

MAKING ‘THE PRINCIPLE OF HONESTY’ (OBJECTIVE GOOD FAITH) MEASURABLE AND DATA-DRIVEN THROUGH THE THEORY OF ‘CONTRACT WITH THE EFFECT OF THIRD PARTY PROTECTION’: AN EXAMPLE FROM EUROPEAN CIVIL LAW COUNTRIES

Erman Benli*

Abstract: *The principle of honesty (objective good faith), as an ethical principle, is the basis of the theory of ‘contract with the effect of third party protection’ in civil law countries. According to the principle of relativity of contracts, damaged third parties, who are not parties to the contract, must apply to tort liability for compensation. However, breach of contract rules for damaged third parties are more advantageous in terms of burden of proof, lapse of time and liability for acts of associates. Therefore, the theory of ‘contract with the effect of third party protection’ helps damaged third parties to apply breach of contract rules for compensation within the framework of the principle of honesty. The problem is to determine in which particular situations can third parties benefit from the protection of ‘contract with the effect of third party protection’. Doctrine uses unmeasurable, non data-driven and speculative criteria called ‘social contact test’ (Schuldverhältnis aus Sozialem Kontakt) that is not consistent with economic efficiency, legal certainty and legal security. Alternatively, this paper offers a measurable and data-driven criteria to determine the number of beneficiaries (damaged third parties) of ‘contract with the effect of third party protection’. Alternative criteria measures the inequality between loss of damaged third parties and monetary value of accepted risk which is determined by a public survey (‘wisdom of crowd’). Data-driven or data-based determination and interpretation of the number of damaged third parties who can benefit from the theory of ‘contract with the effect of third party protection’ makes the principle of honesty measurable that ensures economic efficiency, legal certainty and legal security. Our proposed method is better than actual determination and interpretation of principle of honesty by judges. In other words, our proposed method helps judges to make the the principle of honesty measurable and data-driven where legal order allows it.*

Keywords: *honesty, protection, damaged third parties, risk, public survey, civil law*

INTRODUCTION

The principle of honesty¹ is an ethical principle, but it is involved in the scope of legal ethics after it is regulated in the codes as a corrective principle while exercising rights and obligations. The principle of honesty, also known in Roman Law, was developed by the German Pandectists. There were mottos in times of Roman Law itself to elevate the principle of honesty:

Celsus D. 6.1.38: ‘Neque malitiis indulgendum est’ (the law makes no allowance for chicanery)

Gaius’ Instituones 1.53: ‘Male enim nostro iure uti non debemus’ (we must not use our right to the harm of another)

* Assistant Professor, Erman Benli. Social Sciences University of Ankara Faculty of Law, Ankara, Turkey

¹ We prefer to use the term “principle of honesty” instead of good faith that indicates objective good faith which is no longer in use in Turkey. Former Turkish Civil Code separated good faith as objective good faith and subjective good faith. Objective good faith indicated good faith which is now regulated by new TCC art. 2/1 that we named “principle of honesty”. Subjective good faith is regulated under art. 3 which is not relevant with the principle of honesty.

Dig., l. 50, t. 17, fr. 55: ‘Nullus videtur dolo facere, quisuo iure utitur’ (No one is deemed to work a fraud, who exercises his own right)

The principle of honesty has mainly three functions. First and second functions are complementary and corrective function called ‘*aequitas*’. Third function helps to determine the debtor’s obligation called ‘*bona fides*’.² The principle of honesty aims to eliminate the injustices caused by strict adherence to the legal positivism. The principle of honesty plays an important role in the following:

When parties exercise their rights and obligations arising from legal transactions and/or laws,

In case of interpretation and completion of a legal transaction or a legal norm,

In case of determining subsidiary obligation in ‘debt with consideration’,

In case of determining the obligations of due diligence and protection arising from “debt without consideration”, e.g. ‘contract with the effect of third party protection’,

In case of determining the content of negligence (due care),

In case of judge’s discretionary power.

Turkish-Swiss Civil Codes³ art. 2/1 regulates the principle of honesty⁴ as a mandatory rule.⁵ In addition to this, art. 2/2 of the Turkish-Swiss Civil Codes governs the prohibition of abuse of rights.⁶ It was originated from the principle of honesty, so it was needless to be regulated separately. The prohibition of abuse of rights is no more than *lex specialis* (Akyol, 2006: 4). Germany, as the birthplace of ‘contract with the effect of third party protection’, regulate the principle of honesty with three different legal rules in its German Civil Code (*Bürgerliches Gesetzbuch*, BGB) § 157,⁷ 226⁸ and 242.⁹ Interpretation of contracts is ruled under BGB § 157 according to the principle of honesty.¹⁰ BGB § 242 states that the debtor must perform his debt in accordance with the principle of honesty.¹¹ BGB § 226 regulates the abuse of rights.¹² BGB § 157 and 242 correspond to Turkish-Swiss Civil Codes art. 2/1, and BGB § 226 corresponds to Turkish-Swiss Civil Codes art. 2/2. The principle of

² AKYOL, Ş. *Dürüstlük Kuralı ve Hakkın Kötüye Kullanılması Yasağı* (The Rule of Honesty and the Prohibition of Abuse of Rights). İstanbul: Vedat, 2006, p. 1; EREN, F. *Borçlar Hukuku: Genel Hükümler* (Law of Obligations: General Provisions). Ankara: Yetkin, 2015, p. 19.

³ Turkish Civil Code and Turkish Code of Obligations are based on a Swiss model.

⁴ See the footnote No. 1 for the reason why we prefer to use the term “principle of honesty”.

⁵ Swiss version (literal) of this rule: “Everyone must, in the exercise of his rights and in the performance of his duties, act with truth and faith.” Turkish version (literal) of this rule: “Every person must abide to the rules of honesty while exercising his rights and in the performance of his obligations.”

⁶ Turkish and Swiss versions (literal) of this rule are identical: “The open misuse of a right finds no protection in the law.”

⁷ ‘*Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.*’ (Contracts are to be interpreted as required by honesty, taking customary practice into consideration).

⁸ ‘*Die Ausübung eines Rechts ist unzulässig, wenn sie nur den Zweck haben kann, einem anderen Schaden zuzufügen.*’ (The exercise of a right is not permitted if its only possible purpose consists in causing damage to another).

⁹ ‘*Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.*’ (A debtor has a duty to perform according to the requirements of honesty, taking customary practice into consideration).

¹⁰ BOEMKE, B., ULRICI, B. *BGB Allgemeiner Teil*. Heidelberg: Springer, 2009, pp. 107–108.

¹¹ *Ibid.*, pp. 57–58.

¹² *Ibid.*, p. 396.

honesty is not only implemented in private law, but also used in public law in Germany. Furthermore, the principle of honesty is also embraced in French Civil Code (*Code Civil des Français*) art. 1104.¹³

If the content of the principle of honesty is determined with moral values rather than measurable and data-driven tools, it causes arbitrariness, because each judge has their own moral value that endanger legal certainty and legal security. In order to eliminate this problem, quantitative criteria (methods) must be used in the cases based on the principle of honesty instead of qualitative, speculative and literal criteria. Therefore, this paper aims to develop a measurable and data-driven criteria alternative to doctrine's 'social contact test' to determine the scope of 'contract with the effect of third party protection' that originates from the principle of honesty. Thus, it ensures economic efficiency, legal certainty and legal security.

Part I surveys related literature. Part II offers an alternative quantitative criteria to doctrine's 'social contact test'. Part III presents overall conclusions.

1. LITERATURE REVIEW

In accordance with the principle of relativity of contracts,¹⁴ damaged third parties, who are not parties to the contract, must refer to tort liability for compensation.¹⁵ However, depending on breach of contract rules is more advantageous than tort rules for damaged third parties in terms of burden of proof, lapse of time and liability for acts of associates.¹⁶ Since, burden of proof passes to opposite side according to breach of contract rules (e.g. Turkish Code of Obligations, TCO art.112 et seq.) whereas it remains with third parties in case of tort liability (e.g. TCO art.49 et seq.). Second, lapse of time is ten years for contractual liability (TCO Art. 146), but it is two years for torts (TCO Art. 72). Third, if an employee harms third person, TCO Art. 116 (Liability for acts of associates)¹⁷ is applied in the case of contractual liability. On the other hand, TCO Art. 66 (Liability of employer) is applied in the

¹³ 'Les contrats doivent être négociés, formés et exécutés de bonne foi.' (Contracts must be negotiated, formed and executed in good faith).

¹⁴ VON TUHR, A. *Borçlar Hukuku (Law of Obligations)*. Ankara: Olgac, 1983, p. 9–10; TANDOĞAN, H. *Üçüncü Şahsın Zararının Tazmini (Compensation of Third Party Damage)*. Ankara: Ajans-Türk Matbaası, 1963, p. 20 et seq.; TEKİNAY, S. S. *Borçlar Hukuku (Law of Obligations)*. İstanbul: İstanbul University Faculty of Law Press, 1974, pp. 15 and 57; OĞUZMAN, M. K., ÖZ, T. *Borçlar Hukuku: Genel Hükümler (Law of Obligations: General Provisions)*. İstanbul: Vedat, 2010, p. 17; KOCAYUSUFPAŞAOĞLU, N. *Borçlar Hukukuna Giriş – Hukuki İşlem – Sözleşme (Introduction to Law of Obligations-Legal Transaction-Contract)*. İstanbul: Filiz, 2017, p. 15 et seq.; LEISTNER, M. *Richtiger Vertrag und Lauterer Wettbewerb*. Tübingen: Mohr Siebeck, 2007, p. 179.

¹⁵ OĞUZMAN, M. K., ÖZ, T. *Borçlar Hukuku: Genel Hükümler (Law of Obligations: General Provisions)*. p. 824.

¹⁶ TEKİNAY, S. S. *Borçlar Hukuku (Law of Obligations)*. p. 740; OĞUZMAN, M. K., ÖZ, T. *Borçlar Hukuku: Genel Hükümler (Law of Obligations: General Provisions)*. p. 824; EREN, F. *Borçlar Hukuku: Genel Hükümler (Law of Obligations: General Provisions)*. p. 396; KARABAĞ BULUT, N. *Üçüncü Kişiyi Koruyucu Etkili Sözleşme (Contract with the Effect of Third Party Protection)*. İstanbul: On İki Levha, 2009, p. 8 et seq.

¹⁷ TCO art. 116: "Even if the obligor commits the performance or the use of rights related to obligation to the associates such as people living together with him or his workers in accordance with the law, he shall be liable to compensate the damages caused by them during the performance of the business. The liability for acts of associates may be lifted fully or partially by agreements in advance. If a service that requires specialization, a profession or an art can only be performed by the permission of law or competent authority, the agreements on exclusion of obligor's liability for acts of associates in advance are definitely void."

case of tort liability. For third party compensation, TCO Art. 116 is better to apply than TCO Art. 66. Since, the employer will not be liable if he proves that he exercised all reasonable care when selecting the person employed, instructing him regarding his task, supervising and controlling him in order to avoid the loss and damage according to TCO Art. 66/2. Therefore, it is more beneficial for damaged third parties to apply breach of contract rules for compensation, but the principle of relativity of contracts does not permit it. However, earlier decisions of the German Imperial Court and the German doctrine overcame this problem with a new theory called ‘contract with the effect of third party protection’.¹⁸ This theory offers a great opportunity to damaged third parties. Because they can apply breach of contract rules for compensation instead of tort rules, even if they are not parties to the contract and even the contract is unconcluded, invalid or terminated.¹⁹ It was a significant development in law of obligations. This theory became an exception to the principle of relativity of contracts²⁰ that later influenced Turkish doctrine and practice.²¹

Homeowner sent his mechanic to his tenant to repair something. While the mechanic was doing his job, he suddenly damaged tenant’s wife, children and servant. German Imperial Court decided that even if they were not parties to the contract, damaged third parties (wife, children and servant) was allowed to apply breach of contract rules for compensation.²² It was the case that the German Imperial Court decided first time to accept the theory of ‘contract with the effect of third party protection’. Another case was about car rental agreement. One day, a man rented a car and he took his friends for a ride in his

¹⁸ EREN, F. *Borclar Hukuku: Genel Hukumler (Law of Obligations: General Provisions)*. p. 1152.

¹⁹ LARENZ, K. *Lehrbuch Des Schuldrechts: Allgemeiner Teil*. Munchen: Beck Verlag, 1987, p. 109; CANARIS, C. W. *Anspruche Wegen ‘Positiver Vertragsverletzung’ und ‘Schutzwirkung fur Dritte’ Bei Nichtigten Vertragen: Zugleich ein Beitrag zur Vereinheitlichung der Regeln uber die Schutzpflichtverletzungen. Juristische Zeitung*, 1965, pp. 475–482, p. 476; ESSER, J., SCHMIDT, E. *Schuldrecht, Allgemeiner Teil*. Heidelberg: Muler Juristischer Verlag, 1984, p. 92; AKYOL, Ş. *Durustluk Kuralı ve Hakkın Kotuye Kullanılması Yasası (The Rule of Honesty and the Prohibition of Abuse of Rights)*. p. 56; SEROZAN, R. *Edim Yukumlerinden Bağımsız Borç İlişkisi (Debts Without Consideration)*. *Mukayeseli Hukuk Araştırmaları Dergisi (Journal of Comparative Legal Research)*. 1968, Vol. 2, No. 3, pp. 108–129, p. 119; EREN, F. *Borclar Hukuku: Genel Hukumler (Law of Obligations: General Provisions)*. p. 1058.

²⁰ There are other exceptions that are regulated in TCO art. 129, 322/3 and 507/3. art. 129 rules the contract in favor of a third party: “Where a party concludes a contract on his behalf and adds an obligation into it to the advantage of a third party, he may demand the performance of the debt to the third party. The third party and legal successors of the third party may demand the performance of the debt as long as it is suitable to the aim of parties or customs. Under these conditions, after the third party and his legal successors notify their demand on use of that right, the creditor cannot discharge the obligor or cannot change the characteristics or scope of the debt.” Article 322/3 includes sublet and transfer of tenancy: “In the case where the subtenant uses the leasehold in a manner other than that was permitted to the lessee, the lessee shall be responsible to the Lessor. In such a case, the Lessor may use its rights concerning the lessee, against the tenant or any party which had taken over the tenancy.” Article 507/3 regulates that “In both cases, claims held by the agent against the third party may be enforced by the principal directly against the third party.”

²¹ Turkish Court of Cassation accepted the theory with a decision so called ‘Bottled gas explosion’. See the Assembly of Civil Chambers’ decision dated 6.5.1992 and no. 1992/315. Although, Turkish Court of Cassation did not directly refer to ‘contract with the effect of third party protection’, its landmark decision dated 30.5.1940 and no. 27 was the first step before its acceptance of the theory in 1992. Turkish Court of Cassation decided in its landmark decision that a worker can apply to TCO art. 116 (Liability for acts of associates) against his employer, if he is damaged by his workmate.

²² SEROZAN, R. *Edim Yukumlerinden Bağımsız Borç İlişkisi (Debts Without Consideration)*. pp. 113–114.

car. Unfortunately, his friends were damaged for reasons caused by the car. German Imperial Court followed its precedent and decided that damaged third parties (friends) could apply breach of contract rules for compensation against Lessor, even if they were not parties to the car rental agreement.²³

The logic of 'contract with the effect of third party protection' is that contracting parties have obligations not only to each other but also to third parties to keep them away from damage. This is called 'obligation to protect'²⁴ that results from the principle of honesty.²⁵ In principle, subject of debt is consideration, but not always. Some debts may not include consideration or it is called 'debt without consideration' (*Schuldverhaeltnisse ohne Leistungspflicht*).

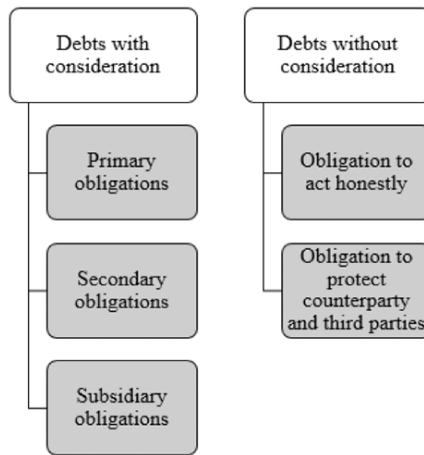


Figure 1: Obligations of contracting parties

1.1 Debt With Consideration (Obligation to Perform)

Obligation to perform is divided into three obligations which are primary, secondary and subsidiary obligations. Primary obligation determines the character of legal transaction. For example, a sale contract is a contract whereby the seller undertakes to transfer the item sold and ownership of it to the buyer who in return shall pay the sale price to the seller (TCO art. 207/1). On the other hand, for instance, compensation liability for faulty

²³ SEROZAN, R. *Edim Yukumlerinden Bağımsız Borç İlişkisi (Debts Without Consideration)*. p. 114.

²⁴ STOLL, H. *Die Lehre Von Den Leistungsstörungen*. Tübingen: Paul Siebert Verlag, 1936, pp. 10 and 27.

²⁵ *Ibid.*, p. 25; LARENZ, K. *Lehrbuch Des Schuldrechts: Allgemeiner Teil*. p. 9; CANARIS, C. W. *Ansprüche Wegen 'Positiver Vertragsverletzung' und 'Schutzwirkung für Dritte' Bei Nichtigen Verträgen: Zugleich ein Beitrag zur Vereinheitlichung der Regeln über die Schutzpflichtverletzungen*. p. 478; ESSER, J., SCHMIDT, E. *Schuldrecht, Allgemeiner Teil*. p. 86; OĞUZMAN, M. K., OZ, T. *Borçlar Hukuku: Genel Hukuklar (Law of Obligations: General Provisions)*. p. 824; EREN, F. *Borçlar Hukuku: Genel Hukuklar (Law of Obligations: General Provisions)*. p. 40; KARABAĞ BULUT, N. *Üçüncü Kişiyi Koruyucu Etkili Sözleşme (Contract with the Effect of Third Party Protection)*. pp. 74–75.

impossibility, the obligation to return the subject of the debt upon the termination of the permanent debt relations are secondary obligation in a contractual relationship. In addition to primary and secondary obligations, subsidiary obligation may exist in a debt relationship. The function of subsidiary obligation is to help fulfillment of primary obligation in accordance with the purpose of the contract. For example, obligations for packaging and insurance are called subsidiary obligations. Primary, secondary and subsidiary obligations are about the performance of concrete consideration.

1.2 Debt Without Consideration

Debt without consideration is based on the principle of honesty. Thus, it is divided into two obligations independent from the obligations to perform.²⁶ Contracting parties oblige to act honestly and to protect counterparty and third parties as well. Specifically, contracting parties must keep third parties away from damage while exercising rights and obligations. The main difference between obligation to perform and debt without consideration is that the former only exists during the period of contract relationship. It starts with the conclusion and ends up with the termination of the contract. On the other hand, the latter begins to emerge before the conclusion of a contract and it remains after the termination. In the period of contract negotiation, parties' obligations without consideration starts in terms of acting honestly and to protect counterparty and third parties. This period is called a liability of 'culpa in contrahendo'.²⁷ The reflection of the same logic also occurs after termination called 'culpa post pactum perfectum'.²⁸

The problem here is to determine the content or boundries of 'contract with the effect of third party protection'. Doctrine refers a concept of 'social contact' (*Schuldverhältnis aus Socialem Kontakt*) in order to legitimize the compensation of damaged third parties. In that respect, doctrine uses a 'social contact test' to determine how many people can apply to 'contract with the effect of third party protection'.²⁹ It mainly requires three criteria as following.

1. Damaged third parties should be close to consideration/performance and should be within the danger area of debtor's consideration/performance.
2. Damaged third parties must deserve to be protected or in other terms they must have a protection worthy of interest.

²⁶ AKYOL, Ş. *Durustluk Kuralı ve Hakkın Kotuye Kullanılması Yasağı (The Rule of Honesty and the Prohibition of Abuse of Rights)*. p. 46.

²⁷ LARENZ, K. *Lehrbuch Des Schuldrechts: Allgemeiner Teil*. p. 106 et seq.; ESSER, J., SCHMIDT, E. *Schuldrecht, Allgemeiner Teil*. p. 435 et seq.; DEDEK, H. *Negative Haftung Aus Vertrag*. Tubingen: Mohr Siebeck, 2007, p. 161 et seq.; HUGUENIN, C. *Obligationenrecht: Allgemeiner Teil*. Zurich: Schulthess, 2006, p. 148 et seq.; VON TUHR, A. *Borclar Hukuku (Law of Obligations)*. pp. 197–198; TEKİNAY, S. S. *Borclar Hukuku (Law of Obligations)*. p. 737 et seq.; EREN, F. *Borclar Hukuku: Genel Hukumler (Law of Obligations: General Provisions)*. p. 1128 et seq.; OĞUZMAN, M. K., OZ, T. *Borclar Hukuku: Genel Hukumler (Law of Obligations: General Provisions)*. p. 321 et seq.

²⁸ LARENZ, K. *Lehrbuch Des Schuldrechts: Allgemeiner Teil*. p. 142; OĞUZMAN, M. K., OZ, T. *Borclar Hukuku: Genel Hukumler (Law of Obligations: General Provisions)*. p. 35.

²⁹ KOCAYUSUFPAŞAOĞLU, N. *Borclar Hukukuna Giriş – Hukuki İşlem – Sözleşme (Introduction to Law of Obligations-Legal Transaction-Contract)*. pp. 22–23; KARABAĞ BULUT, N. *Ucuncu Kişiyi Koruyucu Etkili Sözleşme (Contract with the Effect of Third Party Protection)*. p. 101 et seq.

3. First and second conditions must be known or at least able to be known by one of contracting parties who is blamed as maleficent or perpetrator.

Any damaged third party can benefit from 'contract with the effect of third party protection', if he or she pass the 'social contact test'. In this case, damaged third parties can apply breach of contract rules for compensation instead of tort liability.³⁰

2. MEASURABLE AND DATA-DRIVEN ALTERNATIVE TO 'SOCIAL CONTACT TEST'

Doctrine's 'social contact test' is inconsistent with the principles of economic efficiency, legal certainty and legal security,³¹ because it is unmeasurable, non-data-driven and speculative. This paper aims to design a measurable and data-driven criteria to achieve relevant principles for damaged third parties. It is very hard or mostly impossible to measure the criteria of 'social contact test'. So that this paper offers a measurable and data-driven criteria based on a risk assessment method. In this method, what is determined is the monetary value that public request to accept the risk. It can be hypothetically determined by courts asking to public via survey depending on real cases, facts or theoretical scenarios. Actually, public survey can be conducted by expert survey firms that can be appointed by the courts during litigation process. We think that public survey does not extend the litigation process, rather it shortens the process because expert survey firms are highly professional to provide for tailor-cut surveys. Thus, professional public survey conducted by expert firms can have positive influence on the efficacy of litigation process (procedural efficiency) and content of the court decisions. In this context, the content and the procedure of the public survey should be designed in accordance with particular cases, e.g. the number of people who were questioned or on the locality they live. Further, in survey method, various perception of risks such as education, income, sex, age, proficiency etc. can be classified and normalized in terms of samples. We claim that this is an innovative method for making the principle of honesty measurable and data-driven on the example of the 'contract with the effect of third party protection'. In this paper, we just aim to propose a framework in order to apply an empirical method for particular cases by judges via expert survey firms. Proposed method does not claim to provide totally perfect technique, but it is a better alternative to doctrine's 'social contact test' for many thinkable situations. Moreover, our method is not arbitrariness like 'social contact test'. Since survey method is one of the popular research method in the social sciences. It is the most appropriate method for legal practice, because it provides reliable results and based on the 'wisdom of crowd'³² rather than 'wisdom of the judge or judicial bureaucracy'. The 'wisdom of crowd' is the most efficient way of determining the monetary value of the risk.

³⁰ OĞUZMAN, M. K., OZ, T. *Borclar Hukuku: Genel Hukumler (Law of Obligations: General Provisions)*. p. 825.

³¹ For example, in the Swiss doctrine, Thévenoz draws attention to the theory of 'contract with the effect of third party protection' that it must enhance the principle of legal security. See THÉVENOZ, L. *Commentaire Romand: Code Des Obligations I*. Bâle: Helbing Lichtenhahn, 2012, N., pp. 48–49.

³² I borrowed the phrase from Prof. Saul Levmore. He used this phrase in his 'Public Choice' lecture that I attended in 2017 held by Coase-Sandor Institute for Law and Economics and The University of Chicago Law School. Prof. Levmore used this phrase specifically for 'Wikipedia', but it can be extended to public surveys and experiments.

After collecting data from survey, it is time to calculate the monetary value that public request to accept the risk. In the final stage, loss of damaged third parties and the monetary value of accepted risk is compared. If loss is greater than the monetary value of accepted risk, damaged third parties can apply breach of contract rules for compensation in accordance with the ‘contract with the effect of third party protection’. However, if loss is less than or at least equal to the monetary value of accepted risk, damaged third parties cannot be benefited from the advantageous of ‘contract with the effect of third party protection’, they must apply to tort liability for compensation.

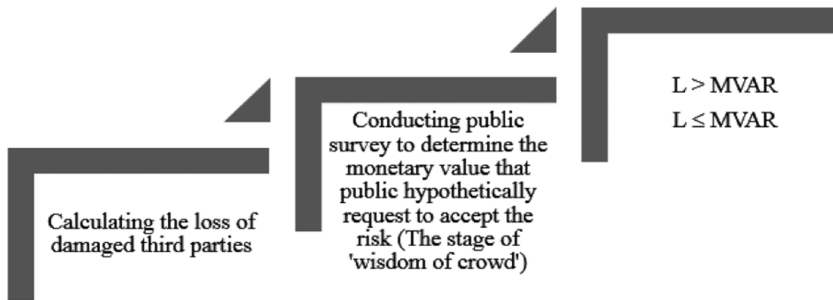


Figure 2: Steps of measurable and data-driven criteria

According to a case held by Turkish Court of Cassation in 1992, (A) bought a bottled gas from (T). While (A) was using his bottled gas, she realized that it was defective. She asked for help from (F) to repair it. While (F) was repairing, bottled gas suddenly exploded and (F) was seriously injured. (F) sued (T) for compensation referring to breach of contract rules. In this case, even if (F) was not a party to ‘bottled gas sale contract’ made between (A) and (T), he referred to breach of contract rules instead of tort liability. In its assessment, Turkish Court of Cassation applied doctrine’s ‘social contact test’ and decided that although (F) was not a party to the contract, he was close to the danger area of the (T)’s consideration/performance and (F) had a protection worthy of interest. Consequently, Turkish Court of Cassation decided that (F) was allowed to benefit from the advantageous of ‘contract with the effect of third party protection’ within the rules of breach of contract. Court’s assessment is not realistic, because the Court did not refer to ‘wisdom of crowd’ to determine the applicability of ‘contract with the effect of third party protection’. Rather the Court was based on a qualitative/unmeasurable analysis contrary to the principles of economic efficiency, legal certainty and legal security. It would be consistent with the relevant principles if the Court first calculated the loss of damaged third parties and then to conduct a public survey based upon real cases, facts or theoretical scenarios to determine the monetary value that public hypothetically request to accept the risk. In the final stage, the Court compares the loss and monetary value of accepted risk. If loss is greater than the monetary value of accepted risk, (F) can apply breach of contract rules for compensation in accordance with the ‘contract with the effect of third party protection’. However, if loss is less than or at least equal to the monetary value of accepted risk, (F) must apply to tort liability for compensation instead of ‘contract with the effect of third party protection’.

Another issue discussed in the doctrine is whether the harm suffered by the guest can be compensated within the theory of 'contract with the effect of third party protection'. According to the doctrine, the 'intensity of danger' is the criteria whether or not the guest has a protection worthy of interest. Thus, if the number of visit increases, intensity of danger raises. In such cases, doctrine allows damaged guests to compensate the harm applying breach of contract rules that are based upon the theory of 'contract with the effect of third party protection'. However, the number of visit is not an efficient tool to measure the intensity of danger. Since, how many visits do we take into account? Is there a definite number for this? Five, ten, fifteen or twenty five? Therefore, this approach in the doctrine cannot solve the problem of which damaged guests can benefit from the protection of the theory of 'contract with the effect of third party protection'. Comparison between loss of damaged guests and publicly determined monetary value of the risk is a better way to which damaged guests can benefit from the protection of the theory of 'contract with the effect of third party protection' independent from the intensity of danger.

3. CONCLUSION

The principle of honesty is the legal basis of 'contract with the effect of third party protection' in civil law countries. According to the principle of relativity of contracts, damaged third parties, who are not parties to the contract, must refer to tort liability for compensation. However, breach of contract rules for damage third parties are more advantageous in terms of burden of proof, lapse of time and liability for acts of associates. Therefore, 'contract with the effect of third party protection' helps damaged third parties to apply breach of contract rules for compensation within the framework of the principle of honesty. The problem is to determine in which particular situations can third parties benefit from the protection of 'contract with the effect of third party protection'

Doctrine uses unmeasurable, non data-driven and speculative criteria called 'social contact test' that is not consistent with economic efficiency, legal certainty and legal security. Alternatively, this paper offers a measurable and data-driven criteria to determine the number of beneficiaries (damaged third parties) of 'contract with the effect of third party protection'. Alternative criteria measures the inequality between loss of damaged third parties and monetary value of accepted risk which is determined by public survey ('wisdom of crowd'). Data-driven or data-based determination and interpretation of the number of damaged third parties who can benefit from the theory of 'contract with the effect of third party protection' makes the principle of honesty measurable that ensures economic efficiency, legal certainty and legal security. Our proposed method is better than actual determination and interpretation of principle of honesty by judges. Since, discretion of judges is determined by scientific methods rather than moral values. So that our proposed method helps judges to make the the principle of honesty measurable and data-driven where legal order allows it.

There is no specific legal regulation on how to determine or interpret the content of the principle of honesty, thus it should be determined and interpreted via measurable and data-driven methods instead of doctrine's literal-based speculative criteria called 'social contact test'.