



Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Have Turkish Courts Started to Enforce Foreign Joint Custody Judgments?

Türk Mahkemeleri Yabancı Ortak Velayet Kararlarını Tenfiz Etmeye Başladı Mı?

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Abstract

The approach of Turkish courts related to the enforcement of joint custody decisions is changing in line with the international perspective. Important development and change arrive with the adoption of the "Protocol No. 7 amended with Protocol No. 11, Annex to the Convention on the Protection of Human Rights and Fundamental Freedoms" (Protocol No. 7). Referring to this, Turkish Courts have both started to rule in favor of joint custody and started to enforce foreign joint custody judgments. The decision of the Supreme Court 2nd Legal Department, dated February 20, 2017, numbered E. 2016/15771, K. 2017/1737 has been the turning point on this. We expect that this encouraging attitude of the Supreme Court will positively affect the enforcement of foreign joint custody decisions, especially in cases where joint custody is in the best interest of the child and the fact that the issue of joint custody after divorce is not regulated in Turkish Law will no longer face public policy interference. However, in order to achieve this, we are of the opinion that provisions that bring a detailed arrangement related to joint custody should be included in the "Turkish Civil Code" (TCC).

Keywords

Joint custody, enforcement, the best interest of the child, public policy, Protocol No. 7

Öz

Türk mahkemelerinin müşterek velayet kararlarının tenfizine ilişkin yaklaşımı milletlerarası yaklaşıma uygun olarak değişmektedir. "11 No'lu Protokol ile Değişik İnsan Haklarını ve Ana Hürriyetleri Korumaya Dair Sözleşmeye Ek 7 No'lu Protokolün" (7 No'lu Protokol) kabul edilmesiyle önemli bir gelişme ve değişim yaşanmıştır. Buna istinaden Türk Mahkemeleri hem müşterek velayet lehinde karar vermeye hem de yabancı müşterek velayet kararlarını tenfiz etmeye başlamıştır. Yargıtay 2. Hukuk Dairesi'nin 20 Şubat 2017 tarih ve E. 2016/15771, K. 2017/1737 sayılı kararı bu konuda bir dönüm noktası olmuştur. Müşterek velayetin çocuğun menfaatine olduğu durumlarda, Yargıtay'ın bu cesaret verici tutumunun, yabancı müşterek velayet kararlarının tenfizini olumlu etkileyeceğini ve boşanma sonrası müşterek velayet konusunun Türk kanunlarında düzenlenmemesinin artık kamu düzeni müdahalesi ile karşılaşmayacağını ümit ediyoruz. Ancak bunun sağlanabilmesi için "Türk Medeni Kanunu"nda (TMK) müşterek velayete ilişkin ayrıntılı bir düzenleme getiren hükümlere yer verilmesi gerektiğine inanıyoruz.

Anahtar Kelimeler

Müşterek velayet, tenfiz, çocuğun üstün menfaati, kamu düzeni, 7 No'lu Protokol

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To cite this article: Ağaoglu C, "Have Turkish Courts Started to Enforce Foreign Joint Custody Judgments?", (2022) 71 Annales de la Faculté de Droit d'Istanbul 1. Advanced online publication. <https://doi.org/10.26650/annaes.2022.71.0001>



Introduction

Joint custody first emerged in a legal arrangement in the State of California and quickly entered discussion all over the world. In terms of Turkish law, joint custody does not have a long history. This is because the provisions of the TCC do not include an explicit regulation on joint custody. The issue of joint custody is discussed in different ways by the doctrine and in judicial decisions. Claims in Turkish courts for the enforcement of the joint custody judgments of foreign state courts were mostly rejected on the grounds of violation of public policy, and the reason for the nonconformity with public policy was the issue of joint custody not being regulated by the TCC.

A very important development and change to this stance has arrived with the decision of the Supreme Court 2nd Legal Department on February 20, 2017 and numbered E. 2016/15771, K. 2017/1737¹. The aforementioned decision refers to Protocol No. 7, signed on March 14, 1985, accepted by law No. 6684 on March 10, 2016, and published in the Turkish Official Journal on March 25, 2016. Article (art.) 5 of Protocol No. 7 emphasizes that spouses have equal rights in the case of dissolution of marriage. It paves the way for the practice of joint custody, allowing a child's custody to remain with both parents after the dissolution of marriage. The attitude of the Supreme Court in this direction has also prepared the way for the filing of cases demanding joint custody in the future.²

Currently, the only situation allowing the practice of joint custody in Turkey is the Supreme Court's decision to approve enforcement of a foreign joint custody judgment. Apart from this, no regulation has been made in the provisions of the TCC regarding joint custody. Moreover, following the Supreme Court decision allowing joint custody after divorce, a detailed legal regulation should be introduced regarding how joint custody will be applied under Turkish Law, and how the risks of joint custody will be tolerated.

I. Joint Custody Under Turkish Law

A. The Notion

There are many technical terms used for joint custody, but in Turkish doctrine the concepts of “*joint custody*”³ or “*shared custody*”⁴ are preferred. Joint custody

1 <https://lib.kazanci.com.tr/kho3/ibb/files/dsp.php?fn=2hd-2016-15771.htm&kw='2017/1737'&cr=yargitay#fm> (accessed 21 August 2021)

2 Turkish Supreme Court 2nd Circuit [Yargıtay 2. Hukuk Dairesi], File nr [Esas No] 2018/289, Decision nr [Karar No] 2018/2511, Date [Tarih] 26.02.2018, <http://www.kazanci.com.tr>; Turkish Supreme Court 2nd Circuit [Yargıtay 2. Hukuk Dairesi], File nr [Esas No] 2018/3738, Decision nr [Karar No] 2018/8266, Date [Tarih] 27.06.2018, www.kazanci.com.tr; Turkish Supreme Court 2nd Circuit [Yargıtay 2. Hukuk Dairesi], File nr [Esas No] 2018/7114, Decision nr [Karar No] 2018/13831, Date [Tarih] 29.11.2018, www.kazanci.com.tr (accessed 21 August 2021).

3 See Aslı Bayata Canyaş, ‘Why Not Enforce? A Critical Analysis of Refusal To Enforce Foreign Joint Custody Judgments in Turkish Courts’ (2013) 27 (3) *International Journal of Law, Policy and the Family*, 310-31.

4 See Fulya Ertlüle, *İsviçre Medeni Kanunu'nda Yapılan Değişiklikler Işığında Boşanmada Birlikte Velayet [Shared Custody In Divorce In The Light of Changes In Swiss Civil Code]* (Yetkin 2019).

can generally be defined as the right of parents to decide jointly on important issues related to the life of the shared child, for example, choices regarding the education or health of a child.⁵

According to art. 336/I of the TCC, custody is shared if the mother and father are married. If the mother and father are not married, custody will belong to the mother (TCC art. 337/I). If the marriage ends by divorce, custody can be awarded to either the mother or father (TCC art. 336/II). Art. 336 of the TCC is essential because custody previously shared during a marriage is then awarded only to one of the spouses when the marriage ends. On the other hand, according to art. 182/I of the TCC, the court arranges parental rights in divorce or separation after hearing from the father and mother, and if the child is under guardianship, soliciting the opinion of the guardian or guardianship authority whenever found. In art. 182/2 it is stipulated that the arrangement of the child's relationship to the parent not awarded custody should consider the interests of the child, especially with respect to health, education, and morality. That spouse must then be liable, proportional according to capacity, for the child's upbringing and costs.

The Turkish Constitution art. 41 and TCC articles 305, 346 and 349 stipulate that the benefit of the child is the most important limit to parental right of custody.⁶ The benefit of the child is the foundation of Turkish child custody law and is the highest norm in terms of the protection of the child.⁷

From a practical view, in a 2017 decision, the Turkish Supreme Court *General Assembly of Civil Chambers* decided that “the main thing in a custody arrangement is the benefit of the children, and in this arrangement, the benefit of the child should be given priority if the benefit of the mother or father conflicts with it”.⁸ The same Assembly also states in another decision that “the purpose of the regulation of custody in case of separation and divorce is the future benefits of the minor. In other words, the main thing in the arrangement of custody is to protect the benefit of the minor and to secure his future”.⁹

5 E. Scott, A. Derdeyn, ‘Rethinking Joint Custody’, (1984) 45 (2) Ohio State Law Journal 455, 455.

6 Bilge Öztan, *Aile Hukuku [Family Law]* (6th ed., Turhan 2015) 1109; Emine Akyüz, *Çocuk Hukuku, Çocukların Hakları ve Korunması [Child Law, Children's Rights and Protection]* (6th ed., Pegem 2018) 227.

7 Akyüz (n 6) 53 et seq. Ayrıca bkz. Rona Serozan, *Çocuk Hukuku [Child Law]* (Vedat 2017) 162 et seq.; Burak Huysal, *Devletler Özel Hukukunda Velayet [Custody in Private International Law]* (Legal 2005) 153 et seq.; Günseli Gelgel, *Devletler Özel Hukukunda Çocuk Hukukundan Doğan Problemler-Ders Notları- [Problems Arising out of Child Law in Private International Law-Lecture Notes-]*(Beta 2012) 29.

8 Turkish Supreme Court General Assembly of Civil Chambers [Yargıtay Hukuk Genel Kurulu [YHGK], File nr [Esas No] 2017/2-3117, Decision nr [Karar No] 2018/1278, Date [Tarih] 27.06.2018.

9 Turkish Supreme Court General Assembly of Civil Chambers [YHGK], File nr [Esas No] 2017/2-1587, Decision nr [Karar No] 2018/1147, Date [Tarih] 30.05.2018.

B. Arguments Put Forward in Favor of Joint Custody in Turkey

In practice, in Turkey, a study of Turkish parents' approach to joint custody during divorce examined 60 families that had at least one child under 18 years old and pending divorce between the years of 2013 and 2014 before the Family Courts in Istanbul.¹⁰ Participants included 120 people, 60 women, and 60 men. Variables of the study included participant age, duration of the marriage, length of separation, child age, gender, and frequency of meeting the child with the separate parent (with whom they stayed during the separation period).

The study concluded that consensually-divorced parents preferred joint custody more (53%) than those who had a contested divorce (27%). Additionally, higher-income parents tended to take a democratic approach towards child-rearing and were more likely to prefer joint custody. Furthermore, participants of the study expressed desires to maintain equal parental rights after the divorce and to stay involved in the child's moral education, physical health, and psychological well-being as a result.¹¹

This study supports the conclusion that Turkish people do not view joint custody negatively, and that joint custody is applicable in contested divorces as well as in consensual divorces because the majority of couples who divorced both in agreement and in conflict displayed a willingness to work together on decisions related to the child. A friendly and communicative attitude between the former partners is of great importance for the application of joint custody.

In theory, Turkish doctrine claimed that the current articles 336 and 337 of the TCC contrast with both the constitutional equality principle and the right to live without separation from the mother and father, which is granted by the UN Convention on the Rights of the Child. Therefore, it is argued that both articles should be brought before the Constitutional Court with the allegation that it is against the Constitution.¹²

C. Arguments Against Joint Custody in Turkey

The reasons for sole-custody decisions usually involve the preservation of a child's best interests due to negative family conditions. Joint custody has failed when the parents were hostile to each other or the parents had negative thoughts about each other.¹³ In the same vein, it is a fact that joint custody has negative consequences

10 Müge Kiremitçi Öztürk, 'Boşanma Sürecinde Ortak (Müşterek) Velayet ve Toplumsal Bakış Açısı' [Joint (Shared) Custody and Social Point of View in the Process of Divorce] in G. Elçin Evgen and A. Genç Arıdemir (eds), *Çocuk Hakları Çalışmaları I [Children's Rights Studies I]* (On İki Levha 2017) 59-117.

11 Ibid, 86.

12 Serozan (n 7) 255 et seq.

13 C. M. Buchanan and P. B. Jahromi, 'A psychological perspective on shared custody arrangements' (2008), 43 (2) Wake Forest University Law Review 419, 425-26; S. B. Steinman, S. E. Zimmelman and T. M. Knoblauch, 'A Study of parents who sought joint custody following divorce: who reaches agreement and sustains joint custody and who returns to court' (1985) 24 (5) Journal of American Academy of Child Psychiatry, 554, 561-62.

for the child in families who have experienced domestic violence in the past and are currently experiencing severe conflicts, or when joint custody is mandated by the court, not by the joint attitude of the parents.¹⁴ Therefore, in our opinion, if a case meets the required child-benefit standards, and if the mother and father provide mutual consent, a decision should be made to establish joint custody. In this respect, consideration of child-benefit is meant to assure the child's right of self-development, which covers all rights, and is used freely and with dignity.¹⁵

The opinion of Turkish doctrine evaluates provisions in articles 336/II and 182/II of the TCC when examining post-divorce custody transfer, and argues that the law does not allow joint custody and therefore joint custody practice is not possible under Turkish Law. Therefore, any agreement made jointly by the parents regarding post-divorce custody will be invalid, and with the divorce, the judge will transfer custody to only one of the parents.¹⁶

According to some opinions in Turkish Doctrine, an implication of the provision is also that custody cannot be left undecided.¹⁷ In other words, Art. 336/II of the TCC gives the judge discretionary power to revoke custody, and the judge will be able to confer custody to both parents by not revoking custody from either parent, in the event that the parents can reach an agreement and understanding regarding their shared custody, which would then leave the child with the parent with whom he will live physically.¹⁸ The justification of art. 336/II of the TCC, provides this reasoning: “the provision was taken from the art. 297 of the Swiss Civil Code”.¹⁹ According to the referenced ZGB 297/II provision, “If the marriage union is abolished or the spouses are separated, then the court may leave the custody to one of the spouses”.

14 Steinman, Zimmelman and Knoblauch (n 13) 562.

15 Sinan Sami Akkurt, ‘Çocuğun Kişiliğinin Korunması ve Velayetin Belirlenmesinde Çocuğun Menfaati Olgusu’ [Interest Of The Child in the Protection of the Child's Personality and the Determination of Custody] in B. İ. Engin (eds), Rona Serozan Armağanı [In Honor of Prof. Dr. Rona Serozan] (On İki Levha 2010), 111.

16 Mustafa Dural, Tufan Ögüz and Alper Gümüş, *Türk Özel Hukuku [Turkish Private Law] Vol. 3, Aile Hukuku [Family Law]* (Filiz 2021) 144-47; Ahmet Kılıçoğlu, *Aile Hukuku [Family Law]* (5th ed., Turhan 2020) 501; Hüseyin Hatemi, *Aile Hukuku [Family Law]* (9th ed., On İki Levha 2021) 150 et seq.; Leyla Müjde Kurt, ‘Boşanma Durumunda Birlikte (Ortak) Velayet’ [Joint Custody in the Case of Divorce] (2018) 9 (2) Inonu University Law Review 157, 172; A. C. Ruhi, and H. Özdemir, *Çocuk Hukuku ve Çocuk Hakları [Child Law and Child Rights]* (On İki Levha 2016) 163.

17 G. E. Grassinger, *Türk Medeni Kanununda Yer Alan Velayet Hükümleri Kapsamında Küçükün Kişi Varlığının Korunması İçin Alınan Tedbirler [Measures Taken for the Protection of the Personal Presence of the Minor Under The Provisions of Custody in Turkish Civil Code]* (On İki Levha 2009) 9; Cengiz Koçhisarhoğlu, *Boşanmada Birlikte Velayet ve Yasanın Aşılması [Shared Custody In Divorce and Overcoming the Law]* (Turhan 2004) 243-44; Bilge Öztan, ‘Türk Hukukunda Boşanmada Birlikte Velayet Sorunu’ [The Problem of Shared Custody in Divorce in Turkish Law] in S. Arkan and A. Yongalık (eds.), *In Honour of Prof. Dr. Tuğrul Ansay* (Turhan 2006) 251-60, 256 et seq.; Ebru Ceylan, ‘Türk Velayet Hukukunda Yeni Gelişmeler’ [Recent Developments in Turkish Custody Law] (2018) 16 (181) Legal Hukuk Dergisi [Legal Journal of Law] 35, 54-55.

18 Mehmet Erdem, *Aile Hukuku [Family Law]* (2nd ed., Seçkin 2019) 171; Yeliz Yücel, *Türk Medeni Hukukunda Boşanma Halinde Velayet, Çocukla Kişisel İlişki Kurulması ve Çocuğun Soyadı [Custody in Case of Divorce in Turkish Civil Law, Personal Relationship With Children and Child's Surname]* (On İki Levha 2018) 125; Azra Serim Arkan, ‘Boşanma Halinde Ortak Velayet [Joint Custody in Case of Divorce]’ (2016) 14 (167) Legal Hukuk Dergisi [Legal Journal of Law], 6075, 6085; İknur Serdar, ‘Birlikte Velayet’ [Shared Custody] (2008) 10 (1) *Dokuz Eylül University Law Review* 155, 180; Süheyla Kahraman, *Türk Milletlerarası Aile Hukukunda Ortak Velayet [Joint Custody in Turkish International Family Law]* (On İki Levha 2019) 60.

19 Turkish Grand National Assembly, Article Justifications of the Turkish Civil Code (22.11.2001), https://www.tbmm.gov.tr/sirasayi/donem21/yil01/ss723_Madde_Gerekceleri_2.pdf.

The system is criticized in terms of constant relocation of the child and accordingly an increase in the likelihood of adaptation problems.²⁰ Another critique concerns the possibility of destabilizing the child's life.²¹ Yet another critique concerns the idea that parental conflicts will harm the child more than sole custody, which is among the reasons for the historical disposition of Turkish Law.²²

D. Protocol No. 7 and Its Effects on Turkish Jurisprudence

The first local court decision issued concerning joint custody in Turkey is the Izmir 4th Family Court, Case No. 448-470 dated 27 May 2009.²³ The court stated that:

... In the meeting with the couples, we have the impression that both parties have the will and consciousness to consider the best interests of the child, to come together, make decisions regarding the joint child after divorce, and to cooperate in decisions regarding the child... As a result of the evaluations made, the impression is obtained that the parties have the desire, consciousness, and the necessary motivation for the joint custody practice and that the parties are in a supportive attitude towards the communication and sharing of the minor with the other parent considering the psycho-social development of the minor, and in case of ensuring the life order that the common child is accustomed to, it has been concluded that the custody can be used by the parties.

The court took into account the custody agreement made by the parties and expert opinion on the subject, evaluated the agreement made by the parents regarding the consequences of the divorce in the context of the best interest of the child, and decided that the parties would share custody.

Nevertheless, with the integration of Protocol No. 7 into Turkish Law, the mentioned provision is above the provisions of the TCC according to art. 90/5 of the Turkish Constitution²⁴ which prevails international conventions with priority over the laws.

Art. 5 of Protocol No. 7, stipulates that spouses have equal rights and responsibilities both in private legal matters and also with respect to their children and their marriage, both during and after the marriage. It has been accepted that art. 5 of Protocol No.7, implicitly abolishes the application of art. 336 of the TCC which disallows joint

20 William P. Statsky, *Family Law: The Essentials* (Cengage Learning 2015) 229.

21 Jay Folberg, *Joint Custody and Shared Parenting* (Guilford Press 1991) 9.

22 Grassinger (n 17) 12; Serdar (n 18) 183.

23 Serdar (n 18) 171-172, fn. 59.

24 Erdoğan Teziç, *Anayasa Hukuku [Constitutional Law]* (Beta 2020) 11 et seq.; Kudret Güven, 'Türk Hukukunda Evliliğin Sona Ermesi ve Evlilik Dışı İlişkide Velayet Hakkının Geldiği Son Nokta: Ortak Velayet' [The Last Word in Turkish Law About Parental Authority After Termination of Marriage and in Concubinage: Joint Parental Authority] (2018) 4 (1) Baskent University Law Review 11, 11.

custody.²⁵ Accordingly, the attitude of the Turkish Courts regarding joint custody has started to change.

For example, Ankara Regional Court of Appeal 1st Civ. Ch., in its decision dated May 10, 2017, and numbered E. 2017/121, K. 2017/601, stated that current provisions of the TCC were tacitly abolished with Protocol No.7 of the ECHR, and concluded that absent of any allegations or evidence in the case file that would endanger the child's safety and contrary to the best interest of the child, joint parental custody should be awarded.

In a contested divorce case filed in the Erzincan Family Court, parental custody of the child was jointly left to both sides after a positive social examination report and reception of statements by the parties that they accepted joint custody, provided the child's place of residence was with the mother. In addition, it was decided to establish a personal relationship between the child, whose residence was determined as the mother's side, and the father, considering the age of the child, ease of travel, and other factors.²⁶

On the other hand, in a decision made by Istanbul Regional Court of Appeal 10. Civ. Ch., it was found incorrect that the joint custody claim of one of the parents had not been evaluated, and the file was returned to the court of first instance for an evaluation in this direction.²⁷ As seen, in practice, Turkish courts are now accepting that the provisions of the TCC preventing joint custody have been abolished implicitly, since provisions of international convention prevail. In practice, the regional court of appeal can decide on joint custody in both contentious and consensual divorce cases. In this context, it is against the procedure and the law that courts at first instance do not evaluate joint custody claims.

II. A Comparative Analysis of Joint Custody

Joint custody is a rising trend in many jurisdictions. The primary reason for this is the best interest of the child, which has been the primary criterion, and the parties continue to carry the identity of mother and father after the divorce. For instance, in para. 5 of “*Resolution 2079 of the Council of Europe on Equality and Shared Parental Responsibility*” it is recommended to introduce into national laws the

25 Ömer Uğur Gençcan, (President of the Court of Cass. 2nd Civ. Ch.), ‘Ortak Velayet’ [Joint Custody], Izmir Bar Association Bulletin (2017) 24, 26. See also Turgut Akıntürk and Derya Ateş, *Türk Medeni Hukuku [Turkish Civil Law]* (23rd ed., Beta 2021). For opposite view see Erlütle (n 4) 306-19.

26 Erzincan Family Court of First Instance [Erzincan Aile Mahkemesi], File nr. [Esas No] 2016/481, Decision nr. [Karar No] 2017/764, Date [Tarih] 05.10.2017.

27 Istanbul 10th Regional Court of Appeal [İstanbul 10. Bölge Adliye Mahkemesi], File nr [Esas No] 2017/ 578, Decision nr [Karar No] 2017/386, Date [Tarih] 26.04.2017; In the same sense see also Izmir 2nd Regional Court of Appeal [İzmir 2. Bölge Adliye Mahkemesi], File nr [Esas No] 2017/1162, Decision nr [Karar No] 2017/835, Date [Tarih] 05.05.2017; Izmir Regional Court of Appeal [İzmir 2. Bölge Adliye Mahkemesi], File nr [Esas No] 2018/3423, Decision nr [Karar No] 2019/373, Date [Tarih] 11.03.2019.

principle of shared residence in post-separation and once shared custody is decided parental responsibility applies to both parents who will continue to share titularity and exercise of parental responsibility unless a court has suspended or taken it away permanently.²⁸ More specifically in Spain shared custody is defined as the way of fulfilling the responsibility of the parents in an active and fair way after the divorce or separation for the care of their children including the material needs in proportion to their personal circumstances.²⁹

In Germany, as a result of separation and divorce, custody continues to be used by the mother and father together, and it ends only with the application of the parents to the court unless it is contrary to the best interest of the child or the child reaches fourteen years old as well as objects to the transfer (art. 1671 of German Civil Code). Therefore, according to German Law, a court decision is not required for joint custody.³⁰

In Switzerland, with the regulation dated June 21, 2013, that entered into force on July 1, 2014,³¹ in case of divorce of the parents, the court regulates the custody, the residence, the right to meet with the child, the division of parental obligations and the financial contribution to the child's care expenses by taking into account the propositions of the parents and, if possible, together with the thoughts of the child, in line with the best interest of the child (art. 133 of Swiss Civil Code).³²

In Italy, law no. 54/2006 provides the joint responsibility of the parents after divorce called "*affidamento condiviso*". The cooperation of the parents is required for the upbringing and care of the children and for making joint decisions about the most important stages of the children's lives.³³ In case of disagreement between the parents, the court evaluates the case following the best interest of the child by

28 See <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22220> (accessed on 13 August 2021).

29 Teresa Piconto Novales, 'The Development of 'Shared Custody' in Spain and Southern Europe', in J. Eekelaar and R. George (eds.), *Routledge Handbook of Family Law and Policy* (2nd ed., Oxon: Routledge 2021) 228.

30 Dieter Martiny, 'The Changing Concept of Family and Challenges for Family Law in Germany in J. M. Scherpe (ed.), *European Family Law Volume II: The Changing Concept of 'Family' and Challenges for Domestic Family Law* (Edward Elgar Publishing 2016) 78. See also Nurten İnce, 'Karşılaştırmalı Hukukta ve Türk Hukukunda Evlilik Birliğinin Boşanma ile Sona Ermesi Durumunda Birlikte Velayet' [Joint Custody in Comparative Law and Turkish Law in the Case of Termination of the Marriage by Divorce] (2018) 34, *Türkiye Adalet Akademisi Dergisi* [Turkish Justice Academy Review] 189, 202.

31 Fassung gemäß Ziff. I des BG vom 21. Juni 2013 (Elterliche Sorge), in Kraft seit 1. Juli 2014 (AS 2014 357; BBl 2011 9077).

32 Ingeborg Schwenzer and Tomie Keller, 'The Changing Concept of Family and Challenges for Family Law in Switzerland in J. M. Scherpe (ed.), *European Family Law Volume II: The Changing Concept of 'Family' and Challenges for Domestic Family Law* (Edward Elgar Publishing 2016) 309-35. See also Eylem Apaydın, 'Ortak Hayata Son Verilmesi Sonrası Ortak Velayet Hususunda Yasal Düzenleme Gereği' [The Necessity of a Legislative Regulation on the Joint Custody After the Dissolution of Marital Union] (2018) 9 (1) *Inonu University Law Review* 445, 469; Tuba Birinci Uzun, 'Türk Medeni Kanunu'na Göre Velayetin Kullanılması ve Çocuğun Üstün Yararı İlkesi Doğrultusunda Boşanmada ve Evlilik Dışı İlişkide Birlikte Velayet Modeli' [The Use of Custody in Turkish Civil Code and the Joint Custody in Divorce and Extramarital Relationship in Line With the Principle of the Best Interest of the Child] (2016) 6 (1) *Hacettepe Law Review* 135, 154.

33 Novales (n 29) 228. See also G.de Blasio and Daniela Vuri, 'Effects of the Joint Custody Law in Italy' (2019) 16 (3) *Journal of Empirical Legal Studies* 479, 479 et seq.

ensuring the rights of the children to maintain contact with both parents. Unlike Spanish law, the decision about the residence of the children with each parent is made by the court later on.

In Portugal, Portuguese Divorce Law no. 61/2008 abolished the “*paternal*” responsibility and replaced it with “*parental*” responsibility. “Shared parental responsibility” has become the rule and “sole parental responsibility” the exception. Shared parental responsibility can only be excluded by a court decision.³⁴

In France, the term “*coparentalité*” is included with law no. 2002-305. It means that the two parents share parental authority both during and after the marriage.³⁵ With regard to this principle, the end of the marriage has no effect on the exercise of parental responsibility (art. 373/2 of the French Civil Code). For residence, the term “*résidence alternée*” is provided with the idea that children have a residence with each of their parents retaining the maintenance obligation of the parents to provide support for the children after divorce or separation as well.³⁶ A fieldwork was performed in France in 2016 in order to observe the impression of joint custody after the end of the marriage on French children.³⁷ The findings were compared with those of a previous study executed 12 years earlier with the same tools. It denoted that joint custody is not necessarily harmful to the child and it does not have as much impact on self-esteem as parent conflict.

Although shared custody has become the norm regulated in these countries, shared custody continues to be granted in a minority of cases by the courts in Spain whether or not there is an agreement between the parents.³⁸ Similarly in Portugal, there is no consensus among courts as to whether shared custody is beneficial for children or even if it is consistent with the existing law no. 61/2008. Therefore, Portugal courts continue to apply the traditional agreement by which the child resides mainly with the mother while the father has contact and visiting rights.³⁹ In any case, courts make their decisions case by case depending on the consideration of the best interest of the children.

The legislation concerning parental responsibility has developed along the same lines in the Scandinavian countries. In Sweden for instance, joint parental responsibility was first made available to divorced and unmarried parents in 1976 provided the

34 Noales (n 29) 228.

35 Vincent Égée, *Droit de la famille*, (2nd. ed., Lexis Nexis 2018) 596 et seq.

36 Patrick Courbe and Adeline Gouttenoire, *Droit de la Famille* (7th ed., Sirey 2017) 500.

37 R. Barumandzadeh, E. M. Lebrun, T. Barumandzadeh and G. Poussin ‘The Impact of Parental Conflict and the Mitigating Effect of Joint Custody After Divorce or Separation’ (2016) 57 (3) *Journal of Divorce & Remarriage* 212-23.

38 See the research made by the Foundation ATYME in 2019, <https://www.atymediacion.es/sites/default/files/2019-04/Custodia%20Compartida%20Fundaci%C3%B3n%20ATYME.pdf> (accessed 14 August 2021).

39 Sofia Marinho and Sonia Vladimira Correia, ‘Notas finais’, in S. Marinho and S.V. Correia (eds.), *Una familia parental, duas casas* (Silabo 2017) 255, 255.

parents jointly requested this. The Norwegian law also created a presumption for joint parental responsibility after divorce unless challenged by one of them. Similar provisions were introduced in Sweden in 1983⁴⁰ and Denmark in 2002.⁴¹ In all these countries parents can make agreements concerning with whom a child should live, including shared residence. In 2016-2017 around 30% of children in Sweden with separated parents have alternating residences.⁴² The frequency of shared residence in Denmark and Norway is also an increasing trend.⁴³

In common law countries, parental responsibility includes making important decisions about the child's life. For instance, in the Australian Family Law Act, all duties and powers that parents have by law in relation to children are included in parental responsibility.⁴⁴ The Children Act, 1989 in England & Wales has an identical formulation other than the addition of "*rights*", preceding "*power & duties*".⁴⁵ In 2006, the Australian legislation was amended to add the presumption of 'equal shared responsibility'.⁴⁶ Recently, the Australian government agreed to the recommendation of the Australian Law Reform Commission⁴⁷, and "*equal shared parental responsibility*" was replaced by "*making decisions jointly about major long-term issues*".⁴⁸

In contrast, "*parental responsibility*" is known as "*legal custody*" in some states of the USA, as distinct from "*physical custody*", which in most states of the USA is the terminology for the child's living arrangements.⁴⁹ Joint physical custody, which focuses on a child living on an equal basis with every single parent after the end of the marriage, is becoming more common in western countries.⁵⁰ For instance, in the USA, joint custody at first started as joint legal custody, which includes the right to make joint decisions on issues such as the child's religious upbringing, education, and medical problems, then it started to transform into joint physical custody over time.⁵¹ There are different regulations regarding joint custody in the USA. In some

40 Law of 1982/83:168 about custody and contact.

41 Law no. 461 of 7 June 2001 amending the Code of Judicial Procedure and various other laws.

42 Anna Singer, 'Parenting Issues After Separation A Scandinavian Perspective' in J. Eekelaar and R. George (eds.), *Routledge Handbook of Family Law and Policy* (2nd ed., Routledge 2021) 237.

43 *ibid* 240.

44 Family Law Act 1975, s. 61B.

45 Children Act 1989 Section 3(2).

46 Australian Family Law Act 1975, s. 61DA.

47 Australian Law Reform Commission, Recommendation 7, https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135_final_report_web-min_12_optimized_1-1.pdf, p. 16 (accessed 14 August 2021).

48 Response of the government to the Recommendation 7, <https://www.ag.gov.au/system/files/2021-03/alrc-government-response-2021.PDF>, p.13 (accessed 14 August 2021).

49 See Minnesota Stat. §518.003, 518.17 (2018); NEW MEXICO STAT. §40-4-9.1 (2011); MONTANA STAT. § 40-4-212 (2017); NEW HAMPSHIRE REV. STAT. §461-A:6 (1979); IDAHO STAT. §32-717B (2017); FLORIDA STAT. §61-13(2) (B) (2018); TEXAS STAT. §153.131(B) (1995).

50 Anja Steinbach, 'Children's and parents' well-being in joint physical custody: A literature review' (2019) 58 (2) Family Process 353, 353. See also A. Carlsund, K. Asplund, S. Eva and U. Eriksson, 'Swedish Parent's Experiences of Joint Physical Custody' (2014) 6 The Open Family Studies Journal 1, 7.

51 Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* (Cambridge University Press 2011) 27.

states, joint custody is considered an option, in others, there is a presumption in favor of joint custody, in some states joint custody is allowed provided that the parties agree, and in other states, joint custody is not specifically considered unless it is an option in the best interest of the child.⁵²

In consequence, there is an attempt in favor of sharing custody in many jurisdictions after a divorce or separation. The best interest of the child is the heart of this revolution. The principle of the best interest has long been criticized for its indeterminacy and malleability, with key issues being a lack of unanimity in society about the instruments to be used when making a determination.⁵³ Previously, the best interest of the child were paramount without further elaboration, leaving interpretation and application to judicial decision makers.⁵⁴ Over time many different factors have been added and actually many legislations have increasingly direct regulation with more details.

III. Enforcement of Joint Custody Judgments in Turkey

The entry into force of Protocol No. 7 in Turkey did not only enable Turkish courts to decide in favor of joint custody, but made it possible to recognize and enforce foreign joint custody judgments in Turkey. Custody decisions may be made as a result of independent custody cases, regulating the custody of the child as a result of divorce or separation cases, or regarding protection measures regarding the person and assets of the minor even if they do not contain any provision regarding custody.⁵⁵ If the custody decision involves the surrender of the child, it becomes subject to enforcement and not recognition.⁵⁶ However, if the custody decision is made in a divorce decree, the divorce decision must be recognized and the custody decision must be enforced.⁵⁷ This distinction is important for the reason that recognition and enforcement conditions are different under the “*Turkish Code of International Private and Procedural Law*” (CPIPL). All conditions necessary for enforcement except reciprocity have also to be provided for recognition (art. 58/1).

Turkey is a party to several international conventions for the recognition and enforcement of foreign joint custody judgments. For instance, the “*Convention of 1961 concerning the Powers of Authorities and the Law Applicable in Respect*

52 ibid 47. See also Linda D. Elrod and Robert G. Spector, ‘A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue’ (2009) 42 (4) *Family Law Quarterly* 713, 713 et seq.

53 Robert H. Mnookin, ‘Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy’ (1975) 39 *Law and Contemporary Problems* 226, 226; John Eekelaar, ‘Beyond the Welfare Principle’ (2002) 14 (3) *Child and Family Law Quarterly* 237, 237 et seq.

54 See Rob George, *Ideas and Debates in Family Law* (1st ed., Hart Publishing 2012) 112 et seq.

55 Nuray Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi [Recognition and Enforcement of Foreign Judgments]* (2nd ed., Beta 2020) 581; Ziya Akıncı and Cemile Demir Gökyayla, *Milletlerarası Aile Hukuku [International Family Law]* (1st ed., Vedat 2010) 159-60.

56 Ekşi (n 55) 580; Akıncı and Gökyayla (n 55) 160; Cemal Şanlı, ‘Türk Hukukunda Çocukların Velayetine ve Korunmasına İlişkin Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi [Recognition and Enforcement of Foreign Child Custody and Child Protection Judgments under Turkish Law]’ (1996) 16 (1-2) *Public and Private International Law Bulletin*, 71, 72.

57 Akıncı and Gökyayla (n 55) 161; Şanlı (n 56) 73.

of the Protection of Infants” replaced by the “1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children”,⁵⁸ “Convention on the Civil Aspects of International Child Abduction”⁵⁹ and “European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children”⁶⁰ can be cited. Nonetheless, in cases that are not covered by these international conventions, the recognition and enforcement of foreign court decisions takes place in accordance with the provisions of the CPIPL.

A. Recognition and Enforcement under CPIPL

Recognition and enforcement of foreign court decisions in Turkish Law are regulated in the CPIPL unless it is not covered by an international convention.⁶¹ By comparison, international conventions include more simple conditions for recognition and enforcement than the CPIPL. If an international convention includes more complex conditions for enforcement compared to the CPIPL, the claimant may choose more favorable conditions provided under the CPIPL.⁶² It is not obligatory for the person requesting enforcement to be a Turkish citizen or to request enforcement against a Turkish citizen. It is possible that both sides of the enforcement case could be foreign.⁶³ What is important for the CPIPL is that the person who filed the enforcement case has a legal interest in opening the case (art. 52). Art. 52/c allows partial recognition and enforcement. In a foreign court decision that includes both divorce and custody, the judge may recognize the divorce decision and reject enforcement of the custody part.⁶⁴ The decisions of the Supreme Court also take this direction.⁶⁵

The conditions for enforcement are divided into two groups in the CPIPL: pre-conditions and essential conditions. Pre-conditions of the enforcement of a decisive final judgment are enumerated under art. 50 of the CPIPL. This provision foresees the necessity of making an enforcement decision for implementation in Turkey of decisions resulting from litigation in foreign courts that are finalized by the state’s laws

58 Turkish Official Journal, 22 May 2016/29719. Date into force: 1 February 2017.

59 Turkish Official Journal, 15 February 2000/23965. Date into force: 1 August 2000.

60 The Agreement is adopted in Luxembourg on May 20, 1980, signed on October 20, 1997 in Strasbourg. It is approved by Turkey with Law No. 4433 of August 4, 1999. Turkish Official Journal, 8 August 1999/23780. Date into force: 1 June 2000.

61 Ekşi (n 55) 117 et seq. Cemal Şanlı, Emre Esen and İnci Ataman Figanmeşe, *Milletlerarası Özel Hukuk [Private International Law]* (9th ed., Beta 2021) 628 et seq.; Aysel Çelikel and B. Bahadır Erdem, *Milletlerarası Özel Hukuk [Private International Law]* (17th ed., Beta 2021) 711-12.

62 Şanlı, Esen and Figanmeşe (n 61) 701.

63 Ekşi (n 55) 68.

64 Akıncı and Gökyayla (n 55) 160; Ayfer Uyanık Çavuşoğlu, *Türk Milletlerarası Özel Hukukunda Boşanma [Divorce in Turkish Private International Law]* (1st ed., Beta, 2006) 155.

65 See Court of Cass. 2nd Civ. Ch. Apr. 5, 2004, 3276/4252 < www.kazanci.com.tr > accessed 21 August 2021.

and have an executive nature. In addition to these prerequisites for the enforcement, it shall also be a decision rendered on civil cases. Nonetheless, the custody decisions made by authorities other than the court in the country where they are given may also be subject to enforcement in Turkey. For instance, in Denmark and Japan, custody decisions are made by administrative authorities.⁶⁶

Foreign judgment, even if it has executory nature, shall not be enforced in Turkey unless it has been finalized.⁶⁷ For example, although a decision made in a divorce case in England⁶⁸ and Australia⁶⁹ is not finalized immediately, it can be executed, but that decision cannot be enforced in Turkey.⁷⁰ Therefore, in order to enforce custody decisions in Turkey, the foreign judgment shall be final in a formal and material sense.⁷¹ Moreover, some authors support the idea that foreign custody judgments finalized in a formal sense only will not present an obstacle to enforcement in Turkey.⁷² Only after these conditions are met, shall enforcement of foreign joint custody judgments be subject to the essential conditions enumerated in art. 54 of the CPIPL. The first enforcement condition enumerated in this provision is the existence of the reciprocity principle based on any convention between the Republic of Turkey and the state where the court decision is rendered, or a de facto practice or a legal provision which will make enforceable a final decision given by Turkish courts in that state.⁷³ Reciprocity shall exist when enforcement is requested.⁷⁴

- 66 Canan Ruhi and Ahmet Cemal Ruhi, *Velayet Hukuku [Law Of Custody]* (Seçkin 2017) 189-90; Nuray Ekşi, *Milletlerarası Özel Hukukta Medeni Olmayan Evliliklerin ve Adli Olmayan Boşanmaların Tanınması [Recognition of Unofficial Marriages and Non-Judicial Divorces in International Private Law]* (Beta 2012) 39 et seq.
- 67 Ergin Nomer, *Devletler Hususi Hukuku [Private International Law]* (22nd ed., Beta 2017) 508-09; Çelikel and Erdem (n 61) 720; Şanlı, Esen and Fıganmeşe (n 61) 641; Ekşi (n 55) 138; Akıncı and Gökayla (n 55) 160.
- 68 Family Law Act 1996, Schedule 8, Section 66 (1) provides 6 weeks for every decree of nullity of marriage to be absolute.
- 69 Family Law Act 1975, art 7A provides that in matrimonial cause proceedings the decree becomes absolute upon the expiration of one month.
- 70 Çelikel and Erdem (n 61) 720.
- 71 Şanlı, Esen and Fıganmeşe (n 61) 644; Çelikel and Erdem (n 61) 720-21. Aysel Çelikel, 'Yeni Kanuna Göre Yabancı Mahkeme Kararlarının Tenfiz Şartları [Enforcement Requirements According to the New Law]' (1982) 2 (2) Public and Private International Law Bulletin 7, 13; Günseli Öztekin Gelgel, Recognition and Enforcement of Foreign Court Judgments Within the Framework of the Application of the Supreme Court of Appeals in R. Kender and S. Ünán (eds.), Prof. Dr. Tahir Çağa'nın Anısına Armağan [In Honour of Prof. Dr. Tahir Çağa] (Beta 2000) 389, 392.
- 72 Ata Sakmar, *Yabancı İlamların Türkiye'deki Sonuçları [Consequences of Foreign Judgments In Turkey]* (İstanbul University Press, 1982) 57; Şeref Ertaş, 'Yabancı İlamların Tanınması ve Tenfizi [Recognition and Enforcement of Foreign Judgments]' 3 (1-4) Dokuz Eylül University Law Review, Prof. Dr. Kudret Ayiter Armağanı [In Honour of Kudret Ayiter], (1987) 365, 391; Fügen Sargın and Rifat Erten, 'MÖHUK Hükümleri Dairesinde Tanınmanın Hukuki Niteliği, Usulu ve Karşılaşılan Bazı Sorunlar: Yeni Bir Düzenleme Yapma Gereği [Legal Nature, Procedure of the Recognition under the Provisions of CPIPL and Some Problems Encountered: Need of New Regulation]', Journal of International Trade and Arbitration Law (2014) 3 (2) 37, 79.
- 73 Çelikel and Erdem (n 61) 739; Ekşi (n 55) 167; Şanlı, Esen, Fıganmeşe (n 61) 646; Faruk Kerem Giray, 'Karşılıklık Koşulu ve Uluslararası Anlaşmalarla MÖHUK'un Tanınma-Tenfiz Sistemine Getirilen Farklılıklar [Condition of Reciprocity and Differences Introduced with International Conventions to the Recognition-Enforcement System of CPIPL]' in S. B. Bozkurt (ed.) *Yabancı Mahkeme ve Hakem Kararlarının Tanınması ve Tenfizinde Güncel Gelişmeler [Current Developments in Recognition and Enforcement of Foreign Courts and Arbitral Awards]* (On İki Levha 2018) 69, 72; İlyas Arslan, 'Türk Hukukunda Yabancı Mahkeme Kararlarının Tenfizinin Mütakabiliyet Şartına Bağlanması Avrupa İnsan Hakları Sözleşmesi'nin m. 6 (1) Açısından Değerlendirilmesi [The Evaluation of the Reciprocity as a Condition for the Enforcement of Foreign Judgments in Terms of art. 6(1) of the European Convention on Human Rights In Turkish Law]' (2019) 10 (1) İnönü University Law Review 1, 1.
- 74 Çelikel (n 71) 9; Bilgin Tiryakioğlu, *Yabancı Boşanma Kararlarının Türkiye'de Tanınması ve Tenfizi [Recognition and Enforcement of Foreign Divorce Judgments in Turkey]* (Ankara University Press 1976) 76.

If there is such a convention, the terms of recognition and enforcement will be determined according to the provisions of this convention.⁷⁵ If there is no such convention, the foreign state's enforcement conditions should not outweigh Turkish regulation of the enforcement requirements.⁷⁶ It should be emphasized that reciprocity will be ignored if the conditions are more stringent than those stipulated by Turkish law. Furthermore, international conventions do not prevent those concerned from relying on more favorable domestic law provisions. If the two states' regulations of terms of enforcement are equivalent to each other, then the legal reciprocity requirement is deemed to have been met.⁷⁷

The second condition of enforcement requires that the decision shall be made on matters outside of the exclusive jurisdiction of Turkish courts, or the defendant objected, or the decision was not made by a state court that considered it competent, even if there was no real relationship between the court and the parties to the case or cases (art. 54/1/b). It is not possible to enforce a foreign court decision in matters where the Turkish court has exclusive jurisdiction. The concept of exclusive jurisdiction is different from the concept of exclusive (final) jurisdiction in domestic law, and in order for an exclusive jurisdiction rule to prevent the enforcement of a foreign judgment, it must be introduced to ensure that the subject of this jurisdiction rule is heard only in Turkish courts.⁷⁸ The CPIPL is silent on which cases fall within the exclusive jurisdiction of Turkish courts. As accepted by the doctrine, it is necessary to focus on the expression and purpose of the rule while determining the exclusive jurisdiction of Turkish courts.⁷⁹ The exclusive jurisdiction rule in private international law states that a case must be heard absolutely and only before Turkish courts.⁸⁰ Since foreign custody judgments do not fall under the exclusive jurisdiction of Turkish courts, it is not possible to prevent enforcement.⁸¹

The third condition for enforcement is that the court decision shall not contradict Turkish public policy. In other words, the request to enforce a foreign custody decision should not be against the fundamental values and principles of Turkish Family Law,

75 Çavuşoğlu (n 64) 158; Şanlı, Esen, Figanmeşe (n 61) 647-48, Giray (n 73) 69 et seq.

76 Çavuşoğlu (n 64) 158.

77 Şanlı, Esen and Figanmeşe (n 61) 650; Nomer (n 67) 520; Şanlı (n 56) 74.

78 Nomer (n 67) 523.

79 Sakmar (n 72) 98-100; Çelikel and Erdem (n 61) 749; Nomer (n 67) 522; Ekşi (n 55) 190 et seq.

80 Nomer (n 67) 523, Çelikel and Erdem (n 61) 749 et seq.; Çelikel (n 71) 9; Sakmar (n 72) 99; Rona Aybay and Esra Dardağan, *Uluslararası Düzeyde Yasaların Çatışması (Kanunlar İhtilafı) [Conflict of Laws at International Level (Conflict Of Laws)]* (2nd ed., Istanbul Bilgi University Press 2008) 302; Nuray Ekşi, *Türk Mahkemelerinin Milletlerarası Yetkisi [International Competence of Turkish Courts]* (2nd ed., Beta 2000) 216; Emre Esen, 'Türk Hukukunda Yabancı Mahkeme Kararlarının Tanınması ve Tenzinde Münhasır Yetki Kavramı [Exclusive Jurisdiction in Recognition and Enforcement of Foreign Judgments under Turkish Law] (2002) 22 (2) Public and Private Law Bulletin 183, 187.

81 Şanlı (n 56) 76; Çavuşoğlu (n 64) 159; Canyaş (n 3) 318.

the Turkish Constitution, or Turkish customs and basic moral values.⁸² As a rule, the court in charge of the enforcement case cannot examine the accuracy of a foreign court decision.⁸³ Therefore, material and legal determinations in the decision will remain outside the jurisdiction of the enforcement judge. The enforcement judge can only intervene in the content of the decision if the aforementioned indispensable values are violated.⁸⁴ In this context, failure to apply Turkish Law or misapplication of the same by a foreign court is not a situation that will prevent enforcement of a decision by requiring public policy intervention.⁸⁵

Public policy is not a defined and determined concept. For this reason, the judge has a high discretionary right as to whether a foreign court decision violates public policy. Turkish judges shall decide whether a foreign court decision is contrary to Turkish public policy by focusing on the consequences of the enforcement.⁸⁶ While using this discretionary power, the judge must consider the reason for the existence of the private international law and the general principles of this law. Therefore, in considering a foreign decision that applies substantive and procedural rules that differ from Turkish Law, the judge cannot refuse enforcement by declaring the decision to be contrary to public policy.⁸⁷

This view is shared by Turkish doctrine as well. Some authors are of the opinion that a joint custody decision made by a foreign court does not alone constitute a violation of public policy because the system does not exist in Turkish Law.⁸⁸ In order to consider that the foreign joint custody judgment violates public policy, joint custody should contradict with the best interest of the child. Therefore, each foreign joint custody decision should be scrutinized from the point of view of public policy, taking into account the best interest of the child⁸⁹. Authors supporting joint

82 Bilgin Tiryakioğlu, ‘Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kamu Düzenine Aykırılık [Violation of Public Policy in Recognition and Enforcement of Foreign Judgments] in S. B. Bozkurt (ed.) *Yabancı Mahkeme ve Hakem Kararlarının Tanınması ve Tenfizinde Güncel Gelişmeler [Current Developments in Recognition and Enforcement of Foreign Courts and Arbitral Awards]* (On İki Levha, 2018) 83, 86-89; Cemile Demir Gökyayla, ‘Yeni Yargıtay Kararları Işığında Gereksiz Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi [Recognition and Enforcement of Unjustified Foreign Court Decisions in the Light of New Supreme Court Decisions]’ (2013) 9 (105-106) *Bahçeşehir University Law Review* 7, 7 et seq.; Şanlı (n 56) 76; Nomer (n 67) 528.

83 Çelikel and Erdem (n 61) 723-24; Şanlı, Esen and Figanmeşe (n 61) 632.

84 Nomer (n 67) 532; Ekşi (n 55) 314; Çelikel and Erdem (n 61) 763-64.

85 Turkish Supreme Court 2nd Circuit [Yargıtay 2. Hukuk Dairesi], File nr [Esas No] 7454, Decision nr [Karar No] 12107, Date [Tarih] 16.09.2008; Turkish Supreme Court 2nd Circuit [Yargıtay 2. Hukuk Dairesi], File nr [Esas No] 2007/16684, Decision nr [Karar No] 2008/16665, Date [Tarih] 04.12.2008; Turkish Supreme Court 2nd Circuit [Yargıtay 2. Hukuk Dairesi], File nr [Esas No] 2007/5600, Decision nr [Karar No] 2008/5494, Date [Tarih] 17.04.2008.

86 Çelikel and Erdem (n 61) 748; Şanlı, Esen and Figanmeşe (n 61) 669 et seq.

87 Supr. Court of Civ. Ch. Nov. 26, 2014, 2013/11-1135 – K. 2014/4973; Şanlı, Esen and Figanmeşe (n 61) 677- 79.

88 Nomer (n 67) 531; Ekşi (n 55) 587; Öztan (n 17) 253; Akyüz (n 6) 234-35; Apaydın (n 32) 457; Zeynep Ayza Gülgösteren, ‘Boşanma Sonucunda Ortak (Birlikte) Velayet [Joint (Shared) Custody as a Result of Divorce]’ (2017) 2 (2) *Cankaya University Journal of Law* 157, 179; Cem Baygın, Soybağı Hukuku [Paternity Law] (On İki Levha 2010) 265-68; Sevgi Usta, Velayet Hukuku [Custody Law] (On İki Levha 2016) 118; Koçhisarlıoğlu (n 17) 229.

89 Arzu Alibaba, Emine Kocano Rodoslu, The Role of Public Policy in the Enforcement of Foreign Custody Judgments: An Example of Joint Custody in Turkish Law, 12 (5) (2020) *Sustainability* 1, 19.

custody argue for an urgent revision that provides for joint custody practice and the establishment of legal arrangements regarding its implementation.⁹⁰

Moreover, if the contradiction to public policy is the case, this situation must concretely demonstrate how the Turkish family structure and social interests are violated by the Court of Cassation. However, the Turkish Supreme Court has not done this in its recent decisions, which interpreted the concept of public policy categorically and found joint custody to be unregulated by Turkish Law supporting public policy.

For example, in its decision on custody in divorce, dated 17 March 1993 and numbered 2-763, the Supreme Court *General Assembly of Civil Chambers* refused to give custody of the children to their Swiss mother without considering the conflict of laws rules. Later, the Supreme Court *General Assembly of Civil Chambers* changed this decision and transferred custody of the children to the mother, but this reversal decision was made without considering conflict of law rules.⁹¹ This attitude of the Supreme Court has been an approach that prevents the application of joint custody in custody cases. This is because states refer to public policy exceptions where a foreign judgment is not in conformity with their national regulations.⁹² Turkey is one of these states, so an enforcement court in Turkey considers rules used in the foreign judgment differing from Turkish Law as contrary to Turkish public policy and neglects the exceptional nature of public policy.⁹³ In other words, the Court applies the public policy exception as a mandatory rule⁹⁴ and was criticized in this respect.⁹⁵ Turkish courts cannot render an enforcement decision whether the law applied by the foreign court conforms with Turkish public policy. Rejection pursuant to the enforcement is possible only if the legal results arising from the execution are contrary to public policy.⁹⁶

90 Çelikel and Erdem (n 61) 771 et seq.; Şanlı, Esen and Figanmeşe (n 61) 687; Öztan (n 17) 259; Koçhisarhoğlu (n 17) 229 et seq.; Evgen Gülçin Elçin, *Çocukla İlgili Uyuşmazlıklarda Görüşünün Alınmaması Gereken Durumlar [Circumstances Where the Opinion of the Child Should Not Be Taken in the Disputes Related to the child Due to Child's Interest]* in Evgen Gülçin Elçin and Arzu Genç Ardemir (eds), *Çocuk Hakları Çalışmaları 1 [Children's Rights Studies 1]* (On İki Levha 2017) 1, 13 et seq.; Apaydın (n 32) 469-73; İnce (n 30) 220.

91 Günseli Öztekin Gelgel, 'Devletler Özel Hukukunda Velayet, Çocuk Kaçırımları, Evlat Edinmeye İlişkin Problemler [Custody, Child Abductions, Adoption Problems in Private International Law]' (2005) 8 (2) Istanbul Commerce University Social Sciences Review 119, 127.

92 Ralf Michaels, 'Recognition and Enforcement of Foreign Judgments' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009) 7.

93 Zeynep Özgenç, 'Velayete Uygulanacak Hukukun Tespitinde Kamu Düzeni Müdahalesine İlişkin Değerlendirmeler [Evaluations Regarding Public Policy Exception in Determination of Applicable Law to Custody]' (2018) 22 (1) Ankara Hacı Bayram Veli University Faculty of Law Review 3, 32-33.

94 Günseli Öztekin Gelgel, 'Türk Devletler Özel Hukukunda Velayet ve Vesayet Kararlarının Tanınması ve Tenfizine İlişkin Bazı Problemler [Custody and Guardianship Issues in Private International Law]' (2015) 35 (2) Public and Private International Law Bulletin 107, 122.

95 ibid. See also Ekşi (n 55) 586-87; Çelikel and Erdem (n 61) 771 et seq.; Şanlı, Esen and Figanmeşe (n 61) 677; Nomer (n 67) 531 et seq.; Pelin Güven, *Tanıma-Tenfiz, Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi [Recognition-Enforcement, Recognition and Enforcement of Foreign Judgments]* (Yetkin, 2013) 136-37; Ebru Şensöz Malkoç, *Aile Hukukuna İlişkin Yabancı Kararların Tanınması [Recognition of Foreign Judgments Regarding Family Law]* (On İki Levha 2017) 444; Vahit Doğan, *Milletlerarası Özel Hukuk [Private International Law]* (Savaş 2021) 310 et seq.; Canyaş (n 3) 314.

96 Court of Cassation *Unification of Judgments General Assembly*, February 10, 2012, 2010/1 E, 2012/1 K., Turkish Official Journal, 20 September 2012 – 28417.

The fourth condition for enforcement is that the person against whom enforcement is requested was not duly summoned in conformity with the laws of that foreign state or court that rendered the judgment, or was not represented before that court, or did not have a court decree rendered in his/her absence or by a default judgment contrary to these laws. The person should also have not objected to the exequatur based on foregoing grounds before the Turkish court. Whether the rights of defense are respected or not will be precise with regard to the law of the country in which the main case is heard.⁹⁷

As a rule, if these conditions are met, the enforcement judge must make an enforcement decision.⁹⁸ Pursuant to art. 51 of the CPIPL, the court tasked to make the enforcement decision is the civil court of first instance; however, according to art. 4 of the “*Law on the Establishment, Duties and Trial Procedures of Family Courts*”, the courts who have jurisdiction for the enforcement of foreign custody decisions are family courts.⁹⁹

I also would like to point out the principle of prohibition of “*révision au fond*”. In Turkish enforcement law, there is a prohibition of entering into the merits of a foreign judgment.¹⁰⁰ In other words, Turkish Law respects legal decisions made by foreign courts on their merits and also evaluates facts and findings in such a way as to reach the truth by way of trial.

B. Turning Point Effect of Protocol No. 7 to the Enforcement of Joint Custody Judgments in Turkey

Considering the practice of Turkish courts regarding joint custody, until March 2016, the Supreme Court has ruled that joint custody cannot be granted after divorce and that the existing legal provision for the granting of custody to one party is mandatory, so enforcement of foreign joint custody judgments have been denied. Nonetheless, the fact that law applied by a foreign court contains provisions different from Turkish law alone is not a reason for the violation of Turkish public policy. Regrettably, as cited above, the Turkish Court of Cassation refused to enforce foreign joint custody judgments with the reasoning that joint custody after divorce or separation is not regulated in the TCC.¹⁰¹

97 Şanlı, Esen and Fıganmeşe (n 61) 690-91; Ekşi (n 55) 326; Çelikel and Erdem (n 61) 777.

98 Nomer (n 67) 539.

99 Çelikel and Erdem (n 61) 726-27.

100 Şanlı, Esen and Fıganmeşe (n 61) 632; Nomer (n 67) 517; Ekşi (n 55) 314.

101 Turkish Supreme Court 2nd Circuit [Yargıtay 2. Hukuk Dairesi], File nr [Esas No] 2003/3874, Decision nr [Karar No] 2003/4670, Date [Tarih] 02.04.2003; Turkish Supreme Court 2nd Circuit [Yargıtay 2. Hukuk Dairesi], File nr [Esas No] E. 2004/12285, Decision nr [Karar No] 2004/13680, Date [Tarih] 22.11.2004; Turkish Supreme Court 2nd Circuit [Yargıtay 2. Hukuk Dairesi], File nr [Esas No] 2006/6824, Decision nr [Karar No] 2006/13638, Date [Tarih] 10.10.2006; Turkish Supreme Court 2nd Circuit [Yargıtay 2. Hukuk Dairesi], File nr [Esas No] 2012/21186, Decision nr [Karar No] 2013/7440., Date [Tarih] 19.03.2013.

In custody decisions, the aim of protecting the child is liable to have consequences that can create a public policy obstacle. However, an important point that should not be overlooked is that public policy intervention is exceptional and should be evaluated separately in each case.¹⁰² Currently, there is an important judicial decision displaying the new attitude of the Supreme Court toward joint custody. The decision of the Court of Cassation 2nd Civ. Ch. in 2017 marks a turning point for the enforcement of joint custody decisions in foreign divorce cases. In this case the plaintiff was a British national whose child was born out of wedlock and claimed joint custody. The Court applied art. 17 of the CPIPL and decided to apply English law since it is the domestic law of the child and its parents. Under English Law, when a child is born out of wedlock, joint custody can be awarded. The court, at first instance, overruled the father's claim for joint custody with the reason that joint custody was in conformity with Turkish public policy. Then, the father appealed to the Supreme Court. The Supreme Court assessed whether joint custody violated Turkish public policy and concluded that joint custody was not clearly contrary to Turkish public policy, providing Protocol No. 7 as legal justification. The decision of the local court, which rejected the application made by the British mother and father to share custody of their children born out of wedlock, was reversed by the 2nd Civ. Ch. of the Court of Cass. with the file number 2016/15771 and decision number 2017/1737 issued on February 20, 2017. In the justification of the relevant decision, there are two issues evaluated. First, the Supreme Court referred to the adoption of Protocol No. 7, which is an international convention, and reminded art. 90/5 of the Turkish Constitution, which orders the priority implementation of international conventions over laws. Second, the issue of whether the joint custody arrangement is contrary to Turkish public policy was evaluated, and the fact that the law to be applied to the principle was different from Turkish law did not mean that it contravenes Turkish public policy. Consequently, it was stated that it was not possible to say that the lack of joint custody under Turkish Law violates its basic structure and fundamental interests with regard to public policy.

This decision marks a literal turning point in Turkish Law. In addition to the decision's reference to Protocol No. 7, the justification regarding what the "public policy" principle means is also very important because the 2nd Civ. Ch. of the Supreme Court stated the following in justification of the decision:

"It is not easy to make a complete description that will express all the features of public policy. With a general definition; "The rules of public policy are all of the institutions and rules that serve to ensure the good performance of public services in a country, the safety and order of the state, and compliance with the rules of peace and morality in the relations between individuals". In this general framework, public policy rules can be explained as the rules that protect the basic structure and fundamental interests of a society.

102 Huysal (n 7) 160.

In general, the basic principles of the legal system aim at social development and protecting personal rights and freedoms, the basic principles of the constitution and the customs and ethical conventions prevalent in the society can be expressed as values representing the public policy, and it can be said that foreign law or foreign law provision that does not clearly comply with these values will not be applied as contrary to public policy. If the result of the application of the foreign law in the concrete case creates an intolerable situation in the face of the above-mentioned basic principles and values, foreign law is not applied on the grounds that foreign law clearly violates public policy. Here, the “negative effect” of the public policy, which prevents the application of foreign law, is mentioned. The concept of public policy is broad, ambiguous, relative and variable.

Public policy in Turkish law has an exceptional character that prevents the application of foreign law. Foreign law, authorized by our rules on conflict of laws, has the opportunity to be applied provided that it does not “explicitly” contradict the public policy of the country (CPIPL art. 5). In this case, public policy is not for us a one-sided “binding rule” of conflict of laws rules. On the contrary, the conflict of laws is an exception to the principle of applying foreign legal order, which is demonstrated by our rule.

... The enforcement of a foreign decision cannot be refused for reasons such as the fact that the law applied to the principle is different from Turkish Law or it is against the mandatory rules of Turkish Law. The criterion to be taken as a basis here is the core values of Turkish Law, the general Turkish understanding of adaptation, morality, the basic understanding of justice and legal policy on which Turkish laws are based, the fundamental rights and freedoms in the Constitution, the common and accepted legal principles, bilateral agreements, and developed societies. It should be concentrated a common understanding of morality and justice, the level of civilization, and their political and economic regime. (Decision of joint chambers of the Turkish Supreme Court dated 10.02.2012 and numbered 2010/1 E, 2012/1 K.)”.

The Court of Cassation not only changed its attitude towards joint custody, but also declared that it does not view joint custody decisions obtained in foreign countries unregulated by Turkish law as an obstacle to public policy. In our opinion, the attitude of the Supreme Court is correct. Righted here are two wrong attitudes regarding public policy in previous decisions of the Supreme Court.

First of all, the fact that a legal arrangement is regulated by mandatory provisions in domestic law, and is considered public policy in terms of its nature, does not result in its inclusion with public policy in international disputes. Otherwise, it would not be possible to implement foreign law in any family law legal disputes. Therefore, the nature of a custody decision should not prevent the implementation of foreign law or enforcement of a foreign custody decision within the scope of private international law.¹⁰³ The consequences that are contrary to the best interests of the child should only be evaluated within the scope of violation of public policy.¹⁰⁴

103 Gelgel (n 94) 120.

104 *ibid* 121.

Secondly, the difference in legal systems should not result in contradiction with public policy. Accepting custody regulated within the framework of different approaches and rules from Turkish Law as contrary to public policy represents a significant obstacle to the functioning of private international law. Considering legal institutions unregulated by domestic law as against public policy is therefore also against the principle of evaluating public policy as exceptional and to be considered specifically in every case.¹⁰⁵

Turkey is a party to several international conventions on joint responsibilities of spouses after marriage and the best interest of the child.¹⁰⁶ These international conventions have a great effect on the basis of the Turkish Court of Cassation's decision regarding joint custody; however, in its decision dated 2017, the Court of Cassation only referred to art. 5 of Protocol No. 7. This situation brings to mind the question of whether this attitude of the Supreme Court is incidental or subsidiary. In our opinion, this attitude of the Supreme Court should be seen as a subsidiary element here. The reason for our opinion shall be demonstrated from many different aspects. First of all, in the context of the present provision, since the parents will have equal post-divorce parental rights and responsibilities, custody application alone, regulated in the TCC, does not meet the purpose of this provision. The equality provided in the provision is only achieved with joint custody, in which parents share parental rights and responsibilities. Therefore, since Protocol No. 7 has come into force in Turkey, it shall be considered a law that cannot be incidental.

Secondly, the question of why the Supreme Court allows joint custody by referring only to art. 5 of Protocol No. 7 is important. As long as TCC art. 336 does not allow joint custody after divorce, the Supreme Court has abstained from this issue. Naturally, the Court of Cassation is aware and conscious of the international conventions to which Turkey is a party. Nevertheless, provisions in these conventions express the elements that create joint custody. Besides, art. 5 of Protocol No. 7 clearly points to joint custody by stating that the spouses have equal rights and responsibilities both in private legal matters even after the divorce. Moreover, single custody is not abolished in the Turkish doctrine because art. 5 of Protocol No. 7 can only be applied to the extent that the best interest of the child allows. The reason for this is that TCC art. 336 is still in force.

On the other hand, as already given in the examples above, the courts in the first instance have already followed this attitude of the Supreme Court and started to make decisions for joint custody if the conditions exist. This situation demonstrates that, as long as the conditions exist, it is not incidental for Turkish Courts to make a judgment in favor of joint custody.

¹⁰⁵ *ibid.*

¹⁰⁶ For instance, United Nations Convention on the Rights of the Child 1989, art 3, 9, 12; The International Covenant on Civil and Political Rights 1966, art 23; The Convention on the Elimination of All Forms of Discrimination Against Women 1979, art. 16; European Convention on the Exercise of Children's Rights 1996, art 3.

Conclusion

Joint custody is not regulated in Turkish Law. Turkish courts, therefore, did not enforce any foreign joint custody judgments for years. Public policy was given as the justification for this situation. Although it is theoretically stated that the concept of joint custody cannot be against Turkish public policy only because it is not regulated in the law, the Supreme Court did not change its practice until 2017. In 2017, the Second Chamber of the Turkish Supreme Court began a new era by changing its view and declaring that joint custody is not repugnant to Turkish public policy. The reason for this is the ratification of Protocol No. 7, which allows parents to enjoy equal rights even after the divorce. Moreover, the condition of being suitable to the interests of the child has also been imposed. Therefore, even if divorces are contentious, joint custody can be granted if it is in the interest of the child.

As a matter of fact, in terms of current legislation, there is no legal obstacle for the application of joint custody in Turkish Law. In addition, after the judgment of the Supreme Court in 2017, other joint custody judgments have been made and are listed above. The only critique to the judgment of the 2nd Civ. Ch. of the Supreme Court can be brought with the reason that since Protocol No. 7 is accepted as a part of Turkish Law, why is there a debate about the joint custody held in a foreign country being against public policy with the reason that it is not regulated in Turkish Law? In our opinion, this confusion can only be resolved by making a detailed arrangement regarding joint custody in the TCC.

For all these reasons, Turkish legislators should make a clear regulation regarding joint custody in the TCC, stating that, provided it is in the best interest of the child, joint custody is the rule, sole custody is the exception. A detailed regulation will obviously prevent possible problems in practice. For example, in a dispute where the applicable law is Turkish law, it is still unclear which procedure or principles will be applied if the parties request provision of joint custody and these requests are accepted.

Peer-review: Externally peer-reviewed.

Conflict of Interest: The author has no conflict of interest to declare.

Financial Disclosure: The author declared that this study has received no financial support.

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