

Judicial Recusation in Germany and Turkey¹

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The appointment of judges is a fundamental brick in the wall of judicial independence. Both its substantive and procedural elements guarantee that the judicial positions will be filled up with qualified persons (mainly lawyers), who are able to solve legal disputes objectively, in compliance with the relevant sources of law, and, in general, for the benefit of the whole society. A judge must always be well educated, aware of contemporary problems, trained in the law, and intelligent to apply and develop his or her knowledge.⁴ In short, the general qualification of judges is guaranteed by the rules of appointment. This is supplemented by a special dimension of qualification: that a judge is qualified to sit in judgment and decide in a specific case.

Such special qualification is mainly guaranteed in a reverse way: judges who are unable to decide the case objectively, who are unable to keep the necessary distance between the case and their own person are recused (excluded or disqualified).⁵ In short, while appointment is a general safeguard to keep away those who do not meet the standards of judiciary; exclusion and disqualification guarantees that an otherwise qualified judge will not damage the impartiality of the decision-making in a special case.

While appointment is generally the privilege of the given country's respective organs (either ministries or self-governments), the exclusion or disqualification procedures might be initiated either by the respective judge himself/herself or by other parties/participants of the procedure. Similarly, the requirements of the judicial appointments are (at least hypothetically) objective, while exclusion or disqualification is generally based on more or less subjective reasons. Consequently, recusation is a quite open concept,⁶ and it shall be used cautiously. If such "subjective reasons are tested objectively",⁷ impartial judgements can be properly guaranteed. Such impartiality of judgements is a piece of the constitutional regime of the United States,⁸ as

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⁴ Sigmund A. Cohn: Judicial Recusation in the Federal Republic of Germany, 3 *Georgia Journal of International and Comparative Law*, 1/1973: p. 18.; Alexander Ignor: Befangenheit im Prozess, *Zeitschrift für Internationale Strafrechtsdogmatik*, Issue 5/2012: p. 228.

⁵ Beschluss vom 15. Juni 2015, BVerfG, 1 BvR 1288/14, para. 11-13. (https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/06/rk20150615_1bvr128814.html); Walter Zeiss - Klaus Schreiber: *Zivilprozessrecht*, 10. Auflage, Mohr Siebeck, Tübingen, 2003: p. 17., para. 45.; Lutz Meyer-Goßner: *Strafprozeßordnung - Kommentar*, 54. Auflage, Verlag C. H. Beck, München, 2011: §21 para. 1. (hereinafter: StPO Kommentar); Max Vollkommer: Ausschließung und Ablehnung der Gerichtspersonen. In: Reinhold Geimer et al. (ed.): *Zöller Zivilprozessordnung - Kommentar*, 29. Auflage, Otto Schmidt Verlag, Köln, 2012: p. 216. para 1. (hereinafter: ZPO Kommentar); Ignor, supra note 4 at p. 228.

⁶ Ignor, supra note 4 at p. 228.

⁷ ZPO Kommentar, supra note 5 at §42 para. 9.; Ignor, supra note 4 at p. 231.

⁸ Compare to Amendment XIV of the United States Constitution.

well as in Germany⁹ and Turkey.¹⁰ Similarly, this is declared to be a fundamental right under the leading international treaties.¹¹ To use the same metaphor we used in the first sentence, it is an equally important brick in the wall of judicial independence in Europe. On the other hand, since judges play a much greater role in the German (and generally all inquisitorial) procedural system, recusation might be adversely applied as a strategy to prolong the trial – and to misuse the judiciary. As a safeguard against the abusive recusation of judges, German academia argues – and German case law confirms¹² – that recusation is not a tool to control procedural mistakes, but solely to control the impartiality of the given judge(s) or court personnel.¹³

This paper aims to provide a comparative insight into the civil and criminal procedural rules of this subjective qualification in Germany and Turkey. The two countries are selected purposefully. On the one hand, Germany represents an excellent example of the Continental legal regimes. On the other hand, Turkey's legal system partially stems from the Continental European heritage, but it differs from it in various aspects.¹⁴ Chapter I focuses on the Federal Republic of Germany and Chapter II introduces the Turkish approach. These chapters are mainly based on desktop-research, and aim to take a close look at the relevant legislative sources and case law of the three named countries. The paper ends with some comparative concluding remarks in Chapter III.

I. Judicial Exclusion in Germany

1. Exclusion v. disqualification

The German civil¹⁵ and criminal¹⁶ procedural laws historically differentiates between two types of recusation: exclusion-by-law (in short: exclusion) and disqualification.

Exclusion (“*Ausschluss*”) allows for the recusation of judges and other court personnel¹⁷ for pecuniary, family and procedural reasons¹⁸ clearly defined by the laws. All these reasons inherently include the assumption that the given person would be unable to objectively comply with his duties. If any of these reasons is present, the respective person is excluded from taking part in the procedure by the force of law.

⁹ Compare to the German Federal Constitution (*Grundgesetz*), Art. 101(1) second sentence.

¹⁰ Compare to the Constitution of the Republic of Turkey (1982), Art. 9

¹¹ International Covenant on Civil and Political Rights, Art. 14(1): “[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” European Convention on Human Rights, Art. 6 on right to fair trial: “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Charter of Fundamental Rights of the European Union, Art. 47 para 2 on right to an effective remedy and to a fair trial: “[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.”

¹² Ignor, *supra* note 4 at p. 232-237. Some (historical) empirical data has indicated that the majority of pleas remain unsuccessful. Compare to Egon Schneider: *Erfolgreiche Richterablehnungen im Zivilprozeß*, *Neue Juristische Wochenschrift*, Issue 35/1996: p. 2285-2286.

¹³ Ignor, *supra* note 4 at p. 233.

¹⁴ Serap Yazıcı: *A Guide to the Turkish Public Law Order and Legal Research*, GlobaLex, 2006 (<https://www.nyulawglobal.org/globalex/Turkey.html>).

¹⁵ Law of 30 January 1877, *Zivilprozeßordnung (Civil Procedure Law, ZPO)* [1877] RGBl. 83.

¹⁶ Law of 1 February 1877, *Strafprozeßordnung (Criminal Procedure Law, StPO)* [1877] RGBl. 253.

¹⁷ See I.2. *infra*.

¹⁸ See I.3. *infra*.

Disqualification (“*Ablehnung*”), on the other hand, requires a “conflicting party”, that is, a person who believes that the subject of recusation cannot objectively comply with his duties. These beliefs are, however, “atypical”, or more precisely, arbitrary. Hence, all claims for disqualification shall be decided¹⁹ precisely before automatically recusing the given court personnel from the given case.

2. *Subjects of recusation*

Although this paper aims to focus solely on judges’ exclusion from decision-making, it is worth to highlight that both the *ZPO* and the *StPO* provides for an almost uniform²⁰ regulation of the exclusion of both judges and other court personnel. These personnel include jurors and jury men (in criminal law),²¹ clerks,²² experts,²³ arbiters.²⁴ The law on the Organization of Courts similarly allows the application of the rules of exclusion on lay judges in commercial matters, officials entrusted with the process and execution of judgments and court orders, and interpreters.²⁵ The rules of exclusion, however, do not apply to prosecutors²⁶ and attorneys.

The plea for recusation shall always target one or more, but always individually designated judges or other court personnel. A plea that does not identify the subject of recusation or that designates a court panel as a whole or the whole court shall be declared to be inadmissible.²⁷

3. *Reasons of recusation*

Both the *ZPO* and the *StPO* provide for a closed list of reasons of exclusion, and hence this list cannot be interpreted openly.²⁸ These reasons are partially identical, but some differences apply due to the differing nature of civil and criminal procedures. In general, the reasons can be categorized in three groups: exclusion for pecuniary, family and procedural reasons.

Pecuniary interests in civil matters mean that the subject of recusation is a party to the case or has joint interests with others involved in the case.²⁹ In criminal matters, the court personnel are excluded from the case, if they are injured by the criminal act that is subject to the given procedure.³⁰

¹⁹ See I.4. *infra*.

²⁰ Tiny differences might exist with respect to the exact procedure of recusation. Compare to *ZPO* §49; *StPO* §31(2).

²¹ *StPO* §31(1).

²² *ZPO* §49; *StPO* §31(1).

²³ *ZPO* §406; *StPO* §74.

²⁴ *ZPO* §1032. On the exclusion of court personnel other than judges see Zeiss - Schreiber, *supra* note 5 at p. 20., para. 52-54.; *ZPO* Kommentar, *supra* note 5 at p. 217 para. 3.

²⁵ Law of January 27, 1877, Concerning the Organization of Courts (*Gerichtsverfassungsgesetz, GVG*) [1877] *RGBl.* 41, §112, §155 and §191, respectively.

²⁶ Compare to Cohn, *supra* note 4 at p. 28-29.; *StPO* Kommentar, *supra* note 5 at §21 para. 3-7.

²⁷ *StPO* Kommentar, *supra* note 5 at §24 para. 3.; *ZPO* Kommentar, *supra* note 5 at §42 para. 3.

²⁸ *StPO* Kommentar, *supra* note 5 at §22 para. 3.

²⁹ *ZPO* §41.1.

³⁰ *StPO* §22.1. Compare to *StPO* Kommentar, *supra* note 5 at §22 para. 6. According to the Federal Supreme Court the mere fact that the accused person deliberately slanders the prospective judge in order to exclude him from the case is not covered by this norm. See: Judgement of May 5, 1954, *Monatschrift für Deutsches Recht*, 628.

Family ties that allow for recusal include spouses and partners (even if the relationship does not exist anymore), all degrees of straight-line kinship, collateral consanguinity to the third degree and collateral affinity to the second degree.³¹

The most complex group of reasons of exclusion are connected to the *procedural role(s)* of the court personnel. Exclusion is necessary in civil cases, if the respective person is/was a lawyer by choice or by appointment, or any form of representative of the party; if he/she has acted as a witness or expert at any stage of the same proceedings; at appeals stage, if he/she has taken part in any lower court's decision-making; if he/she has taken part in the making of a undue long procedure; or if he/she has taken part in any relevant mediation procedure.³² In criminal proceedings, the relevant person shall be excluded, if he/she acts or acted as a guardian or custodian of the accused or the injured person; as a prosecutor or policemen in the given case, or as a representative of either the accused or the injury person of the criminal act; as a witness or expert at any stage of the same proceedings;³³ or has participated in the given procedure at any earlier stage, including any complete restart of the proceedings.³⁴

Disqualification might be allowed in cases where an adequate ground for the *fear of bias or prejudice*, in fact, in case of concern of lack of impartiality, exists.³⁵ The reasons for such impartiality (in German: "*Besorgnis der Befangenheit*") might be similar to, but not identical with the three groups of reasons discussed with respect to exclusion.

The German case law is rich with respect to the question of impartiality. In a historic example, a constitutional judge, who also held a position of law professor, was disqualified in a case, after he publicly expressed his opinion concerning the problem affected by the case. Although academic freedom provides for a quite strong freedom of expression, the Federal Constitutional Court believed that a person's role as a judge prevails over the role of a professor.³⁶ Similarly, the publication of a journal article on the respective issue can serve as a ground of recusal.³⁷ Another judge was disqualified after making pre-trial statements on a press conference, or in case he had clear tensions with the lawyer of one of the parties. Disqualification is acceptable, if the judge adopts solely and expressly the arguments of one of the parties, while refrains from referring to the other party's arguments; a judge makes a clearly and objectively false statement in the ruling; refuses to decide on a claim; denies the right to be heard; unlawfully limits the right to raise questions; purposefully amends a decision contrary to the prohibition of amendment of rulings under §318 of the ZPO.³⁸ Similarly, a juror might be disqualified from a proceeding initiated against Arabic and Turkish nationals, if he wears a black T-Shirt with a white-columned "Pit Bull Germany" sign.³⁹ Contrary to these, judges cannot be disqualified on the mere fact that they are members of political parties or trade unions.⁴⁰ Similarly, religious beliefs, ideology, gender or family status are *per se* not admissible grounds of recusal.⁴¹

³¹ ZPO §41.2-3; StPO §22.2-3, respectively.

³² ZPO §41.4-8, respectively. Compare to ZPO Kommentar, supra note 5 at §41 para. 10-14.

³³ StPO §22.2 and 4-5, respectively. Compare to StPO Kommentar, supra note 5 at §22 para. 1-21.

³⁴ StPO §23(1)-(2). Compare to StPO Kommentar, supra note 5 at §23 para. 1-8.

³⁵ ZPO §42(2); StPO §24(2).

³⁶ Judgment of March 3, 1966 (BVerfG), [1966] *Neue Juristische Wochenschrift* 922 (1966).

³⁷ StPO Kommentar, supra note 5 at §24 para. 11a.

³⁸ Ignor, supra note 4 at p. 234.

³⁹ Ibid. at p. 236.

⁴⁰ The last four examples are mentioned by Cohn, supra note 4 at p. 32-33.

⁴¹ StPO Kommentar, supra note 5 at §24 para. 9.

Personal relationship with the parties/participants of the case allows for a recusation only if that relationship is tight enough.⁴²

4. Procedural aspects

The plea of exclusion or disqualification⁴³ shall be submitted by the parties to the civil case⁴⁴ or the prosecutor, private party⁴⁵ or the accused person of the criminal trial.⁴⁶ The recusation procedure might also be initiated by the judge himself/herself, or *ex officio*, if no interested party initiates it, but sufficient objective grounds exist to believe that the judge cannot provide for an impartial judgment.⁴⁷

Although the court personnel is *ex lege* recused from decision-making in cases of exclusion, interested parties have the right to officially initiate a disqualification procedure as well. This way the competent court can be forced to decide on the recusation of the challenged court personnel.⁴⁸ Nevertheless, in such a case, the initiated procedure functions as a formality, as a mere declaration of exclusion. Hence, the detailed rules of recusation under the *ZPO* and the *StPO* provide the framework of rather arbitrary disqualification procedure.

The plea shall be submitted to the clerk of the court that the affected judge is a member of.⁴⁹ The submission of the plea is strictly limited in time. In civil matters, the affected party is foreclosed to submit the plea after he has entered before the judge any oral argument or made any motions in the procedure.⁵⁰

In criminal matters, the plea on trial level shall be submitted before the first accused person is questioned, and in case of appeals or revision before the rapporteur presents the case.⁵¹ The plea might exceptionally be submitted later than the above deadlines, if the reason of disqualification becomes known at a later stage, and the plea is submitted immediately.⁵² The plea shall, however, never be submitted later than the last word of the accused person.⁵³ No further prolongation or extension of the deadline is allowed. The court in charge shall reject the plea as inadmissible, in case it has been submitted late, no sufficient objective grounds were provided by the complainant, or the plea apparently aims to prolong the procedure.⁵⁴

The plea shall be based on sufficient objective grounds.⁵⁵ The German terminology (“*glaubhaft machen*”)⁵⁶ makes it clear that the plea shall not necessarily be based on any evidences, highly

⁴² StPO Kommentar, supra note 5 at §24 para. 11. For further examples see Zeiss - Schreiber, supra note 5 at p. 18-19., para. 49.; ZPO Kommentar, supra note 5 at §42 para. 11-34.

⁴³ ZPO §42(1); StPO §24(1).

⁴⁴ ZPO §42(3).

⁴⁵ Private parties are allowed to plea for a disqualification only in a limited number of crimes. Compare to StPO §374.

⁴⁶ StPO §24(3).

⁴⁷ ZPO §48; StPO §30. Compare to StPO Kommentar, supra note 5 at §30 para. 1-9.; ZPO Kommentar, supra note 5 at §48 para. 1-11.

⁴⁸ StPO Kommentar, supra note 5 at §24 para. 4.

⁴⁹ ZPO §44(1); StPO §26(1).

⁵⁰ ZPO §43. Compare to ZPO Kommentar, supra note 5 at §42 para. 4 and §43 para. 1-8.

⁵¹ StPO §25(1).

⁵² StPO §25(2).

⁵³ StPO §25(2) second sentence. This rule has been criticised by Cohn, supra note 4 at p. 35.

⁵⁴ StPO §26a(1).

⁵⁵ For the various statutory reasons of exclusion and the (more arbitrary) reasons of disqualification see in part I.3.

⁵⁶ ZPO §44(2); StPO §26(2) first sentence.

probable allegations suffice. Such allegations shall mainly be based on written documents, including attorney's official statements,⁵⁷ expert or witness testimonies.⁵⁸ Sworn affidavits are, however, excluded in criminal cases.⁵⁹

The submitted allegations shall be presented to the affected judge, who is required to officially express his opinion on it.⁶⁰ Such statement shall be taken into consideration during the deliberations of the plea. The decision on disqualification shall be made by the court (the exact panel) that the judge is a member of, but – understandably – without the participation of the challenged judge.⁶¹ The fact that the respective judge himself declares the plea inadmissible (due to the alleged wrongful use of the plea) allowed for quashing of the ruling by the Federal Constitutional Court.⁶² If the respective court is inoperative, the next higher-level court decides the question.⁶³ In case the challenged judge works at the local/trial court (as a single judge) another judge of the same court has competence and duty to proceed with the case.⁶⁴ If the plea is submitted against more, but individually designated judges, a single decision shall be given with respect to all challenged personnel.⁶⁵

The decision cannot be appealed, if the plea was grounded. In case the plea was found ungrounded or it was rejected as inadmissible, an immediate right to appeal exists.⁶⁶ The repetition of the disqualification procedure on the same grounds is, however, prohibited.⁶⁷

II. Judicial Exclusion in Turkey

1. Legal Basis of Judicial Exclusion

The remedy of judicial exclusion in the Turkish law takes its roots from the provisions of the Constitution of the Republic of Turkey (1982).

In coherence with the fundamental principle of “*nemo iudex in causa sua*” (“*no man can be a judge in his own case*”),⁶⁸ the Constitution expressly states that the judicial power in Turkey shall be exercised by independent and impartial courts.⁶⁹ The Constitution also underscores that judges shall be independent in the discharge of their duties.⁷⁰

⁵⁷ Ignor, supra note 4 at p. 230.

⁵⁸ Cohn, supra note 4 at p. 36.

⁵⁹ StPO §26(2) second sentence

⁶⁰ ZPO §44(3); StPO §26(3).

⁶¹ ZPO §45(1); StPO §27(1).

⁶² 1 BvR 1288/14, supra note 5 at para. 15-22.

⁶³ ZPO §45(3); StPO §27(4).

⁶⁴ ZPO §45(2); StPO §27(3).

⁶⁵ StPO Kommentar, supra note 5 at §27 para. 4.

⁶⁶ ZPO §46(2); StPO §28(1)-(2). Compare to StPO Kommentar, supra note 5 at §28 para. 1-10.; ZPO Kommentar, supra note 5 at §46 para. 1-23.

⁶⁷ StPO Kommentar, supra note 5 at §26 para. 3.

⁶⁸ Recep Akcan - Cemil Kaya: Medeni ve İdari Yargıda Hakimin Davaya Bakmaktan Yasaklılığı ve Reddi [Exclusion and Disqualification of Judges in Civil and Administrative Law], 68 *Journal of Istanbul University Law Faculty*, Issue 1-2/2010: p. 171. (<http://dergipark.org.tr/iuhfm/issue/9183/114984>)

⁶⁹ Constitution of the Republic of Turkey (1982), Art. 9.

⁷⁰ Constitution of the Republic of Turkey (1982), Art. 138.

Accordingly, the Turkish procedure laws⁷¹ provide regulations on judicial exclusion in order to ensure the impartiality and the independency of the courts and the court personnel as demanded by the soul of the Constitution.

The Code of Civil Procedure (*HMK*) lays down the primary rules and regulations on judicial exclusion regarding the civil procedures.⁷² The Code of Criminal Procedure (*CMK*) shares an identical legal perspective towards judicial exclusion but it adapts the above rules to the criminal law terminology and subjects.

2. *Exclusion v. disqualification*

The Turkish procedural laws determine two paths for judicial recusation: “exclusion” and “disqualification”.⁷³

Exclusion (“*Yasaklılık*”) applies if there is a reason which objectively prevents the subject of the exclusion from being impartial in the course of the proceedings. The reasons of exclusion are laid down as a closed list (*numerus clausus*) by the *HMK*⁷⁴ and the *CMK*.⁷⁵ Thus, it is not possible to generate new reasons of exclusion by interpreting the reasons which are expressly stated by the two codes. If a reason of exclusion is present in the course of the proceedings that can lead to irreparable legal consequences. Therefore, the presence of such reasons is considered as a threat to the *ordre public* by the Turkish Law.⁷⁶ Consequently, even if there is no conflicted party who presents the reason of exclusion, the judge/the court personnel shall be recused from the proceedings by the force of law as soon as the reason of exclusion becomes known.⁷⁷

Disqualification (“*Ret*”) applies if a sufficient reason is presented by a conflicting party which sheds suspicion on the judge’s/the court personnel’s impartiality.⁷⁸ The presence of a reason of disqualification is not *per se* considered a threat to the *ordre public* by the Turkish Law. Accordingly, even if a reason for disqualification is present, the judge/the court personnel shall not be removed from the proceedings by the force of law unless a conflicting party submits a plea of disqualification on the ground of that particular reason or unless the judge/the court personnel decides to recuse himself/herself.⁷⁹

3. *Subjects of Recusation*

Although the *HMK* and the *CMK* primarily aim to regulate recusation of judges, they expressly underscore that the relevant provisions shall be applied to the other court personnel such as

⁷¹ Hukuk Muhakemeleri Kanunu [Code of Civil Procedure numbered 6100], Art. 34-45. (hereinafter: *HMK*); Ceza Muhakemeleri Kanunu [Code of Criminal Procedure numbered 5271], Art. 22-32. (hereinafter: *CMK*).

⁷² Ömer Çon: *6100 Sayılı Hukuk Muhakemeleri Kanunu’na Göre Hâkimin Davaya Bakmaktan Yasaklılığı ve Reddi* [Exclusion and Disqualification of Judges under the Code of Civil Procedure numbered 6100], Ankara 2013.

⁷³ Gökçen Topuz - Belkıs Konan: From Past to Present Impartiality of Judge in Turkish Law, 66 *Ankara University Faculty of Review*, Issue 4/2017: p. 778. (<http://dergiler.ankara.edu.tr/dergiler/38/2245/23360.pdf>)

⁷⁴ *HMK*, Art. 34(1).

⁷⁵ *CMK*, Art. 22(1).

⁷⁶ Hakan Pekcanitez - Oğuz Atalay - Muhammet Özkes: *Hukuk Muhakemeleri Kanunu Hükümlerine Göre Medeni Usul Hukuku* [Civil Procedural Law under the Provisions of the Code of Civil Procedure], Ankara, 2011, p. 159.

⁷⁷ *HMK*, Art. 34(1).

⁷⁸ *HMK*, Art. 36(1).

⁷⁹ *HMK*, Art. 37(1).

clerks,⁸⁰ experts⁸¹ and arbiters.⁸² As the Turkish judicial system does not provide for having a jury or jurors in the course of proceedings, the discussion whether the jurors are affected by those provisions does not arise. The rules of judicial exclusion brought by the *HMK* and the *CMK* do not apply to prosecutors and attorneys.

It must be borne in mind that the Turkish procedural law do not allow the parties of the proceedings to request the disqualification of an entire court panel.⁸³ The plea of disqualification shall be declared inadmissible if it does not address one or more specific judges or court personnel.

4. Reasons of Recusation

The *HMK* provides a closed list of reasons for the exclusion of judges/the court personnel with regards to the civil procedures,⁸⁴ whereas the *CMK* does the same with respect to the criminal procedures.⁸⁵ Yet, due to differing natures of civil and criminal procedures, there are some significant differences between the two lists.

The list of the *HMK* focuses on the judge's/the court personnel's possible relations with the conflicting parties and his/her possible interests arising from the legal conflict in question.⁸⁶ On the other hand, the list of the *CMK* focuses on the judge's/the court personnel's possible relations with the victim and the accused person as well as on the possible harms that judge/the court personnel might have suffered due to the suspected crime.⁸⁷

In short, both the *HMK* and the *CMK* provide for reasons which can be examined under three main titles: pecuniary, family and procedural reasons.

Pecuniary interests in civil matters mean that the subject of recusation is a party to the case or has joint interests with the others involved in the case.⁸⁸ In criminal matters, the court personnel are excluded from the case, if they are injured by the criminal act that is subject to the given procedure.⁸⁹

Family ties that allow for recusation include spouses and partners (even if the relationship does not exist anymore), all degrees of straight-line kinship, collateral consanguinity to the third degree and collateral affinity to the second degree.⁹⁰

Regarding the *procedural reasons*, the *HMK* prohibits the judge/the court personnel from participating in the decision-making in a civil procedure if he/she has ever acted as the attorney, legal representative, trustee or guardian of one of the conflicting parties at any stage of the civil

⁸⁰ *CMK*, Art. 32.; *HMK*, Art. 45.

⁸¹ *CMK*, Art. 69.; *HMK*, Art. 272.

⁸² *HMK*, Art. 418.

⁸³ Recep Akcan: *Usul Kurallarına Aykırılığa Dayanan Temyiz Nedenleri* [Grounds of Appeal Resulting from the Incompliance with Procedural Rules], Ankara 1999, p. 59.

⁸⁴ *HMK*, Article 34(1).

⁸⁵ *CMK*, Article 22(1).

⁸⁶ *HMK*, Art. 34(1).

⁸⁷ *CMK*, Art. 22(1).

⁸⁸ *HMK*, Article 34(1).

⁸⁹ *CMK*, Article 22(1).

⁹⁰ *CMK*, Article 22(1); *HMK*, Article 34(1)

procedure.⁹¹ Correlatively, the *CMK* prohibits the judge/the court personnel from participating in the decision-making in a criminal procedure if he/she has ever acted as a public prosecutor, attorney, judicial police officer, witness or expert at any stage of the criminal procedure.⁹² Moreover, the *CMK* prohibits the judge/the court personnel from participating in the appeal stage if he/she was involved in the making of the appealed court decision.⁹³ It also prohibits the judge/the court personnel from participating in the prosecution stage of the procedure if he/she was involved in the enquiry stage of the same procedure⁹⁴ as well as from participating in the renewed procedure if he/she was involved in the decision-making of the previous procedure which is subject to the renewal decision.⁹⁵ The presence of one of the aforementioned circumstances is a reason for the exclusion of the judge/the court personnel from that particular civil or criminal procedure.

Unlike the reasons of exclusion, the reasons of disqualification are not laid down as a closed list either by the *HMK* or by the *CMK*. Although not *numerus clausus*, the *HMK* lists some examples as the reasons of disqualification.⁹⁶ Namely, if the judge/the court personnel has ever given legal advice to one of the conflicting parties at any stage of the proceedings; if the judge/the court personnel has ever disclosed his/her opinion on the subject of the proceedings at any stage before or during the proceedings; if the judge/the court personnel has been present at any stage of the proceedings as a witness or if there has been a sort of hostility between the judge/the court personnel and one of the conflicting parties: a plea for the disqualification of that judge/court personnel can be submitted.⁹⁷ The most important requirement for the admissibility of a plea of disqualification is being “sufficiently grounded”.

The sufficiently grounded nature of the pleas of disqualification is predominantly determined by the case law of the Court of Cassation of Turkey. In an example, the Court ruled that no exclusion is allowed if a judge’s wife is a friend of the attorney of one of the conflicting parties, since the attorney must be considered as a third party.⁹⁸ The Court concluded that if the reason for disqualification originates from a relation between a party and the subject of the disqualification, that party must be one of the conflicting parties of the proceedings. Thus, a reason which originates from a relation between the subject of the disqualification and a third party cannot be considered as a sufficient ground for disqualification. In another example, a judge recused himself from the proceedings by stating that he feels under pressure due to an interim injunction which was requested and he no longer believes that he can be impartial in the course of the proceedings. However, the Court of Cassation of Turkey ruled that the judge cannot recuse himself due to abstract reasons of disqualification. The Court concluded that if the judges are allowed to easily recuse themselves due to reasons such as “feeling under pressure” without the presence of a sufficiently grounded reason of disqualification, this can significantly harm the principle of the natural judge.⁹⁹ In a different case, while one of the

⁹¹ *HMK*, Article 34(1).

⁹² *CMK*, Article 22(1).

⁹³ *CMK*, Article 23(1).

⁹⁴ *CMK*, Article 23(2).

⁹⁵ *CMK*, Art. 23(3).

⁹⁶ *HMK*, Art. 36(1).

⁹⁷ *Ibid.*

⁹⁸ 20th Civil Chamber of the Court of Cassation of Turkey, Case. No:2014/8621, Dec. No: 2014/10584 (<https://www.hukukmedeniyeti.org/karar/7258/davali-vekilinin-hakimin-esinin-okuldan-arkadasi-o/?v=list&aranan=hakimin%20reddi>).

⁹⁹ 20th Civil Chamber of the Court of Cassation of Turkey, Case. No: 2013/6729, Dec. No: 2013/8282 (<https://www.hukukmedeniyeti.org/karar/3735/hakimin-reddi-ozel-yetki-ihsasi-rey/?v=list&aranan=ihsas%FD%20rey>).

conflicting parties was speaking at the hearing, a judge intervened by saying “stop telling these, tell me the truth”. Later, the conflicting party submitted a plea of disqualification on the ground that the judge has already disclosed his opinion by implying that the party is lying. The Court of Cassation of Turkey ruled that the plea of disqualification shall be inadmissible as the ground of the plea is not sufficient.¹⁰⁰

5. Procedural aspects

In civil procedures, if a reason of exclusion is present, the judge shall exclude himself/herself from the proceedings even if a plea of exclusion is not submitted by one of the conflicting parties.¹⁰¹ If a reason of disqualification is present, a plea of disqualification can be submitted by the conflicting parties. If no conflicting party is interested in submitting the disqualification plea, the judge can also initiate a process for his/her own recusal in case he/she believes a sufficient reason which affects his impartiality exists.¹⁰²

If a conflicting party knows that a reason of disqualification is present, he/she must submit a plea of disqualification in the first hearing of the proceedings at the latest.¹⁰³ If a conflicting party becomes aware of the presence of a reason of disqualification at a further stage in the course of the proceedings, he/she shall submit a plea of disqualification in the first following hearing at the latest.¹⁰⁴ If the conflicting party does not comply with the abovementioned deadlines, his/her plea of disqualification becomes *per se* inadmissible.¹⁰⁵

The plea of disqualification shall be submitted to the court in which the judge in question is a member of.¹⁰⁶ Once submitted, the plea of disqualification shall not be withdrawn.¹⁰⁷ As the Court makes a decision on the plea of disqualification, the judge in question shall not participate in the decision on the plea.¹⁰⁸ Unless the presence of the disqualification is not sufficiently grounded by the submitting party of the plea, the Court shall not disqualify the judge from the proceedings.¹⁰⁹

Although, there is no particular type of evidence required by the *HMK* regarding the grounding of the disqualification plea, high probability regarding the loss of impartiality must be demonstrated.¹¹⁰ As previously stated, the *HMK* does not provide for a closed list of the reasons of disqualification. Yet, if the plea is based on one of the example reasons of disqualification laid down by the *HMK*, the competent court shall disqualify the judge from the proceedings.¹¹¹ If the subject of the legal conflict is appealable by law, the court’s decision on disqualification is also appealable. In that case, the parties of the proceedings can appeal the court’s decision within a week following the annunciation of the decision.¹¹²

¹⁰⁰ 20th Civil Chamber of the Court of Cassation of Turkey, Case. No: 2015/12692, Dec. No: 2015/11044 (<https://www.hukukmedeniyeti.org/karar/1469949/yargitay-20-hukuk-dairesi-e-2015-12692-k-2015-1104/?v=list&aranan=ihsas%20FD%20rey>).

¹⁰¹ HMK, Art. 34.

¹⁰² HMK, Art. 36(1).

¹⁰³ HMK, Art. 38(1).

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ HMK, Art. 38(3).

¹⁰⁷ HMK, Art. 38(4).

¹⁰⁸ HMK, Art. 40(1).

¹⁰⁹ HMK, Art. 38(2).

¹¹⁰ HMK, Art. 38(6).

¹¹¹ Akcan - Kaya, *supra* note 68 at p. 179.

¹¹² HMK, Art. 43(1).

In criminal proceedings, if a reason of exclusion is present, the judge shall exclude himself/herself from the proceedings.¹¹³ If the judge does not do so, a plea of disqualification can be submitted by the public prosecutor, the attorneys of the victim, the accused person or intervening party.¹¹⁴

The plea on trial level shall be submitted before the first accused person is questioned, and in case of appeals or revision before the rapporteur presents the case.¹¹⁵ The plea might exceptionally be submitted later than the abovementioned deadlines, if the reason of disqualification becomes known at a later stage, the plea must be submitted within 7 days starting from the day that it becomes known.¹¹⁶

The plea of disqualification shall be submitted to the court in which the judge in question is a member of.¹¹⁷ As the court makes a decision on the plea of disqualification, the judge in question shall not participate in the decision on the plea.¹¹⁸ Unless the presence of the disqualification is not sufficiently grounded by the submitting party of the plea, the court shall not disqualify the judge from the proceedings¹¹⁹.

Although, there is no particular type of evidence required by the *CMK* regarding the grounding of the disqualification plea, high probability regarding the loss of impartiality must be demonstrated. If the court decides in favour of the plea of disqualification, that decision is exempt from appealability.¹²⁰ If the court finds the plea of disqualification inadmissible, the submitting party can invoke the remedy of objection.¹²¹

III. Concluding remarks

Both the Turkish and the German procedural laws consider the remedy of judicial exclusion as a highly essential tool to be used in order to ensure the impartiality and the independency of the courts. The findings of this paper support the fact that the modern Turkish Law is significantly inspired by the Continental European legal regimes. The rules and regulations that the *HMK* and *CMK* include on the judicial exclusion are substantially similar to those of the *ZPO* and the *StPO*.

The two legal systems show only small differences which are mostly based on the procedural aspects. To illustrate, the German procedural laws exempt a grounded plea of disqualification from appeal,¹²² while the Turkish procedural laws allow for the appeal of a grounded plea under certain conditions for civil procedures,¹²³ and it provides a remedy of objection for criminal procedures.¹²⁴ Moreover, the German procedural laws provide for an immediate right of appeal

¹¹³ *CMK*, Art. 22.

¹¹⁴ *CMK*, Art. 24(2).

¹¹⁵ *CMK*, Art. 25(1).

¹¹⁶ *CMK*, Art. 25(2).

¹¹⁷ *CMK*, Art. 26(1).

¹¹⁸ *CMK*, Art. 27(1).

¹¹⁹ *CMK*, Art. 26(2).

¹²⁰ *CMK*, Art. 28(1).

¹²¹ *CMK*, Art. 31(3).

¹²² Compare to note 66 supra.

¹²³ *HMK*, Art. 43(1).

¹²⁴ *CMK*, Art. 31(3).

regarding the pleas of disqualification which are found ungrounded or inadmissible.¹²⁵ On the other hand, the Turkish procedural laws provide for a term of 7 days to appeal such pleas under certain conditions for civil procedures.¹²⁶ Furthermore, regarding criminal procedures, the *StPO* provides for a right to submit a plea of disqualification which must be used immediately in case a conflicting party learns the presence of a reason of disqualification at a late stage of the proceedings.¹²⁷ Conversely, the Turkish *CMK* allows the conflicting party to submit his/her plea of disqualification after becoming aware of the presence of a reason of disqualification at a late stage of the proceedings within 7 days.¹²⁸

¹²⁵ Compare to note 67 supra.

¹²⁶ HMK, Art. 43(1).

¹²⁷ StPO §25(2).

¹²⁸ CMK, Art. 25(2).