

## DRAFTING A REASONED JUDGEMENT OF CONVICTION IN TURKISH CRIMINAL PROCEDURE LAW

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KEYWORDS: Right to a Reasoned Verdict, Personal Circumstances of the Convicted Person, Factual Basis of Objective and Subjective Elements of the Crime, Legal Assessments and Sentencing.

1. After the announcement that the trial hearing is closed, the court delivers its verdict (Art. 223 par 1 of Turkish Criminal Procedural Code: abbreviated CPC). If the court releases a judgement on the merits, it might be an “acquittal”, “no need to inflict punishment”, “judgement related to a measure of security”, or “conviction” (Art. 223 par. 1 CPC). In the case of conviction, the court may decide to delay the pronouncement of the judgement if it considers giving the perpetrator a second chance (Art. 231 par 5 CPC). In other cases, the court orally communicates the operative provisions of the judgement at the trial hearing, which shall be listened to by everyone while standing (Art. 231 par 1 and 5 CPC). Besides the type of verdict, the operative part of judgement has to refer, *at least*, to applied provisions including the statutory title of the committed offence, the category and amount of the penalty and, if necessary, the decision on suspension of execution of imposed prison sentences and probation (Art. 232 par 6 CPC).

At the moment of the oral communication, the court is only obliged to explain the main points behind the reasons of conviction (Art. 231 par 1 CPC).<sup>1</sup> However, it may also decide to take simultaneously the reasons of the verdict into the records completely by the registry clerk. Otherwise, a drafted version of the judgement needs to be delivered and added into the files within fifteen days after the pronouncement of the judgement to the participants (Art. 232 par 3 CPC).

According to Art. 230 of CPC, the reasoning must include and handle certain legal and factual aspects of the case.<sup>2</sup> In fact, the requirement of reasoning for the court’s

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<sup>1</sup> Yerdelen, Erdal, Ceza Muhakemesinde Hükmün Gerekçesi [Reasoning of the Verdict in Criminal Proceedings], Ankara 2015, p.31 et seq.

<sup>2</sup> Ibid. p.9.

judgement of conviction is a well-known procedural issue in criminal proceedings. As a procedural issue of broad importance, Art. 34 of CPC postulates, for all formal decisions of a judge or court, the obligation to give reasons for them. This obligation is not a formal requirement for a proper administration of judicature in terms of written documentation and registration of important official acts. It obtains its material importance from a legal necessity that, in certain situations, some judicial activities must be taken in an appropriate and reasonable way. Furthermore, by giving reasons for the court's decisions, the trial judge is expected to reflect his actual motives. Besides that, the main aim of the law is to guarantee protection for a convicted person by postulation of a statutory obligation for reasoned decisions because he or she is the one who is addressed by the moral blame of the conviction and by severe consequences of it, especially deprivation of freedom and its monetary impacts. Therefore, the defendant deserves to be informed about the motives of court.

Nevertheless, the drafting of reasons constitutes an unsolved problem in the legal practice of Turkish courts. Nobody is satisfied about the current process.<sup>3</sup> Indeed, the shortcomings of the ongoing practice of drafting in numerous cases led to the quashing of judgements by the Court of Cassations *only* due to deficiencies in drafting the reasons of evaluation and judging evidence, legal description of the events or sentencing.<sup>4</sup> According to estimation of practitioners at the Cassation Court, roughly 40 percent of the total number of quashing decisions are based on some failures relating to drafting of a judgement.<sup>5</sup> Additionally, the Turkish Constitutional Court has found in a number of cases that the right of applicants to have reasoned judgements was violated and, thereby, the trial was rendered unfair.<sup>6</sup> These all show that the reasoning is still not solved in the judicial practice of criminal justice in Turkey. It must be added that this topic traditionally does not attract the attention of scholars to the extent that it deserves. Similarly, the drafting of a reasoned decision is not a part of a general law education or even judicial training. On the contrary, new judges only continue the existing practice that they learn from their senior colleagues.

In fact, there is a broad agreement on the fact that giving reasons of a judicial decision could be regulated, only to a certain amount, by statutory law. Drafting as practical and reasoning as individual accomplishment would always remain, to some extent, beyond any regulatory control. Finally, drafting the judgement is not only a matter of time for judges, but also a personal performance/skill, which indicates the level of professionalism within the judiciary. Having said that, the interdependence

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<sup>3</sup> See Aşçıoğlu, Çetin, Yargıda Gerekçe Sorunu [The Problem with Reasoning in the Judiciary], TBBD 48/2003, p.110.

<sup>4</sup> For inconsistency between the confession of the defendant and other evidence see Grand Chamber of Turkish Cassation Court (hereafter: GCtCC), n. 2000/87 – 2000/90, 2 May 2000 (Kazancı); see also 8th Chamber of Turkish Cassation Court (hereafter: CtCC), n. 1997/3447 – 1997/6774, 7 May 1997 (Kazancı); GCtCC, n. 2000/163 – 2000/170, 3 October 2000 (Kazancı); GCtCC, n. 1980/8-139 – 1980/203, 12 May 1980, YKD 10/1980, p.1415 et seq.; quashing because of lack of any reasoning 5th CtCC, n. 2006/12441 – 2007/336, 29 January 2007 (Kazancı).

<sup>5</sup> Artuç, Mustafa/Hırslı, Tahir, Hüküm Kurma Sanatı [The Skill of Reasoning a Verdict], Ankara 2013, p. 46.

<sup>6</sup> See footnotes 16, 31, 40, 41 and 44.

between the personal qualities of the judge and the drafting process should not be seen as an excuse for considerable shortcomings in legal practice. Some of them could be avoided, for instance, by following a clear structure and some minimum standards for the drafting of a reasoned judgement. Other administrative and educational measures are also possible.

This paper is based on larger contributions that have been already published in the Law Review of Turkish Justice Academy<sup>7</sup> in order to clarify some aspects of reasoning that attract recently increasing attention in legal doctrine in Turkey.<sup>8</sup> It will sum up the main arguments that have been already developed there. It will focus on highlighting the main aspects of the reasons for a conviction. It leaves out three other parts of a judgement, namely, the caption area (with the heading “on behalf of the Turkish Nation” and specific information about the court and participants), the operative part of the judgement and signatures.<sup>9</sup>

One might be surprised by the fact that most of the conclusions correspond with that of German Criminal Procedural Law. The reason behind this fact traces back to the interpretation of the relevant provisions of the Turkish Criminal Procedure Code. As the Code is based upon the German Criminal Procedure Code to a considerable extent, the interpretation of Criminal Procedure Code is being conducted in Turkey usually in the light of the common understanding of the corresponding provisions by German Courts and scholars.<sup>10</sup> Therefore, the correlations are obvious. That does not mean the approach taken here is purely a dogmatic one, which is even imported from abroad. The Turkish courts, especially under review of Turkish Cassation Courts, indeed, even when not entirely, tried to follow the basic conception that was created originally in Germany, and incorporated by its review into the Turkish criminal system. The recent jurisprudence of Turkish Constitutional Court also seems to provide supplementary sources for further development in this area.

2. Before beginning with the subject matter of this paper, a few remarks about the main characteristic of criminal proceedings are to be made in order to locate the

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<sup>7</sup> Arslan, Mehmet, Drafting a reasoned Judgement of Conviction in Criminal Procedure. In the Light of the new and old Turkish CPO and the originally from Turkey adopted German Criminal Procedure Order, TAAD (July 2016), 549 – 608.

<sup>8</sup> Artuç, Mustafa/Hırslı, Tahir, Hüküm Kurma Sanatı [The Skill of Reasoning a Verdict], Ankara 2013; Deniz, İsmail, Ceza Muhakemesinde Hüküm (Türleri-Oluşturma Şekilleri-Şartları) [Verdict in Criminal Proceedings], Ankara 2014; Yerdelen, Erdal, Ceza Muhakemesinde Hükümün Gerekçesi [Reasoning of the Verdict in Criminal Proceedings], Ankara 2015.

<sup>9</sup> For this see Demirağ, Fahrettin, Ceza Muhakemesi İşlemleri Açısından Adli Yazı [Judicial Drafting For Actions in Criminal Proceeding], Ankara 2013, p.240; Doğan, Koray, Ceza Muhakemesinde Hüküm [Verdict in Criminal Proceedings], CHD 7/2008, p.173; Deniz, (footnote 8.) p.29 et seq.

<sup>10</sup> For more see Arslan, Mehmet, die Aussagefreiheit des Beschuldigten in der polizeilichen Befragung. Ein Vergleich zwischen EMRK, deutschem und türkischem Recht [The accused's freedom to testify at the police interrogation. A comparison between ECHR, German und Turkish Law.], Berlin 2015, p.390 et seq.

reasoning in the complete picture of proceedings and to point out factors that influence the content, structure and scope of reasoning.

2.1 Generally, the purpose of criminal proceedings is deemed the finding of material truth.<sup>11</sup> For reaching this purpose, the Turkish Criminal Procedure Code predominantly follows an inquisitorial model of proceedings. Once the public prosecutor has prepared an indictment and addressed the court that has approved it, it is within the duty of the court to conduct *ex officio* any necessary actions for the search of the truth in the course of the main hearing (*principle of ex officio investigations; re'sen araştırma ilkesi*).<sup>12</sup> This includes, *inter alia*, the interrogation of a defendant and all other types of evidence takings (Art 192 par 1 CPC). It is up to the court to verify substantiality of the accusations against the defendant and the soundness of their legal characterization (Art 225 par 2 CPC).

Correspondingly, the deliberations during the court trial are focused on the reconstruction and recognition of the real circumstances of the events (the question of fact) in order to deliver factual foundations on which the legal qualification of cases brought against the defendant and their consequences could be based (the question of law) (Art. 225 par 2 CPC). The main hearing serves as the one and only platform where evidence is to be presented and discussed for the purpose of searching for the truth (Art. 217 par 1 CPC). The court is allowed to form its judgement, in principle, solely on the basis of the evidentiary results of the main hearing, unless it is obtained by unlawful means (Art. 217 par 2 CPC).<sup>13</sup> In this regard, it is vested with the discretionary power to evaluate the evidence upon their probative value (Art. 217 par 1 CPC). Thus, the Turkish Criminal Procedural Code is based on the principle that the court is bounded by neither any rule of proof while forming his judgement (*principle of free evaluation; delillerin serbest değerlendirilmesi ilkesi*), nor the statements of prosecutors or defences, and the decisions on guilt and appropriate sentencing is a matter of the judge's conscience (*vicdani delil sistemi*).<sup>14</sup>

However, this discretion of the court is subjected to some procedural guaranties that are supposed to inhibit an arbitrarily or unreasonable use of the mentioned discretion. The most prominent guaranty is that the "conscious persuasion" of the judge on guilt or appropriate sentencing must go beyond reasonable doubt (Art. 223 par 5 CPC). This is supplemented by the requirement to give reasons for the particular decision in a written way. In the case of a conviction, the requirement of drafting means that the court has to give reasons why it is convinced beyond reasonable doubt

<sup>11</sup> See Yerdelen, (footnote 1.), p.17.

<sup>12</sup> Turkish Constitutional Court (hereafter: tCC), n. 2011/43 – 2012/10, 19 January 2012, R.G. 5 April 2012 – 28225; GCtCC, n. 2010/1-253 – 2011/11, 1 February 2011 (Kazancı).

<sup>13</sup> The exception to this principle is an in-camera hearing where a criminal court can take state secrets into insight in a closed session unitarily, excluding all other participants of criminal trial (Art. 47 and 125 CPC).

<sup>14</sup> For the standards of judge's evaluation of evidence see GCtCC, n. 1993/6-79 – 1993/108, 19 April 1993, YKD October 1993, p. 1565; see also Yenisey, Feridun, Criminal Law in Turkey, Alphen aan den Rijn 2012, p. 226.

that the accused person is guilty in a factual and legal sense and why the sentencing occurred in the way it was determined in the judgement.

By the delivery of reasons, the court predominantly addresses the participants of the criminal trial.<sup>15</sup> It discloses to them, particularly if they don't agree with verdict, how the court came to its own divergent conclusions. This reasoning will play a central role in the aftermath of the trial hearing by the court of first instance, namely, the very target and also main foundation of the objection, if a participant seeks a legal remedy against the judgement before a higher court. Thus, an exercising of the defendant's right to have his conviction or sentence reviewed by a higher court in an effective way depends on, to a considerable amount, the existence of a well-drafted reasoning.<sup>16</sup>

2.2 The ordinary legal remedy against a conviction by the court of first instance is the appeal before Regional Court that has the power to review the verdict over objections of both a factual or legal nature (Art. 280 CPC). It is up to the Regional Court to act, in its capacity, as the court of second instance and to unroll the trial partially or entirely (Art. 280 par 2 CPC), or to restrict its review on legal matters (Art. 280 par 1 CPC). In the first case, the Regional Court will release a second verdict at the end of the new trial (Art. 280 par 2 CPC). Therefore, it is also obliged to give reasons for the second verdict (Art. 282 par 1 CPC). In this respect, there is no difference between the first and second verdict. However, in its function as the Appellate Court that conducts only a legal review, the Regional Court proceeds like the Court of Cassation, which is the highest Appellate Court of Turkey residing in Ankara. For the legal review of a conviction that is composed of objections over the application of law and over the proceedings by a court, the written reasons are of crucial importance for both the Regional Courts or the Court of Cassation.

As the Appellate Courts do not see the defendant in most cases and could not retake the evidence of the trial court in a reliable and reasonable way, their competence is predetermined by outcomes of the first trial hearings. In particular, this person remains concealed from the eyes of the judges at the Appellate Courts. In order to "neutralise" this disadvantage, the trial court is suggested, *first*, to present the defendant, in other words, the circumstances of his personal life, necessarily and as far as possible in its verdict. Those establishments are not only needed for the judgement of the court regarding the sentencing, but also for the Appellate Courts that can review objections of the participants concerning the sentencing decision of the trial court.

To review the factual and legal accuracy of the trial court verdict, the Appellate Courts need, *second*, a description of the events that the trial court considered to be proven. The Appellate Courts examine any objections to the soundness of the

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<sup>15</sup> Çakmut, Özlem Yerer, Ceza Muhakemesi Hukukunda Esas Mahkemesinin Verdiği Hüküm [The Verdict of Trial Court in Criminal Proceedings], EÜFHD 3-4/2007, p.33.

<sup>16</sup> 4th CtCC, n. 2010/31160 – 2011/3053, 14 March 2011 (Kazancı); see also the case law of tCC, Application of *Gülbu Özgüler*, 11 November 2015, R.G. 24/12/2015-29572, § 22; Yerdelen, (footnote 1.), p.78 et seq.; Application of *Nurten Esen*, 10 June 2015, R.G. 18/09//2015-29479 § 41; Bekri, M. Nedim, Gerekeçeli Karar Hakkı [Right to a reasoned verdict], ABD 3/2014, p.207.

application of material law to accusations on the basis of this description. *Third*, the Appellate Courts need the details on the evaluation of evidence in order to review whether the instance court respected the *principle of in dubio pro reo and whether its conclusions are convincing and not in contrast to basic “rules of experience”*. Furthermore, the evaluation of evidence, as it done by the court, indicates whether it complied with its duty to clarify the accusations *ex officio* or whether it infringed on these important principles of an inquisitorial trial by a lack of some evidence-taking measures or by not *considering an alternative course of action*.<sup>17</sup> *Fourth*, the reasons have to contain the legal assessments of the accusations by the court in a complete and clear way in order to make it possible for the Appellate Courts to review the verdict under the aspect of a correct application of material law.<sup>18</sup> *Fifth*, and finally, the court has to give reasons for its sentencing decision, as this decision is no longer regarded as a matter of unprovable discretion of the trial courts. In contrary, both the fact-finding, with regard to sentencing-related circumstances, and the application of sentencing provisions are deemed to be legal issues that are to undergo the review of Appellate Courts to a certain extent.<sup>19</sup>

As this presentation of the law of appeal review shows, the reasoning of the trial court's verdict is interconnected with the theory of what competence and tasks the courts of different instances do have and what are the subject matters of their review proceedings. The fact that the Criminal Procedural Code also is based on a clear conception in this regard, and reflects this, *inter alia*, by requirements relating to the structure and contents of reasoning, can also be seen in a number of other crucial provisions about the competence of Appellate Courts that cannot be dealt with in detail (see especially Art. 288 and 303 CPC). However, the practice of Appellate Courts differs from theory and also Procedural Code in many aspects. One of the significant deviations is that the Appellate Courts undertake their review over any kind of objection by inspecting the entire contents of case files.<sup>20</sup> Thereby, they do not only “replicate” the evidential results of a court trial, they also demonstrate their main interest, namely, whether the evidence carries the verdict in terms of its accuracy.<sup>21</sup> Thus, the reasoning as a procedural issue is not given anymore attention as the Appellate Courts themselves can “complete” the deficits in presenting the reasons in writing during the inspecting of case files. Only, if the substantiality of verdict is doubted by the Appellate Courts, the deficits in the reasoning can be a supplementary violation of law that the Appellate Courts will address while quashing the verdict. This jurisprudence of the Appellate Courts finally leads to quite a lax handling of the procedural requirement of reasoning by trial courts, as they know what is the main interest of Appellate Courts (namely not procedural law, rather the accuracy of

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<sup>17</sup> GCtCC, n. 2000/163 – 2000/170, 3 October 2000 (Kazancı).

<sup>18</sup> Artuç/Hırslı, (footnote 5.), p.120.

<sup>19</sup> See for instance 10th CtCC, n. 2007/13908 – 2007/14345, 6 December 2007 (Kazancı); 10th CtCC 2012/19920 – 2013/1322, 13 February 2013 (Kazancı).

<sup>20</sup> For the critics on this case law of Turkish Cassation Court see Arslan, The accused's freedom to testify (footnote 10.), p.524 et seq.

<sup>21</sup> GCtCC, n. 2014/13-73 – 2014/384, 16 September 2014 (Kazancı).

verdict), how they pursue it and that the Appellate Courts will overlook incomplete reasoning when the verdict is based on sufficient evidence.

Despite this practice of the Appellate Courts, the reasoning of a verdict remains a legal requirement that is anchored in Criminal Procedural Code and guaranteed by the constitutional right to a fair trial. In fact, the Turkish Constitutional Court has recently established, in a couple of cases that violations of this right occurred due to an infringement in reasoning.<sup>22</sup> Therefore, sooner or later, the Appellate Courts will have to revise their practice and adopt the jurisprudence of the Constitutional Court.

### 3. Parts of reasoning.

3.1 The establishment of personal circumstances of the convicted person aims to prepare and highlight the facts that the court needs when giving the reasons of its sentencing decisions.<sup>23</sup> For this purpose, the CPC explicitly stipulates that the defendant is to be asked about his or her personal and financial circumstances right at the beginning of the interrogation in the court hearing (Art. 191 par 3 CPC; see also Art. 147 par 1 CPC). Even if the defendant decides to make use of his or her constitutionally (Art. 38 par. 5) and statutory (Art. 191 par. 3; see also Art. 147 par 1) granted privilege of self-incrimination and to remain silent,<sup>24</sup> the court, nevertheless, has the duty to investigate and detect these circumstances about the defendant, within the scope of the principle of *ex officio* investigations. Art. 209 par 1 is also based on this principle when it rules on documents and records that need to be read mandatorily during the main hearing by the court, including excerpts from criminal records and personal-status registers concerning the personal and economic state of the defendant. Another statutory basis for this obligation of the court arises from Art. 62 par 2 of the Turkish Penal Code. It requires the giving of reasons for its sentencing decisions if the court exercises its discretion and mitigates the principal punishment due to personal circumstances of the defendant, such as, *inter alia*, his or her background and social relations.

More specifically, the explaining of personal and financial circumstances or background and social relations means that the court establishes in its judgement the following facts:

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<sup>22</sup> See footnotes 16, 31, 40, 41 and 44.

<sup>23</sup> Georg, Philipp/Kretschmer, Marc A./Lorenz, Kilian, Das erstinstanzliche Strafurteil im Assessorexamen – Teil I [The criminal verdict in the assessor examination – Part I], JA 2013, p.626; Schäfer, Gerhard/Sander, Günther M./von Gemmeren, Gerhard, Praxis der Strafzumessung [Sentencing practice]. 5. Edition 2012, par.1368; Meyer-Goßner, Lutz, Hinweise zur Abfassung des Strafurteils aus revisionsrechtlicher Sicht [Comments on drafting of a criminal verdict from the perspective of Appellate Court], NStZ 1988, p.531; Ceza Muhakemeleri Usulü Kanununun Hazırlık Çalışmaları. İstanbul Komisyonunun Müzakere Zabıtları [Preparatory works of criminal procedure code. Minutes of deliberations of Istanbul commission], İstanbul 1953, p.153; Rösch, Bernd/Stegbauer, Andreas, Das Urteil in Straf- und Bußgeldsachen [Verdict in criminal and fine cases], 3. Edition, München 2015, p.29.

<sup>24</sup> Arslan, Drafting a reasoned Judgement (footnote 7.), p.561 et seq.

- marital status, family
- housing conditions, where and with whom she or he lives
- education, training status and stage
- profession, current occupation
- assets, incomes, debts
- citizenship, residential status
- health status, illnesses, addictions, duration, kind and scope of them
- criminal records, committed crimes, imposed punishments, status of their executions, suspensions, probations and conditions.<sup>25</sup>

Ultimately, the court is not supposed to write the biography of the defendants. The purpose of the sentencing should delimit the objects and scope of its establishments.<sup>26</sup> In practice, the courts do not deal with the personal circumstances of the defendant in a separate part. However, corresponding information is scattered in the verdict.<sup>27</sup>

3.2 In this part of the reasoning, the court is expected to report the events and facts that contain the criminal behaviour of the defendant and are assessed to make up the crime committed by the defendant (Art. 230 par 1 lit. c CPC). In others words, it should explain how, in its persuasion, the particular crime occurred and how the surrounding developments took place. The description of events that the court makes in its judgement must be as clear and complete as the case in an exam for students in law school who only have to apply the legal rules to the facts of the issue.<sup>28</sup>

By doing so, *first*, the court will draw up the factual establishments into its judgement and predetermine, thereby, the content and scope of the next part of the reasoning, namely the evaluation of evidence. It will explain, in the latter, by which evidence and how it made those (in the actual judgement above mentioned) factual establishments and its conclusions. *Second*, the court's report about the proven events is the pre-condition for the legal assessments of the cases that are brought against the defendant by the prosecution.<sup>29</sup> As the accusations are proven to have happened only in the way that this report gives, it will show in this part of the judgement to which extent the court agrees or disagrees with the accusations – and in the following part, why.

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<sup>25</sup> Ceza Muhakemeleri Usulü Kanununun Hazırlık Çalışmaları, [Preparatory works of criminal procedure code], (footnote 23.), p.153; Rösch/Stegbauer, (footnote 23.), p.29 et seq.; Meyer-Goßner, Lutz/Appl, Ekkehard, Die Urteile in Strafsachen [Verdicts in criminal cases], 29. Edition, München 2014, p.86; Üzülmöz, İlhan, Yeni Ceza Kanunu'nun Sisteminde Cezanın Belirlenmesi ve Bireyselleştirilmesi [Sentencing and individualization of sentence within the systematic of the new Penal Code], EÜHFD 3-4/2006, p.229.

<sup>26</sup> See below part 5.

<sup>27</sup> See for example GCtCC, n. 2014/13-73 – 2014/384, 16 September 2014 (Kazancı).

<sup>28</sup> Arslan, Drafting a reasoned Judgement (footnote 7.), p.565.

<sup>29</sup> Meyer-Goßner/Appl, (footnote 25.), p.88; Rösch/Stegbauer, (footnote 23.), p.32.

There are some practical guidelines for the court to describe the events in a structured way:

- to report only to the extent that the court considered proven and that will fulfil the needs of the legal assessments and sentencing;
- not use legal notions or terms (the victim is murdered by the perpetrator), report how things actually happened (... the defendant tied up the victim and stabbed her more than ten times in her chest...);
- at the same time, to consider that the readers of the verdict are mainly lawyers. The report on events should be in such a way that they could infer from it without difficulties which crime is committed and how all its elements are fulfilled;
- to explain the events as if the court had saw and felt them like the defendant, but still reporting from a third-person perspective;
- to use past tense in reporting the events; and
- to divide up the events into the stages, such as beginning, happening, developing, completing and finalizing.<sup>30</sup>

Despite the above-mentioned advantages of the description of the events, in legal practice in Turkey, the instance court does not give the entire events in their judgements in a single and separate part or in a clear and complete way.<sup>31</sup> It is not seldom that in a verdict, the factual basis of some legal assessments or characterization (especially regarding objective and subjective elements of the crime) remains not mentioned and established *in the reasoning*: for instance, the amount of money which is alleged to be embezzled by the defendant is not clearly calculated and determined or the content of the publication that is the object of the crime is not specified in anyway.<sup>32</sup> Obviously, the courts expect that the Appellate Court will “put together” the needed information by inspecting the whole content of case files. Instead of a clear and complete description of the events as the court is convinced to have occurred and which will carry the legal assessments of the court (e.g. embezzlement or insulting), the instance courts tend to solely report the single steps of evidence-taking as if they would keep a chronicle and take only the content of each piece of evidence into the judgement. Neither should these be made in to the subject of a judgement nor could this be deemed reasoning. In fact, according to Criminal Procedural Code, these *events of proceedings* must be taken into the court record (see Arts. 219, 220, 22), not the judgement. And recording all evidence, as they have been presented in the main hearing into the judgement, could only give a sequence of trial events, but not a description of the events by the court itself, as it considers proven. Furthermore, it is not a description of events from its own mouth or according to its own evaluation when conclusions, such as *he committed homicide*, are made just by referring to the written testimonies or contents of other evidence, which are presented in the previous sentences. Nevertheless, this is also a widespread phenomenon of the current legal

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<sup>30</sup> Arslan, Drafting a reasoned Judgement (footnote 7.), p.567 et seq.

<sup>31</sup> See tCC, Application of *Billur Güzide Balyemez ve Recai Alper Tunga*, 25 March 2015, R.G. 18/6/2015-29390, § 61; Application of *F.Ö.*, 19 November 2014, § 29.

<sup>32</sup> Ibid.

practice. Indeed, the courts seem to assume to have described the events and evaluated the evidence by their report of the evidence-taking process in the trial and by referring to the evidence in a simple sentence, such as “as the above mentioned evidence showed, he committed...”<sup>33</sup> Thereby, the courts bypass a clear and structured presentation of three essential parts of a reasoned judgement (i.e. description of the events, evaluation of evidence and legal assessments) and put them all together in one sentence.

3.3 In the third part of the judgement, the court has to give details about its evaluation of the evidence. In other words, it has to show how it succeeded in establishing proof of the defendant’s guilt. First, that means including the proof of facts that have fulfilled all objective and subjective elements of the crime, as it was described just before, in the second part of the judgement. *Second*, the proof of facts, which the sentencing decisions of the court are based on, needs to be explicated.

The evaluation of evidence is not about the procedure that is followed during the trial hearing. It is also not about the court’s decisions granting or rejecting a motion of participants to introduce or procure specific evidence by the court. According to Criminal Procedural Code, those decisions are to be added to the trial minutes (Art. 221 par 1 CPC). Similarly, the evaluation of evidence is not about the court’s decisions on the legal admissibility of specific evidence, for instance, whether their use will render the trial unfair because it has been obtained by illegal means (Art. 217 par 2 CPC).

Finally, as already mentioned above, the evaluation of evidence is not the chronicle sequences of the events that happened before, during or after the particular steps of evidence taking in the trial, for instance, that the witnesses took oath, what they said, which questions the court has directed to them, that the court asked the other participants, if they have something to say after accomplishing the evidence taking or what they said during the discussion of evidence.<sup>34</sup> The same is true when the court writes what a witness, expert or defendant said exactly.<sup>35</sup> All of them are objects of trials minutes, as the Criminal Procedure Code prescribes (Art. 221 par 1 CPC).

Rather, the evaluation of evidence is about how the judges were, themselves, *internally* convinced of the guilt of the defendant beyond reasonable doubts.<sup>36</sup> Only referring to the objective contents of evidence that they took in trial would not meet these requirements because the evaluation of the evidence as it occurred on the mind of the judges remains not reported and explicated.

The evaluation covers, *at least*, the following aspects of evaluation that the court has to give in detail:

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<sup>33</sup> Arlsan, Drafting a reasoned Judgement (footnote 7.), p.569 et seq.; for critics on this practice see Aşçıoğlu, TBBD 48/2003 (footnote 3.), p.110.

<sup>34</sup> Meyer-Goßner/Appl, (footnote 25.), p.116.

<sup>35</sup> Yerdelen, (footnote 1.), p.201.

<sup>36</sup> Yerdelen, (footnote 1.), p.201.

- which evidence has the court evaluated for the proof of its decisions on guilt and sentencing (statements of defendant, testimonies of witnesses, experts etc.),
- by which single evidence has the court proven the individual facts that has made up the basis of decisions on guilt and of sentencing (matching established facts and corresponding evidence),
- to what extent is its decisions on guilt and of sentencing based on particular evidence (entirely, solely, essentially, decisively, partially, supportively, additionally, etc.),
- what evidential value has it allocated to the specific evidence, individually and compared to other (undoubtedly, strongly, or to a limited extent convincing and vice versa),
- why did the court assume that each piece of evidence is reliable and credible,
- are any doubts remaining or was it possible (and how) to exclude overcome the doubts in a reasonable way.<sup>37</sup>

For the sake of a proper presentation, the court should start with an evaluation of statements of the accused and other testimonial evidence. In the following, the evaluation of documents and other material evidence is to take place. Within this order, the court should begin the evaluation with the evidence that most proportionally and most strongly strengthened the court in its persuasion. After presenting the very trestle of its evidence building, it could support the accuracy of its evaluation by other supportive or circumstantial evidence. Finally, it is advisable to evaluate any deviating and contradictory evidence in the same breath as their counterparts.<sup>38</sup>

In the same manner, the judge is supposed to extend his/her evaluation to related arguments and opinions of the defence. Is the defence claiming some facts that are essential for the outcome of the trial? In others words, regarding the verdict of guilt and sentencing, the *reference* to such claims in the judgement is obligatory according to the Constitutional Court.<sup>39</sup> Not mentioning<sup>40</sup> or addressing them in a superficial way raises questions about the constitutionally granted right of the defendant to have a reasoned judgement and, therefore, can render the trial unfair.<sup>41</sup>

<sup>37</sup> Rösch/Stegbauer, (footnote 23.), p.42; Yerdelen, (footnote 1.), p.76 et seq.

<sup>38</sup> Rösch/Stegbauer, (footnote 23.), p.42.

<sup>39</sup> Demirağ, (footnote 9.) p. 257; see also the case law of Turkish Constitutional Court, Application of O. H., 15 December 2015, § 46; see also Yerdelen, (footnote 1.), p.76 et seq.

<sup>40</sup> tCC, Application of *Mürsel Bayrak*, 25 March 2015, R.G. 28/3/2015-29309, §§ 30 et seq.; Application of *Billur Güzide Balyemez ve Recai Alper Tunga*, 25 March 2015, R.G. 18/6/2015-29390, §§54 et seq.; Application of *Düzgit Yalova Gemi İnşa Sanayi A.Ş.*, 15 April 2015, R.G. 20/6/2015-29392, §§ 58 et seq.

<sup>41</sup> tCC Application of O. H., 15 December 2015, §§ 45 et seq.; Application of *Nurten Esen*, 10 July 2015, R.G. 18/09//2015-29479, § 41 et seq.; Application of *Caner Kandırmaz*, 30 December 2014, § 32; see also Application of *Abdul Cemal Kırçuvaloğlu*, 15 April 2015, R.G. 20/6/2015-29392, § 41 et seq.; Application of *Abdulvahab Aydemir ve Yusuf Candemir*, 1 December 2015, §§ 99 et seq.

However, as mentioned above, the court is not bound by any confessions, defences or assessments of facts while evaluating the evidence (Art. 225 par 2).<sup>42</sup> At the same time, it has no general obligation to address and rebut *all* defence cases as well as any imaginable alternative courses of events that would be in favour of the defence. In the absence of some supporting circumstantial evidence, or of any seriousness according to the well-known ordinary course of events and life, the court is not expected to refute the whole argumentation of defence step-by-step.<sup>43</sup> Only if they had a reasonable basis or realistic grounds, the court has to include them into its evaluation of evidence. Thereby, it can *first* show to have fulfilled the obligation to investigate the real circumstances of the events and to clear them up upon appropriate arguments and opinions of the defence. *Second*, it can show to have respected the defendant's constitutional right to be heard by the court (Art. 36 par 1).<sup>44</sup>

Admittedly, the above outlined boundaries and requirements of the evaluation of evidence are quite general. Beside them, in the case law of the Appellate Courts, there are a number of more specific issues regarding some singular evidence: for instance, the silence or contest of defendants, the confession or its withdrawal or statements of anonymous witnesses. In such cases, the case law demands the following of certain criteria or applying some tests that are necessary for a proper and admissible evaluation of the evidence. The presenting of those particular criteria and tests would go beyond the scope of this paper.<sup>45</sup>

3.4 In this part of the judgement, the court is supposed to determine the legal characteristics of the established and proven elements of the crime committed by the defendant, as evaluated earlier in the third part. In other words, the court has to apply the general and specific norms of material criminal law to the facts that have been already described in the second part of the reasoning. As already mentioned above, the description of events in the second part is supposed to occur in a way that also corresponds with legal description of the events. Thus, the reader with a certain legal understanding should yet obtain, by the second part, the very first accurate ideas of how the legal assessments of the events will turn out in the fourth part. If the description of the events are already done in this way in the second part of the judgement, the court could complete it by simply naming the committed crime and the corresponding sections and subsections of the Penal Code.<sup>46</sup> As it can be inferred from this way of legally assessing the events, in principle, the court will not deliver this by an academic analysis and assessment of a case. Neither the judgement is the place to prove the ability of the court in this regard, nor is it necessarily required to show the observance of the principle and rules of criminal law by the court in a princely-

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<sup>42</sup> Demirağ, (footnote 9.), p.256; Bekri, (footnote 16.), p.210.

<sup>43</sup> Meyer-Goßner/Appl, (footnote 25.), p.136.

<sup>44</sup> tCC, Application of *Abdul Cemal Kırçuvaloğlu*, 15 April 2015, R.G. 20/6/2015-29392, § 40; Application of *Billur Güzide Balyemez ve Recai Alper Tunga*, 25 March 2015, R.G. 18/6/2015-29390, § 49.

<sup>45</sup> Arlsan, Drafting a reasoned Judgement (footnote 7.), p.580 et seq..

<sup>46</sup> Meyer-Goßner, NStZ 1988 (footnote 23.), p.533.

defined, well-structured and academic case-analysing method. However, this does not mean that two sentences about the name and corresponding paragraphs would always be sufficient to deliver legal assessments of the events in the light of the already well-conducted description of them. Particularly, there might be the need for a clear determination in regard to overlapping elements of a specific category of offences. For instance, among the offences against assets, in some cases the distinction between theft and robbery needs a clear clarification of the terms, force and threats and their delimitation from taking away.<sup>47</sup>

3.5 The last part of reasoning is the sentencing decision of the court. Herein, *first*, it shall refer to circumstances, on which the court based its sentencing decisions. *Second*, it has to subsume them under legal notions according to which the particular sentence must be selected from the statutorily regulated range of punishment (Art. 61 par 1 TPC).<sup>48</sup> In the course of this decision, the court is, *third*, supposed to make clear what it has considered as mitigating circumstances and what are considered aggravating circumstances. *Fourth*, it has to explain how it has balanced the contradictory purposes of punishment, especially guilt-based retribution and prevention-oriented deterrence or rehabilitation under general consideration of proportional and fair punishment. In this regard, the instance court has to take two particular approaches of the Cassation Court in consideration: the further the court deviates from the statutory minimum punishment due to special circumstances of offenses or offender, the broader is the need to give reasons that are supposed to justify the existence of a severe case.<sup>49</sup> Particularly convincing reasons are expected from the judge to be mentioned if the length of imprisonment go beyond the “usual” sentencing tariff that is imposed on similar cases in the practice of lower courts. Finally, even in such cases, the punishment must not be so high that it would not be compatible to the principle of proportionality and justice.<sup>50</sup>

Another statutory provision that the court has to consider while deciding on punishment is Art. 62 par 2 of the Turkish Penal Code. It requires the court to give reasons for its sentencing decisions if the court exercises its discretion and mitigates the principal punishment due to *personal circumstances* of the defendant, such as, *inter alia*, his or her background and social relations. The court has to consider personal circumstances of the defendant in order to estimate the potential effects of the punishment on his or her future life when mitigating the punishment (Art. 62 par 2 of Penal Code).

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<sup>47</sup> Arslan, Drafting a reasoned Judgement (footnote 7.), p.599.

<sup>48</sup> See 1th CtCC, n. 2013/6168 – 2014/1875, 25 March 2014 (Kazancı); 5th CtCC, n. 2013/2722 – 2014/55, 6 January 2014 (Kazancı); GCtCC, n. 2011/9-92 – 2011/105, 24 May 2011 (Kazancı); 4th CtCC, n. 2010/31160 – 2011/3053, 14 March 2011 (Kazancı); 7th CtCC, n. 2014/1723 – 2014/20652, 8 December 2014 (Kazancı).

<sup>49</sup> See 10th CtCC, n. 2012/19920 – 2013/1322, 13 February 2013 (Kazancı); 11th CtCC, n. 2012/750 – 2012/2426, 28 February 2012 (Kazancı); 1th CtCC, n. 2006/2233 – 2007/3689, 14 May 2007 (Kazancı); 11th CtCC, n. 2006/516 – 2006/1625, 6 March 2006 (Kazancı); 6th CtCC, n. 2005/18306 – 2006/7488, 11 July 2006 (Kazancı); see also Deniz, (footnote 8.), p. 226.

<sup>50</sup> GCtCC, n. 2012/15-116 – 2012/191, 15 May 2012 (Kazancı).

4. In conclusion, as far as the legal requirements on the reasoning of a conviction and the content that the judgement has to include, it can be summarized here in accordance with the advocated structure as the following:

- personal circumstances of the convicted defendant to the extent as these circumstances are needed for legal assessments of accusations and sentencing decision of court.

- description of the acts of the convicted defendant as these acts have been proven and considered to fulfil objective and subjective elements of statutorily prescribed crime.

- presentation of the evidence, which had been evaluated in order to bring the proof; how the court has derived its conclusions from the evidence in terms of exercising its discretion on the assessment of reliability and credibility of them: if the proof of a fact is brought by circumstantial evidence or by a rule of common sense, the respective evaluation and exercising of discretion must also be added to the reasoning; had the existence of reasonable facts been claimed, by prosecutor or defence, which are suitable to set aside or to reduce the criminal responsibility of the defendant, after presenting the respective claims in their basic features, the reasons for denial must be enclosed if the court rejected their existence; in appropriate cases, a statement that unlawfully obtained evidence has not been made to the subject of evidence evaluation and the evidence is excluded from supporting the conviction.

- statement, the accused has been found guilty of committing which crime; specifying the statutory provision of the respective crime with its exact name; had reasonable legal assessments of committed offence been expressed, by prosecutor or defence, which are suitable to set aside or to reduce the criminal responsibility of the defendant; after presenting of the respective arguments in their basic features, the reasons of denial must be enclosed if the court opposed them.

- presentation of sentencing-related facts, their matching with statutory foundations of the sentencing decision, in particular whether the court assessed them in the advantage or disadvantage of the offender; had reasonable sentencing-related facts or divergent legal assessments of the facts been expressed, by prosecutor or defence, which are suitable to set aside the imposing of a sentence or to reduce it; after presenting the respective arguments in their basic features, the reasons for denial must be enclosed if the court reached an opposite conclusion.