but it may also be contrary to public order according to the law of the adjudicating state. It is not necessarily the observance of public order for the whole of the event, but rather the discretion of the judge, taking into account the balance between the vested right and public order intervention, in other words, decision-making in the context of easing the impact of public order is expressed as a mitigated effect theory[54].

According to Turkish law, the extenuated effect of the public order was accepted with the "explicit" expression contained in Article 55 / c of MÖHUK[55]. For example, "talak" is not allowed as a method of divorce in Turkey, the decisions made as a result of talak can be recognized in Turkey. Likewise, a valid marriage is according to the law made by countries but not accepted in Turkish law of polygamy in terms of alimony claims arising from the adoption of a second wife in Turkey are a reflection of the impact of public order mitigated[56].

A similar arrangement is also included in German Procedural Law in ZPO. According to the code, non-compliance with the mandatory provisions

---

53 **Sevig, Vedat Raşit** 'Fransız Jürispridansına Bakış', <http://dergipark.gov.tr/download/article-file/13943>, l.a.d. 23.11.2018, p.192; **Umut Mutlu**, footnote. 176.

54 The theory of alleviated influence can be said to have been accepted as "Inlandsbeziehung in German law. The mitigated effect theory has been widely accepted, taking into account the theory of internal relationship. According to this concept, if there is no close relationship between the concrete conflict and the decision state, the competent foreign law is not impeded in public order. See. **Kropholler, Jan** (2006) Internationales Privatrecht, Mohr Siebeck, 6. Neubearbeitete Auflage, p. 246**; Demir Gökyayla**, p.149.

55 **Erdoğan, Burcu İrge** (2018) '5718 Sayılı MÖHUK Uyarınca Tenkis Davasında Uygulanacak Hukukun Kamu Düzeni Bakımından Değerlendirilmesi ve Yetkili Mahkeme', DEÜHFD, V: 20, I: 1 p. 411; **Demir Gökyayla**, p.145.

56 At the time when the contracted divorce was not accepted, the Supreme Court of Appeal did not recognize the foreign court decisions given by the contracted divorce. See. **Demir Gökyayla**, p.153.

of German procedural law and the basic principles of German law for the establishment of non-compliance with public order does not require public order intervention. The intervention is only applied if the provision of a provision by a foreign court puts the "foundations of the state or economic life" under an unbearable burden[57].

The extenuated effect of public order is not absolute. In French law, it is stated that *"although the acquisition of a right is contrary to public order, the effects of this right should be recognized if their effects are not contrary to public order*[58]*."* The detention of recognition or enforcement of the given foreign court decision by public order is only possible if there is an unjustifiable violation of the Turkish public order. The effect of vested rights does not completely eliminate public order intervention. It is unclear at what point the extenuated effect of public order will be considered absolute, as it is in its definition does not have definite lines[59].

V. THE PURPOSE OF PREDICTING PUBLIC ORDER INTERVENTION IN THE RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS

Recognizing the final judgment of foreign courts and/ or giving the ability to exercise to them, without seeking any circumstances, is without a doubt the unconditional transfer of jurisdiction which is a consequence of the sovereign powers of states, which is practically impossible. For this reason that the certain conditions have been stipulated for the recognition or enforcement of decisions taken from a foreign state court.

For example, while the enforcement decision given in Turkish law, the intention of requirement of reciprocity condition is to protect the political interests of the state in the sight of other states and help the foreign policies of the state in this way[60].

57 **Demir Gökyayla**, p. 86.
58 **Demir Gökyayla**, p. 154.
59 **Demir Gökyayla**, p. 155.
60 **Demir Gökyayla**, p. 73.

The aim is to provide a protection norm, "where the sentence has been given in a subject the Turkish state courts non authoritative", in areas where the state's sovereignty authority is absolutely established[61].

The subject of our study: "the condition that where the provision is not clearly contrary to public order" was aimed to protect the interests of the public. It is not just individual or only social interests. With this condition, it is desired to prevent the legal, moral, political understanding and values that are settled in the society from being damaged by a foreign court statement[62].

The requirement that the provision of a foreign court cannot be contrary to public order is not foreseen in favor of Turkish citizens only. The party decided to be in favor of recognized or enforced may be a Turkish citizen or a foreigner as well. On the other hand, is also insignificant whether or not the decision made by a court of a state that does not coincide with the political interests of the state. What is important is that the provision is not contrary to the social interests in accordance with the Turkish public order[63].

VI. PROHIBITION OF REVISION (CONTENT INSPECTION) AS A PRINCIPLE IN PUBLIC ORDER INTERVENTION

The Turkish judge who is examining the case of recognition or enforcement may examine the relevant foreign court's decision only in terms of whether it has the necessary conditions of recognition or enforcement. It is not possible for the judge to decide on a decision which does not comply with the relevant requirements by using his discretion. And again, the judge must enforce a foreign court decision in accordance with the conditions in question, even in the case of errors in the proceedings or in the judgment[64]. Otherwise, the case claimed in a foreign state court will be litigate in the Turkish courts again[65].

Therefore, the decision of the foreign court cannot be examined within the framework of the judicial procedure applied in the foreign court and the

---

61 **Demir Gökyayla**, p. 73.

62 Çelikel/ Erdem, p. 145; **Şanlı/ Esen/ Ataman Figanmeşe**, p. 75; **Dolunay,** p. 93, **Demir Gökyayla**, p.73.

63 **Aygül, Musa** (2011) 'Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi Davalarında Bazı Usul Hukuku Problemleri'**,** C: 31, S: 2, p. 83-121; **Demir Gökyayla**, p. 73.

64 **Demir Gökyayla**, p. 76.

65 **Demir Gökyayla**, p. 76.

accuracy of the law applicable to the case. This is called Prohibition of Revision[66] (Prohibition of Content Inspection), in other words "exequatur system".

The prohibition of revision is stated in the decision of Supreme Court of Appeal, which was issued in 2012, as follows:

The judge has no authority to examine and evaluate the accuracy of foreign court proceedings in terms of material law. In the framework of this prohibition, the judge cannot examine and evaluate a justification of the existing reasoning. The existence or absence of a justification in the provision is not important in determining the violation of the provision in public order. It is clear and unquestionable that the principles laid down by Article 141 of the Constitution in relation to the proceedings procedure shall apply exclusively to Turkish Courts. With the application of the sentence of the foreign court, it is not possible to enforce the foreign court decisions that would cause contrary to public order. It was decided that the absence of just cause for foreign court decisions would not prevent the enforcement of the finalized foreign court decision and this would not be considered a clear breach of public order in the sense of Article 54 / c of MÖHUK[67].

The decision stated that the Turkish judge could not examine the foreign court decision in terms of material law and announced the prohibition of revision. However, the decision was subject to criticisms in that the respection of the unjustified court decisions were not contrary to public order[68].

It is very sensitive to the extent to which decision given by a foreign state court can be examined by the Turkish judge[69]. Because this situation requires

---

66 **Kole Mehmet** (2016) Yabancı Mahkeme Kararlarının Tanıma ve Tenfizinde Usul, Dicle University Journal of Law Faculty, V.21, p.34, p.45.

67 Supreme Court of Appeal, E.2010 / 1, K. 2012/1, Date. 10.02.2012 L.A. 15.11.2018.

68 For detailed information on the examination of unjustified foreign court decisions within the framework of the public order barrier, see. **Ersen Perçin, Gizem** (2015) Gerekçesiz Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kamu Düzeni Engeli, Beykent University Faculty of Law Journal, V.1, I.1, p.61-86.

69 In a decision of 2009, the Supreme Court of Appeal of Turkey declared the relationship between the public order and the revision ban: Georg First Instance Court ruled that the defendant Oruç Necmi Y. was not the father of Y.F and decided to refuse the rejection and this decision became final. Y.F. was born in Hamburg. The defendant of the decision of the desired decision had participated in the hearings and did not request the application of Turkish law. On the other hand, the judge who is required to recognize and enforce the judgment, is not authorized to evaluate which cases are accepted or not in the decision making process in the foreign country. The procedural provisions applied in the foreign decision and the material and legal determinations are outside the scope of recognition and enforcement. Y.F.'s not

the determination of the relationship between public order and prohibition of revision. It was stated that there could be an exception in the examination of foreign court decisions that violate public order rules, which represent the basic values of Turkish society and highlight the social interests. In this regard, the reasons such as the misapplication of Turkish law in the decision given are not just a reason to prevent recognition or enforcement. However, a clear violation of the values that represent public order will be an obstacle to recognition or enforcement.

According to Gökyayla, if the violation of the Turkish public order in the foreign court decision is serious, it cannot serve to reach the desired goal by merely stating the content of the decision to prohibition of the examination. In case of disputes mentioned in public order intervention, the prohibition of revision should be more tolerated[70].

VIII. EVALUATION OF THE JUDICIARY AND PROCEDURAL CRITERIA FOR DISCRETION OF JUDGE IN THE DETERMINATION OF DISCRIMINATION IN PUBLIC ORDER

A. Turkish Disability of Public Order for the Basis of the Criteria Related

The cases where Turkey is adjudicating state, the Turkish judge cannot exemine the law applied to the basis of the dispute by the foreign state court due to the prohibition of inspection (revision). However, in exceptional cases, this rule may be ignored, which limits the authority of the Turkish judge to investigate in terms of disputes. In the doctrine of cases of public order and the personality of the Turks, it is considered as an exceptional case and the application and enforcement of unauthorized law in accordance with MÖHUK is seen as an obstacle to the desired decision. The main point of this view is that the law that will be applied by the foreign court on the basis of the concrete

being represented by a trustee in this case will not constitute a clear violation of Turkish public order and this provision is not a definitive provision in his case. For this reason, Article 53 of Law No. 5718; recognition or enforcement of the final decision on the desired foreign court decision is sufficient to submit to the court. 2. Supreme Court 2. HD, E.2008 / 4290, K.2009 / 10608, Date: 02.06.2009 (www.kazanci.com.tr). For decision, see**. Ekşi**, p. 281; **Demir Gökyayla**, p. 75.

70 **Demir Gökyayla**, p. 77.

dispute, if it is seriously damaging to the Turkish public order and its consequences cannot be tolerated, the balance of national interest is more severe than the prohibition of revision[71].

It is also possible for a foreign state court to have Turkish law as the law applied to the basis of the dispute. Shall it create an obstacle to recognition or enforcement, if the applied law is Turkish law, but if Turkish law is improperly applied? In essence, it is possible to talk about the different opinions of the Supreme Court of Appeal on the misapplication of Turkish law. In some decisions, the misapplication of Turkish law has not been seen as a disability or recognition barrier. In some judgments, it was stated that the objection that the Turkish law was wrongly applied was incompatible with the goodwill rule and that it was a violation of the prohibition of revision[72].

Our opinion is to look at the result of the wrong application of Turkish law. If this result damages the values that represent the Turkish public order to an undeniable extent, then it should not be possible to recognize or enforce the foreign court decision in which Turkish law is improperly applied. As a matter of fact, a decision given by the Supreme Court of Appeals on 2008 is as follows: *"The non-implementation or misapplication of Turkish law by the foreign court does not constitute an obstacle and does not constitute an obstacle to public order in its own right. It can be mentioned that public order is violated if there is a violation of the values that constitute the basis of the Turkish legal order and that it will not be forsaken."*

B. The Turkish Public Order Disability for Procedural Criteria

One of the requirements for the recognition and enforcement of a foreign court decision is the defense rights have been respected in court in respect of procedural criteria. As noted above, the imposition of a foreign court decision on the recognition or enforcement of a foreign court decision due to non-observance of the rights of defense in MÖHUK Article4 (4) may only relate to the matters referred to in the provision. For this reason, violations that do not fall into the cases which are considered as a limitation of the right to defense

[71] **Demir Gökyayla**, p. 190; **Dolunay,** Kamu Düzeni, p. 55.
[72] **Dolunay,** Kamu Düzeni, p. 55; **Özkan**, p. 261.

but are considered the limitation of the MÖHUK Article 54 (Ç), will be evaluated in the context of MÖHUK Article 55 (c) in the framework of the violation of the public order.

In the context of procedural criteria, which is not covered by MÖHUK Article 54 (ç), therefore, the issue of recognition and enforcement of unfounded foreign court decisions is a matter to consider within the scope of the public order criterion. There are different opinions in the doctrine and the Supreme Court of Appeal that the decisions made as a result of the judicial activities carried out by the foreign state courts are unjustified, will constitute a violation of public order[73]. However, before proceeding with the explanations on this issue, it is necessary to determine what is intended by a court decision. Rationale ensures the prevention of arbitrariness in the trial activity[74]. Leaving the judge under the obligation to write a reason for his decision enables him/her to supervise himself/herself and to supervise the above-mentioned courts[75].

In Turkish Law, there are provisions on the justification in both the Constitution and the Procedural law legislation. In the 1982 Constitution Article 141 /3, "*all decisions of all courts are written with justification and the necessity of making decisions with justification in Turkish law*" is clearly stated[76]." In the HMK No. 6100, it was decided that "*...the decisions should be concrete and clearly justified...*" Therefore, there is no discussion about the necessity of justifying the court decisions given in the Turkish judiciary.

---

[73] According to Nomer; the reason for the fact that foreign court decisions were the subject of these discussions was due to the fact that foreign court decisions were made according to the simple case procedure. In the case of German Procedure Law Mahnfahren case is a type of case that results in faster results when compared to other types of cases. The decision made as a result of the trial (am gerichtliche Entsheidung). There is no justification for this as a natural consequence of the trial. See. **Nomer, Ergin** (2011) 'Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Gerekçe', Istanbul Kültür University Faculty of Law Journal, V: 10, I: 1, p.10. In the German Civil Procedure Law, there is an opinion that "Mahnfahren, which is a caveat simple procedure m, should not be enforced. See. **Esen, Emre** (2007) 'Alman Hukukunda İhtarlı Basit Dava Usulü (Mahnfahren) Çerçevesinde Verilen Kararların Türk Hukukunda Tenfizi', MHB, I: 1-2, p. 23 et al.

[74] **Perçin**, p. 74.

[75] **Kuru, Baki/ Arslan Ramazan/ Yılmaz, Ejder** (2011) Medeni Usul Hukuku Ders Kitabı, 22nd Law, Ankara, Yetkin Publishing, p. 472 and **Pekcanitez Hakan/ Atay, Oğuz/ Özekes Muhammet** (2012) Medeni Usul Hukuku, 13th Ed., Ankara, Yetkin Publications, p. 332.

[76] According to Nomer, the term, all courts refers to the Turkish courts. Foreign courts are not within the meaning of art. 141 f. 3. See. **Nomer,** Gerekçe, p. 15.

However, the question of whether the Supreme Court of Appeal is a necessity to find justification in foreign court decisions is controversial. The fact that the Supreme Court of Appeal should be compulsory for the determination of non-compliance with the public order and that the Supreme Court of Appeal's decision dated 18.03.1993 and numbered E.1992, K.1993 / 2756 may be important for our case the provision of the public order is not clearly contrary to the condition.

In order for the court to check the existence of this condition, the reasoned decision must be the reasoned original and the approved translation. It is therefore unlawful for the court to issue a decision of execution of the foreign court decision without an acknowledged original and confirmed translation of the foreign court ruling, and therefore the provision must be broken down. The work to be done by the court is stated as requesting from the plaintiff the requested reasoned original and approved translation of the decision and, according to the result obtained, it consists of making a decision that determines whether the provision is against public order or not[77].

However, it was found that in the decision of Supreme Court of Appeal in 2012 decided to change its opinion[78]:

In this decision, the concept of public order is explained in detail. First of all, it is stated that public order is a set of rules that protect the basic structure and interests of the society; then, the scope of public order intervention is defined as: *"violations against the basic values and conceptions of Turkish law and the basic justice approach and general politics on which the Turkish law is based,….. the fundamental rights and freedoms in the Constitution,….. the common principles of international law…. principles of civil society and justice…. so-*

[77] **Ekşi**, p. 292; Supreme Court of Appeal 15th HD, E.2000 / 829, K. 2000/1121, Date: 08.03.2000 Supreme Court of Appeal 13. HD, E.2001 / 9007, K.2001 / 11406, Date: 05.12.2001 (www.kazanci.com .tr), l.a.d. 18.11.2018; The Supreme Court of Appeal 19. H.D., E. 2013/10286, K. 2013/14182, Date: 19.09.2013 (www.kazanci.com.tr), l.a.d. 18.11.2018; Supreme Court of Appeal 23. H.D., E.2014 / 725, K.2014 / 677, Date: 03.02.2014 (www.kazanci.com.tr), l.a.d. 18.11.2018. For the aforementioned decisions see. **Perçin**, p. 72 et al.

[78] See the detailed review of the judgment**; Perçin**, p. 79 et al. and **Demirkol, Berk** (2017) 'Enforcement of Unjustified Foreign Court Decisions', Bahçeşehir University Faculty of Law Journal, V: 12, I: 157-158, p. 66 et al. About the decision see. YIBGK, E.2010 / 1, K. 2012/1, Date: 10.02.2012 l.a.d. 23.11.2018.

ciety's civilization level, political and economic regime, human rights and freedoms." As it regards the provision of public intervention scheme, consequences will be produced if the decisions taken into account are applied instead of the law and criteria applied in the foreign court decision on the provision of the public order intervention.

The Supreme Court of Appeal states on importance of existence of justification in foreign court decisions as follows: In democratic states of law, the justification is not only based on a provision, but also with the interest of reality in its content, the role of the human, society and public in the person of judgment is controlled by the judge and his effectiveness and by interfering with his habits.

According to the decision, the fact that the provision in a foreign court was unjustified does not constitute a violation of the public order alone, in contrast to previous The Supreme Court of Appeal judgments of different opinion. This situation in the decision; violation of the right to basic defense and the fact that the decision is unjustified, and the fact that the right to defense has not been granted is contrary to the public order in the domestic material law. In connection with this, the weak effect of the justification on enforcement was accepted. Accordingly, the reasoning in the foreign policy does not have the power to influence the enforcement.

In a general evaluation, the Supreme Court of Appeal did not consider the fact that foreign court judgments were unjustified within the scope of non-compliance criteria. The fact that the existence or absence of a justification in the sense of understanding of the Turkish Civil Procedure in the case of foreign court proceedings for which it has been requested is not effective or necessary for the enforcement of the Turkish public order and the criteria of whether the judgment is justified or unjustified is not conducive to comment within the scope of public order intervention.

However, both the European Court of Human Rights (ECHR) and the European Court of Justice in foreign court decisions are clearly expressed the necessity of existance of justified. In the European Court of Human Rights and European Court of Justice Judgments, the case is dealt with in accordance with ECHR Article 6:

1. "Everyone is entitled to a public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide on the merits of his case or his civil rights and obligations or the merits of the charges against him in a criminal area. The decision is made publicly. However, in the event that morality in a democratic society requires the confidentiality of the private life of minors or the interests of a party, in the interests of public order or national security, or in certain special cases where publicity may harm fair trial and in such a way that the court is inevitably assessed, partially closed to the press and listeners.

2. Everyone charged with a criminal offense shall be presumed innocent until his guilt has been legally established.

3. Everyone charged with a criminal offense has the following minimum rights:

a. To be informed promptly, in a language that he/she understands and in detail, of the nature and cause of the accusation against him;

b. To have the time and facilities necessary to prepare his defense;

c. To defend himself in person or to benefit from the assistance of a defense counsel he will choose; if he / she is deprived of the financial means necessary to hire a lawyer, and when it is deemed necessary for the fulfillment of justice, be free to use the assistance of a lawyer to be appointed officially;

d. To interrogate or have interrogated witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. To benefit from the assistance of an interpreter free of charge if he cannot understand or speak the language spoken in the court."

As it can be seen, there is no clear provision on the reasoning of the decisions justified of the ECHR Article 6. However, in its judgments, the Court clearly stated that the justification was part of the right to a fair trial. Therefore, the state courts which are parties to this Convention should make every decision they have justified. This is the direct effect of the right to a fair trial on the justified decision. The fact that the Contracting State Courts did not accept the enforcement of unjustified decisions in terms of concrete dispute was accepted

as a liability for the States Parties to the Convention and accepted as an indirect effect of the right to a fair trial[79].

In the "Pellegrini v. Italy[80]" decision of 20.09.2001, the foreign court decided upon the right to a fair trial and the enforcement of foreign court decisions were drawn[81]. In order to enforce the decision of the annulment of a marriage by the Vatican courts, it was stated that the decision of the Vatican court should be determined in accordance with the right to a fair trial under the ECHR Article 6. This determination can only be made by the judge on the justification of the foreign court decision. Therefore, the enforcement of non-justified decisions is not possible in this context[82].

The Court of Justice of the European Union has a decision of "Krombach v. Bamberski" The decision is based on the first sentence of Article 27 of the "Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters" that the decisions against the public order shall not be enforced[83]. According to this, states cannot determine the limits of the concept of public order. The limit for public order as an intervention instrument should be the "human rights" guaranteed by the ECHR and the ECHR case law[84].

---

79 **Perçin**, p. 82; **Cuniberti**, p. 29-30.

80 For the original text of the judgment, see <www.hudoc.echr.coe.int>, l.a.d. 23.11.2018.

81 **Perçin**, p. 82 and **D'Alessandro, Elena** The Impact of Article 6 on the European Convention on Human Rights in a Non-Contracting State, <http://www.iapl-2011-congress.com/Inhalt>

82 **Perçin,** p. 82; According to the Pürselim, the favorable conditions for recognition should be applie fort he recognition. **Pürselim, Hatice** (2018) 'Son Gelişmeler Işığında Makedonya Mahkemeleri Tarafından Verilen Boşanma Kararlarının Türkiye'de Tanınması', III. International Conference-Ohrid, The East Of The West (27-29.06.2018), III. Uluslararası Doğu Batı Konferansı Kitabı, <http://www.dogubati.org/dosyalar/DBBDTAM.pdf>, p. 229-240.

83 Article 27/1: not A judgment should not be recognized: ... 1. if such recognition is contrary to public order in the State in which recognition is sought ... "

84 *"While the Contracting States in principle remain free, by virtue of the proviso in Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention. Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition*

At this point, both ECHR and European Court of Justice decisions are evaluated together, the concept of public order should be accepted not only within the national boundaries, but also within the scope of the human rights criteria drawn by the international conventions.

EVALUATION AND CONCLUSION

The "public order" is a concept with wide discretion to the judge due to the fact that its boundaries are very difficult to determine and vary according to time, place and even every concrete dispute. The use of this discretion without any limitation shall result in the denial of the recognition and enforcement of any foreign court decisions contrary to Turkish law. For that reason, the decisions made by the Turkish courts for the reciprocity criterion will not be enforced in the foreign state courts. So all the foreign court decisions being contrary to the mandatory norms of Turkish law shouldn't be accepted as contrary to the public order. The foreign court decisions shall be assessed in terms of its consequences. The values representing the Turkish public order must be clearly affected by this contradiction.

In Turkish private international law, the recognition and enforcement of foreign court decisions are essentially limited by the prohibition of revision. However, regarding public order, in doctrine there are some writers' argueing that the implementation of the revision prohibition should be more flexible. This situation was accepted as a mitigated effect of public order and examined under the name of extenuated effect theory. In our opinion, the strict implementation of the prohibition of revision may undermine the national interest which is required to be protected by public order intervention. Therefore, in recognition and enforcement of foreign court decisions, Turkish judge should conduct more flexible examination without strict adherence to the revision prohibition so that the balance of interests is preserved. However, it should be noted that the absolute acceptance of the extenuating effect of public order disrupts the balance of interest in question. For this reason, the extenuating effect

to a judgment emanating from a court in another Contracting State." see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CJ0007>, l.a.d. 24.11.2018; **Perçin,** p. 83.

of public order should only be accepted in case of violation of the basic values and principles of Turkish law in the inaccessible part of Turkish public order.

In terms of procedural criteria, in the Turkish doctrine and in a decision of the Supreme Court of Appeal in 2012, it is discussed that lacking justification of a foreign court decision, should be regarded as a violation of a public order or not. However, in the European Court of Human Rights' decision on that issue, the justification was accepted as part of the right to a fair trial and the ECHR had required the member states to ensure that the foreign court decisions subject to recognition and enforcement are justified. Since Turkey is a member state of ECHR, the Turkish judge should seek justification of foreing court decisions subject to recognition and enforcement, in contrary to the Supreme Court of Appeal's aforementioned decision.

REFERENCES

Akıncı, Ziya (1994) Milletlerarası Ticari Hakem Kararları ve Tenfizi, Ankara, Vedat Publications.

Apaydın, Eylem (2018) 'Ortak Hayata Son Verilmesi Sonrası Ortak Velayet Hususunda Yasal Düzenleme Gereği', İnÜHFD, V: 9, I: 1, p.445-476.

Arat, Tuğrul (1964) 'Yabancı İlamların Tanınması ve Tenfizi', AÜHFD, C: 21, S: 1-4, p. 421-527.

Atakan, Arda (2007) 'Kamu Düzeni Kavramı', MÜHF- HAD, V.11, I.1-2, p.59-136.

Aygül, Musa (2012) 'Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi Davalarında Bazı Usul Hukuku Problemleri', MHB, C: 31, S: 2.

Cuniberti, Gilles (2008) 'The Recognition of Foreign Judgements Lacking Reasons in Europe: Access to Justice Foreign Court Avoidance and Efficiency', International and Comparative Law Quarterly, V: 1, I: 57, p.25-52.

Çelikel, Aysel 'Yeni Kanuna Göre Yabancı Mahkeme Kararlarının Tenfiz Şartları', http://dergipark.gov.tr/download/article-file/99838, l.a.d. 23.11.2018, p.7-13.

Çelikel, Aysel/ Erdem, Bahadır (2017) Milletlerarası Özel Hukuk, Beta, 15.P.

Çelikel, Aysel/Öztekin Gelgel, Günseli (2017) Yabancılar Hukuku, Renewed 24.P., Beta, p. 66.

D'Alessandro, Elena 'The Impact of Article 6 of the European Convention of Human Rights on the Enforcement of Foreign Judgements Rendered in a Non-Contracting State', <http://www.iapl-2011-congress.com/Inhalt/Papers/Paper%20-%20%20Dalessandro%20-%20The%20Impact%20of%20Article%206.pdf>, p. 1, l.a.d. 23.11.2018.

Dayınlarlı, Kemal (2011) Milli- Milletlerarası Kamu Düzeni ve Tahkime Etkileri, 2. P.

Demir Gökyayla, Cemile (2001) Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kamu Düzeni, Seçkin.

Doğan, Vahit (2019) Milletlerarası Özel Hukuk, 5th Ed., Ankara.

Dolunay, Ayhan, 'Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kamu Düzeni', <http://docs.neu.edu.tr/staff/ayhan.dolunay/PUBLICATION_2.pdf>, l.a.d. 24.11.2018, p.45-63.

Dolunay, Ayhan (2015) Türk Hukukunda ve Kıbrıs Türk Hukukunda Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi, On İki Levha Publications, İstanbul.

Ekşi, Nuray (2013) Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi, Beta, Istanbul.

Erdoğan, Burcu İrge (2018) '5718 Sayılı MÖHUK Uyarınca Tenkis Davasında Uygulanacak Hukukun Kamu Düzeni Bakımından Değerlendirilmesi ve Yetkili Mahkeme', DEÜHFD, V: 20, I: 1, p.397-430.

Erkan, Mustafa (2012) 'Bir Tabu: Taşınmazın Aynına İlişkin Davalarda Münhasır Yetki', SÜHFD, V: 20, I: 1, p. 11-51.

Ersen Perçin, Gizem (2015) 'Gerekçesiz Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kamu Düzeni Engeli', Beykent University Faculty of Law Journal, V: 1, I: 1, p. 61-86.

Esen, Emre (2007) 'Alman Hukukunda İhtarlı Basit Dava Usulü (Mahnfahren) Çerçevesinde Verilen Kararların Türk Hukukunda Tenfizi', MHB, I: 1-2, p.21-80.

Gürzumar, Aydanur (1994) 'Türk Devletler Özel Hukuku Açısından Boşanma Davalarında Kamu Düzeninin Etkisi', MHB, I: 1-2, p.21-54.

Kropholler, Jan (2006) Internationales Privatrecht, Mohr Siebeck, 6. Neubearbeitete Auflage.

Hoffmeister, Frank/ Kleinlein, Thomas (2013) International Public Order, Max Planck Encyclopedia of Public International Law, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1430?prd=EPIL>, l.a.d. 06.11.2018.

Huysal, Burak (2012) '6100 sayılı Hukuk Muhakemeleri Kanunu İle Getirilen Yenilikler Işığında Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi Konusunda Bazı Tespitler', V: 32, I: 1, p.71-101.

Koneti, Selim (1968) İsviçre Federal Mahkemesinin Borçlar Hukuku Kararları, Ankara.

Koster, J. :Public Policy in Private International Law, Yale Law Journal, V: 29, I: 7, p.744-766.

Köle, Mehmet (2016) Yabancı Mahkeme Kararlarının Tanıma ve Tenfizinde Usul, Dicle University Faculty of Law Journal, V: 21, I: 34, p.39-98.

Mutlu, Işıl Umut (2003) 'Yabancı Hakem Kararlarının Tanınması ve Tenfizinde Kamu Düzeninin Etkisi', Ankara Üniversitesi Sosyal Bilimler Enstitüsü, Master's Thesis, Ankara.

Nomer, Ergin (2018) Milletlerarası Usul Hukuku, Beta, İstanbul.

Nomer, Ergin (1984) 'Rızai Boşanma ve Kamu Düzeni', MHB, V: 4, I: 2, p.94-98.

Nomer, Ergin (2010) 'Yabancı Çekişmesiz Yargı Kararlarının Tanınmasında Kesinleşme Şartı', Erdoğan Moroğlu's 65th Birthday Award, 2. P., Istanbul, p.909-922.

Nomer, Ergin (2011) 'Yabancı Mahkeme Kararlarının Tenfizinde "Gerekçe", İstanbul Kültür University Faculty of Law Journal, V.10, I.1, 2011, p.9-16.

Ökçün, Gündüz (1967) Devletler Hususi Hukukunun Kaynakları ve Kamu Düzeni, Ankara Üniversitesi, Siyasal Bilimler Fakültesi Yayını, Ankara.

Özden, Bülent (1993) 'Alman Mahkemelerinde "Kamu Düzeni" Kavramının Uygulanması', Journal of Comparative Law Studies of Istanbul University, I: 19, p.101-106.

Özkan, Işıl (2008) Yargıtay İçtihatlarına Göre Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde ‘‘Uygulanan Hukuk’’ Denetimi", Prof. Dr. Turgut Akıntürk'e Armağan, Ankara, p. 249-276.

Pürselim, Hatice Selin ‘Son Gelişmeler Işığında Makedonya Mahkemeleri Tarafından Verilen Boşanma Kararlarının Türkiye’de Tanınması’, III. International Conference-Ohrid, The East Of The West, l.a.d. 27-29.06.2018, III. Uluslararası Doğu Batı Konferansı Kitabı, <http://www.dogubati.org/dosyalar/DBBDTAM.pdf>, p. 229-240.

Reid, Karen (2012) ‘A Practitioner’s Guide To The European Convention On Human Rights’, Sweet&Maxwell, 4. P., Londra.

Seviğ, Vedat Raşit ‘Fransız Jürispridansına Bakış’, <http://dergipark.gov.tr/download/article-file/13943>, l.a.d. 23.11.2018, p.191-208.

Seviğ, Vedat Raşit (1996) ‘Milletlerarası Özel Hukuk Alanında Yetki Anlaşmasının Varlığı’, İHFM, I: 3, p.179-190.

Süzen, Begüm (2015) ‘Yabancı Mahkemelerden Verilen Birlikte Velayet Kararlarının Tenfizi’, Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi, V: 10, I: 133-134, p.27-52.

Şanlı, Cemal (2006) Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları, Istanbul, Beta, 6. P.

Şanlı, Cemal/ Esen, Emre/ Ataman Figanmeşe, İnci (2015) Milletlerarası Özel Hukuk, Istanbul, Vedat Kitapçılık, 4. P.

Tanrıbilir, Feriha Bilge (2010) ‘5718 Sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun’un Genel Hükümlerinde Yapılan Değişiklikler Üzerine’, TBB Dergisi, S: 87, p. 195-227.

Tarman, Zeynep Derya (2011) ‘Milletlerarası Evlat Edinme Hukukunda Kamu Düzeni Engeli’, AUHFD, I: 2, p. 331-365.

Tarman, Zeynep Derya 'Yabancı Mahkeme ve Hakem Kararlarının Türkiye'de Tenfizinde Karşılaşılan Sorunlara İlişkin bazı Tespitler', Public and Private International Law Bulletin, V: 37, I: 2, p.798-820.

Tekinalp, Gülören (2011) 'Milletlerarası Özel Hukuk Bağlama Kuralları', Genişletilmiş 11. P., Istanbul, Vedat Publications.

Tiryakioğlu, Bilgin (1996) Yabancı Boşanma Kararlarının Türkiye'de Tanınması ve Tenfizi, Ankara Publications.

Tütüncübaşı, Uğur (2014) Yabancı Çekişmesiz Yargı Kararlarının Türk Hukukunda Tanınması, Adalet.

Yağcı, Salim Serdar (2017) 'Milletlerarası Özel Hukukta Vasıflandırma', D.E.Ü. Faculty of Law Journal, V: 19, p. 2633-2646,

<www.unece.org/mission.html> l.a.d. 26.12.2018)