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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

The Scope and Limits of the Right to Sport in Turkish Law

Türk Hukukunda Spor Hakkının Kapsam ve Sınırları

Taner Ayanoglu[1]

Abstract
Today, sport has important functions which are not limited to human biology but also reflected in social, cultural, psychological, economic and many other activities. Sport activities, which are an indispensable activity in the life of individuals, must be accepted among the fundamental rights and freedoms protected by the legal order. The right to sport includes, on the one hand, the right and freedom of persons to exercise, and on the other hand, requests from the State to take measures to improve physical and mental health. Although this right is not explicitly regulated in the Constitution, the right to sport is considered to be a constitutional right and freedom, since the various rights and freedoms regulated and guaranteed by the Constitution include the right to sport. The right to sport, however, is not an unlimited right and freedom in either dimension. The right to sport may be restricted due to special restrictions in the Constitution.

Keywords
Human rights and freedoms, Right to sport, Public service, Social rights, Sports federations

Öz
Günümüzde spor, insanın biyolojisi ile sınırlı kalmayan, aynı zamanda sosyal, kültürel, psikolojik, ekonomik ve diğer birçok alandaki faaliyetlerine de yansıyan önemli işlevlere sahiptir. Kişilerin yaşamında vazgeçilmez bir etkinlik olan sportif faaliyetlerin, hukuk düzeni tarafından korunan temel hak ve özgürlükler arasında kabulü zorunlu olmaktadır. Spor hakkı, bir yandan kişilerin spor yapma hak ve özgürlüğüne sahip olmalarını, öte yandan da kişilerin Devletten beden ve ruh sağlığını geliştirecek tedbirleri almasına ilişkin talepte bulunmalarını içermektedir. Bu hak, Anayasa'da açıkça düzenlenmemiş olmakla, Anayasa düzenlenen ve güvence altına alınan çeşitli hak ve özgürlükler spor hakkını da içermekte olduğundan, spor hakkının anayasal bir hak ve özgürlük olduğu kabul edilir. Bununla birlikte, spor hakkı her iki boyutuyla da sınırsız bir hak ve özgürlük değildir. Anayasada yer alan özel sınırlama sebepleriyle spor hakkı sınırlanabilir.

Anahtar Kelimeler
İnsan hak ve özgürlükleri, Spor hakkı, Kamu hizmeti, Sosyal haklar, Spor federasyonları

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The Scope and Limits of the Right to Sport in Turkish Law

Introduction

In ancient times, for human beings, physical mobility was one of the most important talents of survival. In this way, mankind tried to eliminate the weaknesses against other living beings and gained power and sovereignty against nature. He later developed this by using tools such as bows and arrows, thereby gaining a relative advantage. In the early years of human history, sporting activities aimed at meeting the natural needs became a sociological phenomenon in itself by gaining a social dimension and training of the body in later times[1].

Sports is an activity carried out for a wide variety of purposes. Individuals can engage in sports activities in order to be physically and mentally healthier, to spend their leisure time, to communicate with other individuals, or to compete or achieve competitive results[2].

Today, sport has important functions which are not limited to human biology but also reflected in social, cultural, psychological, economic and many other activities. For this reason, it can be said that sport is an indispensable phenomenon that is interested in almost every aspect of human life. Whether sports, which have a multidimensional effect on people's lives, constitute a right and a freedom is an important field of study that needs to be addressed. In this article, we will briefly discuss the constitutional basis, scope and limits of the right to do sports in Turkish Law, and what are the duties assigned to the State in this regard.

I. Basic Characteristics of Sportive Activities and Its Relationship with Human Rights and Freedoms

Sports is a kind of activity that is unique to people. In living things, only people enjoy and enjoy some movements and activities. Camel wrestling, cockfighting, dog racing and horse racing do not indicate that animals are engaged in sports[3]. While some of the animals' behaviors are perceived as sports, no animal competes with the other because the movements of the animals are determined by instinct. Therefore, it is necessary to accept that only people do sports and animals do not do sports.

The need to act is a requirement of the human being's structure. Like all living things, human beings have needs, and as a Bio-Psycho-Social being, they make actions to meet their basic needs specific to these characteristics. Human beings are obliged to act

1 M Y Şahin and A F İmamoğlu, 'Akademisyenlerin ve Milletvekillerinin Spor Siyaset Etkileşimine Yönelik Görüşleri' (2011) GBESBD Vol. XVI, Iss. 2, 42.

2 Hatice Özdemir Kocasakal, *Sportif Uyuşmazlıkların Tahkim Yoluyla Çözümü ve Spor Tahkim Mahkemesi (CAS)* (Vedat 2013) 1.

3 Atilla Erdemli, 'Spor nedir?' in Kısmet Erkiner (eds), *Spor Hukuku Dersleri (*Kadir Has University Press, 2007) 13.

multidimensional. In this context, human beings, from work to nutrition, sexuality to daily activities in many activities to meet the specific needs of all the time. To see man as a body only is to see man as incomplete. Human is a Bio-Psycho-Social entity, and movement is functional in all areas of human life. Therefore, unlike animals, human beings can make multi-faceted and multi-purpose movements. On the one hand, one makes the movements necessary for his/her biological life, on the one hand performs different tasks according to his/her responsibilities and duties towards himself/herself and other people close to the distant, on the one hand, he/she enters into different behaviors for his/her own spiritual needs, take part in different activities for higher lives[4].

There is also the phenomenon of physical movement at the basis of human activities defined as sports. Sports, above all, are the activities that people perform in the form of physical movements. As a matter of fact, according to Article 2.1.a of The European Sports Charter, "*Sport means all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels"*[5].

However, although some of the bodily movements that people make to meet their various needs can be defined as sports activities, most of them are not considered as sports activities. It is not possible to define activities that people do not do sports for sports. For example, the work of a construction worker or taxi driver or the actions of a student's to go to school on foot or by bicycle is not considered as sporting activity. Because the purpose of such actions is not to do sports. Physical movements are defined as sporting activities only when they are carried out for the purpose of doing sports, which is, improving physical and mental health. Sometimes the activities that people do for sports may indirectly result in improving their physical and mental health. However, they cannot be considered as sports because they are not carried out for sports.

Sports is essentially an amateur action. The word amateur, comes from the root of "amare" in Latin, meaning love. Amateurism in sport refers to the fact that physical and physical activity constituting sport is loved because it is not done for another purpose, for example, for making money. However, in the adventure of sport in the 20th century, the fact that sporting activities were carried out with the aim of earning money emerged and thus professional sports emerged. In professional sport, sportive activity is carried out as a professional activity. In other words, a professional athlete has the status of "worker" who performs a certain sport as a profession. As a result, nowadays, the fact that sport is an amateur action in essence is not considered as an obstacle for the sport to be performed professionally[6].

4 ibid 13, 14.

5 <https://rm.coe.int/16804c9dbb> accessed 1 November 2019.

6 Erdemli, Spor nedir? (n 3) 19.

It is unthinkable that sports activities of people do not constitute the subject of law. Therefore, two questions arise when sport meets law: "*Do individuals have the right to make sports?*" And "*Is there such a thing as sports law?*"[7].

Whether it is in the form of physical and mental health, or in the form of acts of a profession, sportive activities are extremely important for the biological, psychological, sociological and economic existence and survival of people. For this reason, sporting activities should constitute a "right" for the people and be protected by the legal order. Nowadays, the legal relations created by sporting activities are mainly related to private law branches such as contract law, association law, corporate law, liability law, and may require the application of other law areas such as administrative law, tax law, criminal law and social insurance law[8]. Therefore, it is necessary to accept that people have the right to play sports, both in terms of their civil rights and as a person[9].

Sport, which is an activity that will last throughout a person's life and an indispensable and inevitable necessity in his bio-psycho-social and cultural life, is also in direct and indirect interaction with other aspects of human life. Due to these characteristics, sport is at the same level as the right to life, the right to equality, the right to education and the right to self-development and is therefore a fundamental human right[10].

There is also worth mentioning that various international documents contain various regulations on the right to sport, and there are directives in this documents for the right to be respected and respected by states[11]. The right to sport was first claimed by the Olympic movement as a human right. According to Article 4 of the Fundamental Principles of Olympism adopted by the International Olympic Committee (IOC), "*The practice of sport is a human right. Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play*"[12]. According to Article 24 of the Universal Declaration of Human Rights of 1948, "*Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay*"[13]. In addition, according to article 1.1 of International Charter of Physical Education, Physical Activity and Sport adopted by UNESCO in 1978, "*Every human being has a fundamental right to physical*

7 Necdet Azak, 'Spor Hukuku I' (1940), BTS, Iss. 24, 13.

8 Erdemli, Spor nedir? (n 3) 19.

9 Azak (n 7) 13.

10 Atilla Erdemli, 'Temel İnsan Hakları ve Spor", Spor Hukuku Dersleri' in Kısmet Erkiner (eds), *Spor Hukuku Dersleri (*Kadir Has University Press, 2007) 30.

11 Şahin and İmamoğlu (n 1) 37.

12 <http://www.olimpiyatkomitesi.org.tr/Upload/Menu/624923_ioc_antlasmasi.pdf> accessed 1 November 2019.

13 <https://www.un.org/en/universal-declaration-human-rights/>accessed 1 November 2019

education, physical activity and sport without discrimination on the basis of ethnicity, gender, sexual orientation, language, religion, political or other opinion, national or social origin, property or any other basis"[14].

It is inconceivable that individuals' activities related to sport and the right to sport are not interested in the fundamental rights and freedoms stipulated in the Constitution. According to Article 12 of the Constitution, "*Everyone has the fundamental rights and freedoms which are bound to his personality, untouchable, transferable and indispensable*" and at this point, it is necessary to determine the relationship between the individuals' right of sport and the fundamental rights and freedoms guaranteed in the Constitution. This is because the ıssue that individuals make requests for sporting activities or protection from interventions against sporting activities depends, first of all, on whether the sporting activities constitute a constitutional right, and what the nature and limits of the right are.

II. Constitutional Regulations Regarding Sports Right

Is sports a constitutional fundamental right and freedom? If so what kind of fundamental right and freedom is it? The answer to these questions should be sought in the Constitution.

The right to sport is not directly and explicitly regulated in the Constitution. Sportive activities are multidimensional phenomena and because of these dimensions they are interested in many fundamental rights and freedoms. Therefore, many rights and freedoms in the Constitution have a direct or indirect connection to the right to sport.

When sporting activities are carried out by individuals for the purpose of earning profits, they are practiced as a profession and become professional sport. Within the freedom of work and contract, there is also the freedom to exercise sport as a profession[15]. Therefore, in the case of sport as a profession, the right to do sport is covered by the right to work[16].

Considering the necessity of learning in order to do a certain sport, there is again the right to education[17]. The right to education and training includes also freedom to learn and teach sports[18].

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14 <www.unesco.org/new/en/social-and-human-sciences/themes/physical-education-and-sport/sport-charter/> accessed 1 November 2019.

15 Seref Ertaş and Hasan Petek, *Spor Hukuku* (3th edn, Yetkin 2017) 57; Ramazan Çağlayan, *Spor Hukuku*, (Asil 2007) 24.

16 Constitution, Article 48: *"Everyone has the freedom to work and conclude contracts in the field of his/her choice. Establishment of private enterprises is free. ..."*

17 Constitution, Article 42: *"No one shall be deprived of the right of learning and education. The scope of the right to education shall be defined and regulated by law. ..."*

18 Ertaş and Petek (n 15) 56; Çağlayan (n 15) 24.

Considering the positive contribution and benefits of sports activities to the physical and mental health of individuals, it is seen that they are interested in the right to benefit from health services and to live in a healthy and balanced environment. Considering the positive contribution and benefits of sports activities to the physical and mental health of individuals, it is seen that they are interested in the right to benefit from health services and to live in a healthy and balanced environment[19]. Article 56/3 of the Constitution imposes a duty on the State to ensure that everyone lives and lives in physical and mental health. As a matter of fact, it is stated in the reasoning of the Advisory Council regarding the article 59 of the 1982 Constitution that the protection of body health by having sports is a part of the health services[20].

In addition, within the framework of the positive contributions and benefits of sports activities to the physical and mental health of individuals; Article 59 of the Constitution imposes also the duty on the State to take measures to develop the physical and mental health of Turkish citizens of all ages and to encourage the spread of sports among the masses[21].

Article 59 of the Constitution does not define the right to exercise and participate in sports activities as a fundamental right and freedom. Article 59 imposes on the state only as a social duty to creating opportunities for citizens to improve their physical and mental health. Therefore, starting from Article 59 of the Constitution, it is not possible to say that the right to do sports is a fundamental right and freedom that is directly recognized in the Constitution[22]. The social rights dimension of the right to sport can be derived from the articles 56 and 59 of the Constitution. However, it is not easy to conclude from these articles that individuals have the right and freedom to engage in sports activities for sports activities not covered by the rights to work and education.

It appears that the regulations in the Constitution concern the right to sport, either because the elements of sport are the subject of other rights and freedoms, or because the duty of the State to make positive actions on sporting activities. Therefore, although it is not possible to derive the right to sport from these regulations, it is not possible to say also that the right to sport is not included in the Constitution in any way.

Necdet AZAK defines the "right to sport" in 1940 as "*the right to make a sport that people like, in accordance with the rules that have been given in the country for*

19 Constitution, Article 56: *"Everyone has the right to live in a healthy, balanced environment. (...) To ensure that everyone leads their lives in conditions of physical and mental health and to secure cooperation in terms of human and material resources through economy and increased productivity, the state shall regulate central planning and functioning of the health services. (...)"*

20 <https://acikerisim.tbmm.gov.tr/xmlui/bitstream/handle/11543/1169/200901027.pdf> accessed 1 November 2019.

21 Constitution, Article 59: *"The state shall take measures to develop the physical and mental health of Turkish citizens of all ages, and encourage the spread of sports among the masses. ..."*

22 Ertaş and Petek (n 15) 57; Çağlayan (n 15) 24.

this kind of sport"[23]. However, when we talk about the right to sport in general today, on the one hand, it is understood that people can exercise their sports activities freely and that these activities should not be interfered with or prevented; on the other hand, a social right is understood which includes the demand of individuals from the State to provide various facilities and facilities for sportsmen, and to provide the necessary facilities such as facilities, fields, halls, tools and equipment for the realization of sport.

There is no doubt that the right to sport is regulated in article 59 of the Constitution with the social right dimension. However, it is also possible to infer from the regulation of Article 59 of the Constitution that the right to sport takes place with the dimension of freedom. Indeed, the concept of improving physical and mental health in Article 59 corresponds to the definition of sport. If sport is defined as a part of one's right to develop himself / herself physically and spiritually; by interpreting Articles 59 and 17 of the Constitution together, it can be concluded that the right to protect and improve the material and spiritual existence of individual includes the right to exercise sports[24].

It appears that the right and freedom to play sports, although regulated directly in the Constitution, is actually indirectly included in the Constitution. According to article 17 /1 of the Constitution, "*Everyone has the right to life and the right to protect and develop his material and spiritual existence.*"

The general purpose of the right to doing sport is to protect and improve one's body and intellectual abilities[25]. The fundamental right to the protection of a person's material and spiritual existence in article 17 of the Constitution includes, although not explicitly stated, also the right to do sports. In other words, doing sports is a part of one's freedom to develop oneself physically and mentally[26].

The right of people to develop their material and spiritual existence includes the right to perform cultural, artistic, scientific and similar human activities as well as the right to doing sports. Therefore, the right of people to live, to protect and develop their material and spiritual existence includes their right to improve their physical and mental health. The concept of improving physical and mental health corresponds to the definition of sport in accordance with article 59 of the Constitution.

On the other hand, the article 59 of the Constitution giving the State the duty to take measures to improve the physical and mental health of individuals, it clearly shows that the Constitution-maker attaches great importance to the improvement of

23 Azak (n 7) 13.

24 Ertaş and Petek (n 15) 56; Çağlayan (n 15) 24.

25 Çağlayan (n 15) 24.

26 Ertaş and Petek (n 15) 56.

physical and mental health of individuals. Indeed, the Constitution-maker assumes the public interest in this duty. Accordingly, it would be contrary to the Constitution the State's carrying out practices contrary to the purpose of improving the physical and mental health of individuals. This shows that in according to article 59 of the Constitution people have the right to improve their physical and mental health that is the right to do sport. Therefore, even if right of individuals to do sport is not explicitly recognized in Article 59 of the Constitution, it is implicitly recognized[27].

To sum up, the right to sport is enshrined in the Constitution both as the freedom of individuals to exercise and as a social right that they can direct to the State. Therefore, it can be said that the right to sport is a two-character right and freedom. According to Jellinek's conceptualization, the right to sport has the characteristics of both negative status and positive status rights. The right to exercise sport freely which exists within the right to sport is a negative status right and we can call it the freedom to do sports. On the other hand, the right of individuals to request positive actions from the State in order to carry out sporting activities which exists within the right to sports is the right to positive status and we can call it a sporting social right.

III. The Scope and Limits of Sports Right

A. The Scope and Limits of the Freedom to Do Sports

Within the scope of the right to sport, people are free to exercise in order to improve their physical and mental health or as a profession. Accordingly, the restriction and prohibition of individuals from doing certain sports is incompatible with freedom in this field. Similarly, it is also incompatible with this freedom for people to be forced to do certain sports by public power or otherwise.

At this point, the question of whether the freedom of individuals to exercise is an absolute right or whether it is possible to restrict or prohibit it in certain situations should be answered.

It means that the restriction or prohibition of the freedom of persons is prohibited to do certain sports or all sports.

At this point, first of all, it is necessary to examine whether a law prohibiting sports is in conformity with the Constitution. *"Can sports be prohibited?"* This question, at first sight, may seem meaningless because of the irrationality of such a ban. But the history of mankind is full of bad examples of irrational prohibition practices.

This question should be addressed not in the context of the prohibition of sport in general, but in the context of the prohibition of certain types of sport because of their

27 Ertaş and Petek (n 15) 54.

conflict with established cultural, social, religious and political values. Therefore, this question should not be considered in the context of the prohibition of sports in general. Some types of sports are banned because of their conflict with established cultural, social, religious and political values. Likewise, the right to sport is prohibited in some cases because of its conflict with other rights and freedoms. For example, table tennis was banned in the Soviet Union between 1930 and 1950 on the grounds that it disrupted the eye health of the audience. Nowadays, there are also opinions that sports like life-threatening wingsuit, boxing or cage fighting should be banned.

It should be noted article 59 of the Constitution provides the State with the task of developing and promoting sports. For this reason, a law prohibiting sports will be contrary to the Constitution as it will make it difficult and eliminate the State to fulfill its duty. Because of that article 59 of the Constitution gives the State the duty to take measures to improve the physical and mental health of individuals, the Constitution recognizes that sport is for the public interest. Accordingly, doing sports is a right guaranteed by the Constitution and as a rule cannot be abolished by the State[28]. The right to engage in sportive activities is also part of the right to develop its material and moral existence, which is regulated in Article 17 of the Constitution. In this respect, legal regulations and administrative procedures that force people to do sports or prohibit people from doing sports cannot be made[29].

However, no fundamental rights and freedoms are unlimited and the right to sport is not also unlimited. in the Constitution the principles of limiting fundamental rights and freedoms in articles 13, 14 and 15 of, the reasons for the limitation in article 17 which regulate the right to develop material and spiritual existence, reasons of limitation in article 42 regulate the right to education and training, the reasons for the limitations in article 48 regulate the freedom to work and conclude contracts, are also valid for the right to sport[30].

The right to improve physical and mental health can be limited to the reasons for the restriction in this article, as it is based on the right to protect and promote the material and spiritual existence of individuals in Article 17 of the Constitution. The reasons for the restriction in Article 17 are more concerned with the right to life and the protection of body integrity. This article does not foresee any reason for the limitation of the right to protect and develop its material and moral existence. However, it can be said that the reason for the limitation of the right of individuals to protect and develop their material and moral existence is within this right itself. The right of people to protect their material and spiritual assets includes also the right to life and the inviolability of body integrity. In addition, Article 56/3 of the

28 Ertaş and Petek (n 15) 53, 55.

29 Çağlayan (15) 24; Ertaş and Petek (n 15) 57.

30 Çağlayan (n15) 25.

Constitution imposes a duty on the State to ensure that everyone lives and lives in physical and mental health. The life of people and the integrity of the body is also protected against the people themselves. For this reason, the right of people to improve their physical and mental health within the scope of their right to protect their physical and spiritual existences also necessitates protection of their right to life and physical integrity against to sporting activities that will harm their physical and spiritual existences.

In this context, a provision that prohibits sports is contrary to the Constitution to the extent that it is contrary to the right to develop the physical and spiritual existences in which it is included. However, it is possible to prohibit any sporting action that involves serious dangers to the right to life of athletes, spectators or other persons, is in conflict with other superior rights and freedoms and is therefore deemed to disrupt public order.

As it is known, although the right to sport is a constitutional right and freedom, in some cases it may be in conflict with other rights and freedoms. For example, the conflict between the continuity of natural life and sports activities such as safari, hunting, fishing; conflict between boxing and body integrity; conflict of motor racing and environmental (noise) right; such as conflict of freedom to travel with marathon or bike races. As mentioned above, the conflict between the right to sport and other rights and freedoms is resolved according to which rights and freedoms are held superior. In case of conflict, in some cases the right to sport, in other cases other rights and freedoms may be held superior or in some cases a balance between conflicting rights and freedoms may be set. For example, if the roads are closed for a certain period of time due to bicycle races the right to sports is superior to the freedom of travel, in the case of the prohibition of hunting for certain animals the continuity of natural life is superior to the right to sport[31].

Indeed, The European Court of Human Rights (ECtHR), decided that the prohibition on tradition of landowner's hunting wild mammals on their land with dogs was not contrary to private life, family life and immunity to housing[32]. In the case of Herrmann v. Germany, The Court decided that obligation to allow a landowner to hunt on his land violated his right to property[33]. In these cases, the ECtHR held the continuity of natural life and the right to property superior to the right to sport.

31 For example, in Turkey the Bolu Branch of Forestry and Water Affairs within the scope of hunting tourism tenders for hunting red deer. However, there is a public reaction to this practice. <http://www.bolutakip.com/haber/paran-varsa-geyik-vurabilirsin> accessed 1 November 2019, <https://www.haberturk.com/bolu-haberleri/72449785-9-bin-tlye-kizil-geyik-avi> accessed 1 November 2019.

32 *Friend and Others v the United Kingdom (dec.)* - 16072/06 and 27809/08, Decision 24.11.2009 [Section IV], <http://hudoc.echr.coe.int/eng?i=002-1236> accessed 1 November 2019.

33 *Herrmann v Germany*, 26 June 2012 (Grand Chamber), (Application no. 9300/07), <http://hudoc.echr.coe.int/eng?i=001-111690> accessed 1 November 2019.

The other dimension of the freedom to do sports is that people do sports subject to their own will, and they cannot be forced to do sports. In other words, the obligation of doing sports is incompatible with the freedom of sports. More specifically, the freedom to do sports also includes the right and freedom to non-sports, i.e. the right to laziness. According to article 4 of the Law on Physical Education in Turkey, dated June 29, 1938, "*It is compulsory for young people to enter clubs and continue physical training in their free time.*" Certainly, with this legal regulation, the obligation to engage in sports contrary to the freedom to do sports was introduced. In 1964, the Constitutional Court ruled that this legal regulation which violated the principle of freedom was contrary to the Constitution and its cancellation which grounds that "*it is necessary not to hold the individuals' activities of physical training and sports, which are a subject of education and training on the non-compulsory, and leave it to their own will*"[34].

Today, most of the sporting activities are not done to improve physical and mental health, but as a professional activity and to make money. The constitutional basis of the right to exercise sport as a profession is not the article 17 of the Constitution regarding the right to protect and improve the material and spiritual existence of the individuals, is article 48 of the Constitution regarding the right to freedom of work and contract. Although freedom of work and contract is included in the social and economic rights section of the Constitution, it is by nature a negative status right. Therefore, within the framework of the right to professional sports based on freedom of work and contract, the State does not have to act positively, but on the contrary, the State should not impose restrictions and prohibitions.

In the case doing of sport as a profession, sporting activities are, as a rule, subject to the restriction regime of the freedom of work and contract. However, the right to professional sport, which is based on the freedom of work and contract, is also subject to the same restriction and prohibition regime as sporting activities aimed at improving physical and mental health. Therefore, professional sporting activities, which may seriously compromise the rights of life of athletes, spectators or other persons, conflict with other superior rights and freedoms and disrupt public order, may also be prohibited. At this point, it is necessary to distinguish between the concept of prohibiting certain sporting actions due to public order and the concepts of temporary or permanent prohibition of the actions of athletes who conduct sport as a professional activity. The prohibition of professional athletes from doing sports on a temporary and permanent basis is essentially a limitation of the freedom to work and contract. On the other hand, it is not possible to say that athletes who have signed professional contracts have the right not to work, that is to say, not to

34 CC, 03.11.1964, 152/66, R.G.17.3.1965-11955, <http://kararlaryeni.anayasa.gov.tr/Karar/Content/4fdfe721-894b-4a02-8ac5-5ef1e58c69a8?excludeGerekce=False&wordsOnly=False> accessed 1 November 2019.

do sports. Professional athletes are obliged to fulfill their contractual performance during the contract.

The principles regarding the limitation of sports activities carried out in order to improve physical and mental health or as a professional activity are as above. At this point, it should be noted that in some cases, athletes or clubs are deprived of the opportunity to engage in sports, if they were not admitted to competitions for various reasons, such as punishment or not being able to achieve the necessary success. Such situations often arise as a result of the monopolistic power of organizations that organize competitive sports. In general, decisions and practices of non-admission to competitions and sporting organizations due to freedom of contract are not considered as a restriction of the right to do sports. Because, in such cases, it is not prohibited for the athlete or sports club to engage in that sport. However, if the organizations organizing a particular sport are monopoly or dominant position owners, and the equality of opportunity is not provided to the athletes or sports clubs willing to participate, then they must benefit from the legal protection of their right to participate in competitions and organizations[35].

B. Scope and Limits of Social Sport Right

According to article 59/1 titled "Development and arbitration of sport" in the Third Section of the Constitution entitled "*Social and Economic Rights and Duties", "The State shall take measures to develop the physical and mental health encourage the spread of sports among the masses.*" Article 59 of the Constitution imposes an obligation on the State for the development of sports and, sport is seen as a tool that improves physical and mental health[36]. In short, according to this article, people have a social right.

The duty of taking measures to improve the physical and mental health of the persons who are imposed on the State by the Constitution is a different duty from not impeding or prohibiting the sports activities of the individuals. Article 59 of the Constitution provides the State with two interrelated tasks: "taking measures" and "encouraging". Although the concept of taking measures is a very general task definition, since this article gives people a social right, it is clear that the State is given the task of making a positive action on the activities that improve the physical and mental health of individuals. The state can take a variety of "measures" such as to vide education and training support according to sports branches in order to develop and promote the

35 In a lawsuit filed in US courts against this decision of the United States National Olympic Committee (USOC), which refused to participate in the Olympic Games due to the Soviet occupation of Afghanistan in 1980, the US National Olympic Committee rather than being an organ, it is recognized as a local representative of the IOC and the right of athletes to participate in the Olympics is not protected. K Gürten and S E Erenel, 'Lex Sportiva: Spor Hukukunun Küreselliği' (2012) IUHFD, Vol.3, Iss.1, 308.

36 Nuray Ekşi, *Spor Tahkim Hukuku* (Beta 2015) 17.

spread of sports to the masses, to provide sports equipment, to construct and use all kinds of sports facilities and halls, to organize sports competitions and competitions to grant scholarships or awards to successful athletes to establish sports organizations.

In article 59 of the Constitution, sport is defined as one of the services of the state regulated by the Constitution[37]. Since the sport has an interest with public health aspect, there is also possible for the State to on sports activities as a public service[38]. The duty to take these measures, each of which is a social right for individuals, constitutes a public service for the State.

The fact that the duty of the State to take measures to improve sporting activities and to promote the spread of sports to the masses is a public service, undoubtedly allows the State to establish administrative organizations to carry out these public services and to carry out its duties. Therefore, within the framework of Article 59 of the Constitution, the State may fulfill this duty by establishing administrative organizations such as ministries and general directorates for carrying out, managing and regulating sporting activities or by establishing sports federation for organizing and conducting sporting organizations[39].

Although the 1982 Constitution imposes duty to the State to exercise the necessary measures for the physical and mental health of citizens, to promote the popularization of sports and to protect successful athletes, but does not foresee it to govern the sport in the form of a monopoly. However, the Constitution does not prevent the State from choosing a monopolistic structure.

Article 65 of the Constitution titled "limits of the economic and social duties of the State" stipulates that the State shall fulfill its duties to develop and promote sports, which can be defined as a sportive social public service, "within the scope of the adequacy of its financial resources". As stated in Article 65 of the Constitution, the State will try to fulfill this duty within the scope of its economic means[40]. Thus, a limit has been drawn to the social claims of individuals regarding sports with the Constitution.

Conclusion

The phenomenon of sports born as an amateur human activity has gained an industrial dimension today. Sports law includes the right and freedom to work as an industrial activity. Lex sportiva which dominate sports law unfortunately did not pay

37 B Öztan and M R Will, 'Türkiye'de Müstakbel Spor Hukuku' (2010) Prof. Dr. Fırat Öztan'a Armağan, Vol.II, 1759.

38 Çağlayan (n 15) 17.

39 The Constitutional Court has decided that the sports federations established for the purpose of organizing sports activities more efficiently and expeditiously and providing sports activities to the wider masses are decentralized administration institutions. See Cons. Court, 16.01.2015, 77/4, <http://kararlaryeni.anayasa.gov.tr/Karar/Content/eaa479b4-e71a-4607-9681-3b4e066a54c4?excludeGerekce=False&wordsOnly=False> accessed 1 November 2019.

40 Çağlayan (n 15) 24.

enough attention to the right to sports. However, it should not be forgotten that there is a wider field of sports law including individual sports activities that are not covered by lex sportiva.

As a final word, the right of sport should be at the center of the sport law of individuals, because the starting point of sport law is the "right to sport". Throughout history, as an act that exists in every age in which human beings exist, sport will emerge as a basic human right in the 21st century more functional and more important than today[41].

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List of Abbreviations

BTS : Beden Terbiyesi ve Spor
CC : The Constitutional Court
ECtHR : The European Court of Human Rights
GBESD : Gazi Beden Eğitimi ve Spor Bilimleri Dergisi
IOC : The International Olympic Committee
IUHFD : İnönü Üniversitesi Hukuk Fakültesi Dergisi
Iss : Issue
p : page
v : Versus
Vol : Volume

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41 Erdemli, Temel İnsan Hakları ve Spor (n10) 30.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

10 Fragen zum deutschen Berufungsrecht*

10 Questions Concerning the German Right of Appeal

Katharina Gelbrich[1]

Zusammenfassung
Der nachfolgende Artikel gibt einen Überblick über das deutsche Berufungsrecht unter besonderer Berücksichtigung der erheblichen Veränderungen, welche die Zivilprozessreform im Jahr 2002 mit sich gebracht hat. Dabei werden zunächst im Detail die Veränderungen für das nunmehr stark begrenzte Novenrecht sowie die Einführung der Möglichkeit eine Berufung gemäß § 522 Abs. 2 ZPO ohne mündliche Verhandlung durch Beschluss zurückzuweisen dargestellt. Aufgrund der starken Begrenzung der Rechte der Rechtsschutzsuchenden war diese Reform in der Literatur und Bevölkerung starker Kritik ausgesetzt. Neben verfassungsrechtlichen Bedenken wurden zumindest solche hinsichtlich der Rechtsstaatlichkeit der Vorschrift geäußert. Insbesondere die Tatsache, dass die Gerichte je nach Region unterschiedlich häufig von der Möglichkeit die Berufung durch Beschluss zurückzuweisen Gebrauch machten, führte zu Unverständnis und negativen Reaktionen auf die Norm. In Auseinandersetzung mit den kritischen Stimmen der Literatur und Politik wurde herausgefunden, dass die Norm nicht verfassungswidrig aber ihre Anwendung zum Teil durchaus rechtsstaatlich bedenklich ist. Neben den Veränderungen durch die Prozessrechtsreform wird ein Überblick gegeben, unter welchen Umständen und gegen welche gerichtlichen Entscheidungen die Berufung das statthafte Rechtsmittel ist.

Schlüsselwörter
Berufung, Zivilprozessrecht, Prüfungsumfang, mündliche Verhandlung, Berufungszurückweisung durch Beschluss

Abstract
The great reform of German civil procedure law in 2002 brought major changes in the right to appeal. The following article will provide an overview of the new regulations and constitutional concerns regarding the changes. In detail it gives an overview against which court decisions and under which conditions an appeal is permitted. Regarding the procedure the article focuses on the audit scope of the court of appeal and the possibility to dismiss the appeal by court order without any oral hearing.

Keywords
Appeal, Civil procedure law, Audit scope, Oral hearing, Dismissal of appeals

* Dem Beitrag liegt ein Vortrag der Verfasserin an der Koç Universität am 24.4.2019 zugrunde.

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Extended Summary

The following article will provide an overview of the right to appeal and of the new regulations that came into place under the great reform of German civil procedure law in 2002. In summary, following German law appeals continue to be an available remedy against the final judgments delivered by the court of first instance (§ 511(1) ZPO). Appeals are pursuant to § 511 (2) ZPO admissible only if the value of the subject matter of the appeal is greater than 600 euros, or if in its ruling, the court of first instance has granted leave to appeal. This mixed restriction of admission to the appeal is surprising. Mentioned in the following text is also the one month time limit for filing an appeal and the period for submitting the particulars of the appeal which are in fact two different time limits following German civil procedure law. Regarding these procedure, the article focuses on the audit scope of the court of appeal and the possibility of dismissing an appeal by court order without any oral hearing. The audit scope was previously limited by the great reform of German civil law in 2002. Before that change it was necessary for the court of appeal to establish the facts and circumstances relevant for its decision in a new fact-finding process whereas now the court of appeal is to base its hearing and decision on the facts established by the court of first instance. The article will show in detail how this reduction of legal protection is realized and how the critical voices are to be assessed. Another criticized change made by the great reform of German civil procedure law in 2002 was the introduction of § 522(2) ZPO. This provision has given the court the possibility to immediately deny leave to appeal if all of its members are unanimously satisfied that the appeal manifestly has no chance of attaining success, the legal matter is of no fundamental significance, the further development of the law or the interests in ensuring uniform adjudication do not require a decision to be handed down by the court of appeal, and no hearing for oral argument is mandated. This provision received an especially critical reception in the scientific community and amongst the greater public. It was said to be unconstitutional and an unnecessary reduction of legal protection. The main criticism lay in that some courts made greater use of the option to immediately deny leave to appeal whereas other courts did not use this option at all. Admittedly, the lapse of the oral hearing has had some negative effects on the acceptance of the court´s decision. It was discovered that the German constitution does not prohibit a regulation like § 522(2) seeing as there is no constitutional legal right to have an oral hearing when raising an appeal. Nevertheless, it is pointed out that the frequent use of § 522(2) - which is practised by some courts, whereas other do not immediately deny any leave to appeal - has caused concerns regarding the principle of equality. Furthermore, there are certain circumstances under which the parties may take legal action in the case of the court immediately denying leave to appeal without a legal hearing. Until 2011 there was no possibility to appeal against an immediate denial. Since the legislative amendment in 2011, the plaintiff in the appeal has been entitled to lodge a complaint against the court order immediately upon denial of leave to appeal.

10 Fragen zum deutschen Berufungsrecht

Das Berufungsrecht hat im Jahr 2002 durch eine große ZPO-Reform[1] maßgebliche Neuerungen erfahren. Die Reform führte zu einer starken Begrenzung der in der Berufungsinstanz zulässigen Noven. Diese Beschränkung erhitzte die Gemüter stark.[2] Eine weitere äußerst strittige[3] Änderung des Berufungsrechts war die Einführung der Beschlusszurückweisung ohne mündliche Verhandlung in § 522 Abs. 2 ZPO. Nachfolgend wird ein Überblick über das deutsche Berufungsrecht unter besonderer Berücksichtigung dieser Gesetzesänderungen gegeben. Hierzu sollen zehn Fragen zum Berufungsrecht beantwortet werden.

I. Gegen welche Urteile ist die Berufung im deutschen Zivilprozess statthaft?

Die Berufung ist im deutschen Zivilprozess gegen im ersten Rechtszug erlassene Endurteile der Amts- und Landgerichte statthaft (§ 511 Abs. 1 ZPO).

Gegen Zwischenurteile ist die Berufung nicht statthaft. Ausnahmsweise kann aber gegen Zwischenurteile über die Zulässigkeit der Klage (§ 280 Abs. 1 ZPO) gemäß § 280 Abs. 2 ZPO Berufung eingelegt werden. Dies kann sinnvoll sein, wenn eine Frage der Zulässigkeit unklar ist und eine abschließende Entscheidung gefunden werden soll, bevor in eine umfangreiche Tatsachenverhandlung und Beweisaufnahme gestartet wird.[4] Auch Zwischenurteile, die die Wiedereinsetzung versagen, sind mit der Berufung angreifbar.[5] Selbstständig anfechtbar ist auch ein Zwischenurteil, das die Verfahrensunterbrechung aufgrund der Eröffnung eines Insolvenzverfahrens gemäß § 17 AnfG bzw. § 240 ZPO bejaht[6], ein trotz Verfahrensunterbrechung ergangenes Urteil aufhebt[7] oder die wirksame Wiederaufnahme des Rechtsstreits in den Fällen der §§ 239 ff. ZPO verneint[8]. So zum Beispiel Zwischenurteile die feststellen, dass die Erben den Rechtsstreit eines Verstorbenen nicht wirksam aufgenommen haben.

Außerdem ist die Berufung gegen Grundurteile statthaft (§ 304 Abs. 2 ZPO), wenn ein Streit über Grund und Betrag eines Anspruchs geführt wird und das Gericht über den Grund vorab durch Zwischenurteil gemäß § 304 Abs. 1 ZPO entschieden hat.

1 BT-Drs. 14/4722; vgl. ausführlich zur Reform Hannich/Meyer-Seitz.

2 Siehe hierzu äußerst kritisch mit Blick auf das arbeitsgerichtliche Verfahren Schmidt/Schwab/Wildschütz, „Neues zur Reform des Zivilprozesses aus arbeitsgerichtlicher Sicht", NZA 2000, 849, 853.

3 Vgl. hierzu u.a. Krüger, „Unanfechtbarkeit des Beschlusses nach § 522 II ZPO – Ein Zwischenruf", NJW 2008, 945-947; Nassall, „Verfassungsgerichtliche Lawinensprengung? – Das BVerfG und die Berufungs-Beschlusszurückweisung", NJW 2008, 3390-3392; Reinelt, „Die unendliche Geschichte – § 522 II ZPO", ZRP 2009, 203-206; vgl. hierzu ausführlich Gelbrich, S. 25 ff.

4 Bacher, in: *BeckOK ZPO*, § 280, Rn. 1; Prütting, in: *Münchener Kommentar zur ZPO*, § 280, Rn. 1.

5 BGH Urt. v. 20.3.1967 - VII ZR 296/64 = NJW 1967, 1566.

6 BGH Beschl. v. 21.10.2004 - IX ZB 205/03 = NJW 2005, 290.

7 BGH Beschl. v. 17.12.2008 - XII ZB 125/06 = MDR 2009, 1000.

8 BGH Beschl. v. 10.11.2005 - IX ZB 240/04 = NJW-RR 2006, 288.

Eine solche Entscheidung bietet sich an, wenn ein bezifferter Betrag eingeklagt und sowohl über Grund und Höhe gestritten wird. Durch die Aufteilung in Grund- und Endurteil kann eine Abschichtung und Vereinfachung des Prozesses erreicht werden. Des Weiteren ist die Berufung gegen Vorbehaltsurteile, die dem Beklagten die Aufrechnung oder eine Ausführung seiner Rechte vorbehalten, statthaft (§ 302 Abs. 3 ZPO und § 599 Abs. 3 ZPO).

Wegen des „Meistbegünstigungsprinzips" ist gegen eine formfehlerhafte Entscheidung immer das Rechtsmittel statthaft, was der Form entspricht, in der die Entscheidung hätte richtigerweise ergehen müssen, sowie das Rechtsmittel, was gegen die fehlerhafte Form statthaft wäre. Dies bedeutet: Ergeht ein Beschluss, obwohl ein Endurteil hätte ergehen müssen, bleibt die Berufung trotzdem statthaft. Ergeht ein Endurteil, obwohl das Gericht eigentlich durch Beschluss hätte entscheiden müssen, dann ist ebenfalls die Berufung statthaft. Zudem bleibt (von einigen Ausnahmen abgesehen) in beiden Fällen auch die gegen Beschlüsse einschlägige sofortige Beschwerde gemäß § 567 ZPO statthaftes Rechtsmittel.

Gegen Scheinurteile ist ebenfalls die Berufung statthaft.[9] Scheinurteile sind solche Urteile, bei denen aufgrund schwerwiegender Mängel (z.B. unwirksame Verkündung, Zustellung eines Urteilsentwurfs) noch nicht einmal der äußere Tatbestand einer richterlichen Entscheidung gesetzt wurde.[10]

II. Warum gibt es neben der Wertberufung auch die Zulassungsberufung?

In Deutschland sind Berufungen im Grundsatz nur zulässig, wenn der Wert des Beschwerdegegenstandes 600 € übersteigt (Wertberufung). Wird dieser Wert nicht überstiegen, kann die Berufung (gemäß § 511 Abs. 4 ZPO) vom Gericht des ersten Rechtszuges zugelassen werden, wenn die Rechtssache grundsätzliche Bedeutung hat oder die Fortbildung des Rechts oder die Sicherung einer einheitlichen Rechtsprechung eine Entscheidung des Berufungsgerichts erfordert (Zulassungsberufung).

Mit der Wertgrenze von 600 €[11] soll vermieden werden, dass die Gerichtskosten in Einzelfällen den Streitwert übersteigen.[12] Die Parteien sollen nicht die Möglichkeit bekommen, die Gerichts- und Anwaltskosten unnötig in die Höhe zu treiben und damit die andere Partei zu schädigen. Der Wert des Beschwerdegegenstandes richtet sich nach dem Interesse des Rechtsmittelklägers.[13] Von Bedeutung ist hier zunächst die Frage, in welcher Höhe der Berufungskläger durch das Urteil der ersten Instanz beschwert ist. Dies wird für den erstinstanzlichen Kläger durch einen Vergleich des letzten erstinstanzlichen

9 BGH Urt. v. 12.10.1952 - III ZR 379/52 = BGHZ 10, 346, 349.

10 Schilken, „Zivilprozessrecht", Rn. 108.

11 Zuvor 1.500 €.

12 BT-Drs. 14/4722, S. 150.

13 BGH Beschl. v. 31.3.2010 - XII ZB 130/09 = MDR 2010, 765.

Antrags mit der Endentscheidung des erstinstanzlichen Gerichts ermittelt (formelle Beschwer) und für den erstinstanzlichen Beklagten danach, inwieweit die Entscheidung für den erstinstanzlichen Beklagten nachteilig ist (materielle Beschwer).[14] Diese Beschwer bildet die Höchstgrenze für den möglichen Berufungsantrag.[15]

Der eigentliche Wert des Beschwerdegegenstandes ergibt sich dann daraus, in welcher Höhe der Berufungskläger die Abänderung des erstinstanzlichen Urteils beansprucht.[16] Die Beschwer kann also höher sein als der Wert des Beschwerdegegenstandes. Bei vermögensrechtlichen Streitigkeiten ist der Wert des Beschwerdegegenstandes aus dem wirtschaftlichen Interesse des Berufungsklägers zu ermitteln, während er bei immateriellen Streitigkeiten aus dem ideellen Interesse des Klägers zu ermitteln ist.[17]

Der Gesetzgeber hat darüber hinaus eine Zulassungsmöglichkeit vorgesehen, wenn der Wert des Beschwerdegegenstandes in der Berufungsinstanz 600 € nicht übersteigt. Da der Gesetzgeber mit dem Rechtsmittelsystem auch eine Sicherung der Einheitlichkeit der Rechtsprechung beabsichtigt, sollen Fragestellungen, die von grundsätzlicher Bedeutung sind, Zugang zur Revisionsinstanz und damit zum Bundesgerichtshof (BGH) finden.[18] Es soll also verhindert werden, dass Entscheidungen von grundsätzlicher Bedeutung schon nicht in die Berufungsinstanz gelangen und damit ein Zugang zur Revision für diese entscheidenden Fragen gar nicht möglich ist. Der Gesetzgeber hat die Zulassung nach § 511 Abs. 4 S. 1 Nr. 1 ZPO daher auch deckungsgleich zu den Voraussetzungen einer Revisionszulassung (§ 543 Abs. 2 ZPO) formuliert. Die Zulassung kann erfolgen, wenn:

> 1. die Rechtssache grundsätzliche Bedeutung hat. Dies ist der Fall, wenn eine klärungsbedürftige und klärungsfähige Rechtssache zu entscheiden ist, die in weiteren Rechtsstreiten maßgeblich sein kann und daher das allgemeine Interesse an einer einheitlichen Entwicklung und Handhabung des Rechts berührt.[19] Klärungsbedürftig ist die Rechtsfrage, wenn zu ihr unterschiedliche Auffassungen vertreten werden und noch keine klärende höchstrichterliche Entscheidung vorliegt.[20]

14 Vorliegend wird der h.M. gefolgt, die davon ausgeht, dass beim Kläger die formelle Beschwer und beim Beklagten die materielle Beschwer gegeben sein muss, BGH Beschl. v. 11.3.2015 - XII ZB 553/14 = NJW-RR 2015, 1203, Rn. 8 mwN; Urt. v. 13.11.1952 - IV ZR 112/52 = JZ 1953, 276; Gerken, in: Wieczorek/Schütze, Vor §§ 511-541 Rn. 33, 37; Habscheid, „Beschwer des verurteilten Beklagten bei nicht vollstreckungsfähigem Leistungstitel?" NJW 1964, 234; Schilken, „Zivilprozessrecht", S. 402; a.A. Bettermann, „Die Beschwer als Rechtsmittelvoraussetzung im deutschen Zivilprozeß", ZZP 82 (1969), 24, 31; Brox, „Die Beschwer als Rechtsmittelvoraussetzung", ZZP 81 (1968), 379, 406, 412; Rimmelspacher, in: *Münchener Kommentar zur ZPO*, Vor § 511, Rn. 17; ausführlich zum Streit Schilken, „Zivilprozessrecht", S. 402.

15 Rimmelspacher, in: *Münchener Kommentar zur ZPO*, § 511, Rn. 47.

16 Heßler, in: *Zöller ZPO*, § 511, Rn. 13.

17 BGH Beschl. v. 24.11.1971 - VIII ZR 80/71 = BGHZ 57 301, 302; Rimmelspacher, in: *Münchener Kommentar zur ZPO*, § 511, Rn. 53.

18 BT-Drs. 14/3750, S. 42.

19 BT-Drs. 14/4722, S. 104; BVerfG Beschl. v. 19.7.2007 - 1 BvR 650/03 = NJW-RR 2008, 29; BGH Urt. v. 11.5.2004 - XI ZB 39/03 = BGHZ 159, 135, 137; Beschl. v. 27.3.2003 - V ZR 291/02 = BGHZ 154, 288, 291; Beschl. v. 1.10.2002 - XI ZR 71/02 = BGHZ 152, 182, 186; Jacobs, in: *Stein/Jonas ZPO*, § 543, Rn. 5; Oberheim, in: *Eichele/Hirtz/Oberheim, Berufung im Zivilprozess*, Kap. 14, Rn. 23.

20 BGH Beschl. v. 18.9.2003 - V ZB 9/03 = NJW 2003, 3765; Jacobs, in: *Stein/Jonas ZPO*, § 543, Rn. 7; Heßler, in: *Zöller ZPO*, § 543, Rn. 11.

2. die Fortbildung des Rechts eine Entscheidung erfordert. Dies ist der Fall, wenn es Veranlassung gibt, Leitsätze für die Auslegung von materiellen oder verfahrensrechtlichen Normen aufzustellen oder Gesetzeslücken zu schließen. Diese Voraussetzungen sind wiederum gegeben, wenn es bei einem verallgemeinerungsfähigen Sachverhalt an einer richtungsweisenden Orientierungshilfe teilweise oder ganz fehlt.[21]

3. die Sicherung einer einheitlichen Rechtsprechung eine Entscheidung erfordert. Dafür muss eine Entscheidung einen Rechtssatz aufstellen, der von einem höheren oder gleichrangigen Gericht anders entschieden wurde (Divergenz).[22] Dabei genügt nicht die bloße Ungleichbehandlung vergleichbarer Fälle. Vielmehr müssen zwei einander widersprechende abstrakte Rechtssätze aufgestellt worden sein.[23] Neben der Divergenz ist eine Berufung auch zuzulassen, wenn derartige Rechtsanwendungsfehler vorliegen, dass das Vertrauen der Allgemeinheit in die Rechtsprechung als Ganzes eine Ergebniskorrektur erfordert.[24] Bei der Verletzung von Verfahrensgrundrechten soll die Berufung ebenfalls zugelassen werden.[25]

Hat also A gegenüber B auf Zahlung von Werklohn nach § 631 Abs. 1 BGB in Höhe von 1.500 € geklagt und werden A nur 900 € zugesprochen, erreicht die Beschwer nur 600 €. Auch der Wert des Beschwerdegegenstandes kann in diesem Fall 600 € nicht übersteigen, da A keine höhere Änderung beantragen kann. Somit ist die Wertgrenze des § 511 Abs. 2 Nr.1 ZPO nicht erreicht. A kann daher keine Wertberufung einlegen. Vielmehr müsste in diesem Fall die Berufung explizit durch das Gericht des ersten Rechtszuges zugelassen werden (§ 511 Abs. 2 Nr. 2 ZPO). Sofern B Klageabweisung beantragt hat, ist er in Höhe von 900 € beschwert. Wenn er nun in der Berufungsinstanz in Höhe von mindestens 600,01 € eine Abänderung des erstinstanzlichen Urteils fordert, liegt der Wert des Beschwerdegegenstandes genau in der Höhe, in der er die Abänderung fordert und damit mindestens bei 600,01 €, sodass er ohne Zulassung Berufung einlegen kann.

Unabhängig vom Wert des Beschwerdegegenstandes ist die Berufung auch noch gegen ein zweites Versäumnisurteil zulässig (§ 514 Abs. 2 ZPO).

III. Welche Gerichte arbeiten in Deutschland als Berufungsinstanz?

Als Berufungsinstanz sind die Landgerichte und die Oberlandesgerichte tätig. Für die von Amtsgerichten erlassenen erstinstanzlichen Entscheidungen sind die Landgerichte zuständig (§ 72 GVG), während für die von Landgerichten erlassenen erstinstanzlichen Entscheidungen die Oberlandesgerichte zuständig (§ 119 Abs. 1

21 BGH Beschl. v. 27.3.2003 - V ZR 291/02 = NJW 2003, 1943, 1945; BGH Beschl. v. 19.9.2002 - V ZB 31/02 = MDR 2003, 46; Baumert, „Nichtzulassungsbeschwerde – Darlegung und Prüfung von Revisionszulassungsgründen", MDR 2014, 1181; Oberheim, in: *Eichele/Hirtz/Oberheim, Berufung im Zivilprozess*, Kap. 14, Rn. 24.

22 Rimmelspacher, in: *Münchener Kommentar zur ZPO*, § 543, 13.

23 Jacobs, in: *Stein/Jonas ZPO*, § 543, Rn. 12.

24 BGH Beschl. v. 27.3.2003 - V ZR 291/02 = NJW 2003, 1943, 1946; Ball, in: *Musielak/Voit ZPO*, § 543, Rn. 8a.

25 Jacobs, in: *Stein/Jonas ZPO*, § 543, Rn. 19; Rimmelspacher, in: *Münchener Kommentar zur ZPO*, § 543, 19.

Nr. 2 GVG) sind. Im Laufe der ZPO-Reform war zunächst eine Vereinheitlichung auf ein für die Berufungsinstanz zuständiges Gericht vorgesehen.[26] Namentlich sollten ausschließlich die Oberlandesgerichte für Berufungen gegen sämtliche Urteile zuständig sein. Davon hat der Gesetzgeber mit Blick auf eine mögliche Haushaltsüberlastung der Landesjustizverwaltungen wieder Abstand genommen.[27] Im Sinne der Verständlichkeit des Rechtsmittelsystems für den Bürger wäre diese Vereinfachung sicherlich von Vorteil gewesen, andererseits sollte auch die räumliche Nähe der Landgerichte für den Rechtsschutzsuchenden bei kleineren Streitwerten nicht vergessen werden. Schließlich müsste er für einen Streit über geringe Beträge unter Umständen eine weite Anreise bis zum zuständigen Oberlandesgericht auf sich nehmen. Hinzu kommt, dass er sich gemäß § 78 ZPO vor den Land- und Oberlandesgerichten ohnehin von einem Anwalt vertreten lassen muss. Der Rechtsschutzsuchende muss also schon gar nicht selbst ermitteln, welches Gericht das richtige Berufungsgericht ist. Vielmehr hat er ohnehin einen Anwalt, der die Voraussetzungen des Rechtsmittels prüft und dieses für ihn entsprechend beim richtigen Gericht einlegt. Von einem Anwalt kann aber erwartet werden, dass er das zuständige Gericht bestimmen kann.

IV. Ist die Berufungsfrist für die Berufungsbegründung ausreichend? Welche Maßnahme wurde in der ZPO vorgesehen?

Bei der Einlegung einer Berufung sind im deutschen Recht zwei verschiedene Fristen zu beachten. In § 517 ZPO ist die Berufungsfrist geregelt. Sie beträgt einen Monat. Innerhalb dieser Frist muss die Berufung eingelegt werden. Es handelt sich um eine Notfrist. Das heißt, diese Frist muss zwingend eingehalten werden und kann vom Gericht nicht verlängert werden. Sie beginnt mit der Zustellung des Urteils. Sollten bei der Zustellung irgendwelche Fehler aufgetreten sein, beginnt die Frist mit dem Ablauf von fünf Monaten nach der Verkündung. Innerhalb dieser Zeit müssen sich die Parteien lediglich entscheiden, ob sie Berufung einlegen möchten oder nicht.

Innerhalb von zwei Monaten ab Zustellung bzw. fünf Monaten nach Verkündung muss die Berufung sodann begründet werden (§ 520 Abs. 2 S. 1 ZPO). Die Berufungsbegründungsfrist ist keine Notfrist. Sie kann daher auf Antrag vom Vorsitzenden verlängert werden, wenn der Gegner zustimmt. Außerdem kann sie nach § 520 Abs. 2 S. 3 ZPO ohne Zustimmung des Gegners verlängert werden, wenn nach freier Überzeugung des Vorsitzenden keine Verzögerung zu erwarten ist oder der Berufungskläger erhebliche Gründe darlegt, die die Verlängerung rechtfertigen. Innerhalb dieser Frist muss ein Schriftsatz mit den Berufungsgründen bei Gericht vorgelegt werden.

26 BT-Drs. 14/4722, S. 5.

27 BT-Drs. 14/6036, S. 116.

Da ohnehin lediglich in geringem Umfang Tatsachen neu vorgetragen werden dürfen und überwiegend rechtliche Ausführungen zu machen sind, dürfte die Begründungsfrist im Normalfall ausreichend sein, zumal für komplexe Vorgänge ohnehin die Fristverlängerung um mindestens einen Monat möglich und damit ausreichend ist. Schließlich sollte berücksichtigt werden, dass sowohl Mandant als auch Anwalt ausreichend im Thema stehen.

Problematisch dürfte die Länge der Frist unter Umständen dann sein, wenn sich derjenige, der Berufung einlegen möchte, vor dem Amtsgericht selbst vertreten hat und sich dann von einem Anwalt vertreten lassen muss, weil die Berufung vor dem Landgericht zu führen ist. Schließlich ist der nunmehr hinzuzuziehende Anwalt zunächst nicht mit dem Fall vertraut. Aber auch in diesen Fällen hat der Anwalt bis zu zwei Monate Zeit, sich umfassend in den Sachverhalt einzuarbeiten, sofern der Rechtsschutzsuchende rechtzeitig einen Anwalt aufgesucht hat. Zudem besteht hinsichtlich der Berufungsbegründung die Möglichkeit, eine Fristverlängerung zu beantragen.

In Fällen, in denen Prozesskostenhilfe beantragt wird, ist es denkbar, dass die Berufungsbegründungsfrist nicht hinreicht, wenn der Prozesskostenhilfeantrag nicht rechtzeitig beschieden wird.[28] In diesen Fällen bleibt den Parteien die Möglichkeit, rechtzeitig einen Antrag auf Verlängerung der Berufungsbegründungsfrist zu stellen. Im Notfall bliebe zudem ein Antrag auf Wiedereinsetzung nach § 233 ZPO.[29]

Dass die Frist ausnahmsweise (aufgrund des Umfangs des Prozesses oder aus anderen Gründen) knapp wird, wird man sicherlich nicht vermeiden können. Auf der anderen Seite sollte aber auch das Interesse des Gegners an Rechtssicherheit und -klarheit sowie einer damit verbundenen zügigen Beendigung des Rechtsstreites nicht vernachlässigt werden. Wem nützt schon ein Prozess, bei dem erst nach Jahrzehnten eine endgültige Entscheidung getroffen wird?

V. Würden Sie die Berufungsinstanz als zweite Tatsacheninstanz bezeichnen? Was hat sich seit der Novelle geändert?

Die Berufung dient - anders als früher - primär der Fehlerüberprüfung des erstinstanzlichen Urteils. Neue Tatsachen sind seit der Reform im Jahr 2002 nur unter ganz bestimmten Umständen vom Berufungsgericht zu berücksichtigen. Zum Teil wird die Berufungsinstanz daher auch als eine zweite, eingeschränkte Tatsacheninstanz bezeichnet, mit dem Ziel, eine „fehlerfreie und überzeugende" und damit „richtige" Entscheidung im Einzelfall zu treffen.[30]

28 BGH Beschl. v. 29.6.2006 - III ZA 7/06 = NJW 2006, 2857.

29 Vgl. hierzu ausführlich BGH Beschl. v. 29.6.2006 - III ZA 7/06 = NJW 2006, 2857; Ball, in: *Musielak/Voit ZPO*, § 520, Rn. 5.

30 BGH Urt. v. 14.2.2017 - VI ZR 434/15 = BGH NJW-RR 2017, 725, 727.

Früher galt in Deutschland das novum iudicium. Der Rechtsstreit wurde vollständig neu verhandelt (§ 525 ZPO a.F.) und es gab nach § 529 ZPO a.F. ein volles Novenrecht. Das bedeutet, dass neue Tatsachen und Beweismittel vollständig vorgebracht werden konnten. Es gab sogar ein Recht zur Nachholung versäumter Handlungen gemäß § 531 ZPO a.F. So konnten unterbliebene oder verweigerte Erklärungen nachträglich abgegeben werden.[31]

Der Gesetzgeber hat sich nunmehr für eine reine Fehlerkontrolle in der Berufungsinstanz entschieden. In der zweiten Instanz soll lediglich eine Überprüfung auf Fehler stattfinden. Nur wenn das Berufungsgericht ernstliche Zweifel an der Richtigkeit oder Vollständigkeit der Feststellungen hat und eine neue Feststellung in zweiter Instanz geboten ist, darf das Gericht über erstinstanzlich festgestellte Tatsachen erneut verhandeln.[32] Ziel dieser Änderung war eine effektivere und bürgerfreundlichere Ausgestaltung des Berufungsrechts.[33]

Es lässt sich daher der Prüfungsumfang des Berufungsgerichts in etwa wie folgt zusammenfassen:

> 1. Die vom erstinstanzlichen Gericht festgestellten Tatsachen sind gemäß § 529 Abs. 1 Nr. 1 ZPO hinzunehmen, soweit nicht konkrete Anhaltspunkte Zweifel an der Richtigkeit oder Vollständigkeit der Tatsachenfeststellung begründen und dadurch erneute Feststellung geboten ist. Ursächlich dafür können Verfahrensfehler sein[34] aber auch bei verfahrensfehlerfrei getroffenen Entscheidungen können im Einzelfall konkrete Anhaltspunkte für Zweifel an der Richtigkeit und Vollständigkeit der Tatsachenfeststellung bestehen[35]. Dies ist zum Beispiel denkbar, wenn das erstinstanzliche Gericht entscheidungserhebliches Vorbringen nicht oder nicht ausreichend berücksichtigt hat.[36] Neue Tatsachen dürfen gemäß § 529 Abs. 1 Nr. 2 ZPO nur in Ausnahmefällen berücksichtigt werden, die in den § 529 ZPO nachfolgenden Vorschriften geregelt sind.
>
> 2. Neue Angriffs- und Verteidigungsmittel (= jedes tatsächliche oder rechtliche Vorbringen, das der Durchsetzung oder der Abwehr des geltenden Begehrens dient, insbes. Tatsachenbehauptung, Bestreiten, Einwendungen, Beweismittel, Beweiseinreden)[37] dürfen gemäß § 531 Abs. 2 ZPO nur vorgebracht werden, wenn sie einen Gesichtspunkt betreffen, der vom Gericht des ersten Rechtszuges erkennbar übersehen oder für unerheblich gehalten wurde, infolge eines Verfahrensmangels im ersten Rechtszug nicht geltend gemacht wurde oder nicht geltend gemacht wurde, ohne dass dies auf einer Nachlässigkeit der Partei beruht. Zusammengefasst kann

31 Münch, „Die „neue" ZPO: bedeutende Änderungen im zivilgerichtlichen Verfahrensrecht (Teil II)" DStR 2002, 133.

32 BT-Drs. 14/3750, S. 40.

33 BT-Drs. 14/3750, S. 40.

34 BGH Urt. v. 3.6.2014 - VI ZR 394/13 = BGH NJW 2014, 2797.

35 BGH Urt. v. 9.3.2005 - VII ZR 266/03 = BGH NJW 2005, 1583.

36 BGH Urt. v. 27.9.2006 - VIII ZR 19/04 = BGH NJW 2007, 2414.

37 Foerstel, in: *Musielak/Voit ZPO*, § 282, Rn. 2; Heßler, in: *Zöller ZPO*, § 531, Rn. 21; Rimmelspacher, in: *Münchener Kommentar zur ZPO*, § 520, Rn. 65.

> jedes Angriffs- oder Verteidigungsmittel noch zulässig vorgebracht werden, das ohne Verschulden der Partei nicht vorgebracht wurde.
>
> 3. Klageänderungen, Aufrechnung und Widerklage sind gemäß § 533 ZPO nur zulässig, wenn der Gegner einwilligt oder das Gericht sie für sachdienlich hält und diese auf Tatsachen gestützt werden können, die zulässigerweise in der zweiten Instanz berücksichtigt werden dürfen.

Zulässig ist es auch, Angriffs- und Verteidigungsmittel vorzubringen, wenn deren Voraussetzungen zwar schon in erster Instanz gegeben waren, sie aber noch eines privatautonomen Gestaltungsaktes bedürfen, der erst in der zweiten Instanz vorgenommen wird, sodass sie dort neu entstanden sind. Beispielhaft sei hier die Verjährungseinrede genannt. Wenn die materiell-rechtliche Erhebung der Einrede in der ersten Instanz nicht erfolgt ist, obwohl sie zulässig gewesen wäre, ist dies im Berufungsprozess ein neues Angriffs- und Verteidigungsmittel.[38] Strenger ist hier die höchstrichterliche Rechtsprechung. Nach Ansicht des Großen Senats des BGH ist die Einrede der Verjährung nur dann ein neues Angriffs- und Verteidigungsmittel, wenn die Erhebung der Verjährungseinrede und die den Verjährungseintritt begründenden tatsächlichen Umstände zwischen den Prozessparteien unstreitig sind.[39] Eine Aushöhlung des Grundsatzes[40], dass die Berufungsinstanz lediglich der Fehlerkontrolle dienen soll, ist durch beide Ansichten nicht zu befürchten.

VI. Würden Sie das neu eingeführte Novenverbot als einen Rückgang in Bezug auf die Rechtsstaatlichkeit des Zivilverfahrens bezeichnen?

Der derzeitige Gesetzesstand genügt ohne Frage dem Gebot der Rechtsstaatlichkeit, denn jede Partei hat weiterhin in der ersten Instanz ausreichend Zeit und Möglichkeit, sich zu äußern und die für sie günstigen Tatsachen vorzutragen. Es bleibt also dabei, dass eine Instanz die Möglichkeit bietet, sämtliche Tatsachen vorzutragen und vollständig gehört zu werden. Auch in der zweiten Instanz bleibt die Möglichkeit Neues vorzubringen erhalten, sofern die Partei den fehlenden Vortrag unverschuldet nicht vorgebracht hat (siehe hierzu im Einzelnen unter V). Insbesondere ergibt sich aus Art. 19 Abs. 4 GG sowie aus dem Justizgewährungsanspruch keine Pflicht, überhaupt mehrere Instanzenzüge im Zivilprozess zu errichten. Wenn die Regelung aber schon gar nicht zwingend eine zweite Instanz erfordert, kann sie auch nicht eine besondere Ausgestaltung dieser Instanzenzüge regeln.[41]

38 Vgl. hierzu ausführlich Meller-Hannich, „Zur Präklusion der Verjährungseinrede in der Berufungsinstanz", NJW 2006, 3385, 3888; für eine Zulässigkeit bei unstreitigem Sachverhalt BGH Beschl. v. 23.6.2008 - GSZ 1/08 = NJW 2008, 3434.

39 BGH Beschl. v. 23.6.2008 - GSZ 1/08 = NJW 2008, 3434.

40 Stackmann, „Fünf Jahre reformiertes Rechtsmittelverfahren im Zivilprozess", NJW 2007, 9, 10.

41 BVerfG Beschl. v. 8.1.2004 - 1 BvR 864/03 = NJW 2004, 1371; Beschl. v. 30.4.2003 - 1 PBvU 1/02 = NJW 2003, 1924; Beschl. v. 08.2.1994 - 1 BvR 765, 766/89 = NJW 1994, 1053; Urt. v. 11.6.1980 - 1 PBvU 1/79 = NJW 1981, 39, 41.

Insbesondere ist bei der Ausgestaltung der Rechtsmittel zu beachten, dass der Rechtsmittelbeklagte ebenfalls ein Rechtsschutzsuchender ist und ein Interesse am Erhalt der für ihn günstigen Entscheidung sowie daran hat, dass jeder Rechtsstreit irgendwann ein Ende findet. Auch dies ist Ausdruck des Rechtsstaatsprinzips.[42] Hierzu gehört es ebenso, lange Verfahrenszeiten zu vermeiden. Nach altem Recht war es durchaus möglich, unredlich den Prozess zu verzögern und so ein abschließendes Prozessergebnis möglichst lang hinauszuzögern. Dies ist nach der neuen Gesetzeslage nur noch begrenzt möglich.

VII. Zur Beschlusszurückweisung

A. Was ist die Beschlusszurückweisung nach Art. 522 Abs. 2 ZPO?

§ 522 Abs. 2 ZPO bietet seit 2002 die Möglichkeit, Berufungen ohne mündliche Verhandlung durch Beschluss zurückzuweisen. Voraussetzung hierfür war bis zum Jahr 2011 nach § 522 Abs. 2 ZPO die Überzeugung des Gerichts davon, dass

1. die Berufung keine Aussicht auf Erfolg hat,

2. die Rechtssache keine grundsätzliche Bedeutung hat und

3. die Fortbildung des Rechts oder die Sicherung der einheitlichen Rechtsprechung eine Entscheidung des Berufungsgerichts nicht erfordert.

Außerdem musste das Gericht den Beschluss über die Zurückweisung einstimmig treffen.

Diese Voraussetzungen wurden parallel zu denen der Zulassungsvoraussetzungen der Revisionsinstanz gestaltet. Dies zeigt einmal mehr, dass solche Entscheidungen im Sinne der Rechtseinheitlichkeit auch nach der ZPO-Reform im Jahr 2002 weiterhin den Weg zu den höchsten Gerichten finden und nicht schon in der Berufungsinstanz herausgefiltert werden sollen.

Aufgrund heftiger Kritik an dieser Vorschrift[43] wurde sie im Jahr 2011 geändert (wesentliche Änderungen sind unterstrichen dargestellt).

42 Ahrens, in: *Eichele/Hirtz/Oberheim Berufung im Zivilprozess*, Kap. 1, Rn. 25.

43 Baumert, „Beschränkung des Zugangs zum Revisionsgericht durch Zurückweisung der Berufung durch Beschluss gem. § 522 Abs. 2 ZPO“, MDR 2008, 954, 958; Krüger, „Unanfechtbarkeit des Beschlusses nach § 522 II ZPO - Ein Zwischenruf“, NJW 2008, 945 ff.; Nassall, „Verfassungsgerichtliche Lawinensprengung? – Das BVerfG und die Berufungs-Beschlusszurückweisung“, NJW 2008, 3390 ff; Rimmelspacher, „Bessere Kontrolle zivilprozessualer Berufungsentscheidungen“, ZRP 2010, 217 ff.

Alte Fassung	Neue Fassung
(2) [1]Das Berufungsgericht weist die Berufung durch einstimmigen Beschluss unverzüglich zurück, wenn es davon überzeugt ist, dass 1. die Berufung keine Aussicht auf Erfolg hat, 2. die Rechtssache keine grundsätzliche Bedeutung hat und 3. die Fortbildung des Rechts oder die Sicherung einer einheitlichen Rechtsprechung eine Entscheidung des Berufungsgerichts nicht erfordert.	(2) [1]Das Berufungsgericht soll die Berufung durch Beschluss unverzüglich zurückweisen, wenn es einstimmig davon überzeugt ist, dass 1. die Berufung offensichtlich keine Aussicht auf Erfolg hat, 2. die Rechtssache keine grundsätzliche Bedeutung hat, 3. die Fortbildung des Rechts oder die Sicherung einer einheitlichen Rechtsprechung eine Entscheidung des Berufungsgerichts nicht erfordert und 4. eine mündliche Verhandlung nicht geboten ist.
[2]Das Berufungsgericht oder der Vorsitzende hat zuvor die Parteien auf die beabsichtigte Zurückweisung der Berufung und die Gründe hierfür hinzuweisen und dem Berufungsführer binnen einer zu bestimmenden Frist Gelegenheit zur Stellungnahme zu geben. [3]Der Beschluss nach Satz 1 ist zu begründen, soweit die Gründe für die Zurückweisung nicht bereits in dem Hinweis nach Satz 2 enthalten sind.	[2]Das Berufungsgericht oder der Vorsitzende hat zuvor die Parteien auf die beabsichtigte Zurückweisung der Berufung und die Gründe hierfür hinzuweisen und dem Berufungsführer binnen einer zu bestimmenden Frist Gelegenheit zur Stellungnahme zu geben. [3]Der Beschluss nach Satz 1 ist zu begründen, soweit die Gründe für die Zurückweisung nicht bereits in dem Hinweis nach Satz 2 enthalten sind. [4]Ein anfechtbarer Beschluss hat darüber hinaus eine Bezugnahme auf die tatsächlichen Feststellungen im angefochtenen Urteil mit Darstellung etwaiger Änderungen oder Ergänzungen zu enthalten.

Damit hat der Gesetzgeber hinsichtlich des Wörtchens „einstimmig" lediglich eine Veränderung der Position vorgenommen, sodass nunmehr nicht mehr nur die einstimmige Beschlussfassung, sondern darüber hinaus die einstimmige Überzeugung des Gerichts notwendig ist.[44] Ob durch eine solche Positionsveränderung im Gesetzestext tatsächlich eine Abänderung der über Jahre eingeübten gerichtlichen Praxis erreicht werden kann, ist zu bezweifeln.

Außerdem muss das Gericht seit der Gesetzesänderung im Jahr 2011[45] nicht mehr nur von der Aussichtslosigkeit, sondern von der offensichtlichen Aussichtslosigkeit der Berufung überzeugt sein. Die Einführung dieses Wörtchens hat für die praktische Anwendung kaum Veränderungen mit sich gebracht, vielmehr handelt es sich um eine Klarstellung. Vor der Änderung war es notwendig, dass „für alle Mitglieder des Berufungsgerichts ersichtlich ist, dass die Berufung keine Aussicht auf Erfolg bietet."[46] Eine qualitative Steigerung der Aussichtslosigkeit kann das Wort „offensichtlich"

44 BT-Drs. 17/6406, S. 8.

45 BT-Drs. 17/6406.

46 BT-Drs. 14/4722, S. 97.

nicht meinen, da eine Berufung nur keine Aussicht oder eben Aussicht auf Erfolg haben kann. Ein Mehr oder Weniger an Erfolgsaussicht kann es nicht geben.[47] Die Aussichtslosigkeit muss auch weiterhin nicht sofort ins Auge springen.[48] Das Gericht muss nach - unter Umständen auch umfassender - Prüfung zweifelsfrei alle Tat- und Rechtsfragen beantworten können, ohne sich von der Durchführung einer mündlichen Verhandlung neue Erkenntnisse zu versprechen.[49] Bereits vor der Reform genügte eine rein summarische Prüfung nicht und das Gericht musste nach einer umfassenden Prüfung von der Aussichtslosigkeit überzeugt sein[50], sodass durch das Einfügen dieses Merkmals keine intensivere oder gründlichere Prüfung zu erwarten ist.

Weiterhin darf seit dem Jahr 2011 eine mündliche Verhandlung nicht geboten sein. Hier geht es um Fälle, in denen die prozessuale Fairness eine mündliche Verhandlung gebietet.[51] Wann dies der Fall ist, steht im Ermessen des Gerichts. In der Gesetzesbegründung wird davon ausgegangen, dass z.B. die existenzielle Bedeutung (insbesondere der Arzthaftungsprozess sowie die fehlerhafte Begründung eines im Ergebnis richtigen erstinstanzlichen Urteils) dazu führt, dass eine mündliche Verhandlung geboten ist.[52] Hintergrund dieser Änderung ist vor allem der Fall „Deike". Deike Holweg erlitt während ihrer Geburt einen schweren Geburtsschaden, weil sie unter Sauerstoffmangel litt. Die Eltern klagten deswegen gegen die Klinik und legten gegen das erstinstanzliche Urteil Berufung ein. Diese Berufung wurde ohne mündliche Verhandlung zurückgewiesen. Die Eltern empfanden diese Behandlung als ungerecht und generierten ein großes öffentliches Interesse, indem sie Petitionen veröffentlichten und Kontakt zu Bundespolitikern aufnahmen. Dies führte dazu, dass die Änderung der Vorschrift in Öffentlichkeit und Politik große Beachtung fand.[53]

B. Kann ich mich dagegen wehren, wenn ein Gericht meine Berufung durch Beschluss zurückgewiesen hat?

Bis zur Gesetzesänderung im Jahr 2011 war die Beschlusszurückweisung unanfechtbar (§ 522 Abs. 3 ZPO a.F.). Es gab keinerlei Möglichkeit gegen die Entscheidung vorzugehen. Denkbar waren allenfalls die Gehörsrüge (§ 321a ZPO) oder die Einlegung einer Verfassungsbeschwerde. Beides sind aber Rechtsmittel, die nur unter sehr engen Voraussetzungen zugänglich sind. Auch aus diesem Grund

47 Heßler, in: *Zöller ZPO*, § 522, Rn. 36; ähnlich auch Gehrlein, „Beschlusszurückweisung einer Berufung im Zivilprozess", NJW 2014, 3393, 3394; a.A. Baumert, „Reformierte Berufungszurückweisung durch Beschluss", MDR 2013, 7, 8.

48 Meller-Hannich, „Die Neufassung von § 522 ZPO – Unbestimmte Rechtsbegriffe, Ermessen und ein neuartiges Rechtsmittel", NJW 2011, 3393, 3394; Stackmann, „Die Reform des § 522 ZPO", JuS 2011, 1087, 1088.

49 BT-Drs. 17/6406, S. 9.

50 Vgl. ausführlich hierzu Gelbrich, S. 13 ff.

51 BT-Drs. 17/6406, S. 9.

52 BT-Drs. 17/6406, S. 9.

53 Ausführlich hierzu www.522zpo.de (letzter Aufruf 21.12.2019).

wurde die Vorschrift in ihrer alten Fassung stark kritisiert.[54] Im Jahr 2011 wurde daher die Nichtzulassungsbeschwerde als statthafter Rechtsbehelf[55] eingeführt. Diese ist sonst statthaft, wenn ein Gericht die Revision nicht zugelassen hat (§ 543 Abs. 1 Nr. 1 ZPO). Zu begrüßen ist zwar, dass es nunmehr zumindest auch nach der Beschlusszurückweisung die Möglichkeit gibt, zur dritten Instanz zu gelangen.

Allerdings führt die Erhebung der Nichtzulassungsbeschwerde nach § 544 Abs. 2 ZPO nicht zu einer vollständigen Überprüfung des Beschlusses und seiner Voraussetzungen. Prüfungsumfang der Nichtzulassungsbeschwerde ist lediglich die Frage, ob ein gesetzlicher Zulassungsgrund vorliegt. Es wird also nur geprüft, ob

> 1. die Rechtssache grundsätzliche Bedeutung hat, oder
>
> 2. die Fortbildung des Rechts oder die Sicherung einer einheitlichen Rechtsprechung eine Entscheidung erfordert.

Nicht geprüft wird, ob eine mündliche Verhandlung geboten war oder ob die Rechtssache offensichtlich keine Aussicht auf Erfolg hatte. Hinzu kommt, dass für eine Nichtzulassungsbeschwerde der Wert der mit der Revision geltend zu machenden Beschwer 20.000 Euro übersteigen muss (§ 26 Nr. 8 EGZPO).

Dennoch eröffnet § 522 Abs. 3 ZPO nunmehr zumindest theoretisch die Möglichkeit, noch bis zur Revision zu gelangen und eine inhaltliche Überprüfung der Entscheidung zu erreichen. Allerdings sind dafür die bereits genannten nicht unerheblichen Hürden zu überwinden. Der Beschwerdewert für die Revision muss eine Höhe von 20.000 € übersteigen und es muss ein Revisionsgrund vorliegen. Erst wenn diese Voraussetzungen gegeben sind und erfolgreich mit der Nichtzulassungsbeschwerde geltend gemacht wurden, kann in die Revisionsinstanz übergegangen werden.

Allerdings sind die Hürden für eine Zulassung hoch. Im Jahr 2018 wurde bei insgesamt 4232 Neueingängen bei sämtlichen Zivilsenaten des BGH die Zulassung in 2138 Fällen abgelehnt. Dies ist etwa die Hälfte aller Neueingänge. Im gleichen Jahr gab es 3926 Eingänge von Revisionen und Nichtzulassungsbeschwerden. Davon wurden lediglich 759 zugelassen oder waren unbeschränkt statthaft.[56] Bei Nichtzulassungsbeschwerden gegen Beschlüsse nach § 522 Abs. 2 ZPO lag die Erfolgsquote in den Jahren 2013-2016 bei unter 5 % Prozent.[57] Auch

54 Baumert, „Beschränkung des Zugangs zum Revisionsgericht durch Zurückweisung der Berufung durch Beschluss gem. § 522 Abs. 2 ZPO", MDR 2008, 954, 956; Krüger, „Unanfechtbarkeit des Beschlusses nach § 522 II ZPO - Ein Zwischenruf", NJW 2008, 945 ff.; Nassall, „Verfassungsgerichtliche Lawinensprengung? – Das BVerfG und die Berufungs-Beschlusszurückweisung", NJW 2008, 3390 ff; Reinelt, „Die unendliche Geschichte – § 522 II ZPO", ZRP 2009, 203 ff.; Rimmelspacher, „Bessere Kontrolle zivilprozessualer Berufungsentscheidungen", ZRP 2010, 217 ff.

55 Die Nichtzulassungsbeschwerde ist kein Rechtsmittel im klassischen Sinne, weil sie zwar Suspensiveffekt, aber nur einen begrenzten Devolutiveffekt hat. Sie soll daher vorliegend als Rechtsbehelf bezeichnet werden.

56 Übersicht über den Geschäftsgang bei den Zivilsenaten des Bundesgerichtshofes im Jahre 2018, Jahresstatistik abrufbar unter https://www.bundesgerichtshof.de/DE/Service/Statistik/statistik_node.html, (letzter Aufruf 21.12.2019).

57 *Greger*, „Realität und Reform des Zivilprozesses im Spiegel der Justiz-Statistik", ZZP 131 (2018), 317, 337.

dies zeigt, dass der Zugang zum BGH nur wenigen Fällen eröffnet ist. Und die Nichtzulassungsbeschwerde insbesondere nach erfolgter Beschlusszurückweisung nur sehr geringe Erfolgschancen hat.

Problematisch ist auch, dass aufgrund der Einführung von § 522 Abs. 3 ZPO nunmehr jährlich über 1200 weitere Nichtzulassungsbeschwerden beim BGH eingehen[58], was zu einer erheblichen Mehrbelastung führt.

Im Übrigen bleiben den Parteien natürlich auch weiterhin die Gehörsrüge nach § 321a ZPO und die Verfassungsbeschwerde erhalten.

C. Wie beurteilen Sie die Beschlusszurückweisung nach Art. 522 Abs. 2 ZPO? Gibt es rechtsstaatliche Bedenken?

In der Literatur wurden und werden häufig Bedenken an der Rechtsstaatlichkeit bzw. der Verfassungsmäßigkeit der Vorschrift geäußert.[59] Insbesondere vor der Änderung der Vorschrift im Jahr 2011 wurde die Unanfechtbarkeit kritisiert.

Es ist allerdings nicht erkennbar, dass die Vorschrift in der nunmehr geltenden Fassung gegen Verfassungsrecht verstößt.[60] Ein Verstoß gegen das Gebot des effektiven Rechtsschutzes (Art. 19 Abs. 4 GG; Art. 2 Abs. 1 i.V.m. Art. 20 Abs. 3 GG[61]) liegt nicht vor, denn dieser legt für den Zivilprozess keinen bestimmten Instanzenzug fest, der eingehalten werden muss.[62] Wenn schon kein bestimmter Instanzenzug vorgesehen ist, kann erst recht nicht die Ausgestaltung der einzelnen Instanzen von diesem Grundsatz vorgeschrieben werden.

Der Grundsatz des rechtlichen Gehörs bestimmt lediglich, dass die Möglichkeit gegeben werden muss, sich tatsächlich und rechtlich zu äußern.[63] Auch dieser Grundsatz ist gewährleistet. Bereits in der ersten Instanz hat der Rechtsschutzsuchende die Möglichkeit, sich umfassend in einer mündlichen Verhandlung und den entsprechenden Schriftsätzen zu äußern. Eine weitere Möglichkeit zur Äußerung

58 Zumindest lag die Zahl in den Jahren 2015-2018 in diesem Rahmen, vgl. Übersicht über den Geschäftsgang bei den Zivilsenaten des Bundesgerichtshofes im Jahre 2018, Jahresstatistik abrufbar unter https://www.bundesgerichtshof.de/DE/Service/Statistik/statistik_node.html (letzter Aufruf 21.12.2019).

59 Baumert, „Reformierte Berufungszurückweisung durch Beschluss", MDR 2013, 7, 12; Gehrlein, „Beschlusszurückweisung einer Berufung im Zivilprozess", NJW 2014, 3393, 3397; Krüger, „Unanfechtbarkeit des Beschlusses nach § 522 II ZPO - Ein Zwischenruf", NJW 2008, 945 ff.; Nassall, „Verfassungsgerichtliche Lawinensprengung? – Das BVerfG und die Berufungs-Beschlusszurückweisung", NJW 2008, 3390 ff.; Reinelt, „Die unendliche Geschichte – § 522 II ZPO", ZRP 2009, 203 ff.; *Weller*, „Rechtsfindung und Rechtsmittel: zur Reform der zivilprozessualen Zurückweisung der Berufung durch Beschluss", ZZP 124 (2011), 343, 351 ff.

60 Vgl. hierzu ausführlich Gelbrich, S. 74 ff.

61 Äußerst ausführlich zur Gewährleistung effektiven Rechtsschutzes im Zivilprozess Zuck, „Die Gewährleistung effektiven Rechtsschutzes im Zivilprozess", NJW 2013, 1132.

62 BVerfG Beschl. v. 22.6.1960 - 2 BvR 37/60 = BVerfGE 11, 232; Beschl. v. 21.10.1954 - 1 BvL 9/51, 1 BvL 2/53 = BVerfGE 4, 74.

63 BVerfG Beschl. v. 1.10.2004 - 1 BvR 173/04 = NJW 2005, 659, 660; Beschl. v. 27.10.1999 - 1 BvR 385/90 = BVerfGE 101, 106, 129.

besteht durch den Schriftwechsel im Berufungsverfahren. Zum einen bietet die Berufungsbegründung eine Äußerungsmöglichkeit zu tatsächlichen und rechtlichen Fragen. Zum anderen ist das Gericht nach § 522 Abs. 2 S. 2 ZPO verpflichtet, den Berufungskläger auf die beabsichtigte Zurückweisung und die Gründe hierfür hinzuweisen. Der Berufungsführer hat danach noch einmal die Möglichkeit, sich zu äußern. Die Möglichkeit zur tatsächlichen und rechtlichen Äußerung bleibt damit erhalten.

Allein der Unterschied, dass im Fall einer Beschlusszurückweisung keine mündliche Verhandlung und bei einer Entscheidung durch Urteil eine solche stattfindet, führt noch nicht zu einer Verletzung der Rechtsschutzgleichheit (Art. 3 Abs. 1 GG).[64] Eine Verletzung dieses Grundsatzes ist bei einer Norm, die Rechtszüge regelt, nur gegeben, wenn für die Ungleichbehandlung keinerlei sachlich einleuchtende Gründe erkennbar sind und die Aufrechterhaltung der Norm einen Verstoß gegen das allgemeine Gerechtigkeitsempfinden darstellen würde.[65] Ein sachlicher Grund ergibt sich schon daraus, dass bei Entscheidungen, die durch Beschluss zurückgewiesen werden, vorab eine einstimmige Überzeugung von der offensichtlichen Aussichtslosigkeit der Berufung des Gerichts gegeben sein muss[66] und dieses eine mündliche Verhandlung nicht für geboten erachtet. Wird die Berufung nicht durch Beschluss zurückgewiesen, ist das Gericht vom Vorliegen dieser Voraussetzungen gerade nicht einstimmig überzeugt.

Als praktisches Problem ist das Zustandekommen einer solchen Entscheidung zu sehen. In einer Kammer gibt es häufig den „Berichterstatter", der die Entscheidung vorbereitet; dieser arbeitet sämtliche Grundlagen für die Entscheidung aus und beschäftigt sich intensiv mit dem Thema. Außer ihm entscheiden noch der Vorsitzende und der Beisitzer. Beide arbeiten sich unter Umständen nicht so tief in den Fall ein.[67] Es ist daher denkbar, dass sie ohne weitere Befassung mit der Sache der Ansicht des Berichterstatters folgen.[68]

Bedenken bereitet, dass die Gerichte regional in sehr unterschiedlichem Umfang Berufungen durch Beschluss zurückweisen.[69] Unabhängig davon, ob darin eine Verletzung der Rechtsanwendungsgleichheit (Art. 3 Abs. 1 GG)[70] oder die Gefahr der Rechtszersplitterung zu sehen ist, sind derartige Unterschiede in einem Rechtsstaat

64 Krüger, „Unanfechtbarkeit des Beschlusses nach § 522 II ZPO – Ein Zwischenruf", NJW 2008, 945, 946.

65 BVerfG, Beschl. v. 23.5.1990 - 1 BvR 467/90 = BVerfGE 14, 56, 74.

66 Zur alten Fassung: BVerfG Beschl. v. 18.6.2008 - 1 BvR 1336/08 = MDR 2008, 991, 992.

67 Hinrichs, „Zurückweisungsbeschluss – ein Votum pro", DRIZ 2016, 66, 67 f.

68 Ähnlich auch Schmude, BRAK-Mitt. Sonderdruck 5. ZPR-Symposion der Bundesrechtsanwaltskammer am 16. und 17. April 2010 in Potsdam 17, 19.

69 Siehe hierzu ausführlich Gelbrich, S. 36 ff.

70 [72] Nassall, „Verfassungsgerichtliche Lawinensprengung? – Das BVerfG und die Berufungs-Beschlusszurückweisung", NJW 2008, 3390, 3392.

jedenfalls nicht wünschenswert. Hinzu kommt, dass nicht nur in unterschiedlichen Regionen unterschiedlich häufig von der Beschlusszurückweisung Gebrauch gemacht wird, sondern dass davon auszugehen ist, dass einzelne Richter die Möglichkeit zur Begrenzung ihrer Arbeitsbelastung nutzen und besonders häufig durch Beschluss zurückweisen. Diese rechtsstaatlich durchaus bedenkliche Möglichkeit bleibt auch nach der Gesetzesänderung im Jahr 2011 bestehen. Nur die Einführung der Nichtzulassungsbeschwerde schwächt in diesen Fällen die Folgen etwas ab.

Auch sollte der allgemeine gesellschaftliche Einfluss einer mündlichen Verhandlung nicht verkannt werden. Eine mündliche Verhandlung hat in der Regel eine Befriedungsfunktion und steigert die Akzeptanz der gerichtlichen Entscheidung bei den Parteien.[71] Dies wird nicht zuletzt dadurch gewährleistet, dass die Parteien in der mündlichen Verhandlung die Möglichkeit erhalten, noch einmal das Erlebte aus ihrer Sicht vorzubringen und ihre Argumente anderen mitzuteilen. Dies führt dazu, dass sie den Entscheidungsprozess als fair empfinden, was wiederum zur Folge hat, dass auch negative Entscheidungen besser akzeptiert werden.[72] Die Akzeptanz der Einzelentscheidung ist wichtig für die grundsätzliche Legitimation der Gerichte.[73] Gibt es zu viele Rechtsschutzsuchende, die in ihren Angelegenheiten ergangene Gerichtsentscheidungen nicht akzeptieren, kann dies zu einem Vertrauensverlust der Bevölkerung in die Justiz führen. Ein grundlegender Vertrauensverlust in die Justiz hätte für die Gesellschaft erhebliche Folgen. Insbesondere wäre zu befürchten, dass die Bürger sich einen anderen Weg zur Rechtsdurchsetzung suchen und das Vertrauen in staatliche Institutionen nachhaltig geschädigt wird.

Es muss natürlich berücksichtigt werden, dass im Rahmen der Berufung eine mündliche Verhandlung mit all diesen Wirkungen im Normalfall bereits in der ersten Instanz stattgefunden hat. Es sind aber auch Fälle denkbar, in denen die erstinstanzliche Verhandlung gerade nicht zur zufriedenstellenden Anhörung geführt hat und die Befriedungs- und Anhörungsfunktion erst in der zweiten Instanz erreicht werden kann. Die Bedeutung der mündlichen Verhandlung in der zweiten Instanz sollte nicht unterschätzt werden und eine Beschlusszurückweisung ohne mündliche Verhandlung nur unter strenger Beachtung der Voraussetzungen von § 522 Abs. 2 ZPO bejaht werden.

71 Oberheim, in: *Eichele/Hirtz/Oberheim, Berufung im Zivilprozess*, Kap. 14, Rn. 2a, Reinelt, „Die unendliche Geschichte – § 522 II ZPO“, ZRP 2009, 203, 205 f.; Wolf, „Zwischen Effizienz und Akzeptanz - zur Reform der Berufungszurückweisung durch Beschluss nach § 522 Abs. 2 ZPO“, BRAK-Mitteilungen 2010, 194.

72 Bierbrauer/Klinger, in: *Handbuch der Rechtspsychologie,* 516; Klendauer/Streicher/Jonas/Frey, in: *Handbuch der Sozialpsychologie und Kommunikationspsychologie*, 187, 189.

73 Bierbrauer/Klinger, in: *Handbuch der Rechtspsychologie,* 516; Geipel/Doukoff, „Halten um jeden Preis? – Anwaltliche Fehleinschätzung, richterliches Beharrungsvermögen und der Anspruch auf ein faires Verfahren“, ZAP 2011 Fach 13, 1689; Luhmann, S. 36.

VIII. Wie würden Sie den Prüfungsumfang des Berufungsgerichts hinsichtlich der Fehler, der Rechtsanwendung, Verfahrensfehler, der Richtigkeit und Vollständigkeit der Tatsachenfeststellungen beschreiben?

In der Berufungsinstanz gilt ein beschränktes Novenrecht. Grundsätzlich ist der Prozessstoff aus der ersten Instanz zugrunde zu legen, sofern nicht konkrete Anhaltspunkte Zweifel an der Richtigkeit oder Vollständigkeit der entscheidungserheblichen Feststellung begründen und deshalb eine erneute Feststellung gebieten (§ 529 Abs. 1 Nr. 1 ZPO). Es handelt sich um eine Fehlerüberprüfung. Neue Tatsachen und Beweismittel sind nur unter sehr engen Voraussetzungen zulässig. Zusammengefasst wird die Entscheidung lediglich auf Rechtsverletzungen, Sachverhaltsfehler bzw. ausnahmsweise zulässige neue Tatsachen und Beweise überprüft.

Mit Blick auf Fehler der Rechtsanwendung (Rechtsverletzung) erfolgt eine vollständige und umfassende Überprüfung des erstinstanzlichen Urteils auf ursächliche Fehler innerhalb der gestellten Anträge (§ 528 ZPO).[74] Dabei werden das materielle Recht und das Verfahrensrecht überprüft. Unter Rechtsnormen sind alle auf den Fall anwendbaren Normen zu verstehen, dies umfasst Bundes- und Landesgesetze, Rechtsverordnungen des Bundes und der Länder, europarechtliche Verordnungen und Richtlinien, Völkerrecht, u.U. auch ausländisches Recht, Gewohnheitsrecht sowie öffentlich-rechtliche Satzungen. Außerdem werden Denk- und Erfahrungssätze sowie eine Vielzahl von Personen betreffende privatrechtliche Satzungen und AGB überprüft.[75] Hatte das erstinstanzliche Gericht bei seiner Entscheidung ein Ermessen, wird nicht die Ermessensentscheidung überprüft, sondern das zweitinstanzliche Gericht trifft eine eigene Ermessensentscheidung.[76] Auch Interpretationsmängel im Rahmen der Auslegung sind Rechtsanwendungsfehler.[77] Für das Berufungsgericht ist die eigene Auslegung maßgeblich.[78] Verletzt ist eine Rechtsnorm im Sinne dieser Vorschrift, wenn sie nicht oder nicht richtig angewendet wurde. Die Rechtsverletzung muss auch kausal für die Entscheidung gewesen sein. Bei der Verletzung materiell-rechtlicher Vorschriften ist es notwendig, dass die Entscheidung bei richtiger Anwendung günstiger ausgefallen wäre. Bei der Verletzung von verfahrensrechtlichen Vorschriften genügt die Möglichkeit, dass das Erstgericht ohne den Verfahrensfehler zu einem anderen Ergebnis gelangt wäre.[79]

74 Rosenberg/Schwab/Gottwald, § 139, Rn. 34.

75 Rimmelspacher, in: *Münchener Kommentar zur ZPO*, § 513, Rn. 9; Wolf, in: BeckOK ZPO, § 513, Rn. 3.

76 BGH Urt. v. 14.7.2004 - VIII ZR 164/03 = NJW 2004, 2751; Rosenberg/Schwab/Gottwald, § 139, Rn. 34; a.A. Arnold, „Zur Überprüfung tatrichterlicher Ermessensspielräume in der Berufung", ZZP 126 (2013), 63, 80.

77 BGH Urt. v. 4.7.2004 - VIII ZR 164/03 = BGHZ 160, 83, 87; Rimmelspacher, in: *Münchener Kommentar zur ZPO*, 513, Rn. 9.

78 BGH Urt. v. 4.7.2004 - VIII ZR 164/03 = BGHZ 160, 83, 87; Ball, in: *Musielak/Voit ZPO*, § 513, Rn. 4a.

79 BGH Urt. v. 20.3.1995 - II ZR 198/94 = NJW 1995, 1841; Ball, in: *Musielak/Voit ZPO*, § 513, Rn. 5; ähnlich auch Rimmelspacher, in: *Münchener Kommentar zur ZPO*, § 513, Rn. 13; Wolf, in: BeckOK ZPO, § 513, Rn. 5.

Eine Berufung kann nicht auf die Unzuständigkeit des erstinstanzlichen Gerichts gestützt werden (§ 513 Abs. 2 ZPO).[80]

Gemäß § 529 Abs. 2 ZPO sind Verfahrensmängel, soweit sie nicht von Amts wegen zu berücksichtigen sind[81], nur insoweit einzubeziehen, als sie in der Berufungsbegründung gerügt wurden. Dispositive verfahrensleitende Normen werden immer von Amts wegen geprüft.[82] Wird ein Verfahrensfehler festgestellt, muss das Berufungsgericht aber eine volle Inhaltskontrolle durchführen und allen sich konkret ergebenden Anhaltspunkten nachgehen. Der Prüfungsumfang der Inhaltskontrolle wird durch § 529 Abs. 2 ZPO nicht eingeschränkt.[83]

Die Richtigkeit und Vollständigkeit der Tatsachenfeststellungen können auch ohne eine entsprechende Rüge vom Gericht überprüft werden. Voraussetzung ist allein, dass sich Zweifel an der Richtigkeit oder Vollständigkeit der Feststellungen ergeben und diese eine neue Feststellung gebieten (siehe hierzu unter IX). In der Regel werden sich diese Zweifel aus der Berufungsbegründung ergeben.[84] Wenn sich derartige Zweifel ergeben, muss über die entsprechende Tatsachenbehauptung erneut verhandelt, Beweis erhoben und eine neue Beweiswürdigung vorgenommen werden.[85]

IX. Kann die Bindung an die Feststellungen der ersten Instanz manchmal entfallen?

Die Bindungswirkung kann entfallen, wenn konkrete Anhaltspunkte Zweifel an der Richtigkeit oder Vollständigkeit der entscheidungserheblichen Feststellungen begründen (§ 529 Abs. 1 Nr. 2 ZPO).

Es ist nicht erforderlich, dass die festgestellten Tatsachen verfahrensfehlerhaft zustande gekommen sind. Es genügt vielmehr, wenn konkrete Anhaltspunkte für die Unvollständigkeit oder Unrichtigkeit vorliegen.[86] Für das Berufungsgericht muss sich eine gewisse, aber nicht zwingend überwiegende Wahrscheinlichkeit ergeben, dass eine neue Feststellung ein anderes Ergebnis ergibt.[87]

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80 Ausführlich hierzu Rimmelspacher, in: *Münchener Kommentar zur ZPO*, § 513, Rn. 14 ff.

81 Siehe zur Frage, welche Verfahrensmängel von Amts wegen zu berücksichtigen sind Ball, in: *Musielak/Voit ZPO*, 16. Aufl., § 529, Rn. 21.

82 Rosenberg/Schwab/Gottwald, § 139, Rn. 34.

83 BGH Urt. v. 12.3.2004 - V ZR 257/03 = NJW 2004, 1876, 1878; Rosenberg/Schwab/Gottwald, § 139, Rn. 34; Rimmelspacher, in: *Münchener Kommentar zur ZPO*, § 520 Rn. 53; Ball, in: *Musielak/Voit ZPO*, § 529 Rn. 9, 23; a.A. Hannich/Meyer-Seitz, § 513 Rn. 8, § 529 Rn. 27, 43; Heßler, in: *Zöller ZPO*, § 529 Rn. 12.

84 Rosenberg/Schwab/Gottwald, § 139, Rn. 38.

85 Rimmelspacher, in: *Münchener Kommentar zur ZPO*, § 529, Rn. 19.

86 BGH Urt. v. 14.2.2017 - VI ZR 434/15 = NJW-RR 2017, 725, 727; BGH Urt. v. 9.3.2005 - VIII ZR 266/03 = NJW 2005, 1583.

87 BGH Beschl. v. 21.3.2018 - VII ZR 170/17 = NJW-RR 2018, 651; Urt. v. 3.6.2014 - IV ZR 394/13 = VersR 2014, 1018; Beschl. v. 2.7.2013 - VI ZR 110/13 = NJW 2014, 74, 75.

Dies ist u.a. der Fall, wenn das erstinstanzliche Gericht entscheidungserhebliches Vorbringen nicht oder nur unvollständig berücksichtigt - also übergangen oder gar nicht verwertet – hat[88] oder wenn es seine Hinweispflicht nach § 139 Abs. 1 ZPO nicht erfüllt hat[89]. Die Zweifel können sich auch aus einer unterschiedlichen Wertung (z.B. andere Würdigung eines Beweises) ergeben.[90]

X. Gilt bei der Entscheidung über die Berufung das Verbot der reformatio in peius?

Grundsätzlich ist das Gericht an die Anträge der Parteien gebunden und darf nicht zu Ungunsten des Berufungsführers gegen seinen Willen entscheiden (§ 528 ZPO). Bei einer nur von einer Partei eingelegten Berufung gilt also das Verbot der reformatio in peius. Allerdings hat der Berufungsbeklagte die Möglichkeit, Anschlussberufung (§ 524 ZPO) oder eine eigenständige Berufung einzulegen. Für den Fall der Anschlussberufung ist die Erreichung des Beschwerdewertes in Höhe von über 600 € sowie eine etwaige Zulassung nicht notwendig. Die Einhaltung der Berufungsfrist ist nicht erforderlich. Es ist ebenso nicht hinderlich, wenn vorab ein Rechtsmittelverzicht[91] erklärt wurde (§ 524 Abs. 2 ZPO).

Auch wenn beide Parteien eine Berufung einlegen, ist das Gericht an die Anträge gebunden. Wenn das Gericht aber nach dem Antrag der anderen Partei, z.B. des Berufungsbeklagten entscheidet, ist durchaus eine Verschlechterung für den Berufungskläger im Vergleich zur ersten Instanz denkbar.

Für den Fall, dass der Berufungsbeklagte lediglich Anschlussberufung eingelegt hat und der Berufungskläger bemerkt, dass das Gericht eher dem Antrag des Berufungsbeklagten folgen wird, kann der Berufungskläger seine Berufung auch noch zurücknehmen. Die Anschlussberufung ist nämlich nicht selbstständig und wird mit Rücknahme des Hauptrechtsmittels unwirksam (§ 524 Abs. 4 ZPO).

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88 BGH Urt. v. 27.9.2006 - VIII ZR 19/04 = NJW 2007, 2414, 2415.

89 BGH Urt. v. 27.9.2006 - VIII ZR 19/04 = NJW 2007, 2414, 2416.

90 BGH Urt. v. 9.3.2005 - VIII ZR 266/03 = NJW 2005, 1583, 1584.

91 Rimmelspacher, in: *Münchener Kommentar zur ZPO*, § 524, Rn. 31.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Isaiah Berlin: Negative and Positive Liberty*

Isaiah Berlin: Negatif ve Pozitif Özgürlük

Yasemin Isiktac[1]

Abstract
Liberty is defined in dictionaries as not being determined by anything outside of oneself. Despite the clarity of this definition, liberty has been one of the most debated concepts throughout history and still is today. Isaiah Berlin, one of the most significant political philosophers of the twentieth century, is an important architect of the negative-positive liberty dichotomy. Berlin created the opportunity of an assessment from a different perspective of moral and political contexts by considering the dual nature of liberty and using value plurality concept. By dividing liberty into negative and positive liberties, Berlin, with the classical liberal tendency, points to negative liberty, considered with the value pluralism, as the one that should be emphasized. Negative liberty is the "private" sphere which determines the borders and the purpose of liberties and in which people can take decisions without an external impact. Berlin specifically emphasizes that "negative" here does not indicate an unfavorableness but points to the sphere that "does not accept any impact". He calls liberty which takes place in the public sphere as positive liberty. Positive liberty takes place in the outer atmosphere. It is very much related to democracy as the way of governance and also to liberal rights. The division of positive and negative liberties, as Berlin called his significant article in 1958, is still in use to define liberty. This division is also effective in the context of "substance" and "conceptual field" separation.

Keywords
Liberty, Negative liberty, Positive liberty, Value pluralism

Öz
Özgürlük, sözlüklerde, bir şeyin kendisi dışında bir şey veya etkiyle belirlenmemiş olması şeklinde tanımlanır. Bu tanımın netliğine rağmen özgürlük, tarih boyunca ve günümüzde de, üzerinde en çok tartışma yürütülen kavramlardan biri olmaya devam etmektedir. Yirminci yüzyılın önemli siyaset felsefecilerinden Isaiah Berlin, özgürlüğün, başlıkta geçtiği üzere negatif ve pozitif olarak ayrıştırılmasının önemli bir mimarıdır. Berlin özgürlük kavramının ikili doğasını göz önünde bulundurarak ve değer çoğulculuğu kavramını da kullanarak ahlak ve siyaset bağlamının farklı bir perspektiften değerlendirilmesi olanağını yaratmıştır. Özgürlüğün pozitif ve negatif özgürlük olarak ayrılması yolu ile Berlin'in klasik liberal eğilimler ekseninde, değer çoğulculuğu ile birlikte asıl üzerinde durulması gereken özgürlük türü olarak negatif özgürlüğe işaret ettiğini görmekteyiz. Negatif özgürlük; bireysel özgürlüklerin amacını ve sınırlarını belirleyen, kişinin etki altında kalmaksızın kararlar alabildiği "özel" alandır. Berlin "negatif" isimlendirmesinin bir olumsuzluk anlatımı olmaya değil, "etki kabul edilemez alana" işaret ettiğini özel olarak belirtmektedir. Kamusal alanda gerçekleşen özgürlüğü ise pozitif özgürlük olarak isimlendirmektedir. Pozitif özgürlük dış atmosferde gerçekleşir. Yönetim bicimi olarak demokrasi ve liberal haklarla çok yakından ilgilidir. Berlin'in 1958 yılında yazmış olduğu önemli bir makalesinin de ismi olan negatif – pozitif özgürlük ayrımı, özgürlüğün nitelendirilmesinde günümüzde de etkin olarak kullanılmaktadır; bu ayrım, aynı zamanda, "öz" ve "kavramsal alan" ayrımı acısından da etkindir.

Anahtar Kelimeler
Özgürlük, Negatif özgürlük, Pozitif özgürlük, Değer çoğulculuğu

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Isaiah Berlin: Negative and Positive Liberty

I. Introduction: Berlin's Life and Works

Isaiah Berlin, 1909–1997, is considered to be one of the most significant liberal thinkers of the twentieth century. Born in Latvia, his family immigrated to England in 1921, where he received an education in philosophy, economy and political science. From 1957 to 1967, Berlin held the position of professor of Society and Political Theory at Oxford University. He was knighted in 1957. His academic works include *The Hedgehog and the Fox: An Essay of Tolstoy's View of History*, *Against the Current: Essays on the History of Ideas*, *The Roots of Romanticism*, *Three Critics of the Enlightenment*, *The Crooked Timber of Humanity*, *The Sense of Reality*, *Enlightening: Letters 1946–1960*, and *Building: Letters 1960–1975*.

His Two Concepts of Liberty, published in 1958, contributed to the differentiation of substance and the conceptual sphere as well as the differentiation between the concepts of positive and negative liberty. This separation is also related to the separation of positive and negative liberty.

Berlin states that, in the private sphere, individuals are able to make their own decisions without any external effect and that this private sphere determines the limit and the goal of personal liberties. Berlin refers to liberty in this ground as negative liberty, but negative in this context does not indicate negativity. It refers instead to "not allowing any effect." Berlin defines liberty in the public sphere as positive liberty. He emphasizes that, in order to be free from collective mediocrity (as discussed in Mill's On Liberty), it is negative liberty that people need most of all. The private sphere is also the sphere of choices, where individuals can improve and actualize themselves.

Unlike negative liberty, positive liberty exists in the external sphere and is provided by institutions. An institution must take action in order to create positive liberty. The extension of the field of positive liberties can interfere with the liberty of others. If the liberty of others is constrained by regulations, this would constitute an invasion of ethical space, which cannot be tolerated. Berlin criticized this point. Moreover, according to Berlin, the space that is determined according to the criteria of being constrained by others' liberties belongs to morals, and restricting this space is not compatible with human dignity. From these evaluations, we see that Berlin has serious concerns with respect to democracy and about the abuse of liberty that comes from elections. Liberties which have no individual basis impose a political discipline on individuals[1]. Berlin believed that democracy chooses liberalism. His concerns about democracy and macro theories stem from the necessity to act cautiously, as their holistic effects would narrow the field of negative liberties. He developed

1 Jean Luc Nancy, 'Freedom and We', in Dennis King Keenan (ed), *Hegel and Contemporary Continental Philosophy*, (State University of New York Press, 2004) 440 et seq.

a philosophy-based theory of liberty that takes into account neither social or nor economic rights. This approach is criticized, however, as being superficial. His critics claim that his theory has no difference from classical liberal theory of liberty[2].

II. General Approach

Berlin's method of presenting his position—by rejecting the conventional and the dialectic methods in a bright way that surprises the reader—is extremely famous. His sharp style is highly effective, and the examples he presents are as striking as the novelty of his thoughts. Oakeshott quite rightly declared him as one of the most important intellectual virtuoso of our era[3]. Taylor points that, although Berlin explained important truths, he was not widely understood or appreciated because of the prejudicial nature of general approaches and especially of the narrow understanding[4]. In fact, Berlin witnessed the tragedy of the complexity of the world in a moral sense and from broken hopes. If we take this complexity as a contingency in the ordinary stream of life, we might arrive at the realization that the world is not a very challenging place. Berlin's central axis is his detection of thinking that is shape-edged, not accepting different thoughts and also not being able to tolerate their existence is the biggest mistake of humanity. He makes the following observations, which are also important: Nothing can harm individuals, groups and organizations, including the state, more than the belief of possessing the only truth. Especially the accepted views on how to live, how to become, and how to do, and asserting claims of truth in this frame cause this result. Those who believe there is only one truth, label those who think differently as traitors or perhaps insane and therefore believe that those who think in a different way should be restrained and suppressed. However, the arrogance of seeing oneself as the only right one, by the belief of having magical eyes for seeing the truth and believing that whoever else does not agree with them is wrong, is much more dangerous. Berlin's liberal identity is in line with the principle of seeing different values not as a source of conflict in societal living but simply as a point of view on other ways of living.

III. Two Concepts of Liberty

The distinction between the concepts of negative and positive liberty has been used as a significant awareness since the seventeenth century. The transformation of the social and political structure that began in this century, strengthened this awareness.

A map of positive versus negative liberty against a historical backdrop can be drawn using Hobbes's and Rousseau's arguments about the changing and improving

2 Charles Taylor, 'What's Wrong with Negative Liberty', in Alan Ryan (ed), *The Idea of Freedom: Essays in Honor of Isaiah Berlin* (Oxford University Press, 1979) 180 et seq.

3 Michael Oakeshott**,** *Morality and Politics in Modern Europe: The Harvard Lectures*, (Yale University Press, 1993) 87 et seq.

4 Charles Taylor, *Philosophical Arguments*, (Harvard University Press, 1995) 181 et seq.

perspectives of liberty and the transition from negative to positive liberty[5]. The understanding of a liberal state is another important focus point. In this context, the evaluations of Locke, Hume and Mill are significant. In the context of moral philosophy, Kant's teleological approach to moral acts and personal liberty is also substantial for liberty. In a more recent historical context, the concept of liberty has become that of liberation, and with the frame of Nietzsche, Marx, Habermas, and the Frankfurt School, has reached a different conclusion that differs from Berlin's construction.

Berlin borrowed the distinction between the positive and negative concepts of liberty from Thomas Hill Green, a pioneer of social liberalism. Green's statement about the "necessity of absence of coercion and interference" as being only able to be the subject of positive regulations and yet having no meaning in the sense of human's capacity of act and possibilities, is significant.

With this statement, another untouchable field of liberty was identified: negative liberty. The expressions "having one's own liberty space" and "not being anyone's slave" have different meanings. One can sometimes be a slave of his/her own nature or have feelings inside of both sovereignty and also handicap. In this case, the higher self of each individual evaluates [something] using the mind. The lower self, on the other hand, chases after desires and passions. Three essential works of Berlin on the negative-positive dichotomy are *Two Concepts of Liberty, Historical Inevitability* and *My Intellectual Path.*

Two Concepts of Liberty was originally the speech he gave on his appointment to professorship at Oxford University. He differentiated the distinction between positive and negative liberty in a most detailed way. Negative liberty means eliminating obstacles facing the human act, as distinct from obstacles from the outside world and from the biological, physiological and psychological laws that determine human acts. The topic of the speech was social liberty, where obstacles are human-made, intentional or not. The extent of negative liberty is dependent on the level of such human-made obstacles. Therefore, the subject should be examined in the sense of both political and moral philosophy[6].

Berlin argues, first of all, that until we understand the world's main problems, our own attitudes and acts will also remain in the dark. Foremost among these problems is the relationship between obedience and oppression. There are two intellectual platforms about this fundamental question: one is "why should I obey others?" and the other is "will I be oppressed if I don't obey?" In order to achieve liberty, it is necessary to overcome obstacles, to eliminate barriers and to be freed from them.

5 Yasemin Işıktaç, *Hukuk Felsefesi,* (Filiz Kitabevi, 2019), 141 et seq.

6 Richard Rorty, *Philosophy and the Mirror of Nature,* (Blackwell Publishing, 1996) 17 et seq.

Berlin disagrees, however, as liberty has another side, one that comes from within, such as the liberty of someone who is imprisoned. The concept of liberty also has a limit that is related to capacity and being capable of doing something desirable. This limit is determined by nature and physical space; this is the external limit of the concept of liberty[7]. Liberty therefore shows the human capacity for action as natural and physical fact. Liberty, as a characteristic of human nature, is the liberty that Locke describes, which includes the right to live, the right to have property, and the right to choose freely. Rights that protect fundamental liberties are defined as natural rights. Natural rights are, in fact, protective rights in that they recognize the right to live and right to have property as fundamental liberties for the sake of protecting life and property. At the same time, natural rights are defined as "negative liberties" in the literature. Negative liberty refers to one's capacity to act freely in the absence of interference. There is no need to provide anything for negative liberties. In the case of positive liberties, on the other hand, it is necessary for both the liberty of others to be restricted and also for the state to take action. Positive liberties are therefore defined as intrusive rights. Positive liberty answers the question, "what is the field that is left —or should be left —to the individual to act, or what can an individual do or be, in the absence of the interference of others?" He suggests making this distinction in order to appreciate liberty in both the personal and the social sense, and to be able to establish a formal and contextual basis.

Berlin describes this type of liberty as "being free from something." The other type (negative liberty) indicates freedom to do something." Berlin defines negative liberty as the answer to the question, "to what extent am I under someone's control?" The two liberties are related and are not in conflict. What is more, the answer to one does not necessarily determine the answer to the other. Negative liberty can be evaluated as "laissez-faire economics." From an ontological perspective, negative liberty rests on two principles. In the first, individuals are hedonistic, that is, they run after happiness and naturally are atomized. Existential grade is identical and limited to the individual. A rise in social order necessitates that these atomized individuals encounter each other and at the most minimum level, that the construction of the state is seen as the societal system. Such a state would ensure that individuals enjoy their negative liberties by protecting the external boundaries.

In the sense of epistemology, we encounter relativism and empiricism in negative liberty. When the only criterion becomes the individual, then as many varieties occur as the particulars. These varieties and the existence of the state as an organization would first provide negative liberties and then define a positive liberty scope that is limited by the necessities. Positive liberty, on the other hand, allows the participation

7 Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History*, (Princeton University Press, 2013) 13 et seq.

of the individual in a structure that is determined in the framework of social and political rights. These arguments illustrate the distinction between negative and positive liberty, and they provide a formal and contextual basis for understanding both the personal and societal dimensions.

IV. The Relationship Between Positive and Negative Liberty and Value Pluralism

Even though Berlin offered a significant insight with his distinction between positive and negative liberty, another concept he offers, namely value pluralism, also warrants attention.

Value pluralism has been strengthened by the scientific and technological improvements of the twentieth century and by great ideological storms. Each ideology carries different values. Berlin, by first examining the significant works of Russian literature, made profound detections on values[8]. Literature, particularly Russian literature, is an outstanding resource for understanding good and evil characters, and the emergence of the will to achieve liberty.

Berlin adopted the works of numerous philosophers on the importance of mind and the improvement of human will through the agency of mind. In the absence of a fixed and constant human nature, the possibilities of humans also find different ways for them to express themselves. However, explaining this variety through relativism is not appropriate for Berlin, either. Despite many differences, there are universal situations which belong to humanity. These situations can also be used for realistic explanations of society. Through universal human situations, societies growing entirely isolated from each other would also be avoided. People still have a common ground despite their different values, life styles and tastes. This is a ground constructed by the human rationality. Humans, as thinking creatures, should have the capacity to take into account others' situations, values, and desires for liberty. This rationality provides both interpersonal relationships and relationships between societies. According to Berlin, objective values are the main path. However, conflicts in values are inevitable. A world that is immune from conflicts that derive from different people and values is not the world we currently inhabit, but the absence of this kind of world does not preclude the practice of searching for a solution to world conflicts. People who believe in certain dogmas are happy because doing so protects them from questioning and doubts. But this is an illusion. The view that everything has an answer silences the mind. People with this kind of belief also want to suppress questioning minds. In other words, they become the enemy of liberty. Accepting the existence of conflicts is the first realistic step. However, despite the conflicts,

8 Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History*, s. 2.

it is necessary to tenderize these fields of conflicts. Establishing a certain balance between equality and liberty may decrease the conflicts. The most appropriate way of searching for a solution would be to avoid extremes in establishing a balance and determining certain priorities, as one does when facing difficult situations. Rules, values and principles should undergo a partial change under certain conditions. Even in situations where the customs and values of one society are in conflict with those of others, there should be a common sense of humanity in terms of right and wrong, good and evil.

V. Between Self-Actualization and the Temple of Sarastro

The main path to reaching liberty is critical reason. People understand the difference between things which are necessary and those which are contingent. Rationality in matters that relate to liberty will eventually reach the question of whether it is not only to be applied to a person's own life but also to their relationships between the other members of society. Under this circumstance, would free individuals be able to avoid the clash? For instance, is a rational (free) state one which is governed by laws that all rational people would freely accept? The state as an organization should define boundaries. Who will determine those boundaries in the name of the state? Would (mostly) self-evident ratios emerge, as in the field of positive sciences? The state as a successful organization actualizes itself by establishing a just order to give liberties to the rational creature as their right. However, is this a crude re-imagination of the Golden Age? These questions in particular require governance practices that would emerge as a political-societal organization.

Berlin used the story of the Temple of Sarastro, which was also used in Mozart's "Magic Flute," to explain the subject[9]. Like the Magic Flute, it is not only about the contrast between good and evil but also about practices that become despotic in the name of doing good. In other words, one's behaving in a despotic manner in the name of their own "good" thinking as it is also beneficial for others. Here also, there has been a decision made on behalf of someone else, the consequences of which are imposed on that person. What would happen if liberty turned into despotism? As long as people live in society, everything that is done is about values.

Berlin's descriptions of humans living in society are interesting. As none of us is like Robinson Crusoe, living on his own on a desert island, which would also be true for him as well, that is a necessity for us to be bound to the society not just because of our needs but also because of our sense of identity[10]. The field of liberty, as sketched roughly by Mill, includes protection from oppression, the absence of arbitrary arrest, and the absence of deprivation from opportunities to act. These are also not enough for

9 Isaiah Berlin, *Two Concepts of Liberty, Four Essays on Liberty*, (Oxford University Press, 1969) 138.

10 Işıktaç, *Hukuk Felsefesi,* 439 et seq.

human beings. The subject is closely related to recognition. Recognition is something that people desire and for which they fight passionately. Recognition is not liberty, but Berlin explains it as a concept that closely resembles liberty. Recognition has a societal dimension in that it cannot be eliminated completely from living human beings, and no government can restrict all individual liberties. Moreover, it is a boundary, because creatures would no longer be moral if their acts were prevented by others. And sometimes people imagine liberty as something that can be sacrificed in exchange for security, status, virtue, the idea of an afterlife, justice, equality or fraternity. However, liberty and equality, spontaneity and security, happiness and knowledge, forgiveness and justice are the ultimate human values which are being searched for on their own, yet they do not accord with each other, nor can they be reached altogether, and choices result in tragic losses. Therefore, the relationship between each of the aforementioned titles is antinomical. What needs to be done is to reach a harmony, which would provide an artistic togetherness by accepting the pluralism of values[11].

Even in the absence of universal values, there is at least a minimum field of values without which societies would barely exist. Forcing people into stereotypes would draw them away from their humanity. Everything possible should be done to avoid this consequence. Communal living is not exempt from conflict; positive values can conflict as well. Berlin suggests that conflicts can reach a relatively stable balance by continuous reparation. "Good" will emerge if this delicate balance can provide a proper societal order and a position that is morally acceptable.

VI. Conclusion

Clearly, the distinction between positive and negative liberty is nourished by a substantial sense of liberty. The sense of liberty can go forward thanks to the rationality of liberty in the sense of existential struggles in and against nature. The importance of positive liberty should be underlined in this distinction because negative liberty can emerge only from positive liberty, which provides protection from external interference or determination. Yet there should be a consensus in both fields of liberty. The opportunity for a person's self-actualization can only occur in systems where positive liberties are strong. We can see that Berlin's perception of this is the liberal economic order of society and democratic governance.

It has been suggested that the distinction between negative and positive liberty has become outdated, because no matter which right is in question, the necessity for the state to interfere for the right to occur keeps increasing. Therefore, it is being said that the distinction is misleading, as a state's affirmative action is still necessary in

11 For general information and contemporary approaches to justice theories: Sercan Gürler, *Ahlak ve Adalet,* (Legal Yayıncılık, 2007).

the field of negative liberties—thus, the absence of these actions[12]. The right to due process, for instance, requires many public means such as courts, judges, terms of application and so on.

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12 Gülriz Uygur, *Hukukta Adaletsizliği Görmek*, (Türkiye Felsefe Kurumu, 2013) 130 et seq.

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Quest For The Harmony: On the Vienna Reservations Regime and International Human Rights Treaties*

Uyum Arayışı: Viyana Çekinceler Rejimi ve Uluslararası İnsan Hakları Andlaşmaları Üzerine

Gulsum Kaya[1]

Abstract

The *reservation* is one of the most important and controversial topics in international treaty law. The validity of reservations and their application came to the fore and customary reservation rules were reviewed with the Convention on the Prevention and Punishment of the Crime of Genocide in international law. Also, in the Vienna Convention on the Law of Treaties, rules on reservations were codified, which were asserted as the rules of customary international law. However, in human rights treaties, because of their distinctive characteristics, the rules of reservations needed to be applied and interpreted compatible to these particularities.

First of all, human rights treaties are different from standard contractual treaties and they do not create a balanced system between the state parties' rights and obligations. Therefore, the reciprocal effect of the reservation which gives equivalency to the parties' rights and obligations cannot function properly in human rights treaties. The second aspect is the main ideal of ensuring the universality of human rights which challenges the integrity of these treaties. The choice between integrity and universality gives us a hint about the status of the treaties regarding reservations. Another issue is the compliance of a reservation with the object and purpose of the treaty which is rated among the main rules about validity of a reservation in the Vienna Convention on the Law of Treaties. In human rights treaties, a reservation's compatibility with the object and purpose and even determining the object and purpose of the treaty is controversial. In this context two different mechanisms issuing from the Vienna Convention – opposability and permissibility- will be handled to determine the validity of the reservations in international human rights treaties.

In this paper, within the scope of the human rights treaties' aspects stated above, the application and the validity of the reservations to international human rights treaties will be discussed by assessing the solutions in the ILC's Guide to Practice on Reservations.

Keywords

Reciprocity, Permissibility of reservations, Monitoring body, Opposability doctrine, Compatibility with the object and purpose

Öz

Çekinceler andlaşmalar hukukunun önemli ve tartışmalı konularındandır. Bunların geçerliliği ve uygulanması Soykırım Suçunun Önlenmesi ve Cezalandırılması Sözleşmesi ile gündeme gelmiş ve çekincelere ilişkin teamül kuralları bu danışma görüşünde gözden geçirilmiştir. Viyana Andlaşmalar Hukuku Sözleşmesi ile ise çekincelere ilişkin teamül kurallarının kodifiye edildiği kabul edilmektedir. Ancak bu kurallar insan hakları andlaşmalarına uygulanırken bu andlaşmaların farklı nitelikleri gereğince yorumlanmaları ihtiyacı ortaya çıkmıştır.

Öncelikle sözleşmesel uluslararası andlaşmalardan farklı olarak insan hakları andlaşmalarında tarafların hakları ve yükümlülükleri bakımından bir denge gözetilmemektedir. Bu nedenle de taraflara haklar ve yükümlülükler bakımından

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denklik sağlayan karşılıklılık ilkesi insan hakları andlaşmalarına ileri sürülen çekincelerde tam olarak işlememektedir. İkinci olarak insan hakları andlaşmaları evrensellik ve bütünlük geriliminin yaşandığı türden andlaşmalardır, zira daha fazla insanın haklarının düzenlenmesi ideali kimi hallerde andlaşmanın bütünlüğünü tehdit eden bir hal alabilecektir. Ayrıca andlaşmanın konu ve amacı ile bağdaşırlık bir çekincenin geçerliliği bakımından Viyana Andlaşmalar Hukuku Sözleşmesinde getirilmiş esas niteliğinde bir kuraldır, ancak bir çekincenin konu ve amaç ile bağdaşırlığına karar vermek hatta konu ve amacı tespit etmek oldukça tartışmalı hususlar olagelmiştir. Bu bağlamda kabul edilebilirlik ve itiraz edilebilirlik çekincelerin geçerli olup olmadığının değerlendirilmesinde iki farklı yöntem olarak VAHS'nde yer almaktadır.

Bu çalışmada çekinceler rejiminin hukuk yaratıcı niteliğe sahip insan hakları andlaşmalarında uygulanması ve çekincelerin geçerliliği Uluslararası Hukuk Komisyonu'nun Uygulama Rehberi'nde getirdiği çözüm önerilerine değinilerek tartışılacaktır.

Anahtar Kelimeler
Karşılıklılık, İzin verilebilirlik, Denetim mekanizması, İtiraz edilebilirlik doktrini, Konu ve amaca uygunluk

Quest for the Harmony: On the Vienna Reservations Regime and International Human Rights Treaties

International human rights treaties can be described as treaties which are based upon norms related to human rights and aiming to create a normative system for the protection of human rights in the international area. The statement under article 1/3 of the United Nations (UN) Charter "To achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" shows the objectives and principles of the UN in international human rights law. In addition to that, other articles in the UN Charter show the importance attributed to human rights. For instance, in the preamble of the Charter it is stated that during the foundation of the UN "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" is regarded amongst the high goals of the state parties. Another sign for the attributed importance to human rights is the adoption of the Universal Declaration of Human Rights within three years as of the establishment of the UN and afterward the momentous number of human rights treaties adopted under the shelter of the UN[1].

In the Universal Declaration of Human Rights (UDHR), having the international order which allows people to enjoy rights and freedoms, is counted also as a right in article 28[2] as well. This provision and the general tendency confirms that for an international community to enjoy rights and freedoms is one of the fundamental aims of the UN. These aspects of the international system which are crystallized around the UN, show the guiding spirit of international human rights treaties.

1 UN treaties under the domain of human rights e. g.: Convention on the Prevention and Punishment of the Crime of Genocide (approved and proposed for signature 9 December 1948, entry into force 12 January 1951), Convention related to the Status of Refugees (adopted 28 July 1951, entry into force 22 April 1954), International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entry into force 4 January 1969), International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976)

2 Everyone is entitled to a social and international order in which the rights and freedoms outlined in this Declaration can be fully realized.

The purpose of international human rights treaties is, as stated by the Special Rapporteur of the International Law Committee; not to set forth the rights and freedoms which states accepted reciprocally, but to constitute general international norms which parties can observe in their territories and reflect the shared values[3]. In this way, international human rights treaties can strive to create a normative order, they are accepted as law-making treaties and so they can be distinguished from contractual treaties categorically.

International Human Rights Law, in the new world order established with the UN, becomes an international law system emanating from the treaties, customary law, international practices and the case-law of the international judicial bodies or the independent committees and whose real respondent is the individual[4]. Major functional tools for the protection of human rights are the treaties and in this sense, the consent of states has a distinct importance[5]. While taking individual as the beneficiary, human rights treaties create obligations to state parties with the consent of states. Also, the number and trend of human rights treaties show the collective will of international society on the topic and make it essential to argue the international treaty system to reveal its suitability with international human rights treaties - especially the reservations regime of the international treaty system.

The Vienna Convention on the Law of Treaties (VCLT) regulates applicable rules in international treaties including the ones in international human rights law. However, in some aspects, the VCLT may not be suitable especially with law-making treaties and human rights treaties as normative, law-making treaties may need special treatment. The VCLT reflects and suits the classic treaty system, regardless of the type of treaty, VCLT is the *lex generalis* in treaty law. If a specific treaty does not regulate a special reservations system, the VCLT is going to be applied to it. But in some cases a human rights treaty can establish its own reservations system. In the European Convention on Human Rights (ECHR), article 57 regulates the reservation rules for this treaty and permits states formulating reservations for any particular provision to the extent of the inconformity of the provision in the treaty and the domestic law in force. Article 57 also has two restrictions; one, a reservation should not have a general character, and two, the brief statement about the domestic law rule concerned. Even though a treaty may include a special reservations system, it must be mentioned that the ECHR regulation is exceptional and generally human rights treaties do not include *lex specialis* on the issue. According to the VCLT rules, a treaty's silence on reservations has two main consequences: States can formulate reservations to the treaty and the VCLT rules are going to be applied.

3 ILC, 'Second Report on Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur' (10 May-13 June 1996) UN Doc A/CN.4/477&Corr.1&2 and Add.1&Corr.1-4, para 84.

4 Mahmut Göçer, *Uluslararası Hukuk ve İnsan Haklarının Uluslararası Korunması* (Seçkin 2002) 21.

5 ibid 26.

This study displays the Vienna reservations system within the scope of human rights treaties and the International Law Commission's (ILC) Guide to Practice on Reservations. At first, the need for a reservations system will be handled, on behalf of the protection of human rights unconditionally, human rights treaties should choose the integrity or, as a challenging idea, the universality of human rights treaties. The second topic will be the insistence on the permissibility doctrine and why reciprocity does not function in human rights treaties. And lastly we will move on to the institutionalization demands for the application of general rules on reservations.

I. Essentiality of a Reservations Regime: Universality and Integrity

A treaty conveys a selection between two choices which contains a contrast within integrity and maximum participation, through the applicable reservations regime [6]. The first option gives priority to the integrity of the treaty and also a common practice between whole parties, therefore reservations were delimited. The second option gives priority to the universality of the treaty and reservations would be unrestrained, also more states become parties to this sort of treaty. In the first option, the state parties would be limited in number. In the second option, more states will be part. However with the reservations, not all rights and obligations in the treaty bind every state party in practice. Between these two options the question would be the preference of the international community.

Concerning the existence of the reservation rules in VCLT article 19, it can be said that the international system supports the flexibility of treaties. However, to create a balance with integrity, in the same article the compatibility test is suggested. This test is used for reviewing the reservation if it is compatible with the object and purpose of the treaty, but if the specific treaty does not entrust an authority to evaluate the compatibility of reservations, consequences arise subjectively because every state party can evaluate the reservation individually.

Minimizing the dissimilarities between the anticipations of states and associating them in the same treaty system could be possible by enabling reservations, even if the integrity of the treaty is ignored, the consensual power of the treaties advances the international law[7]. Harboring the tension between universality and integrity is also asserted by the UN as the fundamental feature of the human rights treaties[8]. In the Genocide Case, the difference between the majority opinion and the dissenting opinion is generally based on this tension. Judges representing the majority opinion supports

6 Erkan Akdoğan, *Belirsizlik Kuramı Yönünden Uluslararası Andlaşmalarda Çekinceler* (Yetkin 2018) 184.

7 Catherine Logan Piper, 'Reservations to Multilateral Treaties, The Goal of Universality' (1985) 71 Iowa Law Review 295, 322.

8 ILC, Fourteenth Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur (2 April, 22 May and 7 August 2009) UN Doc A/CN.4/614, 32.

the idea that as much state as possible must become party to a treaty which stands for universality[9], on the other hand judges representing the dissenting opinion support that the main aim is to fulfill the general obligations, and conclude "it would be better to lose a state as a party to the convention which insists in face of objections on a modification of the terms of the convention than to permit it to become a party against the wish of a state or states which have irrevocably and unconditionally accepted all the obligations of the convention"[10]. The discrepancy between these two ideals is the core of the debate. If we need to choose one of them for a solution, then we have two possibilities. In the first option, to achieve universality, rules about reservations must be flexible and broad, however in the second option for integrity, the uniformity of consent needs to be protected[11] through designing strict reservation rules.

The single and exact way to assure the absolute integrity of the treaty is to prohibit reservations[12], with respect to this, it can be said by relying on the existence of article 19, the VCLT system does not protect absolute integrity in principle. In the case of human rights treaties, they are not for a limited group of states aiming for limited goals, they are based on the aim of creating global norms adopted by most states[13]. Seeking absolute integrity inevitably decreases the number of state parties. The proportion of the beneficiaries also decreases relatively to the decline in the number of state parties, so the normative system which will be created by the human rights norms, loses its comprehensiveness. That the Vienna system permits reservations is appropriate for the human rights treaties in this context, but the alleged problems come up with practice.

The national or international inconsistencies form a state party's conduct in human rights treaties and the alternative of a state participation in a treaty by declaring a reservation may not be ratifying it without the reservation but opting out of it[14]. Because of this conduct, reservations must be approached as a strengthening component which assists universality instead of a weakness abolishing the integrity[15].

In conclusion, a normative treaty creates an order which is intended to have broader participation but also has to constitute a perfect body of rules to function well. This is the background of the reservation's compatibility with the object and purpose test. Apart from the situation in which a treaty prohibits reservations in itself, the important

9 *Reservations to the Convention of Genocide* (Advisory Opinion) 1951 < https://www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-EN.pdf > accessed 25 September 2019 [30 ff].

10 ibid 34.

11 Alain Pellet, Daniel Müller, 'Reservations to Human Rights Treaties: Not An Absolute Evil…' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest* (OUP 2011) 523.

12 ibid 524; UNGA 'Report of the International Law Commission' UN GAOR 61th Session Supp No 10 UN Doc A/61/10 (2006) 318.

13 Elena A. Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties' (1999) 17 Berkeley Journal of International Law 277, 288.

14 Massimo Coccia, 'Reservations to Multilateral Treaties on Human Rights' (1985) 15 California Western International Law Journal 1, 22.

15 ibid 15.

thing is to protect the efficiency and essence of the treaty[16]. For this test, a reservation would be valid if it is compatible with the object and purpose of the treaty, which stops reservations from posing a threat to the integrity of the treaty. As stated, universality and integrity do not necessarily exclude each other. Following the referred doctrinal views, these two aspects are not in contradiction in human rights treaties, they are twin ideals[17]. The aim must be to harmonize and choose a midway between them. As for us, there is no need for a selection among these two, but in treaties including human rights as a catalog-list, universality becomes more preferable by providing international protection to more rights of more people at least. Especially universal human rights treaties bind states from different cultural, religious backgrounds and such a treaty system could be achieved by permitting reservations. For Klabbers, there is no dilemma between choosing universality or integrity, the choice is accepting the values of the other parties[18]. In this manner, the international system must allow reservations and have a system which is applicable also in human rights treaties.

II. Reservations to International Human Rights Treaties and the Principle of Reciprocity

The principle of reciprocity - which is fundamental for the contractual basis of international treaty law - refers to a balance between the parties of a treaty while undertaking the liabilities and enjoying the rights. Thus the traditional system of multilateral treaties is based upon contractual considerations and absolute congruence of each state party[19]. However, in human rights treaties, the rights do not belong to the state parties, rather they regulate the obligations of states that they owe to their nationals, residents or those in their territorial jurisdiction. So the contractual balance between the rights and obligations has no place in human rights treaties and the obligations not owed to the other state parties. Also, the reciprocity notion as a tool to maintain the balance between states has a contractual characteristic[20]. International treaties which do not have a contractual nature also do not pursue the balance of one state party's rights and obligations from that treaty with reciprocity.

The effect of the reciprocity in the reservation rules can be seen in the VCLT. A reservation has the same effect on the reserving state and the accepting state in their bilateral relation, the aim is to balance the advantages of the states originating

16 Göçer (n 4) 61.

17 Pierrick Devidal, 'Reservations, Human Rights Treaties in the 21st Century: from Universality to Integrity' (LLM thesis, Georgia Law, 2003) 48.

18 Jan Klabbers, 'On Human Rights Treaties, Contractual Conceptions and Reservations' in Ineta Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff Publishers 2004) 181.

19 Akdoğan (n 6) 201.

20 Klabbers (18) 158.

from the reservation[21]. The articles in the VCLT including the reciprocal effect about reservations are especially these:

> -21/1-b: "modifies those provisions to *the same extent* for that other party in its relations with the reserving State."
>
> -21/3: "When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply *as between the two States to the extent of the reservation*."

A reservation shows the reserving party's tendency to incline the terms in the relevant provision according to its particular destination. An automatic mechanism of reciprocity restrains the violation of the treaty balance and constitutes an optimized cooperation between the state parties[22], because it affects both sides' rights and obligations. Instead of formulating reservations to achieve cooperation, states could have voiced their intent during the negotiation process, and would not pursue the solution by declaring a reservation. In the end, this will bring a more consensual text in its real meaning, and also bears as a more robust system especially in the international human rights treaties.

The organization of a treaty, whether it is multilateral or bilateral, is the exchange of rights and obligations. In a multilateral treaty, dual relations within two state parties are formed by reciprocity. Even multilateral human rights treaties build bilateral and separate relations between states, but the ground of difference about reciprocal application from contractual treaties is not their multilateral character but their law-making character[23]. Existence of a reservation aims for the elimination of the legal effect of a provision; also the reciprocal impact of an accepted reservation results with the elimination of the legal effect of that provision mutually. Since human rights treaties aim to constitute a common order rather than the exchange of rights and obligations, accepting a reservation related to elimination of an obligation would not mean elimination of the obligation for the accepting state too[24]. Because even if a state is party of a human rights treaty, the beneficiaries of it are the citizens of state parties or the residents in its territory, in general. States become party to a transaction that takes part in the international area, but have impacts in their domestic politics[25]. Human rights treaties have a hybrid structure, they are both law and contract, because of their constitutional aspect[26]. In this case, human rights

21 Aydoğan Özman, *Milletlerarası Andlaşmalarda Çekinceler (İhtirazi Kayıtlar)* (Sevinç 1970) 96.

22 Francesco Parisi, Catherine Ševčenko, 'Treaty Reservations and The Economics of Article 21(1) of the Vienna Convention' (2003) 21 Berkeley Journal of International Law 1, 20.

23 Catherine Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 Nordic Journal of International Law 383, 390.; Cooperation basis-the law making and contractual treaties Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International 1996) 25.

24 Göçer (n 4) 67.

25 ibid 23.

26 Ekaterina Yahyaoui Krivenko, 'The "Reservations Dialogue" as a Constitution-Making Process' (2014) 16 International Community Law Review 306, 310.

treaties belong to a normative category which does not generate international mutual relations[27]. Another opinion which reflects the normativity of human rights treaties asserts that beyond representing the consensus between states, human rights treaties show the state admitting the international norms in their relations with the citizens through a unilateral act[28]. According to these views, it is possible to say that human rights treaties do not take up contractual balance and by themselves they abolish the need for party equation. In this case to supervise the compliance of the parties to the human rights treaty needs another sort of mean, a judicial tool or an enforcement authority[29].

It is accepted both by the doctrine and practice that reciprocity principle has a limited application in international human rights treaty obligations of states[30]. Moreover, the Human Rights Committee in General Comment 24 emphasizes that the principle of reciprocity cannot be applied in human rights treaties[31]. The International Law Commission's Special Rapporteur Pellet, remarks that the human rights rules are not reciprocal by nature, generally[32]. In addition to this, again Pellet in his first report ascertains that the VCLT system based on reciprocity would be incapable in human rights treaties[33].

The principle of reciprocity has two powers; the first one is the creative force which seeks balance between costs and benefits and the second one is the supervision power, which basically urges states to fulfill their obligations to obtain their rights[34]. The reciprocity principle is also an enforcement tool within a contractual treaty preventing noncompliance tendencies.

As stated above, in human rights treaties, reciprocity does not have this function, they are separated from standard treaties with their content and beneficiaries[35]. The ICJ in its Genocide decision describes the situation and remarks that in human rights treaties rather than the advantages of states the *raison d'etre* of the treaty, constitutes the high objective of the treaty is intended, also this common interest prevents the *perfect contractual balance*[36]. An infringer state is not devoid of its rights that are

27 Belinda Clark, 'The Vienna Convention Reservations Regime and the Convention of Discrimination Against Women' (1991) 85 American Journal of International Law 281, 287.

28 Parisi, Ševčenko, (n 22) 37.

29 Liesbeth Lijnzaad, *Reservation to UN Human Rights Treaties: Ratify or Ruin?* (Martinus Nijhoff Publishers 1995) 68.

30 Marco Milanovic, 'Linos-Alexander Scilianos, Reservations to Treaties: An Introduction', (2013) 24 EJIL 1055, 1057.

31 UNHRC, General Comment adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights (11 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6, para 17.

32 Alain Pellet, *State Sovereignty and the Protection of Fundamental Human Rights: an International Law Perspective* (Pugwash Occasional Papers 2000) 39.

33 ILC, 'First Report on the Law and Practice relating to Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur' (30 May 1994) UN Doc A/CN.4/470, para 139.

34 Lijnzaad (n 29) 69-70.

35 ibid 110.

36 *Reservations to the Convention of Genocide* (n 9) 21.

stemming from the same treaty because the treaty in principle does not regulate the rights of states.

Basically it can be said that a state without gaining any right undertakes the obligations in human rights treaties. This is also stated by the European Commission of Human Rights (EComHR) in the Austria v. Italy decision with the phrase "the objective is not creating mutual and subjective rights for high contracting parties, but to protect from violation of high contracting parties"[37]. Another judicial organ, the Inter-American Court of Human Rights in its *Effects of Reservations* decision characterizes the object and purpose of human rights treaties, irrespective of nationality issues, to protect fundamental rights of people from their home state and the other state parties[38]. These regional judicial decisions reflect the international consistency on the same point, the conflict of objectives between the human rights treaties and reciprocity.

It is available for state parties to use reciprocity when declaring, accepting or objecting reservations as a tool for enforcement because of the effects of reservations and the reaction to them. However, the accepting state could not take advantage of the acceptance and have to fulfill its obligations, originating from the treaty, in human rights treaties[39]. This feature of human rights treaties excludes the individual supervision and there have been attempts to cover this lacuna by monitoring bodies established by treaties[40]. The ineffectiveness of the reservation in the bilateral application, prompted other states to tacitly accept the reservation[41], also this deprives the reservation even of the individual evaluation of state parties.

To conclude, it should be said that reciprocity is not totally nonfunctional in human rights treaties, as an example to this limited impact, the accepting or objecting states cannot be invited by the reserving state to fulfill their obligations originating from the treaty[42]. Beyond that, the reciprocity principle cannot carry out its supervision function in international human rights treaties, because of their abovementioned features which are not built on contractual balance. As a result of reciprocity not working or being a subjective mechanism to supervise the parties and their reservations in human rights treaties, the tendency to establish their monitoring bodies exists. As mentioned above, if the useful tool of reciprocity does not perform, the international system requires other useful tools for judiciary or enforcement means.

37 *Austria v Italy* App no 788/60 (Commission Decision, 11 January 1961)

38 The Effect of Reservations on the Entry into Force of the American Convention, Advisory Opinion OC-2/82, Inter-American Court of Human Rights (24 September 1982)

39 ILC, Guide to Practice on Reservations to Treaties Report of the International Law Commission on the work of its 63th session (26 April- 3 June and 4 July- 12 August 2011) Un Doc A/66/10/Add.1, 4.2.5.; Göçer, (n 4) 70.

40 Kasey Lowe McCall-Smith**,** 'Reservations to Human Rights Treaties' (DPhil thesis, University of Edinburgh, 2012) 254.

41 Lijnzaad (n 29) 112.

42 Pellet, Müller (n 11) 535.

III. Reservations' Compatibility with the Object and Purpose

As mentioned above the liberty of formulating reservations in human rights treaties is important to bind maximum number of states possible, however the system based on reciprocity in the VCLT causes some problems on the application in human rights treaties. In this part, the problems in the Vienna System and the proposals from theory and practice -especially the ILC's Guide to Practice- to solve them will be discussed.

According to the principle in article 19, when the treaty does not prohibit declaring reservations or it permits specific kinds of reservations and the reservation is consistent with this rule, a state party can declare a reservation but it has to be compatible with the object and purpose of the treaty. Article 20 regulates the reservations in specific kinds of treaties and the reactions to them from the other parties. The system causes problems mainly in two points. First of all, the relationship between the 19th and 20th articles of the VCLT and secondly what is the object and purpose of a treaty and how the object and purpose of a treaty is going to be determined are ambiguous parts of the law of reservations.

A. Two Different Doctrines in the VCLT: Permissibility and Opposability

Article 19 of the VCLT regulates the terms for the validity of reservations, and article 20 regulates the acceptance and objection of a reservation by other state parties and the consequences of these reactions. In practice states apply article 20 and accept or object to a reservation, even if the reservation is invalid from the beginning, because the compatibility test included in the article 19 does not prescribe a certain process[43]. There is no expression in the VCLT regarding what happens with the acceptance of an incompatible reservation[44]. The apparent importance of article 20 relies on the absence of exact consequences of incompatibility and the regulation of accepting and objecting invalid reservations.

There is no visible, described connection between these two articles and also no obstacles for a state accepting a reservation which is incompatible with the object and purpose[45]. Even though, accepting a reservation will not make it compatible *ab initio*[46], because of the ambiguity, these two articles cannot be implemented together properly. Unlike the objective validity terms in article 19, article 20 does not consider the content of the reservation and leaves its fate to the state party's preference which is free in accepting or objecting it[47]. As to us, this consequence is coherent because

43 Göçer (n 4) 57. Hence, according to Göçer, in this subjectivist system parties acting according to article 20 are not obliged to consider the terms in article 19.

44 Coccia (n 14) 23.

45 Françoise Hampson 'Specific Human Rights Issues Reservations to Human Rights Treaties-Final Working Paper Submitted' UN Economic and Social Council Commission on Human Rights E/CN.4/Sub.2/2004/42 (2004) para. 30.

46 Göçer (n 4) 58.

47 Coccia (n 14) 23.

the permissibility doctrine considers the context of the reservation in the case of the object and purpose test but the opposability doctrine does not consider the reservation itself, it is about the reaction of other state parties to the reservation.

Thus, there exist two possible commentaries about the relevance of these articles, the first one is to understand article 19 as a doctrinal statement which can help states in reacting reservations, while considering that state parties can determine the validity of the reservations. In the Genocide Advisory Opinion, the ICJ accepted the object and purpose test as a limitation for the freedom of state parties and the individual decision of a state on acceptance or objection of a reservation must be made according to the compatibility with the object and purpose[48]. In the same direction with this commentary, Bowett asserts that a reservation, if it is not compatible -independent from the other state party's acceptance- is prohibited, also as a matter of law, the acceptance is unlawful[49]. Clearly, this can be understood as article 20 is only applicable for reservations which are ensuring the terms in article 19[50]. According to this view accepting a reservation that does not ensure the terms in article 19, is nonfunctional even illegal. But the Guide to Practice distinguishes the treaty law and law of responsibility and accepts the solution that formulating an impermissible reservation has consequences under the law of treaties and it does not entail the responsibility of the reserving state[51]. As to that, a state can object to a reservation whether it is admissible or not[52]; accepting an impermissible reservation is not *ipso facto* impermissible[53].

Pursuant to the opposability view, in the period of objection the permissibility rules in article 19 function[54], after the end of 12 months without objection or after the explicit acceptance of the reservation there will be no impact of permissibility rules. As a response to this, Simma supports that the opposability rule highlights a system that reservations' only becoming invalid by the objections of the state parties is totally inappropriate for human rights treaties[55]. Attributing the validity of the reservation to the individual conduct of the state parties' against the reservation, contravenes the objective, law-making structure of human rights treaties.

In short, the opposability view represents that if a reservation which is not objected by state parties in 12 months could not become invalid[56] then, on the other hand,

48 *Reservations to the Convention of Genocide* (n 9) 24,26.

49 D W Bowett, 'Reservations to Non-Restricted Multilateral Treaties' (1976) 48 British Ybk Intl L 67, 77-83.

50 Coccia (n 14) 24.

51 Guide to Practice (n 39) 3.3.2.

52 ibid 2.6.2.; Hampson (n 45) para 30.

53 Guide to Practice (n 39) 3.4.1.; Hampson (n 45) para 30.

54 Bruno Simma**,** Gleider I. Hernandez, 'Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 62.

55 ibid 62.

56 Curtis Bradley, Jack Goldsmith, 'Treaties, Human Rights and Conditional Consent' (2000) 149 University of Pennsylvania Law Review 399, 434-435.

permissibility supporters assert that the rules of article 20 can only be applied if the reservation provides the conditions stated under article 19. According to the supporters of the permissibility view, a reservation after a long time from its acceptance can be invalidated because of incompatibility[57]. The problem arises from the point that the incompatibility of a reservation can be justified without a time limit which is unfavorable for the stability of the treaty regime, having unstable treaty relations is not a situation desired by state parties.

The ILC also asserts that, the validity of a reservation cannot be determined by a state party's attitude[58]. A reservation must provide the terms in article 19 objectively, and if it is valid for them, it can be accepted or objected by other state parties according to article 20. As to the Guide to Practice, a state party's acceptance does not make a reservation permissible or valid[59], if a reservation is impermissible according to article 19 after acceptance by the other party it will continue to be impermissible and invalid. Simma justifiably remarks that article 20 is about the legal effects of reservations, not the validity of them, and also, article 20 cannot be applied to an incompatible reservation[60]. But, as asserted above, there is no signal for the priority between the articles 19 and 20, so these contradictory approaches arise from the regulation itself. Pellet points that out this lacuna (or confusion) in the VCLT is left to state practices, monitoring bodies of treaties and tribunals to be filled[61].

According to the ILC's approach, the permissibility doctrine is theoretically correct. However, state practice, except for human rights treaties, is described through the opposability doctrine[62]. Application of opposability doctrine is not coherent with human rights treaties, as the monitoring of other states is not based upon their rights or obligations owed to them. The opposability doctrine remains elusive because of the political features of reservations in general, that's why the opposability doctrine can correspond to treaties which are strictly contractual and reciprocal in nature[63].

There are two main problems with this resolution: the authority to decide the compatibility and the legal consequences of the invalid reservation[64]. The legal consequences of an invalid reservation are regarded in three different possibilities: the first one is the surgical doctrine, without the provision its reservation has been declared, the state stays party to the treaty; the second one is the backlash doctrine,

57 Roslyn Moloney, 'Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent' (2004) 5 Melbourne Journal of International Law 155, 157.

58 UNGA 'Report of the International Law Commission' UN GAOR 65th Session Supp No 10 UN Doc A/65/10 (2010) para 68.

59 Guide to Practice (n 39) 3.4.1.

60 Simma, Hernandez (n 54) 62.

61 Pellet, Müller (n 11) 545.

62 Kasey L McCall-Smith, 'Severing Reservations' (2014) 63 International Law Quarterly 599, 609.

63 Klabbers (n 18) 181.; Göçer (n 4) 60, 75.; ibid 614.

64 Moloney (n 57) 158.

the will of the state to participate in the treaty becomes invalid with the incompatible reservation; the third one is the severability doctrine which cuts the incompatible reservation out of state's will and the state stays party to the treaty[65].

The severability doctrine has been developed through practice, especially by the praxis of monitoring bodies or decisions of courts in international human rights law[66]. Distinctively discussing the severability doctrine, it seems the midway between the first and second doctrines and adopted by monitoring bodies, however, this doctrine itself has its own problems. In the definition of severability doctrine "the reservation which is not essential to the state's consent to be bound"[67] statement is used. A state's will to be party of a treaty whether it cannot declare a reservation to it, is an assumption; also the reservation becomes invalid without the will of the state, with the judgment that it is not essential to the consent to be bound. According to the ILC only the state itself can determine the essentiality of its reservation[68]. Objectively, from the ratification document of the state a deduction can be done about essentiality[69], but according to other doctrinal views, this document cannot guide on this matter[70].

Specific to the International Covenant on Civil and Political Rights' (ICCPR) monitoring body Human Rights Committee, severability is the general consequence of invalid reservations in human rights treaties[71], which was applied in USA's reservation to the death penalty and applied by ECHR in several cases like Belilos v. Switzerland and Loizidou v. Turkey[72].

Even if severability is implemented, there is no way to find out the state's real intention in declaring the reservation. The purpose of this system is to keep the state bound with the treaty. However, the decision about the essentiality of a reservation cannot be taken objectively by any organ because a reservation itself is subjective, for Klabbers it is a political[73] tool. As a consequence of its political character, states have the liberty to object to a reservation on any basis or no basis at all[74].

The proposed system of the ILC declared in the Guide to Practice, the reserving state can make a choice between being bound without a reservation or opting out

65 ibid 158-160.

66 McCall-Smith (n 62) 611.

67 Moloney (n 57) 160.

68 UNGA 'Report of the International Law Commission' UN GAOR 52nd Session Supp No 10 UN Doc A/52/10 (1997) para 97.

69 Richard W Edwards Jr, 'Reservations to Treaties' (1989) 10 Michigan Journal of International Law 362, 375.

70 Moloney (n 57) 167.

71 UNHRC General Comment 24 (n 31) para 18.

72 *Belilos v Switzerland* App no 10328/83 (ECtHR, 29 April 1988); *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995)

73 Klabbers (n 18) 181.

74 McCall-Smith (n 62) 606.

of the treaty[75]. Silence has given meaning, as staying party, the former reserving state can declare its will to opt-out every time, if a monitoring body decides the invalidity, the state has 12 months to declare its intention to opt-out. This solution seems practical and realistic, but in the case of absence of a monitoring body, the status of the reservation becomes ambiguous again.

B. The Evaluation of Compatibility with the Object and Purpose: Monitoring Bodies

In the Guide to Practice, assessing the permissibility of a reservation is stated as the duty of party states and international organizations, dispute settlement bodies and monitoring bodies according to their respective competences[76]. Permissibility is especially problematic and requires an instrument in case of incompatibility with the object and purpose, however the other conditions of permissibility may be proved objectively. It becomes vivid for a treaty to have a monitoring body to ensure objective supervision, in our case objective mechanism for judicial and enforcement issues needed especially to decide the object and purpose of a treaty and to apply article 19[77]. However, a monitoring body expanding its authority due to its uncertain competence makes states doubtful about either becoming a party to a treaty or formulating a reservation to the provision on the authority of the monitoring body. Within this direction, the Guide to Practice does not determine the competence of monitoring bodies and a monitoring body may not have the authority to determine the validity of reservations. Nevertheless, the lack of a judicial organ that can make binding decisions on the interpretation of the treaty, can cause an 'unworkable' object and purpose criteria[78].

The actual performance of a functioning monitoring body related to the topic of this study is determining the object and purpose of its treaty. Pellet, in the final report on reservations, clarifies how to determine the object and purpose: the content of the treaty, the title and its preamble must be assessed in its own context and with *bona fides* if needed preparatory work and state practices will be subsidiary[79]. The ILC Guide to Practice on Reservations describes the object and purpose of the treaty as the essential elements composing its *raison d'etre* [80], this definition itself needs a definition and it is vital to determine what are the essential elements and *raison d'etre* of a treaty to adjudicate the validity of reservations. On the other hand, because of the

75 Guide to Practice (n 39) 4.5.3.

76 ibid 3.2.

77 Anja Seibert-Fohr, 'The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties' in Ineta Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff Publishers 2004) 204.

78 Isabelle Buffard, Karl Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 Austrian Review of International & European Law 311, 342.

79 Guide to Practice (n 39) 3.1.5.1.

80 ibid 3.1.5.

controversial nature of defining the object and purpose, the expression in Guide to Practice 3.1.5 may be understood as a methodological tool for helping to find out the object and purpose of the treaty rather than defining it[81].

In this part, two issues will be clarified, the first is the authority of monitoring bodies, and the second is the determination of *raison d'etre* of the treaty, to find out the object and purpose.

1. The Competence of Monitoring Bodies

Generally, the charge loaded to a treaty monitoring body is to exercise authority within the treaty order in respect of this study to assess the validity of a reservation. A reservation not providing the terms in article 19 is null and void[82], and should be invalidated proactively by the monitoring body[83]. However, the monitoring body may not have this authority in all cases.

As Pellet stated, the authority of the monitoring body amounts to that assigned with the treaty[84]. In practice various amounts of authorities can be given to monitoring bodies, the basis of this delegation is the will of the state parties. Article 31/3-b of the VCLT states the interpretative function of the monitoring bodies - this function will be effective in determining the object and purpose of a treaty that needs interpretation to determine it[85].

Not all views accept the determination of the validity of a reservation within the limits of the monitoring bodies' authority. As a practical example, the monitoring body of The International Convention on the Elimination of All Forms of Racial Discrimination rejects the use of this function[86]. But the general tendency is to accept this authority. An example of this view is from the Committee Against Torture, which accepts determining its authority to decide the validity of a reservation within the frame of the VCLT[87]. To explain the source of the authority of monitoring bodies, some authors use the "competence-competence" principle[88], which means a mechanism should decide its jurisdiction primarily. Despite this principle, a monitoring body's

81 Zeynep Elibol Brönneke, 'Uluslararası İnsan Hakları Sözleşmelerine Koyulan Çekinceler Çerçevesinde Hedef ve Amaçla Bağdaşmama Ölçütü ve Türkiye Uygulaması' (PhD thesis, Istanbul University, 2017) 105-111, 123.

82 ibid 4.5.1.

83 Christian Walter, 'Section 2: Reservations' in Oliver Dörr, Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 277.

84 UN GAOR (n 68) para 82.

85 McCall-Smith (n 40) 232.

86 UNGA 'Committee on the Elimination of Racial Discrimination Report' UN GAOR 33rd Session Supp No 18 UN Doc A/33/18 (1978) para 374.: In the article 20 of the Convention it is stated that "A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it."

87 ILC, Fifth Report on the Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur (1 May- 9 June and 10 July- 18 August 2000) Un Doc A/CN.4/508, para 13.

88 Manuel Rama-Montaldo, 'Human Rights Conventions and Reservations to Treaties' in *Héctor Gros Espiell Amicorum Liber: Human Person and International Law* (Bruylant 1997) v2, 1271.

functioning must not cause *ultra vires*[89] on the other hand, the state parties may accept assessing the validity of reservations as broadening the authority and given consent can turn into a loose foundation.

The problems originated from states declaring interpretative declarations in the effect of reservations on the ICCPR, so the Human Rights Committee took action and brought out General Comment 24, aiming to maximize the efficiency of the ICCPR[90]. Unlike the previous comments, General Comment 24 was accepted as a revolutionary attempt because it decided on the authority and functioning of the system[91]. Three main points took place in General Comment 24; the committee has the legal authority to decide which reservations are valid, to decide the reservations permissibility, it must be compatible with the object and purpose, as to the severability in the situation of invalid reservation the state stays party to the treaty without reservation and the monitoring body resolves the consent of the state[92]. In the Loizidou case, the ECHR assesses Turkey's consent and decides the continuation of its member status, and also its own competence as the monitoring body[93].

The Guide to Practice indicates that the competence of a monitoring body must be formulated including the assessment of the validity of the reservation and for the existing ones, measures could be adopted to the same ends[94]. Related to that, a distinction should be made between regional and global monitoring bodies. Regional treaty systems are based on regional common grounds which are stronger than global agreements, while monitoring bodies of global treaties granted limited power[95]. Surely it will be less troublesome to reach a consensus in regional treaties because states in the same region usually share a common background, but in global treaties the need is to counterbalance the expectancies of states from different backgrounds, also the monitoring bodies of regional treaties tend to use broader authority[96].

2. The Object and Purpose of International Human Rights Treaties

In the Genocide Advisory Opinion, the ICJ states the object and purpose of the convention limits the freedom of making reservations[97]. As a limiting factor of freedom of states, determining the object and purpose of a treaty has a gravity in treaty law but

89 UN GAOR (n 68) para 83.

90 Baylis (n 13) 278.

91 ibid 285.

92 UNHRC General Comment 24 (n 31) para 1-17.

93 W A Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform', Canadian Yearbook of International Law (1995) 32 Canadian Ybk Intl L 39, 74.

94 Guide to Practice (n 39) 3.2.2.

95 Baylis (n 13) 323.

96 Christina M. Cerna, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts', (1994) 16 Human Rights Quarterly 740, 749.

97 *Reservations to the Convention of Genocide* (n 9) 24.

the task is complex. Referring to Pellet's object and purpose determination formula again, from the final report on reservations, would be illustrative: The content of the treaty, the title and its preamble must be assessed in its context and with *bona fides,* if needed preparation work and state practices will be subsidiary.

For Schabas, this determination is a matter of interpretation; and to determine the object and purpose of a treaty, it had to be interpreted under the light of its object and purpose[98] according to VCLT article 31/1. This shows how inextricable the issue is. In human rights treaties, the essential instruments of the treaty cannot be identified steadily, however it would be helpful to protect the basis-core of the treaty and let parties formulate reservations to the other parts considering their social, economic and cultural situations[99]. This basis-core formulation also does not directly help to find out the object and purpose but the test proposed by the Inter-American Court of Human Rights is more result-oriented, that reserving the inalienable rights do not cause incompatibility in case of not totally depriving of the enjoyment of a right[100], the compatibility problem solved in deciding the deprivation proportion from enjoying the right. This assessment has two levels, at first the determination whether it is inalienable or not, secondly the examination of deprivation. When approaching human rights treaties as law-making, order founding instruments, any reservation can be claimed incompatible with the object and purpose because it contravenes the ideal of protection, but this monolithic approach restrains state parties' will and blocks universal participation. Also, this order can be established by meeting on common ground rather than binding parties with exactly the same terms.

The Human Rights Commission in its report asserts that to assess the validity of a reservation, its relation with other rights and indivisibility must be considered[101]. This refers to a cumulative judgment, its place in the treaty and relation with the other rights must be considered[102] to find out the validity of the reservation.

Lastly, a distinction must be made between the types of human rights treaties, i. e. treaties regulating a specific right and general human rights treaties. To determine the object and purpose of specific human rights treaties requires less effort than general human rights treaties which are multifaceted[103] and including rights as a catalog-list.

98 Schabas (n 93) 48.; VCLT art 31/1: A treaty shall be interpreted in good faith under the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose.

99 Catherine Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties' (1993) 64 British Ybk Intl L 245, 281.

100 Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-American Court of Human Rights (8 September 1983) para 66.

101 UNGA 'Report of the International Law Commission 59th Session' UN GAOR 62nd Session Supp No 10 UN Doc A/62/10 (2007) 115.

102 Guide to Practice-Commentary (n 39) 3.1.5.1., paras 3, 4.

103 Beyza Özturanlı, 'Uluslararası Hukuk Komisyonu Çalışmaları Çerçevesinde Uluslararası Andlaşmalara Getirilen Çekincelere İlişkin Hukuki Rejim' (2012) 22 İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi 471, 491.

The object and purpose of the Convention Against Torture can be determined to prevent torture. But in treaties protecting human rights different in subject - as in a catalog-list - the object and purpose can be decided to guarantee these rights. According to Hampson, the object of a human rights treaty is not to undertake a certain number of obligations, the goal is respecting, protecting and promoting human rights[104].

In that vein, according to the Guide to Practice, reservations must be admissible if the enjoyment of all the rights which no derogation permitted did not restrained substantially in the catalog sort of human rights treaties[105]. The ILC in its report asserts that the effect of the reservation to the right must be assessed if the enjoyment of the right is prevented substantially, there can be incompatibility with the object and purpose[106] and by the way, adopts the test proposed by the Inter-American Court of Human Rights stated above. In this case, every right and reservation has to be assessed individually since there is no order of priority between rights, a general assessment among rights would not be possible. Reservation to a right if it is not a *jus cogens* norm will not be regarded invalid at first sight, the normative characteristics of the right must be evaluated to determine the validity. Also, it can be proper to use the "deprivation proportion" test proposed by the Inter-American Court of Human Rights instead of using the object and purpose test, which also, as to us seems, more appropriate for international human rights treaties.

As mentioned above to determine the object and purpose of human rights treaties and applying the object and purpose test to them may not help to reach the conclusion intended with article 19 of the VCLT. The object and purpose can be determined vast enough to prevent the proper application of the test. On the other hand, assessing a reservations' deprivation proportion firstly enables the individual assessment of rights in an international human rights treaty and secondly in comparison with the object and purpose test it refers to the direct relation between the right and reservation. In the method proposed by the Inter-American Court, not the provision's importance and essentiality in the formulation of the treaty but the right's normative status in international human rights law evaluated to decide the validity of the reservation according to the permissibility doctrine. These differences make the deprivation proportion test more suitable and less equivocal in the implementation of international human rights treaties.

IV. Conclusion

Problems originated from the different aspects of human rights treaties and caused complexities in the application of the VCLT. The individual supervision effect of the reciprocity rule is of no use in international human rights treaties and also the acceptance

104 Hampson (n 45) para 50.

105 Guide to Practice (n 39) 3.1.5.4.

106 UN GAOR (n 101) 116.

of reservations does not function as in synallagmatic treaties. However, objections to reservations still maintain their importance unless an *ante hoc* supervision is provided[107]. Also, the universality of the treaty has a major importance and the parties to the treaties should be more in number to ensure more peoples' rights with international protection; so in reservation regimes, while liberal options pave the way for international inclusion, the essence of the treaty must be protected to constitute a normative system. Reaching the high ideals and standards of the international community cannot be maintained by prohibiting the reservations, therefore in human rights treaties reservations are indispensable. Permitting reservations enables effectuating the rights of more peoples from different regional, cultural, and religious systems. As mentioned above, Klabbers accepted the universality and integrity as twin ideals, the consequences of the liberation reveal the requirement of an institutionalized system in the application of reservations especially in some types of treaties.

The rules of the VCLT regarding the validity of a reservation, articles 19 and 20, conflicts with each other and the application of them cause problems in objectivity. Against the individualist system of opposability in article 20, the permissibility system in article 19 has to be applied priorly, and a reservation ensuring the terms in article 19 must become acceptable or opposable by the states according to article 20. The implementation of these articles requires institutionalization, a monitoring body to determine the validity of a reservation for the sake of objectivity. Despite the views from the doctrine, there are no exact and precise rules about the authority of monitoring bodies and the determination of the object and purpose. Rules in the Guide to Practice are non-binding in composition and intrinsically guiding principles. The Vienna System is said to be suitable for different types of treaties because it establishes a balance between universality and integrity[108], but the point is more than the universality and integrity tension, the Vienna system also produces other problems. Also, Pellet calls attention to the negotiators of treaties who find the Vienna system satisfactory and suitable[109]. However, because of being vague and open-ended, the VCLT rules remained incapable of solving the problems arising from the practice[110]. The Vienna system is blurry in practice and does not provide certain methods for the application of reservations, and with the Guide to Practice, the ILC and Pellet struggled to solve the problems arising from the application of the VCLT, but there may exist some structural and institutional ones. It is essential in the application of a treaty that the reservation conflicting with the object and purpose of the treaty must not be determined as of compatible or not by an objective mechanism, at least. However as mentioned above, the ILC incisively adopted the view to convert the

107 Elibol Brönneke (n 81) 216-217, 230.

108 Alain Pellet, 'The ILC Guide to Practice on Reservations to Treaties' (2013) 24 EJIL 1061 2013, 1078.

109 ibid 1077.

110 Elif Uzun, 'Uluslararası Hukuk Komisyonu'nun "Andlaşmalara Çekince İleri Sürülmesi için Uygulama Rehberi" Üzerine Betimsel Bir İnceleme' (2013) 12 TAAD 185, 187-188.

object and purpose test in VCLT article 19 to the deprivation proportion test with the effect of practice in human rights treaties.

As we tried to mention and illustrate above, even if the Guide to Practice is comprehensive and detailed, the problems remain eloquently in case of human rights treaties or general, which requires more institutions and indirectly more restrictions on the sovereignty of states. In the case of international human rights treaties, other state parties may not have much concern about the reservations which do not affect their benefits thoroughly and intercept their rights. They may even admit or respond impermissible reservations in human rights treaties on subjective grounds for any reason. In treaties that are drafted after a productive negotiation process, parties may tend to formulate reservations less because they can reflect their will in the treaty directly. After the end of the negotiation process, the subjective ground pales and the application of the reservation rules in the VCLT or Guide to Practice requires a more institutional procedure.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

The Evidential Value of Interrogation in the Law of Civil Procedure

Medeni Usul Hukuku'nda İsticvabın Delil Değeri

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Abstract
Since the end of the nineteenth century, there has been debate in many countries whether a reform of the regulations on interrogation is necessary. These debates have been developed around the idea of accepting an interrogation instead of the "oath" institution that is within the legal system. Some national legal systems (e.g. Austria and Switzerland) accepted this idea and introduced interrogation as admissible evidence in the civil justice. On the other hand, some other nations (e.g. Germany) took a more conservative attitude in this matter and accepted the interrogation as "auxiliary evidence".

The Turkish law-maker set forth the evidence in the Fourth Section of Code of Civil Procedure and decided not to include interrogation as evidence. Therefore, in Turkish Law, interrogation is in general a tool for obtaining evidence and eliminating uncertainties about cases.

The main purpose of this study is to examine the evidence value of interrogation in Civil Procedure Law. Comparative law research will be used as the main data collection method and the position of Turkish Law will be determined.

Keywords
Civil Procedure, Interrogation, Oath, Evidence, Proof

Öz
19. yüzyılın sonlarından itibaren, birçok ülkede, isticvaba ilişkin düzenlemelerde bir reform yapılmasının gerekli olup olmadığı tartışması yaşanmaya başlamıştır. Bu tartışmalar, hukuk sisteminde yer alan "yemin kurumu yerine isticvabın (*"interrogation"*) delil olarak kabul edilmesi düşüncesi etrafında gelişmiştir. Bazı kanun koyucular (örneğin Avusturya ve İsviçre) bu düşünceyi kabul etmişler ve isticvabı, hukuk yargısında bir delil olarak düzenlemişlerdir. Buna karşılık diğer bazı kanun koyucular (örneğin Almanya) ise bu konuda daha muhafazakâr bir tutum izlemişler ve isticvabı bir *"tâli delil"* olarak kabul etmişlerdir.

Türk kanun koyucu, delilleri Hukuk Muhakemeleri Kanunu'nun Dördüncü Kısmı'nda düzenlemiş ve isticvaba deliller arasında yer vermemeyi tercih etmiştir. Bu nedenle isticvap, Türk Hukuku'nda, genel olarak bir delil elde etme ve vakıalar hakkındaki belirsizlikleri giderme aracı konumundadır.

Bu çalışmanın temel amacı, Medeni Usul Hukuku'nda isticvabın delil değerinin incelenmesidir. Burada temel veri toplama yolu olarak karşılaştırmalı hukuk araştırması kullanılacak; Türk Hukuku'nun konumu belirlenecektir.

Anahtar Kelimeler
Medeni yargı, İsticvap, Yemin, İspat, Kanıt

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The Evidential Value of Interrogation in the Law of Civil Procedure

Introduction

The idea of utilization of the parties as instruments of proof in the Law of Civil Procedure brought along heated debates in almost all legal systems by the early 19th century. In addition to several other reasons, the thought that the parties themselves would be the ones who would know about the dispute the best on one hand, and the concern that the parties would be the most suspicious witnesses in their own procedures on the other hand, have led legal systems to make different arrangements in terms of the evidential value of the testimonies of the parties.

In Turkish Law, in Law No. 1086 on Civil Procedure (CCP)[1], the institutions of "comperendinatio" (CCP art. 75/2) and "interrogation" (HUMK art. 230-235) have been accepted in terms of utilization of the parties as sources of information in a trial. Law No. 6100, the Code of Civil Procedure (New CCP)[2] also made some changes, while preserving both institutions in the general sense. In this study, we will examine the institution of interrogation that has been regulated in arts. 169-175 in HMK. In this context, we will firstly determine the position of interrogation in the Turkish Law of Civil Procedure, and by also considering comparative law, we will try to determine the position this institution needs to have. After this, we will make effort to bring solutions to problems that are faced by discussing legal arrangements in terms of the subject matter and procedure of interrogation, relevant doctrine debates and the decisions of the Court of Cassation regarding the issue.

I. The Concept of Interrogation and Its Definition

The concept of interrogation in Turkish, *isticvap*, is one of the words in the heritage of Turkish from Ottoman Turkish, and in terms of its dictionary definition, it means "*asking an receiving answers, making [one] say with the purpose of receiving an answer, questioning*". The Lawmaker used *'isticvap'* with this meaning also in various parts of the Law No. 1086 on Civil Procedure. For example, in HUMK art. 270, it is stated that "*if the witness does not speak Turkish, interrogation is achieved with the help of a translator*"[3].

Other than its dictionary definition, the legal definition of the word interrogation could also be discussed. Accordingly, this word may be defined as verbally

1 RG, 2-4.07.1927, no: 622-624.

2 RG, 12.01.2011, no: 27836.

3 Another example of this is HUMK art. 266: "*The judge interrogates witnesses himself/herself."* Likewise, the word 'interrogation' was also used with its dictionary meaning in HUMK arts. 150/III, 216, 241/II, 267, 279, 309/I and 378. The concept of 'interrogation', which is used with its dictionary definition in the Law on Civil Procedures was changed in the Code of Civil Procedure. Such that, for example, in HMK art. 263 which corresponded to HUMK art. 270, the statement "*if the witness does not speak Turkish, they are heard with a translator*" was preferred. The case is the same for the other articles that are mentioned above; the term 'interrogation' in these articles was changed in general with the term 'being listened to'.

questioning the parties before the court regarding the facts that form the foundation of the proceedings or issues that are related to these[4]. Law No. 6100, the Code of Civil Procedure (New CCP) was rearranged between the items 169 through 175 by accepting 'interrogation' only by its technical definition.

II. Field of Application and Subject Matter of the Interrogation

After determining the legal status of interrogation, in which civil proceedings interrogation could be referred to should be considered. In the doctrine, it is accepted that interrogation may find an area of application in cases where the principle of arrangement of the case material by the parties is practiced[5]. The main justification for this is shown as that the concession of the parties in these trials would not be binding for the judge[6]. In French CPC art. 184, it is projected that the judge may arraign the parties or one of them in terms of any issue. At this point, in French Law, it is accepted that an idea such as "interrogation cannot be resorted to in cases where concession does not bind the judge" would not be correct, because interrogation is not an institution that only aims to acquire concession, but it also serves to enlighten the facts that form the reason for the trial[7]. Hence, interrogation in French Law is an institution with a broad area of implementation that may be resorted to in all courts regarding all kinds of issues[8].

We also have the view that the objective of interrogation cannot be reduced to merely "acquisition of concession"[9]. In our opinion, interrogation, other than acquisition of concession, is also an institution for the judge to obtain information and form an opinion. While it may be suggested that there is the institution of "listening to the parties" for this purpose against this proposition, interrogation is

4 Ergun Önen, *Medeni Yargılama Hukuku* (Sevinç, 1979), p. 185; Saim Üstündağ, *Medeni Yargılama Hukuku (*7. éd, Nesil, 2000), p. 757; Baki Kuru, *İstinaf Sistemine Göre Yazılmış Medenî Usul Hukuku*, (Yetkin, 2017), p. 227**;** R. Arslan, E. Yılmaz and S. Taşpınar Ayvaz, *Medenî Usul Hukuku* **(**Yetkin 2018), p. 369; H. Pekcanıtez, O.Atalay and M. Özekes, *Medenî Usûl Hukuku,* (6.éd., Vedat 2018), p. 288; Muhammet Özekes, *Pekcanıtez Usûl Medenî Usûl Hukuku (*15. éd, On İki Levha, 2017), p. 1368; Süha Tanrıver, *Medenî Usûl Hukuku* (Yetkin, 2016) p. 712; Oruç Hami Şener*, 'Medeni Yargılama Hukukunda Tarafların İsticvabı',* (1990) 1-2, YD, 59; İlker Hasan Duman, *'Hukuk Mahkemesinde Tarafların Sorgusu',* (1985) 3 AD, 715; Abdurrahim Karslı, *Medeni Muhakeme Hukuku Ders Kitabı* (4.éd., Alternatif, 2014), p. 580; Erdal Tercan, *Medenî Usûl Hukukunda Tarafların İsticvabı* (Yetkin, 2001), p. 47; Mehmet Akif Tutumlu, *Bilimsel Görüşler ve Yargıtay Kararları Işığında Medenî Yargılama Hukukunda Delillerin İleri Sürülmesi* (3. Éd., Seçkin, 2005), p. 677; Gérard Chabot**,** 'Comparution Personnelle', (2016) RPC, 1; Gaëlle Deharo, 'Comparution Personnelle Des Parties', (2017) Encyclopédie Juris-Classeur Procédure Civile, 2; Serge Guinchard*, Lexique Des Termes Juridiques* (Dalloz, 2016*),* p. 699-700.

5 Kuru (n 4) p. 228; B. Kuru, R.Arslan and E.Yılmaz*, Medenî Usul Hukuku* (21. Éd., Yetkin, 2010); p. 371; Arslan, Yılmaz and Taşpınar Ayvaz (n 4), p. 369; Tanrıver (n 4), p. 712; Pekcanıtez, Atalay and Özekes, (n 4), p. 289; Özekes (n 4), p. 1386.

6 Kuru (n 4) p. 228; Arslan, Yılmaz and Taşpınar Ayvaz (n 4) p. 369; Tanrıver (n 4) p. 172; Pekcanıtez, Atalay and Özekes n 4) p. 289.

7 C. Chinais, F. Ferrand and S. Guinchard, *Procédure Civile-Droit Interne Et Européen Du Procès Civil* (33. Éd., Dalloz, 2016), p 483; P. Julien and N. Fricero, *Droit Judiciaire Privé* (3. Éd., LGDJ, 2009), p. 256; Chabot (n 4) p. 23; Christophe Lefort, *Procédure Civile,* (4.éd., Dalloz, 2011), p. 347.

8 Chainais, Ferrand and Guinchard (n 7) p. 483; Deharo (n 4) no: 8.

9 Özekes (n 4) p. 1386.; Nur Bolayır*, Hukuk Yargılamasında Delillerin Toplanmasında Tarafların ve Hâkimin Rolü* (Vedat, 2014), p. 480-481.

a more effective method as it involves interrogation of the parties by the judge by following a certain procedure[10]. For this reason, interrogation could play a role the most in divorce proceedings where concession does not bind the judge[11]. The Court of Cassation is also of the opinion that interrogation may be used with the parties in divorce proceedings if needed[12].

As clearly arranged by New CCP art. 169/2, the subject matter of interrogation would consist of the facts that form the foundation of the trial and the issues related to these facts[13]. According to CPC art. 191/1 in Swiss Law, interrogation may be used with the parties regarding the facts that form the basis of the trial.

III. Result Attributed to the Statements Obtained in Interrogation in Various Legal Systems

A. German Law

In the period where *gemeines Recht* was being applied in German Law, the only institution that allowed utilization of the statements of the parties was the oath[14]. In that period, there were two types of oaths that were accepted as oath ex officio and oath of parties. Oath ex officio could be applied only when proof could not be achieved despite the existence of *prima facie* elements and exhaustion of other evidence[15]. An oath of parties did not require these conditions, and it could be requested any time[16].

It is seen that the evidential value of interrogation was focused on in the German doctrine in the mid-19th century. Such that, in their work dated 1867, von Bar, as a result of their studies on British Law, emphasized that testimonies of parties were now starting to be utilized as evidence[17]. Nevertheless, the German Lawmaker was not concerned with this opinion and did not include interrogation in evidence by including the oath as evidence in the 1877 Code of Civil Procedure (*Zivilprozessordnung*). The reason for this attitude of the Lawmaker is shown as that interrogation would not be

10 Özekes (n 4) p. 1386.

11 Sabri Şakir Ansay, *Hukuk Yargılama Usulleri* (7. Éd, 1960), p. 250; İsmail Hakkı Karafakih, *Hukuk Muhakemeleri Usulü Esasları* (AÜSBF 1952)**,** p. 156; İlhan Postacıoğlu, *Medeni Usul Hukuku Dersleri,* (İstanbul 1975), p. 171; Şener (n 4) p. 60; Tercan (n 4) p. 331. Kuru thinks that the parties cannot be subjected to interrogation in divorce proceedings that are followed with proxy, but they could be listened to. See. Kuru (n 4) p. 228.

12 Y. 2. HD., 25.02.2013, 18738/4757, (www.kazanci.com).

13 The subject matter of interrogation was described in HUMK art. 230/II, with an unsuccessful expression in our opinion, as follows: "*İsticvap is required for concerns on the object of demand or facts in the case of situations that are related to it."* With this unclear statement of the law, in the doctrine and the decisions of the Court of Cassation, it was accepted that facts would constitute the subject matter of interrogation. See Önen (n 4) p. 186; Kuru, Arslan and Yılmaz (n 5) p. 371; Şener (n 4) p. 66; H. Pekcanıtez, O. Atalay and M. Özekes, *Medenî Usûl Hukuku* (9. Éd., Yetkin 2010), p. 369.

14 Paul Oberhammer, 'Parteiaussage, Parteivernehmung und freie Beweiswürdigung am Ende des 20. Jahrhunderts', (2000) ZZP, 312.

15 Oberhammer (n 14) 297.

16 Oberhammer (n 14) 297.

17 Carl Ludwig Von Bar, *Recht und Beweis im Civilprocesse, Tauchnitz* (Leipzig, 1867), p. 157.

suitable with the German system of civil procedure with its then dominant principle of being brought upon by the parties[18].

The existing skeptical approach despite the respect received by testimonies of the parties in civil proceedings in German Law started to lose its strength after World War I. Such that, in the reform of 1924, *Parteianhörung*, which could be defined as listening to the parties for the purpose of eliminating the incomplete or ambiguous parts in the petitions of the parties, became more prominent, and the position of the judge in direction of the judging process was made stronger[19].

In the years that followed the 1924 reform, debates on recognizing the evidential value of interrogation continued around especially the idea of harmonization of the civil procedure systems of Germany and Austria. Hence, in 1931, *Juristentag* made a proposal to legislate interrogation as a piece of evidence by itself[20]. Nevertheless, in the 1933 reform, the Lawmaker showed more conservative attitude. Such that, the Lawmaker not only accepted interrogation (*Parteivernehmung*) instead of oath of the parties but also looked for the same conditions in the oath of the parties for interrogation[21]. Accordingly, based on ZPO § 445/1, the party on whom the burden of proof falls could request interrogation in the case that they cannot completely prove their claim with other evidence. Likewise, the court could also decide upon the interrogation of the parties ex officio (§ 448). If the party to be arraigned does not agree to be arraigned, does not attend the summons of the court or does not answer questions without a valid reason, the court would assess these behaviors freely (§ 452).

B. Austrian Law

Austria is prominent as a legal system that pioneered the recognition of the evidential value of interrogation. Such that, in Austrian Law, especially as a result of the comparative examinations with British Law, the idea of accepting interrogation as evidence instead of an oath was adopted[22]. As a consequence of this, interrogation was accepted as evidence in *Bagatellverfahren* for small disputes in just 1873[23].

After the successful results obtained in *Bagatellverfahren*, in the Austrian Law on Civil Procedure dated 1895, the Lawmaker recognized interrogation as evidence

18 Oberhammer (n 14) p. 301.

19 P. Oberhammer and T. Domej, *'Germany, Switzerland and Austria'*, European Tradition In Civil Procedure, Antwerp 2005, p. 257.

20 This proposal by *Juristentag* is significant because this value was not recognized for interrogation even in Austrian Law at that period.

21 Oberhammer and Domej (n 19) p. 258.

22 Julius Anton Glaser, '*Über den Haupteid",* Allgemeine österreichische Gerichtszeitung, 1865, p. 311; Philipp Harras Von Harrasowsky**,** *Die Parteienvernehmung und der Parteieneid nach dem gegenwärtigen Stande der Civilprocessgesetzgebung,* (Vienna, 1876), p. 102.

23 Oberhammer (n 14) p. 299.

in all civil code. In the background of this preference, there was the idea that the evidence of the oath - which had strict formal conditions - did not comply with the principle of free assessment of evidence[24]. Despite being included among forms of evidence, until the year 1983, interrogation was considered to be "collateral evidence" in Austrian Law[25]. Such that, it could be resorted to only in the case that proof cannot be achieved by other evidence. This limitation in resorting to interrogation was lifted in *Zivilverfahrens-Novelle* approved in 1983, and interrogation was accepted as evidence with the same power of proof as testimony[26].

C. Swiss Law

Until the entry into force of the Swiss Federal Code of Civil Procedure, there were differences among the cantons in terms of the evidential value of interrogation. Some cantons did not recognize the evidential value of interrogation.

Some other cantons, while recognizing the evidential value of interrogation, brought some limitations or conditions with it. For example, the Lawmaker recognized the status of interrogation defined as *Beweisaussage* as collateral evidence in the Zurich Code of Civil Procedure and accepted that this evidence could be admissible in the case that proof is not possible by other evidence.

In the third group, there were cantons which accepted interrogation as evidence by itself without any preconditions. The Bern Canton may be an example of this. Accordingly, forms of evidence were listed in Bern CPC art. 212, and these also included interrogation. Nevertheless, pursuant to Bern CPC art. 280, the judge would freely asses the testimonies of the parties during interrogation[27].

Forms of evidence are defined in Art. 168 of the Swiss Federal Code of Civil Procedure. Here, the Lawmaker resorted to the method of listing evidence in a restrictive manner[28], and accordingly, forms of evidence included witnesses, bonds, discoveries, experts, written information and interrogation and testimonies of the parties.

Two issues get the attention within the framework of this arrangement in the law. The first of these is accepting interrogation (*interrogatoire, Parteibefragung, interrogatorio*) that is utilized as a source of information from the party and testimonies of the parties *(déposition de partie, Beweisaussage, deposizioni delle parti)* among

24 Oberhammer and Domej (n 19) p. 257.

25 Oberhammer and Domej (n 19) p. 257.

26 Oberhammer (n 14) p. 299; Oberhammer and Domej (n 19) 257.

27 A similar arrangement was also found in Fribourg Code of Civil Procedure.

28 F.Bohnet and others, *Code De Procédure Civile Commenté,* (Helbing Lichtenhahn 2011), art. 168, no: 1. The French text of the article uses the statement "*les moyens de preuve sont.*" Additionally, the statements "*sind zulässig*" in the German text and "*sono ammessi*" in the Italian text more clearly show that the forms of evidence were established as *numerus clausus*.

evidence. The second important point is that the Swiss Lawmaker did not include the oath among the forms of evidence. As seen here, the Lawmaker accepted interrogation as evidence rather than evidence of oath. Moreover, in the Swiss Federal Code of Civil Procedure, interrogation is not in the position of "collateral evidence" that can be resorted to in cases where proof cannot be achieved with other evidence. Such that, interrogation has the same evidential value as testimony, and the judge would assess these freely.

D. French Law

In the French Code of Civil Procedure that was enacted on 14 April 1806 and had been in effect for exactly 170 years, two institutions in terms of listening to the parties by the judge as *interrogatoire sur les faits* and *comparution personnelle* were proposed. While these two institutions had different characteristics to each other, it was accepted that both had the objective of "acquiring concession"[29]. Therefore, these two institutions could be considered as "instruments of obtaining evidence" rather than "instruments of proof".

The most important difference between these two institutions was the formal rules they were subject to. *Interrogatoire sur les faits*, because it was subject to highly strict formal rules, was considered to be both inefficient and a large factor in slowing down the judicial process, whereas this situation was resulting in failure to apply the process listening to testimonies regarding facts in practice[30]. The Lawmaker that considered this situation abolished "*interrogatoire sur les faits*" with the law approved on 23 May 1942.

In the French Civil Code dated 01.01.1976, the institution of "*comparution personnelle*" (interrogation of the parties) was established in detail between articles 184 and 198. At this point, it could be argued that an important step was taken in terms of the legal status of interrogation in Fr. CPC art. 198. Accordingly, based on the provision in question, the judge could derive all types of legal results based on all statements of the parties, absences or refusals to answer and accept these to be equivalent to commencement of written proof. During the enaction works of the New French Code of Civil Procedure, with the purpose of harmonizing the Code of Civil Procedure and the Civil Code, a similar provision was added to the third paragraph of article 1347 of the French Civil Code (CC). Accordingly, the statements made by a party before the judge, denial of response or failure to appear before the judge could be equivalent to commencement of written proof.

29 Edouard Bonnier, *Des Preuves En Droit Civil et En Droit Criminel*, (Paris 1873), p. 470-471; Charles Eugène Camuzet, *Manuel Des Matières du Code de Procédure Civile* (Paris 1878), p. 168; René Japiot, *Traité Elémentaire de Procédure Civile et Commerciale (*Paris 1929), p. 505; René Moret, *Traité Elémentaire de Procédure Civile* (Paris 1932), p. 542-543; Jean Sicard, *La Preuve En Justice Après La Réforme Judiciaire,* (Paris 1968), p. 198.

30 Sicard, p. 199.

As seen here, in French Law, by paving the way for recognition of "evidential status" even though limited to the statement made before the judge, the judge gained judicial discretion. Accordingly, in French Law, where the rule of proof by deed was adopted as in the case of Turkish Law, the rule of proof by deed was made flexible by accepting behaviors of the parties during interrogation to be equivalent to commencement of written proof.

E. English Law

In British Law, interrogation corresponds to the very broad category of discovery (or *disclosure* with its expression today)[31]. *Discovery* is a procedural institution where the parties force each other to provide information regarding the proceedings, where one of the ways of transferring information here is interrogation[32].

The history of appealing to the interrogation of the parties may be dated back long ago in English Law, especially proceedings held at the *Courts of Chancery*[33]. In addition to this, the interrogation process practices at the *Courts of Chancery* was not in the form of an institution that is utilized to prove facts but in the form of an institution to gather evidence[34]. For this reason, petitions for proceedings included a section that determined the questions to be asked to the corresponding party starting with the late 17th century[35].

Discovery, as an instrument of gathering evidence, started to lose its prominence as a result of reduction of the strict nature of the law of evidence. Such that, in the *Civil Evidence Act* dated 1851 which was prepared with the effect of the New York Code of Civil Procedure dated 1848, where it was established that the parties could be witnesses for or against themselves in every proceeding heard before all courts in the Union[36].

The *Rules of Supreme Court* dated 1883 brought a significant change in terms of the application area of interrogation. Accordingly, an interrogation could be applicable in claims for damages originating from fraud or exploitation of trust without needing permission from the court, while it would require permission from the court in other cases[37]. Nevertheless, before this change could be practiced for much longer, in 1893, applying interrogation was subjected to permission from the court in all cases[38]. After this, courts started to allow interrogation only when they reached the opinion that it

31 Cornelis Hendrik Van Rhee, *'England and Wales',* European Tradition In Civil Procedure, Antwerp 2005, p. 261.

32 Van Rhee (n 32) p. 261.

33 William Searle Holdsworth, *A History of English Law*, (3.éd., Methuen, Sweet&Maxwell 1944), p. 194.

34 Robert Wyness Millar, *Civil Procedure Of The Trial Court In Historical Perspective*, (New York 1952), p. 202.

35 Millar (n 34) p. 202-203.

36 Millar (n 34) p. 212; Van Rhee (n 32) p. 262.

37 John Anthony Jolowicz, *On Civil Procedure,* (Cambridge University Press 2000), p. 42-43.

38 Jack Jacob, *'The Administration of Civil Justice',* The Reform Of Civil Orocedural Law and Other Essays in Civil Procedure (Sweet&Maxwell 1982), p. 316.

would be required as a part of the right to a fair trial, and consequently, interrogation disappeared almost completely in practice[39].

In terms of the applicability of interrogation, the *Civil Procedure Rules (CPR)* dated 1999 carries great significance. Section 18 of CPR, which abolished most of the old terms and the term "interrogatory" in this context, considers the interrogation of the parties under the name of "heading of further information". Hence, according to Section 18.1 of CPR, the court would always be authorized to order a party to explain or provide more information on an issue related to the dispute. At this point, while CPR art. 18 rather establishes the institution of "listening to the parties", it is also possible for the court to question the parties in this framework[40].

F. Turkish Law

1. In the Period of Law on Civil Procedures (1927)

Considering the systematic of the Law No. 1086 on Civil Procedures, interrogation was established in the seventh paragraph with the title "*interrogation of both parties by the examining judge*" and not in the eight sub-section of the second section of the law titled "*evidence and proceedings*".

This form of establishment in the law led to debates on the issue of the legal status of interrogation, or more accurately, whether or not it would serve as "evidence". In the doctrine, two different views were proposed on this topic. Authors who defend the first view accept that interrogation does not have the quality of "evidence"[41]. The main justification of this view is that interrogation is established in the law not in "*evidence*" but in a different paragraph[42]. Some authors who defend this position stated that interrogation is "*an instrument to shed light on the trial*"[43], while some others considered it to represent an "instrument of acquiring concession"[44].

The second view in the doctrine argues that interrogation constitutes "*evidence*". Among the authors who defend this point, Üstündağ explained the denial of interrogation as an instrument of proof by confusion between the institutions of listening to the parties and interrogation[45]. According to the author, interrogation is not a collateral instrument of proof that is resorted to in the case of the absence or

39 Jacob (n 38) p. 316-317.

40 Van Rhee (n 32) p. 264-265.

41 Ansay (n 11) p. 249-250; Kemal Onsun, *'Senet ve İmza Hakkındaki İsticvap Davetine İcabet Etmemek İkrar Sayılabilir mi?'*, (1948) 13 HİD, 1; Postacıoğlu (n 11) p. 565; Şener (n 4) p. 61; Kuru, Arslan and Yılmaz (n 5) p.371; Pekcanıtez, Atalay and Özekes (n 11), p. 369.

42 Onsun (n 41) p.1; Pekcanıtez, Atalay and Özekes (n 11) p. 369.

43 Şener (n 4) p. 561; Kuru, Arslan and Yılmaz (n 5) p. 371.

44 Postacıoğlu (n 11) p. 565.

45 Üstündağ (n 4) p. 759.

inadequacy of other evidence, but it is an instrument of proof that may be combined with other evidence[46]. Likewise, some authors in the doctrine considered the issue in terms of normative law, and they argued that interrogation should be accepted as "*evidence*" in terms of the modern proof theory that utilizes the parties as a "source of information" and the objectives of civil procedure[47].

In a decision dated 1987, the Court of Cassation decided that the judge is bound by the requests and pieces of evidence shown by the parties, but in the case that the gathered evidence falls short in making a conviction, the judge must find the truth by inquiry ex officio by utilizing institutions written in the procedural law as interrogation and oath[48]. Although the decision in question gives an impression that the Court of Cassation considered interrogation as an "*instrument of proof*", in many of its decisions later, the Court of Cassation decided that interrogation is not an instrument of proof, but it is a procedural process that may be employed by the own decision of the judge or upon the approval of a request from one of the parties with the purpose of clarifying certain facts in a proceeding and achievement of the concession of the party with the favor against it in terms of a fact's existence and absence[49].

2. In the Period of Code of Civil Procedure (2011)

The form of establishment of interrogation in the law is also similar in the Code of Civil Procedure. Such that, Section 4 of New CCP has the title of "*proof and evidence*". The Code did not include interrogation in this section and preferred to establish this institution as the sixth distinction of Section 5 titled "*inquiry and inquiry-related special cases*" in the third part titled "*written trial procedure*".

It is seen in the works written in the period of HMK that debates on the legal status of interrogation are less heated. Accordingly, a large part of the authors in the doctrine argue that interrogation does not have an evidential status by itself based on the systematic of the law[50]. In the doctrine, Kuru and Arslan/Yılmaz/Taşpınar Ayvaz explained the reason for making such a choice with the justification that the parties are the most suspicious witnesses in their own proceedings[51]. While some authors in the literature stated that interrogation tends towards the purpose of "*proving*", they did not argue that it has an "evidential" position[52]. Another view that is proposed in

46 Üstündağ (n 4) p. 759.

47 Y. Alangoya&M. K.Yıldırım&N.Deren-Yıldırım, *Hukuk Muhakemeleri Kanunu Tasarısı*, (İstanbul 2006), p. 103-104; Tercan (n 4) p. 134-135; Tutumlu (n 4) p. 668.

48 Y. 1.HD., 02.04.1987, 1347/2838, 02.04.1987 (www.kazanci.com).

49 Y. 13. HD., 19.02.2001, 2467/3419 (www.kazanci.com); Y. 3. HD., 19.02.2001, 1153/1539 (www.kazanci.com).

50 Kuru (n 4) p. 228; Ejder Yılmaz, *Hukuk Muhakemeleri Kanunu Şerhi* (3. Éd. Yetkin, 2017), p. 2213; Arslan, Yılmaz and Taşpınar Ayvaz (n 4) p. 370; Tanrıver (n 4) p. 712; Pekcanıtez, Atalay and Özekes (n 4) p. 288; Bolayır (n 9) p. 480; Uğur Yağcı, *'İsticvaba İlişkin Olarak Hukuk Muhakemeleri Kanunu İle Getirilen Düzenlemeler'*, (2012) 1-2 EÜHFD, 2012, p. 289.

51 Kuru (n 4) p. 228; Arslan, Yılmaz and Taşpınar Ayvaz (n 4) p. 370.

52 Karslı (n 4) p. 581; Özekes (n 4) p. 1372-1373.

terms of the legal status of interrogation is that, based on the form of its establishment in the law, it is an "institution towards the objective of acquiring concession"[53]. The Court of Cassation also stated in its decisions made in the period of New CCP that interrogation would not constitute evidence by itself[54]. According to the Court of Cassation, interrogation is a procedural process that is closely related to proof and employed with the purpose of acquiring concession or eliminating ambiguities[55].

As stated at the beginning of our study, interrogation is one of the two institutions established for the court to be able to utilize the parties as a source of information. With its form of establishment in the law, arguing that interrogation is "*evidence*" would be a stretch in our opinion. In addition to this, one should not doubt that interrogation is an effort towards "*proof*". Accordingly, the court would question the parties about the facts that are against their favor, and as a result of this, it would reach a decision about the accuracy of those facts. Hence, in our opinion, assuming that interrogation is merely an "effort towards the purpose of obtaining concession" will also negatively affect the productivity of this institution[56]. In this case, if the concession of the party is not obtained as a result of interrogation, there will be no worth to the statements provided by the party within the interrogation. At this point, as we support the rule of proof by deed, as in the case of French Law, allowing assessment of the statements of the party within the context of interrogation as "*commencement of evidence*" would be a suitable solution[57]. In this framework, the Court of Cassation hold that, in the case of the absence of hard evidence in situations where the rule of proof by hard evidence is applicable, after determining the parties of the contractual relationship by employing interrogation, the party should be reminded that they have the right to offer oath[58]. As seen here, the Court of Cassation merely attributed the value of an "instrument to eliminate ambiguities" for interrogation. Nevertheless, in another relatively newer decision, the Court of Cassation decided that interrogation cannot be employed in cases where the rule of proof by hard evidence is applicable, and interrogation is already not evidence by itself[59].

In Turkish Law, testimonies of the parties are considered as evidence under "oath" (HMK art. 225). An oath is evidence that originates from religious traditions and sacred beliefs[60]. With this aspect, an oath may be considered as an effective inspection mechanism that intends that individuals tell the truth under the pressure of the sacred

53 Tanrıver (n 4) p. 712.

54 Y. 3. HD., 04.04.2012, 5520/9054 (www.kazanci.com).

55 Y. 15. HD., 14.04.2016, 3605/2312 (www.kazanci.com).

56 For the view that interrogation is not only about "acquiring concession", see. Bilge Umar, *Hukuk Muhakemeleri Kanunu Şerhi*, (2. Éd., Yetkin 2014), p. 500-501; Pekcanıtez, Atalay and Özekes (n 4) p. 289; Özekes (n 4) p. 1372-1373.

57 Kuru (n 4) p. 228.

58 Y. 15. HD., 04.04.2007, 1025/2099 (www.kazanci.com).

59 Y. 6. HD., 21.05.2012, 4304/7562 (www.kazanci.com).

60 Heinrich Nagel, *Die Grundzüge des Beweisrechts im europaeischen Zivilprozess*, (Baden 1967), p. 144-145.

values of social life in the past. However, as these effects have relatively decreased the value attributed to the admissibility of the oath is questioned in modern legal systems, and interrogation is employed instead of oath[61]. We also believe that, in terms of normative law, accepting an interrogation instead of an oath as evidence in modern trials would be appropriate in terms of "*reaching the truth*", which is the objective of civil procedure.

As we also stated above, considering its form of arrangement in New CCP, it would not be possible to consider interrogation as evidence by itself. However, interrogation is an institution that has great significance in modern procedural law in terms of reaching the truth in the context of a judge's utilization of the parties by questioning them as a source of information. In this context, considering the decisions made by the Court of Cassation in recent times, it is seen that the Court of Cassation considered a lack of employment of interrogation in terms of the facts constituting the subject matter of proof as a shortcoming that would require overturning the decision[62]. In our opinion, while these decisions are appropriate and highly encouraging in terms of broadening the application area of interrogation in civil procedure, in fact, accepting interrogation as evidence by itself rather than "*collateral evidence*" would be more appropriate in terms of normative law.

Conclusion

Considering the provisions of New CCP art. 169, etc., as generally accepted in the doctrine and stated in various decisions of the Court of Cassation, it is not possible to accept interrogation as evidence by itself in Turkish Law. In addition to this, other than obtaining concession, interrogation is also an institution towards the judge to obtain information and form an opinion. For this reason, today, while there are some differences, German, Austrian and Swiss Law removed the oath as evidence and replaced it with interrogation. Nevertheless, in French Law where the rule of proof by deed is accepted, it was established that the statements and behaviors of the parties during interrogation could be considered as "commencement of written proof." Considering this trend in the Law of Civil Procedure, in our opinion, an opportunity has been missed regarding the evidential value of interrogation in the Code of Civil Procedure. In terms of normative law, beyond being an "instrument of collateral evidence", interrogation should be included as evidence in the place of "oath".

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61 As mentioned above, the situation is so in Austrian and Swiss Law. See Seda Özmumcu, *'Medeni Yargılama Hukukundaki Yemin Delili ile Vergi Yargılaması Hukukundaki Yemin Delili Hakkında Genel Bir Değerlendirme'*, (2019) 1 ABÜHFD, p. 77.

62 Y. 15. HD., 02.11.2015, 943/5482 (www.kazanci.com); Y. 15. HD., 22.01.2014, 6172/461 (www.kazanci.com); Y. 22. HD., 24.09.2013, 25574/19749 (www.kazanci.com).

Abbreviations

ABD : Ankara Barosu Dergisi
AD : Adalet Dergisi
art. : Article
AÜHFD : Ankara Üniversitesi Hukuk Fakültesi Dergisi
BGB : Bürgerliches Gesetzbuch
c. : Cilt
CC : Civil Code
CPC : Civil Procedure Code
CPR : Civil Procedure Rules
DEÜHFD : Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi
ed. : Edition
f. : Fıkra
Fr. : French
HD : Hukuk Dairesi
HFD : Hukuk Fakültesi Dergisi
HGK : Hukuk Genel Kurulu
HMK : Hukuk Muhakemeleri Kanunu
HUMK : Hukuk Usulü Muhakemeleri Kanunu
İBD : İstanbul Barosu Dergisi
İBK : İçtihadı Birleştirme Kararı
İÜHFM : İstanbul Üniversitesi Hukuk Fakültesi Mecmuası
m. : Madde
no : Numero
p. : Page
RG : Resmi Gazete
S. : Sayı
Somm. : Sommaire
t. : Tome
TBBD : Türkiye Barolar Birliği Dergisi
v. : volume
Y. : Yargıtay
YD. : Yargıtay Dergisi
YKD : Yargıtay Kararları Dergisi
ZPO : Zivilprozessordnung
ZZP : Zeitschrift für Zivilprozessrecht

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Qui est le secrétaire du tribunal arbitral ?

Who is the Secretary to the Arbitral Tribunal ?

Hakem Heyeti Sekreteri Kimdir ?

Berk Hasan Ozdem[1]

Résumé
Le secrétaire du tribunal arbitral est une personne qui collabore et contribue à la mission du tribunal en effectuant les tâches qui lui sont confiées par les arbitres. Bien que les secrétaires soient engagés pour les avantages qu'ils procurent, le recours à des secrétaires d'arbitrage peut également comporter des risques pouvant entraîner des contestations ou nuire au bon déroulement des procédures. Après avoir discuté des avantages et des inconvénients de cette mission, le présent document examinera les points de vue contradictoires sur les activités autorisées des secrétaires, en mettant l'accent sur les divergences entre les règles des différentes institutions arbitrales ainsi que sur les décisions de justice pertinentes. Enfin, il proposera des solutions pour minimiser les risques que les parties peuvent rencontrer.

Mots-clés
Arbitrage, Sécretaire, Intuitu Personae, Mandat, Prise de décision

Abstract
The secretary to the arbitral tribunal/arbitral secretary is a person who works with the tribunal for the purpose of contributing to the process by carrying out the tasks entrusted to him/her by the arbitrators. While the secretaries are appointed for the advantages they provide, practice of using arbitral secretaries may also entail risks that may provoke challenges or affect the smooth running of the proceedings. After discussing the benefits and not-so-bright sides of such a practice, this paper examines the contradictory views on the permissible scope of secretaries' activities by focusing on the discrepancies amongst the regulations of different arbitral institutions as well as on the relevant court decisions. Finally, it offers solutions for minimizing the risks that the parties may encounter.

Keywords
Arbitration, Secretary, Intuitu personae, Mandate, Decision making

Öz
Hakem heyeti sekreteri/hakem sekreteri, hakemler tarafından onlara verilen görevleri yerine getirerek tahkim yargılaması sürecine katkıda bulunmak amacıyla çalışan kişilerdir. Sekreterler tahkim yargılamasına sağlayacakları katkı için tayin edilmelerine rağmen, uygulamada sekreter kullanımı red taleplerine yol açabilecek veya sürecin düzgün işleyişini etkileyecek riskleri de beraberinde getirebilmektedir. Bu makalede, sekreter kullanımının yararları ve avantajlı olmayabilecek yönleri tartışıldıktan sonra çeşitli tahkim kurumlarının düzenlemelerindeki farklılıklara ve ilgili mahkeme kararlarına odaklanılarak sekreterlerin faaliyetlerinin kapsamına ilişkin çelişen görüşler incelenmektedir. Son olarak, karşılaşabileceği riskleri en aza indirmeleri için taraflara çözümler sunulmaktadır.

Anahtar Kelimeler
Tahkim, Sekreter, Intuitu personae, Yetki, Karar verme

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Extended Summary

Where the identity of an arbitrator is a subjectively essential element of the arbitration agreement, in other words, where the parties choose their arbitrator in view of the specific person, the mission of the arbitrator becomes one that should not be delegated to someone else. However, the "intuitu personae" character of the mission entrusted to the arbitrator does not mean that arbitrators cannot take any assistance. Particularly in large and complex international commercial arbitrations, massive resources (such as voluminous documentary evidence or memoranda) as well as the organization and the arrangement of the proceedings may involve the sole or the presiding arbitrator in an overwhelming amount of work. In view of such a workload, in some cases it may be desirable for the arbitrators to entrust some activities to another person for assistance.

The secretary to the arbitral tribunal/arbitral secretary is a person who works with the tribunal for the purpose of contributing to the process by carrying out the tasks entrusted to him/her by the arbitrators. Particularly in large commercial arbitrations, it is a common practice for the arbitrators to appoint a secretary, generally a young lawyer, to act as a link between the parties and the tribunal as well as to secure administrative arrangements. The practice of using arbitral secretaries is generally not statutorily regulated. While some arbitration laws explicitly provide for such a possibility most jurisdictions remain silent in this regard but do not prohibit the appointment of a secretary. Furthermore, uncertainties remain as to the question whether an arbitral tribunal may appoint an arbitral secretary in a manner contrary to the consent of the parties.

When entrusted with tasks such as drafting administrative and organizational procedural orders, reviewing submissions and managing documentary evidence, the appointment of an arbitral secretary may provide great advantages to the arbitral tribunal and the parties since it can provide efficiency by leaving the arbitral tribunal with more time to concentrate on the substantive matters. Furthermore, the use of a secretary may lower the overall fees, particularly in cases where the arbitrators are remunerated on an hourly basis. Undoubtedly, it also provides an excellent opportunity for young practitionners to observe the conduct of the arbitral proceedings from the perspective of the secretary.

However, there is no rose without thorns. Despite its potential benefits, the issue of arbitral secretaries have been highly controversial across the international arbitration community. Authors mention that the use of arbitral secretaries entails risks such as ex parte communications or breaches of confidentiality which may lead to situations that could affect the swiftness of the procedure, or other perceived virtues of arbitration should they are not handled properly. Such concerns particularly make sense in cases

where secretaries are appointed without any formal appointment process, or, in some circumstances, without any disclosure to the parties.

In addition to these risks, many scholars have been voicing concerns in recent years that through some duties they undertake, secretaries may be inappropriately doing work that a tribunal should be doing itself; and thus, violate the intuitu personae mission of arbitrators by going beyond their position as assistants and becoming decision-makers. Contradictory views exist on the appropriate scope of secretaries' activities. While there are authors who are of the opinion that the tribunal's responsibilities include carrying out all substantive tasks, no matter adjudicative or non-adjudicative, as part of its own personal mandate, for others, even if the delegation is related to a substantive task it should be permissible as long as it does not influence the tribunal's decision-making process. In addition to the differences between the regulations of arbitral institutions, there is a paucity of case law regarding the appropriate role of the tribunal secretaries and even when the issue was considered, courts have been quite reluctant to explain the permissible functions that would not affect the decision-making process.

This author believes that in view of all the benefits that a secretary may provide and of all the arbitrators out there eager to fulfill their duties in the most responsible way, using arbitral secretaries should not be a practice to stay away from. However, in order to overcome, or at least to minimize, the risks entailed to such a practice, the informed consent of the parties to the appointment, the transparency about the functions of the secretary and the diligence of the arbitral tribunal from the beginning to the end of the proceedings become crucial.

Qui est le secrétaire du tribunal arbitral ?

I. Introduction

En tant que « condition fondamentale de la confiance qui nourrit et vivifie l'institution tout entière »[1], le principe de base de l'arbitrage est la possibilité pour les parties de choisir les arbitres impliqués dans le règlement de leur différends.[2] Les parties peuvent énoncer des qualifications et prérequis spécifiques que leurs arbitres devraient avoir (telles que l'expérience ou l'expertise dans un domaine particulier, ou la capacité de parler une langue particulière)[3] et sont libres de nommer l'arbitre de leur choix.[4] Lorsque l'identité d'un arbitre est un élément subjectif essentiel de la convention d'arbitrage[5], en d'autres termes quand les parties choisissent un arbitre du fait de sa personne[6], la mission de cet arbitre est dite sujette à l'« *intuitu personae* ».[7] Pour cette raison, « l'arbitre doit accomplir lui-même sa mission, sans pouvoir la déléguer à un tiers ».[8]

Cependant, même si la mission juridictionnelle confiée à l'arbitre est éminemment personnelle, cela ne signifie pas que les arbitres ne peuvent pas être assistés.[9] Dans le

1 « La liberté du choix des arbitres - que certains centres d'arbitrage cherchent à tort à limiter— est une condition fondamentale de la confiance qui nourrit et vivifie l'institution tout entière » Pierre Lalive, 'Le choix de l'arbitre' dans Mélanges Jacques Robert, *Libertés*, (Montchrestien 1998) 353, 363.

2 Michal Malacka, 'Party Autonomy in the Procedure of Appointing Arbitrators' (2017) 17(2) International and Comparative Law Review 93, 95–96.

3 Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2018) 43.

4 Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, 'Secretaries to International Arbitral Tribunals' (2006) 17 American Review of International Arbitration 575, 586.

5 Gabrielle Kaufmann-Kohler et Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (3e, Oxford University Press 2015) 158–159; Jean-François Poudret et Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 245ff.

6 Michael Polkinghorne et Charles Rosenberg, 'The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard' (2014) 8 Dispute Resolution International 107, 107–108; İnci Biçkin, 'Hakem Sözleşmesi ve Hakem Yargılaması' (2006) 67 Türkiye Barolar Birliği Dergisi 380, 382.

7 Pierre Lalive, 'Mission et Démission des Arbitres Internationaux' dans Marcelo Kohen, Robert Kolb et Djacoba Liva Tehindrazanarivelo (eds) *Perspectives of International Law in the 21st Century / Perspectives du Droit International au 21e Siecle: Liber Amicorum Professor Christian Dominica in Honour of His 80th Birthday* (Bilingual[e], Brill-Nijhoff 2011) 269, 277; Guy Keutgen et Georges-Albert Dal (avec la collaboration de Marc Dal et Gautier Matray), *L'arbitrage en droit belge et international* (3e, Bruylant 2015) para 264; « Il est axiomatique de dire que la mission d'un arbitre est "intuitu personae" ». Constantine Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' (2002) 18 *Arbitration International* 147, 147, en citant Frédéric Eisemann, 'Déontologie de L'Arbitre Commercial International' (1969) 4 Revue de l'Arbitrage 217, 229; Voir aussi, Elie Kleiman 'Arbitre, Intuitu Personae' dans Laurent Lévy et Yves Derains (eds) *Liber Amicorum en l'honneur de Serge Lazareff* (Pedone 2011) 361; Concernant la relation contractuelle entre les parties de l'arbitrage et les arbitres en droit turc, voir, Sera Reyhani Yüksel, 'Tahkim Tarafları ve Hakem Arasında Yapılan Hakemlik Sözleşmesinin Maddi Hukuk Açısından Değerlendirilmesi' (2016) 22 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi: Özel Sayı Prof. Dr. Cevdet Yavuz'a Armağan 2436.

8 « La mission juridictionnelle confiée à l'arbitre est éminemment personnelle, et le contrat d'arbitre est conclu *intuitu personae*. Cela implique que l'arbitre doit accomplir lui-même sa mission, sans la déléguer à un tiers, fût-il un confrère travaillant dans le même cabinet que lui s'il est avocat ». Tribunal fédéral, 4A_709/2014, Arrêt du 21 mai 2015, Ire Cour de droit civil 3.2.2.; Thomas Clay, *L'arbitre* (Dalloz 2001) n. 422, 632, 785 et 895; Gary Born, *International Commercial Arbitration* (2e, Kluwer Law International 2014) 2043; Lalive (n 7) 274; Francisco Blavi et Gonzalo Vial, 'The Tribunal Secretary in International Arbitrations' (2017) 30 New York International Law Review 1, 4; James U. Menz et Anya George, 'How Much Assistance Is Permissible? A Note on the Swiss Supreme Court's Decision on Arbitral Secretaries and Consultants' (2016) 33 Journal of International Arbitration 311, 313; Voir aussi, Reyhani Yüksel (n 7) 2441.

9 Kaufmann-Kohler et Rigozzi (n 5) 235.

cas particulier d'arbitrages internationaux de grande envergure, il n'est pas rare que les parties, lorsqu'elles luttent pour leur droit, déploient des ressources considérables (telles que de nombreuses preuves documentaires[10] ou des mémoires volumineux[11]) ce qui peut être une tâche accablante pour des tribunaux seulement composés d'une ou trois personnes ayant moins de vingt-quatre heures par jour à consacrer à un cas.[12] Par ailleurs l'organisation d'une telle procédure peut signifier pour le président ou l'arbitre unique un travail administratif.[13] Par exemple, le tribunal arbitral peut être amené à prendre des dispositions spécifiques pour organiser des réunions entre les parties et demander la présence d'interprètes lors des audiences, afin de garantir le bon déroulement de l'arbitrage.[14] Lorsque l'affaire n'est pas administrée par une institution arbitrale ou que son implication ne comprend pas la fourniture d'un soutien administratif,[15] ces missions retombent généralement dans les mains du tribunal lui-même, plutôt que dans celle des parties.[16] Par conséquent, et dans certains cas, il peut être souhaitable de confier certaines activités à une autre personne pour les aider.[17]

II. Le Secretaire Du Tribunal Arbitral

Le secrétaire du tribunal arbitral[18] est une personne qui collabore et contribue au processus du tribunal en effectuant les missions qui lui sont confiées par les

10 Constantine Partasides et autres, 'Arbitral Secretaries' dans Conseil International pour l'Arbitrage Commercial, *Young ICCA Guide on Arbitral Secretaries* (The ICCA Reports No.1) (International Council for Commercial Arbitration 2014) 23, 27; Alexandre-Yacine Souleye, 'Fourth chair: the controversial role of arbitral tribunal secretaries' (Young ICCA Blog 16 Février 2017) <http://www.youngicca-blog.com/fourth-chair-the-controversial-role-of-arbitral-tribunal-secretaries/> consulté le 10 septembre 2019.

11 Emmanuel Gaillard et John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 683.

12 Zachary Douglas, 'The Secretary to the Arbitral Tribunal' dans Bernhard Berger et Michael E. Schneider (eds) *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions (ASA Special Series No. 42)* (Juris 2014) 87, 88.

13 Alan Redfern et autres, *Law and Practice of International Arbitration* (4e, Sweet & Maxwell 1999), 224.

14 ibid.

15 Voir, Commission des Nations Unies Pour le Droit Commercial International 'Draft Notes on Organizing Arbitral Proceedings: report of the Secretary-General (A/CN.9/423)' dans *Yearbook of the United Nations Commission on International Trade Law Vol. XXVII (A/CN.9/SER.AI)* (United Nations 1996) 45, 50.

16 « Il peut aussi être considéré comme acceptable de laisser certaines missions aux parties, ou à l'une seulement des parties » ibid 50.

17 « Cette interdiction de déléguer la tâche d'arbitrer à autrui n'exclut pas nécessairement le recours à l'assistance de tiers » Tribunal fédéral (n 8) 3.2.2.; Bernhard Berger et Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (3e, Beck/Hart 2015) n. 1007; « […] celle-ci implique souvent une documentation considérable, que bien des arbitres n'ont guère les moyens de maîtriser seuls, sans assistance » Lalive (n 7) 270, Pour Professeur Lalive, c'est pourquoi il y a « certaines "*horror stories*" qui circulent, oralement biensûr, entre les initiés, et qui décrivent tel praticien comme ayant démontré en audience qu'il n'avait pas eu le temps d'assimiler ou d'étudier les faits du dossier ! ».

18 En ce qui concerne la terminologie du présent article, l'auteur voudrait mentionner que les termes « secrétaire », « secrétaire du tribunal arbitral », « secrétaire d'arbitrage » et « assistant » sont utilisés indifféremment. Voir aussi, Sofia Andersson, 'A Fourth Arbitrator or an Administrative Secretary? A Study on the Appointment and Authority of Arbitral Secretaries in Swedish Arbitral Proceedings' (Mémoire de maîtrise en droit de l'arbitrage, Université d'Uppsala, 2015) 8–10; Hong-Lin Yu et Masood Ahmed, 'Keeping the Invisible Hand under Control? -Arbitrator's Mandate and Assisting Third Parties' (2016) 19(2) Vindobona Journal of International Commercial Law and Arbitration 213, 221; Pour les allégations de la Russie dans le processus d'annulation des sentences de *Yukos* concernant la différence entre un « secrétaire d'arbitrage » et un « assistant d'arbitrage » voir, Writ of Summons (28 janvier 2015), 181ff <https://www.italaw.com/sites/default/files/case-documents/italaw4158_0.pdf> consulté le 10 septembre 2019 ; Concernant le fond de *Yukos*, voir, Bağdagül Kaya Caner, 'Enerji Şartı Anlaşmasının Muvakkaten Uygulanması ve Anlaşmadan Çekilme Hakkında Bir Değerlendirme' (2014)3 Ankara Barosu Dergisi 315, 328–329; voir aussi générallement, Nihal Üral, 'Avrupa Enerji Şartı Antlaşmasının Onaylanmamış Olmasının Hakem Mahkemesinin Yetkisi Üzerindeki Etkileri: Yukos Davası' 2009 8(1) İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi 71.

arbitres. Ils sont couramment assignés par les institutions arbitrales à quelques litiges administrés par elles.[19] Lorsque l'institution d'arbitrage ne nomme pas de secrétaire, ou dans le cadre d'une procédure d'arbitrage *ad hoc*, certains arbitres engagent fréquemment les mêmes personnes.[20] Bien qu'une étude menée par White & Case et par l'Université Queen Mary de Londres révèle que des secrétaires n'étaient nommés que dans 35% des affaires,[21] un autre sondage réalisée en 2012 dans le cadre du congrès du Conseil International pour l'Arbitrage Commercial (ICCA) à Singapour indique que 95% des participants approuvent l'utilisation du secrétaire.[22] Dans le cas particulier des arbitrages commerciaux internationaux importants et complexes, les arbitres ont pour habitude de nommer un secrétaire chargé de faire le lien entre les parties et le tribunal et de mettre en œuvre des procédures administratives que le tribunal arbitral aurait autrement été amené à prendre lui-même.[23]

Les secrétaires peuvent ou non faire partie de l'institution arbitrale qui va juger d'un litige.[24] Dans l'enquête menée par l'ICCA, seulement 14,3% des personnes interrogées ont déclaré qu'une liste fournie par une institution d'arbitrage était le lieu idéal pour trouver un secrétaire potentiel, tandis que 69,4% ont indiqué qu'elles nommeraient un employé du cabinet d'avocats du président du tribunal ou de l'arbitre unique.[25] En ce qui concerne le niveau et le type d'expérience qu'un secrétaire devrait avoir, la pratique montre que, en fonction de leurs besoins, les choix des parties diffèrent selon les profils : étudiants en droit,[26] jeunes professionnels[27] ou même

19 Commission des Nations Unies Pour le Droit Commercial International (n 15) 50.

20 ibid.

21 Selon l'enquête internationale sur l'arbitrage menée en 2012 par White & Case et l'Université Queen Mary de Londres, auprès de 710 personnes interrogées, les secrétaires sont plus souvent nommés dans les arbitrages concernant de *civil law* (46%) par rapport aux arbitrages du *common law* (24%). D'un point de vue régional, le recours aux secrétaires des tribunaux est plus fréquent dans les arbitrages d'Amérique latine (62%), tandis qu'il est moins fréquent dans les arbitrages d'Amérique du Nord (23%) et d'Asie (26%). White & Case et Queen Mary University of London School of International Arbitration, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, 11 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf> consulté le 10 septembre 2019.

22 Conseil International pour l'Arbitrage Commercial, *Young ICCA Guide on Arbitral Secretaries* (The ICCA Reports No.1) (International Council for Commercial Arbitration 2014) 55.

23 Redfern et autres (n 13) 224; Berger et Kellerhals (n 17) 356; Une autre enquête qui concerne spécialement la pratique en Afrique afin de comprendre l'expérience des sondés dans l'arbitrage entre les années 2012 et 2017, indique que parmi les 191 réponses reçues « [e]n matière d'arbitrage interne, environ 2% des répondants sont intervenus comme secrétaire de tribunal arbitral dans 11 à 15 arbitrages, tandis qu'en matière d'arbitrage international, on compte entre six et dix références seulement pour environ 2% des répondants. Aucun répondant n'est intervenu en qualité de secrétaire du tribunal dans au moins 15 différends en matière d'arbitrage international au cours de la période de référence. » SOAS University of London et Broderick Bozimo Company, *Enquête SOAS sur l'Arbitrage en Afrique Arbitrage Interne et International: Perspectives par les praticiens africains de l'arbitrage 2018*, 19 <https://eprints.soas.ac.uk/26110/1/Enquête%20SOAS%20sur%20l%27arbitrage%20en%20Afrique-Fr.pdf> consulté le 10 septembre 2019.

24 Bridie Mcasey, 'International Arbitral Institutions' dans Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press 2019) 51, 67.

25 Conseil International pour l'Arbitrage Commercial (n 22) 57.

26 ibid.

27 Voir, Keutgen et Dal (n 7) para 264; Partasides (n 7) 147.

arbitres réputés.[28] Cependant, l'enquête de l'ICCA révèle que les avocats débutants étaient entre autres les plus privilégiés pour faire fonction de secrétaires.[29]

A. Les réglementations nationales concernant les secrétaires d'arbitrage

Le sujet des secrétaires d'arbitrage n'est généralement pas réglementé par la loi.[30] La plupart des juridictions restent silencieuses à cet égard mais n'interdisent pas la nomination d'un secrétaire.[31] Alors que le Concordat Suisse de 1969[32] et la loi espagnole sur l'arbitrage de 1988[33] qui reconnaissent expressément la possibilité pour les tribunaux arbitraux de nommer des secrétaires sont abrogés par des lois qui ne contiennent aucune disposition à cet égard, la loi brésilienne prévoit toujours une telle possibilité.[34] La Cour d'appel de Paris a admis qu'un tribunal arbitral pouvait nommer un secrétaire et que celui-ci pouvait assister aux audiences sans porter atteinte à l'égalité des parties.[35] De même le Tribunal Fédérale suisse a jugé qu'est « *généralement admis que la possibilité, offerte par l'art. 365 al. 1 CPC (RS 272) au tribunal arbitral, de désigner un secrétaire dans un arbitrage national vaut aussi en matière d'arbitrage international, quand bien même le chapitre 12 de la LDIP ne la mentionne pas*. » [36] Les lois de certains pays comme le Chili[37] ou l'Argentine[38] rendent la désignation d'un secrétaire obligatoire.

B. Les réglementations nationales concernant les secrétaires d'arbitrage

Il convient de mentionner que des incertitudes subsistent quant à la question de savoir si un tribunal arbitral peut nommer un secrétaire arbitral d'une manière contraire

28 Voir, Eric A. Schwartz, 'The Rights and Duties of ICC Arbitrators' dans Jean-François Bourque (ed) *Special Status of the Arbitrator, ICC International Court of Arbitration Bulletin: 1995 Special Supplement* (ICC Publishing 1995) 67, 86; « Il n'est pas surprenant que des praticiens talentueux aient servi ou continuent à servir de secrétaires à d'éminents tribunaux arbitraux. Pour en nommer quelques uns : M. Martin Valasek dans *HYV v Russian Federation* (Yves Fortier, Stephen Schwebel, Charles Poncet); M. Samuel Wordsworth QC dans *Methanex v USA* (William Rowley, Warren Christopher, V.V. Veeder); Dr. Romesh Weeramantry dans *McKenzie v Vietnam* (Neil Kaplan, Campbell McLachlan, John Gotanda), et bien d'autres. » Olga Boltenko, 'Stop Ignoring the Elephant in the Room!' (Kluwer Arbitration Blog 9 juin 2014) <arbitrationblog.kluwerarbitration.com/2014/06/09/stop-ignoring-the-elephant-in-the-room-2/> consulté le 10 septembre 2019.

29 Selon le sondage, les interrogés recherchent des secrétaires ou assistants de bureau (%1), des assistants juridiques (%6.1), des étudiants en droit (%9.2), des avocats stagiaires (%26.5), des jeunes avocats (%89.8), des avocats expérimentés (%26.5) et des jeunes arbitres (%25.5) comme secrétaires de tribunal arbitral. Conseil International pour l'Arbitrage Commercial (n 22) 57.

30 Mauro Rubino-Sammartano, International Arbitration Law and Practice, (3e, Juris 2014) 537.

31 Voir, Sebastián Partida, L'arbitre international : étude de droit comparé (Master 2 Recherche de Droit européen comparé, Université Paris II Panthéon – Assas, Séjour de recherche à la Harvard Law School 2011) 48 <https://docassas.u-paris2.fr/nuxeo/site/esupversions/6078e606-e9d8-4733-b52a-1bdd14eb402f> consulté le 10 septembre 2019.

32 Concordat sur l'arbitrage du 27 mars 1969, art.15.

33 Loi n° 36/1988 du 5 décembre 1988, art. 20.

34 Loi n° 9.307/69 du 23 septembre 1996, art. 13(5); Voir aussi, Code de procédure civile néerlandais art. 1035(a), 1061, 1073.

35 *Compagnie Honeywell Bull S.A. v. Computacion Bull de Venezuela c.A.* CA Paris, 21 juin 1990, 1991 Revue de l'arbitrage 96.

36 Tribunal fédéral, 4A_709/2014, Arrêt du 21 mai 2015, Ire Cour de droit civil 3.2.2.

37 Code de procédure civile chilien, art. 639.1

38 Code national de procédure civile argentin, art. 749

à l'accord des parties. Dans une décision prise en 2015[39] sur la base d'une convention d'arbitrage *ad hoc* dont les règles de procédure n'étaient pas déterminées par les parties, le Tribunal fédéral suisse a expliqué que la *lex arbitri* suisse ne stipulait pas que le consentement des parties était nécessaire pour la nomination d'un secrétaire arbitral. Il a toutefois noté que les parties pouvaient conjointement exclure une telle possibilité, que ce soit dans la convention d'arbitrage ou à un stade ultérieur :

> « […] *le projet du Conseil fédéral soumettait la désignation d'un secrétaire à l'accord des parties (FF 2006 7103), mais cette condition a été abandonnée à l'instigation du Conseil des Etats pour favoriser l'autonomie organisationnelle du tribunal arbitral et éviter des retards (BO 2007 CE 641). Doit cependant être réservée la volonté commune des parties, exprimée dans la convention d'arbitrage ou dans un accord ultérieur, d'exclure la désignation d'un secrétaire.* »[40]

Bien que l'on puisse penser à première vue que le Tribunal fédéral a jugé que la possibilité pour les tribunaux arbitraux de nommer des secrétaires soit subordonnée à l'accord des parties, les auteurs précisent que, lorsqu'il a fait cette déclaration, le Tribunal fédéral suisse s'est référé au manuel de Tarkan Göksu[41], qui note par la suite que même si les parties déclarent conjointement qu'elles n'acceptent pas la nomination, le tribunal arbitral peut toujours retenir les services d'un secrétaire d'arbitrage, à condition que la rémunération du secrétaire ne soit pas supportée par les parties.[42] En l'espèce, le Tribunal fédéral fédéral n'a pas été confronté à un tel scénario puisqu'il n'y avait pas d'opposition commune des parties à la nomination du secrétaire.[43] Par conséquent, il est mentionné que la déclaration du Tribunal fédéral suisse n'est « pas assez spécifique » pour être interprétée comme ayant statuée sur la question de savoir si le tribunal arbitral peut retenir d'office l'usage d'un secrétaire d'arbitrage contre la volonté des parties et la question reste controversée dans la doctrine juridiques suisse.[44] Cependant, mis à part les discussions relatives à la *lex arbitri* suisse, de nombreux auteurs affirment que les parties devraient être libres de choisir si leurs arbitres peuvent ou non faire appel à un secrétaire[45] et que

39 Tribunal fédéral, 4A_709/2014, Arrêt du 21 mai 2015, Ire Cour de droit civil 3.2.2.

40 ibid.

41 Tarkan Göksu, *Schiedsgerichtsbarkeit* (Dike 2014) para 880.

42 Michael Feit et Chloé Terrapon Chassot, 'The Swiss Federal Supreme Court Provides Guidance on the Proper Use of Arbitral Secretaries and Arbitrator Consultants under the Swiss lex arbitri: Case Note on DFC 4A_709/2014 dated 21 May 2015' (2015) 33 ASA Bulletin 897, 907; Concernant la question de la rémunération les arbitrages internationaux voir Kemal Dayındarlı, 'İhtiyarî Tahkimde Hakem Ücretleri' dans Yaşar Karayalçın (ed), *Prof. Dr. Ali Bozer'e Armağan*, (Bankacılık Enstitüsü Yayınları 1998) 539.

43 ibid.

44 ibid; Jean Marguerat et Tomás Navarro Blakemore, 'Note: A. SA v. B. Sàrl, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, Case No. 4A_709/2014, 21 May 2015' 2016 13 Revista Brasileira de Arbitragem 199, 203–204.

45 Voir par exemple, International Commercial Disputes Committee and Committee on Arbitration of the New York City Bar Association (n 4) 591; Douglas (n 12) 88; Simon Maynard, 'Laying the fourth arbitrator to rest: re-evaluating the regulation of arbitral secretaries' (2018) 34 Arbitration International 173, 183; Benjamin Hughes, 'The Problem of Undisclosed Assistance to Arbitral Tribunals' dans Patricia Shaughnessy et Sherling Tung, *The Powers and Duties of an Arbitator: Liber Amicorum Pierre A. Karrer* (Kluwer Law International 2017) 161, paras 17.01–17.03; Blavi et Vial (n 8) 12; Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 445.

« *l'autonomie des parties est en contradiction avec toute tentative de réglementer l'utilisation du secrétaire sans le consentement des parties ou en contravention avec leur autorité*. »[46]

C. La rose et ses épines

1. Les bons aspects de la nomination d'un secrétaire

Comme toute méthode alternative de règlement des litiges, l'arbitrage international s'efforce de maximiser l'efficacité de la justice qu'il offre ; en d'autres termes, il s'efforce d'accroître la vitesse et de réduire les coûts de la procédure.[47]

Ce n'est pas un secret de la communauté des arbitres que de dire qu'ils sont généralement des personnes aux agendas bien remplis. [48] Parallèlement à leurs mandats *ad hoc* - parfois plusieurs arbitrages en parallèle[49] -, les arbitres accomplissent généralement diverses tâches supplémentaires : un nombre important d'entre eux exerce dans des cabinets d'avocats ; certains d'entre eux enseignent et se sont engagés à partager leurs connaissances ; et beaucoup d'autres sont des professionnels travaillant à temps plein dans des secteurs éclectiques.[50] Dans des affaires complexes en particulier, la nomination de secrétaires peut offrir de grands avantages à l'arbitrage international, dans la mesure où il permet de gagner en efficacité en laissant au tribunal arbitral plus de temps pour se concentrer sur les questions de fond.[51] En utilisant judicieusement un secrétaire, le tribunal arbitral et les parties peuvent bénéficier d'une assistance pour garantir que les communications et les documents, ainsi que le déroulement procédural de l'affaire elle-même, sont gérés correctement et efficacement, permettant ainsi au tribunal de se concentrer sur l'essentiel de l'affaire et ne pas se concentrer sur l'arbre qui cache la forêt.[52]

46 Courtney J. Restemayer, 'Secretaries Always Get a Bad Rep: Identifying the Controversy Surrounding Administrative Secretaries, Current Guidelines, and Recommendations' (2012) 4 Yearbook on Arbitration Mediation 328, 337–338; Voir, Tracey Timlin, 'The Swiss Supreme Court on the Use of Secretaries and Consultants in the Arbitral Process' (2016) 8 Yearbook on Arbitration Mediation 268, 294.

47 Partasides (n 7) 156; Restemayer (n 46) 329; Yavuz H Alangoya, Medeni Usul Hukukumuzda Tahkimin Niteliği ve Denetlenmesi (İstanbul Üniversitesi 1973) 15; Fikret Yıldırım, 'Tahkimde İptal Davası ve İptal Davasının Amaçları Bakımından Bazı Değerlendirmeler' (2016) 22 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi: Özel Sayı Prof. Dr. Cevdet Yavuz'a Armağan 3006, 3018; Voir généralement, Loukas A. Mistelis, 'Efficiency. What Else? Efficiency as the Emerging Defining Value of International Arbitration: between Systems theories and party autonomy' (15 avril 2019) Queen Mary School of Law Legal Studies Research Paper No. 313/2019 <https://ssrn.com/abstract=3372341> consulté le 10 septembre 2019.

48 Souleye (n 10).

49 Menz et George (n 8) 318.

50 Souleye (n 10).

51 Doug Jones, 'Ethical Implications of Using Paralegals and Tribunal Secretaries' (2014) 17 Hors Serie 251, 253; 'On rappelle brièvement les avantages du secretaire, connus de tous ceux qui ont expérimenté le systeme : économie de temps et d'argent' Pierre Lalive, 'Inquiétantes dérives de l'arbitrage CCI (sur un recent "Oukase" du Secrétariat de la Cour d'Arbitrage CCI)' (1995) ASA Bulletin 634, 636.

52 James U. Menz, Miss Moneypenny vs. the Fourth Musketeer: the Role of Arbitral Secretaries (Kluwer Arbitration Blog 9 juillet 2013) <arbitrationblog.kluwerarbitration.com/2013/07/09/miss-moneypenny-vs-the-fourth-musketeer-the-role-of-arbitral-secretaries/> consulté le 10 septembre 2019; Blavi et Vial (n 8) 8; Partasides et autres (n 10) 27.

De plus, il est mentionné que le recours aux secrétaires est une méthode largement utilisée pour réduire les coûts.[53] Lorsque le secrétaire d'arbitrage est chargé de tâches telles que la rédaction d'ordonnances de procédure administratives et organisationnelles, l'examen des affaires soumises et la gestion de preuves documentaires, cela réduit le temps que les arbitres auraient passé dessus. En conséquence, la nomination d'un secrétaire d'arbitrage peut réduire les honoraires globaux du tribunal arbitral, en particulier dans les cas où les arbitres sont rémunérés à l'heure.[54] Comme le montrent clairement les résultats de l'enquête de 2012, le potentiel d'économie de coûts est l'une des principales raisons de recourir à un secrétaire. Parmi les sondés qui ont approuvé la pratique consistant à nommer des secrétaires, 58,8% d'entre eux ont indiqué que les économies de coûts étaient l'une des principales raisons de la nomination d'un secrétaire et 57,7% ont indiqué que leur objectif était notamment de gagner du temps, lequel est directement lié aux coûts pour les cas où les arbitres sont rémunérés à l'heure.[55]

En outre, être secrétaire d'un tribunal arbitral offre « une excellente formation et une excellente éducation pour les jeunes professionnels » [56]. Étant donné que de nombreux cabinets ont maintenant des services dédiés à l'arbitrage, les jeunes collaborateurs ont la possibilité d'observer le déroulement d'un arbitrage du point de vue du secrétariat.[57] Le professeur Pierre Lalive, réputé « être un ardent défenseur de l'utilisation des secrétaires au fil des ans » [58], résume les avantages d'une telle expérience :

> « […] *Plus importante encore est l'occasion aussi donné aux arbitres de demain de faire leur apprentissage et à juste très juste titre que M. Shihata, Secrétaire général du CIRDI, a insisté dans son excellente conclusion au 12e Colloque CCI - AAA - CIRDI du 17 novembre, sur l'importance prioritaire de la formation des arbitres. Rien ne peut remplacer pareille formation pratique, pas même la fréquentation assidue des colloques ou un stage au Secrétariat de la Cour CCI.* » [59]

En résumé, le recours à un secrétaire d'arbitrage présente certains avantages pour la procédure, ce qui pourrait, selon Blavi et Vial, être la raison pour laquelle 95% des

53 Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill - Nijhoff 2010) 139.

54 Partasides et autres notent que les honoraires du tribunal arbitral et du secrétaire sont inférieurs aux honoraires de l'avocat des parties dans la plupart des procédures arbitrales, sinon toutes. Ainsi, le versement supplémentaire à un secrétaire d'arbitrage, qui s'accompagnerait généralement de frais généraux moins élevés pour le tribunal arbitral, ne devrait pas alarmer. Partasides et autres (n 10) 32; Kyriaki Karadelis, 'The Role of the Tribunal Secretary' (Global Arbitration Review 21 décembre 2011) <www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/> consulté le 10 septembre 2019.

55 Conseil International pour l'Arbitrage Commercial (n 22) 15–16 et 56.

56 Jones (n 51) 253; Blavi et Vial (n 8) 8.

57 Nigel Blackaby et autres, *Redfern and Hunter on International Arbitration* (6e, Oxford University Press 2015) 252.

58 Voir, Partasides (n 7) 148.

59 Lalive 1995 (n 51) 636; L'enquête menée par l'ICCA a révélé que près de 22% des personnes interrogées qui approuvent l'emploi de secrétaires ont déclaré que l'un des principaux objectifs de la nomination d'un secrétaire est de « fournir à un jeune collaborateur une expérience pratique de l'arbitrage ». Conseil International pour l'Arbitrage Commercial (n 22) 56.

personnes interrogées dans le sondage de l'ICCA ont indiqué avoir approuvé une telle pratique.[60]

2. Les moins bons aspects de la nomination d'un secrétaire

Cependant, il n'y a pas de rose sans épines. En dépit des avantages potentiels mentionnés ci-dessus, le sujet des secrétaires a été très controversé dans la communauté de l'arbitrage international.[61] Les auteurs mentionnent que l'utilisation de secrétaires comporte des risques tels que des divulgations *ex parte*[62] ou des violations de la confidentialité pouvant conduire à des situations affectant la bonne conduite de la procédure ou d'autres vertus de l'arbitrage si elles ne sont pas traitées correctement.[63]

Dans de nombreuses juridictions, les arbitres sont soumis à une obligation de confidentialité qui est généralement considérée comme l'un des principaux avantages de l'arbitrage et qui peut être extrêmement valorisée par les parties.[64] A cet égard il est noté que « *le secrétaire doit respecter le secret qui s'attache à la procédure arbitrale en général et aux pièces et renseignements échangés au cours de celle-ci en particulier* »[65]. La préoccupation relative à la confidentialité est particulièrement pertinente dans les cas où les secrétaires sont nommés sans processus de nomination officiel ou, dans certaines circonstances, sans aucune information aux parties.[66]

60 Blavi et Vial (n 8) 9; En ce qui concerne ces avantages, voir aussi, Ole Jensen, *Tribunal Secretaries in International Arbitration* (Oxford University Press 2019) 51ff; Pierre Lalive, 'Un Post-Scriptum et Quelques Citations' (1996) ASA Bulletin 35, 35–43.

61 Katia Fach Gómez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer 2019) 198.

62 Le groupe de travail de la Young ICCA sur la nomination et l'utilisation de secrétaires d'arbitrage mentionne qu' « il est important de noter que toute communication du secrétaire faite au nom du tribunal arbitral doit clairement indiquer qu'elle est faite en tant que tel et doit obéir aux mêmes règles que celles applicables aux communications entre les parties et le tribunal arbitral, en particulier les règles relatives aux communications *ex parte*.' Conseil International pour l'Arbitrage Commercial Arbitration (n 22) 12.

63 Jones (n 51) 253; Blavi et Vial (n 8) 10 et 13; Restemayer (n 46) 337.

64 Blavi et Vial (n 8) 13; Gaillard et Savage (n 11) 1132; Concernant l'obligation de confidentialité dans l'arbitrage, voir généralement, Eric Loquin 'Les obligations de confidentialité dans l'arbitrage' (2006)2 Revue de l'Arbitrage 323; Philippe Cavalieros, 'La Confidentialité de l'Arbitrage' (2006)2 Les Cahiers de l'Arbitrage 56; Born (n 8) 2249–2287; Cemre Tüysüz, 'Milletlerarası Ticari Tahkimde Gizlilik Yükümlülüğü' (2017) 37(2) Public and Private International Law Bulletin 846; Ergun Özsunay, 'Tahkim Yargılamasında Mahremiyet' (2004)2 İstanbul Barosu Dergisi 89; Zeynep Derya Tarman, 'Tahkim ve Gizlilik' (2008)1 Maltepe Üniversitesi Hukuk Fakültesi Dergisi 305; Candan Yasan, 'Milletlerarası Tahkimde Gizlilik' (2011)1 Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 777.

65 Keutgen et Dal (n 7) para 264; « Le secrétaire doit être lié par les mêmes devoirs de confidentialité et de secret que le tribunal arbitral ». Conseil International pour l'Arbitrage Commercial (n 22) 8; Voir, Richard M. Mosk 'Deliberations of Arbitrators' dans David Caron et autres (eds), *Practising Virtue: Inside International Arbitration* 486, 495; Poudret et Besson (n 5) 513; Voir aussi, Restemayer (n 46) 337.

66 Dans l'enquête de 2012, 72,4% des interrogés étaient en faveur du consentement des parties, tandis qu'une minorité ont qualifié l'exigence de consentement en fonction de circonstances différentes. En réponse à une version différente de la question dans l'enquête de 2013, 74,7% des personnes interrogées ont convenu qu'un tribunal arbitral ne devrait pas être autorisé à utiliser un secrétaire d'arbitrage en l'absence d'une nomination officielle et de la connaissance des parties. Conseil International pour l'Arbitrage Commercial (n 22) 58–60 (questions 8 et 11) 74–75 (questions 9,10, 11 et 12); Selon un sondage mené par Berwin Leighton Paisner, 76% des interrogés ont indiqué que le consentement des parties devrait être une condition préalable à la nomination d'un secrétaire au tribunal, Berwin Leighton Paisner, *Research based report on the use of tribunal secretaries in international commercial arbitration* (2015 Berwin Leighton Paisner) 3 <https://www-staging.bclplaw.com/images/content/1/4/v2/147226/BLP-International-Arbitration-Survey-2015.pdf> consulté le 10 septembre 2019."

Quand un tribunal demande l'assistance d'un secrétaire de cette manière, ce qui est vivement critiqué par certains auteurs[67], il est dit que « *l'obligation de maintenir la confidentialité devient diluée et ambiguë* ».[68] Il en va de même pour les devoirs essentiels d'indépendance et d'impartialité lorsque les règles applicables les prévoient pour le secrétaire[69], car le fait de nommer un secrétaire à l'insu des parties les prive de la possibilité de refuser la nomination ou de contester la sentence en se fondant sur des doutes quant à l'impartialité ou à l'indépendance du secrétaire.[70]

En outre, contrairement à ceux qui affirment que les parties peuvent bénéficier de la rentabilité[71] du secrétaire, il est mentionné que son recours pourrait présenter un désavantage en termes de coûts pour les parties car ces coûts pourraient augmenter en tenant compte des paiements additionnels aux honoraires de l'arbitre[72]. Le problème de la rémunération est encore plus important dans les cas où des secrétaires sont nommés sans que les parties en soient informées. Hughes explique le problème comme suit:

> « *L'un des aspects les plus troublants de l'utilisation non divulguée d'assistants au sein des tribunaux arbitraux est la question de la rémunération. Lorsque le tribunal est rémunéré sur une base ad valorem, conformément aux règles de la CCI ou de la SIAC, aucun problème particulier ne se pose. Peut-être on présume que l'assistant serait payé sur les honoraires versés à l'arbitre ou au tribunal, lesquels ne sont pas sensiblement affectés par le nombre d'heures facturées. Cependant, lorsque le tribunal est payé sur une base horaire, comment doit-on rémunérer les heures d'un assistant non divulgué ? Par exemple, dans le contexte d'un cabinet d'avocats, il semble peu probable que tout le temps consacré à un arbitrage par un avocat collaborateur soit simplement*

67 « C'est donc avec étonnement que, lors d'un intéressant Colloque organisé en 2009 par la *School of International Arbitration* de *Queen Mary College*, Londres, nous avons entendu l'un des "*panelists*", praticien genevois connu, soutenir le caractère normal et justifié de la délégation par l'arbitre, à un collaborateur, de sa fonction de décision. Et ceci sur la base du consentement, *tacite* et présumé des parties en litige ! » Pierre Lalive (n 7) 277;
« L'autonomie des parties est en contradiction avec toute tentative de réglementation de l'utilisation des secrétaires sans le consentement des parties ou de leur autorité principale.» Restemayer (n 46) 337–338; Hughes (n 45) paras 17.01–17.03; Blavi et Vial (n 8) 12; Waincymer (n 45) 445.

68 Blavi et Vial (n 8) 13.

69 Par exemple, l'article 15 du Concordat suisse soumettait les secrétaires d'arbitrage aux mêmes exigences d'indépendance et d'impartialité que les arbitres. Concordat sur l'arbitrage du 27 mars 1969, art.15; Voir, Kaufmann-Kohler et Rigozzi (n 5) 312; Poudret et Besson (n 5) 513. Voir aussi concernant l'indépendance et l'impartialité des arbitres, Ziya Akıncı, *Milletlerarası Tahkim* (4e, Vedat Kitapçılık 2016) 158ff; Didem Kayalı, Milletlerarası Ticarî Tahkimde Hakemlerin Bağımsızlığı ve Tarafsızlığı (Seçkin 2015); Berk Hasan Özdem et Mehmet Yusuf Sert, 'Uluslararası Tahkimde Çıkar Çatışması Hakkında Uluslararası Barolar Birliği Kılavuzu'nun İncelenmesi' (2019) 8(1) Uluslararası Ticaret ve Tahkim Hukuku Dergisi 151.

70 Voir, Hughes (n 45) para 17.02; Mcasey (n 24) 68.

71 Voir, *supra* (n 28).

72 International Commercial Disputes Committee and Committee on Arbitration of the New York City Bar Association (n 4) 584; Menz et George (n 8) 318; Blavi et Vial (n 8) 10; Restemayer (n 46) 330; Afin de prendre des précautions sur cette question, la Cour International d'Arbitrage note que « Toute rémunération due au Secrétaire administratif doit être prélevée sur la somme totale des fonds alloués pour les honoraires des arbitres, de façon à éviter toute majoration du coût total de l'arbitrage. En aucun cas le tribunal arbitral ne doit demander aux parties un défraiement au titre des activités du Secrétaire administratif. Toute entente sur les honoraires du Secrétaire administratif faite directement entre les parties et le tribunal arbitral est prohibée. » Chambre de Commerce Internationale Cour International d'Arbitrage, *Note aux Parties et aux Tribunaux Arbitraux sur la Conduite de l'Arbitrage selon le Reglement d'Arbitrage CCI* (Cour International d'Arbitrage 2019) para 191–192 <https://cms.iccwbo.org/content/uploads/sites/3/2016/11/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-french.pdf> consulté le 10 septembre 2019.

éludé. L'associé désigné comme arbitre pourrait-il simplement s'approprier les heures facturées par son collaborateur ? Ou est-ce que certains calculs seraient appliqués pour réduire le taux de facturation et/ou le nombre d'heures du collaborateur afin d'éviter de surcharger les parties ? Comment peut-on arriver à une telle formule ? Les mines antipersonnel éthiques et le potentiel de méfait sont évidents. »[73]

D. Le noeud de la controverse

En complément de ces risques « le nœud de la controverse »[74] entourant les secrétaires repose sur l'influence que revêt ce poste. Ces dernières années, de nombreux universitaires ont exprimé leur inquiétude quant au fait que les secrétaires remplissent parfois certaines fonctions qu'un arbitre devrait lui-même accomplir, et donc violent la mission *intuitu personae* des arbitres en allant au-delà de leur rôle d'assistants et en devenant des décideurs.[75] Cette inquiétude qui a engendré la création de surnoms pour les secrétaires tels que « *the Fourth Arbitrator* »,[76] « *the Fourth Chair* »,[77] « *the Fourth Musketeer* »,[78] « *the Invisible Hand* »,[79] « *the Unseen Actor* »,[80] « le Collaborateur » [81] et « *the Elephant in the Room* » [82] a été soulignée dans les enquêtes 2012 et 2013 de l'ICCA par les réponses aux questions relatives aux tâches qu'un secrétaire d'arbitrage devrait être autorisé à accomplir. Les sondages indiquent que, même si les tâches administratives ont reçu un support considérable, les réponses ont commencé à changer radicalement à mesure que les tâches envisagées sont devenues plus substantielles.[83] Par exemple, 95,6% des personnes interrogées ont voté en faveur de l'organisation de réunions et d'auditions par des secrétaires, tandis que 74,2% d'entre elles ont indiqué que les secrétaires ne devraient pas être autorisés à donner leur point de vue au tribunal arbitral.[84]

Alors, quelles sont les missions qui inquiètent les commentateurs ? La réponse n'est pas simple. Les arbitres de différents systèmes juridiques, et même au sein d'une même juridiction, ont des points de vue contradictoires sur la portée appropriée

73 Hughes (n 45) para 17.02.

74 Thomas Clay, 'Le secrétaire arbitral' (2005) Revue d'Arbitrage 931, 931; Restemayer (n 46) 338.

75 Polkinghorne et Rosenberg (n 6) 107; Mcasey (n 24) 67; Jones (n 51) 253; Blavi et Vial (n 8) 9; « La désignation d'un secrétaire du tribunal arbitral n'affecte pas la mission de l' arbitre, qui est intuitu personae, ni la responsabilité qui en découle. En d'autres termes, quand bien même les parties ont marqué leur accord à la désignation d' un secrétaire, les arbitres ne peuvent s' abriter derrière cette désignation pour écarter totalement ou partiellement leur éventuelle responsabilité à l'égard des parties ou du centre d'arbitrage qui les a désignés. » Keutgen et Dal (n 7) para 264.

76 Partasides (n 7) 147,

77 Souleye (n 10).

78 Menz 2013 (n 52).

79 Yu et Ahmed (n 18).

80 Mcasey (n 24) 67.

81 Pierre Lalive, 'L'Article 190 al. 2 LDIP a-t-il une utilité ?' (2010) 28 ASA Bulletin, 726, 728; Lalive (n 7) 277.

82 Boltenko (n 28).

83 Conseil International pour l'Arbitrage Commercial (n 22) 2–3.

84 ibid 3.

des activités des secrétaires.[85] Certains auteurs sont d'avis que la responsabilité du tribunal inclut notamment l'exécution de toutes les missions de fond, qu'elles soient ou non de nature juridictionnelle, dans le cadre de son mandat, Pour d'autres, même si la délégation est liée à une tâche de fond, elle devrait être admissible tant qu'elle n'influence pas le processus décisionnel du tribunal.[86]

En effet, il est clair qu'un secrétaire ne devrait pas être impliqué dans le processus de prise de décision[87] ; cependant, la détermination des fonctions qui n'auraient aucune incidence sur le processus décisionnel du tribunal n'est pas une tâche facile, car il n'est pas si simple de déterminer où ce processus commence et se termine.[88] Par exemple, bien qu'il soit incontestable pour Ashford qu'un secrétaire devrait s'acquitter des « tâches de bureau » telles que la tenue d'un registre[89], Restemayer demande :

> « *si le secrétaire réalise les procès-verbaux des débats sans surveillance, ou peut-être sans formation de sténographe judiciaire, comment savoir dans quelle mesure est dissimulée son opinion, son agenda, sa perception des parties ? Bien qu'il ne soit pas impensable de fournir une documentation impartiale, ces rapports ne sont pas soumis à un examen par une autorité pour confirmer leur véracité. Des opinions mêmes non intentionnelles pourraient abonder dans les documents que les arbitres examineront avant de rendre la sentence. Un arbitre présent à la conférence GAR [Global Arbitration Review] a déclaré que les faits et les arguments qui se dégagent pendant la procédure sont indispensables pour identifier le raisonnement qui sous-tend une sentence. Si le compte rendu est vraiment essentiel pour le résultat, ces pratiques courantes, et souvent d'arrière-plan, garantissent un cadre*. »[90]

Les auteurs expriment leur préoccupation devant des fonctions telles que la recherche juridique,[91] la rédaction d'un résumé de cette recherche sur un point de droit,[92] la rédaction de chronologies factuelles et de mémorandums résumant les

85 Rovine (n 53) 142; « Les secrétaires remplissent une large gamme de tâches et de fonctions. Ils peuvent apporter un appui purement organisationnel, notamment effectuer des réservations de salles d'audience et de réunion et fournir ou coordonner des services administratifs. Certains tribunaux arbitraux leur confient des tâches plus fonctionnelles, notamment sous forme de recherches juridiques ou d'autres types d'assistance professionnelle, comme établir des résumés des faits ou de l'historique de la procédure arbitrale, élaborer des recueils ou des résumés de décisions de justice ou de commentaires publiés sur des questions juridiques définies par le tribunal, ou rédiger des projets de décisions de procédure. » Commission des Nations Unies Pour le Droit Commercial International, Aide-mémoire de la CNUDCI sur l'organisation des procédures arbitrales (Mars 2012) 16 <https://www.uncitral.org/pdf/french/texts/arbitration/arb-notes/arb-notes-2016-ebook-f.pdf> consulté le 10 septembre 2019.

86 Yu et Ahmed (n 18) 222–223; Partasides et autres (n 10) 27–28.

87 *Rhéaume v. Société d'Investissements L'Excellence Inc.* [2010] QCCA (Québec Ct. App.) 2269, para 25; *Threlfall v Fanshawe* (1850) 19 LJQB 334; « Le secrétaire ne peut en aucun cas prendre la place des arbitres auxquels il est interdit de déléguer la mission qui leur est confiée. » Keutgen et Dal (n 7) para 264; Âlim Taşkın, *Hakem Sözleşmesi*, (Turhan Kitabevi 2005) 126; Reyhani Yüksel (n 7) 2441.

88 Peter Ashford, *Handbook on International Commercial Arbitration* (Juris 2009) 143; Restemayer (n 46) 339; Blavi et Vial (n 8) 4.

89 Ashford (n 88) 143.

90 Restemayer (n 46) 339, citing Karadelis (n 54).

91 Commission des Nations Unies Pour le Droit Commercial International (n 15) para 27.

92 Yu et Ahmed (n 18) 224.

observations et les éléments de preuve des parties,[93] la compilation des ressources, la gestion de la documentation unique des procédures[94] et, par-dessus tout, la préparation des projets de sentence[95], peut causer des problèmes en raison de l'influence qu'ils peuvent avoir sur le processus décisionnel du tribunal arbitral.

E. Les divergences entre les règles des différentes institutions arbitrales

Certains auteurs affirment que le débat a été alimenté par les différentes restrictions imposées aux fonctions des secrétaires dans les notes ou directives de différentes institutions arbitrales.[96] En fait, les institutions d'arbitrage commercial ont été « l'avant-garde »[97] en matière de réglementation des activités des secrétaires des tribunaux arbitraux aux côtés de la Commission des Nations-Unies pour le Droit Commercial International et du Conseil International pour l'Arbitrage Commercial.

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93 Voir, Guillermo Aguilar-Alvarez, 'Foreword' dans Conseil International pour l'Arbitrage Commercial, *Young ICCA Guide on Arbitral Secretaries* (The ICCA Reports No.1) (International Council for Commercial Arbitration 2014) vii, vii; Ashford (n 88) 143.

94 Restemayer (n 46) 338–339; Feit et Chassot (n 42) 897.

95 En réponse à la question de savoir s'il est approprié que la tâche de rédaction de la sentence soit déléguée au secrétaire, certains auteurs déclarent que le tribunal ne devrait en aucun cas être libéré de son obligation de rédiger lui-même la sentence. Voir par exemple, « [C]omment en effet l'arbitre pourrait-il se contenter d'indiquer à son secrétaire ou "*law clerk*" dans quel sens il doit rédiger la sentence? Comment admettre que la forme de celle-ci serait indépendante du *fond* et donc laissée à l'activité du secrétaire? À l'évidence, contenu et expressions de celui-ci sont inséparables et interdépendants, et c'est finalement lors de la rédaction finale, dans le choix des mots, que l'arbitre parviendra à une relative certitude quant à la justesse, et à la justice, de sa décision. La mission de l'arbitre international "*intuitu personae*", ne permet donc en principe aucune dichotomie, aucune délégation de ce genre. » Lalive (n 7) 277; « [U]n arbitre devrait limiter le rôle du secrétaire dans la rédaction des sentences. » Maynard (n 45) 182; « Au cours d'un examen contradictoire, on a demandé pourquoi et on s'est demandé comment certains arbitres pouvaient traiter autant de litiges. Une solution consiste à confier la rédaction à d'autres, dans le cas du CIRDI, au Secrétariat. Il semble que les arbitres, très occupés, apprécient beaucoup, mais c'est inapproprié. » *Compañía de Aguas del Aconquija SA & Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3 (Annulment Proceeding), Additional Opinion of Professor Jan Hendrik Dalhuisen under Art 48(4) of the ICSID Convention, 30 juillet 2010, [8]; Selon une autre approche, tant que le tribunal fournit les orientations et que le projet est soumis à un examen minutieux des arbitres, il est inutile de limiter un secrétaire à une telle tâche. Voir par exemple, Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris 2003) 493; Feit et Chassot font valoir que la Cour fédérale suisse implique également cette approche dans son *obiter dictum* qui prévoit que « Les tâches du secrétaire juridique sont comparables à celles d'un greffier en procédure étatique: organisation des échanges d'écritures, préparation des audiences, tenue du procès-verbal, établissement des décomptes de frais, etc. Elles n'excluent pas une certaine assistance dans la rédaction de la sentence, sous le contrôle et conformément aux directives du tribunal arbitral ou, s'il n'est pas unanime, des arbitres majoritaires, ce qui suppose que le secrétaire assiste aux audiences et aux délibérations du tribunal arbitral. » Feit et Chassot (n 42) 908; Tribunal fédéral, 4A_709/2014, Arrêt du 21 mai 2015, Ire Cour de droit civil 3.2.2..; Une troisième approche suggère que les secrétaires peuvent être autorisés à rédiger des parties non substantielles des sentences, qui peuvent consister en une description de l'identité des parties et de leur conseil, de l'historique de la procédure et d'un bref résumé des faits non controversés. Voir par exemple, Partasides (n 7) 158; « Il est admis qu'un secrétaire ou un arbitre assistant est autorisé à rédiger la partie introductive d'une sentence telle que celle décrivant l'identité des parties et de leur conseil et, le cas échéant, l'historique procédural et un bref aperçu des faits non controversés. » Waincymer (n 45) 446; « Par conséquent, le secrétaire peut rédiger des ordonnances de procédure et des parties non substantielles des sentences, telles que le contexte de la procédure et les positions des parties. » Polkinghorne et Rosenberg (n 6) 126. A la lumière des résultats de différentes enquêtes, cette approche semble être préférée. White & Case et Queen Mary University of London School of International Arbitration (n 21) 43; Conseil International pour l'Arbitrage Commercial (n 22) 15, 79; International Commercial Disputes Committee and Committee on Arbitration of the New York City Bar Association (n 4) 584–585.

96 Polkingthorne et Rosenberg ne voient aucune bonne raison pour des institutions arbitrales différentes de placer des restrictions considérables et appellent à une meilleur uniformisation des règles. Polkinghorne et Rosenberg (n 6) 107–108, 121; cf. il est peu probable qu'une norme uniforme satisfasse toutes les parties et il ne semble pas y avoir de raison de ne pas multiplier la pratique permettant aux secrétaires d'arbitrage de se voir confier des tâches différentes, en fonction des règles institutionnelles choisies par les parties. Maynard (n 45) 183.

97 Mcasey (n 24) 67.

Quant aux divergences entre les activités autorisées pour un secrétaire, certaines institutions ont préféré proposer des réglementations plus libérales. Par exemple, les directives de la JAMS sur l'utilisation des greffiers et des secrétaires dans les arbitrages[98] laisse aux arbitres un large pouvoir discrétionnaire quant aux fonctions du secrétaire, à condition que celui-ci ne participe pas aux délibérations ou au processus décisionnel. Cette approche est également suivie par l'article 3(1) des « *Best Practices for the Appointment and Use of Arbitral Secretaries* » de la Young ICCA, qui suggère que le rôle du secrétaire peut légitimement aller au-delà des tâches purement administratives placées sous la direction et la supervision appropriées du tribunal et comprend des tâches telles que la recherche de questions de droit, la recherche de questions relatives aux preuves factuelles et aux dépositions des témoins, la rédaction d'ordonnances de procédure et de documents similaires, la rédaction de chronologies et de notes résumant les exposés et les preuves des parties, la participation aux débats du tribunal et la rédaction de passages pertinents de la sentence.[99] D'autres règles, cependant, telle que la note sur la conduite de l'arbitrage de la CCI[100] et la Practice Note de la SIAC[101] viennent limiter les devoirs du secrétaires à des matières purement administratives.[102]

98 Judicial Arbitration and Mediation Services, Guidelines for Use of Clerks and Tribunal Secretaries in Arbitrations <https://www.jamsadr.com/files/Uploads/Documents/JAMS-International-Guidelines-for-Use-of-Clerks-and-Tribunal-Secretaries-in-Arbitrations.pdf> consulté le 10 septembre 2019.

99 Conseil International pour l'Arbitrage Commercial (n 22) 5.

100 Cour International d'Arbitrage (n 72) paras 177–192; La rigueur de la note de la CCI à l'égard des secrétaires d'arbitrage a été mise en lumière lors de débats intéressants. En réponse à la plainte du professeur Lalive concernant l'augmentation du nombre de sentences de mauvaise qualité, Schweizer a souligné le rôle purement administratif du secrétaire fourni dans la note de la CCI.: « Une dernière remarque, et c'est surtout pour cela que je vous écris : vous avez milité ardemment, auprès de la CCI notamment, pour la reconnaissance du statut de secrétaire du tribunal arbitral, fonction à vocation préparatoire qui devait notamment permettre de former les ténors et les cadors du surlendemain. Et vous dénoncez maintenant "*une augmentation des sentences de qualité médiocre, confuses ou erronées, et mal rédigées – que ce soit par l'arbitre lui-même ou (selon une* ***mode en inquiétant progrès****) par un* ***collaborateur*** *auquel il aurait délégué sa tâche"* D'abord, selon les directives CCI, les prérogatives d'un secrétaire de tribunal arbitral s'épuisent dans le droit qu'on peut éventuellement lui reconnaître de réserver des chambres d'hôtel single ou doubles, avec ou sans hôtesse, avant l'audience, et sur place de commander au mieux les panini chips, les cafés piscines et les eaux minibulles qui agrémenteront les papotages de pauses. Ensuite, si l'on regarde les choses en face, le secrétaire, conscient du privilège que lui confère le président qui l'adoube, accomplit un travail de forme et de fond au moins aussi minutieusement qu'un arbitre débordé. Et à moindre frais. Pour moi l'art d'un bon arbitre surbooké c'est d'ordonner, de décider, de diriger, de (re)lire, de corriger, ou pour faire plus simple : de donner son avis s'il en a un. Et dans 99% des cas tout cela se passe à la satisfaction générale et dans un anonymat, pour ne pas dire camouflage, total où chacun trouve son compte (bancaire, sauf peut-être le secrétaire). Aussi ne vous laisserai-je pas dire, sans me rebiffer ne serait-ce que d'un lever de sourcil, qu'une partie de la qualité médiocre des sentences suisses est due à l'appel en cause, si je puis dire, de "collaborateurs" ! » Philippe Schweizer, 'Correspondance Au Sujet de L'Article 190(2) LDP: Quelques lignes en réponse à l'article du Professeur Lalive « L'article 190 al. 2 LDIP a-t-il une utilité ? »' (2011) 29 ASA Bulletin 66, 69; Lalive 2010 (n 81) 728.

101 Singapore International Arbitration Center, Practice Note for Administered Cases - On the Appointment of Administrative Secretaries (2 février 2015) <http://www.siac.org.sg/our-rules/practice-notes/practice-note-for-administered-cases-on-the-appointment-of-administrative-secretaries> consulté le 10 septembre 2019.

102 Commission des Nations Unies Pour le Droit Commercial International 2012 (n 85); London Court of International Arbitration, LCIA Notes for Arbitrators, Section 8 <https://www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx> consulté le 10 septembre 2019; Hong Kong International Arbitration Center, Guidelines on the Use of a Secretary to the Arbitral Tribunal <https://www.hkiac.org/images/stories/arbitration/HKIAC%20Guidelines%20on%20Use%20of%20Secretary%20to%20Arbitral%20Tribunal%20-%20Final.pdf> consulté le 10 septembre 2019; Australian Centre for International Commercial Arbitration, ACICA Guideline on the Use of Tribunal Secretaries 10–13 <https://acica.org.au/wp-content/uploads/2017/01/ACICA-Tribunal-Secretary-Guideline.pdf> consulté le 10 septembre 2019; Finland Arbitration Institute, Note on the Use of a Secretary <https://arbitration.fi/wp-content/uploads/sites/22/2013/06/note-on-the-use-of-a-secretary.pdf> consulté le 10 septembre 2019.

1. Les décisions de justice pertinentes

En complément des différences entre les réglementations des institutions d'arbitrage, il existe peu de jurisprudence concernant le rôle des secrétaires et, même lorsque la question a été examinée, les tribunaux sont restés assez réticents à expliquer quelles seraient les fonctions autorisées qui n'auraient aucune incidence sur le processus de résolution du litige.

Dans l'affaire *Sacheri c. Robotto*[103] de 1989, la Cour Suprême Italienne a été confrontée à une situation dans laquelle les arbitres, qui n'avaient aucune formation juridique, ne participaient pas à la rédaction de la sentence et avaient chargé un avocat de les rédiger. Soulignant que les arbitres ne peuvent pas déléguer leur devoir de décision, la Cour Suprême Italienne a noté que

> « *du fait de l'incapacité déclarée des arbitres à trancher des questions autres que des problèmes techniques de construction, il revenait à déléguer à un tiers le soin de formuler la décision finale, ce que les arbitres n'étaient pas en mesure de concevoir et qu'ils ne pouvaient pas examiner de manière critique une fois qu'elle avait été rédigée* »[104]

La Cour a estimé que l'implication de la tierce partie constituait une violation des garanties d'une procédure régulière et a annulé la sentence contestée. Cependant, la délégation de la fonction décisionnelle était claire dans ce cas.

Dans l'affaire *Sonatrach c. Statoil*,[105] la compagnie pétrolière nationale algérienne Sonatrach avait demandé l'annulation d'une sentence de la Chambre de Commerce international d'une valeur de 536 millions de dollars américains en faveur de la compagnie pétrolière nationale norvégienne Statoil. Dans sa lettre aux parties du 17 janvier 2011, le président du tribunal avait expliqué sa volonté de nommer un secrétaire comme suit:

> « *Le tribunal arbitral serait heureux de compter sur l'assistance d'un secrétaire administratif. Le statut du secrétaire administratif consistera uniquement à assister le Tribunal et son président dans les tâches administratives liées à la procédure, à l'organisation des audiences et à la préparation des documents pouvant être utiles à la décision. En aucun cas le secrétaire administratif n'aura le droit de participer à la décision.* »[106]

Aucune objection n'a été soulevée par les parties lorsque le président a invité les parties à confirmer si elles approuvaient la nomination. Sonatrach a ensuite affirmé que le tribunal avait indûment délégué ses pouvoirs au secrétaire puisqu'il avait

103 *Sacheri v. Robotto*, Corte di Cassazione, 2765, 7 juin 1989 extrait de "Decision" disponible dans Albert Jan van der Berg, *Yearbook Commercial Arbitration Volume XVI* (International Council for Commercial Arbitration 1991) 156–157.

104 ibid, Decision para 1.

105 [2014] EWHC 875 (Comm).

106 ibid [47].

permis au secrétaire de produire des notes à l'attention du tribunal qui avaient ensuite été utilisées dans les délibérations. Selon Sonatrach une telle tâche ne pouvait être considérée comme administrative. Toutefois, le président du tribunal a confirmé que le secrétaire n'avait pas outrepassé ses missions, telles que décrites dans la lettre du 17 janvier 2011. Même si elle a mentionné que « *les notes faisaient partie intégrante des délibérations* »[107], la Haute Cour de justice d'Angleterre et du pays de Galles a finalement rejeté la demande de Sonatrach.

Andersson explique que le tribunal de district de Halmstad a discuté du type de tâches régulièrement confiées aux secrétaires d'arbitrage dans une affaire[108] liée à la réduction de la rémunération d'un arbitre.[109] Dans cette affaire, bien que l'ampleur des tâches du secrétaire n'ait pas été réglée par un accord, celui-ci avait assisté à toutes les audiences et délibérations, mené des recherches juridiques et examiné et structuré les preuves et documents de référence qu'il avait ensuite présentés au tribunal.[110] Le tribunal de district rejeta la demande de réduction de la rémunération de l'arbitre, *inter alia* au motif que les tâches exécutées par le secrétaire n'étaient que des tâches incombant habituellement aux secrétaires.[111] Toutefois, étant donné que l'affaire concernait la rémunération de l'arbitre plutôt que la contestation ou l'invalidité de la sentence, Andersson indique qu'il est impossible de conclure si les types de tâches susmentionnés peuvent être délégués à un secrétaire en vertu de la loi suédoise sur l'arbitrage.[112]

Au travers d'un *obiter dictum* dans sa décision[113] du 21 mai 2015, le Tribunal fédéral suisse a également exprimé son opinion sur le rôle du secrétaire :

> « *Les tâches du secrétaire juridique sont comparables à celles d'un greffier en procédure étatique: organisation des échanges d'écritures, préparation des audiences, tenue du procès-verbal, établissement des décomptes de frais, etc. Elles n'excluent pas une certaine assistance dans la rédaction de la sentence, sous le contrôle et conformément aux directives du tribunal arbitral ou, s'il n'est pas unanime, d'une majorité des arbitres, ce qui suppose que le secrétaire assiste aux audiences et aux délibérations du tribunal arbitral. Il lui est, en revanche, interdit, sauf convention contraire des parties, d'exercer des fonctions de nature judiciaire, lesquelles doivent demeurer l'apanage des seuls arbitres*. »[114]

107 ibid [49]–[50].

108 Halmstad District Court case no. T 271-83.

109 Andersson (n 18) 55.

110 ibid.

111 ibid.

112 Andersson note également que les jugements des tribunaux de district n'ont pas une grande valeur en tant que sources du droit en Suède. ibid.

113 Tribunal fédéral, 4A_709/2014, Arrêt du 21 mai 2015, Ire Cour de droit civil.

114 ibid 3.2.2. en citant Göksu (n 41) n. 879; Gabrielle Kaufmann-Kohler et Antonio Rigozzi, *Arbitrage international : droit et pratique à la lumière de la LDIP*, (2e, Bern 2010) 678.

Dans le fameux arbitrage *Yukos*, la Russie a demandé au tribunal de district de La Haye d'annuler la sentence rendue par La Cour Permanente d'Arbitrage en 2014[115], entre autres motifs, parce que le tribunal arbitral n'avait pas rempli son mandat personnel[116]. Affirmant que Martin Valasek, qui avait été présenté comme assistant du président Fortier, avait joué un rôle important dans l'évaluation des preuves, les délibérations et la préparation des sentences finales, la Russie s'était référée à la feuille de présence du tribunal arbitral et du secrétaire pour révéler que M. Valasek avait consacré plus de temps à l'arbitrage qu'aucun des arbitres[117]. Le 20 avril 2016, le tribunal de district de La Haye a annulé six sentences arbitrales pour d'autres motifs, laissant la question sans discussion.[118]

L'une des déclarations les plus explicatives sur les fonctions des secrétaires d'arbitrage a peut-être été faite par Hon. M. le juge Popplewell dans l'affaire *P c. Q*[119]. Dans cette affaire, un courrier électronique du président destiné au secrétaire avait été envoyé par erreur à un assistant juridique des avocats de P. Le courrier électronique contenait une lettre de P au tribunal et demandait sa « réaction à cette dernière de [P] » [120]. P a contesté la sentence devant la Haute Cour d'Angleterre et du Pays de Galles, au motif notamment que le secrétaire était trop impliqué dans le processus de prise de décision. Dans la partie pertinente de la décision, le juge Popplewell a déclaré ce qui suit:

> « *Il y a une inquiétude considérable et compréhensible de la communauté des arbitres internationaux quant au fait que le recours aux secrétaires risque de les transformer en "quatrième arbitre". Il faut veiller à ce que la prise de décision soit bien celle des membres du tribunal. Le moyen le plus sûr de s'assurer que tel est le cas est que le secrétaire ne soit pas chargé de quoi que ce soit qui implique d'exprimer un point de vue sur le fond d'une demande ou d'une question. Si tel est le cas, le tribunal risque réellement de subir une influence inappropriée sur le processus décisionnel, ce qui compromettra sa capacité à parvenir à un jugement totalement indépendant. Le danger peut être plus grand avec des arbitres sans formation juridique ou sans expérience, qu'avec des juges qui sont habitués à prendre des décisions juridictionnelles entièrement indépendantes avec l'aide d'auxiliaires de justice ou autres assistants juridiques. Cependant, le danger existe pour tous les tribunaux. La meilleure pratique consiste donc à éviter d'impliquer un secrétaire de tribunal dans tout ce qui pourrait être qualifié d'expression d'un point de vue sur le fond de ce que le tribunal est appelé à trancher. Si le rôle du secrétaire est ainsi circonscrit, les parties peuvent être*

115 *Yukos Universal Limited (Isle of Man) v The Russian Federation,* PCA Case No. AA 227, In the Matter of an Arbitration Before a Tribunal Constituted in Accordance with Article 26 of the Energy Charter Treaty and the 1976 UNCITRAL Arbitration Rules, Final Award, 18 juillet 2014. <https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf> consulté le 10 septembre 2019.

116 Rechtbank Den Haag, ECLI:NL:RBDHA:2016:4230, C/09/477160 / HA ZA 15-1 Section 4.2. <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230> consulté le 10 septembre 2019.

117 Writ of Summons (n 18) 185ff.

118 Rechtbank Den Haag (n 116) Section 5.98.

119 [2017] EWHC 194 (Comm).

120 ibid [10]ff.

> *assurées qu'il n'y a aucun risque d'influence inappropriée sur la fonction décisionnelle personnelle et non délégable du tribunal.*
>
> *Toutefois, le fait de ne pas suivre les meilleures pratiques ne signifie pas ne pas mener correctement les procédures […]. Pour l'arbitre, solliciter ou recevoir des avis de quelque nature que ce soit auprès du secrétaire d'un tribunal arbitral sur le fond des décisions ne prouve pas en soi qu'il manque à son devoir personnel de s'acquitter lui-même de la tâche décisive qui lui incombe. Cela est particulièrement vrai lorsque, comme en l'espèce, l'arbitre compétent est un juge expérimenté, habitué à prendre des décisions en toute indépendance et qui n'est pas influencé de manière inappropriée par les suggestions des assistants juridiques débutants.* »[121]

Justice Popplewell explique ensuite les missions réalisée par le secrétaire et démontre qu'il n'y a eu aucune faille quant au parfait déroulement de la procédure.

> « *Le recours à un secrétaire pour analyser les demandes et les projets d'ordonnances procédurales ne constitue pas une délégation indue de fonctions décisionnelles, sauf accord contraire des parties. Ce ne serait pas non plus nécessairement une délégation aussi inappropriée du président que de solliciter ou de prendre en compte l'opinion de ce secrétaire d'arbitrage sur le bien-fondé de ces décisions de procédure. […] En tout état de cause, si le président avait demandé au secrétaire de donner son avis sur le bien-fondé de la demande, on ne pouvait en déduire (et le président a nié) qu'il avait ainsi abandonné une partie de son propre rôle de décision.* »[122]

Bien que les tribunaux nationaux semblent avoir été libéraux en ce qui concerne l'ampleur des tâches pouvant être confiées aux secrétaires, une contestation de la partie perdante concernant la délégation indue du mandat de l'arbitre peut entraîner une prolongation non désirée du litige.

E. Minimiser les risques

En citant le soutien apporté à la pratique consistant à utiliser des secrétaires au sein de la communauté arbitrale, Partasides et autres diraient que la plupart d'entre eux semblent accepter que ces défauts soient contrebalancés par les avantages inhérents à l'utilisation d'un secrétaire.[123] Cependant, les risques peuvent aussi être minimisés.

L'inquiétude suscitée par la confidentialité, l'indépendance et l'impartialité des secrétaires semble être relativement facile à surmonter. Si un arbitre informe les parties de l'identité d'un secrétaire potentiel et ne le nomme pas sans le consentement des deux (ou de toutes les) parties, les parties peuvent déjà avoir une idée de l'indépendance et de l'impartialité de cette personne. Certaines règles institutionnelles, telles que la Note de la CCI[124] et les guidelines de l'ACICA (Centre

121 ibid [68]–[69].

122 ibid [70].

123 Partasides et autres (n 10) 27.

124 Cour International d'Arbitrage (n 72) paras 2, 181 et 182.

Australien d'Arbitrage Commercial International)[125], prohibent déjà pour les arbitres de nommer un secrétaire sans en divulguer le nom et sans obtenir le consentement des parties. En outre, dans la convention d'arbitrage ou ultérieurement, les parties peuvent convenir de demander à un secrétaire potentiel de signer une convention de confidentialité[126] et un engagement d'indépendance et d'impartialité.[127]

En ce qui concerne l'étendue des activités des secrétaires, dans les procédures *ad hoc* et même dans les cas où les parties choisissent une institution d'arbitrage dont les notes ou les directives ne sont pas contraignantes (ou bien lorsque l'institution arbitrale choisie n'a pas adopté de règlement concernant les secrétaires), les incertitudes peuvent être minimisées grâce à la transparence et au consentement éclairé des parties.[128] Si un tribunal arbitral décrit clairement les tâches qu'un secrétaire sera en mesure d'accomplir[129], obtient le consentement des parties et bénéficie de l'assistance de ce secrétaire de manière transparente et conformément à cette description, la question ne devrait pas susciter beaucoup d'inquiétude. Il est également possible pour les parties de s'entendre à l'avance sur les tâches du secrétaire à condition que le tribunal est transparent quant aux fonctions du secrétaire du début à la fin de la procédure. Après tout, un arbitre consciencieux et désireux de remplir son mandat avec diligence ne devrait avoir beaucoup de difficulté à appliquer la distinction claire qui existe entre délégation appropriée et dérogation irresponsable.[130]

Comme le dit Partasides, « *The system should not be fashioned by fear of the irresponsible, for they can undermine any safeguard* ».[131] Compte tenu de tous les avantages qu'un secrétaire peut offrir et de tous les arbitres désireux de s'acquitter de leurs tâches de la manière la plus responsable, le recours à des secrétaires ne devrait pas être une pratique à éviter. Peut-être que dans quelques années, ce ne sera pas du « quatrième » mais du « cinquième arbitre »[132] dont il faudra être prudent.[133]

125 Australian Centre for International Commercial Arbitration (n 102) paras 1, 3 et 5.

126 Les guidelines de l'ACICA indiquent déjà qu' « [un] secrétaire de tribunal est soumis au même degré de confidentialité que celui requis des parties et du tribunal » ibid para 13

127 La note de la CPI exige également une déclaration d'indépendance et d'impartialité de la part du secrétaire potentiel. Cour International d'Arbitrage (n 72) para 181.

128 International Commercial Disputes Committee and Committee on Arbitration of the New York City Bar Association (n 4) 591; Douglas (n 12) 88; Maynard (n 45) 183; Conseil International pour l'Arbitrage Commercial (n 22) 16.

129 Pour un « *Model Letter from Arbitral Tribunal to the Parties on the Appointment of an Arbitral Secretary or Assistant* » voir, Kaufmann-Kohler et Rigozzi (n 5) 312.

130 Maynard (n 45) 182; Voir, Menz 2013 (n 52).

131 Partasides (n 7) 157.

132 Filipe Sanches Afonso, The Fifth Arbitrator? The Role of Artificial Intelligence to Tribunals in International Arbitration (Lisbon Arbitration 18 décembre 2018) <https://lisbonarbitration.mlgts.pt/articles/the-fifth-arbitrator-the-role-of-artificial-intelligence-to-tribunals-in-international-arbitration/81/> consulté le 10 septembre 2019.

133 « Les arbitres doivent s'acquitter de leur mandat personnellement, sans déléger à un tiers. On peut se demander si l'utilisation par un tribunal d'une AI constitue une délégation acceptable de ses fonctions. » Maud Piers et Christian Aschauer, 'Conclusion' dans Maud Piers et Christian Aschauer (eds) *Arbitration in the Digital Age The Brave New World of Arbitration* 283, 294.

III. Conclusion

Bien que les arbitres doivent s'acquitter de leurs obligations juridictionnelles sans délégation à un tiers en raison de la nature « *intuitu personae* » de leur mandat, cela ne signifie pas que les arbitres ne peuvent être assistés. Dans les grands arbitrages internationaux en particulier, le volume des documents soumis par les parties ainsi que la nécessité de prendre certaines dispositions peuvent laisser aux tribunaux une charge de travail accablante.

Le secrétaire du tribunal arbitral est une personne, généralement un jeune avocat travaillant au sein du cabinet d'avocats du président ou de l'arbitre unique, qui assiste le tribunal dans les tâches spécifiées par les arbitres. La question du secrétaire n'est généralement pas réglementé par la loi et, dans certaines juridictions, des incertitudes demeurent quant à la question de savoir si un tribunal arbitral peut nommer un secrétaire d'arbitrage sans l'approbation des parties.

Les secrétaires d'arbitrage peuvent améliorer l'efficacité du tribunal en laissant aux arbitres plus de temps pour se concentrer sur les questions de fond en cause et peuvent aussi réduire les frais généraux du tribunal arbitral, en particulier dans les cas où les arbitres sont rémunérés à l'heure. De plus, les jeunes collaborateurs peuvent bénéficier de la possibilité d'observer le déroulement d'un arbitrage du point de vue du secrétariat.

En revanche, l'utilisation de secrétaires d'arbitrage peut comporter des risques liés à l'indépendance et l'impartialité ainsi qu'à la confidentialité. C'est particulièrement le cas dans les hypothèses où des secrétaires sont nommés sans aucune information des parties. Par ailleurs, beaucoup d'auteurs ont exprimé leur inquiétude de voir les secrétaires devenir des décideurs. Quant à la question de savoir quelles tâches enfreignent la mission *intuitu personae* des arbitres, on peut trouver différentes réponses dans le milieu ; les points de vue des commentateurs, les règlements des institutions d'arbitrage et les décisions de justice.

Si les arbitres demandent l'approbation des parties pour la nomination des secrétaires, les risques peuvent être minimisés en demandant au secrétaire potentiel de signer un accord de confidentialité et une déclaration d'indépendance et d'impartialité. En ce qui concerne l'influence non-désirée que pourrait avoir un secrétaire sur la décision du tribunal, et si les parties ne s'étaient pas entendues à l'avance, les risques peuvent être minimisés par un arbitre consciencieux décrivant clairement les tâches qu'un secrétaire serait en mesure d'accomplir, obtenant le consentement des parties et déléguant les tâches avec diligence, transparence et conformément à la description.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

The 'Executive of Change' and the 2019 Crisis as a Touchstone for the Italian Parliamentary Form of Government

Valentina Rita Scotti[1]

Abstract
The government crisis which began on 20 August in Italy has put an end to the innovative experience of the 'Executive of Change,' which has challenged the traditional constitutional conventions regarding the relationship between state powers, as well as the fundamental values on which the Italian Republican Constitution grounds the legal system. The article analyses the reasons for the crisis and, moreover, the impact it has had on the role and prerogatives of the President of the Republic, the Prime Minster and the Parliament, contextualizing it in the general framework of the evolution of the Italian parliamentary form of government.

Keywords
Parliamentary form of government, Government crisis, Constitutional interpretation, Constitutional conventions, Fundamental constitutional values

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The 'Executive of Change' and the 2019 Crisis as a Touchstone for the Italian Parliamentary Form of Government

I. The 2019 Italian Government Crisis: Facts and Questions

From 20 August to 9 September 2019, Italy was involved in a quite unexpected government crisis terminating the so-called 'Executive of Change' appointed only 14 months before, thanks to the support of a very peculiar – for the parties involved and for their history – coalition. Since its appointment and until the crisis ended, the vicissitudes related to this Executive raised very relevant questions with regards to the interpretation of the Italian Constitution (henceforward also IC), as well as of the constitutional conventions mostly characterizing the relationship between state powers. In brief, this Executive controversially innovated with regard to the normative value of coalition agreements, challenged the roles and prerogatives of the President of the Republic and of the Prime Minister, as well as the relationship between the Parliament and the Executive with regard to the law-making process, and raised concerns about the extent of the protection that should be granted through parliamentary immunity. Furthermore, from a more political than constitutional perspective, the 'Executive of Change' challenged the unwritten conventions on the exploitations of religious symbols in the political field and showed the great impact of populism and of new technologies on Italian democracy.

The present article discusses these aspects, contextualizing them through an introduction on Italian politico-institutional history.

A. The Formation of the 'Executive of Change': A Popular Executive Bound by A Contract

In order to contextualize the crisis, a few words on Italian constitutional history are called for. For almost fifty years since the establishment of the Italian Republic in 1946, the Democrazia Cristiana (DC – Christian Democracy) was the majoritarian party in government coalitions established under a proportional electoral law. In this period, the so-called *conventio ad excludendum* enabling the Partito Comunista Italiano (PCI – Italian Communist Party) to be kept out of the Executive offices was constantly respected.[1] At the beginning of the '90s, due to the consequences of the fall of the Berlin Wall and to a dramatic corruption scandal concerning bribes and illegal funding to political parties,[2] the political party system underwent a massive

1 This was a constant reality in the history of the country. Indeed, when the leader of the DC Aldo Moro tried to include the PCI in the Executive with the so-called 'historical compromise', he was kidnapped and then killed by the terrorist communist group the *Red Brigades*, possibly with the never confirmed connivances of some sectors of the Italian secret service.

2 The scandal was known as *Tangentopoli*, roughly translatable as 'town of bribers' from *tangente* which is the Italian noun for bribe, and the investigation led by the public prosecutor Antonio Di Pietro took the name *Mani Pulite* (Clean Hands).

change.. In brief, this change resulted in the approval of a majoritarian electoral act[3] and in the establishment of a two party coalition system: the center-left coalition, led by the descendant of the PCI, called since 2007 Partito Democratico (PD – Democratic Party), and the center-right coalition, led by Silvio Berlusconi's party Forza Italia (FI – Go Italy) and including also the Lega Nord (Northern League), mainly interested in promoting a federalist reform, and some post-fascist forces. In a political environment characterized by the personalization of politics, the right-wing coalition has led the country for twenty years almost consecutively until the effects of the 2008 economic crisis and the personal vicissitudes of the FI leader pushed the then President of the Republic Giorgio Napolitano to appoint a care-taker government. Meanwhile, a populist digital party, the Movimento 5 Stelle (M5S – Five Stars Movement) emerged. Members of the latter were elected as MPs for the first time in the XVII legislature (2013-2018)[4], when the Executive was led by the PD. The attempt to reform the Parliament, reducing the number of MPs and amending the perfect bicameralism of the Houses[5], as well as the electoral law, characterized this legislature. A referendum, however, struck down the reform of the Parliament, while the electoral acts which came into force at the time did not completely pass the control of constitutionality, so that the 2018 elections were held according to a system mixing proportionality and majority rules approved only few months before.[6]

Ultimately, the 4 March 2018 election for the XVIII legislature was held with a three-tier system. Namely, 232 single-member districts (SDM) exist for the Chamber and 116 for the Senate, to which the second tier should be added, providing for the election of 386 deputies and 193 senators with a proportional system in multi-member districts (MMD); finally, the 28 constituencies of the Chamber and the 20 regions of the Senate represented the last tier. The law also prescripts closed lists which may be formed by candidates belonging to a single party or to a coalition of parties. Due to the closed lists and to the decision to prefer a fused vote, voters had three options: either they expressed a vote for the SMD, and all the votes were then transferred pro quota to the parties affiliated to SMD candidates on the basis of the proportional votes they got in the relative MMD, or they voted for a party list, which automatically entailed a vote for the SMD candidate affiliated to the same list, or they voted both for an SMD candidate and for one of the lists affiliated to him/her. However, voters could not modify the order of candidates in the MMD list. It should be added that in SMDs, the rule for winning a seat was plurality, while in MMDs, the

3 See Electoral Acts n°. 276 and 277, 4 August 1993.

4 For a more detailed analysis of Italian political history leading to the affirmation of populism, see Giovanni Orsina, 'Genealogy of a populist uprising. Italy. 1979-2019' [2019] *The International Spectator* 50, 54.

5 The Constituent Assembly debated both the unicameral and the bicameral options and finally decided for a Parliament composed of two Houses (the 630-member Chamber of Deputies and the 315-member Senate) having exactly the same powers and competences according to the formula of the 'perfect bicameralism' meant to ensure a thorough decision-making process.

6 Electoral Act n°. 165, 3 November 2017.

largest remainder Hare quota was used. In order to limit pluralism and the subsequent risks of instability, the law provided for a complex system of thresholds.[7]

From a political perspective, a tri-polar scenario presented itself: a center-right coalition, composed by Forza Italia (FI), Lega[8] and Fratelli d'Italia (FdI – Brothers of Italy)[9]; the Movimento 5 Stelle (M5S), running alone after having spent the previous legislature blaming both center-left and center-right previous governments and policies; and, the center-left coalition, gathering the Partito Democratico with several minor left-wing pro-EU parties. Out of the left-wing coalition but gravitating in the same ideological area, there was also the Liberi e Uguali (LEU – Free and Equal).

Given both the electoral law and the abovementioned political scenario, it was clear that none of the groups could have won an absolute majority. This was indeed what happened,[10] and it was therefore necessary to make a political alliance in order to form the Executive and grant it with the confidence. As detailed below, this proved difficult, and the new Executive, led by Giuseppe Conte, was finally entitled to start its activities only on 5 July, having received the confidence thanks to a coalition agreement between the M5S and the Lega, which had detached from its pre-electoral coalition.

Promising to change Italy, but actually having to bargain regarding the direction of the change between the two forces forming the government coalition, the Executive survived between the ups and downs thanks to the fact that, particularly after the European elections in May 2019 which showed the great popular support behind Lega, the M5S, although majoritarian in numbers, accepted an ancillary role and supported the implementation of Lega's political program. Notwithstanding some minor criticism inside the M5S, this was the equilibrium established when the Parliament closed for the summer holidays on 2 August. Quite unexpectedly, however, August was the momentous month for the government crisis. Exposed to the harsh criticism of the opposition and of some members of M5S for his controversial

7 Notably, single parties had to overcome a threshold of 3% of the valid votes calculated at the national level (however, for parties representing ethnic minorities, this threshold does not apply, and they have to overcome a threshold of 20% in their region). In addition, but only for the Senate, any party getting 20% of the votes at the regional level could gain proportional seats. Coalitions, instead, participated in the allocation of proportional seats only if they got at least 10% of the votes at the national level and if one of the party in the coalition had gained not less than 3%. Having met these conditions, the coalition could count on the votes received by all of its candidates having obtained at least 1% at the national level.

8 This is the new denomination of the party Lega Nord (Northern League), which abolished the geographic adjective in order to stress its decision to abandon the secessionist requests. On the evolution of the party, see Daniele Albertazzi et al., ''No regionalism please, we are Leghisti!' The transformation of the Italian Lega Nord under the leadership of Matteo Salvini' (2018) 28 *Regional & Federal Studies* 645.

9 This party inherits the post-fascist tradition. It should be also noted that the coalition included a remnant of the DC, the Union of Christian Democrats (UDC), which, however, did not pass the required threshold for gaining seats in Parliament.

10 Notably, the center-right coalition won a total of 109 seats in the Chamber of Deputies and 58 seats in the Senate, with the Lega, led by Matteo Salvini, becoming the first party, with, respectively, 73 and 37 seats; the M5S, led by Luigi Di Maio, won 133 and 68 seats; the center-left coalition, 86 and 43 seats; and, finally, LEU won 14 and 4 seats. For an analysis of the vote, see Alessandro Chiaramonte et al., 'Populist success in a hung parliament: the 2018 general election in Italy (2018) 23 *South European Society and Politics* 479; Gianfranco Pasquino, 'Introduction. Not a normal election: roots and consequences' (2018) 23 *Journal of Modern Italian Studies* 347.

public appearances,[11] the leader of Lega, Matteo Salvini, decided to attempt a final overturning of the political situation. Probably counting on the surveys declaring Lega as the first political party in case of immediate elections, he presented a motion of non-confidence at the Senate[12] against the Prime Minister on 9 August.

Waiting to vote on the motion, scheduled on 20 August, the M5S and the PD tried to establish a dialogue after all the mutual accusations exchanged when they were political opponents, while Lega showed an opaque attitude coupling aggressive declarations of political power with proposals for a new deal with the M5S. Due to the reasons discussed below, on 20 August, although the motion was withdrawn, the Prime Minister resigned. In a very troublesome week, a new coalition agreement was established between the M5S and the PD with the support of some other left-wing parliamentary groups, and a new Executive, although led by the same Prime Minister, finally obtained the parliamentary confidence on 9 September.

It is not within the scope of this article to analyze the difficulties in establishing a dialogue between the M5S and the PD or to explain why, while bargaining for the new Executive's program and composition, the EU, the Vatican and the US welcomed the potential government coalition and the renewal of Conte's premiership. Neither it is appropriate to analyze here the reasons why, pending the definition of the new coalition, the Spread between Italian and German bonds consistently decreased and the Italian stock-exchange market performed better than the other European ones in that same week. It is, however, worth underscoring that, in spite of their ideological differences, both the M5S and the PD publicly cited their responsibility to the Italian people as the main reason for their cooperation.

1. The Five Stars Movement: The Italian Digital Party

Being the majoritarian party in both Conte's Executives, the M5S should be further examined because of the peculiarities of its creation and of the internal procedures regulating the relationship between the elite and the members of the Movement.

Established coevally with other digital parties in the rest of Europe, such as the *Pirate Parties* in Northern Europe, *Podemos* in Spain and *La France Insoumise* in France, M5S is distinguished from the others because of a flexible political program that has allowed it to speak to the discontent of people coming both from right-wing and left-wing parties.[13] Such a program developed during its genesis period starting

11 Newspapers widely reported pictures and videos of Salvini's son using a water scooter of the Italian police forces, as well as Lega's chairperson himself at the Papeete beach playing the Italian Anthem as a disc-jockey while holding a cocktail and dancing with an almost naked dancer.

12 He presented the motion at the Senate because he was elected as a member of that House and, according to the Italian system, he kept the office after the appointment as Minister of the Interior.

13 For further references, see Lorenzo Mosca, Filippo Tronconi, 'Beyond left and right: the eclectic populism of the Five Star Movement (2019) 42 *West European Politics* 1258.

around 2007, when some people discontent with traditional political parties began to gather in *Meet-ups* and finally organized a public meeting in Bologna on 8 September 2007, during which the former comedian Beppe Grillo harangued people by blaming the corruption and inefficiency of all the other political parties[14]; during that gathering, 336,144 signatures were also collected, allowing the Movement to present the petition 'Clean Parliament'. Henceforward, the Movement organized itself and ran during the 2012 administrative elections as well as for the 2013 parliamentary election, when Beppe Grillo was appointed as the head of the Movement, but not as a candidate for Parliament. The electoral results, which were so successful that the PD tried to form a government coalition with M5S[15], allowed Luigi Di Maio to be appointed as the youngest Vice-President of the Italian Chamber of Deputies. Then, the M5S proved successful also in the 2014 European elections (21.6%) and, lastly, in the 2018 parliamentary elections.

Beside its fluid ideology, this movement is peculiar because of its internal organization. Its members, indeed, debate through a blog which not only allows for organizing public events but also for finding common positions and making final decisions on specific topics. The blog progressively evolved in a more structured system – the Rousseau platform – owned by the Casaleggio Ass., which has allowed for the online selection of candidates, for the broadcasting of the most relevant institutional events in which representatives of the M5S are involved, and for 'direct communication' between the base and the leader. The Platform thus ensures the realization of the formula inspiring the action of the M5S: 'everyone counts the same'. However, the real implementation of the latter can be doubted when observing that Beppe Grillo seems to count more than the other members due to his role of 'guarantor' of Movement and, moreover, because he is the owner of the Movement's logo, a circumstance that makes of him an immoveable component of the party's leadership entitled to certify the respect of the M5S's standards before conceding the use of the logo.

In spite of this philosophy, the M5S has progressively evolved in a party-fashioned structure, having established in 2014 a leading body, the *Direttorio*, composed of 5 prominent personalities of the party (Alessandro Di Battista, Luigi Di Maio, Roberto Fico, Carla Ruocco and Carlo Sibilia) with the approval of 97% of the voters on the Platform. The M5S has passed through at least 3 stages during this evolution. In 2009, a 'non-Statute' established a Movement whose members were considered supporters

14 It is worth noting that that public gathering was called VDay, with 'V' summarizing the Italian word for rudely sending away someone. An echo of the relevance that day has had for this movement can be seen in its official denomination, MoVimento 5 Stelle, with the V capitalized, as it was for the VDay. Public gatherings were also organized on other occasions, until the final one occurred on 1 September 2013 in Genoa.

15 The coalition, the agreement of which was publicly broadcasted for the very first time in the history of the Italian Republic, failed because the M5S refused to support the PD, accusing it of being part of the 'caste' having led the country for decades and guilty of its uncertain political and economic situation.

lacking voting rights in the Assembly of the association. Therefore, when the M5S presented its candidacies in 2013, it was necessary to establish a 'second' Movement, controlled by Beppe Grillo, which was a closed association that confirmed the logo's ownership. Then, in 2018, a third Movement was established, providing mechanisms for internal democracy and allowing its members to vote for confirming/removing both the political leader, Luigi Di Maio, and the guarantor, Beppe Grillo, who however still keeps the ownership of the logo, whose use is granted to this third association. In the same year, Grillo's blog also published the Ethics Code for the incoming MPs, committing them to: voting in favor of all the motions of confidence required to support a M5S's Executive; using the Rousseau Platform as the main communication tool in order to respect the principles of transparency and accountability toward the members of the party and citizens in general; devolving a share of their salary as MPs to the party; paying a fee of 100.000 euro should they be expelled from the party or resign due to political dissent.

A final peculiarity of the M5S, which must be underscored for its consequences on the structure and functioning of the party, is the role of the Casaleggio Ass. Some scholars consider it as the real manager of the decision-making process of the M5S[16] because the 2018 Statute clarifies that both the Rousseau Platform and its manager, the Rousseau Association[17], are integral parts of the M5S and that they agree with the Movement concerning the procedures for the voting moments and for the organization of internal thematic debates.

II. (Re)interpreting the Italian Constitution

Below, the main relevant constitutional issues raised during the 'Executive of Change' tenure and the government crisis are discussed. Preliminarily, however, it is worth keeping in mind that the Italian Constitution (IC), entered into force on 1 January 1948 and established the Italian Republic after the defeat of Fascism and of the Savoy's constitutional monarchy, states that 'Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution' (art.1.2 IC). These forms are those of a parliamentary system, according to which the bicameral Parliament ordinarily lasts for five years (art. 60 IC).

On the functioning of the parliamentary form of government in Italy, a few notes should also be added. Considering the degenerations of the system during the Weimar Republic and being aware of the consequences they could have entailed in

16 Giuliano Santoro, *Un Grillo qualunque: il Movimento 5 stelle e il populismo digitale nella crisi dei partiti italiani* (Castelvecchi 2013).

17 It was established in 2016 by the late Gianroberto Casaleggio and his son Davide, to whom the Statute ensures the perpetual ownership of the leading position inside the Association. It is noteworthy that the Statute has never been approved, or at least shared, with M5S members, and that, Gianroberto having passed away, Davide fully controls the Association and thus has a great influence on the M5S's internal dynamics.

the post-war, post-fascist Italy, constituent framers underlined the need to introduce 'suitable mechanisms' in order to ensure the stability of the Executive.[18] Namely, during the debates, the possibility of extending the validity of the vote of confidence for two years was examined – but put aside because it could not save the stability in cases of an extra-parliamentary crisis or of ministerial resignations – as well as the constructive no-confidence.[19] Since then, having failed to introduce any such mechanisms,[20] the rationalization of the system has been tried through electoral acts providing a majority bonus in order to counterbalance the instability deriving from proportionality.[21] Aware of the still existing risks of instability, lawmakers also appointed bicameral Commissions tasked with proposing constitutional amendments aimed at providing a restyling of the form of government. These Commissions, for instance, discussed the possibility of introducing either the semi-presidential or the presidential forms of government, but none of them finally achieved any real change. Even when the parliamentary system was not questioned, proposals were drafted for binding only the Prime Minster (before the appointment of the Ministers) with the confidence, similarly to Germany and Spain,[22] but these never became constitutional amendments. The Prime Minister, therefore, has continued to be an ambiguous office whose real power has depended on electoral law, personal charisma, and the relationship with the majority party.

A. The Appointment of the Executive

Following the Constitution, once MPs have been elected, it is the duty of the President of the Republic (henceforth also PdR or the President) to convene the political forces to verify the possibility of forming an Executive able to obtain the vote of confidence of both Houses of the Parliament through interviews, called 'consultations', with the leaders of political parties and of the parliamentary groups formed after the election. Should this be possible, the President of the Republic appoints the President of the Council of Ministers (henceforth also PCM, Prime Minister or Premier). As regards this appointment, either the PdR may give an 'explorative office' to a PCM, which will therefore verify the existence of a majority voting the confidence in his favor,[23] or the appointed PCM may accept the office 'with reserve', which means that the formal acceptance is subjected to the verification of the majority. Once the office is accepted,

18 See *Ordine del giorno Perassi*, Italian Constituent Assembly, Commission for the Constitution, Second Sub-Commission, Minutes, 4-5 September 1946.

19 As is known, this mechanism was introduced three years later in the German Fundamental Law, allowing to vote no-confidence in the Prime Minister only if a substitute was already able to gather a new majority entrusted with the parliamentary confidence.

20 For the reasons of these failures, see Leopoldo Elia, 'La forma di governo', in Maurizio Fioravanti (ed), *Il valore della Costituzione* (Laterza 2009).

21 For an evolution of the Italian electoral legislation, see Gianluca Passarelli, 'Electoral Systems in Context: Italy', in Erik S. Herron et al. (eds), *The Oxford Handbook of Electoral Systems* (OUP 2018).

22 This was the case of the Bozzi Commission (1983-1985).

23 It is worth noting that, until now, none of the Presidents of the Council of Ministers have been women.

on a proposal of the PCM, the PdR appoints the Ministers (art. 92); the Executive then must come before the Parliament no later than ten days after the appointment in order to obtain the confidence (art. 94) by the absolute majority of both Houses.

With regard to the 'Executive of Change', therefore, the consultations began on 4 April 2018. Lacking an agreement between political forces, the President, Sergio Mattarella, called several times for national responsibility and urged the Speakers of the Houses to discuss the possibility of establishing a coalition either between the center-right coalition and the M5S or between the latter and the center-left coalition. None of the attempts proved successful and, on 7 May 2018, the President released a public declaration summing up the constitutional tradition of Italy and clarifying that, should a government coalition be impossible, his only option was to suggest a vote of confidence for a neutral Executive lasting until the approval of the budget act. He envisaged this solution as more suitable than agreeing to calls for an immediate new election, given the impossibility of organizing it in June, and reminding everyone that a summer vote has traditionally been avoided because of the difficulties it causes for voters. A third option, therefore, was a vote in autumn, which, however, could have hampered the timely approval of the budget act.

Quite unexpectedly, this speech was followed by a note in which Lega, detached from the center-right coalition, and the M5S informed the public and the President of their attempts to find a coalition agreement, finally achieved on 23 May 2018, when Giuseppe Conte[24] accepted with reserve the appointment as PCM and opened negotiations to present a list of Ministers to the PdR. Usually, the President does not interfere in the choice of Minsters and merely approves the list the PCM presents, but on this occasion, Mattarella fully utilized his constitutional prerogative and decided to reject the appointment of Paolo Savona, renowned for his euro-skeptical positions, to the office of Minister of Economy. As a consequence, Conte resigned, and the consultation process started again with Carlo Cottarelli appointed as PCM. Because the latter could not achieve a majority sufficient for the confidence, the PdR again appointed Giuseppe Conte, who this time proposed a list of Ministers with Savona as the Minster of European Affairs[25]. Mattarella eventually accepted. On 1 July 2018 – three months after the elections – the 'Executive of Change' composed of 18 Ministers (12 men and 6 women) took the oath in the hands of the President and finally obtained the vote of confidence on 5 June 2018.[26]

24 He was a professor of private law at the University of Florence with no previous political experience and who was neither a member of Lega nor of M5S.

25 This Minister is without portfolio and is tasked not with developing Italian policies toward or related to the EU, but only of implementing in Italy the EU *acquis*. Nevertheless, Savona held the office only until March 2019, when he was appointed as the Chair of the public authority responsible for regulating the Italian financial markets (CONSOB).

26 A complete timeline of all the events leading to the appointment of the Executive can be found in Marco Valbuzzi, 'When populists meet technocrats, The Italian innovation in government formation' (2018) 23 *Journal of Modern Italian Studies* 460, 465-467.

The most noteworthy element with regard to the 'Executive of Change' is the decision of the two forces composing the coalition to use a civil law tool, the contract, in order to define their agreement and the guiding principles of their political program. The 'Contract for the Executive of Change'[27] is explicitly mentioned several times in the motion of confidence n. 1-00014 which was presented to the Senate in order to confirm the confidence to Conte's Executive. The Contract provided for 30 programmatic points, clarified that political targets not included therein would be negotiated when necessary and that parties would support each other with regard to the fundamental goals of the political programs they presented during the electoral campaign in respect to the principles of good faith and legal cooperation. It also established a Reconciliation Council for solving potential disagreements and evaluating pros and cons of the realization of big infrastructural works not explicitly agreed to in the Contract.[28] This reconciliatory mechanism was an evident necessity for the endurance of the coalition because, as the doctrine underlined, 'the Contract reached by the two parties cannot be described as a synthesis of their respective electoral platforms but, more aptly, as a juxtaposition of their more salient and iconic policy measures'.[29] Nevertheless, the mechanism has never been activated, and the parties found other, more 'informal', ways for settling their different views, until they finally completely diverged.

The idea of signing a contract for establishing a government coalition is extremely unusual in Italian institutional history and raises some doubts of unconstitutionality. Indeed, the leaders of Lega and M5S declared that the German tradition of *Koalitionvertrag* inspired the idea of the Contract, but they probably failed to contextualize it both in the German and in the Italian context. In fact, the Contract cannot have any binding force because there is no normative prescription grounding it, even when considering it as a private law act, due to the fact that coalitions are not endowed with a legal personality[30], and therefore there is no regulation about the termination or the dissolution of the agreement signed by these actors. Indeed, Italian scholarship has already conceived coalition agreements[31] – with which Italian political history is instead more familiar – as based on conventional rules[32] whose validity cannot influence their stability, given the fact that their binding effects last as long as the political opportunity makes them suitable. This is exactly what also happened with

27 For the full text, in Italian, of the Contract, see http://download.repubblica.it/pdf/2018/politica/contratto_governo.pdf. A summary in English is available at http://www.efdd-5seuropa.com/imgblog/summary_of_the_contract_for_the_government_of_change_in_italy.pdf

28 Indeed, Lega and M5S were already aware of their different opinions over some infrastructural works, i.e. the TAV (high speed train) already under construction in northern Italy and the drill plants for exploiting oil in Basilicata (southern Italy).

29 See Valbruzzi (n. 26), p. 471.

30 In spite of several attempts to modify this condition, in Italy, political parties are not state's institutions (Constitutional Court, 22 February 2006, *Ordinanza,* 79), but private associations lacking legal personality whose activity is regulated through the provisions of the civil code (see Court of Cassation, 18 May 2015, 10094).

31 See Piero Alberto Capotosti, *Accordi di governo e presidente del consiglio dei ministri* (Giuffré 1974).

32 Capotosti, ibid. 148.

the Contract Salvini withdrew from when he realized that it could be more opportune for his party to run in a new election. In addition, this conception clearly distinguishes the Italian system from the German one both institutionally – because of the way the no-confidence is conceived in the two systems – and culturally – because the German politician's credibility is also based on the respect of 'gentlemen's agreements'. On the latter point, the fact that Lega signed the Contract after having withdrawn from a pre-electoral coalition agreement is quite symptomatic of the Italian way to approach this issue. Although named a Contract, therefore, a fortiori it had no binding effects on the parties having signed it; more saliently, it was not a real contract because it was not fulfilling the main characteristics of this private law act according to the Italian Civil Code (namely art. 1321 and 1372).

Having clarified that it was a mere political act, further consideration should be introduced with regard to the Contract's potential impact on MPs, given also the express limits to their activity the Contract contains.[33] According to the Italian legal system, indeed, the imperative mandate (art. 67 IC) is prohibited.[34] Nevertheless, the evolutions of the political system made MPs increasingly more subjected to the internal party's discipline, through which the party ensures the votes of its members in order to approve the measures resulting in the implementation of the coalition program.[35] Furthermore, by giving the confidence, MPs agree with the Executive's political program, assumed to be the way in which the latter is fulfilling the interest of the Nation; at the same time, the lack of support on a single measure or bill does not deteriorate the confidence up to the point that this does not entail a duty to resign for the Executive (art. 94.4 IC). Because of this complex relationship between the MP, the party and the Executive, it is not possible to infer whether any coalition agreement, including the 2018 Contract, has a binding force on the MP.[36] Nevertheless, it cannot be ignored that it represented another element of soft pressure on them, which for M5S MPs added to the already relevant political pressure deriving from having signed the party's Ethics Code.

Given the situation, one may finally ask whether it is consistent with the parliamentary form of government to have an Executive which does not fully respect the majoritarian political orientation of the Italian population, which, as

33 Notably, the Contract prevented MPs belonging to M5S and Lega from presenting bills related to the political goals listed therein, allowing this only for the members of the Executive and the Presidents of the two parliamentary groups; the latter are also exclusively able to set the agenda of the 'remaining' bills which MPs may propose.

34 The Italian system entrenched in the fundamental Charter the prohibition of the imperative mandate since the times of constitutional monarchy. Art. 41 of the Albertine Statute, indeed, prevented this limit to the MP freedom, countertrending the coeval European charters.

35 This is not the context for expanding on the topic of the imperative mandate in the party; for a detailed discussion, see Antonino Spadaro, 'Riflessioni sul mandato imperativo di partito' [1985] *Studi parlamentari e di politica costituzionale*.

36 A more detailed analysis on the nature and content of the contracts for the government coalition has been outlined in Luca Mariantoni, 'Contratto di governo e accordi di coalizione. Natura giuridica e vincolatività' (2018) 3 *Osservatorio costituzionale* 317.

demonstrated on the occasion of the European elections, seems to prefer right-wing forces and, moreover, Lega. Right-wing parties raised this point many times while the M5S-PD Executive was under formation. Although Mortati reminded us that the President of the Republic should ensure the existence of a harmony between the popular political orientation and the representation,[37] it should be clearly stressed that Italy is a parliamentary form of government and that under it the Executive is legally established when it is able to achieve the vote of confidence of the absolute majority of the MPs. Therefore, against every political objection, the procedure for the appointment of the M5S-PD Executive is fully consistent with the Constitution, and it is in respect of the latter that the President of the Republic factually supported the negotiations for finding a new coalition agreement after the termination of Conte's Executive.

1. The Impact of the Digital Party and Its Internal Procedures

The relationship existing between the M5S MPs and the base has also raised a very noteworthy constitutional issue with regard to the appointment of the Executive, due to the M5S leadership's decision to ask for a vote on the Rousseau Platform about coalition agreements. Although this kind of 'consultation' has also occurred on other occasions, i.e. with regard to the formation of the 'Executive of Change', its result became even more relevant during the entry into office of the Conte *bis* Executive.

Pending the consultations with the President of the Republic, indeed, the M5S leadership announced that they were ready to establish a government coalition with the PD – and were going to inform the President of this – but that they needed the final approval of the Rousseau Platform before the vote of confidence. Vague as it may be, this declaration was constitutionally challenging. First, it called into question the abovementioned issue of MPs' freedom, highlighting that, in the M5S leadership's mind, their vote should be bound to the decision of people voting on the Platform. Second, as the President of the Republic is constitutionally the arbiter in the formation of the Executive, three questions arose: how should the online vote be considered? In case of a negative vote, would it hamper the formation of the Executive to the point that people gathered through the Platform were meant to have a decision-power higher than the President? Or should the vote to be conceived of only as a party's internal procedure before the vote of confidence in the Parliament?

Actually, the high degree of support (80%) in favor of the new Executive that the vote held on 3 September revealed made all these questions less relevant for the final outcome. However, it is still unclear what would have happened in case of a different

37 Costantino Mortati, *Istituzioni di Diritto Pubblico* (CEDAM 1952). This point and the way it should be framed with regard to the current government crisis has been addressed in Beniamino Caravita, 'Governi Conte: aspetti problematici di diritto costituzionale' (2019) 5 *Osservatorio Costituzionale*.

result, and it is certainly an issue that should be better considered given the increasing relevance of forms of digital democracy both in Italy and worldwide. Notably, Italian law-makers should try to assess whether online consultations pertain to internal party democracy, as foreshadowed in art. 49 IC, or to the provisions on the formation of the Executive (art. 92-94 IC). Until now, the President of the Republic's conduct has demonstrated the lack of institutional relevance of the online vote; an approach to which the M5S seemed to agree, as its leadership mostly understated the voting moment and often underscored the will of ensuring loyal cooperation among state-powers. Nevertheless, this still remains a potential open challenge for the endurance of the Italian legal system.

B. Dismissing the Executive

If one tenth of the MPs of a House sign a motion of no-confidence, the Executive is obliged to resign (art. 94.5 IC). Should this happen, the President of the Republic has to call for consultations in order to verify whether another parliamentary majority exists in favor of another Executive and, lacking this majority, he must call for new elections. This is the way the Italian Constitution envisages the procedure for managing parliamentary crises of government. Nevertheless, throughout Italian institutional history, the great majority of government crises have been extra-parliamentary. This means that the resignation of the Executive did not derive from a vote of no-confidence but from other factors unrelated to parliamentary procedures, such as internal disagreements in the government coalition. Although Presidents of the Republic have generally tried to 'parliamentarize' crises, on only very few occasions a final vote of no-confidence has been observed.[38]

During the development of events in the case of the 2019 crisis, on 20 August, Prime Minister Conte participated in the Senate's session for his Communications to the House and expressed his disapproval of the actions of the Minister of the Interior. As they had never been allies, Conte blamed Salvini for lacking political and constitutional culture, accusing him of having initiated the crisis when the drafting of the budget act was upcoming and the constitutional amendment procedure for reforming the composition of the Parliament was in the delicate phase of the final vote. Salvini, who has still not resigned from his office as minister, replied with a brief speech rebutting the accusations and, in turn, accusing Conte of being more interested in saving his office than in fulfilling the national interest; confirming Lega's Euroscepticism, he also accused Conte of being a slave of the European Union, presented as 'a just master'.[39] Finally, he showed a rosary and invoked the protection of the Virgin Mary. Soon after this, he left the House. In a coup de theatre,

38 A vote of no-confidence has only terminated the Executive in 1998 and in 2008.

39 Here he cited Cicero: 'liberty is not the freedom of living under a just master, but of no master at all'.

however, while MPs were declaring their positions before the vote on the motion, it was announced that the motion of no-confidence had been withdrawn. In spite of this, Conte decided to resign *motu proprio*, and the government crisis was officially begun when he formalized his resignation to the President of the Republic, Sergio Mattarella, a few hours later.

The 2019 government crisis, therefore, proved innovative because it was not fully extra-parliamentary, but there have been some attempts to frame it as a parliamentary one. Actually, it was not extra-parliamentary, because Conte explicitly explained his reasons for the resignation to the Parliament (namely, in front of the Senate), but it was also not parliamentary, as a vote of no-confidence did not occur. Quite uniquely, it probably was a case of a semi-parliamentary crisis of government.

It should furthermore be stressed that Conte's *motu proprio* resignation and the withdrawal of Lega's motion of no-confidence avoided the system facing a huge constitutional law challenge: should the motion have been voted on and rejected due to the vote of a parliamentary majority different from the one having supported the Executive until then, would the Prime Minister have been obligated to resign? Although this risk can be assumed to have been the main political reason for the motion's withdrawal, since Lega was evidently willing to hamper the creation of a new majority, procedurally, the lack of the motion could have created a constitutional uncertainty because the Prime Minister's resignation is effective only when the President of the Republic accepts them, whilst on the present occasion, Conte only announced his resignation during his Communication to Parliament, but nothing had been formalized at this stage. On this same point, the reasons for not having determined the termination of the Executive through the resignation of all the Ministers appointed among Lega's members still remains unclear. Indeed, this would have resulted in the same aim Lega pursued through the motion of no-confidence, but without risking the negative vote of a PD-M5S majority. Two explanations, fully political, may be put forward: either it was a late attempt to restore parliamentary centrality after 14 months of Executive supremacy, or it was a way to threaten the M5S, counting on the fact that the M5S would not risk a new election and would instead negotiate a new coalition agreement in which Lega might have had greater powers.

Relevant also is the way the President of the Republic intervened to solve the government crisis, paving the way to the appointment of the M5S-PD Executive. Indeed, soon after the first round of consultations on 22 August 2019, Mattarella delivered a short but meaningful speech stating that he excluded the possibility of an exploratory mandate, as well as of a care-taking government, and that should a new coalition fail to be formed, he would called for new elections. This speech actually relied on a specific interpretation of art. 88 IC regarding the power to dissolve the

Parliament, conceiving it not as an act only formally presidential – and substantially of the Executive – but as the outcome of an *extrema ratio* decision that the President should only take lacking other alternatives and not in order to appease political forces. In this way, President Mattarella also put an end to the unconventionality having characterized the crisis until that moment, clarifying that if the President is not bound to dissolve the Parliament on request of the Prime Minister, *a fortiori* he is not bound to do so on request of a Minister.

C. The Role of the President of the Council of Ministers

In the Italian system, the Executive is composed of the President of the Council and the Ministers who together form the Council of Ministers (art. 92). In line with this definition, with regard to the action of the Executive, the PCM is conceived as a *primus inter pares* tasked with constitutional duties to conduct and hold responsibility for the general policy of the Executive, as well as to ensure the coherence of political and administrative policies, by promoting and coordinating the activity of the Ministers (art. 95 IC). This set of duties was then confirmed in the 1988 Act on the Executive's activity and the functioning of the Prime Minister's Office.[40] Respecting the collegiality of the Executive, and, moreover, when it is grounded on a government coalition, the PDC therefore cannot unilaterally determine the action of the Executive which emanates from the determinations of the Council of Ministers.

When Giuseppe Conte was appointed as the PDC, some skepticism arose around his possibility to comply with these duties because of the peculiar agreement on which the government coalition was grounded, due to the fact that only at a later stage the M5S and Lega agreed to appoint him as the PDC and that both leaders of the parties in coalition, Di Maio and Salvini, were appointed as Vice-PCMs, serving respectively as the Minister of Economic Development and the Minister of the Interior. On several occasions, furthermore, both underscored that they conceived Conte as 'an executor' of the Contract, a role that the oppositions soon interpreted as a mere figurehead and protested that this infringed on the relevant constitutional provisions, believing that the way Conte was selected could have limited his margins of autonomy in coordinating the action of the Executive.

On the contrary, Conte proved able to obtain the respect of his European homologues and, at the domestic level, to carve out some space for himself and to ensure the highest possible respect for the procedures. The Italian Russia-gate and the vote on the TAV are noteworthy examples.

In spring 2018, a voice recording published on a website denounced the attempt to conclude a secret agreement in the hall of the *Metropol* hotel in Moscow according

40 Act n°. 400, 23 August 1988.

to which some Russian oligarchs would have guaranteed discounted oil imports from Russia, regardless of EU sanctions, with the consequent redistribution of the amount earned from the discount among several parties, including Lega.[41] Apart from the possible penal consequences,[42] this affair impinged both on parliamentary procedures and on the internal dynamics of the government coalition, moreover because the M5S has consistently trumpeted its electioneering 'honesty' as a leading principle of its political action. Therefore, when Salvini refused to report to the Parliament in spite of the explicit request coming from the Partito Democratico, implicitly endorsed by the M5S, it was Prime Minister Conte who, on 24 July 2019, presented official Communications to Parliament on the potential scandal. In reaction, several MPs of the M5S deserted the Assembly as a sign of protest against the lack of respect the Minister of the Interior was demonstrating by refusing to appear in front of Parliament. The disrespect toward a fundamental check mechanism of the parliamentary form of government also represented a turning point for the endurance of the government coalition Conte mentioned during his final speech before resigning; on that occasion, he also blamed Salvini for his lack of support in preparing the Communication and for failing to approach him personally about the matter. The Prime Minister's decision to face Parliament on behalf of the Minister of the Interior evidently showed his desire to confirm an independent standing and to comply with the formal procedure, notwithstanding the behavior of Lega's members of the Executive. He almost followed the same line of reasoning when decided to 'parliamentarize' the crisis and to resign *motu proprio*, regardless of the withdrawal of the motion of no-confidence.

Conte also proved independent from M5S's behavior. Indeed, the M5S has always declared its absolute opposition to the construction of the high-speed railway between Lyon and Turin (the so-called TAV) and, while the Council of Ministers was discussing whether to continue with the construction, the M5S presented a motion[43] to reject the required authorization for the construction project. On 7 August, this motion was voted on, together with 5 other motions, including one proposed by Lega in favor of the construction. Before the vote, the Premier, patently opposing to the behavior of the main party that had supported his appointment, declared his support of the TAV, adding that impeding it would have cost more than finishing the construction, which had already been ongoing for several years.

41 Only a few months before (July 2018), the Court of Cassation had condemned Lega for the embezzlement of public funds from 2008-2010 and ordered it to repay 49 million euro.

42 The Public Prosecutor of Milan opened an investigation into international corruption which is still pending as of October 2019.

43 Motions are acts of political orientation through which the Parliament declares its preferences to the Executive, which, however, is not bound by them.

D. The Immunity and The Migratory Issue

MPs are not accountable for the opinions expressed or votes cast in the performance of their function and, with the exception of cases of *flagrante delicto* or when a final court sentence is enforced, they cannot be submitted to personal or home searches, arrested or otherwise deprived of personal freedom unless an authorization is provided by the House they belong to (art. 68 IC). Similarly, an authorization from Parliament is required in order to submit the PCM or a Minister to normal justice for crimes committed in the exercise of their duties (art. 96 IC). The Constitutional Act n. 1 of 16 January 1989 has further clarified the procedure for this authorization and has stated that it should be denied only in those cases in which the action of the member of the Executive was aimed at protecting the national interest (art. 9.3).[44]

These provisions represented the framework for the issue concerning Matteo Salvini in his role as the Minister of the Interior with regard to the management of immigration. Indeed, respecting the political program presented during the electoral campaign, soon after the appointment, Salvini started to implement through the so-called security decrees the 'Closed harbors' policy,[45] according to which Italy denied harboring rights to rescue ships, mainly managed by humanitarian NGOs, operating between the two shores of the Mediterranean in order to assist people trying to illegally immigrate into Europe. The first implementation of this policy occurred when the Diciotti ship of the Italian Coast Guard assisted 190 migrants encountering serious difficulties in the middle of the sea. Although the Minister of Transportation, Danilo Toninelli, instructed the ship to reach Catania's harbor, the Minister of the Interior barred the migrants from disembarking, claiming that other European countries needed to examine their requests for international protection. In the end, the Italian Episcopal Conference, Albania and Ireland decided to accommodate the migrants, who were finally allowed to disembark after 10 days. Meanwhile, on 25 August, the Minister of the Interior received a notice of investigation from the Public Prosecutor of Agrigento for abduction, illegal detention and abuse of power. Acknowledging the notice and broadcasting it live on facebook, Salvini called on popular support and declared that he was merely protecting Italian borders. The Prosecutor then submitted to the Senate the request of authorization to open the investigation, according to the abovementioned procedure. In the request, he underlined that the Constitutional Court had already clarified that the management of immigration should balance the national interest and respect the spirit of the Constitution, the principle of rationality, international law to which Italy is bound, and the inviolability of personal freedom guaranteed in art. 13 IC, which applies to citizens and foreigners without distinction. In the Prosecutor's opinion, therefore, Salvini had violated the

44 For further details on immunities in Italy, see Alessandro Pizzorusso, 'Immunità parlamentari e diritti di azione e di difesa', (2000) 123 *Il Foro Italiano* 301.

45 The decrees-law then passed into law with the Acts n°. 132, 1 December 2018 and n°. 77, 8 August 2019.

migrants' personal freedom, also guaranteed in art. 5 of the European Convention on Human Rights, as well as several international provisions requiring states to shelter migrants in the absence of any justification deriving from the need to protect an overriding, endangered national interest. On 20 March, however, the Senate refused the authorization (237 votes in favor, 61 against). This 'lifeboat' the Senate provided to the Minister allowed him to keep going on this track, so that several other rescue ships were prevented from harboring, with severe consequences for the migrants on board, included the notorious case of the Sea Watch 3.[46] The decision Senators made by confirming Salvini's immunity, however, is extremely relevant because it seems to rely on a very permissive interpretation of the Constitution and of the relevant constitutional jurisprudence, up to the point that it resembles more an attempt of the 'political caste' to protect one of its members than a mere evaluation of the criteria for authorizing the prosecution.

Beyond the issue of immunity, some considerations may be introduced with regard to respecting the Constitution and its spirit. First is the question of whether the kind of act used for implementing the 'Closed harbors' policy, the decree-law, is consistent with the Constitution. Indeed, this kind of decree should be issued only in case of necessity and urgency (art. 77 IC), a condition that, according to several scholars, could not be attached to the migration crisis or, better, to the fields the decrees ruled in order to manage the crisis, such as citizenship, refugee sheltering, public order and security, and international terrorism.[47] Also, the fact that all these different fields were considered in a single decree-law raised some doubts, since a consolidated, domestic constitutional jurisprudence exists which grounds the evaluation of the suitability of a decree-law on its homogeneity.[48] Indeed, when approved under other circumstances, this kind of decree was adjudicated as an infringement of the legislative power of the Parliament in a way that cannot be corrected through the act passing the decree into law.[49] Second, the general approach connecting migration to public security is grounded on the stereotype 'the foreign as the enemy' which does not correspond to any statement in the Italian Constitution, which instead constantly protects the

46 Apart from the final decision of the ship's captain, Carola Rackete, to dock the ship, regardless of the ministerial prohibition, this case is also noteworthy because Rackete's decision followed the rejection of her appeal to the European Court of Human Rights. She lodged an urgent request to the Court (according to art. 39 of the Rules of the Court) claiming that migrants were detained on board without legal basis, suffering inhuman and degrading treatment, with the risk of being returned to Libya without evaluation of their individual situation. Although recognizing the suffering, the Court did not grant the applicants' requests to be disembarked, but requested the Italian Government 'to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary. As far as the 15 unaccompanied minors were concerned, the Government was requested to provide adequate legal assistance (e.g. legal guardianship). The Government was also requested to keep the Court regularly informed of the developments of the applicants' situation.' (see, *Rackete and Others v. Italy*, n. 32969/19).

47 On these doubts, see Alessandra Algostino, 'Il decreto 'sicurezza e immigrazione' (decreto legge n. 113 del 2018): estinzione del diritto di asilo, repressione del dissenso e diseguaglianza' (2018) 2 *Costituzionalismo.it*; Marco Ruotolo, 'Brevi note sui possibili vizi formali e sostanziali del d.l. n. 113 del 2018 (c.d. decreto sicurezza e immigrazione)' (2018) 3 *Osservatorio costituzionale*.

48 See Constitutional Court, D22/2012, D34/2013, D32/2014, and D154/2015.

49 Constitutional Court, D29/1995.

human being as such, i.e. through the right to asylum (art. 10.3 IC). Even accepting the need to protect the state from illegal immigration, it is hard to see the Constitution as consistent with an approach which denies the right to harbor while exploring the possibility of the individual applying for international protection as a refugee or entering the country according to other forms of legal migration.

All these controversial elements have been only partially acknowledged by the President of the Republic. Indeed, the President of the Republic can 'send Parliament a reasoned opinion to request that an act scheduled for promulgation be considered anew', but if the Houses again approve the act, it shall be promulgated (art. 74 IC). However, the President decided not to send back the acts passing into law the decrees but only to accompany the promulgation with a message reminding the Executive of the need to implement them without disregarding international and European commitments.

E. The Approval of The Budget Act

The approval of the budget act entrenches domestic provisions with procedures agreed on according to Italy's status as an EU founding member. Indeed, Parliament shall pass the budget and the financial statement every year (art. 81 IC) according to a timeline defined at the EU level. Notably, by 10 April, the Executive must present the Finance and Economy Document (DEF) to Parliament, exposing the economic and financial situation of the country and proposing the Executive's goals; by the end of April, the Executive has to present the Stability Program and the National Reform Program, which are included in the DEF, to the Council of the EU and to the EU Commission. At the beginning of the summer, the latter will then send their recommendations to the Executive, which has to consider them, together with the evolution of the economic situation which has meanwhile occurred, when it presents the DEF Review Note (NADEF) by 27 September. Following this programmatic phase, the Executive has to propose the budget bill to Parliament by 20 October, which must be approved by 31 December; finally, by the end of January, the Executive must propose all the bills potentially needed for implementing the content of the budget act.

According to an amendment to the Italian Constitution introduced in 2012 to art. 81 in order to comply with EU economic and financial requirements,[50] the budget act must provide for a balanced budget, and indebtedness should be allowed only under exceptional circumstances and after parliamentary authorization. Furthermore, since 2011, the Italian budget act includes the so-called safeguard clauses meant to ensure the EU approval of the budget by promising to reduce the effects of the budget deficit through increasing the VAT (Value Added Tax) should the national income not

50 See Constitutional Act n. 1, 20 April 2012. For a critical appraisal of this Act, see Franco Bilancia, 'Note critiche sul c.d. 'pareggio di bilancio'' (2012) 2 *Rivista dell'Associazione Italiana dei Costituzionalisti*.

increase in the expected time.[51] In 2019, therefore, the budget act promised a VAT increase of 2 points in 2020 and 2021, at the same time increasing the state expense by reducing the retirement age and introducing the so-called citizenship income (*reddito di cittadinanza*).[52] Apart from any possible evaluation of the effectiveness and efficacy of these measures, their impact on the state budget should be underscored, as well as the fact that they risk a VAT increase becoming unavoidable in the 2020 budget act. The 'VAT risk' connected to the approval of the budget act by an Executive in charge of the ordinary legislation only – who is therefore less responsible in front of the electorate – was exactly the main reason M5S and PD put forward to justify their coalition.

Under a constitutional perspective, the approval of the 2019 budget was relevant also because of the procedure. In principle, according to the Italian system, the budget act is introduced by the Executive and goes through a parliamentary debate during which several amendments are proposed. Then, the Executive provides for a consolidated text in the form of the so-called maxi-amendment put to a vote, together with a motion of confidence. In the case of the 2019 budget act, though, there was no debate, and the text on which the motion of confidence was put was provided to the MPs only moments before the vote. Because of such an unconventional procedure, 37 MPs appealed to the Constitutional Court for a conflict of attribution between the powers of state. They contested the lack of provisions aimed at including the corrective measures Brussels requested from the Executive and the bias in the procedure, which, according to their understanding, denied any role to the parliamentary opposition. The appeal was therefore aimed at re-establishing the correct exercise of the competencies constitutionally attributed to Parliament in art. 72 IC and not at requesting the annulment of the budget act. In a noteworthy decision, the Court stated that, although the procedure for carrying out parliamentary activity on the state budget bill for 2019 has aggravated the problematic aspects of the practice of maxi-amendments approved with a vote of confidence, it cannot ignore that it took place under the pressure of time due to the long dialogue with the European institutions. Furthermore, the Court said that the discussion occurred in the previous phases on texts merged at least in part into the final version of the maxi-amendment, and thus the usual procedure was not completely disregarded. According to the Court, therefore, 'In these circumstances, there is no abuse of the legislative procedure that would lead to those manifest violations of the constitutional prerogatives of the parliamentarians who rise to admissibility requirements in the current situation. This makes the present conflict of attribution inadmissible. Nevertheless, in other

51 Act n°. 214, 22 December 2011.

52 According to this measure, Italian citizens who are unemployed or with a minimum income – those who can be considered in the category of 'poor citizens' – will receive a pre-defined amount of euros per month for a pre-determined period. At the same time, an attempt to restyling the Italian employment system by introducing the position of 'Navigators', state officers tasked with supporting unemployed people in finding a job, was made.

situations such a compression of the constitutional function of parliamentarians could lead to different outcomes'.[53] This compromise in the Court's decision sounded a warning to the Executive, similar to the one the President of the Republic included in his speech on New Year's Eve, when Mattarella underscored the limitations which had occurred in the parliamentary contribution to the law-making process and the need for the institutions to find better ways of dialogue and discussion.

III. Final Remarks

As the analysis above demonstrates, 2018 can be considered a touchstone for the evolution of the Italian political system, given the conclusion of the quasi-bipolar experience, the instability of the center-right coalition, and the introduction of a widespread unconventionality in constitutional interpretation, openly admitted and considered as a personal pride by party's leaders.[54]

Indeed, the Executive gathered political forces that no one would have expected to be able to form a coalition, particularly because Lega participated in an electoral coalition with Forza Italia and Fratelli d'Italia. Furthermore, this entailed the attribution of the executive functions to political forces not belonging to the mainstream political parties and ideologies and which have previously had only a marginal familiarity with these functions.[55] Constitutionally, it is relevant that these forces sealed their coalition through a contract, a tool previously unknown to the Italian system of forming coalitions. Although lacking binding force, this 'privatization' of the procedure for forming the government coalition infringed previous conventions in this regard in order to give more relevance to the parties' leaders than to those constitutionally entitled (i.e. the President of the Republic and the President of the Council of Ministers). In fact, Conte – at least until the very last months of the Executive's life – seemed to be more an arbiter between two pugnacious disputers than a figure unifying and managing the Executive's activities. This was evident since the first phases of the formation of the Executive, when Conte could not negotiate with the President of the Republic with regard to the appointment of Savona as the Minister of Economy, but could only resign when facing with the impossibility of imposing on Mattarella the decision made elsewhere by Di Maio and Salvini.

This is a clear breach in the usual conventions related to this phase of institutional life. Usually, consultations occur discreetly behind the closed doors of the President's

53 Constitutional Court, 10 January 2019, *Ordinanza*, 17. A list of comments, in Italian, is provided in the online review *Federalism.it*, 4, 2019.

54 During the declaration to the Senate the appointed PDC made asking for the confidence, Conte explicitly recognized the innovative approach of the method used for defining the political program and the list of Ministers and clarified that it was meant to ensure transparency and accountability.

55 Notably, Lega already participated in government coalitions during the Berlusconi era, but only as a minority component of the latter. M5S, instead, was participating in the Executive for the first time.

office *alla Vetrata*, which allows the negotiation of both the Ministers' appointment and the content of the Executive's program to be presented for the vote of confidence. The intense use of mass media and social networks during this period certainly increased the transparency of the whole process, but also made any potential negotiation more difficult. Furthermore, because of this lack of discretion, the President of the Republic was put in the unconventional position of publicly explaining the reasons for his refusal to appoint Savona, continuing in the newly introduced tradition of presidential explanations which had already occurred when he tried to negotiate potential government coalitions in cooperation with the Speakers of the Houses and which continued during the formation of the M5S-PD government coalition in 2019.

In the way the 'Executive of Change' terminated his activities and due to the decision of the incoming Executive to draft a common political program instead of a contract, we can assume the latter is not going to become a new practice in establishing a coalition agreement, at least while the electoral system remains as it is.[56] Nevertheless, the way 'the Change' has been pursued, especially with regard to the prerogatives of Parliament, underscores the possibility of entrenching in Italian parliamentarism a completely different set of conventions and practices that may highlight the beginning of an erosion of the form of government in which the Houses may be turned in mere ratifiers of the coalition agreement. In general, it can be observed that the role of Parliament was diminished – following a pre-existing Italian trend[57] – and it was turned into a hostage of the Executive's partners through the tools of the motion of confidence, having reached its apical application on the occasion of the vote for the budget act and of the so-called security decrees. This trend couples with the implicit accusation of redundancy evident in the repeated attempts to reduce the number of MPs – without restructuring the way they should be linked to the electorate and ensure people's representation – as a spending review policy.[58] This redundancy has been increased by the constant communications that the parties' leaders appointed in the Executive established with the people through social networks, so that the political confrontation often occurs more on Facebook than in the Houses.

The role of the President of the Republic, instead, is probably gaining new visibility and relevance. For instance, in the circumstance of the refusal to appoint Savona to the Ministry of Economy, Mattarella proved that the President has not a merely symbolic role, but a role of guarantee for the system and for the population, given

56 The approval of a new electoral act is in the Executive's agenda and the option of re-introducing the proportional system is under discussion. Should this happen, future coalitions may consider signing 'contracts' to define their programs, thus putting both scholars and decision-makers in the condition of considering whether and how to frame them within the institutional system.

57 On this, see Carlo F. Ferrajoli, 'L'abuso della questione di fiducia. Una proposta di razionalizzazione', (2008) 2 *Diritto pubblico* 613.

58 Such a reduction has been finally approved at the very beginning of the Conte *bis*.

the consequences in terms of reputation that the appointment of Savona could have caused to Italy in dialogue with EU institutions. Similarly, during the consultations that led to the appointment of the Conte *bis* the President demonstrated his decision-making power with regard to the dissolution of Parliament. In brief, through this approach, Mattarella fully respected the duty to ensure the harmonic functioning of the institutional framework the Constitutional Court recognized to his office.[59]

This renewed relevance of the President's office is likely at the origin of the repeated requests for elections that right-wing forces are making, in spite of the full compliance with the parliamentary form of government of the Conte *bis*. Indeed, surveys (and the trend in European and regional elections) show that the popular political orientation is in favor of right-wing forces and, with only 2 years until the end of President Mattarella's term, an election may increase their presence in Parliament and ensure that their will prevails when the time comes to elect his successor.

The political turmoil also makes it possible to question whether the government crisis should be considered as the first sign of an imminent crisis of the form of government and, in a broader sense, of constitutional values. Several among the latter were in fact disregarded during the 14 months of life of the Executive of Change. For instance, the principle of gender equality (art. 51 IC) failed to be respected both in the electoral lists and in the Council of Ministers (among 18 Ministers, there were only 6 women); an approach totally confirmed in the Conte *bis*, which includes 7 female Ministers of 21. Relevant as well is the disregard toward the principle of secularism (art. 7, 8 and 19 IC). Indeed, throughout the electoral campaign and, increasingly, during political meetings he organized as Minister of the Interior, Salvini showed religious symbols, namely a rosary, and mentioned religious elements to give strength to his ideals. He invoked Christian values and the protection of the Virgin Mary for his activities, and the more he was attacked for his anti-immigration policy, the more he relied on this rhetoric. Although Italy has had a religiously-inspired majoritarian party, the Democrazia Cristiana, for almost 50 years, the idea that the State and the Church are independent has always permeated politics, with references to religious values having disappeared with political changes at the beginning of '90s. Therefore, Salvini's approach to such a sensitive issue again demonstrates the unconventionality of the 'Executive of Change' and raises the question of whether religion is another tool Italian populists will continue to use in order to gather consensus or a sign that politics cannot continue to be indifferent to religion because it is pervasively permeating (once again) the public sphere.

In conclusion, it is possible to infer from the analysis above how consistently the 'Executive of Change' was proposing a vision for Italy in clear opposition with the

59 Constitutional Court, D1/2013.

pillars on which it was built at the end of WWII:[60] secularism, Europeanism, human rights and dignity protection are only the more evident. The Conte *bis* political program has instead confirmed the will of Italy to continue to be an integral part of the EU and to escape from the most dangerous influences of populism. Auspiciously, it is worthwhile keeping in mind that 'All citizens have *the duty to be loyal to the Republic* and to uphold its Constitution and laws. Those citizens to whom public functions are entrusted have *the duty to fulfil such functions with discipline and honor*, taking an oath in those cases established by law' (art. 55 IC).

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60 It is worth remembering that Italy suffered harsh consequences from the war and, from an institutional perspective, was able to overcome them only thanks to a well-drafted Constitution entrenching values such as the protection of the inviolable rights of the person (art. 2 IC), respect of international law with a specific mention of the rights of foreigners (art. 10 IC), and the rejection of war as an instrument of oppression or of dispute resolution (art. 11 IC).

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

L'état d'urgence et la Cour Constitutionnelle Turque

State of Emergency and Turkish Constitutional Court

Olağanüstü Hâl ve Türk Anayasa Mahkemesi

Ozen Ulgen Adadag[1]

Résumé
Pendant la dernière proclamation de l'état d'urgence, à la suite de la tentative avortée du coup d'État militaire du 15 juillet 2016, le régime d'état d'urgence en Turquie a démontré ses limites et ses insuffisances, au premier rang desquels l'absence d'un contrôle judiciaire effectif. Cet article a pour but d'examiner l'approche de la Cour constitutionnelle turque de l'état d'urgence et analyser en quoi elle constitue ou non une voie effective pour la protection des libertés et l'état de droit durant et après cette période. En se basant sur les deux modes de voies de recours devant le juge constitutionnel, cet article s'articulera autour de deux axes d'analyse : la jurisprudence rendue dans le cadre d'un contrôle normatif a posteriori des normes et celle rendue dans le cadre du recours individuel. On a constaté que le principal problème de la Cour constitutionnelle est de retarder l'examen des requêtes.

Mots-clés
La justice constitutionnelle, la Cour constitutionnelle, l'état d'urgence, les décrets-lois en état d'urgence, protection des droits fondamentaux en état d'urgence

Abstract
After the attempted coup d'état in 15 July 2016, the Council of Ministers, chaired by the President declared a state of emergency which was extended seven times and will last until 18 July 2018. During this period, the Council of Ministers, chaired by the President issued thirty-two emergency decrees. This study examines the jurisprudence of the Turkish Constitutional Court on the measures in a state of emergency. In the first part, the decisions of the Constitutional Court on normative control are discussed. The second part focuses on the decisions of the Constitutional Court on individual applications. In both cases, the main problem of the Constitutional Court is to delay the examination of the applications. Therefore, the question of the effectiveness of the Court in emergency period has become controversial.

Keywords
Constitutional justice, Constitutional Court, emergency state, emergency decrees, fundamental rights

Öz
15 Temmuz darbe girişiminin ardından, Cumhurbaşkanı başkanlığında toplanan Bakanlar Kurulu, yedi kez uzatılan ve 18 Temmuz 2018'e kadar süren bir olağanüstü hâl ilan etmiştir. Bu süre içerisinde, Cumhurbaşkanı başkanlığında toplanan Bakanlar Kurulu otuziki olağanüstü hâl kanun hükmünde kararnamesi yayımlamıştır. Bu çalışma Anayasa Mahkemesinin olağanüstü hâl tedbirlerine yönelik içtihadını incelemektedir. Birinci kısımda, Anayasa Mahkemesinin norm denetimi sonucunda verdiği kararlar ve özellikle Mahkemenin yerleşmiş içtihadından dönmesinin sonuçları, ikinci kısımda ise bireysel başvurular üzerine verdiği kararlar ele alınmıştır. Her iki durumda, Anayasa Mahkemesinin temel sorununun başvuruları incelemeyi geciktirmesi olduğu tespit edilmiştir. Bu nedenle, olağanüstü hal döneminde Anayasa Mahkemesinin etkililiğinin tartışmalı hale geldiği sonucuna ulaşılmıştır.

Anahtar Kelimeler
Anayasa yargısı, Anayasa Mahkemesi, Olağanüstü hâl, Olağanüstü hâl kararnameleri, Temel Haklar

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Extended Summary

After the attempted *coup d'état* on 15 July 2016, the Council of Ministers, under the chairmanship of the President of the Republic, declared state of emergency which was extended seven times and would last until 18 July 2018, approximately two years. The Turkish constitution distributes the powers of state of emergency between the legislative and the executive with a concentration of power in favor of the latter but excludes effective judicial review thereof. This study examines the case law of the Turkish Constitutional Court (TCC) on the emergency measures and analyzes how it constitutes or not an effective way for protection of rights and freedoms and the rule of law during and after this period. A year after the end of the state of emergency, it may be easier to understand the stance of the TCC on the emergency regime.

In the first part, the decisions of the Constitutional Court on normative control are discussed. During this period, the Council of Ministers, chaired by the President, issued thirty-two emergency decrees. According to the Constitution, executive power was entitled to issue emergency decrees without authorization of the parliament but these decrees should be submitted to the Turkish Grand National Assembly on the same day for approval. There was a time limit for approval (30 days) in the Rules of Procedure of the Assembly, but no consequences were prescribed for non-compliance with this rule. Thus, parliamentary control over emergency decrees was not effective. Moreover, the Constitution (art. 148) excludes the emergency decrees from judicial review by the TCC.

However, before the last state of emergency, the TCC qualified all norms it examined notwithstanding their denominations. According to the TCC, the scope of emergency decrees should be limited with the purpose, region and the duration of the state of emergency proclamation. If they exceeded these limits, they would be qualified as ordinary decrees and be subject to constitutional review. The most important result of this approach was to prevent emergency decrees from amending ordinary legislation. Unfortunately, the TCC departed from its previous case law and ruled that it did not have the authority to control emergency decrees even if they exceeded constitutional limits. The new approach of the TCC may be controversial, but it is only a question of preference in the method of interpretation. The literalistic approach favored by the TCC caused the deterioration of legal order. Within the same emergency decree or statute, some provisions are meant for the ordinary period while others are for the period of emergency, but it is unclear which.

On the other hand, the TCC is entitled to control these decrees if they are approved by Turkish Grand National Assembly and become law. Only five laws approving the emergency decrees were published in the Official Gazette in 2016. Most of the remaining approval laws were published in the Official Gazette on 8 March 2018. By

its inaction or omission, whether intentional or not, the Parliament merely delayed the constitutional review of the measures taken by emergency decrees. Since Turkish law does not impose any procedural time limit on constitutional judges to examine and decide on actions for annulment, the Court remained silent for a long time. One year after the end of the state of emergency, in July 2019, the TCC examined five of the submitted laws and annulled some of their dispositions. However, two months later, none of these judgments were published in the Official Gazette.

The second part focuses on the judgments of the Constitutional Court on individual applications. According to the Constitution, "everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the ECHR which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted." As an ordinary remedy, a new *ad hoc* administrative commission was created by emergency decree no. 685 of 2 January 2017. Although this Commission issued its first decision on 22 December 2017, the TCC, as early as July 2017, rejected all applications lodged directly before it on the ground that the applicants had not exhausted ordinary remedies. Thus, according to statistics, 86 percent of the individual applications lodged during the state of emergency were examined by the TCC. Lastly, judgments of the TCC in individual applications are analyzed in comparison with the case law of the ECtHR as to their timing and content.

In both legal remedies, the main problem of the Constitutional Court was delaying the examination of the applications. Therefore, the question of the effectiveness of the Court during emergency period has become controversial.

L'état d'urgence et la Cour Constitutionnelle Turque

Contrairement au régime français, l'état d'urgence est un état d'exception qui dispose en Turquie d'un fondement juridique de rang constitutionnel. Il est en effet un des états d'exception déterminé de façon détaillée par la Constitution turque de 1982, notamment dans ses articles 15, 119[1], 125 et 148. Ces dispositions constitutionnelles définissent précisément les conditions nécessaires pour déclarer, approuver et proroger un état d'urgence. Elles sont complétées par une loi spéciale relative à l'état d'urgence laquelle fixe le cadre général applicable aux limitations ou suspensions temporaires des droits et libertés fondamentaux, et ce, conformément aux principes énoncés à l'article 15 de la Constitution[2]. Selon cet article, en cas d'état d'urgence, l'exercice des droits et libertés fondamentaux peut être partiellement ou totalement suspendu ou des mesures contraires aux garanties constitutionnelles peuvent être arrêtées dans la mesure requise par la situation (proportionnalité) et à condition de ne pas violer les obligations découlant du droit international. Inspiré par l'article 15 de la Convention Européenne des Droits de l'Homme (Convention EDH), cet article constitutionnel énonce ainsi les droits et libertés qui ne peuvent souffrir aucune dérogation ou limitation en période d'urgence tels que le droit à la vie, le droit à l'intégrité physique et spirituelle, la liberté de religion, de conscience et de pensée, la non-rétroactivité des peines et la présomption d'innocence jusqu'à la condamnation définitive.

Strictement encadré par la Constitution, le régime d'état d'urgence semble ainsi disposer, en Turquie, de garanties nécessaires et suffisantes pour assurer la protection des droits de l'homme. Cependant, la récente proclamation d'un état d'urgence, à la suite de la tentative avortée du coup d'État militaire du 15 juillet 2016 démontre, que dans la pratique, ces garanties constitutionnelles sont loin d'être suffisantes[3]. Déclaré le 20 juillet 2016 par le Conseil des ministres réunis sous la présidence du Président de la République[4] et applicable à partir du 21 juillet 2016 sur l'ensemble du territoire,

1 Précédemment le texte constitutionnel turc régissait et dissociait le régime de l'état d'urgence (articles 119, 120 et 121) et le régime de l'état de siège (article 122). Par la révision constitutionnelle du 16 avril 2017, qui est entrée en vigueur le 9 juillet 2018, l'état de siège est abrogé et les dispositions concernant l'état d'urgence ont été reformulées. Désormais, seul l'article 119 détermine le régime d'état d'urgence. La nouvelle disposition ne fait plus de distinction entre différents types d'états d'exception. Selon le nouveau texte, un état d'urgence peut être proclamé en cas de guerre, de situation nécessitant la guerre, de mobilisation, de soulèvement, de tentative vigoureuse et réelle d'atteinte à la patrie et à la République, d'actes de violence généralisés d'origine intérieure ou extérieure menaçant l'indivisibilité du pays et de la nation, d'actes de violence généralisés visant à la destruction de l'ordre constitutionnel ou des libertés et droits fondamentaux, de graves perturbations de l'ordre public par des actes de violence, de catastrophes naturelles, de pandémie dangereuse ou de crise économique grave.

2 La loi n° 2935 relative à l'état d'urgence, adoptée le 25 octobre 1983. RG. (*Journal officiel)* 27 octobre 1983.

3 Voir İbrahim Kaboğlu/ Christelle Palluel, "L'état d'urgence en Turquie à l'épreuve du droit européen des droits de l'homme", Revue trimestriel des droits de l'homme, 113/2018, p.7. Pour les insuffisances avant la dernière période d'état-d'urgence, voir Sevtap Yokuş, Avrupa İnsan Hakları Sözleşmesi'nin Türkiye'de Olağanüstü Hal Rejimi Pratiği ve Anayasa Şikayetine Etkisi, Seçkin, Ankara, 2017, pp.175-184 ; Zafer Üskül, Olağanüstü Hal Üzerine Yazılar, Büke, İstanbul, 2003; Mehmet Semih Gemalmaz, Olağanüstü Rejim Standartları, 2.bası, Beta, İstanbul, 1994, pp.387-389.

4 Décision n°. 2016/9064, du 20 juillet 2016, RG. 21 juillet 2016. A l'époque des faits, le régime politique de la Turquie était parlementaire et en conséquence l'organe exécutif était bicéphale ; le Président de la République et le Conseil des ministres. Durant la période d'état d'urgence, le régime politique de l'État est modifié par une révision constitutionnelle. Désormais, le Président de la République détient seul le pouvoir de proclamer l'état d'urgence.

l'état d'urgence a été approuvé et prolongé à sept reprises par la Grande Assemblée Nationale de Turquie (GANT). Il aura duré au total 728 jours, soit environ deux années[5]. Au cours de cette période exceptionnelle, le régime turc d'état d'urgence a démontré ses limites et ses insuffisances, au premier rang desquels l'absence d'un contrôle judiciaire effectif. Si en Turquie, la garantie juridictionnelle des dispositions constitutionnelles est assurée par la Cour constitutionnelle, instaurée par la Constitution de 1961[6], il n'est pas si surprenant que des juges jouent un rôle minimal pendant l'état d'urgence, et ce malgré la compétence de la Cour à statuer également sur les recours individuels depuis 2012, en plus de son contrôle de constitutionnalité à posteriori des normes par voie d'action et d'exception.

Aujourd'hui, un an après la fin de l'état d'urgence en Turquie et donc un an après cette effervescence politique et juridique qui a entrainé un enchainement conséquent d'actes et de réactions, il peut être plus aisé d'appréhender la position de la Cour constitutionnelle turque sur ce régime d'exception. Cet article a pour but d'examiner l'approche de la Cour constitutionnelle turque de l'état d'urgence et analyser en quoi elle constitue ou non une voie effective pour la protection des libertés et l'état de droit durant et après cette période. En se basant sur les deux modes de voies de recours devant le juge constitutionnel, cet article s'articulera autour de deux axes d'analyse : la jurisprudence rendue dans le cadre d'un contrôle normatif a posteriori des normes (I) et celle rendue dans le cadre du recours individuel (II).

I. Le contrôle normatif en état d'urgence : Les obstacles constitutionnels

Conformément à l'article 148 de la Constitution, quatre types de normes peuvent être soumises au contrôle de la Cour constitutionnelle : les lois de révision de la constitution, les lois, les décrets-lois et le règlement intérieur de la GANT. En l'espèce, l'acte juridique déclarant l'état d'urgence ainsi que l'acte d'approbation de cet état ne peuvent faire l'objet d'un contrôle judiciaire en raison de leur nature : le premier parce qu'il est rendu par le Conseil des ministres présidé par le président de la République et donc un acte administratif[7] et le second, parce que l'approbation de la proclamation de l'état d'urgence par la GANT est faite non par une loi mais par une décision parlementaire[8]. Ainsi, en temps d'état d'urgence, seules deux types de normes peuvent être effectivement contrôlées par la Cour constitutionnelle : les lois et les décrets-lois.

5 La dernière extension de trois mois avait débuté le 19 avril 2018 selon la décision de la GANT et le 18 juillet 2018 était le dernier jour de l'état d'urgence.

6 Voir Eric Sales, "La Cour constitutionnelle Turque", Revue de Droit Public, 2007, n.5, p.1263 et suites.

7 Un contrôle politique réalisé par le parlement est prévu à cette fin. Mais, ce contrôle ne sera pas effectif tant que l'exécutif détient la majorité au parlement. Voir Selin Esen, Karşılaştırmalı Hukukta ve Türkiye'de Olağanüstü Hal Rejimi, Adalet, Ankara, 2008, pp.274-276.

8 Une partie de la doctrine était favorable au contrôle de constitutionnalité de cet acte au motif qu'il est lié aux droits et libertés des individus. Voir Erdoğan Teziç, Anayasa Hukuku, 21. bası, Beta, İstanbul, 2016, p.73. Mais la Cour constitutionnelle a rejeté cet avis. E.1970/44, K. 1970/42, Kt.17.11.1970 et E.1996/20, K.1996/14, Kt.14.05.1996.

Cependant, les obstacles constitutionnels à ce contrôle juridique par la Haute Cour demeurent. L'article 148 précité, qui fonde la compétence de la Cour, exclut tout d'abord expressément les décrets-lois qui sont édictés en période d'état d'urgence du champ de compétence de la Cour ; ils ne peuvent faire l'objet d'un recours en inconstitutionnalité, ni quant à la forme, ni quant au fond (A)[9]. Si cette incompétence affecte de facto tous les décrets-lois pris au cours de cette période par le Conseil des ministres réuni sous la présidence du Président de la République, il n'en est pas de même des actes d'approbation de ces décrets-lois par la GANT, dont les délais et procédures d'approbation par l'Assemblée sont déterminés par son Règlement intérieur. De sorte que seul, l'acte d'approbation par la GANT, rendu sur la base de l'article 128 du Règlement intérieur de la GANT et qui prévoit que les décrets-lois en état d'urgence sont discutés et adoptés selon les règles de débat applicables à toutes les lois, peut être contrôlé par la Cour constitutionnelle (B).

A. Le revirement de la jurisprudence établie sur les décrets-lois en période d'état d'urgence

Comment prétendre à l'existence d'un contrôle de constitutionnalité des décrets-lois édictés en période d'état d'urgence alors qu'il existe une disposition explicite de la Constitution qui prévoit le contraire? La réponse est simple. La Cour constitutionnelle n'a jamais contrôlé ces décrets-lois sur le fond, elle s'est seulement contentée de qualifier et d'examiner la qualification de l'acte juridique soumis à son examen. Une telle situation s'explique, dans un premier temps, par l'esprit qui anime le texte constitutionnel lui-même et sur lequel se fonde la Cour, mais également, dans un second temps, par la méthode jurisprudentielle mise en œuvre par cette dernière et découlant de la théorie de la conversion.

En effet, la Cour constitutionnelle ne peut ignorer et passer outre l'esprit du texte constitutionnel. La Constitution de 1982, élaborée après le coup d'État militaire du 12 septembre 1980, reflète bien l'idéologie de ses auteurs pour qui, l'Etat et son autorité occupaient une place primordiale dans l'ordonnancement juridique et l'organisation de la société dans son ensemble, tandis que la démocratie, l'état de droit et les droits de l'homme perdaient leurs valeurs constitutionnelles[10]. Le non-contrôle des décrets-lois édictés en période d'état d'urgence était donc le fruit de cette approche de « démocratie illibérale » se trouvant à l'origine du système. Cette approche est d'autant plus significative que cette disposition de la Constitution, donnant une prééminence à l'État, n'a été abrogée par aucun des pouvoirs constitutionnels dérivés jusqu'à aujourd'hui.

9 Conformément à la révision constitutionnelle, les décrets présidentiels en état d'urgence sont également exclus du contrôle de constitutionnalité.

10 İbrahim Kaboğlu et Eric Sales, Le droit constitutionnel turc, L'Harmattan, Paris, 2015, pp.67-77.

Par trois arrêts rendus entre les années 1991-2003[11], la Cour constitutionnelle avait atténué les effets limitatifs du contrôle constitutionnelle née de cette interdiction expresse de contrôle imputable à l'idéologie sous-jacente du texte. Selon la Cour, pour qu'un décret-loi soit qualifié de décret-loi rendu en état d'urgence, et qu'en conséquence il échappe bien au contrôle de la Cour, certaines conditions doivent être remplies : il faut que ses dispositions portent sur les mesures nécessaires pour éliminer les raisons de l'état d'urgence, qu'elles ne soient valables que pendant l'état d'urgence et dans les zones où l'état d'urgence est déclaré. Dès lors que le décret-loi était pris dans un contexte spécifique, pour une période donnée et sur une zone géographique précise, la Cour refusait de contrôler la norme attaquée. A défaut, le décret-loi était requalifié en décret-loi ordinaires et était soumis à l'entier contrôle du juge, de sorte notamment qu'en l'absence de loi d'habilitation pour ce décret-loi, il était considéré contraire à la Constitution et annulé par la Cour.

La principale différence entre les décrets-lois ordinaires et les décrets-lois pris « en état d'urgence » reposait sur la nécessité d'une loi d'habilitation pour la validité de ces derniers. Avant la réforme constitutionnelle d'avril 2017, l'ancien article 121 de la Constitution prévoyait que la compétence d'édicter les décrets-lois en période d'état d'urgence (*ratione temporis*), dans les matières que l'état d'urgence exige *(ratione materiae)* appartenait au Conseil des ministres réunis sous la présidence de Président de la République (*ratione personae*). Ces décrets-lois étaient publiés au Journal officiel et soumis le même jour à l'approbation de la GANT. D'autre part, selon l'ancien article 91, pour édicter des décrets-lois ordinaires, le Conseil des ministres avait besoin d'une loi d'habilitation qui mentionne le but, la portée, les principes et la durée de la compétence ainsi acquise par édiction des décrets-lois et indique si plus d'un décret-loi peut être pris pendant cette période. Parce qu'ils étaient soumis à la GANT le jour de leur publication au Journal officiel, les numéros des décrets-lois se succédaient, indépendamment de leur qualification juridique.

Dans le raisonnement et la construction juridique en vigueur alors, le contrôle du décret-loi ne pouvait se fonder sur l'auteur de l'acte. La présidence du Conseil des ministres par le Président de la République, bien que politiquement contestable, n'était pas de nature à justifier une remise en cause de sa nature, d'autant que rien juridiquement n'interdisait au Président de siéger et de présider le Conseil. Aucune différenciation juridique ne pouvait donc être opérée et justifiée quant à la nature de l'acte pris au regard de ses seuls membres. Ainsi, la Cour constitutionnelle turque ne pouvait s'intéresser à la qualification de la norme attaquée sur ce simple fondement juridique.

11 Décisions de la Cour, (AYM) E.1990/25 (nº de requête), K.1991/1(nº de décision), Kt.10.01.1991(la date de la décision) ; E.1991/6, K.1991/20, Kt.03.07.1991 ; AYM, E.2003/28, K.2003/42, Kt.22.05.2003. Les deux premiers recours en annulation ont été fait par voie d'action, le troisième est un recours en annulation par voie d'exception. Le quatrième recours en annulation par voie d'exception sur les décrets-lois en état d'urgence a été rejeté par la Cour pour incompétence de celle-ci. AYM, E.1992/30, K.1992/36, Kt.26.05.1992.

En ce sens, l'utilisation de la « théorie de conversion de l'acte juridique » par la Cour a permis aux juges constitutionnels d'étendre *a minima* sa compétence sans pour autant remettre en cause l'acte dans son intégralité et ce, tout en respectant l'esprit de la Constitution. Si un tel contrôle constituait une avancée importante au nom de l'état de droit en période d'état d'urgence et donc était un signal fort envoyé à l'exécutif pour lui rappeler l'existence de limites constitutionnelles à son action, il demeurait cependant un sujet controversé parmi la doctrine[12] car il induisait une distinction entre les dispositions soumises à contrôle et celles qui étaient exclues de sorte que l'inconstitutionnalité ainsi constatée n'affectait pas l'ensemble de l'acte attaqué, mais seulement certaines de ces dispositions.

Dans ce cadre, il est nécessaire de revenir et d'analyser les décisions d'annulation rendues par la Cour sur cette base. Il convient, en premier lieu, de noter que la Cour ne cherchait pas à affaiblir l'exécutif dans sa lutte contre les conditions qui l'avaient conduit à la déclaration de l'état d'urgence. Elle cherchait seulement à encadrer son autorité dans l'exercice temporel et spatial de ce pouvoir, à savoir pendant l'état d'urgence (limite temporelle) et dans les zones où l'état d'urgence est proclamé (limite territoriale). Pour ces deux limites, le raisonnement déployé par la Cour était simple. Du point de vue temporel les dispositions des décrets-lois devaient prévoir des mesures provisoires, limitées en termes de temps à la durée du régime de l'état d'urgence. Et du point de vue spatial, les dispositions des décrets-lois devaient s'appliquer aux seules zones concernées par la déclaration de l'état d'urgence. Aussi, dès lors que les dispositions des décrets-lois rendus en état d'urgence amendaient de façon permanente une disposition d'une loi ou d'un décret-loi ordinaire, ou des lors qu'elles prévoyaient des mesures applicables en dehors de la zone concernée, la Cour avait été conduite à annuler systématiquement toutes les modifications introduites dans les faits par cet acte et sans examiner des dispositions sur le fond[13].

La Cour n'avait jamais ainsi poussé son appréciation jusqu'à examiner la nécessité de la mesure, ni réalisé un contrôle de proportionnalité ou un contrôle de sa conformité à l'article 15 de la Constitution. Dans sa décision de 2003, par exemple, elle avait examiné l'acte par rapport à l'article 125 de la Constitution. Cet article, qui porte sur les recours judiciaires, dispose qu'en cas d'état d'urgence, une loi peut modifier ou limiter, les conditions d'exécution des actes administratifs pour des raisons tenant à la sécurité nationale, à l'ordre public ou à la santé publique. Par un raisonnement *a contrario,* la Cour avait conclu qu'un décret-loi rendu en état d'urgence ne pouvait priver un justiciable du droit à exercer un recours en annulation contre les actes administratifs émis par la préfecture régionale de l'état d'urgence. Selon la Cour,

12 Kemal Gözler, *Kanun Hükmünde Kararnamelerin Hukuki Rejimi*, Bursa, Ekin, 2000, p.224 et suites. Voir aussi, Necmi Yüzbaşıoğlu, Türkiye'de Kanun hükmünde Kararnameler Rejimi, Beta, İstanbul, 1996, p.190-200; Sevtap Yokuş, Avrupa İnsan Hakları Sözleşmesi'nin Türkiye'de Olağanüstü Hal Rejimine Etkisi, Beta, İstanbul, 1996, pp.111-116.

13 AYM, E.1990/25, K.1991/1, Kt.10.01.1991.

cette disposition spéciale relative à l'état d'urgence encadrait de fait la compétence de l'exécutif[14].

Juridiquement, le contrôle de constitutionnalité exercé par la Cour était restreint et se limitait à l'examen de la simple irrégularité externe, à savoir la compétence de l'auteur de l'acte. Ce contrôle était d'autant plus limité à ce seul motif que l'article 6 de la Constitution prévoit qu'aucun organe de l'État ne peut exercer une compétence qui ne trouve pas son fondement dans la constitution. Ainsi, bien que juridiquement fondé, le contrôle exercé par la Cour constitutionnelle était plus que décevant pour les défenseurs des libertés et droits fondamentaux. Néanmoins, malgré ses limites, on ne peut nier son importance du point de vue de l'état de droit en Turquie. Même si la Cour ne pouvait et n'avait pas réalisé un contrôle effectif, elle avait malgré tout adressé une mise en garde à l'attention de l'organe exécutif en lui rappelant le cadre limité de ses actions.

Aujourd'hui, la position de la Cour constitutionnelle quant au contrôle constitutionnel des décrets-lois rendus en période d'état d'urgence est totalement différente. Suite à la récente proclamation de l'état d'urgence, de juillet 2016 jusqu'en juillet 2018, la Cour constitutionnelle a mis fin à sa jurisprudence antérieure, en refusant de qualifier elle-même la norme attaquée. Le raisonnement de la Cour est désormais assez fort simple : elle ne dispose pas de compétence pour examiner la constitutionnalité des décrets-lois édictés en période d'état d'urgence. Dans son arrêt de principe du 12 octobre 2016 relatif au décret-loi no 668, elle a plus particulièrement considéré que, en vertu de l'article 148 de la Constitution, les décrets-lois édictés en période d'état d'urgence ne peuvent faire l'objet d'un recours en inconstitutionnalité devant elle, ni sur la forme, ni sur le fond[15]. Dans sa décision, la Cour s'est attachée à se fonder sur la seule lecture littérale de l'article 148 de la Constitution et à ignorer l'esprit du texte et son interprétation systématique [16]. Elle s'est également appuyée sur l'article 6 de la Constitution, qu'aucun organe, y compris elle, ne pouvait exercer une compétence qui n'avait pas de fondement dans la Constitution.

En modifiant sa jurisprudence et en renouvelant sa lecture des textes fondateurs, la Cour constitutionnelle turque donne *in fine* un chèque en blanc à l'exécutif. L'absence de tout contrôle constitutionnel des décrets-lois pris par le Conseil des ministres réunis sous la présidence du Président de la République ne fait que renforcer le pouvoir exécutif dont les actes non plus à se soucier du moindre contrôle juridique[17]. Dans les faits, les conséquences de ce revirement de jurisprudence ne se sont pas fait attendre bien longtemps. Sur la période considérée, trente-deux décrets-lois au total

14 AYM, E.2003/28, K.2003/42, Kt.22.05.2003.

15 AYM, E.2016/166, K.2016/159, Kt.12.10.2016; E.2016/167, K.2016/160, Kt.12.10.2016.

16 Osman Can/Duygu Şimşek Aktaş, "Olağanüstü Hal Dönemi Kanun Hükmünde Kararnamelerinin Yargısal Denetimi Üzerine", MÜHF-HAD, C.23, S.1, p.32 et suites.

17 Voir Ekrem Ali Akartürk, "« Sınırlı Denetimden Mutlak Denetimsizliğe : OHAL KHK'lerinin Hukukla İmtihanı », Yeditepe Üniversitesi Hukuk Fakültesi Dergisi, C.XIII, S.1, 2016, p.197-212.

furent publiés par l'exécutif sans qu'aucun juge ne se soucie de leurs conformités aux dispositions constitutionnelles[18].

En termes de procédure, les publications au journal officiel se sont rapidement enchainées sur une très courte période. Du 6 janvier au 9 février 2017[19], neuf décrets-lois ont été publiés, partie par partie, donnant l'impression d'une décision prise par le Conseil des ministres au gré des évènements et au cas par cas, alors qu'ils avaient tous été actés par le Conseil des ministres le même jour, soit le 2 janvier 2017. La différence des dates et l'étendue de la durée de publication laissaient planer une célérité politique, juridique et procédurale favorable en faveur de l'exécutif, alors que dans les faits, il lui suffisait d'inscrire la date de la dernière réunion du Conseil des ministres réunis sous la présidence du Président de la République pour s'exonérer de plus de formalisme juridique. Outre ce simple défaut formel tenant à leur condition de publication, ces décrets-lois ont surtout clairement outrepassé les limites constitutionnelles jusque-là opposées par la Cour, avant son revirement, quant au fond. L'article 2 du décret-loi n° 687 qui impose l'obligation d'installer des pneus d'hiver pour certains véhicules suivant les conditions météorologiques et qui prévoit les sanctions administratives en cas de méconnaissance illustre parfaitement cette déliquescence des derniers remparts constitutionnels en la matière. Il est évident, même pour le juriste néophyte, que cet article devenu malheureusement célèbre aujourd'hui et qui porte sur des conditions particulières de circulation des véhicules n'a aucun lien, direct ou indirect, avec l'état d'urgence. Il en est de même du décret-loi interdisant les programmes TV de *matchmaking*[20].

Bien que ces réglementations ne soient pas source de graves violations des droits de l'homme, elles ont néanmoins contribué à modifier significativement l'ordre juridique. Les dispositions des décrets-lois rendus en état d'urgence peuvent désormais modifier, sans le moindre contrôle constitutionnel, les dispositions des lois ordinaires et, leurs effets peuvent s'étendre bien après la fin de l'état d'urgence. Il suffit pour cela, ainsi qu'il en fut en mars 2018, avant la dernière prorogation de l'état d'urgence que le parlement les approuve afin qu'ils acquièrent un rang législatif.

B. Le contrôle retardé des lois approuvant les décrets-lois

En refusant de contrôler les décrets-lois rendus en état d'urgence, la Cour constitutionnelle turque avait renvoyé le pouvoir législatif à sa responsabilité en précisant qu'il incombait à ce pouvoir d'exercer ledit contrôle dans la mesure où il

18 Décrets-lois n^{os} : 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697 et 701. Les décrets-lois n^{os} 698, 699 et 700 sont des décrets-lois ordinaires.

19 Le décret-loi n° 679 du 02.01.2017, RG. 06.01.2017M; le décret-loi n° 680 du 02.01.2017, RG. 06.01.2017M; le décret-loi n° 681 du 02.01.2017, RG. 06.01.2017M; le décret-loi n° 682 du 02.01.2017, RG. 23.01.2017; le décret-loi n° 682 du 02.01.2017, RG. 23.01.2017 ; le décret-loi n° 683 du 02.01.2017, RG. 23.01.2017 ; le décret-loi n° 684 du 02.01.2017, /RG. 23.01.2017 ; le décret-loi n° 685 du 02.01.2017, RG. 23.01.2017 ; le décret-loi n° 686 du 02.01.2017, RG. 07.02.2017M ; le décret-loi n° 687 du 02.01.2017, RG. 09.02.2017.

20 L'article 60 du décret-loi n° 690, RG. 29.04.2017M.

pouvait, juridiquement, par une loi, rejeter, adopter ou amender les décrets-lois qui lui étaient soumis.

Selon l'article 128 du Règlement intérieur de la GANT, ces décrets-lois doivent, en effet, être discutés et adoptés dans les trente jours à compter de leur soumission au parlement. Passé ce délai, aucune sanction n'est prévue en cas de négligence potentielle de la GANT[21] et l'omission du parlement ne peut donc elle-même faire l'objet d'un contrôle par la Cour constitutionnelle. Ce fut le cas, lors d'une précédente période d'état d'urgence, entre 1983-2002, où vingt décrets-lois avaient été édictés par le Conseil des ministres présidé par le Président de la République et seulement quatre d'entre eux avaient été discutés et adoptés par le parlement[22]. Plus récemment, au cours de la dernière période d'état d'urgence, seulement cinq lois approuvant les décrets-lois en état d'urgence ont été publiés au Journal officiel[23] en 2016. Les lois d'approbation des vingt-six décrets-lois ont, quant à eux, tous été publiées au journal officiel, le 8 mars 2018. Mais, lorsque l'état d'urgence pris fin le 18 juillet 2018, un seul décret-loi en état d'urgence devant le parlement avait été promulgué au journal officiel dix jours auparavant[24]. Par son inaction ou son omission, volontaire ou non d'ailleurs, le parlement ne fait que retarder d'autant l'exercice du contrôle de constitutionnalité des mesures prises par les décrets-lois. Les députés de l'opposition, conscients de cette difficulté politique laquelle constitue un frein juridique considérable à l'état de droit, ont immédiatement saisis la Cour constitutionnelle et demander l'annulation par voie d'action de toutes les lois d'approbation des décrets-lois rendus en état en urgence[25]. Cependant, tous les recours introduit au titre d'une irrégularité procédurale furent rejetés en bloc par la Cour. Suivant l'article 148 de la Constitution, la Cour précisa que sa compétence sur le contrôle formelle des lois était limitée à la vérification de l'existence de la majorité requise lors de leur vote final, et se contenta de vérifier que toutes les lois qui lui avaient été soumises disposaient bien de la majorité requise[26]. Elle écarta, de fait, de son examen, tous autres griefs fondés sur les irrégularités procédurales des décrets-lois comme le non-discussion de ceux-ci dans les 30 jours suivant leur soumission à la GANT ou la nécessité de qualifier l'acte d'approbation comme une décision parlementaire etc.

21 Après la révision constitutionnelle, le président de la République détient seul le pouvoir d'édicter des décrets présidentiels en état d'urgence. Mais, l'article 119 modifié prévoit que les décrets présidentiels en état d'urgence sont automatiquement abrogés au bout de trois mois s'ils n'ont pas été examinés et adoptés par la GANT.

22 Le décret-loi nº 201 approuvée par la loi nº 3076, RG.21.11.1984 ; le décret-loi nº 259 approuvée par la loi nº 3310, RG.10.09.1986 ; le décret-loi nº 387 approuvée par la loi nº 3601, RG.26.01.1990 ; le décret-loi nº 481 approuvée par la loi 3920, RG.10.12.1993.

23 Le décret-loi nº 667 du 22.07.2016 approuvé par la loi nº 6749, RG.29.10.2016 ; le décret-loi nº 668 du 25.07.2016 approuvé par la loi nº 6755, RG.24.11.2016 ; le décret-loi nº 669 du 25.07.2016 approuvé par la loi nº 6756, RG.24.11.2016 ; le décret-loi nº 671 du 15.08.2016 approuvé par la loi nº 6757, RG.24.11.2016 ; le décret-loi nº 674 du 15.08.2016 approuvé par la loi nº 6758, RG.24.11.2016.

24 Le décret-loi nº 701 du 04 juin 2018, RG.08.07.2018, approuvée par la loi nº7150, RG.03.11.2018.

25 Selon l'article 148 de la Constitution, le droit de recours en annulation par voie d'action s'éteint à l'expiration d'un délai de soixante jours à partir de la publication au journal officiel de ladite loi. Si le motif de l'inconstitutionnalité porte sur une irrégularité formelle, cette durée est réduite à dix jours.

26 AYM, E.2018/42, K.2018/48, Kt.31.05.2018, RG.29.06.2018.

Quant à l'examen au fond des recours, le droit turc n'imposant aucun délai procédural aux juges constitutionnels pour examiner et statuer sur les recours en annulation par voie d'action, la Cour garda le silence pendant plus d'un an avant de se prononcer enfin. Un an après la fin de l'état d'urgence, en juillet 2019, elle a en effet examiné cinq des lois qui lui étaient soumises par l'opposition et annulé seulement quelques dispositions pour inconstitutionnalité : une portant sur la compétence attribuée au Ministère de l'Intérieur pour retirer les passeports des conjoints des personnes interdits de se déplacer à l'étranger, l'autre concernant les frais de scolarité des étudiants contraints de changer d'université suite à la fermeture de leur université d'origine par un décret-loi[27].

Cet examen tardif des recours est d'autant plus surprenant que la Cour aurait pu, juridiquement, reporter sa décision ou les effets de celle-ci à une date ultérieure. Les décisions de la Cour constitutionnelle bénéficie, en effet, du principe de l'effet immédiat, de sorte qu'elles sont réputées produire un effet dès leur publication au journal officiel. Cependant, en cas de nécessité, la Cour peut décider de moduler cette date d'application et de la reporter jusqu'à un an à compter de la publication de celle-ci au journal officiel. Si, pour quelles raisons que se soient, les membres de la Cour redoutaient que leurs décisions d'annulation produisent des effets néfastes, voire négatives, sur l'ordre juridique en générale et la société en particulier, ils auraient pu tout aussi bien, dans un état de droit et une démocratie, statuer et fixer une date d'entrée en vigueur ultérieure à la publication de la décision. Mais le choix juridique fut tout autre. Le choix fut de « suspendre » le contrôle de constitutionnalité des lois et de retarder, autant que faire se peut, l'examen des recours. En refusant de statuer immédiatement, ou dans les meilleurs délais, la Cour, par son attitude qualifiable de « déni de justice [28]» a rendu ineffectif le contrôle normatif, pendant et après l'état d'urgence.

Si le contrôle normatif a été fragilisé par la présence de nombreux obstacles constitutionnels, ainsi qu'il a été développé ci-dessous, rester au justiciable la voie du recours individuel devant la Cour constitutionnelle turque. Or, ce recours individuel ne fut pas non plus épargné par le régime de l'état d'urgence.

II. Le recours individuel en état d'urgence : Un contrôle limité

Selon l'article 148 de la Constitution, tel qu'amendé en 2010, toute personne, estimant avoir été lésée par la puissance publique dans l'un de ses libertés/droits fondamentaux garantis par la Constitution et par la Convention européenne des droits de l'homme et ses protocoles, peut former un recours devant la Cour

27 E.2016/205, E.2017/16, E.2017/18, E.2018/73 et E.2018/92. Les décisions d'annulation n'ont pas encore été publiées au journal officiel (le 23 septembre 2019). Voir Cumhuriyet, 25 Juillet 2019. http://www.cumhuriyet.com.tr/haber/turkiye/1505634/pasaport-magduruna-aymden-iyi-haber.html.

28 Didem Yılmaz, "La continuité du service public en Méditerranée. Essai de droit comparé", Revue Méditerranéenne de Droit Public, Vol. VIII, Éditions l'Epitoge, 2018, p.200.

constitutionnelle. Ce droit, ouvert à tous sous conditions, ne peut être introduit qu'après l'épuisement des voies de recours ordinaires et ne peut porter que sur certains droits ou libertés, en l'espèce les droits ou libertés conjointement reconnus par la Constitution et par la Convention européenne des droits de l'homme et ses protocoles dont la Turquie est partie. Dès lors, pour toutes violations de ces droits et libertés par les actes pris en période d'état d'urgence, les individus disposent donc de la faculté de saisir la Cour constitutionnelle turque d'un recours individuel.

La décision de la Cour constitutionnelle sur la constitutionnalité d'une norme (loi ou décret-loi) dans le cadre d'un recours en inconstitutionnalité, soit par voie d'action, soit par voie d'exception, ne fait pas obstacle à ce que les individus introduisent un recours individuel contre les actes individuels pris en application des dispositions de cette norme. La seule limite à ce droit de recours, reconnue par la Constitution, figure à l'article 45 §3 de la loi n° 6216 relative à la procédure devant la Cour constitutionnelle, lequel exclu expressément de ce droit les actes insusceptibles de recours et qui donc ne peuvent faire l'objet d'aucun contrôle judiciaire. Quid alors du droit de recours individuel lorsqu'un individu est affecté directement par un décret-loi rendu en état d'urgence ?

En ce sens, la « mort civile[29] » organisée pour des milliers de fonctionnaires, révoqués de leurs fonctions par des décrets-lois, pour lesquels le Conseil national de sécurité avait établi qu'ils se livraient à des activités préjudiciables à la sécurité nationale de l'État, met en exergue une interrogation juridique fondamentale. Ces individus dont les noms ont été annexés aux décrets-lois, et qui n'ont reçu aucune notification individuelle, ont perdu l'exercice de leurs fonctions et d'autres droits (dont le retrait du passeport) par la publication d'un acte général au journal officiel. Or, ces actes, les décrets-lois, ne peuvent faire l'objet de recours devant le juge. Seul, l'acte administratif de notification aurait pu faire l'objet d'un recours devant le juge administratif. A ce jour, la Cour constitutionnelle, saisie de milliers de recours individuels, ne s'est pas encore prononcée sur la violation directe de droits par un décret-loi rendu en état d'urgence. Et il serait fort étonnant que la Cour fasse preuve de promptitude pour examiner ces demandes. En l'absence de décision constitutionnelle, la Cour européenne des droits de l'homme a déclaré les requêtes des victimes de ces décrets-lois irrecevables au motif que les voies de recours internes n'avaient pas été épuisées[30].

29 Alain Bockel, « Turquie : la « mort civile » d'İbrahim Kaboğlu, « opposant actif » et « défenseur de l'État de droit » », Le Monde, Tribune, 9 juin 2017.

30 CEDH, 2e Section, *Zihni/Turquie*, Requête no.59061/16, 29 novembre 2016. Le requérant était professeur de lycée et fut révoqué de ses fonctions par le décret-loi n° 672, car considéré comme appartenant, affiliés ou liés à des organisations terroristes ou à des organisations, structures ou groupes pour lesquels le Conseil national de sécurité avait établi qu'ils se livraient à des activités préjudiciables à la sécurité nationale de l'État.

Suite au rapport de la Commission de Venise soulignant la nécessité d'instaurer une voie de recours effective[31], une nouvelle commission *ad hoc* a été créée par le décret-loi n° 685 du 2 janvier 2017. Cette commission est chargée de se prononcer sur les recours introduits par les personnes affectées directement par les décrets-lois adoptés dans le cadre de l'état d'urgence, et sans l'intermédiaire d'un acte administratif individuel. Prévue comme une commission administrative, les décisions de la commission pourraient faire l'objet d'un recours en annulation devant les tribunaux administratifs d'Ankara[32], de sorte que la voie du recours individuel devant la Cour constitutionnelle pourrait être recevable après épanouissement des voies de recours ordinaires.

Instaurée par le décret-loi du 2 janvier 2017, cette commission a commencé à enregistrer les recours dès le 17 juillet 2017 et a rendu sa première décision le 22 décembre 2017. Formée de sept membres, la commission doit examiner environ 126200 recours déposés devant elle[33]. Mais alors qu'il s'agit-là d'un travail de longue haleine, la Cour constitutionnelle a, dès juillet 2017, rejeté toutes les requêtes déposées directement devant elle au motif que les requérants n'avaient pas épuisés les voies de recours ordinaires et a orienté tous les recours, y compris ceux introduits avant l'existence de la Commission *ad hoc*, devant cette dernière. Ainsi, selon les statistiques, 86% des recours individuelles déposés pendant l'état d'urgence ont été examinés par la Cour constitutionnelle.[34]

La Cour constitutionnelle a rendu sa première décision sur le fond, pour un recours individuel lié à l'état d'urgence, seulement en juin 2017, soit à peu près un an après de la déclaration de l'état d'urgence. Cette décision, même si elle conclut à la non-violation d'un droit ou d'une liberté, est déterminante dans le sens où elle pose le cadre général de la compétence de la Cour constitutionnelle en matière de recours individuel pendant la période de l'état d'urgence. Mais avant d'analyser la jurisprudence de la Cour sur les recours individuels pendant l'état d'urgence (B), et afin de mieux comprendre les enjeux de cette décision, il faut d'abord souligner le caractère contraignant de ces arrêts (A).

31 L'avis n° 865/2016 du 12 décembre 2016 de la Commission européenne pour la démocratie par le droit sur les décrets-lois n°s 667-676 adoptés dans le cadre de l'état d'urgence après la tentative de coup d'État du 15 juillet 2016, par.220-223. CDL-AD (2016)037.

32 RG. 23.01.2017. Pour les dispositions concernant la commission en français voir. CEDH, l'arrêt *Köksal/ Turquie,* Requête no. 70478/16, 06 juin 2017, par.16. et voir Christelle Palluel, « Etat d'urgence et violations des droits de l'homme : Quelle justice pour les citoyens de Turquie ? » Anayasa Hukuku Dergisi, C.8, S.15, 2019, pp. 45-48.

33 Selon le bulletin paru le 28 juin 2019 sur le site internet de la Commission, il existe 131 922 mesures qui sont prises par les décrets-lois dont 125 678 sont des révocations de fonctionnaires et 2 791 des fermetures d'institution. Le nombre de recours enregistrés est 126 200 au total. Elle a rendu 77 900 (6 000 acceptées et 71 900 rejetées) décisions depuis le 22 décembre 2017. L'examen de 48 300 dossiers sont en cours. Pour les statistiques détaillées en anglais voir. The inquiry commission on the state of emergency measures activity rapport, June 2019, p.17 et suites. www.soe.tccb.gov.tr (page consulté le 28 juillet 2019)

34 En 2017, 86 537 requêtes ont été déclarées irrecevables. Ce nombre est en corrélation avec le nombre de recours déposé devant la commission *ad hoc.* Le discours du président de la Cour constitutionnelle lors de la cérémonie du 56e anniversaire de la Cour. Pour le discours et les statistiques voir. Rapport annuel de la Cour pour l'année 2018, pp.66 et 363.

A. Les effets des décisions de la Cour : L'affaire Şahin Alpay

D'après l'article 153 de la Constitution, les décisions de la Cour constitutionnelle sont définitives et lient les pouvoirs législatif, exécutif et judiciaire ainsi que les autorités administratives et les personnes physiques et morales. Mais pendant l'état d'urgence, malheureusement, cette disposition explicite a été sciemment ignoré par le pouvoir exécutif et le pouvoir judiciaire Pour la première fois depuis le début de l'état d'urgence, le 11 janvier 2018, la Cour constitutionnelle a rendu trois arrêts de « violation » dans le cadre de recours individuel lié directement à l'état d'urgence. Statuant non pas en section spécifique comme il se doit pour tous les recours individuels mais en Assemblée Plénière, la Cour a constaté, à onze voix contre six, pour les recours formés par trois journalistes reconnus, la violation de leur droit à la liberté individuelle et de leur droit à la liberté d'expression[35]. Et, dans le cadre de deux de ces recours où les journalistes étaient toujours maintenus en détention provisoire, elle avait enjoint aux juridictions pénales du premier degré de prendre acte de cette violation et de rétablir les requérants dans leurs droits[36].

Juridiquement, devant une telle injonction émanant de la Cour constitutionnelle, la juridiction judiciaire dispose de deux possibilités. L'une consiste à suivre l'injonction et accessoirement à mettre fin à la détention provisoire, et, l'autre consiste au contraire à maintenir sa position, et donc à poursuivre le maintien en détention provisoire, mais en supprimant toutes les causes de violations constatées par la Cour. En l'espèce, la Cour n'avait pas ordonné directement la mise en liberté des journalistes, mais seulement que des mesures nécessaires et suffisantes soient prises afin de rétablir les individus dans leurs droits et d'effacer les conséquences des violations précisées dans le dispositif de sa décision. Ainsi, selon l'article 50 de la loi n° 6216 relative à la Cour constitutionnelle, « *si une décision de violation a été rendue, des mesures (doivent être prises) pour mettre fin à la violation et en effacer les conséquences précisées dans le dispositif. (…) Lorsque la violation constatée découle d'une décision judiciaire, le dossier est renvoyé au tribunal compétent pour une réouverture de la procédure en vue de mettre fin à la violation et d'en effacer les conséquences*[37]. »

Cependant, devant cette demande fondée des juges constitutionnels, les réactions des tribunaux de premiers degrés furent assez surprenantes[38]. Ils refusèrent tout simplement de se conformer à la décision de la Cour constitutionnelle en ignorant le

35 Ça nous montre l'importance que la Cour attache aux affaires liés à l'état d'urgence ou la réservation des membres de statuer sur des questions délicates. *Şahin Alpay*, requête n° 2016/16092, Date de la décision:11.01.2018, RG.19.01.2018 ; *Mehmet Hasan Altan (2),* requête n° 2016/23672, Date de la décision :11.01.2018, RG.19.01.2018.

36 AYM, *Şahin Alpay,* par.162, *Mehmet Hasan Altan (2),* par.255. Le troisième des requérant ayant déjà retrouvé sa liberté suite à son procès intervenu avant même la décision de la Cour. AYM, Turhan Günay, requête n° 2016/50972, 11.01.2018, par. 27-28.

37 La loi n° 6216 du 30 mars 2011 relative à l'établissement et aux règles de procédure de la Cour constitutionnelle, RG.03.04.2011-27894. Pour la traduction en français voir. CEDH, l'affaire Şahin Alpay, par.52.

38 13e et le 14e Cour d'assises d'Istanbul pour l'affaire Şahin Alpay et 26e et 27e Cour d'assises d'İstanbul pour l'affaire Mehmet Hasan Altan.

caractère définitif et contraignant attachés à ces arrêts. Ils décidèrent de maintenir les requérants en détention provisoire sans recourir à de nouvelles justifications sur le fond. Ils déclarèrent, en premier lieu, la demande des avocats irrecevables au motif que la décision de la Cour n'avait pas encore fait l'objet d'une notification officielle et, le lendemain, jugèrent que la Cour constitutionnelle n'avait aucune compétence pour évaluer les preuves contenues dans un dossier pénal[39]. Les juridictions pénales avaient méconnu les décisions de la Cour constitutionnelle sans même s'interroger sur leur propre compétence et autorité à évaluer la validité d'une décision rendue par une telle instance. Cette contestation judiciaire trouva d'ailleurs un écho favorable au sein du gouvernement qui soutint avec force cette approche. Le porte-parole du gouvernement et le vice-Premier ministre de l'époque, ancien ministre de la justice, *M. Bozdağ* déclara ainsi que la Cour constitutionnelle avait outrepassé sa sphère de compétence et agi comme une cour d'appel[40].

Si une telle position des juridictions de non-exécution des décisions de la Cour constitutionnelle était amenée à se maintenir, elle induisait *ipso facto* la fin du recours individuel comme une voie de recours qui doit être épuisé avant toute saisine de la Cour EDH. Afin de sauvegarder l'effectivité de ses décisions, et d'asseoir son autorité juridictionnelle, la Cour constitutionnelle résista contre ces réactions dépourvues de base légale. Suite au nouveau recours déposé par *Şahin Alpay*, en raison de son maintien en détention malgré la décision de la Cour constitutionnelle, l'Assemblée Plénière de la Cour rendit cette fois à l'unanimité son arrêt par lequel elle décida qu'il y avait eu violation du droit à la liberté et à la sûreté. Elle ordonna expressément, cette fois-ci, la mise en liberté du requérant puisque aucune autre voie de recours n'était susceptible d'effacer les conséquences de cette violation[41]. Deux mois après la première décision, le requérant fut remis en liberté et assigné à résidence par une ordonnance, laquelle fut levée à son tour par le tribunal suite à la condamnation du requérant à une peine de prison de 8 ans et 9 mois[42].

Avec le recul dont nous disposons aujourd'hui, il apparait que les premières décisions de « violation » de la Cour constitutionnelle turque pendant l'état d'urgence ont coïncidé avec les premiers arrêts de « violation » rendus par la Cour EDH sur ce même sujet. La deuxième section de la Cour EDH a délibéré, le 20 février 2018 sur les requêtes de *M. Alpay* et *M. Altan* et a conclu à la violation de l'article 5 § 1 et l'article

39 Voir CEDH, l'affaire *Şahin Alpay*, par.37-42.

40 https://www.aa.com.tr/tr/turkiye/basbakan-yardimcisi-bozdag-anayasa-mahkemesi-anayasa-ve-yasalarin-cizdigi-siniri-asmistir/1028834. (page consulté le 28 juillet 2019)

41 AYM, *Şahin Alpay (2),* 2018/3007, Kt.15.03.2018, RG.19.03.2018-30365.

42 Arrêt du 6 juillet 2018, 13e Cour d'assise d'Istanbul. Le contrôle judiciaire de l'interdiction de quitter le territoire continue toujours. Quant à l'autre requérant *Mehmet Hasan Altan,* la condamnation à la prison à vie de celui-ci par un arrêt rendu le 16 février a changé le statut de sa détention. Mais il a été mis en liberté, le 27 juin 2018, par la Cour d'appel d'İstanbul au motif que la décision rendue par la Cour constitutionnelle le 11 janvier était contraignante.

10 de la Convention[43]. La Cour constitutionnelle a rendu quant à elle sa première décision de « violation », le 11 janvier 2018, soit quelques temps avant la Cour DEH. Cette coïncidence des calendriers est particulièrement notable, que l'exécution de décision de la Cour constitutionnelle turque ait eu lieu après la décision concordante de la Cour EDH.

B. L'approche de la Cour constitutionnelle de la protection des libertés en état d'urgence

Dans sa première décision de non-violation, mentionnée ci-dessus[44], la Cour constitutionnelle a exposé en détail son approche quant à la protection des libertés en période d'état d'urgence La méthode suivie par la Cour en la matière est fort remarquable.

Le raisonnement de la Cour constitutionnel repose sur la lecture combinée de deux articles de la Constitution de 1982 qui établit deux régimes différents de restriction aux droits et libertés : l'article 13 qui détermine un régime de restriction des droits en temps ordinaire, et, l'article 15 qui précise, quant à lui, un régime de suspension et de restriction des droits et libertés pendant des temps exceptionnels, tels que la guerre, la mobilisation ou l'état d'urgence. La Cour examine le recours individuel déposé devant elle en se fondant, d'abord, sur l'article 13, c'est- à- dire dans le cadre d'un régime ordinaire de restriction des droits, puis, ne se prononce sur le régime exceptionnel prévu par l'article 15 de suspension ou de restriction des libertés que si elle estime que la violation est suffisamment caractérisée en temps ordinaire.

En effet, l'application de l'article 15 étant conditionnée à la proclamation de l'état d'urgence, le régime exceptionnel qu'il prévoit peut-être conçu comme une dérogation au régime général de protection des droits et des libertés, visé par l'article 13 de la Constitution. Suivant ce dernier article, les droits et libertés fondamentaux ne peuvent être limités que par les lois et pour des motifs prévus par la disposition concernée. Les restrictions ne doivent pas porter atteinte à l'essence des droits et doivent respecter le principe de proportionnalité. Elles ne peuvent être en contradiction ni avec la lettre et l'esprit de la Constitution, ni avec les exigences d'une société démocratique et laïque.

Lorsqu'elle est saisie d'un recours individuel pour la violation d'un droit en état d'urgence, la Cour met en œuvre, dans un premier temps, les critères établis en temps ordinaire. Et ce n'est que si elle parvient à la conclusion d'une violation des droits suivant ces critères, qu'elle vérifie si cette violation peut être justifiée ou non dans le cadre de l'état d'urgence. Reste à cet égard, de savoir si les critères

43 CEDH 2e section, Affaire *Mehmet Hasan Altan c. Turquie,* Requête no 13237/17, 20 mars 2018 et Affaire *Şahin Alpay c. Turquie*, Requête no 16538/17, 20 mars 2018.

44 AYM, *Aydın Yavuz et autres*, Requête no 2016/22169, Kt.20.06.2017.

prévus en temps ordinaires, tels que la proportionnalité, les obligations découlant du droit internationale ou la non-violation du « noyau dur » des droits et libertés seront également entièrement mis en œuvre par la juge constitutionnel dans le contrôle exercé lors du régime d'état d'urgence[45].

La plupart des décisions de la Cour sur les recours individuels introduits en état d'urgence concerne la liberté individuelle des requérants[46]. Sur ce point, la jurisprudence de la Cour constitutionnelle ne va pas toujours dans le même sens que celle de la Cour EDH ainsi qu'en atteste l'affaire *Alparslan Altan.* Dans cette affaire, le requérant était membre de la Cour constitutionnelle turque et était mis en cause devant le juge pénal en raison de son appartenance à une organisation terroriste armée. Bien qu'il existe une procédure spéciale pour toutes les instructions judiciaires diligentée à l'égard d'un des membres de la Cour constitutionnel (loi n° 6216 relative à la Cour constitutionnelle), le requérant fut poursuivi selon les règles de droit commun. L'infraction reprochée au requérant avait été assimilée par les autorités turques à un cas de flagrant délit, lequel ne relève que de la compétence des cours d'assises. Cette qualification sera d'ailleurs reprise par la Cour constitutionnelle qui ne s'offusquera pas de la non mise en œuvre de la procédure spéciale à l'égard d'un de ses membres[47].

Au contraire de la Cour constitutionnelle turque, la Cour EDH a constaté la violation de l'article 5/1 de la Convention à raison du défaut de légalité de la mise en détention provisoire et de l'absence de raisons plausibles au moment de la mise en détention provisoire. La Cour EDH estime que l'interprétation extensive de la notion « flagrant délit » a privé le requérant de ses garanties procédurales en tant que membre de la Cour constitutionnelle[48]. La Cour EDH estime plus précisément que cette interprétation extensive de la notion flagrant délit réduit les garanties procédurales accordées aux juges non pour leur bénéfice personnel mais pour garantir leur indépendance dans l'exercice de leur fonction[49].

Quelle que soit son interprétation de la notion de « flagrant délit », la Cour constitutionnelle turque n'aurait d'autant pas rendu de décision de violation des droits de son ancien membre qu'elle l'avait révoqué, elle-même, de ses fonctions le 4 août 2016, par une décision rendue en Assemblée Plénière. Elle disposait en effet, par l'article 3 du décret-loi n° 667[50] de la compétence pour révoquer tous membres qui

45 AYM, *Aydın Yavuz et autres*, Requête n° 2016/22169, Kt.20.06.2017, § 182-211.

46 AYM, *E.A*, Requête n° 2016/78293, Kt.03.07.2019, RG.11.09.2019-30885 (violation); *Bekir Mustafa Yılmaz*, Requête n° 2016/72230, Kt.17.07.2019, RG.11.09.2019-30885 (violation); Mustafa Açay, Requête n° 2016/66638, Kt.03.07.2019, RG.11.09.2019-30885(violation).

47 AYM, *Alparslan Altan*, 2016/15586, Kt.11.01.2018, RG.19.01.2018.

48 Cour EDH, 2e section, Affaire *Alparslan Altan*, Requête n° 12778/17, 16.04.2019. (définitif, le 9 septembre 2019).

49 Cour EDH, 2e section, Affaire *Alparslan Altan*, Requête n° 12778/17, 16.04.2019, §111-115.

50 AYM, E.2016/6*(Değişik işler),* K.2016/12, Kt.04.08.2016.

étaient considérés comme appartenant, affiliés ou liés à des organisations terroristes et elle estimait disposer de preuves suffisantes de l'existence de lien entre le membre concerné et l'organisation FETÖ/PDY, preuves provenant de l'environnement social de l'individu et fondée sur une conviction commune des membres de la Cour. Il en fut de même de la révocation d'un autre de ses membres, par la même décision.

Il est certain qu'une Cour constitutionnelle qui révoque deux de ses membres sur le fondement d'un décret-loi dont elle ne peut examiner la constitutionnalité nous conduit à nous interroger sur la réelle indépendance de l'institution et de ses membres. Le retard et la prudence dont a fait preuve la Cour dans l'exercice du contrôle de constitutionnalité ne fait que conforter cette idée. La Cour constitutionnelle pourrait bientôt rendre des décisions sur des violations des droits pendant le régime de l'état d'urgence[51]. Mais, il est plus qu'évident qu'une justice différée, pour quels motifs que soit, est une justice refusée ou déclinée.

Conclusion

L'état d'urgence est un régime dans lequel l'équilibre entre la protection des droits fondamentaux et le maintien de l'ordre public est perturbé au profit de ce dernier. La différence entre les divers régimes de restriction des droits fondamentaux reflète bien le caractère particulièrement attentatoire aux droits et libertés de l'état d'urgence. Parce qu'il permet de rétablir les conditions favorables à l'exercice des droits et libertés conformément à l'ordre juridique antérieur *(status quo ante)*, en permettant au pouvoir exécutif de mettre en œuvre les moyens appropriés pour supprimer les raisons qui sont sources d'une telle situation, l'état d'urgence peut, néanmoins, être considéré comme une des modalités de l'état de droit[52]. La Cour constitutionnelle turque définit l'état d'urgence comme un régime d'exception à caractère temporaire qui accorde aux pouvoirs publics des pouvoirs plus étendus qu'en temps ordinaire et ce, dans le but d'éliminer les menaces et les dangers graves qui ont conduit à la déclaration de cet état d'urgence[53].

La constitution turque répartit les pouvoirs d'état urgence entre le législatif et l'exécutif avec une concentration du pouvoir en faveur de ce dernier, mais exclut le contrôle judiciaire effectif. Les conséquences négatives de cette approche avaient été atténuées par la Cour constitutionnelle, qui depuis est revenue sur sa position, par

51 Quelques exemples des décisions de « violation » non-mentionnées dans cet article : AYM, *Ahmet Sil*, Requête no. 2017/24331, 09.05.2018 (sur la liberté de conscience et de la religion), AYM, *Selma Elma*, Requête no. 2017/24902, 04.07.2019 et *Erdal Karadaş*, Requête no. 2017/22700, Kt.28.05.2019 (sur la liberté de réunion et de manifestation) ; *Mustafa Baysal,* Requête no. 2016/58482, Kt.11.09.2019 (sur le droit au respect de la correspondance), *Abuzer Uzun,* Requête no. 2016/61250, Kt.13.06.2019 et *Hüseyin Ekinci*, Requête no. 2016/38867, Kt.03.07.2019 (sur le droit à la vie familiale).

52 Didier Bigo / Laurent Bonelli, « Introduction : Ni État de droit, ni État d'exception. L'état d'urgence comme dispositif spécifique », L'état d'urgence en permanence I, Cultures & Conflits no.112, Hiver 2018, L'Harmattan, Paris, 2018, p.8.

53 AYM, *Aydın Yavuz et autres*, Requête no. 2016/22169, 20.06.2017, §164. Voir aussi Bülent Daver, Fevkalâde Hal Rejimleri, AÜSBF Yayınları no.130-112, Ankara, 1961, pp.111-130 et 165-169.

un revirement de jurisprudence récent lors de la dernière période d'état d'urgence. Aussi, l'absence de contrôle des décrets-lois rendus en état d'urgence et la pratique inconstitutionnel du pouvoir ne fait que détériorer et rendre encore plus confus l'ordre juridique en vigueur.

Selon l'article 2 de la Constitution, la Turquie est un état de droit. Tous les actes des organes étatiques doivent donc être conformes au principe de l'état de droit. Mais, les mesures relatives au régime de l'état d'urgence ont été fixées par la Constitution dans une perspective dérogatoire de nature à suspendre partiellement et à mettre entre parenthèse l'acte fondateur de l'Etat, et surtout le principe de l'état de droit qui est un principe primordial pour la démocratie et les libertés individuelles. Ainsi la constitution contient en son sein un mécanisme de sa propre destruction. Les circonstances d'un état d'urgence pourraient exiger la suspension de certaines garanties constitutionnelles mais aucune circonstance ne peut justifier la suppression du principe de l'état de droit et du contrôle judiciaire des actes réglementaires de l'exécutif.

Le revirement de jurisprudence de la Cour n'est qu'une question d'interprétation de la Constitution. L'interprétation littérale de l'article 148 de la Constitution est claire. Le recours à une interprétation systématique aurait en faveur de la protection de l'état de droit et des droits et libertés fondamentaux. Mais, on ne serait blâmé la Cour seulement à cause de son choix dans la méthode de l'interprétation.

La Cour est responsable des violations des droits de l'homme en période d'état d'urgence à cause de l'ajournement de l'examen des recours devant elle. L'annulation des passeports des conjoints en est un bon exemple. Il a fallu attendre à peu près trois ans pour que la Cour statue sur cette violation, qui n'était pas une question si difficile ou si complexe à trancher[54]. C'est pourquoi, le contrôle de la Cour constitutionnelle a perdu toute effectivité, laissant l'exécutif et la majorité parlementaire agir, sans cadre juridique et sans contrôle judiciaire, et sans crainte d'un tel contrôle, pendant l'état d'urgence mais aussi après.

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54 Le décret-loi n° 667 est approuvé par la loi n° 6749. RG.29.10.2016. Les députés ont saisi la Cour en 2016 (E.2016/205) et la Cour a statué le 24 juillet 2019. On attends la publication au journal officiel (le 23 septembre 2019)

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