

THE IMMATERIAL DAMAGES THAT CAN BE DEMANDED BECAUSE OF THE DIVORCEMENT IN TURKISH CIVIL LAW

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Abstract

A certain number of consequences show up in terms of spouses and children along with the divorce. The consequences that are related to spouses can be classified as personal and financial. Spouses, along with the divorce, gain a new statue due to the marital breakdown. However, divorce has financial results, too. Financial results, on one hand, aim to end financial relationship which arise during the marriage; at the same time regulate the demands of alimony and damages which show up with the divorce and its compensation. Divorce can cause pecuniary or non-pecuniary loss to the spouse who is disadvantaged. The Turkish Civil Code allows the spouses to claim damages if the disadvantaged spouse is flawed or defective (TMK. M. 174/II). Our study has focused on non -pecuniary damages and how to decide its circumstances; its amount and its manner have been evaluated. In addition, in the event of divorce due to adultery emerging from court decision, the possibility of seeking non -pecuniary compensation from the third person with whom the unfaithful spouse is in relation has been examined.

Keywords: *compensation of non-pecuniary damages, divorce, non -pecuniary compensation from the third person.*

JEL Classification: K15, K36

1. Introduction

Ending marriage union with divorce has a number of consequences. The assets that the spouses have built up to that time are shared with the divorce. The parent to have custody of the child is determined². These issues can be resolved by agreement of spouses and after the agreement is deemed appropriate by the court (TCC Art 166/III). The parties may acquire the divorce and its legal and financial consequences by court order, in cases of breakdown of marriage or emergence of private causes (TCO, art.161, art.162, art.163, art.164, art. 165) (TCC art 166/I).

One of the financial consequences of divorce is the claim for non-pecuniary damage. This compensation constitutes basically the subject of our study. However, the probability of seeking compensation from the third party in relation with the unfaithful spouse, which is possible with the application of the Court of Cassation, and which is accompanied by a divorce, is also examined in the study.

2. The concept of non-pecuniary damage

Non-pecuniary damage is a compensation that can be claimed in case of violation of personal (social, physical, emotional) values. Thus, it aims to restore one's spiritual balance which is deteriorated unlawfully and to create a sense of satisfaction. Although it does not constitute a basic element, it also has deterrence aspect in terms of the perpetrator³.

The ways of full protection of personal rights have been discussed in doctrine and court decisions. After all the discussions and historical process, when the personality rights are violated, it

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² TCC foresees that a child remains in the custody of the mother or the father in case of divorce. However, Turkey also signed “Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms” substantively enacted after Protocol No. 11 which was signed on 14.03.1985 and this protocol was approved by the Turkish Grand National Assembly and published in Official Gazette dated 25.03.2016. In accordance with this protocol, which has been signed and approved, it is possible to establish joint custody in Turkey in the event of marital breakdown.

³ “Non-pecuniary damage is a type of compensation provided that the person's social, physical and emotional personality values are attacked. It aims to restore one's spiritual balance which is deteriorated unlawfully, to create a sense of satisfaction and also to deter the perpetrator from having such an action again.” SCACC. B. 2012/4-179, V. 2012/412, Dated. 27.06.2012.(<http://www.kazanci.com>)

is concluded that the best compensation is to pay the sufferer some amount of money⁴. Since non-pecuniary damage is caused by violation of personality rights, it is not included in property losses and cannot actually be measured by money. Although it may seem contrary to the logic of the concept, it cannot be ignored that the best way to compensate a damage resulting from an unlawful interference with the values that cannot be measured by money is a sum of money⁵. For this reason, it can be said that the pecuniary damage is to be calculated and the non-pecuniary damage is to be appreciated⁶.

The fact that the non-pecuniary damage cannot be precisely calculated in monetary terms does not mean that it cannot be subject to a material calculation⁷. Indeed, the same difficulty is there for loss of income and losses due to unbalance of economic future, which are types of pecuniary damage⁸.

Compensation of non-pecuniary damage is based on proof. Proving non-pecuniary damage takes place by making an impression on the judge that the act which constitutes an attack on personality values is suitable to cause harm according to the natural flow of life⁹. This opinion will be established with objective values, for example economic and social criteria, not subjective value judgments, since it is not possible to determine the pain and sadness in one's inner world¹⁰. In other words, the claimant claims to have an objective decrease in his/her personality values while the counterparty tries to ensure that such a violation has not occurred or no damage has occurred to the person claiming compensation. For example, in the case of violation of personality rights by insult, the damage caused to the person in question may change according to his personality, occupation or environment. These matters appear to have been taken into account in the decisions of the Court of Cassation¹¹.

3. Compensation of non-pecuniary damage due to divorce

Divorce can be caused by special reasons such as adultery, dishonourable behaviour, leading a disrespectful life or mental illness as well as breakdown of marriage, which is a general cause of divorce. A spouse may claim non-pecuniary compensation from the other spouse who causes these reasons to appear, and thus leads to the end of marriage. If the parties agree that they will not seek compensation for non-pecuniary damage in a consensual divorce, a new case cannot be filed after the decision of divorce. However, if there is no provision in the text of the agreement, it is possible that after the decision of divorce, non-pecuniary compensation may be claimed¹².

TCC. art. 174/II, acknowledges that the party whose personality rights are attacked because of the incidents that have led to divorce may seek compensation from the other party for non-pecuniary damage. This provision constitutes a particular view of application of TCC art.23/II and

³Compensation claims arising from violations of personality rights are also recognized in the Roman law. Initially, Iniuria was a concept used to express attack on body integrity. According to the nature of the behaviour that violates the integrity of the body, some money was paid to punish the perpetrator. In time when the penalty became meaningless after the monetary depreciation, the principle of determining the penalty by the judge was adopted. Thus, words, deeds and behaviours which have degraded the status of the person in society and harmed his reputation were evaluated in this frame. The act to be filed in such violations was *actio iniurarium*. The judge took who, against whom and where into account. For further information, Tahiroğlu Bülent: *Roma Hukukunda Iniuria*, İstanbul 1969, pp.19, 25; Erdoğan Belgin: *Roma Borçlar Hukuku Dersleri*, İstanbul 2006, pp. 130, 131; Akıncı Şahin: *Roma Borçlar Hukuku*, Konya 2016, p. 46.

⁴ Serozan Rona: *Manevî Tazminat İstemine Değişik Bir Yaklaşım*, Prof. Dr. Haluk Tandoğan'ın Anısına Armağan 1990, p. 78; Arat Ayşe: 6098 Sayılı Borçlar Kanunu m.58'e Göre Manevî Tazminatın Belirlenmesine, 818 Sayılı Borçlar Kanunu M. 49/II'nin Kaldırılmasının Etkisi, *Erzincan Üniversitesi Hukuk Fakültesi Dergisi*, Cilt: XVII Sayı: 3-4, 2013, p.194.

⁶ Serozan, *op. cit.*, p. 71; Arat, Manevi, *op. cit.*, p. 194.

⁷ "The absence or inadequacy of any other means obliges the monetary determination of compensation of non-pecuniary damage." SCACC Dated 30.05.2001, B. 2001/4-410, V. 2001/466. (<http://www.kazancihukuk.com/>)

⁸ Serozan, *Tazminat, op. cit.*, p. 86; Arat, Manevi, *op. cit.*, p. 195.

⁹ Ünal Mehmet: *Manevî Tazminat ve Bu Tazminat Çeşidinde Kusurun Rolü*, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Yıl 1978, Cilt 35, Sayı 1- 4, sayfa 397-437, p. 190.

¹⁰ Serozan, p.83; Arıdemir, p. 183; Arat, Manevi, p.195.

¹¹ "When determining the amount of compensation, the judge must take into account the nature of the action and event that created the attack, as well as the rate of flaws of the parties, their titles, occupations, and other social and economic situations." SCACC. 3, Dated. 07.06.2012, B. 2012/11299, V. 2012/14561. (<http://www.kazanci.com/>)

¹² Tutumlu, Mehmet Akif: *Teorik ve Pratik Boşanma Yargılaması Hukuku*, Cilt II, 2. Baskı, Ankara 2009, p. 1060.

provision of art.58 of TCO, which generally regulates non-pecuniary damage¹³. In that case, in order to be able to claim non-pecuniary damages, the personality rights must be attacked and the other party should cause divorce with his/her faults.

4. Conditions for non-pecuniary damage claim

a) Violation of personality rights. In order to claim non-pecuniary damages due to divorce, personality rights of the spouse must be violated. This violation occurs in the form of an objective decrease in the personality values of the spouse caused by the reasons that lead to divorce. For example, tarnishing the divorced spouse's name, health, honour and dignity is handled in this way¹⁴. Non-pecuniary compensation with the reason for divorce is introduced as an equalization tool to ensure that this objective reduction that has taken place can be reconstructed and completed¹⁵.

It is not necessary that the personality rights are severely damaged in order for this kind of compensation to be claimed¹⁶. Violation of personal rights is sufficient. The degree of violation is important in determining the amount of compensation¹⁷.

Whether the rights of personality are violated or not and whether it is possible to demand non-pecuniary compensation can be judged separately for each concrete case. This judgement takes into account factors such as the nature of the events, the environment they are in, violation of the present or expected benefit and the damage to the social status¹⁸. For instance, exposure to insults, violence and/or infidelity justifies the claim for non-pecuniary compensation¹⁹.

b) Defect. The first condition of a claim for non-pecuniary damage is defect. The claim for compensation is addressed to the defective spouse. The spouse (claimant spouse) does not have to be flawless²⁰. TCC art. 174 evaluates the defect of the claimant spouse not as an obstacle for the award of non-pecuniary damages but just as a reason for reduction of compensation or no compensation at all²¹.

The defect of a spouse emerges with behaviours that make marriage unbearable²². Insult, infidelity, violence, indifference towards spouses and children, and the prevention of relationships of the spouse and with relatives and friends are considered as justified divorce, and at the same time constitute a defect for the spouse²³. It is acknowledged that the response of the spouse who is exposed to such behaviour under unjust provocation such as insulting against a spouse who constantly violates or insults will not eliminate the possibility of claiming non-pecuniary damages²⁴. If the divorce is caused by a condition which is not attributable to the parties as in the case of mental illness, non-pecuniary compensation is not required²⁵.

¹³ Öztan, p. 825; Feyzioğlu, p. 405; Velidedeoğlu, p. 205; Köprülü/Kaneti, p. 193; Kılıçoğlu, p. 18.

¹⁴ Velidedeoğlu, p. 205; Köprülü/Kaneti, p. 194; Feyzioğlu, p. 405; Öztan, p. 829.

¹⁵ Öztan, p. 826; Akıntürk/Ateş Karaman, p.300; Velidedeoğlu, p. 206.

¹⁶ Öztan, p. 826; Akıntürk/Ateş Karaman, p. 299; Dural/Öğüz/Gümüş, p. 148. However, Former CC numbered 723. art. 143 / II allowed the claim for non-pecuniary compensation if the personality rights of the spouse in demand were severely violated.

¹⁷In justification of TCC art. 174/II the situation is explained as: Since the claimant is supposed to be flawless in every case where the defendant is supposed to be defective, no such requirement has been found necessary. If the claimant is found defective in divorce, it will lead to reduction of compensation or no compensation at all as a result of application of TCC art. 50 and subsequent provisions in accordance with the general provisions.

¹⁸ Köprülü/Kaneti, p. 193; Feyzioğlu, p. 406; Öztan, p. 831; Of, p.264.

¹⁹ SCACC 2., Dated. 06.03.2003, B. 1614/V. 3099; SCACC 2. Dated. 17.02.2003, B. 947/V. 1824 (Tutumlu, pp. 1276, 1277).

²⁰ Öztan, p. 826; Akıntürk/Ateş Karaman, p. 300; Dural/Öğüz/Gümüş, p. 148; Feyzioğlu, p. 407; Kılıçoğlu, pp. 18, 19; Tutumlu, p. 1272. On the other hand, former CC numbered 724 art. sought for the condition that the spouse claiming non- pecuniary compensation to be flawless.

²¹ Justification of TCC art. 174/II.

²² Feyzioğlu, p. 407

²³ YHGK. Dated 06.03.2013, B. 2012/2-707, V. 2013/303; YHGK. Dated. 15.10.2014, B. 2013/2-1156, V. 2014/753; YHGK. Dated 11.05.2016, B. 2014/2-936, V. 2016/597. (www.kazanci.com).

²⁴ Of, p. 261.

²⁵ Feyzioğlu, p. 407; Velidedeoğlu, p. 206; Köprülü/Kaneti, p. 193.

Non-pecuniary damage cannot be claimed if the parties are equally flawed²⁶. The decisions of the Court of Cassation indicate that compensation cannot be awarded in such a case²⁷. However, according to absence of perfection requirement for non-pecuniary compensation claim, there are also authors who argue that, non-pecuniary damage should be awarded in case of equal defect²⁸. In our opinion, if there is an equal fault, non-pecuniary damages shall not be awarded. The legislator does not require the defendant to be flawless and thus has made it easier to claim non-pecuniary compensation. Otherwise, the spouse who is equally defective is not given the opportunity to claim compensation.

c) Amount and form of non-pecuniary damage. The judge appreciates the amount of non-pecuniary damage. A compensation is awarded by taking into account the size, depth, form and defect rates of non-pecuniary damage, social and economic conditions and age of the parties, and duration of marriage in particular²⁹.

The amount of compensation must be proportional to the loss suffered, the party who pays the compensation should not be economically challenged and should be fair³⁰. We should also keep in mind that every divorce will not necessarily violate personality rights³¹. A higher compensation than the requested amount cannot be awarded because the judge is tied to the demand even with the right to more compensation being reserved³².

TCC. art. 174/II has clearly regulated what kind of compensation will be awarded. Accordingly, the compensation must be a certain amount of money. No other form of compensation can be decided³³. Likewise, irregular compensation in the form of income can not be awarded (TCC. art. 176). The compensation case must be opened separately with the divorce case or within one year after the divorce decision is finalized. One-year period is organized as a limitation period for the rights to sue arising from divorce law (TCC. art. 178).

5. Claim for non-pecuniary damage directed to the third party in relation with the unfaithful spouse by the cheated spouse

Non-pecuniary damage is of special importance for our subject of study, especially in the case of infidelity. Because compensation claim arising from another divorce has emerged with the application of Court of Cassation in Turkish law. This is the claim for compensation directed to the 3rd party in relation with the unfaithful spouse.

According to the Court of Cassation, the cheated spouse may request non-pecuniary compensation from the 3rd person with whom the unfaithful spouse has been in relation³⁴.

²⁶ Öztan, p. 830; Dural/Öğüz/Gümüş, p. 148.

²⁷ ACC. B. 2-120, V. 136, Dated. 13.02.2008; SCACC 2, Dated 06.05.2003, B. 5753/V. 6668; SCACC 2, Dated. 26.05.2003, B. 6799/V. 7640; SCACC 2, Dated 16.06.2004, B. 6820/V. 7919 (Tutumlu, pp. 1274, 1275).

²⁸ Of, p. 262.

²⁹ Öztan, p. 831; Tekinay, p. 272; Akıntürk/Ateş Karaman, p. 300; Of, p. 264. "Compared to economic and social conditions of the parties, purchasing power of money, personality rights, especially the degree of attack on family integrity or understanding that the person seeking compensation for non-pecuniary damage is not severely or equally flawed in the events leading to the divorce, the non-pecuniary compensation awarded for the benefit of women is scarce". SCACC 2, Dated 02.10.2003, B. 10811/V. 12638; "the court must award the amount of non-pecuniary damage appropriate to the benefit of the woman, taking into account the social and economic situation of the parties, the degree of the act of compensation and the rules of equity." SCACC 2, Dated 19.06.2003, B. 8083/V. 9158 (Tutumlu, p. 1278).

³⁰ Öztan, 830; Akıntürk/Ateş Karaman, p. 301.

³¹ Öztan, p. 828; Kılıçoğlu, p. 20.

³² Öztan, p. 831; Oğuzman/Öz, p.274.

³³ For, although other means may be an appropriate solution to any claim for compensation, such compensation, publication of the court ruling for instance, would have the effect of increasing the likelihood of suffering and aggravation. Tekinay, 272, fn. 23.

³⁴ Decision of SCACC dated 22.3.2017, B. 4-1334/V. 545 is summarized as follows: "The family, has been accepted as a society-based provision both in the Constitution and in the Turkish Civil Code and the provisions protecting the family have been included. The family is important not only for those who are members but also for society. Violations of family members' obligations to each other often affect public order, and protection measures are taken in the case of laws. It is inevitable that the emotional and sexual relationship established knowing that one is married gives damage to the family institution, and it is unthinkable that the defendant has not foreseen it. For this reason, the relationship with married people has long been considered a crime, and the family institution is also wanted to be protected in this way. The fact that such actions were removed from the offense during the later legal regulations will not remove the irregularity and thus the injustice of this action. The fact that an act does not constitute a criminal offense according to the criminal

Court of Cassation considers TCO art. 49/II as the basis for this claim. TCO art. 49/II holds the person, who deliberately harms someone else with an act that is contrary to morality, responsible for the damage. Moreover, even if there is no legal rule prohibiting damaging acts, compensation for damages is still necessary in such a case. It can be concluded from the decisions that establishing and maintaining a relationship when the unfaithful partner is aware of the marriage is regarded as an act contrary to morality. Establishment of a relationship being aware of the marriage carries the intentionally damaging element. In this framework, it is justified that a cheated spouse should also seek compensation from the partner of the unfaithful spouse. In fact, decisions of the Supreme Court are based on a view that has been advocated much earlier in the doctrine. According to this view, if the third party (partner) is aware of the fact that his/her partner is married, this is accepted as deliberate act and the other spouse may claim for non-pecuniary damage according to the provisions of TCO art. 49/II (former CO art. 41/II) and TCO art. 58 (former CO art. 49)³⁵.

This practice of the Supreme Court is criticized in the doctrine. The criticisms are based on the following reasons³⁶: Legally speaking, there is not a personality right that can be put forward against anyone in the form of a right not to be deceived by one's spouse. The loyalty obligations of spouses against each other are regulated in the Civil Code (TCC art.185/III). However, for persons other than spouses, even if they are lovers or partners, violating the loyalty obligation of spouses against each other is not in question. On the other hand, marriage is only a contract between spouses and cannot be regarded as a public status which the society should show respect. For this reason, "nobody out of the contract is obliged to respect marriage law of in this regard". Moreover, the Criminal Code does not regard adultery as a crime. It is also unacceptable to apply the provision of non-harm to another person (TCO. art. 49/II) in this case as the basis for non-pecuniary damage because in order to be able to do this, it is necessary to act only with the aim of harming the cheated wife. Granting the cheated spouse right to seek non-pecuniary compensation from the partner of the unfaithful spouse may also lead to strange results such as other types of relations being evaluated in this context. For all these reasons, practices of the Court of Cassation are not proper. However, if the case constitutes another attack on the personality rights of the cheated spouse, for example in case of words which damage his/her reputation or reveal secrets of married life, s/he may claim for non-pecuniary compensation from the third person (partner, lover) also according to TCO art. 58³⁷.

As controversial in Turkish doctrine, it is seen that claim of the cheated spouse for non-pecuniary compensation from the third party has, in fact, been rejected in some judicial decisions³⁸. In these decisions, the reasons for criticism in the doctrine have been used. For the solution of the question, it must be investigated which way is preferable. It should be noted that it is not right to reject such a claim from the very beginning. If the third person, with whom the unfaithful partner is in relation, has violated the honour and dignity of the cheated spouse, it should be considered independently of the act of infidelity and compensation may be claimed within the general provisions

law and the fact that the action is not regulated does not prevent it from being accepted as immoral or illegal according to the provisions of the Code of Obligations. Thus, extramarital affair of a married person is an attack on the values of the other spouse's social personality, and the action of the person participating in this action cannot be considered apart from this. Thus, extramarital affair of a married person is an attack on the values of the other spouse's social personality, and the action of the person participating in this action cannot be considered apart from this. Therefore, the other partner, who is aware of this marriage, is also responsible for the damage of the other spouse. According to the regulation form of Article 185 of the Turkish Civil Code, "Spouses show fidelity and help each other", extramarital affair of a married spouse is an attack on the other spouse's social personality values. As a result, according to the fact that the emotional and sexual intercourse of the defendant with the spouse of the claimant knowing that s/he is married is in the acceptance of the parties and the court; the responsibility of the defendant is due to the "action of tort" which is caused by the moral and the dishonesty and the legal basis of the case is based on the unfair facts. The other partner, who is included in the affair being aware of the marriage, is also responsible for the damage of the other spouse. It also does not matter whether or not the spouses are divorced because of this reason. For these reasons, the claimant spouse is in a position to award damages by the court in the concrete case, assuming responsibility for the action of the defendant as outlined."

(HGK. Dated 22.03.2017, B. 2017/4-1334, V. 2017/545). (www.kazanci.com).

³⁵ Velidedeoğlu, p. 260.

³⁶ Oğuzman/Öz, p. 259, 260. These criticisms put forth in the doctrine are also defended in the first-instance court decision, which was defeated by the above-mentioned ACC decision and in the black-balling letter of the same decision.

³⁷ Oğuzman/Öz, p. 261.

³⁸ SCACC. 4., Dated 07.06.2016, B.2016/ 196, V. 2016/7483; SCACC. 4., Dated 25.06.2015, B2014/9122, V. 2015/8585; SCACC. 4., Dated 11.06.2015, B. 2014/ 8510, V. 2015/7762. (www.kazanci.com).

(TCO, art. 58)³⁹. However, the question arises whether only the act of infidelity will justify such a claim or not. At this point, it is arguable whether the third person has the obligation to protect marriage, more precisely whether married spouses have family unity value that is included in the personality rights or not⁴⁰. The Swiss Federal Court has an earlier ruling that such a relationship would violate the personality right of the other spouse⁴¹. However, the Federal Court considered OR, regulating general claims of damages art.49, as the basis for claiming compensation (TCO, art. 58). At this point, the Court of Cassation bases on TCO. art. 49/II. Whether the provision that a person who deliberately harms someone with a verb contrary to morality is liable may be considered to constitute a basis for such a claim is debatable. For a person, having an intercourse with someone s/he knows to be married is against morality. However, taking into account that intention requires not only awareness but also desire for a harmful result, is being aware of the marriage enough to accept that the act is intentionally committed?⁴² When focused only on the element of awareness, borders of those who can be compensated can expand and even this demand becomes debatable even in terms of relations whose legal protection is debatable⁴³.

On the other hand, the fact that a result of probable compensation claim by children in such a case because of violation of personality rights is also suggested as a criticism⁴⁴. However, in the case which is the subject of decision dated 22.3.2017, B. 1334/V, numbered 545 of the Court of Cassation, ACC, the claim of children evaluated. In the decision, request of children was dealt with in the framework of former TCO art. 49 (TCO art. 58), and was rejected on the grounds that the liability set forth in this provision could not be extended and that non-pecuniary compensation could not be claimed through reflection.

6. Conclusion

Turkish Civil Code has issued non-pecuniary compensation as one of the financial consequences of divorce. This provision constitutes a special view of the general regulation on non-pecuniary damage (TCO, art. 58).

In accordance with TCC art. 174/II, in order to claim compensation for non-pecuniary damage, the divorce must have taken place, the divorce must have violated the spouse's personality rights and the spouse for whom compensation is sought must be deficient in divorce. While a serious defect is not sought for, it is not required that the wife who is in the demand is perfect.

If the divorce is caused by infidelity, the issue of divorced and cheated spouse's seeking non-pecuniary compensation also from the third person with whom the ex spouse was in relation is controversial. The Court of Cassation treats these requests positively. On the other hand, the doctrine argues that the third person cannot be charged with non-pecuniary compensation because he is in common with the act of infidelity only if there is no behaviour that violates the personality rights of an explicitly cheated wife.

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³⁹ Oğuzman/Öz, p. 261; Demircioğlu, p. 717.

⁴⁰ Demircioğlu, p. 716.

⁴¹ "The third person who has had extramarital affair with one of the spouses and thus harmed the marriage has violated the personality rights of the other spouse; in this case the other spouse may demand compensation for non-pecuniary damage to the extent that the degree of violation and defect is confirmed in accordance with CO 49 (TCO.art.58)". For the text of the resolution see Demircioğlu, p.702

⁴² Eren, p. 622; Von Thur, p. 379; Demircioğlu, p. 717.

⁴³ Demircioğlu, p. 717.

⁴⁴ Demircioğlu, p. 716.

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Abbreviations

ACC: Assembly of Civil Chambers
art.: article
B.: Basis
CC: Civil Chamber
DJC: Decision of Joint Chambers
fn.: footnote
SCACC:
p.: page
TCC: Turkish Civil Code
TCO: Turkish Code of Obligations
V.: Verdict