Annales de la Faculté de Droit d'Istanbul

Number: 71 • Year: 2022

Annales de la Faculté de Droit d'Istanbul
Number: 71 • Year: 2022
ISSN: 0578-9745 • E-ISSN: 2687-4113 • DOI: 10.26650/annales

Indexing and Abstracting
SCOPUS
TÜBİTAK-ULAKBİM TR Index
DOAJ
EBSCO Central & Eastern European Academic Source
Erih Plus

Annales de la Faculté de Droit d'Istanbul

Number: 71 • Year: 2022

ISSN: 0578-9745 • E-ISSN: 2687-4113 • DOI: 10.26650/annales

Owner

Prof. Dr. Ömer EKMEKÇİ

Istanbul University, Faculty of Law, Istanbul, Turkiye

Responsible Manager

Prof. Dr. Halil AKKANAT

Istanbul University, Faculty of Law, Istanbul, Turkiye

Correspondence Address

İstanbul Üniversitesi, Hukuk Fakültesi,
İstanbul Üniversitesi, Beyazıt Kampüsü,
34116 / İstanbul, Türkiye
Phone: +90 (212) 440 01 05
E-mail: annales@istanbul.edu.tr
https://iupress.istanbul.edu.tr/en/journal/annales/home
https://dergipark.org.tr/tr/pub/iuafdi

Publisher

Istanbul University Press
İstanbul Üniversitesi Merkez Kampüsü,
34452 Beyazıt, Fatih / İstanbul, Türkiye
Phone: +90 (212) 440 00 00

Printed by

Birlik Fotokopi Baskı Ozalit Gıda San. Tic. Ltd. Şti.
Nispetiye Mah. Birlik Sokak No: 2
Nevin Arıcan Plaza 1. Levent/Beşiktaş/İstanbul
Tel: +90 (212) 269 30 00
Sertifika No: 20179
Basımı ve dağıtımı On İki Levha Yayıncılık A.Ş. tarafından yürütülmüştür.

The publication languages of the journal are French, English and German.

This is a scholarly, international, peer-reviewed and open-access journal published annually in December.

Publication Type: Periodical

Annales de la Faculté de Droit d'Istanbul

Number: 71 • Year: 2022

ISSN: 0578-9745 • E-ISSN: 2687-4113 • DOI: 10.26650/annales

EDITORIAL MANAGEMENT

EDITORIAL BOARD

Annales de la Faculté de Droit d'Istanbul
Number: 71 • Year: 2022
ISSN: 0578-9745 • E-ISSN: 2687-4113 • DOI: 10.26650/annales

TABLE OF CONTENTS

RESEARCH ARTICLES

Annales de la Faculté de Droit d'Istanbul
Number: 71 • Year: 2022
ISSN: 0578-9745 • E-ISSN: 2687-4113 • DOI: 10.26650/annales

TABLE OF CONTENTS

RESEARCH ARTICLES

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 1–26

DOI: 10.26650/annales.2022.71.0001
http://annales.istanbul.edu.tr/

Submitted: 06.08.2021
Accepted: 09.02.2022

Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Have Turkish Courts Started to Enforce Foreign Joint Custody Judgments?

Cahit Ağaoğlu*

Abstract

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

Keywords

Joint Custody, Enforcement, the Best Interest of the Child, Public Policy, Protocol No. 7

* **Corresponding Author:** Cahit Ağaoğlu (Asst. Prof. Dr.), Beykent University, Faculty of Law, Department of Private International Law, Istanbul, Turkiye. E-mail: cahitagaoglu@beykent.edu.tr ORCID: 0000-0002-5103-5196

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

Introduction

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

A very important development and change to this stance has arrived with the decision of the Supreme Court 2nd Legal Department on February 20, 2017 and numbered E. 2016/15771, K. 2017/1737[1]. The aforementioned decision refers to Protocol No. 7, signed on March 14, 1985, accepted by law No. 6684 on March 10, 2016, and published in the Turkish Official Journal on March 25, 2016. Article (art.) 5 of Protocol No. 7 emphasizes that spouses have equal rights in the case of dissolution of marriage. It paves the way for the practice of joint custody, allowing a child's custody to remain with both parents after the dissolution of marriage. The attitude of the Supreme Court in this direction has also prepared the way for the filing of cases demanding joint custody in the future.[2]

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

I. Joint Custody Under Turkish Law

A. The Notion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Arguments Against Joint Custody in Turkey

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

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

11 Ibid, 86.

12 Serozan (n 7) 255 et seq.

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

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

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

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

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

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

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

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

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

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

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

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

The first local court decision issued concerning joint custody in Turkey is the Izmir 4th Family Court, Case No. 448-470 dated 27 May 2009.[23] The court stated that:

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

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

Nevertheless, with the integration of Protocol No. 7 into Turkish Law, the mentioned provision is above the provisions of the TCC according to art. 90/5 of the Turkish Constitution[24] which prevails international conventions with priority over the laws.

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

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

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

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

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

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

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

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

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

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

II. A Comparative Analysis of Joint Custody

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

34 Novales (n 29) 228.

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

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

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

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

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

parents jointly requested this. The Norwegian law also created a presumption for joint parental responsibility after divorce unless challenged by one of them. Similar provisions were introduced in Sweden in 1983[40] and Denmark in 2002.[41] In all these countries parents can make agreements concerning with whom a child should live, including shared residence. In 2016-2017 around 30% of children in Sweden with separated parents have alternating residences.[42] The frequency of shared residence in Denmark and Norway is also an increasing trend.[43]

In common law countries, parental responsibility includes making important decisions about the child's life. For instance, in the Australian Family Law Act, all duties and powers that parents have by law in relation to children are included in parental responsibility.[44] The Children Act, 1989 in England & Wales has an identical formulation other than the addition of *"rights"*, preceding "*power & duties"*.[45] In 2006, the Australian legislation was amended to add the presumption of 'equal shared responsibility'.[46] Recently, the Australian government agreed to the recommendation of the Australian Law Reform Commission[47], and *"equal shared parental responsibility"* was replaced by *"making decisions jointly about major long-term issues"*.[48]

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

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

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

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

43 ibid 240.

44 Family Law Act 1975, s. 61B.

45 Children Act 1989 Section 3(2).

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

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

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

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

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

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

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

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

III. Enforcement of Joint Custody Judgments in Turkey

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

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

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

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

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

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

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

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

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

A. Recognition and Enforcement under CPIPL

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

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

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

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

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

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

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

63 Ekşi (n 55) 68.

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

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

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

Foreign judgment, even if it has executory nature, shall not be enforced in Turkey unless it has been finalized.[67] For example, although a decision made in a divorce case in England[68] and Australia[69] is not finalized immediately, it can be executed, but that decision cannot be enforced in Turkey.[70] Therefore, in order to enforce custody decisions in Turkey, the foreign judgment shall be final in a formal and material sense.[71] Moreover, some authors support the idea that foreign custody judgments finalized in a formal sense only will not present an obstacle to enforcement in Turkey.[72] Only after these conditions are met, shall enforcement of foreign joint custody judgments be subject to the essential conditions enumerated in art. 54 of the CPIPL. The first enforcement condition enumerated in this provision is the existence of the reciprocity principle based on any convention between the Republic of Turkey and the state where the court decision is rendered, or a de facto practice or a legal provision which will make enforceable a final decision given by Turkish courts in that state.[73] Reciprocity shall exist when enforcement is requested.[74]

66 Canan Ruhi and Ahmet Cemal Ruhi, *Velayet Hukuku [Law Of Custody]* (Seçkin 2017) 189-90; Nuray Ekşi, *Milletlerarası Özel Hukukta Medeni Olmayan Evliliklerin ve Adli Olmayan Boşanmaların Tanınması [Recognition of Unofficial Marriages and Non-Judicial Divorces in International Private Law]* (Beta 2012) 39 et seq.

67 Ergin Nomer, *Devletler Hususi Hukuku [Private International Law]* (22nd ed., Beta 2017) 508-09; Çelikel and Erdem (n 61) 720; Şanlı, Esen and Figanmeşe (n 61) 641; Ekşi (n 55) 138; Akıncı and Gökyayla (n 55) 160.

68 Family Law Act 1996, Schedule 8, Section 66 (1) provides 6 weeks for every decree of nullity of marriage to be absolute.

69 Family Law Act 1975, art 7A provides that in matrimonial cause proceedings the decree becomes absolute upon the expiration of one month.

70 Çelikel and Erdem (n 61) 720.

71 Şanlı, Esen and Figanmeşe (n 61) 644; Çelikel and Erdem (n 61) 720-21. Aysel Çelikel, 'Yeni Kanuna Göre Yabancı Mahkeme Kararlarının Tenfiz Şartları [Enforcement Requirements According to the New Law]' (1982) 2 (2) Public and Private International Law Bulletin 7, 13; Günseli Öztekin Gelgel, Recognition and Enforcement of Foreign Court Judgments Within the Framework of the Application of the Supreme Court of Appeals in R. Kender and S. Ünan (eds.), Prof. Dr. Tahir Çağa'nın Anısına Armağan [*In Honour of Prof. Dr. Tahir Çağa]* (Beta 2000) 389, 392.

72 Ata Sakmar, *Yabancı İlamların Türkiye'deki Sonuçları [Consequences of Foreign Judgments In Turkey]* (İstanbul University Press, 1982) 57; Şeref Ertaş, 'Yabancı İlamların Tanınması ve Tenfizi [Recognition and Enforcement of Foreign Judgments]' 3 (1-4) Dokuz Eylul University Law Review*, Prof. Dr. Kudret Ayiter Armağanı [In Honour of Kudret Ayiter],* (1987) 365, 391; Fügen Sargın and Rıfat Erten, 'MÖHUK Hükümleri Dairesinde Tanımanın Hukuki Niteliği, Usulu ve Karşılaşılan Bazı Sorunlar: Yeni Bir Düzenleme Yapma Gereği [Legal Nature, Procedure of the Recognition under the Provisions of CPIPL and Some Problems Encountered: Need of New Regulation]', Journal of International Trade and Arbitration Law (2014) 3 (2) 37, 79.

73 Çelikel and Erdem (n 61) 739; Ekşi (n 55) 167; Şanlı, Esen, Figanmeşe (n 61) 646; Faruk Kerem Giray, 'Karşılıklılık Koşulu ve Uluslararası Anlaşmalarla MÖHUK'un Tanıma-Tenfiz Sistemine Getirilen Farklılıklar [Condition of Reciprocity and Differences Introduced with International Conventions to the Recognition-Enforcement System of CPIPL]' in S. B. Bozkurt (ed.) *Yabancı Mahkeme ve Hakem Kararlarının Tanınması ve Tenfizinde Güncel Gelişmeler [Current Developments in Recognition and Enforcement of Foreign Courts and Arbitral Awards]* (On İki Levha 2018) 69, 72; İlyas Arslan, 'Türk Hukukunda Yabancı Mahkeme Kararlarının Tenfizinin Mütekabiliyet Şartına Bağlanmasının Avrupa İnsan Hakları Sözleşmesi'nin m. 6 (1) Açısından Değerlendirilmesi [The Evaluation of the Reciprocity as a Condition for the Enforcement of Foreign Judgments in Terms of art. 6(1) of the European Convention on Human Rights In Turkish Law]' (2019) 10 (1) İnonu University Law Review 1, 1.

74 Çelikel (n 71) 9; Bilgin Tiryakioğlu, *Yabancı Boşanma Kararlarının Türkiye'de Tanınması ve Tenfizi [Recognition and Enforcement of Foreign Divorce Judgments in Turkey]* (Ankara University Press 1976) 76.

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

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

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

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

76 Çavuşoğlu (n 64) 158.

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

78 Nomer (n 67) 523.

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

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

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

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

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

This view is shared by Turkish doctrine as well. Some authors are of the opinion that a joint custody decision made by a foreign court does not alone constitute a violation of public policy because the system does not exist in Turkish Law.[88] In order to consider that the foreign joint custody judgment violates public policy, joint custody should contradict with the best interest of the child. Therefore, each foreign joint custody decision should be scrutinized from the point of view of public policy, taking into account the best interest of the child[89]. Authors supporting joint

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

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

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

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

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

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

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

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

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

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

For example, in its decision on custody in divorce, dated 17 March 1993 and numbered 2-763, the Supreme Court *General Assembly of Civil Chambers* refused to give custody of the children to their Swiss mother without considering the conflict of laws rules. Later, the Supreme Court *General Assembly of Civil Chambers* changed this decision and transferred custody of the children to the mother, but this reversal decision was made without considering conflict of law rules.[91] This attitude of the Supreme Court has been an approach that prevents the application of joint custody in custody cases. This is because states refer to public policy exceptions where a foreign judgment is not in conformity with their national regulations.[92] Turkey is one of these states, so an enforcement court in Turkey considers rules used in the foreign judgment differing from Turkish Law as contrary to Turkish public policy and neglects the exceptional nature of public policy.[93] In other words, the Court applies the public policy exception as a mandatory rule[94] and was criticized in this respect.[95] Turkish courts cannot render an enforcement decision whether the law applied by the foreign court conforms with Turkish public policy. Rejection pursuant to the enforcement is possible only if the legal results arising from the execution are contrary to public policy.[96]

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

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

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

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

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

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

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

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

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

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

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

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

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

98 Nomer (n 67) 539.

99 Çelikel and Erdem (n 61) 726-27.

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

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

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

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

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

102 Huysal (n 7) 160.

> *In general, the basic principles of the legal system aim at social development and protecting personal rights and freedoms, the basic principles of the constitution and the customs and ethical conventions prevalent in the society can be expressed as values representing the public policy, and it can be said that foreign law or foreign law provision that does not clearly comply with these values will not be applied as contrary to public policy. If the result of the application of the foreign law in the concrete case creates an intolerable situation in the face of the above-mentioned basic principles and values, foreign law is not applied on the grounds that foreign law clearly violates public policy. Here, the "negative effect" of the public policy, which prevents the application of foreign law, is mentioned. The concept of public policy is broad, ambiguous, relative and variable.*
>
> *Public policy in Turkish law has an exceptional character that prevents the application of foreign law. Foreign law, authorized by our rules on conflict of laws, has the opportunity to be applied provided that it does not "explicitly" contradict the public policy of the country (CPIPL art. 5). In this case, public policy is not for us a one-sided "binding rule" of conflict of laws rules. On the contrary, the conflict of laws is an exception to the principle of applying foreign legal order, which is demonstrated by our rule.*
>
> *... The enforcement of a foreign decision cannot be refused for reasons such as the fact that the law applied to the principle is different from Turkish Law or it is against the mandatory rules of Turkish Law. The criterion to be taken as a basis here is the core values of Turkish Law, the general Turkish understanding of adaptation, morality, the basic understanding of justice and legal policy on which Turkish laws are based, the fundamental rights and freedoms in the Constitution, the common and accepted legal principles, bilateral agreements, and developed societies. It should be concentrated a common understanding of morality and justice, the level of civilization, and their political and economic regime. (Decision of joint chambers of the Turkish Supreme Court dated 10.02.2012 and numbered 2010/1 E, 2012/1 K.)".*

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

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

103 Gelgel (n 94) 120.

104 ibid 121.

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

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

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

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

105 ibid.

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

Conclusion

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

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

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

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.

Bibliography

Akıncı Z and Gökyayla CD, *Milletlerarası Aile Hukuku [International Family Law]* (1st ed., Vedat 2010).

Akıntürk T and Ateş D, *Türk Medeni Hukuku [Turkish Civil Law]* (23rd ed., Beta 2021).

Akkurt SS, 'Çocuğun Kişiliğinin Korunması ve Velayetin Belirlenmesinde Çocuğun Menfaati

Olgusu' [Interest of The Child in the Protection of the Child's Personality and the Determination of Custody] in B. İ. Engin (eds), *In Honor of Prof. Dr. Rona Serozan* (On İki Levha 2010) 91-121.

Akyüz E, *Çocuk Hukuku, Çocukların Hakları ve Korunması [Child Law, Children's Rights and Protection]* (6th ed., Pegem 2018).

Alibaba A and Rodoslu E, The Role of Public Policy in the Enforcement of Foreign Custody Judgments: An Example of Joint Custody in Turkish Law, 12 (5) *(2020) Sustainability 1-28.*

Apaydın E, 'Ortak Hayata Son Verilmesi Sonrası Ortak Velayet Hususunda Yasal Düzenleme Gereği' [The Necessity of a Legislative Regulation on the Joint Custody After the Dissolution of Marital Union] (2018) 9 (1) Inonu University Law Review 445-476.

Arkan AS, 'Boşanma Halinde Ortak Velayet [Joint Custody in Case of Divorce]' (2016) 14 (167) Legal Hukuk Dergisi [Legal Journal of Law] 6075-6088.

Arslan İ, 'Türk Hukukunda Yabancı Mahkeme Kararlarının Tenfizinin Mütekabiliyet Şartına

Bağlanmasının Avrupa İnsan Hakları Sözleşmesi'nin m. 6 (1) Açısından Değerlendirilmesi [The Evaluation of the Reciprocity as a Condition for the Enforcement of Foreign Judgments in Terms of art. 6(1) of the European Convention on Human Rights in Turkish Law]' (2019) 10 (1) Inonu University Law Review 1-15.

Aybay R and Dardağan E, *Uluslararası Düzeyde Yasaların Çatışması (Kanunlar İhtilafı) [Conflict of Laws at International Level (Conflict of Laws)]* (2nd ed., Istanbul Bilgi University Press 2008).

Barumandzadeh R, Lebrun EM, Barumandzadeh T and Poussin G, 'The Impact of Parental

Conflict and the Mitigating Effect of Joint Custody After Divorce or Separation' (2016) 57 (3) Journal of Divorce & Remarriage 212-223.

Baygın C, *Soybağı Hukuku [Paternity Law]* (On İki Levha 2010).

Blasio G and Vuri D, 'Effects of the Joint Custody Law in Italy' (2019) 16 (3) Journal of Empirical Legal Studies 479-514.

Buchanan CM and Jahromi PB, 'A psychological perspective on shared custody arrangements' (2008), 43 (2) Wake Forest University Law Review 419-439.

Canyaş AB, 'Why Not Enforce? A Critical Analysis of Refusal to Enforce Foreign Joint

Custody Judgments in Turkish Courts' (2013) 27 (3) International Journal of Law, Policy and the Family 310-331.

Carlsund A, Asplund K, Eva S and Eriksson U, 'Swedish Parent's Experiences of Joint Physical Custody' (2014) The Open Family Studies Journal 1-7.

Ceylan E, 'Türk Velayet Hukukunda Yeni Gelişmeler' [Recent Developments in Turkish Custody Law] (2018) 16 (181) Legal Hukuk Dergisi [Legal Journal of Law] 35-68.

Courbe P and Gouttenoire A, Droit de la Famille (7th ed., Sirey 2017).

Çavuşoğlu AU, *Türk Milletlerarası Özel Hukukunda Boşanma [Divorce in Turkish Private International Law]* (1st ed., Beta, 2006).

Çelikel A and Erdem BB, *Milletlerarası Özel Hukuk [Private International Law]* (17th ed., Beta 2021).

Çelikel A, 'Yeni Kanuna Göre Yabancı Mahkeme Kararlarının Tenfiz Şartları [Enforcement Requirements According to the New Law]' (1982)2 (2) Public and Private International Law Bulletin 7-13.

Doğan V, *Milletlerarası Özel Hukuk [Private International Law]* (Savaş 2021).

Dural M, Öğüz T and Gümüş A, *Türk Özel Hukuku [Turkish Private Law] Vol. 3, Aile Hukuku [Family Law]* (Filiz 2021).

Eekelaar J, 'Beyond the Welfare Principle' (2002) 14 (3) Child and Family Law Quarterly 237-250.

Egéa V, *Droit de la famille*, (2nd. ed., Lexis Nexis 2018).

Ekşi N, *Milletlerarası Özel Hukukta Medeni Olmayan Evliliklerin ve Adli Olmayan Boşanmaların Tanınması [Recognition of Unofficial Marriages and Non-Judicial Divorces in International Private Law]* (Beta 2012).

Ekşi N, *Türk Mahkemelerinin Milletlerarası Yetkisi [International Competence of Turkish Courts]* (2nd ed., Beta 2000).

Ekşi N, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi [Recognition and Enforcement of Foreign Judgments]* (2nd ed., Beta 2020).

Elçin EG, *Çocuğun Menfaati Gereği Çocukla İlgili Uyuşmazlıklarda Görüşünün Alınmaması Gereken Durumlar [Circumstances Where the Opinion of the Child Should Not Be Taken in the Disputes Related to the child Due to Child's Interest] in* G. Elçin Evgen and A. Genç Arıdemir (eds), *Çocuk Hakları Çalışmaları I [Children's Rights Studies I]* (On İki Levha 2017) 1- 26.

Elrod DL and Spector RG, 'A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue' (2009) 42 (4) Family Law Quarterly 713-765.

Erdem M, *Aile Hukuku [Family Law]* (2nd ed., Seçkin 2019).

Erlüle F, *İsviçre Medeni Kanunu'nda Yapılan Değişiklikler Işığında Boşanmada Birlikte Velayet [Shared Custody in Divorce in the Light of Changes in Swiss Civil Code]* (Yetkin 2019).

Ertaş Ş, 'Yabancı İlamların Taninmasi ve Tenfizi [Recognition and Enforcement of Foreign Judgments]' 3 (1-4) Dokuz Eylul University Law Review*, In Honour of Kudret Ayiter,* (1987) 365-439.

Esen E, 'Türk Hukukunda Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Münhasır

Yetki Kavramı [Exclusive Jurisdiction in Recognition and Enforcement of Foreign Judgments under Turkish Law] (2002) 22 (2) Public and Private Law Bulletin 183-206.

Folberg J, *Joint Custody and Shared Parenting* (Guilford Press 1991).

Gelgel G, *Devletler Özel Hukukunda Çocuk Hukukundan Doğan Problemler-Ders Notları-[Problems Arising out of Child Law in Private International Law-Lecture Notes-]* (Beta 2012)

Gelgel GÖ, 'Devletler Özel Hukukunda Velayet, Çocuk Kaçırmaları, Evlat Edinmeye İlişkin Problemler [Custody, Child Abductions, Adoption Problems in Private International Law]' (2005) 8 (2) Istanbul Commerce University Social Sciences Review 119-148.

Gelgel GÖ, 'Türk Devletler Özel Hukukunda Velayet ve Vesayet Kararlarının Tanınması ve Tenfizine İlişkin Bazı Problemler [Custody and Guardianship Issues in Private International Law]' (2015) 35 (2) Public and Private International Law Bulletin 107-138.

Gelgel GÖ, Recognition and Enforcement of Foreign Court Judgments Within the Framework of the Application of the Supreme Court of Appeals in R. Kender and S. Ünan (eds.), *In Honour of Prof. Dr. Tahir Çağa* (Beta 2000) 389-397.

Gençcan ÖU, 'Ortak Velayet' [Joint Custody], Izmir Bar Association Bulletin (2017) 24-31.

George R, *Ideas and Debates in Family Law* (1st ed., Hart Publishing 2012).

Giray FK, 'Karşılıklılık Koşulu ve Uluslararası Anlasmalarla MÖHUK'un Tanıma-Tenfiz Sistemine Getirilen Farkliliklar [Condition of Reciprocity and Differences Introduced with International Conventions to the Recognition-Enforcement System of CPIPL]' in S. B. Bozkurt (ed.) *Yabancı Mahkeme ve Hakem Kararlarının Tanınması ve Tenfizinde Güncel Gelişmeler [Current Developments in Recognition and Enforcement of Foreign Courts and Arbitral Awards]* (On İki Levha 2018) 69-83.

Gökyayla CD, 'Yeni Yargıtay Kararları Işığında Gerekçesiz Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi [Recognition and Enforcement of Unjustified Foreign Court Decisions in the Light of New Supreme Court Decisions]' (2013) 9 (105-106) Bahcesehir University Law Review 7-42.

Grassinger GE, *Türk Medeni Kanununda Yer Alan Velayet Hükümleri Kapsamında Küçüğün Kişi Varlığının Korunması İçin Alınan Tedbirler [Measures Taken for the Protection of the Personal Presence of the Minor Under the Provisions of Custody in Turkish Civil Code]* (On İki Levha 2009).

Gülgösteren ZA, 'Boşanma Sonucunda Ortak (Birlikte) Velayet [Joint (Shared) Custody as a Result of Divorce]' (2017) 2 (2) Cankaya University Journal of Law 157-180.

Güven K, 'Türk Hukukunda Evliligin Sona Ermesi ve Evlilik Disi Iliskide Velayet Hakkının Geldigi Son Nokta: Ortak Velayet' [The Last Word in Turkish Law About Parental Authority After Termination of Marriage and in Concubinage: Joint Parental Authority] (2018) 4 (1) Baskent University Law Review 11-64.

Güven P, *Tanıma-Tenfiz, Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi [Recognition-Enforcement, Recognition and Enforcement of Foreign Judgments]* (Yetkin 2013).

Hatemi H, *Aile Hukuku [Family Law]* (9th ed., On İki Levha 2021).

Huysal B, *Devletler Özel Hukukunda Velayet [Custody in Private International Law]* (Legal 2005).

İnce N, 'Karşılaştırmalı Hukukta ve Türk Hukukunda Evlilik Birliğinin Boşanma ile Sona Ermesi Durumunda Birlikte Velayet' [Joint Custody in Comparative Law and Turkish Law in the Case of Termination of the Marriage by Divorce] (2018), Türkiye Adalet Akademisi Dergisi [Turkish Justice Academy Review] 189-230.

Kahraman S, *Türk Milletlerarası Aile Hukukunda Ortak Velayet [Joint Custody in Turkish International Family Law]* (On İki Levha 2019).

Kılıçoğlu A, *Aile Hukuku [Family Law]* (5th ed., Turhan 2020).

Koçhisarlıoğlu C, *Boşanmada Birlikte Velayet ve Yasanın Aşılması [Shared Custody in Divorce and Overcoming the Law]* (Turhan 2004).

Kurt LM, 'Bosanma Durumunda Birlikte (Ortak) Velayet' [Joint Custody in the Case of Divorce] (2018) 9 (2) Inonu University Law Review 157-186.

Malkoç EŞ, *Aile Hukukuna İlişkin Yabancı Kararların Tanınması [Recognition of Foreign Judgments Regarding Family Law]* (On İki Levha 2017).

Marinho S and Vladimira Correia S, 'Notas finais', in S. Marinho and S.V. Correia (eds.), Una familia parental, duas casas (Silabo 2017) 255-263.

Martiny D, 'The Changing Concept of Family and Challenges for Family Law in Germany in J. M. Scherpe (ed.), European Family Law Volume II: The Changing Concept of 'Family' and Challenges for Domestic Family Law (Edward Elgar Publishing 2016).

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

Mnookin RH, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemporary Problems 226-293.

Nomer E, *Devletler Hususi Hukuku [Private International Law]* (22nd ed., Beta 2017).

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

Özgenç Z, 'Velayete Uygulanacak Hukukun Tespitinde Kamu Düzeni Müdahalesine İlişkin Değerlendirmeler [Evaluations Regarding Public Policy Exception in Determination of Applicable Law to Custody] (2018) 22 (1) Ankara Haci Bayram Veli University Faculty of Law Review 3-47.

Öztan B, 'Türk Hukukunda Bosanmada Birlikte Velayet Sorunu' [The Problem of Shared Custody in Divorce in Turkish Law] in S. Arkan and A. Yongalık (eds.), In Honour of Prof. Dr. Tuğrul Ansay (Turhan 2006).

Öztan B, *Aile Hukuku [Family Law]* (6th ed., Turhan 2015).

Öztürk MK, 'Boşanma Sürecinde Ortak (Müşterek) Velayet ve Toplumsal Bakış Açısı' [Joint (Shared) Custody and Social Point of View in the Process of Divorce] in G. Elcin Evgen and A. Genc Aridemir (eds), *Çocuk Hakları Çalışmaları I [Children's Rights Studies I]* (On İki Levha 2017) 59-116.

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

Ruhi AC, and Özdemir H, *Çocuk Hukuku ve Çocuk Hakları [Child Law and Child Rights]* (On İki Levha 2016).

Ruhi C and Ruhi AC, *Velayet Hukuku [Law of Custody]* (Seçkin 2017).

Sakmar A, *Yabancı İlamların Türkiye'deki Sonuçları [Consequences of Foreign Judgments in Turkey]* (Istanbul University Press, 1982)

Sargın F and Erten R, 'MÖHUK Hükümleri Dairesinde Tanımanın Hukuki Niteliği, Usulu ve

Karşılaşılan Bazı Sorunlar: Yeni Bir Düzenleme Yapma Gereği [Legal Nature, Procedure of the Recognition under the Provisions of CPIPL and Some Problems Encountered: Need of New Regulation]', Journal of International Trade and Arbitration Law (2014) 37-136.

Schwenzer I and Keller T, 'The Changing Concept of Family and Challenges for Family Law in Switzerland in J. M. Scherpe (ed.), European Family Law Volume II: The Changing Concept of 'Family' and Challenges for Domestic Family Law (Edward Elgar Publishing 2016).

Scott E, Derdeyn A, 'Rethinking Joint Custody', (1984) 45 (2) Ohio State Law Journal 455-498.

Serdar İ, 'Birlikte Velayet' [Shared Custody] (2008) 10 (1) Dokuz Eylul University Law Review 155-197.

Serozan R, *Çocuk Hukuku [Child Law]* (Vedat 2017).

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

Statsky WP, *Family Law*: The Essentials (Cengage Learning 2015).

Steinbach A, 'Children's and parents' well-being in joint physical custody: A literature review' (2019) 58 (2) Family Process 353-369.

Steinman SB, Zemmelman SE and Knoblauch TM, 'A Study of parents who sought joint custody following divorce: who reaches agreement and sustains joint custody and who returns to court' (1985) 24 (5) Journal of American Academy of Child Psychiatry 554-562.

Şanlı C, 'Türk Hukukunda Çocukların Velayetine ve Korunmasına İlişkin Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi [Recognition and Enforcement of Foreign Child Custody and Child Protection Judgments under Turkish Law]' (1996) 16 (1-2) *Public and Private International Law Bulletin* 71-82.

Şanlı C, Esen E and Ataman- Figanmeşe İ, *Milletlerarası Özel Hukuk [Private International Law]* (9th ed., Beta 2021).

Teziç E, Anayasa Hukuku [Constitutional Law] (Beta 2020).

Tiryakioğlu B, 'Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kamu Düzenine Aykırılık [Violation of Public Policy in Recognition and Enforcement of Foreign Judgments] in S. B. Bozkurt (ed.) *Yabancı Mahkeme ve Hakem Kararlarının Tanınması ve Tenfizinde Güncel Gelişmeler [Current Developments in Recognition and Enforcement of Foreign Courts and Arbitral Awards]* (On İki Levha, 2018) 83-94.

Tiryakioğlu B, *Yabancı Boşanma Kararlarının Türkiye'de Tanınması ve Tenfizi [Recognition and Enforcement of Foreign Divorce Judgments in Turkey]* (Ankara University Press 1976).

Usta S, *Velayet Hukuku [Custody Law]* (On İki Levha 2016).

Uzun TB, 'Türk Medeni Kanunu'na Göre Velayetin Kullanılması ve Çocuğun Üstün Yararı İlkesi Doğrultusunda Boşanmada ve Evlilik Dışı İlişkide Birlikte Velayet Modeli' [The Use of Custody in Turkish Civil Code and the Joint Custody in Divorce and Extramarital Relationship in Line with the Principle of the Best Interest of the Child] (2016) 6 (1) Hacettepe Law Review 135-166.

Yücel Y, *Türk Medeni Hukukunda Boşanma Halinde Velâyet, Cocukla Kişisel İlişki Kurulması ve Çocuğun Soyadı [Custody in Case of Divorce in Turkish Civil Law, Personal Relationship with Children and Child's Surname]* (On İki Levha 2018).

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 27–39

DOI: 10.26650/annales.2022.71.0006
http://annales.istanbul.edu.tr/

Annales de la Faculté de Droit d'Istanbul

Submitted: 18.09.2022
Revision Requested: 13.10.2022
Last Revision Received: 25.10.2022
Accepted: 30.10.2022
Published Online: 19.12.2022

RESEARCH ARTICLE

The 1921 Constitution and Beyond: Any Inspiration After 100 Years?

Nilay Arat*, Aslı Topukçu**

Abstract

The 1921 Constitution has mostly been considered as a unique piece of legal document in Turkish Legal History with regard to the time it was written, the conditions under it was created, the necessity it touched and the era it changed. The 1921 Constitution had been assessed by scholars, bureaucrats, politicians and lawyers in different times from distinct perspectives. It has got special attention lately as regards to the discussions on constitution-making processes. Even after 100 years, many of its features inspire today's constitutional discussions as the 1921 Constitution touches even today's sociological, political and legal needs.

In this context, this paper aims to assess the 1921 Constitution first by pointing out the unique features; then, gives try to answer a question posed whether the 1921 Constitution is a constitution itself, or not. This trial is done under the double constitution period discussions and by pulling out the deficiencies of the 1921 Constitution.

Subsequently, the box of inspirational touches of the 1921 Constitution to 100 years beyond is opened. In that sense, it has been found that the understanding of sovereignty that brings it down to its origin "earth/humankind", the idea of local democracy and the vision on fundamental rights and freedoms that open the door to modern understanding of rights on this part of the world, could be drawn/inherited for today's constitutional making processes.

Keywords

1921 Constitution, Centenary of 1921 Constitution, Double Constitution Period, Turkish Constitutional History

* **Corresponding Author:** Nilay Arat (Assoc. Prof. Dr.), Kadir Has University, Faculty of Law, Department of Administrative Law, Istanbul, Turkiye. E-mail: nilay.arat@khas.edu.tr ORCID: 0000-0002-8625-054X

** Aslı Topukçu (Asst. Prof. Dr.), Kadir Has University, Faculty of Law, Department of Constitutional Law, Istanbul, Turkiye. E-mail: atopukcu@khas.edu.tr ORCID: 0000-0002-5156-9569

To cite this article: Arat N, Topukcu A, "The 1921 Constitution and Beyond: Any Inspiration After 100 Years?", (2022) 71 Annales de la Faculté de Droit d'Istanbul 27. https://doi.org/10.26650/annales.2022.71.0006

Introduction

The 1921 Constitution has a significant role in Ottoman Turkish Constitutionalism in terms of both constitution-making process and the time period it was enacted and its content. In fact, it was based on the period that covered both "liberation" and "establishment" of the newly Turkish state.[1] Even though the 1921 Constitution was left behind over a hundred years back it still has important features that enlighten today's constitutional works and indeed needs. In this context and in this study, the 1921 Constitution is examined by its unique features and its nature, in order to find out whether any reflection or inspiration could be drawn for today's constitution making processes.

I. Unique Features of the 1921 Constitution

The 1921 Constitution differs from the constitutional movements of the Ottoman Empire and the successor constitutions of the Republic of Turkey due to some of its prominent features.[2] The 1921 Constitution has an extremely important and exceptional character in Ottoman-Turkish constitutional history, with its essential founding feature in terms of the way the constitution was formed, as well as with its characteristics indicating the establishment of a new state and being the highest in the hierarchy of norms in the course of the struggle for independence.

In this context, the effect of the struggle for independence and the ideal of establishing a new state on the axis of the main constituent power debates are essential. As a matter of fact, with the establishment of a new state, the creation of its law is in question. Although the Grand National Assembly, which accepted the 1921 Constitution, was not formed for the purpose of preparing a constitution, yet it is accepted that the Grand National Assembly is a constituent assembly because it established a new state as "a parliament with extraordinary powers" and laid down the rules for its organization.[3]

In terms of constituent power, a parallel structure is observed with Arendt's understanding. In this context, Arendt encourages the participation of councils and the people in terms of constitution, and also advocates the separation of the source of government (power) and law. As regards to the Turkish Revolution, local congresses[4] might be linked to Arendt's concept of "council".[5] When the

1 Such identification was used by Prof. Dr. Bülent Tanör, who has intensive and expanded work on Ottoman Turkish Constitutional movements and whose work we are deeply indepted from See Bülent Tanör, *Osmanlı-Türk Anayasal Gelişmeleri* (11nth edn, Yapı Kredi Yayınları 2004).

2 For a detailed information on 1921 Constitution see Ergun Özbudun, *1921 Anayasası* (Atatürk Kültür Dil ve Tarih Yüksek Kurumu Atatürk Araştırma Merkezi Yayınları 2008). For a recent work on the centenary of 1921 Constitution see https://blog-iacl-aidc.org/centenary-of-the-turkish-constitution, last accessed August 21, 2022.

3 Erdoğan Teziç (Anayasa Hukuku, Beta 2020) 185, Belkıs Konan, "1921 Teşkılat-ı Esasiye Kanunu Layihası" (2022) 71 (1) Ankara Üniversitesi Hukuk Fakültesi Dergisi 437, 448.

4 For detailed information on local congresses, see Bülent Tanör, *Türkiye'de Kongre İktidarları* (Yapı Kredi Yayınları 2009).

5 Dinçer Demirkent, *Bir Devlet İki Cumhuriyet*, (Ayrıntı 2017) 66.

1921 Constitution is evaluated based on this approach and the process before its establishment, a democratic structure that had never before existed in the process of Ottoman constitutional developments had been encountered. This draws attention to the original structure of the 1921 Constitution in terms of its differentiation from the constitutional developments until that time.

It has been observed that the 1921 Constitution differed sharply from the previous constitutional processes in terms of its understanding of sovereignty thus perception of national sovereignty had been introduced to the constitutional order. In this context, the 1st article of the 1921 Constitution stated, "(T)he prerequisite for sovereignty belongs to the nation. The administrative method is based on the principle that the people personally and actively manage their destiny." Right after, with the October 29, 1923 amendment, the understanding of national sovereignty was emphasized with the "republic", which is the new form of government introduced by the Constitution.

Apart from the understanding of national sovereignty, one of the philosophical principles that dominated the 1921 Constitution was the principle of populism. What is meant by the principle of populism in the context of practice was popular administration and democratic administration.[6] In the first four articles, titled Purpose and Profession (Aim and Doctrine) of the Populism Curriculum, which has a significant role in the context of the 1921 Constitution the main objectives of the government are set forth. In this context, it was especially mentioned that the people are the real owners of sovereignty. Thus, it is possible to find the traces of the idea of national sovereignty in the Populism Program.[7]

The 1921 Constitution was in force during the transitional period under extraordinary conditions, and for that, some aspects that are required to be essential parts of a constitution were lacking. The most important of these issues was that the 1921 Constitution did not include provisions on fundamental rights and freedoms. Such issues should be assessed as period specific deficiencies. It could be asserted that the function of the constitution as regards the struggle for national independence was initially prioritized over many other issues including fundamental rights and freedoms.

One of the most original aspects of the 1921 Constitution was to adopt the principle of unity of powers (Art. 2). In this context, legislative and executive power was gathered in the Grand National Assembly. The principle of unity of powers was not limited to the legislative and executive branches, but also the judiciary. In this

6 Demirhan Burak Çelik, *Ulusal Kurtuluş Savaşı Döneminde Anayasal Gelişmeler ve 1921 Anayasası* (M.A. Thesis, 2003) 105, Serdar Narin, "1921 Anayasası'nın Genel Özellikleri Bağlamında Yer Yönünden Yerinden Yönetimler ve Siyasal Özerkliğin Reddi" (2018) Eylül İzmir Barosu Dergisi 79, 89.

7 Çelik (n 6) 121-122, Murat Sevinç and Dinçer Demirkent, *Kuruluşun İhmal Edilmiş İstisnası 1921 Anayasası ve Tutanakları* (İletişim Yayınları 2021) 21.

context, the Independence Courts ("İstiklal Mahkemeleri") should be mentioned as the members of these courts were elected by the Assembly and among the deputies.[8] The government system established by the 1921 Constitution also emerged as the "parliamentary government system" in this context.

Another prominent feature of the 1921 Constitution is that it included wide range of provisions regarding local governments. The 1921 Constitution, which lacked provisions on fundamental rights and freedoms and the judiciary, gave such a wide place to local governments, leaving the impression that the understanding of autonomy in the administration had a wide dominance. This could have been rooted in the understanding of dominance of populism by the Grand National Assembly; the wide range of provisions on local governments are mostly linked with the "Populism Program" and the experience of Anadolu and Rumeli Associations for Defence of Rights.[9] In this context the effect of Bolshevik "shura" system and the October Revolution of 1917, which was closely related during the War of Independence, is given credit to effect both the pre constitution making period and the 1921 Constitution itself.[10] In addition, it is argued that the concepts of "populism", "Bolshevism" and "self-determination" are used in line with "local autonomy", and that the idea of populism is not only related to Bolshevism but also to autonomy. As a matter of fact, the emphasis on autonomous council emerges in each of the populism programs that cast about for the associations destined after the opening of the Grand National Assembly.[11]

As regards to the local governments provisions, it has to be pointed out that the Kurdish issue was also linked to that preference.[12] In this context, local government was expressed as the "method of living together" of the Turkish and Kurdish populations.[13]

However, although autonomy was given wide scope under the constitution, it did not have a common application due to the inability to convene the provincial and sub-district councils specified in the Constitution.[14, 15]

8 Tanör (n 1) 258-263.

9 ibid 266-267.

10 Bülent Tanör, *Kurtuluş, Kuruluş* (Cumhuriyet Kitapları 2009) 153; Sevinç - Demirkent (n 7) 20; Tolga Şirin, "Inspiration of Turkey's 1921 Constitution: October Revolution", https://www.tolgasirin.com/post/1921turkishconstitution, last accessed November 1, 2022.

11 Sevinç - Demirkent (n 7) 21.

12 Mustafa Kemal, *Eskişehir-İzmit Konuşmaları 1923* (3rd edn. Kaynak Yayınları 1993) 105.

13 Sevinç - Demirkent (n 7) 40.

14 Oktay Uygun, "Yerel Yönetim Reformu için Anayasal İlkeler" (2015) 2 Strategic Public Management Journal 1, 1-27.

15 One of the prominent features of the 1921 Constitution is that it gave a wide place to local governments and regulated local governments in terms of autonomy. In the 1921 Constitution, which does not include the provisions on fundamental rights and freedoms and the judiciary in the material sense, the fact that local governments are given such a wide place gives the impression that the understanding of autonomy in the administration has a wide scope. The basis of this is that the Grand National Assembly has made the understanding of populism dominant. (Tanör (n 1) 266). However, although autonomy is given wide coverage in terms of legal regulation, it has not been a common application area due to the inability to convene the provincial and sub-provincial councils specified in the Constitution. (Uygun (n 15) 7.

After pointing out the unique features of the 1921 Constitution there comes out a question as regards how such features affect the constitutional value/nature of the 1921 Constitution. If such a question is posed the answer has to be given by examining whether the 1921 Constitution constitutes a constitution or not.

II. What Constitutes a Constitution? Does 1921 Constitute One?

Rules regarding the establishment and organization of states, governmental bodies and their relations, along with fundamental rights and freedoms consist a constitution. The components also underline the material sense of a constitution. In light of the features of 1921 Constitution, it has to be put forth that it comprises provisions regarding sovereignty, functioning of the parliament and provincial and local authorities and governmental system. However, the 1921 constitution lacks fundamental rights and freedoms and rules regarding judiciary. From that point of view, material constitution issue might be questioned as the 1921 Constitution came with shortfalls as regards to the fundamental rights and freedoms and judiciary. However, the period the 1921 Constitution was introduced might give a clue to answer such a question as those days were featured by the War of Independence. Hence, the 1921 Constitution emphasized governmental institutionalization and endeavors to establish a new state.[16]

At this point, the feature of the 1921 Constitution as a "double constitution period" should also be evaluated. The period of the 1921 Constitution is considered as "double constitution period" under the Turkish constitutional literature.[17] Although, a detailed evaluation was not included in terms of this "double constitution period" it has been generaly accepted that the provisions of the 1876 Constitution, which did not conflict with the 1921 Constitution, were still in effect.

It was claimed that the 1921 Constitution abolished the "raison d'étre" of the 1876 Constitution due to the concept of sovereignty, the fact that all state apparatuses were tied to elections, and the legislative, executive and judicial powers were gathered in the parliament. Due to the conditions of the period, the repeal of the 1876 Constitution was not expressly stated, it was not legally abolished, yet, in the letter conveyed by Mustafa Kemal Pasha to the Grand Vizier Tevfik Pasha, it was stated that the provisions of the 1876 Constitution, which did not contradict the 1921 Constitution, were in effect.[18] Finally the 1876 Constitution was abolished by the 1924 Constitution article 104.

However, in the context of "double constitution", apparently at that time period there existed two different constitutions; yet, in terms of the spirit of the new

16 Tanör (n 1) 247.

17 Tarık Zafer Tunaya, *Devrim Hareketleri İçinde Atatürk ve Atatürkçülük* (İstanbul Bilgi Üniversitesi Yayınları 2002) 78; Tanör, (n 1) 268.

18 Tanör, (n 1) 267.

constitution, which forms the institutional foundations of a new state and radically changes the understanding of sovereignty, there existed only 1921 Constitution.[19]

It is obvious that the 1921 Constitution is not a follow-up of the 1876 Constitution besides it benefits from the achievements of Ottoman constitutional developments. Thus, such benefits could also be considered to amount to inspiration. Surely, there existed two separate governments (one being Ankara and the other being Istanbul) with two distinct constitutions having unlike legitimate basis where provisions of these constitutions did not overlap, they ran in parallel lines.

The "*double constitution period*" also has to be examined in the light of the concept of "*deconstitutionalization by revolutions*". It is accepted under the "*deconstitutionalization by revolutions*" concept that after revolutions constitutions are abolished and only the provisions not related with state institutions and organizations might be effective at a statutory level. In general, provisions regarding fundamental rights and freedoms and criminal law principles are accepted to be in force. Thus, provisions of constitutions left behind by revolutions become deconstitutionalized with the effect of revolution.[20] [21]

In addition, it has to be put forth that in the 1921 Constitution, there existed no provision referring to the 1876 Constitution in any way, including its effectiveness and abolishment.[22] In that sense, the "Discrete Clause" ("Madde-i Münferide") which explicitly articulates that the 1921 Constitution be effective from the date of its release without any reference to any former legal instrument including the 1876 Constitution, has to be considered. Under such scheme, it might be asserted that the provisions of the 1876 Constitution that are not in contradiction with the 1921 Constitution be effective only at the statutory level.

As stated above, the contribution of the constitution to the struggle for national independence was prioritized over the need for special regulation of fundamental rights and freedoms. Again, it should be noted that the perception of fundamental

19 In the same parallel see; Osman Can, "1921 Anayasası'nın 100. Yılı: Bir İstisnai Başarı ve Dramatik Başarısızlık Hikayesi" (2021) 38 (1) Anayasa Yargısı Dergisi 127, 136 ft. 22. For a different view see; Mustafa Erdoğan, "Anayasacılık ve Demokrasi Açısından 1921 Teşkilat-ı Esasiye Kanunu", http://erdoganmustafa.org/anayasacilik-ve-demokrasi-acisindan-1921-teskilat-i-esasiye-kanunu/ , last accessed July 1, 2022.

20 Kemal Gözler, *Kurucu İktidar* (2nd edn, Ekin 2016) 69-70.

21 A common example for such under Turkish Law is the article 1 of the Law on the Constitutional Order (Law No 2324, date 27.10.1980) that entered into force after 1980 coup d'état, which gives a way to some provisions of the 1961 Constitution be effective until a new constitution enters into force.

22 "In fact, an example for such could be pulled out from 1958 French Constitution that does not involve social and economic rights, yet it refers to the 1946 Constitution for such.
In other words, the preamble of the 1958 Constitution explicitly refers to the preamble of the 1946 French Constitution which brings us to an end on the effectiveness of the provisions covering civil, political and social rights during the 1958 French Constitution period. Such relation in between the 1958 Constitution and 1946 Constitution could be named as complimentary and continuity. Nevertheless, it is hard to say that same argument applies to the case of 1876 Constitution and the 1921 Constitution. Hence, mentioned two different constitutions reflects and represents two distinct states' institutional spirit." See; https://blog-iacl-aidc.org/centenary-of-the-turkish-constitution/2021/3/9/the-turkish-constitution-of-1921-an-assessment-of-the-double-constitution-period-f7r2f , last accessed August 14, 2022.

rights and freedoms has to be considered indispensable in a constitution, and that it had not yet been embraced or rooted in the Ottoman Empire, especially in the context of a struggle for independence.

Under the 1876 Constitution[23], fundamental rights and freedoms was regulated under the title of "The General Law of the Subjects of the Ottoman State"("Tebaa-i Devlet-i Osmaniye'nin Hukuk-ı Umumiyesi"). Under this scheme, citizenship[24] and religious freedoms, right to liberty and security, freedom of expression had been granted. Additionally, rights and freedoms in the sphere of economic and social life such as right to education, right to enterprise and the principle of legality of taxation had also been regulated.

Although the 1921 Constitution[25] lacks any provision as regards to the judiciary it offered rights and freedoms on procedural issues. In article 23, the guarantee of a legal judicial process is provided, and it is regulated that a person cannot be compelled to go to another court prescribed by law. In addition, under the title of "Mehakim" of the 1876 Constitution, there are some regulations that could be discussed within the scope of the right to a fair trial in today's sense. For example, the principle of publicity of the proceedings was regulated under the Article 82, and that courts cannot be established other than the existing courts was set forth under the Article 89, and in this context, the principle of natural judge, the right of defense was enshrined under the Article 83, and the guarantee of judges and prosecutors was regulated under the Articles 81 and 91.

However, under this legal fragment there existed numerous contradictions on provisions regarding the fundamental rights and freedoms that had been granted by the 1876 Constitution. The guarantees brought by the 1876 Constitution in the field of the judiciary had not been followed, and therefore a weakness had emerged in the protection of fundamental rights and freedoms. Especially in this period, the formation and functioning of the Independence Courts contradicted the principles of the independence of judges and legal judge assurance. For these reasons, under the 1921 Constitution, a significant piece of legislation was enacted regarding judicial guarantees and the right to personal freedom and security. In addition to article 203 of the current 1858 Ottoman Penal Code, the 10-item Personal Freedom Law ("Hürriyet-i Şahsiye Kanunu")[26] proposal was submitted on April 18, 1921 however, adopted in the form of 5 articles on February 12, 1923.

23 For an unofficial translation of the text in English see https://iow.eui.eu/wp-content/uploads/sites/18/2014/05/Brown-01-Ottoman-Constitution.pdf , last accessed November 20, 2022.

24 The article 8 of the 1876 Constitution defined the citizenship as "(A)ll subjects of the empire are called Ottomans, without distinction whatever faith they profess; the status of an Ottoman is acquired and lost according to conditions specified by law."

25 For an unofficial and selected translation of the text in English see http://genckaya.bilkent.edu.tr/1921C.html , last accessed November 20, 2022.

26 For detailed information on Hürriyet-i Şahsiye Kanunu see; Asaf Özkan and Esra Taşdelen, "Türkiye'de Kişi Hak ve Özgürlüklerinin Gelişimi Bağlamında Hürriyet-i Şahsiye Kanunu" (2019) 8 (1) Atatürk Dergisi 53, 53-78; Can (n 21) 154-157.

Under the Personal Freedom Law, among other issues, the violation of the principle of natural judge and the right to a fair trial, and those who participated in these crimes being sentenced to imprisonment from one year to three years and to life imprisonment was covered. It was regulated that they will have been punished with the penalty of dismissal from rank and civil service. In addition, it was stipulated that the personal damage will have been compensated.

In this period, based on many examples, it was observed that the guarantees brought by the 1876 Constitution in the field of the judiciary were not complied with; therefore a weakness appeared in the protection of fundamental rights and freedoms. Especially the formation and functioning of the Independence Courts contradicted the principles of independence of judges and legal judge assurance. For these reasons, the importance of the Personal Freedom Law will be better understood while taking into account the time period.

III. What could be inherited from the 1921 Constitution?

The 1921 Constitution, has an important role in the history of the Turkish Constitutionalism as it is a legal document in which the first phases of the important constitutional principles and founding values that have come down to the present day could have been found. It carried extremely advanced steps compared to the conditions of that specific period both in terms of its understanding of sovereignty, introducing a new form of government, and focusing on decentralization. In addition to these features, another important element is related to the role of the primary constituent power in the constitution-making process. Under an assessment as regards the constitution-making processes until today the 1921 Constitution has a unique quality in terms of being in line with democratic procedures. However, it emerged under the conditions of the struggle for independence.[27]

The 1921 Constitution, which provides the basis of the following constitutions of the Republic of Turkey, is an important text that includes previous constitutional experience, repertoire and progress from Ottoman constitutional period.

The 1921 Constitution comes to the forefront with the ability of establishing a constitutional accumulation in Ottoman Turkish constitutional movements, both benefitting from previous experience and forming a basis for future constitutional movements, by addressing and implementing significant constitutional principles for the first time.

In this context, the idea of "democracy" and with reflection of such as a constituent assembly, first steps were taken towards the institutionalization of

27 Narin (n 6) 85.

democratic institutions. Even under extraordinary circumstances the guidance of law and democracy culture not being laid aside indicates the sensibility of the 1921 Constitution as regards to "solve the crisis with democracy"[28].

As regards to the local governments, the 1921 Constitution pointed to a different political philosophy from the Ottoman-Turkish administrative tradition. In that context, the formation of the organization model based on the sub-district is interpreted as the constitutionalization of the reaction of Anatolia against the center.[29]

During the discussion of the articles of the 1921 Constitution in the Parliament, the positive opinions of the majority of the deputies on the principle of decentralization draw attention. Contrary to the practice up to that period, it was stated that an order from the local power to the center would be more appropriate.[30]

Besides, allowing local governments a wide setting in the 1921 Constitution, creating assemblies elected by the people in local governments, and transferring important powers and duties of the center to local governments should be considered as a step in the realization of national sovereignty.[31]

The local congress governments, which prepared the environment in which the 1921 Constitution emerged, are also the starting point of the understanding of "resolving the crisis with democracy". In this context, it can be said that the understanding of democratic participation and the power of representation is extremely broad provided that it is evaluated within the framework of the conditions of the period.[32] As a matter of fact, thirty congresses were convened between 05.11.1918 and 08.04.1920, which were based on the representation of different geographical regions throughout the country and constituted "examples of spontaneous direct participation"[33]. The main purpose of the local congresses and their contribution to the following process was to reveal the will of the people. This was reached through the congresses, democratic discussions and joint decision-making processes.[34] Another contribution of congresses to democracy was seen in the 1919 election. It could be said that the culture of democracy developed through congresses during this period was reflected in the last Ottoman parliament that was formed with the 1919 elections. This had a positive impact on the first assembly, which also included the members of the last

28 Tanör (n 1) 288, Tanör (n 10) 75.

29 Narin (n 6) ft. 27, Tanör (n 1) 265, Rıdvan Akın, "Birinci Türkiye Büyük Millet Meclisi'nin 1921 Teşkilat-ı Esasiye Kanunu Lahiyasını Müzakeresi" in *Tarık Zafer Tunaya'ya Armağan* (İstanbul Barosu Yayınları 1992) 357.

30 Konan (n 3) 470.

31 ibid 472.

32 As for the participation the issue has to be considered under the conditions of those times in terms of electoral rights, i.e. universal suffrage. For e gender based e-assesment on this issue see; https://blog-iacl-aidc.org/centenary-of-the-turkish-constitution/2021/3/23/gender-of-the-constituent-power-of-the-turkish-constitution-of-1921.

33 Tevfik Çavdar, Türkiye'nin Demokrasi Tarihi 1839-1950 (6th edn, İmge 2019) 162.

34 ibid 183.

Ottoman assembly, in the context of democratic participation. In this context, the 1919 elections ensured public participation in the axis of the War of Independence.[35]

Apart from the perception of democracy, it may be necessary to evaluate the characteristics of the Grand National Assembly as a constituent assembly in the making of the 1921 Constitution. Although the will that created the 1921 Constitution was not formed only to make a constitution, it should be considered as a constituent assembly in terms of revealing the basic principles of a newly established state.[36] It is seen that the founding leaders had concerns about legality and legitimacy during the establishment of the new state, which is combined with the concern for democracy.[37] As a matter of fact, in the circular that Mustafa Kemal sent to Anatolia after the occupation of Istanbul, he called for the convening of the Assembly of Establishment[38], and he explained the purpose of this statement as the assembly to be equipped with powers to realize the regime change. However, later on, this expression was abandoned and the expression "assembly with extraordinary powers" was preferred. Here, it could be evaluated that there was a perception of a constituent assembly formed by democratic methods in terms of both legal and sociological representation[39] in the context of the constitution-making technique, even under war conditions. In this context, the construction process of the 1921 Constitution is very unique in terms of the fact that these conditions under the occupation conditions produced democracy within their own possibilities, and in Tanör's words, it almost created a democracy of war[40], and that it was evaluated as a civilian constitutionalism[41] experience under the occupation conditions.

Conclusion

After assesing the 1921 Constitution in a general framework, it is necessary to reveal its aspects which we might reach and benefit from for today's constitution making processes/constitutionalism.

It draws ones attention that it was an environment in which two states, one of which is ending and the other being newly established, and their founding principles were dramattically contradicted, co-existed together. Additionally, the newly established

35 ibid 192.

36 For detailed information on the constituent assembly see; Sinem Şirin, "1921 Teşkilatı Esasiye Kanunu Çerçevesinde Kurucu İktidar Tartışması", (2019) 8 (16) Anayasa Hukuku Dergisi 359, 369-388.

37 Yusuf Tekin and Şeref İba, "Görüşme ve Yasama Yöntemi Bağlamında 1921 Anayasasının Kanunlaşma Süreci" (2020) 53 (2) Amme İdaresi Dergisi 1, 17.

38 Faik Reşit UNAT, "Atatürk'ün Toplamak İstediği 'Meclis-i Müessisan'", https://belleten.gov.tr/tam-metin-pdf/1282/tur , last accessed June 2, 2022.

39 Tarık Zafer Tunaya, "TBMM'nin Kuruluşu ve Siyasi Karakteri" (1958) 23 (3-4) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 227, 231-232.

40 Tanör (n 10) 75, 115.

41 Tanör (n 1) 288.

state did not left behind the constitutional accumulation of the past even during the struggle for the independence. From this point of view, if an inspiration has to be gained for todays' constitutional processes from the 1921 Constitution times, in cases where a new system, a regime or a legal framework is to be created, the existing knowledge might be guiding and even complementary; considering that the 1921 Constitution benefitted from the provisions of the 1876 Constitution -at a level of law- that did not conflict with the 1921 Constitution and inspired from the experience of the previous period within the scope of both election and democracy experience.

In addition, although fundamental rights and freedoms were not covered under the 1921 Constitution, the perception of fundamental rights in the previous period had been preserved at a level of law. And even further, it could be asserted that, the philosophical ground was prepared for the understanding and regulations of human rights for the future constitution making periods. This perception is a result of the understanding of national sovereignty, the abolition of the sultanate, as well as the proclamation of the republic and thus the naming of the new regime. In this context, even the fundemantal rights and freedoms were not covered even under the struggle for independence period, the importance attributed and the guarantees granted by law to fundamental rights and freedoms should shed light on the present day as an issue that should be handled with care and sensitivity in every period since fundamental rights and freedoms is one of the most important elements of the constitutional system.

The key point in benefiting from the accumulation of previous constitutions is not to ignore the characteristics of the rules that formed the framework of the principles of administration and fundamental rights in accordance with the needs of existing social dynamics. New rules and new institutions could be integrated into the system according to the needs of society; however, the spirit of the constitutional structure has to be kept. In this respect, constitutional accumulation must be taken into account while meeting the social dynamics and needs.

Today, if the 1921 constitutionalism is to be inspired, attention should be paid to the reflexes in the formation process of the constitution, but the needs and social structure shaped by today's conditions should also be prioritized. However, it should be kept in mind that the essential founding element peculiar to this period did not appear in the constitutions of the next period, and it has been observed that the spirit of the 1921 Constitution has been misjudged in the recent past.

Peer-review: Externally peer-reviewed.
Author Contributions: Conception/Design of study: N.A., A.T.; Drafting Manuscript: N.A., A.T.; Critical Revision of Manuscript: N.A., A.T.; Final Approval and Accountability: N.A., A.T.
Conflict of Interest: The authors have no conflict of interest to declare.
Financial Disclosure: The authosr declared that this study has received no financial support.

Bibliography

Books and Articles

Akın, R, "Birinci Türkiye Büyük Millet Meclisi'nin 1921 Teşkilat-ı Esasiye Kanunu Lahiyasını Müzakeresi" in *Tarık Zafer Tunaya'ya Armağan* (İstanbul Barosu Yayınları 1992) pp. 343-357.

Can, O, "1921 Anayasası'nın 100. Yılı: Bir İstisnai Başarı ve Dramatik Başarısızlık Hikayesi" (2021) 38 (1) Anayasa Yargısı Dergisi, pp. 127-170.

Çavdar, T, *Türkiye'nin Demokrasi Tarihi 1839-1950* (6th edn, İmge), 2019.

Çelik, D B, *Ulusal Kurtuluş Savaşı Döneminde Anayasal Gelişmeler ve 1921 Anayasası*, (M.A. Thesis, Galatasaray Üniversitesi Sosyal Bilimler Enstitüsü) 2003.

Demirkent, D, *Bir Devlet İki Cumhuriyet*, (Ayrıntı 2017).

Gözler, K, *Kurucu İktidar*, (2nd edn, Ekin, 2016).

Konan, B, "1921 Teşkılat-ı Esasiye Kanunu Layihası" (2022) 71 (1) Ankara Üniversitesi Hukuk Fakültesi Dergisi pp. 437-476.

Mustafa Kemal, Eskişehir-İzmit Konuşmaları 1923, (3rd edn. Kaynak Yayınları), 1993.

Narin, S, "1921 Anayasası'nın Genel Özellikleri Bağlamında Yer Yönünden Yerinden Yönetimler ve Siyasal Özerkliğin Reddi" (2018) Eylül İzmir Barosu Dergisi, pp. 79-109.

Özbudun, E, *1921 Anayasası* (Atatürk Kültür Dil ve Tarih Yüksek Kurumu Atatürk Araştırma Merkezi Yayınları, 2008).

Özkan, A, Taşdelen, E, "Türkiye'de Kişi Hak ve Özgürlüklerinin Gelişimi Bağlamında Hürriyet-i Şahsiye Kanunu" (2019) 8 (1) Atatürk Dergisi, pp. 53-78.

Sevinç, M, Demirkent, D, *Kuruluşun İhmal Edilmiş İstisnası 1921 Anayasası ve Tutanakları* (İletişim Yayınları, 2021).

Şirin, S, "1921 Teşkilatı Esasiye Kanunu Çerçevesinde Kurucu İktidar Tartışması", (2019) 8 (16) Anayasa Hukuku Dergisi, pp. 359-408.

Tanör, B, *Kurtuluş, Kuruluş* (Cumhuriyet Kitapları, 2009).

Tanör, B, *Osmanlı-Türk Anayasal Gelişmeleri* (11nth edn, Yapı Kredi Yayınları, 2004).

Tanör, B, *Türkiye'de Kongre İktidarları* (Yapı Kredi Yayınları, 2009).

Tekin, Y, İba, Ş,"Görüşme ve Yasama Yöntemi Bağlamında 1921 Anayasasının Kanunlaşma Süreci" (2020) 53 (2) Amme İdaresi Dergisi, pp. 1-18.

Teziç, E, *Anayasa Hukuku* (Beta, 2020).

Tunaya, T Z, "TBMM'nin Kuruluşu ve Siyasi Karakteri" (1958) 23 (3-4) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, pp. 227-247.

Tunaya, T Z, *Devrim Hareketleri İçinde Atatürk ve Atatürkçülük* (İstanbul Bilgi Üniversitesi Yayınları, 2002).

Uygun, O, "Yerel Yönetim Reformu için Anayasal İlkeler" (2015) 2 Strategic Public Management Journal, pp. 1-27.

Electronic Sources

Erdoğan, M, "Anayasacılık ve Demokrasi Açısından 1921 Teşkilat-ı Esasiye Kanunu", http://erdoganmustafa.org/anayasacilik-ve-demokrasi-acisindan-1921-teskilat-i-esasiye-kanunu/ , last accessed July 1, 2022.

Şirin, T, "Inspiration of Turkey's 1921 Constitution: October Revolution", https://www.tolgasirin.com/post/1921turkishconstitution, last accessed November 1, 2022.

Unat, F R, "Atatürk'ün Toplamak İstediği 'Meclis-i Müessisan'", https://belleten.gov.tr/tam-metin-pdf/1282/tur , last accessed June 2, 2022.

https://blog-iacl-aidc.org/centenary-of-the-turkish-constitution, last accessed August 21, 2022.

https://blog-iacl-aidc.org/centenary-of-the-turkish-constitution/2021/3/9/the-turkish-constitution-of-1921-an-assessment-of-the-double-constitution-period-f7r2f , last accessed August 14, 2022.

1986 Constitution, https://iow.eui.eu/wp-content/uploads/sites/18/2014/05/Brown-01-Ottoman-Constitution.pdf , last accessed November 20, 2022.

1921 Constitution, http://genckaya.bilkent.edu.tr/1921C.html , last accessed November 20, 2022.

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 41–49

DOI: 10.26650/annales.2022.71.0016
http://annales.istanbul.edu.tr/

Annales de la Faculté de Droit d'Istanbul

Submitted: 01.12.2022
Revision Requested: 10.12.2022
Last Revision Received: 12.12.2022
Accepted: 18.12.2022

RESEARCH ARTICLE

Facebook Decision of the Berlin District Court: Does the use of Unfair Terms Constitute Unfair Competition?

Elif Beyza Akkanat Öztürk*

Abstract

Unfair terms regulation is aimed at protecting consumers from differences in negotiation power and information asymmetry between the consumer and the entrepreneur. However, the unfair terms regulations serve not only for the protection of consumers but also the protection of competition between entrepreneurs so as to prevent unfair competition. Hence, based on the regulation the use of terms contrary to the rule of good faith may constitute unfair competition (TCC Art.55/1/f.). Nevertheless, the legal consequences of unfair terms and unfair competition regulations are different. This study analyses the effect of the use of unfair terms on the claims based on unfair competition. The decision of the Berlin District Court on 16 January 2018 regarding Facebook's terms of use has been selected as a reference to answer to the question . Thereby, the interaction of different protection mechanisms is demonstrated. The decision is analysed not in terms of data protection law, but in terms of the assessments regarding whether the use of unfair terms constitutes unfair competition. The court assessed the terms of use for conformity with the provisions of BGB §§305-310 and decided whether the provision of services based on terms of use containing unfair terms constitutes unfair competition. This case, filed by a consumer organisation to protect the interests of consumers, has been chosen deliberately. It is aimed at emphasising the significance of the collective action in consumer protection. Evaluating the protection mechanisms as a holistic approach will ensure a more effective protection of both the consumer and competition.

Keywords

Consumer Protection, Holistic Approach, Unfair Terms, Unfair Competition, Terms of Use

* **Corresponding Author:** Elif Beyza Akkanat Öztürk (Dr.), Istanbul University Faculty of Law, Comparative Law Department, Istanbul, Turkiye. E-mail: eba@istanbul.edu.tr ORCID: 0000-0003-4856-9733

To cite this article: Akkanat Ozturk EB, "Facebook Decision of the Berlin District Court (Landgericht): Does the use of Unfair Terms Constitute Unfair Competition?", (2022) 71 Annales de la Faculté de Droit d'Istanbul 41.
https://doi.org/10.26650/annales.2022.71.0016

I. Introduction

It is safe to say that data processing is shaping the market and bringing a breath of fresh air to various business models. Data-driven business models are diversifying day by day and strengthening their place in the market. Despite all the scandals, the number of active users of Facebook is 2.96 billion depicts the sheer size of this market. It is followed by Youtube (2.57 billion) and WhatsApp (2.5 billion)[1]. As every benefit comes with a burden; data-driven business models are subject to many authorities and court decisions in various aspects. In this context, in the list of companies with the largest data protection law penalties (fines) imposed since the effective date of the GDPR (30 largest fines), it is seen that 7 of the top 10 largest fines were imposed on the above-mentioned companies[2].

The subject of this study is the 2018 judgement of the Berlin District Court, in which Facebook's terms of use (and thus its data policy) were subject to review under the unfair terms provisions. In this respect: (1) the facts in the case will be analysed in detail. (2) Subsequently, the importance of the relationship between unfair terms and unfair competition in terms of the legal remedies that consumers have will be emphasised. (3) This case, filed by a consumer association to protect the interests of consumers, has been deliberately chosen. Thus, it is aimed at emphasising the importance of collective action for protection of consumers, and the thesis of this study is that the evaluation of protection mechanisms as a whole will ensure the effective protection of both consumers and fair competition.

A. Subject Matters of The Case

In the present case, a German consumer association (the claimant[3]) filed an action against Facebook for injunctive relief (§ 3a D-UWG), seeking a declaration that the terms of use and default settings on Facebook's website, accessible in Germany, constitute unfair competition (§ 3a D-UWG)[4]. Characteristic of the Berlin District Court's judgement is that it assessed the terms of use and default settings in accordance with §§ 305-310 BGB and German data protection law and then decided whether the defendant had caused unfair competition with its terms of use. The claimant alleged that Facebook's terms of use applicable to users with permanent residence in Germany infringed the UWG (*Gesetz gegen den unlauteren Wettbewerb - Unfair Competition Act*) in the following respects:

1 Statista GmbH, "Ranking der größten Social Networks und Messenger nach der Anzahl der Nutzer im Januar 2022", Date of Access 08 November 2022.

2 https://www.tessian.com/blog/biggest-gdpr-fines-2020/ , Date of Access 08 November 2022.

3 See also on the status and activities of the Claimant, Facebook (n 1) N. 2.

4 Facebook (n 1) N. 1.

1. Although Facebook gives the impression that it offers a free service, data-driven business models are an additional cost for the consumer and in this respect, Facebook misleads consumers[5]. It was claimed that Facebook provides a service in return for the opportunity to process the personal data of its users, that it generates income through the processing of personal data, and that such practice constitutes unfair competition[6]. It was argued that Facebook's data processing activity contravened the indirect pricing regulation (§ 3(3)(21) of the UWG and § 3(2) of the UWG)[7].

2. Data processing in violation of data protection law is unfair competition. In particular, data processing without the consent of users (based on default settings) violates the fundamental rights of users. Data processing based on these default settings is an unfair condition (tipping the balance against the consumer), as it is contrary to the rules of data protection law[8].

3. An assessment of the terms of use and privacy policy shows that the data subject is not provided with transparent information. Users will try to figure out how to use the service on their own, which is contrary to BGB § 309 Nr. 12 b[9].

4. Provisions in the terms of use that oblige the user to provide true data and impose an age limit for use are contrary to BGB § 307 Nr. 1 and 2[10]. In addition, while it is Facebook's legal obligation to check the age of users and whether they are able to enjoy the relevant service, it has been claimed that Facebook is trying to get rid of this by means of the terms of use. Facebook must check the age of the counterparty before concluding the contractual relationship. Otherwise, it is Facebook, not the contracting party, that is in breach of its obligation[11].

5. Finally, it was claimed that the provision allowing unilateral modification of the contract was an unfair term[12]. The main reason for this is that the term "modification" is defined in a very broad manner, and therefore, it disrupts the balance against the consumer in violation of the rule of Good Faith. This is because the use after the change is also linked to the conclusion that consent to the change has been given, which is unacceptable. It is unfair to expect users to predict the respondent's need to make changes. The inclusion of such an amendment provision within the scope of the contract is the use of unfair terms and therefore constitutes a violation of the principles of unfair competition[13].

5 Facebook (n 1) N. 6.

6 Facebook (n 1) N. 6.

7 Facebook (n 1) N. 7.

8 Facebook (n 1) N. 7 ff.

9 Facebook (n 1) N. 9.

10 Facebook (n 1) N. 10.

11 Facebook (n 1) N. 11-12.

12 Facebook (n 1) N. 13.

13 Facebook (n 1) N. 13-14.

B. Court Decision

The Court stated the following conclusions:

- Firstly, it determined that the applicable law is German law[14].
- It also ruled that it was possible for the claimant to pursue this action because the common interests of German consumers could be prejudiced by any objectionable content and conditions of use on the websites[15].
- The Court considered that the central issue in dispute was the directly accessible and easily understandable nature of the terms of use[16]. It was stated that the respondent's terms of use were redirected to many pages in order to be accessed as a whole (in the rights and responsibilities section, which is the following link within the scope of the terms of use/legal explanation-legal warnings at the bottom of the site) and that a reasonable consumer could not easily access the information. It was emphasised that it does not matter if the default settings can be changed by the user after registration, as the obligation to inform before registration must be fulfilled[17].
- The Court characterised the "default settings" as a "commercial act" within the meaning of UWG §2 1/1/1[18]. It was stated that the default settings were also the respondent's practices for data processing[19]. Default settings are technical features for the scope of processing of user data. In this context, as the Court correctly pointed out, Facebook did not rely on a valid ground of lawfulness in terms of the data processing activity carried out with default settings[20]. In this framework, it has been determined that these settings shall be subject to examination, taking into account the German data protection regulations.
- The Court then indicated that the rules of data protection law also regulate market behaviour[21]. The provisions of data protection law are intended to regulate market behaviour in the interest of consumers (as well as the respondent) as market participants within the meaning of UWG §3a[22]. The collection, processing and use of data within the scope of the default settings objected to by the claimant is

[14] Facebook (n 1) N. 30 ff. The decision has not been analysed in this study in terms of determining the applicable law. On the other hand, the Court has made relevant assessments on the basis of the provision in the contract that Irish law shall be applied. See also Facebook (n 1) N. 31 ff.

[15] Facebook (n 1) N. 33 ff.

[16] Facebook (n 1) N. 39.

[17] Facebook (n 1) N. 39.

[18] Facebook (n 1) N. 42.

[19] Facebook (n 1) N. 42.

[20] Facebook (n 1) N. 42 and 44.

[21] Facebook (n 1) N. 44.

[22] Facebook (n 1) N. 44 ff.

unlawful under German data protection law. This unlawfulness will persist until the user either changes one of these settings himself or gives valid consent[23]. At this point, the Court held that the question to be answered is whether the use based on default settings implies consent. The Court considered that such consent is not valid. This is because the user's consent for the collection and use of data must be disclosed (expressed) beyond any doubt[24]. Moreover, consent must be based on informed decisions. The user must be able to make a decision of his/her own free will; for this, the user must first be thoroughly informed about the context-meaning, background and consequences of his/her declaration. It may not be defended that the valid consent is given only on the basis of use[25].

- However, the Court disagreed with the description of "additional costs". Accordingly, since there is no economic burden on the consumer, the principles of indirect pricing do not apply to the concrete case[26]. According to the UGW (§3/3 (annex to paragraph 3) a number of cases are recognised as additional costs. Examples of additional costs are cases in which a hidden cost actually arises for the consumer in the form of direct or indirect payment obligations or financial burdens (charging a fee after the broadcast of adverts that are deemed to be free of charge)[27]. The Court held that this was not the situation in the present case. Here, the possibility of processing personal data affects the non-material interests of the consumer, i.e., his or her right to self-determination with regard to information (innuendo the data processing concerns non-material interests)[28]. The labelling of the service as free of charge is also not misleading. Because the average informed and reasonable consumer understands the meaning of "free of charge"[29]. Personal data is a counter-performance, but not a price. However, Facebook does not claim to provide a free service[30].

- As mentioned above, the Court emphasised that the information requirements for all contractual provisions were not complied with[31]. The user must also be informed of the purpose of the collection, processing or use (of the data) before consent is given BDSG (§4a (1) sentence 2). The respondent failed to do so. It is not clear which of the user's data will be transferred to the USA and how it will be

23 Facebook (n 1) N. 44-45.

24 Facebook (n 1) N. 46 ff.

25 Facebook (n 1) N. 46-47.

26 Facebook (n 1) N. 49 ff.

27 Facebook (n 1) N. 50.

28 Facebook (n 1) N. 50.

29 The statement that there is actually an awareness of what is in return here is an important determination, although not in the context of this study.

30 Facebook (n 1) N. 51.

31 Facebook (n 1) N. 52 ff.

processed there, and what data security standards will apply there[32]. This is also a violation of the transparency requirement. Since the user cannot determine the consequences of his or her declaration on the basis of the information provided to him or her in this respect either, a conscious decision on the part of the user cannot be assumed (§§ 4,4a BDSG, 12, 13 TMG). This provision constitutes an unfair term according to the BGB and the consent based on this provision is also invalid (BGB §307 Abs. 1; BDSG §§ 4, 4a, 12, 13 TMG). Because it is not possible to assume the existence of informed consent[33].

- The Court considered that the unilateral granting of the possibility of modification and the provision that consent is given by use are also unfair terms and void pursuant to BGB §307[34]. Here, the Court assessed the consequences of the post-amendment use[35]. It is noticed that the Court draws attention to the fact that consent is a separate legal transaction from the contractual relationship. Accordingly, the user's continued use after becoming aware that he or she has consented to changes in the applicable conditions has a dual function: (1) acceptance of the terms of the contract (2) declaration of consent in accordance with data protection law[36]. Even though it is possible and legally valid for the user to implicitly accept a change in the general terms and conditions, it is not possible to come to the same conclusion for consent, considering the nature of consent[37].

- The Court held that it was not clear why the age limit provision existed. Accordingly, it is not clear why a minimum age limit of 13 years is applied to the contractual relationship between the user and the defendant[38]. For reasons of protection of minors, the respondent may wish to ensure that its services can only be used by persons over the age of 13. However, it is not clear from the terms of use what legal obligation the respondent has to impose such an access restriction. Furthermore, the users were not informed about the age limit. Moreover, this obligation belongs to the defendant in any case and cannot be shown as an obligation of the user by the contract[39].

[32] Facebook (n 1) N. 65.

[33] Facebook (n 1) N. 59 ff.

[34] Ibid.

[35] Facebook (n 1) N. 60.

[36] Facebook (n 1) N. 71 ff.

[37] Facebook (n 1) N. 61 ff. However, not every change in the terms of use will mean that the type or scope of data processing has changed. There may also be purely formal changes which have no impact on the data processing activity. The Court emphasised that these possibilities are not covered by article (contractual provision in the terms of use). See also Facebook (n 1) N. 68 ff.

[38] Facebook (n 1) N. 74.

[39] Facebook (n 1) N. 74 ff.

C. The Court's Decision and its Consequences

As a result of all these considerations, the Court ruled that the use of unfair terms also constitutes unfair competition[40]. As it is known, the purpose of the existence of the rules on unfair terms (the aim of the norm) is the protection of consumers. This protection is based on the difference in negotiation power and information asymmetry between the consumer and the entrepreneur[41]. However, the protection of unfair terms has the function of protecting not only the consumer but also the competition between entrepreneurs and preventing unfair competition[42]. Unfair terms principles (and the control of general terms and conditions) also play a role in stabilising market failure[43]. In Switzerland, unfair terms are regulated under the Unfair Competition Act (S-UWG §8). In German Law, the principles of the control of unfair terms are regulated under §§ 305-310 of the BGB. Nevertheless, it is accepted that unfair terms have legal consequences in terms of contract law in Swiss Law and in terms of unfair competition in German Law[44].

This correlation is much easier to establish under Turkish law. It is regulated that the use of terms contrary to the rule of good faith may constitute unfair competition (TCC Art.55/1/f.[45]). However, it should be underlined that the legal consequences of both regulations are different[46]. As seen in the sample court decision, the unfair terms control is considered as a criterion for the existence of unfair competition (violation of a rule of conduct)[47]. Namely, the Berlin District Court used the principles of unfair terms and data protection law as a criterion. A review of the force, interpretation or validity of the terms of use was not carried out. However, the contractual provision/ entrepreneurial practice, which is determined to be an unfair term in accordance with the principles of the law of contracts, will allow the assertion of claims based on unfair competition.

What is unique about the judgement of the Berlin District Court is the court's review of the valid consent criterion under data protection law. Accordingly, the court determined whether a provision can be characterised as an unfair term within the framework of the principles of data protection law. In other words, the rules of data

40 Facebook (n 1) N. 80.

41 See also Marcus Stoffels, *AGB-Rechts* (4. Auflage, C.H. Beck 2021) 29 ff.

42 Yeşim Atamer, *Sözleşme Özgürlüğünün Sınırlandırılması Sorunu Çerçevesinde Genel İşlem Şartlarının Denetlenmesi*, (2. Bası, Beta 2001) s. 30 ff.; Ramazan Aydın, "Tüketici Sözleşmelerindeki Haksız Şartlar (TKHK m. 5)", 2016 11(1) Erciyes Üniversitesi Hukuk Fakültesi Dergisi 83, 89 ff.

43 Aydın, (n 43) 116; Stoffels, (n 42) 21 ff.

44 O. Gökhan Antalya and E. Doğa Doğancı, "Genel İşlem Koşullarında Saydamlık Kuralının, Bunun TBK m. 20 vd.'daki Görünümlerinin ve TTK m. 55 f. 1 f ile TBK m. 20 vd.'nın Birlikte Uygulanabilirliğinin Değerlendirilmesi", 2018 24(2) Marmara Üniversitesi Hukuk Fakültesi Dergisi 823, 825. In this context, § 3a of the German Unfair Competition Act (UWG) stipulates that the violation of a legal provision aiming to regulate market behaviour for the benefit of market actors, including consumers, shall constitute unfair competition.

45 "particularly in a misleading manner to the detriment of the other party"

46 See also Antalya and Doğancı, (n 45) 836.

47 Ibid.

protection law are used as a criterion when assessing whether the balance between the parties in the contractual relationship has been disturbed in violation of the rule of good faith[48].

The claims based on unfair competition are also important in terms of their consequences. This is one of the reasons why the relevant decision is preferred. This is mainly because the range of persons who may be claimants in the assertion of claims based on unfair competition is wide. As a matter of fact, in this particular case, the claimant is a German consumer association. Contents and services (products) in the digital world are complex. As seen in the decision under review, the terms of use of free products (privacy policies) are the terms of the contract the consumer has to deal with. Understanding the relevant conditions is difficult, let alone protecting consumer rights effectively within the framework of these provisions. Despite all efforts, the privacy policies in practice have not been simplified. In addition, consumers are hesitant to apply for legal actions for unfair-contractual terms or product defects individually[49]. For the effective protection of consumers, "collective actions" should be taken instead of individual claims[50]. The connection between unfair competition and unfair terms will allow non-governmental organisations to step in for more effective consumer protection[51].

Furthermore, important improvements are taking place in the European Union in terms of class actions. Directive (EU) 2020/1828 is aimed at activating collective actions in favour of the consumer[52]. Article 9(6) of Directive 2020/1828 states: "*Member States shall ensure that a redress measure entitles consumers to benefit from the remedies provided by that redress measure without the need to bring a separate action*." Redress measure is defined in Article 3 of the same Directive (Art. 3/10). Accordingly: "*redress measure means a measure that requires a trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law*." Thus, the necessity to assert the claims in two separate actions, namely the case for determination of precedent and the subsequent action for performance, which are characteristic features of class actions, and the difficulties caused by this, have been overcome.

[48] Nonetheless, the decision has not been analysed in terms of its implications for data protection law. See also, Franziska Leinemann, *Personenbezogene Daten als Entgelt*, (Peter Lang 2020) 107 ff.

[49] The individual actions of the consumer do not compel the entrepreneur to act in accordance with the law or to refine the terms of the contract. See also Axel Metzger, "Verbraucherschutz bei der Bereitstellung digitaler Produkte Zur Durchsetzung der §§ 327–327u BGB", in Antje G. I. Tölle, Jörg Benedict, Harald Koch, Stephan Klawitter, Christoph G. Paulus, Friedrich Preetz (eds.) *Selbstbestimmung: Freiheit und Grenzen-Festschrift für Reinhard Singer zum 70. Geburtstag*, (Berliner Wissenschafts-Verlag 2021) 431, 437 ff.

[50] Metzger (n 50) 438.

[51] Ece Baş, "6098 Sayılı Türk Borçlar Kanunu'nda Genel İşlem Koşulu Kavramı ve İçerik Denetimi", *Prof. Dr. Mustafa Dural'a Armağan*, (Filiz 2013) 276, 303.

[52] See also https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020L1828&from=EN Date of Access 08 November 2022.

Instead of a Conclusion

Data-driven business models are complex. This complexity prevents the consumer from understanding the rules and consequences of these rules when utilising the relevant business model. Frequently, as in the case under review, the consumer does not even have access to the terms of use in a single place in an organised manner. Unfair competition provisions have been introduced in order for consumers to be a party to contracts under better conditions in the market. They have an important function in protecting consumer interests in the market. Within the scope of the relevant audit, the existence of a contractual relationship "containing unfair terms" is also taken into consideration. In data-based business models, such control is carried out in the light of the principles of "data protection law". The decision of the Berlin Regional Court is an important and guiding example in terms of the method to be followed in addressing the problem in Turkish law.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Grant Support: The author declared that this study has received no financial support.

Bibliography/Bibliyografya

Antalya OG and Doğancı ED, "Genel İşlem Koşullarında Saydamlık Kuralının, Bunun TBK m. 20 vd.'daki Görünümlerinin ve TTK m. 55 f. 1 f ile TBK m. 20 vd.'nın Birlikte Uygulanabilirliğinin Değerlendirilmesi", 2018 24(2) Marmara Üniversitesi Hukuk Fakültesi Dergisi 823-860.

Atamer Y, *Sözleşme Özgürlüğünün Sınırlandırılması Sorunu Çerçevesinde Genel İşlem Şartlarının Denetlenmesi*, (2. Bası, Beta 2001).

Aydın R, "Tüketici Sözleşmelerindeki Haksız Şartlar (TKHK m. 5)", 2016 11(1) Erciyes Üniversitesi Hukuk Fakültesi Dergisi 83-123.

Baş E, "6098 Sayılı Türk Borçlar Kanunu'nda Genel İşlem Koşulu Kavramı ve İçerik Denetimi", *Prof. Dr. Mustafa Dural'a Armağan*, (Filiz 2013) 276-306.

Beck Online (https://beck-online.beck.de/Home)

LG Berlin (Zivilkammer 16), Urteil vom 16.01.2018-16 O 341/15, BeckRS 2018, 1060, Beck-Online-10.08.2022 ("Facebook").

Axel Metzger, "Verbraucherschutz bei der Bereitstellung digitaler Produkte Zur Durchsetzung der §§ 327–327u BGB", in Antje G. I. Tölle, Jörg Benedict, Harald Koch, Stephan Klawitter, Christoph G. Paulus, Friedrich Preetz (eds.) Selbstbestimmung: Freiheit und Grenzen-Festschrift für Reinhard Singer zum 70. Geburtstag, (Berliner Wissenschafts-Verlag 2021) 431-443.

Statista GmbH, "Ranking der größten Social Networks und Messenger nach der Anzahl der Nutzer im Januar 2022", Date of Access 08 November 2022.

Stoffels M, *AGB-Rechts* (4. Auflage, C.H. Beck 2021).

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020L1828&from=EN Date of Access 08 December 2022.

https://www.tessian.com/blog/biggest-gdpr-fines-2020/ , Date of Access 08 November 2022.

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 51–62

DOI: 10.26650/annales.2022.71.0008
http://annales.istanbul.edu.tr/

Submitted: 22.02.2022
Accepted: 23.03.2022
Published Online: 18.12.2022

Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Transforming the Judiciary into the Rulers' Proxies: The Case of Hagia Sophia

Barış Bahçeci*, Serkan Yolcu**

Abstract

This article examines from a critical perspective the judgment of the Turkish Council of State (Danıştay) in 2020, which invalidated the executive decision of 1934 regarding the designation of Hagia Sophia in Istanbul as a museum. We argue that Council of State did not really perform adjudication of a legal dispute in this case, but rather functioned as a proxy of the executive power for particular reasons. As a matter of fact, we argue the justifications regarding the case law of the European Court of Human Rights (ECtHR) and the right to property on which the decision was based to be a falsification. Moreover, the developments before and after the decision demonstrate this judgement to be a product of a non-judicial motivation. Lastly, the sequence of political actions regarding the conversion of several other museums into mosques that have been observed in Turkey over the last ten years implies the non-judicial dynamics behind the Council of State's decision regarding Hagia Sophia. Our analysis reveals the political decisions that would possibly be the subject of criticism by domestic opponents and the international community to have been eliminated by referring the issue to the packed courts in order to avoid all undesired consequences.

Keywords

Rule of Law, Judicial Independence, Court Packing, Judicial Falsification, Council of State

* **Corresponding Author:** Barış Bahçeci (Assoc. Prof. Dr.), İzmir University of Economics, Faculty of Law, İzmir, Turkiye. E-mail: baris.bahceci@ieu.edu.tr ORCID: 0000-0001-9991-0378

** Serkan Yolcu (Assoc. Prof. Dr.), Bilkent University, Faculty of Law, Ankara, Turkiye. E-mail: serkan.yolcu@bilkent.edu.tr ORCID: 0000-0002-2951-4406

To cite this article: Bahceci B, Yolcu, S, "Transforming the Judiciary into the Proxies of The Rulers: The Hagia Sophia Case", (2022) 71 Annales de la Faculté de Droit d'Istanbul 51. https://doi.org/10.26650/annales.2022.71.0008

I. Introduction

On July 2, 2020, the Turkish Council of State (*Danıştay*) paved the way for the Hagia Sophia Museum to be converted into a mosque.[1] Immediately after the Court announced that it had revoked Hagia Sophia's status as a museum, the President of the Republic then issued a decree ordering Hagia Sophia to be opened for prayers.[2] Several commentators have already criticized the decision with respect to the historical role of Hagia Sophia, mostly focusing on the political features,[3] cultural implications,[4] and compliance with international law and human rights.[5] We argue, however, that this decision was delivered by a high court of questionable independence and should be considered contrary to the rule of law, not only as an example of abusive judicial review but also as a justification that is legally wrong. In this context, our aim is to investigate the role of the judiciary in light of the legal and political facts related to the decision. The rest of the article proceeds as follows. In Section 2, we briefly explain the background of the case in order to give a better understanding of the issue and a fully coherent analysis. Section 3 concerns the institutional and functional reasons behind why the Council of State is regarded as having been abused by the executive power. The final section will then focus on the falsity of the decision's argumentation and provide the reasons proving the illegality of the decision.

II. Background of the Decision

In order to fully understand the consequences of the decision, one must begin by examining the technical details of the legal framework in which the decision was delivered. Apart from its appellate powers, the Council of State also has an original jurisdiction as a first instance administrative court to review the legality of executive decisions. The lawsuit regarding Hagia Sophia was filed with the Council of State alongside the request to annul the decision of the Council of Ministers regarding Hagia Sophia having been converted from a mosque into a museum in 1934. The plaintiff was the organization named Sürekli Vakıflar, Tarihi Eserlere ve Çevreye Hizmet Derneği [the Association of Service to Foundations, Historic Monuments, and the Environment].

1 10th Chamber of the Council of State (Danıştay), Matter No. 2016/16015, Decision No. 2020/2595, July 2, 2020: https://danistay.gov.tr/assets/pdf/guncelKararlar/10_07_2020_060019.pdf (accessed on March 25, 2021)

2 New York Times, *Erdogan Signs Decree Allowing Hagia Sophia to Be Used as a Mosque Again*, https://www.nytimes.com/2020/07/10/world/europe/hagia-sophia-erdogan.html (accessed on March 25, 2021)

3 Berkley Forum, *Hagia Sophia: From Museum to Mosque*, July 17, 2020, https://berkleycenter.georgetown.edu/posts/hagia-sophia-from-museum-to-mosque

4 Serhun Al, "Hagia Sophia in Turkey's culture wars", *Le Monde Diplomatique*, 3 August 2020, https://mondediplo.com/outsidein/hagia-sophia; Judith Herrin, Opinion, "Converting Hagia Sophia into a Mosque Is an Act of Cultural Cleansing", *Washington Post* 15 July 2020, https://www.washingtonpost.com/opinions/2020/07/15/converting-hagia-sophia-into-mosque-is-an-act-cultural-cleansing/

5 Michael P. Goodyear, "Heaven or Earth: The Hagia Sophia Re-Conversion, Turkish and International Law, and the Special Case of Universal Religious Sites", *UCLA Journal of Islamic & Near Eastern Law*, Forthcoming Fall 2021, https://ssrn.com/abstract=3680139

Upon filing the lawsuit, the Office of the Prime Minister was called in as the defendant in respect of the Council of Ministers. However, the Office of the Prime Minister had been abolished as a result of the constitutional amendment and government system change in 2017, and thus the defendant became the President of Turkey.[6] Immediately after the Council of State annulled the decision of 1934, President Erdogan issued a decree reconverting the building into a mosque under the responsibility of the Directorate of Religious Affairs.[7] In other words, the defendant in this case was the same authority who had provoked the decision.

A comprehensive legal analysis requires that the facts of the case be recalled, and to do this requires a brief historical background. The cultural and architectural value of Hagia Sophia is widely known around the world. The more decisive point in this regard, however, is its symbolic value. Hagia Sophia was known as the cathedral with the largest dome in the Eastern Roman period, and due to its iconic position in the Orthodox world, its identity became the target of both Latin (Fourth Crusade in 1204) and Ottoman (1453) invasions. Sultan Mehmet II, who acquired the title of *Fatih* [The Conquerer] when the Ottoman army captured Istanbul, established a waqf [foundation] under his name and ordered that Hagia Sofia be converted into a mosque under the possession of the foundation.

As noted by Byzantologists, converting the largest church of a conquered city into a mosque eventually became a tradition, and thus even churches whose names had not actually been Hagia Sophia suddenly become known as Hagia Sophia mosques.[8] In fact, the name Hagia Sophia contains a symbolism that goes beyond a particular architecture built in Istanbul in the 6th century, such that several Hagia Sophia mosques are found that had never been known by this name when functioning as churches. For example, the church known as the Little Hagia Sophia had been built in Istanbul under the name of Hagia Sergios and Bachos and was converted into a mosque after the conquest of Istanbul during the reign of Sultan Beyazıt, long before the reign of Sultan Mehmet II.

The practice of Ottoman sultans establishing symbolic mosques gained special importance in terms of the structure of power during the reign of Sultan Selim. After conquering the sacred lands in the Hijaz, this sultan also adopted the title of caliph, and the Ottoman Empire consolidated its theocratic identity as the leading authority in the Islamic world. Accordingly, the *selamlık,* namely the sultan's ceremonial cortege

6 Prior to 2017 constitutional amendment, Turkey had a dual executive consisting of the Council of Ministers led by the Prime Minister and the President of the Republic. Nevertheless, 2017 amendments removed the parliamentary structure of the government system and established a *sui generis* presidential system of government in which only the President of the Republic is vested with executive power.

7 Presidential Decision numbered 2729, dated 10 July 2020, Official Gazette of the Republic of Turkey, https://beta.shariasource.com/documents/3777 (accessed on March 29, 2021)

8 https://islamansiklopedisi.org.tr/ayasofya

toward the mosque for Friday prayer, became a ritual over the years. Nevertheless, Friday prayers unlike other prayers had a political rather than religious character, and Hagia Sophia was used as one of the venues for this political ritual for many centuries.[9]

After modern Turkey was established following the War of Independence, this tradition came to an end with the removal of the sultanate in 1922 and the abolition of the caliphate in 1924.[10] With the development of secularism, Islamic law and the concept of conquest was removed from the political agenda.[11] Criticisms toward Hagia Sophia's transformation into a museum have been put forward since the 1950s by leading pro-Islamic thinkers.[12] However, with the rise of political Islam, the issue began to take form on the agenda more effectively. After the dissolution in 1997 of the leading political party of the Islamist movement, the Welfare Party, one of its successors, Justice and Development Party, (Adalet ve Kalkınma Partisi/AKP), came to power in 2002.

Under AKP rule and with the constitutional amendments in 2010 and 2017, the judicial power that had taken a rather hostile attitude toward these parties in the past underwent a massive change and currently rarely invalidates the ruling party's policy preferences.[13] The transformation of the judiciary in favor of AKP rule has also been reflected in the change in decisions regarding Hagia Sophia, with new lawsuits filed on similar issues now concluding in the opposite direction from its earlier decisions.

III. Abuse of the Court

The decision regarding Hagia Sophia not only constitutes an example of turning a particular museum into a mosque but also gives the judiciary a role in the government's political agenda, and in this regard thus resonates with the concept of abusive judicial review as observed in many other countries throughout the world.[14] The process of converting multiple museums with the name of Hagia Sophia into mosques has been going on in Turkey since 2011. However, the role that the high court assumed for this particular Hagia Sophia in Istanbul was different from the others.

During this conversion, the first step actually involved another symbolic building, the Hagia Sophia in the town of İznik, currently a municipality in Bursa Province.

9 Ibid.

10 Hilafetin İlga ve Hanedan-ı Osmaninin Türkiye Cumhuriyeti Memaliki Haricine Çıkarılmasına Dair Kanun, Law no 431, Enacted on 03.03.1924, Resmi Gazete 06.03.1924/63.

11 As a matter of fact, in the light of the Cyprus operation in 1974, there was no experience for the Turkish army to acquire any land outside the land of Turkish country.

12 See, for example, Necip Fazıl Kısakürek, "Ayasofya" *Büyük Doğu* (1959) 1.

13 Demirhan Burak Çelik, "16 Nisan Anayasa Değişikliği ve Yeni Hâkimler ve Savcılar Kurulu Üzerine Bir Değerlendirme", *Ankara Üniversitesi SBF Dergisi* 73 (2018) 1057-1094.

14 David Landau and Rosalind Dixon, "Abusive Judicial Review: Courts Against Democracy", *UC Davis Law Review* 53 (2020): 1313-1387.

This building had hosted the Ecumenical Councils that are considered extremely important in terms of the history of Christianity.[15] When İznik (ancient *Nicaea*) was conquered by Orhan Gazi, the second sultan of the Ottoman Empire, this building was the first structure to be converted into a mosque of Hagia Sophia. It too was transformed into a museum in the 1930s, and continued its function as such until 2011. Interestingly, the same plaintiff that was involved in the Istanbul Hagia Sophia case, the Association of Service to Foundations, Historic Monuments, and the Environment, had also become involved in demanding permission to hold religious ceremonies in İznik's Hagia Sophia. The demand was rejected by the court; however, the Directorate of Foundations as the central administrative authority charged for all foundations decided that same year to convert the museum into a mosque with the name *Aya Sophia Orhan* [Hagia Sophia Orhan].[16]

The next step was the Hagia Sophia in Trabzon (ancient *Trebizond*). The city had been conquered by Sultan Mehmed II, with its largest central church, *Panagia Hrisokefalos*, being converted into a mosque with the name *Ortahisar Fatih*. However, this Hagia Sophia church was neither turned into a mosque by Mehmet II nor given to a foundation. The building, which is thought to have been converted into a mosque about a century after the conquest of Trabzon, began being used as a museum in the early 1960s.[17] In 1996, the regional directorate of foundations in Trabzon filed a lawsuit demanding its Hagia Sophia be transferred to the central authority of foundations. The case was rejected by the first instance court and the Court of Cassation in 1998. After 14 years, a new lawsuit with the same demand was refiled in Trabzon and summarily dismissed.[18] However, the appellate division of the Court of Cassation decided this time that no final verdict would occur regarding possessory actions and that, since the building was under the ownership of the Foundations Administration, the demand for transfer would be accepted.[19] Thus, after the high court's decision in 2013, the museum was reverted into a mosque.

The process of converting the Chora Museum in Istanbul into a mosque followed a very similar path. The lawsuit regarding the cancellation of the Council of Ministers' Act from 1945 regarding the Chora Mosque being allocated to the Ministry of National Education for use as a museum was rejected by the relevant chamber of the Council of State in 2014. In 2017, the appeal filed against this refusal decision of the

15 Pınar Aykaç, "Contesting the Byzantine Past: Four Hagia Sophias as Ideological Battlegrounds of Architectural Conservation in Turkey", *Heritage & Society* 11:2 (2018), 151-178.

16 Consequently, the head of the NGO filed a lawsuit for the monument's allocation for religious ceremonies, which was denied by court (İsmail Kandemir as the head of the Association of Service to Foundations, Historic Monuments and Environment, April 9, 2011, BDFA). Aykaç, p 160.

17 Semavi Eyice, https://islamansiklopedisi.org.tr/ayasofya-camii--trabzon

18 Yargıtay 1. Hukuk Dairesi (Court of Cassation, First Chamber), Matter No 1998/6603, Decision No 1998/9265, http://www.muzemedokunma.org/AyasofyaMuzesiHakkinda.html#

19 Yargıtay 1. Hukuk Dairesi E. 2012/5916 K. 2012/8101 T. 27.6.2012 https://lib.kazanci.com.tr/kho3/ibb/files/1hd-2012-5916.htm

Chamber was also rejected by the higher appeal authority of the Council of State, the Board of Administrative Litigation Chambers. However, upon making an objection against this decision, the same Board decided to reverse its decision in 2019. After this reversal decision, the 6th Chamber of the Council of State then cancelled the allocation process, which was the subject of the case, through a decision in opposition to its previous decision, thus enabling the Chora Museum to revert to a mosque.[20] As can be seen, the Council of State began taking an opposite stance on this issue after 2017.

Three facts exist that reveal the bias in the Council of State's 2020 decision. Firstly, the results from previous case law on the same matter was reversed after a court packing strategy had been applied to higher judicial bodies following the 2010 constitutional amendment.[21] In fact, the same body of the Council of State (10th Chamber), composed of different judges, had rejected another lawsuit in 2008 that had been filed demanding the annulment of the decision of the Council of Ministers regarding Hagia Sophia having been turned into a museum.[22] All five members of the 10th Chamber who unanimously ruled to invalidate the decision in 2020 had been appointed following the 2010 constitutional amendment under AK Party rule.[23]

Lastly, the decision to covert Hagia Sofia into a mosque was actually a promise the President and the political movement from which he emerged had made decades earlier, the same President who appeared as the defendant in this case. More importantly, the actions and rhetoric prior to and immediately after the conclusion of this case provided strong hints as to what the outcome would be in advance. Indeed, Berat Albayrak, son-in-law of President Erdoğan and his then Minister of the Treasury, recited the words of a famous Islamic poet, "One Day Hagia Sophia will be opened," on social media, just 14 days before the decision was announced.[24]

Accordingly, the decision was celebrated by the ruling party and its media outlets. The opening took place on Friday, July 24, with a special event to mark the decision. The president and the political elites performed the Friday prayer in the newly

20 All this process is summarized in the Hagia Sophia decision of the Council of State.

21 Başak Çalı & Betül Durmuş, "Judicial Self-Government as Experimental Constitutional Politics: The Case of Turkey", *German Law Journal,* 19 (7) (2018): 1671-1706.

22 Matter no: 2005/127, Decision no: 2008/1858, 31 March 2008. The Court refers to this decision in its subsequent decision on Hagia Sophia.

23 The head of Chamber, Judge Akçil, was appointed on 24.02.2011 by the Board of Judges and Prosecutors (RG 11.03.2011/27871). Among the members, Judge Ürker appointed by President Erdoğan on 15.12.2014 (RG 16.12.2014/29207) while Judge Civri and Judge Aygün on 16.07.2018 by the Board of Judges and Prosecutors (RG 17.07.2018/30481). Judge Akbulut was also appointed on 28.11.2018 by President Erdoğan (RG 29.11.2018/30610).

24 "Bakan Albayrak'tan Ayasofya Paylaşımı", *Hürriyet*, 10.07.2020 https://www.hurriyet.com.tr/ekonomi/son-dakika-bakan-albayrak-kazanimlarimizi-koruyarak-bu-surecten-guclenerek-cikacagiz-41561700 (accessed on March 25, 2021). See also "Hagia Sophia converted into mosque as Erdoğan signs decree", *Hürriyet Daily News,* https://www.hurriyetdailynews.com/hagia-sophia-converted-into-mosque-as-erdogan-signs-decree-156455 (accessed on March 25, 2021). In addition, it was claimed that 13 days before the decision, a carpet order was ordered by the circles close to the ruling party to cover the opening of the fourteen thousand square meters of Hagia Sophia, https://www.cumhuriyet.com.tr/haber/yandas-anapalidan-tuhaf-iddia-ayasofyanin-parasini-ummetin-halife-dedigi-biri-odedi-1750925

reverted Hagia Sophia within the atmosphere of a political demonstration and with the participation of thousands. The President of the Directorate of Religious Affairs held a ceremony with a sword in hand, symbolizing the conquest.

However, this case had already been filed against the presidency as an adversary. Therefore, that the government would be so pleased with the acceptance of this lawsuit against itself appears strange. As a matter of fact, no appeal was ever filed against this decision. Thus, the decision to turn Hagia Sofia into a mosque, which is understood to have been the government's plan, was organically accepted by the court. Of course, the dependency issue is a controversial subject. However, although this administrative decision appears to have been the fulfilment of a judgment made by the judiciary with the appearance of a more neutral institutional body, this decision actually appears to have been made by the person who actually enforced it, rather than the one who finally approved it. Therefore, the government left the way open for the decision to be made by the Council of State, thus giving this conversion the appearance of a judicial decision, at least in technical terms.

Consequently, this decision reflects a trend in the judiciary, similar to the recent approach to abortion by the Polish Constitutional Court. As a matter of fact, the Polish Constitutional Court's decision regarding the right to abortion on October 22, 2021 set a pattern regarding the function of the court and the content of the trial.[25] Another fact that cannot be overlooked is the similarity of the Turkish and Polish cases in terms of this change in the role of judicial bodies, their structures, and their decisions. Court-packing in favor of the ruling party and its role as a proxy power to keep the government's hands clean,[26] or at least as an institution in which the ruling party can hide from the reactions of international public opinion.[27] This explains why the European Parliament condemned the Polish[28] as well as the Turkish rulings.[29]

IV. Falsity of the Justification

That a court which has lost its institutional identity due to a political intervention also declines in the legal quality of its jurisprudence is no surprise. However, the

25 For the translation in English: https://eclj.org/eugenics/eu/avortement-eugenique--le-jugement-du-tribunal-constitutionnel-polonais-extraits-

26 Aleksandra Kustra-Rogatka, *Populist but not Popular: The abortion judgment of the Polish Constitutional Tribunal, VerfBlog,* 2020/11/03, https://verfassungsblog.de/populist-but-not-popular/, DOI: 10.17176/20201103-235627-0.

27 Ewa Łętowska, *A Tragic Constitutional Court Judgment on Abortion, VerfBlog,* 2020/11/12, https://verfassungsblog.de/a-tragic-constitutional-court-judgment-on-abortion/, DOI: 10.17176/20201112-200210-0.

28 Polish de facto ban on abortion puts women's lives at risk, says Parliament**,** https://www.europarl.europa.eu/news/en/press-room/20201120IPR92132/polish-de-facto-ban-on-abortion-puts-women-s-lives-at-risk-says-parliament

29 Biden statement on calling "Turkish President Erdogan to reverse his recent decision to convert the Hagia Sophia to a mosque", https://joebiden.com/2020/10/06/tensions-between-greece-and-turkey-statement-by-vice-president-joe-biden/, EU ministers chide Turkey over Hagia Sophia, https://www.dw.com/en/turkey-haghia-sofia-european-union/a-54165074; Hagia Sophia: UNESCO deeply regrets the decision of the Turkish authorities, https://en.unesco.org/news/unesco-statement-hagia-sophia-istanbul

argumentation in the Hagia Sofia decision carries a much more decisive factor. The legislation to which the Court referred by using a fundamental rights discourse involve secular legal rules such as the constitution, civil code, and case law of the European Court of Human Rights (ECtHR). In this context, a case note published in the *Harvard Law Review* (*HLR*) claimed this decision to be *legally correct* and filled the gaps in the decision using knowledge of Islamic law to turn the concepts of rule of law and judicial independence into an accessory.[30] As a matter of fact, the argumentation in the *HLR* case note shows that the Court had actually arrived at its conclusion by applying Islamic law, but the basis for the decision could not go beyond providing a mere apparent justification as secular law did not arrive at this result in its discourse.

A discrepancy exists between the justification and characteristics of the case, so much so that the argumentation made in the decision of the Council of State actually contains a fundamental contradiction in addition to many smaller inconsistencies. According to the Court's justification, should the purpose of the foundation or its properties change, regardless of the founding will of the donor while forming the foundation, qualifying the foundation as a private legal entity will become impossible, and this situation will not comply with the principles of legal security, freedom of association, and the right to property as found in the 1982 Constitution.[31] The Court also argued the ECtHR to also guarantee the protection of foundations' immovable and rights, including those established in the Ottoman period; thus as a result of their protected status, they fall within the scope of property rights.[32]As a matter of fact, two prominent issues stand out here based on this justification. The first is the will of the founder and the second is the *waqf*'s [foundation] property right as a private legal entity protected by the ECtHR case law.

Regarding the first issue, the following question can be put: Is the Fatih Sultan Mehmed Foundation a private legal entity? According to the Court's argumentation, the *establishment of a foundation is a private legal process that creates a private legal entity.* However, this abstract justification overlooks the characteristics of the concrete conditions under which the Sultan Mehmed II had conducted this foundation process. By using modern legal institutions and concepts, the Court ignores the fact that the right of disposition on this building had not been obtained by means of purchase or inheritance, as well as its public nature.

The second issue concerns whether a foundation run by the public authority has property rights. The Court's second argument is partly bound to the first, but goes further: *Should the Fatih Sultan Mehmed Foundation have a private legal identity, then it has the constitutional right to property, and the will of the founder should*

30 The Hagia Sophia Case, 134 *Harvard Law Review*, p 1285, https://harvardlawreview.org/2021/01/the-hagia-sophia-case/

31 Decision of the Council of State, p 13.

32 Ibid, p 14.

also be protected from interventions. In this respect, the Court reveals certain facts, including Hagia Sophia being the property of the Fatih Sultan Mehmed Foundation, which is a private legal entity. However, the decision did not evaluate the status of this foundation. In fact, the General Directorate of Foundations (GDF) is a public body run by state officials. Moreover, GDF as a public authority was a shareholder until 2019 of the bank (Vakıfbank) that represents these historical foundations.[33] Furthermore, by the decision of GDF, a university was established on behalf of five foundations, one being the Fatih Sultan Mehmet Foundation.[34]

The Islamic legal analysis states the property of the foundation to not be "*akin to Mehmed's private property; these are the city's civic institutions, fitting well within the category of property made public after conquest.*" However, should the kind of property be a mosque, future rulers (such as Mustafa Kemal Ataturk) are not entitled to control over them. However, the Court fails to clearly address this fact, instead simply stating that properties belonging to foundations cannot be transferred. However, there is no transfer, as it is already registered as a mosque on the deed. The act of the Council of Ministers in 1934 concerned allocation.

Moreover, the Court also cites European human rights law, pointing out the case[35] in which the ECtHR ruled that Turkey to have violated the Convention due to the seizure of property that had been donated to an Armenian Church, School, and Cemetery foundation. Still, the Court's reference to human rights law seems irrelevant and misleading, given that no possible parallels are present between the conditions of a minority foundation and those of the Sultan Fatih Mehmed Foundation, which is already state-run and whose property therefore was not seized.

The case should be noted to not include any claim regarding the right to property. This was actually expected, given that the Council of Ministers' decision in 1934 had only changed the building's *function*, not *ownership*. As explained in the decision of the Council of State, in 1936, Hagia Sophia had already been registered in the land registry under the name of the Fatih Sultan Mehmed Foundation, which was managed by the General Directorate of Foundations, a state institution. Moreover, the administration of the building as a museum was carried out by the Ministry of Culture and Tourism. Therefore, no precedent exists in the context of property rights between the legal dispute regarding the function of Hagia Sophia only (its use as a mosque or a museum) and the seizure of assets from a minority foundation.

In this context, neither the ECtHR jurisprudence nor the fundamental rights regulated in the Turkish Constitution constitute a real justification. On the contrary,

33 https://www.vakifbank.com.tr/ortaklik-yapisi.aspx?pageID=299

34 http://int.fsm.edu.tr/Uluslararasi-Ofis-About-Us--About-the-University

35 Case of *Samatya Surp Kevork Ermeni Kilisesi, Mektebi ve Mezarliği Vakfi Yönetim Kurulu v. Turkey*, App. No. 1480/03 (16 December 2008), http://hudoc.echr.coe.int/eng?i=001-90264

the Council of State, whose composition had been changed by the executive, is seen to have acted not as an independent court but as a proxy for a decision that the executive, having an agenda based on Islamic law, did not want to make directly.

V. Conclusion

The rule of law can only be achieved through independent courts and a fair trial process. Rule of law also requires that courts do not act as a proxy for the implementation of a political program. However, the Council of State's decision, despite its legal appearance, was arrived at completely independent of the facts of the subject matter and law. As appears from the Hagia Sophia case which emphasized the political significance of historical buildings, the law's undermining was an unfortunate example of a sacrifice of the courts to the spirit of conquest. This phenomenon, which is not unique to Turkey cannot be defined as judicial review, but instead evokes the transformation of the judiciary into a proxy of the government.

Peer-review: Externally peer-reviewed.
Author Contributions: Conception/Design of study: B.B., S.Y.; Data Acquisition: B.B., S.Y.; Data Analysis/Interpretation: B.B., S.Y.; Drafting Manuscript: B.B., S.Y.; Critical Revision of Manuscript: B.B., S.Y.; Final Approval and Accountability: B.B., S.Y.
Conflict of Interest: The authors have no conflict of interest to declare.
Financial Disclosure: The authors declared that this study has received no financial support.

Bibliography

Al, S, "Hagia Sophia in Turkey's culture wars", Le Monde Diplomatique, 3 August 2020, https://mondediplo.com/outsidein/hagia-sophia

Aykaç, P, "Contesting the Byzantine Past: Four Hagia Sophias as Ideological Battlegrounds of Architectural Conservation in Turkey", Heritage & Society 11:2 (2018), 151-178.

Bakan Albayrak'tan Ayasofya Paylaşımı, Hürriyet, 10.07.2020 https://www.hurriyet.com.tr/ekonomi/son-dakika-bakan-albayrak-kazanimlarimizi-koruyarak-bu-surecten-guclenerek-cikacagiz-41561700 (accessed on March 25, 2021).

Berkley Forum, Hagia Sophia: From Museum to Mosque, July 17, 2020, https://berkleycenter.georgetown.edu/posts/hagia-sophia-from-museum-to-mosque

Biden statement on calling "Turkish President Erdogan to reverse his recent decision to convert the Hagia Sophia to a mosque", https://joebiden.com/2020/10/06/tensions-between-greece-and-turkey-statement-by-vice-president-joe-biden/

Çalı, B, Durmuş, B, "Judicial Self-Government as Experimental Constitutional Politics: The Case of Turkey", German Law Journal, 19 (7) (2018): 1671-1706.

Çelik, D B, "16 Nisan Anayasa Değişikliği ve Yeni Hâkimler ve Savcılar Kurulu Üzerine Bir Değerlendirme", Ankara Üniversitesi SBF Dergisi 73 (2018) 1057-1094.

EU ministers chide Turkey over Hagia Sophia, https://www.dw.com/en/turkey-haghia-sofia-european-union/a-54165074

Eyice, S, https://islamansiklopedisi.org.tr/ayasofya-camii--trabzon

Goodyear, M P, "Heaven or Earth: The Hagia Sophia Re-Conversion, Turkish and International Law, and the Special Case of Universal Religious Sites", UCLA Journal of Islamic & Near Eastern Law, Forthcoming Fall 2021, https://ssrn.com/abstract=3680139

Hagia Sophia: UNESCO deeply regrets the decision of the Turkish authorities, https://en.unesco.org/news/unesco-statement-hagia-sophia-istanbul

Herrin, J, Opinion, "Converting Hagia Sophia into a Mosque Is an Act of Cultural Cleansing", Washington Post 15 July 2020, https://www.washingtonpost.com/opinions/2020/07/15/converting-hagia-sophia-into-mosque-is-an-act-cultural-cleansing/

Hilafetin İlga ve Hanedan-ı Osmaninin Türkiye Cumhuriyeti Memaliki Haricine Çıkarılmasına Dair Kanun, Law no 431, Enacted on 03.03.1924, Resmi Gazete 06.03.1924/63

Kısakürek, N F, "Ayasofya" Büyük Doğu (1959) 1

Kustra-Rogatka, A, Populist but not Popular: The abortion judgment of the Polish Constitutional Tribunal, VerfBlog, 2020/11/03, https://verfassungsblog.de/populist-but-not-popular/, DOI: 10.17176/20201103-235627-0

Landau D, Dixon, R, "Abusive Judicial Review: Courts Against Democracy", UC Davis Law Review 53 (2020): 1313-1387

Łętowska, E, A Tragic Constitutional Court Judgment on Abortion, VerfBlog, 2020/11/12, https://verfassungsblog.de/a-tragic-constitutional-court-judgment-on-abortion/, DOI: 10.17176/20201112-200210-0.

New York Times, Erdogan Signs Decree Allowing Hagia Sophia to Be Used as a Mosque Again, https://www.nytimes.com/2020/07/10/world/europe/hagia-sophia-erdogan.html (accessed on March 25, 2021)

Presidential Decision numbered 2729, dated 10 July 2020, Official Gazette of the Republic of Turkey, https://beta.shariasource.com/documents/3777 (accessed on March 29, 2021)

RG 11.03.2011/27871.

RG 16.12.2014/29207.

RG 17.07.2018/30481.

RG 29.11.2018/30610.

The Hagia Sophia Case, 134 Harvard Law Review, p 1285, https://harvardlawreview.org/2021/01/the-hagia-sophia-case/

http://int.fsm.edu.tr/Uluslararasi-Ofis-About-Us--About-the-University

https://eclj.org/eugenics/eu/avortement-eugenique--le-jugement-du-tribunal-constitutionnel-polonais-extraits-

https://islamansiklopedisi.org.tr/ayasofya

https://www.cumhuriyet.com.tr/haber/yandas-anapalidan-tuhaf-iddia-ayasofyanin-parasini-ummetin-halife-dedigi-biri-odedi-1750925

https://www.europarl.europa.eu/news/en/press-room/20201120IPR92132/polish-de-facto-ban-on-abortion-puts-women-s-lives-at-risk-says-parliament

https://www.vakifbank.com.tr/ortaklik-yapisi.aspx?pageID=299

Judgements

10th Chamber of the Council of State (Danıştay), Matter no: 2005/127, Decision no: 2008/1858, 31 March 2008.

10th Chamber of the Council of State (Danıştay), Matter No. 2016/16015, Decision No. 2020/2595, July 2, 2020: https://danistay.gov.tr/assets/pdf/guncelKararlar/10_07_2020_060019.pdf (accessed on March 25, 2021)

Case of Samatya Surp Kevork Ermeni Kilisesi, Mektebi ve Mezarliği Vakfi Yönetim Kurulu v. Turkey, App. No. 1480/03 (16 December 2008), http://hudoc.echr.coe.int/eng?i=001-90264

Yargıtay 1. Hukuk Dairesi (Court of Cassation, First Chamber), Matter No 1998/6603, Decision No 1998/9265, http://www.muzemedokunma.org/AyasofyaMuzesiHakkinda.html#

Yargıtay 1. Hukuk Dairesi E. 2012/5916 K. 2012/8101 T. 27.6.2012 https://lib.kazanci.com.tr/kho3/ibb/files/1hd-2012-5916.htm

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 63–97

DOI: 10.26650/annales.2022.71.0013
http://annales.istanbul.edu.tr/

Submitted: 08.06.2022
Accepted: 30.08.2022
Published Online: 15.12.2022

Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Incorporation of Standard Risk Exclusion Clauses into Insurance Contract (A Comparative Analysis with the Provisions of PEICL and Turkish Law)

Aslıhan Erbaş Açıkel*

Abstract

The construction of the insurance coverage as set out in the standard insurance terms can furnish complexities for the policyholder to grasp the scope of the risks covered. If the insurer does not provide full information about the risks covered and excluded before the conclusion of the insurance contract, the policyholder may find out at a later stage that the event that occurred was not covered by the policy. In such cases, the policyholder may claim that those risk exclusions are not valid under Article 1423 of the Turkish Commercial Code, which bestows upon the insurer a duty to inform before the conclusion of the contract. In order to determine the validity of the incorporation of standard risk exclusion clauses in an insurance contract and their interplay with the provisions of the Turkish Code of Obligations, the validity of boilerplate clauses must be analysed within the frame of the so-called operability test.

Keywords

Duty to Inform, The Duty of Advice, Incorporation of Standard Insurance Terms, Policyholder's Right of Objection, Surprising Terms

* **Corresponding Author:** Aslıhan Erbaş Açikel (Assr. Prof. Dr.), Kadir Has University, Faculty of Law, Department of Commercial Law, Istanbul, Turkiye. E-mail: aslihan.acikel@khas.edu.tr ORCID: 0000-0002-9770-8472

To cite this article: Erbas Acikel A, "Incorporation of Standard Risk Exclusion Clauses into Insurance Contract (A Comparative Analysis with the Provisions of PEICL and Turkish Law)", (2022) 71 Annales de la Faculté de Droit d'Istanbul 63.
https://doi.org/10.26650/annales.2022.71.0013

Introduction

Insurance contracts primarily consist of standard insurance terms previously formulated by the insurer.[1,2] The primary rationale of such terms is to describe the insurance coverage and concretise its scope. Therefore, standard insurance terms usually provide a list of the main risks covered by the insurance contract and then include the specific risk exclusions to clarify which events do not enjoy the policy coverage.[3] It is also likely that standard tertiary risk re-inclusions be added within the insurance coverage.[4]

Such a mazed description of the included or excluded risks jeopardises a clear construction of the insurance coverage by the policyholder before the conclusion of the contract.[5] This ambiguity gives rise to legal conflicts, almost always after the occurrence of the risk, when the insurer rejects to pay the insurance money by claiming that the occurred event does not fall into the ambit of the insurance contract.

It is worth noting that most of the legal precedent in Turkey is related to claims brought against the insurers, which are generally ruled in favour. The reasoning behind this tendency is typically linked with the insurer's breach of the duty to inform and grounded in the legal consequence attached to its violation under Turkish Commercial Code[6] (TCC) Article 1423(2).

1 In Turkey, insurance contracts include general terms and special terms of insurance. Although general terms are subject to the approval of a supervisory authority, namely the Sigortacılık ve Özel Emeklilik Düzenleme ve Denetleme Kurumu (Insurance and Private Pension Regulation and Supervision Agency), special terms are exempt from such an approval. As a landmark of the Turkish insurance practice, the Turkish supervisory authority, not only approves the general terms, but also directly draws up those terms. However, the fact that the general insurance terms are not drafted by the insurer, does not prevent the legal nature of those terms to be qualified as standard contract terms or boilerplate clauses, which are subject to judicial review. See Emine Yazıcıoğlu and Zehra Şeker Öğüz, *Sigorta Hukuku* (4th edn, Filiz 2021) 14; Yeşim Atamer and Samim Ünan, 'Control of General and Special Conditions of Insurance Under Turkish Law with Special Regard to the Transparency Requirement' in Manfred Wandt and Samim Ünan (eds), *Transparency in Insurance Law* (Sigorta Hukuku Türk Derneği 2012) 69; Melda Taşkın, *Krediye Bağlı Hayat Sigortası Sözleşmesi* (Onikilevha 2019) 80; Mehmet Bahtiyar, 'Sigorta Poliçesi Genel Koşulları' (1997) 19(2) Banka ve Ticaret Hukuku Dergisi 89, 92; Merih Kemal Omağ, 'Özel Sigorta Hukukunda Sigorta Ettirenlerin Korunması/Himayesi' in *Özel Sigorta Hukukuna Hakim İlke ve Kurumlar (1975-2016) Makaleler - Tebliğler* (Onikilevha 2019) 405; Samim Ünan, 'Sigorta Genel Şartları ile İlgili Olarak Uygulamada Karşılaşılan Bazı Sorunlar' *Prof. Dr. Rayegân Kender'e Saygı Günü" Sigorta Genel Şartlarının Düzenlenmesi, Denetlenmesi ve Uygulamada Ortaya Çıkan Sorunlar Sempozyumu* (Filiz 2020) 177; Aslıhan Sevinç Kuyucu, 'Sigorta Genel Şartlarının Hukuki Niteliği ve Uygulanacak Hükümlerin Belirlenmesine İlişkin Esaslar', *Prof. Dr. Rayegân Kender'e Saygı Günü" Sigorta Genel Şartlarının Düzenlenmesi, Denetlenmesi ve Uygulamada Ortaya Çıkan Sorunlar Sempozyumu* (Filiz 2020) 21. See for the opposite view Tekin Memiş, *Sigorta Sözleşmesi Şartlarının Yargısal Denetimi* (Onikilevha 2016) 32-40; Ecehan Yeşilova Aras, 'Sigorta Sözleşmelerinde Genel İşlem Şartlarının Kullanılması' (2015) 80(3) İzmir Barosu Dergisi, 458. Likewise, the special insurance terms, prepared by the insurer are also - argumentum a fortiori - considered as standard contract terms subject to judicial review. See Atamer and Ünan (n 1) 68; Memiş (n 1) 134.

2 In this study, the term 'standard insurance terms' stands for both the general insurance terms and the special insurance terms because based on the type of the insurance, the risk exclusion clauses can be set out either in the general or the special insurance terms, which are pre-formulated before the conclusion of the insurance contract.

3 Manfred Wandt, 'Transparency in the Insurance Contract Law of Germany' in Pierpaolo Marano and Kyriaki Noussia (eds), *Transparency in Insurance Contract Law* (Springer 2019) 68. Also see Emine Yazıcıoğlu, 'Zarar Sigortalarında Sigorta Himayesinin Sınırlandırılması ve Davranış Yükümlülüklerinin Teminat Şartı ya da İstisna Olarak Öngörülmesi Sorunu', 1186.

4 Wandt (n 3) 64.

5 Wandt (n 3) 64. See also Aslıhan Erbaş Açıkel, 'İngilizce Sözleşme Koşullarının Sigorta Sözleşmesi İçeriğine Dahil Edilmesi' "*Prof. Dr. Rayegân Kender'e Saygı Günü" Sigorta Genel Şartlarının Düzenlenmesi, Denetlenmesi ve Uygulamada Ortaya Çıkan Sorunlar Sempozyumu* (Filiz 2020) 52-55.

6 Türk Ticaret Kanunu, Kanun Numarası: 6102, Kabul Tarihi: 13.1.2011, RG 14.2.2011/27846.

According to this provision, "*If an information explanation is not given, the contract shall be deemed as having been concluded in accordance with the terms written in the policy, unless the policyholder objects to the conclusion of the contract within fourteen days*". As will be seen below, among the Turkish scholars the meaning of this provision and particularly the legal qualification of the term "objection" are highly debatable. Different views, such as revocation, termination and avoidance, have been expressed in this regard. However, according to the author, neither the aforementioned norm – which does not explicitly address the issue - nor the said opinions are helpful in solving the problem of the validity of the risk exclusion clauses against the policyholder in case of a lack of objection.

Taking into account the aforementioned background, the purpose of this study is to examine the meaning of Article 1432(2) of the TCC under the principles of general contract law. Such a quest is primarily due to the fact that standard insurance terms containing the risk exclusion clauses are indeed pre-formulated and not individually negotiated, and therefore their incorporation into the insurance contract places their validity within the realm of the general contract law, laying the path to judicial review mechanisms set out for standard contract terms or boilerplate clauses.

The very first prong of the judicial review is to analyse whether the standard terms are incorporated into the contract and become part of it. It is generally accepted that in order to be incorporated into the contract, the standard contract terms must be handed over to the other party of the contract so that the latter is informed of the standard terms. It is also required that the insurer inform the prospective policyholder of the standard insurance terms so that he or she can make a conscious decision about whether or not to conclude the contract under insurance law. However, the duty to inform stipulated by the general contract law and the insurance law are different regarding their scope and timing, and this variation requires a closer examination of the incorporation of standard insurance terms.

Therefore, instead of determining the legal qualification of Article 1423(2) of the TCC as a distinct, isolated provision of insurance law, the author will endeavour to construe it under the principles of general contract law on the conclusion of contracts and incorporation of standard contract terms. Meanwhile, the author will also strive to conduct a comparative study between Turkish law and the Principles of European Insurance Contract Law (PEICL) [7], which also provides legal consequences for the breach of the insurer's duty to inform.

7 PEICL has been prepared by the Project Group of Restatement of European Insurance Contract Law by taking into account the different legal provisions of European countries and constitutes an important model law for Member States. See Jürgen Basedow, John Birds, Malcolm Clarke, Herman Cousy, Helmut Heiss and Leander Loacker, *Principles of European Insurance Contract Law (PEICL)* (2nd edn, Ottoschmidt 2016) 5.

To this end, in Section I of this analysis, the pre-contractual information duties of the insurer under the PEICL and Turkish law will be highlighted. This preliminary information will lead to a review of the interaction of the rules of general contract law with insurance law on the incorporation of general contract terms in Section II. Therefore, the incorporation of standard insurance terms under PEICL will be analysed in conjunction with the Principles of European Contract Law (PECL)[8], whereas the provisions of TCC will be analysed in connection with the principles of the Turkish Code of Obligations[9] (TCO). Different views expressed by legal scholars in relation to the legal nature of TCC Article 1423(2) and the author's own critique thereon will be dealt with in this part as well. Then in Section III, from a more specific perspective, the validity of 'surprising' risk exclusion clauses will be put under scrutiny. Finally, the outcomes of the previous sections will be used to review the protection provided to the policyholder under Turkish law.

I. Pre-Contractual Information Duties of the Insurer

Information duties oblige the insurer to provide the policyholder with specific information, which is necessary for better evaluation of decisions and prevent the insurer from abusing its superior bargaining position.[10] Only after having been well-informed, can the policyholder be deemed to have understood the consequences of his choices about the insurance product that he wants to purchase.[11]

In modern insurance law, the pre-contractual information duties of the insurer can basically be divided into two categories: the duty to inform about the insurance contract and the duty to advise in respect of the policy holder's individual requirements of insurance.[12] The distinction between informing and advising lies in the fact that information relates to providing standard and abstract info about the insurance product, while advice relates to the ascertainment of the concrete needs of the policyholder[13] and is linked with the policyholder's decision process.[14] There is also a duty to highlight, which entails the clarification of certain issues and warning

8 PECL is a set of model rules drawn up by the Commission on European Contract Law, which aims to harmonise the contract law of the Member States of the European Union. See Ole Lando and Hugh Beale (eds), *Principles of European Contract Law (Part I and II)* (Wolters Kluwer 2000) xxiv.

9 Türk Borçlar Kanunu, Kanun Numarası: 6098, Kabul Tarihi: 11.1.2011, RG 4.2.2011/27836.

10 Marta Ostrowska, 'Information Duties Stemming from the Insurance Distribution Directive as an Example of Faulty Application of the Principle of Proportionality', in Pierpaolo Marano and Kyriaki Noussia (eds), *Insurance Distribution Directive* (Springer 2021) 31.

11 Ostrowska (n 10) 31. See also Ana Keglević, 'Pre-contractual Information Duty and Unfair Contract Terms-Open Questions and Dilemmas' in Insurer's Precontractual Information Duty (Sigorta Hukuku Türk Derneği 2013) 77, 79.

12 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 125.

13 Erich Prölls, Anton Martin and Mathis Rudy 'VVG § 6 Beratung des Versicherungsnehmers' in *Prölls/Möller Versicherungsvertragsgesetz* (31st edn CHBeck 2021) Rn 1.

14 Matthias Beenken, 'Beratungspflichten nach der IDD und Ihre Umsetzung ins deutsche Recht' (2017) Rechts und Schaden 44 (12) 617, 618.

the policyholder who is mistaken about the insurance coverage, provided that it is reasonable to expect the insurer to point out such a mistake.[15]

The Insurance Distribution Directive[16] ("IDD"), which entered into force on 2 February 2016, stipulates both the duty to inform and advice in Article 20.[17] Recital 44 of the IDD explains that to avoid any mis-selling, the sale of insurance products should always be accompanied by a demands-and-needs test on the basis of information obtained from the customer. If the insurer breaches its obligation under Article 20, sanctions, which are mostly administrative in nature, will be applied (Article 33/2).

A. *Pre-contractual Duties of the Insurer under PEICL*

PEICL lists three pre-contractual duties of the insurer in its Section Two: i) *to provide pre-contractual documents* (Article 2:201); ii) *to warn about the inconsistencies in the cover* (Article 2:202); iii) *to warn about commencement cover* (Article 2:203). The author will not deal with Article 2:203, which is deemed as a special case of the general duty of the insurer to warn the applicant as stipulated in Article 2:202 and, therefore, leads to the same sanctions.[18]

1. *Duty to Provide Pre-Contractual Documents*

PEICL Article 2:201(1) requires that "*The insurer shall provide the applicant with a copy of the proposed contract terms as well as a document which includes the following information if relevant: (a) the name and address of the contracting parties, in particular of the head office and the legal form of the insurer and, where appropriate, of the branch concluding the contract or granting the cover; (b) the name and address of the insured and, in the case of life insurance, the beneficiary and the person at risk; (c) the name and the address of the insurance agent; (d) the subject matter of the insurance and the risks covered; (e) the sum insured and any deductibles; (f) the amount of the premium and the method of calculating it; (g) when the premium falls due as well as the place and the mode of payment; (h) the contract period, including the method of terminating the contract, and the liability period; (i) the right to revoke the application or avoid the contract in accordance*

15 For the meaning of 'informing' and 'highlighting', see: Emine Yazıcıoğlu, 'Sigortacının Bilgilendirme (Aydınlatma) Yükümlülüğü' in Samim Ünan and Emine Yazıcıoğlu (eds), *Sigorta Hukuku Sempozyumları* (Onikilevha 2018) 391. See also, for the differences between information (Information), highlight (Aufklärung) and advice (Beratung): Beenken (n 14) 618.

16 Council Directive 2016/97/EC of 20 January 2016 on insurance distribution OJ L26/19.

17 The objective of the revision to the Insurance Mediation Directive was designed to ensure consistency of terms between all participants involved in the sale of insurance products and to increase customer protection. See: Christian Bo Kolding-Krøger and Regitze Aalykke Hansen and Amelie Brofeldt, 'The Reality of the Promised Increase in Customer Protection Under the Insurance Distribution Directive' in Pierpaolo Marano and Kyriaki Noussia (eds), *Insurance Distribution Directive* (Springer 2021) 398.

18 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 127.

with Article 2:303 in the case of non-life insurance and with Article 17:203 in the case of life insurance; (j) that the contract is subject to PEICL; (k) the existence of an opt-out-court complaint and redress mechanism for the applicant and the methods of having access to it; (l) the existence of guarantee funds or other compensation arrangements."

a. Scope

As the first step of the insurer's pre-contractual duties, this provision ensures that the standard and abstract info about the insurance is given to the prospective policyholder by means of providing the pre-contractual documents. Those documents help to ensure transparency for the prospective policyholders and put them in a position to check the content of the contract and reach an informed decision.[19]

Under PEICL Article 2:201(1), the pre-contractual documents to be provided by the insurer are the 'proposed contract terms', which embrace the insurer's standard insurance terms[20] and a 'document' including the information of listed issues. With regard to 'risk exclusion clauses', which are the focus of attention of this paper, it is worth noting that PEICL Article 2:201(1)(d) only mentions *the subject matter of the insurance and the risks covered*. However, it is assumed that, as part of the proposed contract terms, they fall within the scope of information to be given to the prospective policyholder.

By mentioning a 'copy' of the proposed contract terms and a 'document' including the relevant information, PEICL secures that the abstract information about the insurance will be provided in written form. Besides, that written information must be 'given' to the prospective policyholder. Therefore, it is not sufficient to emphasise the place where those terms can be found. Consequently, statements such as "*For insurer's proposed terms see the following webpage*" would not be sufficient to perform the duty of providing pre-contractual documents.

b. Time

PEICL Article 2:201(2) requires that "*If possible, this information shall be provided in sufficient time to enable the applicant to consider whether or not to conclude the contract.*" The time frame requested in this provision hints that the PEICL prefers the 'offer model'[21] in the contract conclusion so that the prospective policyholder has been enabled to read and consider all the proposed terms of the insurer, including the risk exclusions, before expressing its binding intention to conclude the contract.

19 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 119.

20 See Keglević (n 11) 80.

21 See, for the meaning of 'offer model': Samim Ünan 'Insurer's Pre-contractual Duties to Inform and Warn/Advice' in Insurer's Precontractual Information Duty (Sigorta Hukuku Türk Derneği 2013) 9, 13.

However, the prescribed time period in this provision is only applied when it is 'possible'. What is meant by '*if possible*' is not explained in PEICL. In its Commentary, Finnish Insurance Contracts Act s. 5 para 1 is annotated, which provides that the information does not need to be provided if the policyholder does not want it or if giving such information "would pose excessive inconvenience".[22]

A similar provision is set out in the German Insurance Contract Act § 7 para 1 sentence 3, which provides that "*If, upon the request of the policyholder, the contract is concluded by telephone or using another means of communication which does not permit the information to be provided in writing prior to the policyholder's contractual acceptance, that information must be provided without undue delay after the contract is made; this shall also apply if the policyholder explicitly waives the right to information by a separate written declaration prior to submitting his contractual acceptance*."

Therefore, at least in cases where the insurance contract has been concluded by means of remote communication, one may assume that it was impossible for the insurer to provide its contract terms within a sufficient period of time to enable the applicant to consider its content. In such cases, the insurer would not be in breach of its duty to provide pre-contractual documents. But due attention should be given because not breaching the duty to inform under insurance law may not be sufficient to incorporate the standard insurance terms into the contract under general contract law. It is also important to note that PEICL does not provide a legal sanction in case the insurer does not provide the pre-contractual documents sufficiently in advance, even if otherwise was possible.

2. Duty to Warn About Inconsistencies in the Cover

PEICL Article 2:202(1) stipulates that "*When concluding the contract, the insurer shall warn the applicant of any inconsistencies between the cover offered and the applicant's requirements of which the insurer is or ought to be aware, taking into consideration the circumstances and mode of contracting and, in particular, whether the applicant was assisted by an independent intermediary*".

This provision obliges the insurer to warn the applicant about aspects of the proposed risk not covered by the policy. However, it is limited to situations where the gaps in the cover would be deemed to be in the know of the insurer, especially if the actual risk of the applicant was apparent to the insurer or such a gap should reasonably have been anticipated by the insurer.[23]

22 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 120. See also, Salla Hyvönen, 'Information Obligations and Disinformation of Consumers: Finnish Law Report', in Gert Straetmans (ed), *Information Obligations and Disinformation of Consumers* (Springer 2019) 423.

23 Basedow, Birds, Clarke, Cousy, Heiss,and Loacker (n 7) 123.

It seems that the duty to warn about the inconsistencies in the cover offered and the applicant's requirements is less comprehensive than the duty of advice as stipulated in the IDD.[24] It is clear that the duty of advice as included in the IDD requires the identification of the demands and needs of the customer and to inform him objectively about the insurance product. Commentary of the PEICL also explains that Article 2:202 reflects a compromising solution between the extremes[25] and aims at establishing a general pre-contractual duty on the part of the insurer to assist the applicant by providing information relevant to the applicant's choice of cover.[26]

In case of a breach, PEICL Article 2:202(2)(a) entitles the policyholder to claim damages. The insurer will have to pay the policyholder the amount of money that will put the policyholder in the position he would have been in, had he been duly warned by the insurer.[27] In addition to claiming damages, Article 2:202(2)(b) gives the policyholder a right to terminate the contract.

B. Pre-contractual Duties of the Insurer under Turkish Law

1. Duty to Inform

Turkish insurance law neither stipulates a duty of warning nor a duty of advice on the insurer. It simply provides a duty to inform in TCC Article 1423(1): "*Before the conclusion of the contract and sufficiently in advance for due consideration, the insurer and its agent shall inform in writing the policyholder of all matters related to the insurance contract, the insured's rights, the provisions to which the insured has to pay special attention, notification duties that may arise in the course of the insurance cover*."[28]

a. Scope

The wording of this provision with respect to the scope of information to be given to the policyholder is, albeit contrary to the enumeration technique of PEICL, widely formulated. It is generally accepted that the scope of insurance coverage, its exceptions, premium and insurance amount are included within the scope of the insurer's duty to inform.[29] Insurer's standard insurance terms are also contained within the scope of the duty to inform.[30]

24 According to Keglević, duty to advise is explicitly prescribed in PEICL Article 2:202. See Keglević (n 11) 82. Ostrowska states that "… *the PEICL do not provide a standard insurer duty to advise, which is common for European insurance regulations. However … the insurer's duty to warn the applicant of any inconsistencies between the cover offered and his requirements give reasonable grounds to state that the PEICL fulfil the purpose of the duty to advise at least partially*." See Ostrowska (n 10) 287.

25 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 126.

26 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 122.

27 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 124.

28 Translation is taken from Ecehan Yeşilova Aras, 'Transparency in the Insurance Contract Law of Turkey' in Pierpaolo Marano and Kyriaki Noussia (eds), *Transparency in Insurance Contract Law* (Springer 2019) 472.

29 Kübra Yetiş Samlı, 'Sigortacının Aydınlatma Yükümlülüğünü Düzenleyen TTK m. 1423 Hükmüne İlişkin Bazı Değerlendirmeler' (2016) 22 (3) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 2987.

30 Samim Ünan, Türk Ticaret Kanunu Şerhi Altıncı Kitap Sigorta Hukuku Cilt 1 Genel Hükümler (Madde 1401-1452) (Onikilevha 2016) 229.

Besides, Regulation on the Information in Insurance Contracts ("Regulation on Information") [31] includes a provision, which contains the minimum amount of information to be included in the information form.[32] According to Article 8 of this Regulation, the information form must include: *a) the title and the contact information of the insurer and its agent, b) General warnings about the contract to be concluded, c) insurance coverage given by the contract, ç) exclusions of the insurance coverage and values, risks, which are based on each insurance type outside the coverage but can be included in the coverage by an additional contract provided that they are mentioned in the policy, or special terms and clauses that can be added in the contract, d) general rules on insurance payment, e) objection and information requests and information on arbitration membership, f) all other information and documents requested by the Ministry.*

As viewed above, insurance coverage and its exclusions are specifically mentioned among the information to be included in the information form. It is further possible to infer from the phrase "*the provisions to which the insured has to pay special attention*" that the 'risks covered and excluded' in the insurance contract are covered with TCC Article 1423(1).

TCC Article 1423(1) requires that the insurer must perform its duty to inform in written form. Other than this, the TCC does not prescribe a duty to provide pre-contractual documents as provided in PEICL and the information form prescribed by the Regulation on Information is only a document of evidence that the insurer has performed its duty to inform.[33] The written form as prescribed in TCC Article 1423(1) is criticised by legal scholars since it does not take into account the insurance contracts concluded by means of distance communication instruments.[34] It is interesting to note that Regulation on Information allows an oral form in cases of contract conclusion through a call centre or telephone.[35] However, its validity under TCC Article 1423(1) is strongly rejected among scholars.[36]

b. Time

According to TCC Article 1423(1), the duty to inform must be performed before the conclusion of the contract and by providing sufficient time for consideration. This

31 Sigorta Sözleşmelerinde Bilgilendirmeye İlişkin Yönetmelik, RG 14.02.2020/31039.

32 According to Regulation on Information Art 4(1)b, an information form can be given to the prospective policyholder, which will include summary information on the scope of the insurance, procedures and rules on the payment of the insurance money.

33 Mehmet Özdamar, *Sigortacının Sözleşme Öncesi Aydınlatma Yükümlülüğü* (Yetkin 2009) 240; İrem Aral Eldeklioğlu, '6102 Sayılı Türk Ticaret Kanunu ve Sigortacılık Mevzuatı Uyarınca Sigortacının Aydınlatma Yükümlülüğü' 18 (1) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 393.

34 Ünan (n 30) 235.

35 Regulation on Information Art 5(3): Information to be given by the insurer through the call center or telephone can be made orally, provided that the interview is recorded on magnetic or digital media.

36 Yetiş Samlı (n 29) 2990.

formulation is very similar to PEICL Article 2:201(2) and requires that the insurer informs the prospective policyholder before its offer or acceptance accordingly.[37] However, unlike PEICL, there is no restriction on this duty to provide the information by giving sufficient time only when "possible".

2. Duty to Highlight or Advise the Policyholder

TCC does not entail a specific duty to warn about the cover offered and the applicant's requirements which the insurer is aware of. Whether from TCC Article 1423(1), an obligation to enlighten the policyholder who is mistaken about the contract and its coverage can be extracted is not clear. Taking into account the content of TCC Article 1423(1), it has been argued by legal scholars that no obligation is imposed on the insurer beyond providing information,[38] such as the duty of warning about the inconsistencies of the cover offered and the policyholder's requirements combined with a right to claim damages. As will be seen below, this absence is the reason for divergent opinions regarding the legal consequence stipulated in TCC Article 1423(2).

It is further obscure whether such an obligation can be extracted from the general contract law and, in particular, from *culpa in contrahendo*. According to *Özdamar*, in addition to providing information, the insurer is under obligation to provide consultancy, guidance and advice to the addressee within the scope of Turkish Civil Code Article 2.[39] According to this provision, everyone has to comply with the rule of good faith while using their rights and performing their obligations. This obligation requires negotiating with serious intent to make a contract, not to engage in effective deceptive conduct, to give the necessary information to the other party and to warn if the other party falls at fault.[40]

It is true that *culpa in contrahendo* covers both the duty of giving information and also providing accurate and complete information.[41] Providing deficient or wrong information will diminish the expected benefits of the contract for the counterparty.[42]

37 See Ünan (n 30) 224; Yetiş Samlı (n 29) 2977, 2984

38 Yazıcıoğlu (n 15) 394; Yeşilova Aras (n 28) 459, 472.

39 Özdamar (n 33) 190.

40 Osman Gökhan Antalya, *Marmara Hukuku Yorumu Borçlar Hukuku Genel Hükümler Cilt V/1-1* (2nd ed, Seçkin 2019) 255; Rona Serozan, Başak Baysal and Kerem Cem Sanlı, *Serozan Borçlar Hukuku Genel Bölüm – İfa, İfa Engelleri, Haksız Zenginleşme* (8th ed, Onikilevha 2022) 347-348;Haluk Nami Nomer, *Borçlar Hukuku Genel Hükümler*, (17th ed, Beta 2020) 437-438; Ahmet Kılıçoğlu, *Borçlar Hukuku Genel Hükümler*, (24th ed, Turhan 2020) 119-120; Yeşilova Aras (n 28) 473; Aylin Görener, 'Culpa In Contrahendo Sorumluluğu', (2019) 36 (2) İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, 73-34; Kemal Şenocak, 'Sigorta Sözleşmesini Kurmaya Yönelik İcap Beyanının Kabulü veya Reddi Yönünde İrade Beyanı Açıklanmadan Önce Sigortacının, İcaba Bağlılık Süresi İçerisinde Gerçekleşen Riziko'dan Dolayı Culpa In Contrahendo Sorumluluğu Söz Konusu Olabilir Mi?' (2007) 1-2 (11) Gazi Üniversitesi Hukuk Fakültesi Dergisi 299; Mustafa Arıkan, 'Die Haftung aus Culpa in Contrahendo' (2009) 17 (1) Selçuk Üniversitesi Hukuk Fakültesi Dergisi, 72.

41 Huriye Reyhan Demircioğlu, *Güven Esası Uyarınca Sözleşme Görüşmelerindeki Kusurlu Davranıştan Doğan sorumluluk (Culpa in Contrahendo Sorumluluğu)*, (Yetkin 2009) 222.

42 Demircioğlu (n 41) 235. See also Fikret Eren, Borçlar Hukuku Genel Hükümler (17th ed, Yetkin 2014) 1135; Serozan, Baysal and Sanlı, (n 40) 358.

Hence, according to the author, in insurance contracts, although a duty to highlight the policyholder can arise from the doctrine of the *culpa in contrahendo* (not from the TCC Article 1423(1)), a duty of advice as understood by IDD cannot be endorsed either from *culpa in contrahendo* nor from TCC Article 1423(1). Conducting a demands-and-needs test and determining the best suitable insurance coverage for the applicant is of high-level consumer protection. It would be better if such protection were specifically included in the TCC.

II. Incorporation of Standard Insurance Terms

III. A. Incorporation under PEICL

PEICL takes into account the fact that the standard insurance terms of the insurer have been drafted by one of the contract parties, and thus, they have the character of standard contract terms. PEICL deals with the validity of the unfair terms included in the standard contract terms, but other than imposing a duty to provide pre-contractual documents and to warn about the inconsistencies of the cover, it does not directly deal with the question of how and to what extent these standard terms are validly incorporated into the contract.

The only provision that seems to be relevant in this regard is PEICL Article 2:502, which provides that "*If the terms of the insurance policy differ from those in the policyholder's application or any prior agreement between the parties, such differences as have been highlighted in the policy shall be deemed to have been assented by the policyholder unless he objects within one month of receipt of the policy.*"

PEICL Article 1:105(2) provides that questions arising from insurance contracts that are not expressly settled in the PEICL are to be ascertained in conformity with the PECL. Therefore, in the following part, the role of PEICL Article 2:502 will be analysed by taking into account the related provisions of PECL on the incorporation of standard contract terms.

1. Incorporation under PECL

With regard to incorporation of general contract terms, PECL Article 2:104 provides that "*(1) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded. (2) Terms are not brought appropriately to a party's attention by mere reference to them in a contract document, even if that party signs the document*". [43]

43 PECL's regulation on incorporation, in a way, completes Directive 93/13/EEC on Unfair Contract Terms, which deals with the consequences of being an *unfair term* included in the standard contract terms but fails to determine whether and under which conditions those contract terms become part of the contract. In the absence of PECL, this question should be answered within the context of general contract law of the respective Member State. Some Member States, for example, Germany (BGB § 305/2), have extensive rules on unfair terms than the Directive's rules and describe the rules for the incorporation of the general contract conditions.

It is worth mentioning that PECL Article 2:104 does not mention or make reference to "pre-formulated" contract terms. Nevertheless, it covers standard terms prepared by one party, provided that they are not individually negotiated with the other party.[44] It is also worth noting that other than bringing the standard terms to the attention of the other party in a reasonable way, PECL does not require any advice or assistance duties of the party that uses such terms and does not oblige the user to bring the differences between the provisions of the standard contract terms and its actual demands and needs to the other party's attention. To read and consider whether these terms are in accordance with its needs or not is bestowed upon the other party.

In order to incorporate the user's standard contract terms, PECL requires that the user must get the other party's attention on such terms. According to the clear wording of its provision, a mere reference to the standard contract terms is not sufficient to incorporate them into the contract.[45] Thus, in addition to referencing the general terms, such terms must either be attached to the contract or available to the offeree in different ways.[46] In other words, the user of the standard terms is not obliged to provide the full content of the conditions, but at least the information on where to find the content of these conditions must be provided.

2. Interaction of PECL with PEICL Regarding Incorporation

a. Scope of Information

It is obvious that by requiring to provide a 'copy' of the proposed contract terms, the standard required by PEICL Article 2:201 with regard to the scope of information is higher than PECL, according to which it is sufficient to inform the other party where to find the standard contract terms. Therefore, should the insurer furnish the contract terms in a timely manner, the standard insurance terms would be incorporated under PECL Article 2:104.

It should be pointed out that in addition to providing the standard terms, PEICL also requires a warning about inconsistencies. Therefore, the incorporation of standard insurance terms under PEICL Article 2:201 in connection with PECL Article 2:104 does not hinder the application of PEICL Article 2:202. Thus, if the insurer does not warn the applicant about the inconsistencies between the cover offered in the

44 See Lando and Beale (n 8)149. For a similar approach expressed regarding Article(s) 7 and 70 of CESL (Draft Regulation on a Common European Sales Law) see Sonja A Kruisinga, 'Incorporation of Standard Terms According to the CISG and the CESL: Will These Competing Instruments Enhance Legal Certainty in Cross-Border Sales Transaction' (2013) 24 (3) European Business Law Review 341, 353. According to Magnus, the Commentary to Article 2:209 PECL implies that standard terms are prepared in advance by one of the parties without any influence from the other party. See Ulrich Magnus, 'Incorporation of Standard Terms' in Larry DiMatteo, Andre Janssen, Ulrich Magnus and Reiner Schulze (eds), *International Sales Law* (CH Beck, Hart, Nomos 2016) 251.

45 Lando and Beale (n 8) 149, Magnus (n 44) 251.

46 Magnus (n 44) 251, Kruisinga (n 44) 354.

proposed contract terms and the applicant's requirements (which the insurer became aware of upon receiving the applicant's invitation for an offer), he might be liable to pay damages under Article 2:202; although such inconsistent terms validly became part of the contract.

b. Time of Information

According to PECL Article 2:104, standard contract terms should be brought to the attention of the other party before or when the contract is concluded. However, as we have seen above, under PEICL, the information does not have to be provided sufficiently in advance in cases where it is not possible to do so. In this respect, different scenarios must be taken into account as regards the way of concluding the insurance contract.

1. Before Contract Conclusion

In the most ideal way of contract conclusion, upon receiving the applicant's invitation to offer, the insurer provides its standard terms together with its questionnaire to be filled out by the applicant.[47] This would enable the applicant sufficient time to consider the content and decide whether or not to make an offer to the insurer. This way of contract conclusion comprises the 'offer model' and best suits the interests of the policyholder because the applicant only makes an offer after considering the standard terms. In this case, there would be no doubt that the standard insurance terms would become part of the insurance contract upon acceptance of the insurer.

2. At Contract Conclusion

If the prospective policyholder triggers the contractual relationship by making an offer through a means of real-time communication, for example, by telephone, it may not be possible for the insurer to provide its insurance terms in due time through the same means of communication. In such a way, the acceptance by the insurer might be given through a letter by post.[48] This type of contract conclusion is known as the 'policy model' in which the informative documents are delivered simultaneously with the policy at the moment when the contract is entered into.[49] The submission of the relevant information at the last moment is obviously too late for an informed decision, and it is highly questionable whether the terms included in those documents have been incorporated into the insurance contract or whether the insurance contract has been concluded at all.

47 According to PEICL Article 2:101(1), the applicant's pre-contractual information is dependent on the insurer's questionnaire.

48 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 129.

49 Ünan (n 21) 13.

In this scenario, by sending its proposed contract terms with its acceptance, the insurer has indeed modified the offer. Therefore, such an acceptance would be considered a modified acceptance under general contract law and be subject to PECL 2:208.[50] According to this provision "*(1) A reply by the offeree which states or implies additional or different terms which would materially alter the terms of the offer is a rejection and a new offer. (2) A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract. (3) However, such a reply will be* treated *as a rejection of the offer if ... (c) the offeror objects to the additional or different terms without delay*."

Under PECL Art 2:208, which is almost identical to CISG Art 19, a reply containing the terms which materially alter the terms of the offer is tantamount to rejection and a new offer.[51] Only additional or different terms which do not materially alter the terms of the offer become part of the contract.[52] In such a case, the offeror can object to them if he finds it worthwhile to express his disagreement.[53] Thus, the determination of what constitutes 'material terms' and whether the risk exclusion clauses can be qualified as material alterations are crucial to understanding the fate and content of the insurance contract.

According to the *Commentary* of the PECL, '*A term is material if the offeree knew or as a reasonable person in the same position as the offeree should have known that the offeror would be influenced in its decision as to whether to contract or as to the terms on which to contract*'.[54] Unlike CISG 19(3), the PECL does not provide a list of material terms. Nevertheless, the *Commentary,* for illustrative purposes, mentions the same terms of CISG, such as the price, payment, quality and quantity of the goods, place and time of delivery, and the extent of one party's liability to the other.[55]

Following the above explanations, the author believes that risk exclusion clauses and any condition restricting the coverage and the insurer's liability against the policyholder must be deemed a material alteration to the offer. The acceptance of the insurer, including such material alterations must be considered as a new offer, which requires the approval of the policyholder. Consequently, in the absence of the

50 Lando and Beale (n 8) 150.

51 Lando and Beale (n 8) 178. This provision recognises the so-called mirror image rule of offer and acceptance exactly matching each other. See Michael Greenhalgh Bridge, *The International Sale of Goods* (3rd ed, Oxford University Press 2013) 536.

52 Lando and Beale (n 8) 178. In departing from the mirror image rule for non-material changes, this rule significantly deviates from the English law, according to which a purported acceptance containing additional or different terms would be regarded as a counter-offer, whether those terms were material or not. See Bridge (n 51) 537.

53 Lando and Beale (n 8) 178.

54 Lando and Beale (n 8) 178.

55 See Lando and Beale (n 8) 178.

policyholder's acceptance, the contract will not be concluded.[56] In this regard, it is also important to note that according to PECL Article 2:204(2), silence or inactivity does not amount to acceptance.

In the light of the previous remarks, the meaning of PEICL Article 2:502 clearly crystallises, especially when one reads the explanation given as the rationale for this provision:

> "*Under general contract law such changes could even lead to an absence of agreement that might affect the whole contract and leave the policyholder unprotected*".[57]

It seems that the drafters of the PEICL delineate the probability of the insurance contract being not concluded if the insurer makes material changes in its acceptance. Thus, thanks to PEICL Article 2:502, in insurance contracts, regardless of being material or not, any differentiation from the offer would be deemed accepted when not objected by the policyholder within one month. In this way, PEICL Article 2:502 operates as permission to consider a modified acceptance/new offer as an 'acceptance' even for material alterations. It provides a ground that the insurer can rely on the silence of the policyholder by granting a right of objection within one month.

3. After Contract Conclusion

PECL strictly requires that the other party's attention be drawn at the latest by the contract conclusion. After the conclusion of the contract, any subsequent attempt to inform the other party would not be sufficient to incorporate the general insurance conditions.[58] However, the drafters of PEICL considered the different alternative scenarios of the contract conclusion under Article 2:502. This said provision is explained by the *Commentary* as follows: "*Often the insurer will intentionally issue the policy with new or modified terms as a consequence of a risk evaluation. It is the interest of lowering transaction costs in the insurance sector to allow an insurer to issue the policy on different terms*."[59]

Therefore, under PEICL, the constitutive effect of the policy also occurs when the insurer sends its policy after contract conclusion to modify the already concluded contract. It is worth noting that the obligation to issue a policy is independent of the duty to provide the pre-contractual documents. No legal sanction is attached to the violation of the duty to provide those pre-contractual documents. Hence failing to provide pre-contractual documents in due time does not hinder the constitutive effect

56 Ünan states that "In case the standard insurance terms are not provided to the prospective policyholder sufficiently in advance for consideration and negotiation, they will not have a binding effect on it." See Ünan (n 21) 17.

57 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 160.

58 Lando and Beale (n 8) 150; Magnus (n 44) 250.

59 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 160.

of the policy. All these together seem to be consistent because PEICL allows that *the terms of the insurance policy may differ from any prior agreement between the parties.* The wording of '*any prior agreement*' aims to provide for this result.

c. Special Protection

As seen above, due to specific characteristics of insurance practice, the rules of PEICL deviate significantly from the general principles of PECL in relation to contract conclusion and incorporation of standard terms. However, to provide a fair balance between the contractual parties, such deviation is subject to certain conditions set out in PEICL Article 2:502(1), according to which i) the policyholder has been highlighted about every variation of the policy from the application or prior agreement, ii) the policyholder has not objected to the variation within one month of the receipt of the policy, and iii) the insurer has informed the policyholder in writing and in bold print about the right of objection to the variations.[60]

It seems that PEICL establishes a balanced solution between the needs of the insurance sector and the protection of the insurance consumer. On one side, it facilitates the incorporation of different terms through the policy, and on the other side, it subjects the incorporation to certain conditions. However, the function of the objection after the conclusion of the contract is vague. In this regard, one may question whether the insurer should be allowed to assert that he would not have concluded the insurance contract without the subject contract terms.

As a final remark, it is doubtful whether the duty of "warning" under PEICL Article 2:202 is more comprehensive than the requirement of "highlighting" under PEICL Article 2:502. But according to the author, both provisions serve different purposes, and it seems logical to assert that an insurer who tacitly accepts the applicant's offer by sending its policy would be deemed to have violated Article 2:202 if he does not warn of the inconsistencies between the cover he offered and the policyholder's requirements.

C. Incorporation under Turkish Law

1. Incorporation under TCO

With regard to the incorporation of standard contract terms, TCO Article 21 provides that "*General contract terms detrimental to the contractual partner of the user shall become part of the contract only when concluding the contract if the other party was informed about their existence and was given the opportunity to learn their content and upon acceptance of the other party*."

60 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 161.

Under this provision, standard contract terms will be incorporated into the contract subject to the fulfilment of three conditions. Firstly, the user of the standard terms must inform the other party that the contract will be subject to standard terms.[61] Secondly, the standard terms must be handed over to the other party, who was given the opportunity of reading them.[62] In harmony with PECL Article 2:104, it would not be sufficient to make a mere reference to the general contract terms in the contract, and the text must have been available to the other party to give a fair chance to read and think about their content.[63] Thirdly, such terms must be accepted by the other party either explicitly or impliedly.[64]

2. Interaction of TCO with TCC Regarding Incorporation

a. Scope of Information

Under TCC Article 1423(1), the scope of information duty is broader than in TCO Article 21. Thus, if the insurer provides the information form or gives the related information in another written form, this would satisfy the condition of TCO Article 21 regarding incorporation.

b. Time of information

1. Before Contract Conclusion

According to Turkish law, the timing of the information is the latest moment of the conclusion of the contract. In line with PEICL, it can be concluded that if, before the applicant's offer, the insurer provides its standard insurance terms together with its questionnaire, it would suffice for incorporation of those terms into an insurance contract.

It is also possible that, since Turkish law does not mandatorily require a question list to be submitted to the applicant before contract conclusion, the insurer may (regardless of whether it received an invitation to offer or not) make an offer to the applicant. If the insurer provides its standard insurance terms with its offer, the applicant will be able to consider their content before accepting them. So, if the applicant accepts the offer, those terms will be incorporated into the contract.

61 The warning about the usage of the standard terms can be oral or in writing. See Ayşe Havutçu, 'Genel İşlem Şartlarının Sözleşme ile İlişkilendirilmesinde Düzenleyen (GİŞ Kullanan) İçin Getirilen Külfetler' (2015) 80(3) İzmir Barosu Dergisi, 246.

62 Atamer and Ünan (n 1) 70.

63 Atamer and Ünan (n 1) 70; Havutçu (n 61) 250.

64 Yeşim Atamer, *Sözleşme Özgürlüğünün sınırlandırılması Sorunu Çerçevesinde Genel İşlem Şartlarının Denetlenmesi* (2. Ed, Beta 2001) 99.

2. At Contract Conclusion

i. In General

If the prospective policyholder makes an offer without a previous invitation from the insurer, the insurer must hand over the standard insurance terms by the latest with his so-called acceptance. As explained above, such a so-called acceptance might be considered a new offer.[65] In this regard, it is worth noting that Turkish law does not stipulate a similar provision of PECL 2:208, which sets the conditions of a new offer to operate as an acceptance, and the question must be analysed under the general principles of contract conclusion.

In relation to the conclusion of the contract, TCO Article 2 provides that "*Where the parties have agreed on the essential terms, it is assumed that the contract shall be deemed to be concluded even if secondary terms are not mentioned*". Based on the *favour contractus* principle, this provision provides a legal assumption that agreement on the essential terms is considered evidence that the contract has been concluded.

In order to have a true understanding of this provision, the meaning of the 'essential terms' must be clarified. Essential terms primarily include the *essentialia negotii*, which constitute the minimum content of the concrete contract (objectively essential terms).[66]

Essential terms also include points, which constitute a condictio sine qua non for one of the parties and which the other party knows the importance of for the counterparty.[67] Here we can detect a remarkable similarity between the 'material' terms of PECL and 'subjectively essential' terms of Turkish law, without consensus on which the contract cannot be deemed as concluded. All other terms of a contract constitute secondary terms, which can be considered as 'non-material terms'.

Thus, there will be no doubt that if the deviation in the acceptance relates to objectively essential terms of the contract, it would be considered a rejection or a new offer.[68] For instance, if upon receiving the prospective policyholder's offer for life insurance the insurer impliedly accepts this offer by sending a policy for health insurance, this acceptance would not cause the conclusion of the contract because both parties' expressions of intent do not comply with the essential terms.

However, if the deviations do not relate to objectively essential terms of the contract, it would not be so easy to come to the same solution. This situation would

65 Mustafa Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler C. I* (17. Ed, Vedat 2019) 68; Atamer (n 64) 89. See also Rayegan Kender, *Türkiye'de Hususi Sigorta Hukuku* (17th ed, Onikilevha 2021) 193; Bahtiyar (n 1) 90.

66 Eren (n 42) 234; Oğuzman and Öz (n 65) 75; Antalya (n 40) 298.

67 Eren (n 42) 235; Oğuzman and Öz (n 65) 76; Antalya (n 40) 299.

68 Eren (n 42) 255; Antalya (n 40) 331-332.

occur, for example, when the insurer sends a policy for life insurance which includes restrictions on the insurance coverage as a response to the prospective policyholder who had applied for life insurance.

In this context, it should be pointed out that TCO Article 2 requires agreement on both objectively essential terms and also subjectively essential terms.[69] Therefore if the deviations in the modified acceptance relate to subjectively essential terms, such acceptance would be considered as a new offer, and without the acceptance of the counter-offeree, the contract would not be concluded.[70]

It can be deduced that Turkish law and the PECL reach similar outcomes with respect to contract conclusion in terms of a modified acceptance, which include alterations on 'subjectively essential terms' or 'material terms' respectively.[71]

In light of these explanations governing the general contract law, we can come to the conclusion that if the insurer declares its acceptance firstly by sending the policy, which albeit being in harmony with the offer as to the main coverage, nonetheless includes risk exclusions or restrictions, such acceptance might be treated as a new offer and unless accepted by the policyholder no contract would be concluded.

In this regard, it can be questioned whether the silence of the policyholder can be considered as an implied acceptance under TCO Art 6. This provision stipulates that "*Unless the offeror is obliged to await an explicit acceptance according to law, the nature of the transaction or the circumstances, the contract is presumed to have been concluded if the offer is not rejected within a reasonable time"*. Under Turkish law, silence, in principle, does not constitute an expression of intention. However, within the context of trust theory, under exceptional circumstances, silence can be construed as a declaration of intent.

69 Andreas von Tuhr, *Borçlar Hukukunun Umumi Kısmı Cilt: 1-2* (Çeviren Cevat Edege) (2nd ed, Olgaç Matbaası 1983) 184; Selahattin Sulhi Tekinay, Sermet Akman, Haluk Burcuoğlu and Atilla Altop, *Tekinay Borçlar Hukuku Genel Hükümler* (7th ed, Filiz 1993) 76; Eren (n) 236; Oğuzman and Öz (n 65) 76; Antalya (n 40) 300. See, for a contrary view, Necip Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş Hukuki İşlem Sözleşme* (7. Ed, Filiz 2017) 176; Sanem Aksoy Dursun, *Borçlar Hukukunda Hakimin Sözleşmeyi Tamamlaması* (Onikilevha 2008) 43. According to this latter view, in order to refute the presumption that the contract has been established, the party claiming that the contract has not been established must prove that the term assumed to be reserved is not an objective secondary term, but a subjective essential term; in other words, it must demonstrate that it is not in a position to conclude the contract without agreement on the issue in question. Aksoy Dursun (n 69); Andreas Furrer, Markus Muller Chen and Bilgehan Çetiner, Borçlar Hukuku Genel Hükümler (Onikilevha 2021) 90, 91. In this regard it was also stated that it will not be fair to put the burden on the offeror to prove that the deviations expressed for the first time in the acceptation are essential from his side. Instead of putting the burden of proof on the offeror, a right of objection can be granted to him. CISG 19/b(2), which is almost the same as PECL 2:208, is proposed as a solution in this respect and it is suggested that TCO Article 6 should be applied in such cases. Kocayusufpaşaoğlu (n) 205.

70 Feyzi Necmeddin Feyzioğlu, *Borçlar Hukuku Genel Hükümler Cilt 1* (2nd ed, İstanbul Üniversitesi Yayınları 1976) 89; Antalya (n 40) 332. Within this context it has been also argued that all issues included in the offer, even if they do not relate to objective essential terms, are prima facie evidence of being subjectively essential terms from perspective of the offeror. Tekinay, Akman, Burcuoğlu and Altop (n 69) 80.

71 Differenciation of Turkish law and PECL arises with respect to secondary terms, which can be deemed as 'non-material' terms under PECL. According to PECL, such non-material deviations in the acceptance will hinder the conclusion of the contract if the offeror objects within reasonable time. In the absence of such an explicit provision, under Turkish law, the non material additions to acceptation will not hinder the contract conclusion. Non-agreed terms will be completed by the judge.

Thus, with regard to the standard contract terms, which have been submitted firstly with an acceptance, silence of the other party could not be considered as an acceptance. However, although such a party was silent against the counteroffer, he performs his contractual obligations, the user of the standard contract terms can be found justified to believe that the other party has agreed to its terms.[72] Therefore, if the policyholder receives the insurer's standard insurance terms firstly with its acceptance, his silence will not be considered an implied acceptance as long as he does not pay the premium or otherwise perform its obligations.

ii. Meaning of TCC Article 1423(2)

At this stage, it is time to analyse this general contract law structure under the outcomes of insurance law in relation to the insurer's breach of duty to inform. According to TCC Article 1423(2), "*If the information explanation is not given, the contract shall be deemed as having been concluded in accordance with the terms written in the policy, unless the policyholder objects to the conclusion of the contract within fourteen days*".

The first remark on the meaning of this provision is that it is criticised by legal scholars because it only covers the cases where the information explanation is not given. According to legal scholars, with an extensive interpretation, this provision also covers both the deficient and misinformation.[73]

Secondly, Regulation on Information also contains a legal sanction in case the duty to inform is violated. According to Article 7(1) of the Regulation on Information, "*During the conclusion and continuation of the insurance contract, if the duty to inform is not duly fulfilled, or misleading information has been given about the insurer, or the information in the Information Text has been prepared incorrectly and any of these circumstances has been effective in the decision of the policyholder, the policyholder may terminate the insurance contract and may demand compensation for the loss, if any*." It is alleged that the right(s) conferred under Regulation on Information and TCC Article 1472(2) are conflicting.[74]

Thirdly, different views have been expressed as to the legal meaning of the "objection". Some authors argue that the objection ends the insurance contract *ab initio*.[75] Others argue that the objection means termination, which will end the

72 Atamer (n 64) 89.

73 Ünan (n 30) 239; Yetiş Samlı (n 29) 2991.

74 Eldeklioğlu (n 33) 398.

75 Ünan (n 30) 239; Zehra Şeker Öğüz and Aslıhan Sevinç Kuyucu, *Yeni Türk Ticaret Kanunu'nda Sigorta Hukuku* (Filiz 2011) 24; Eldeklioğlu (n 33)395. Within the context of this view, it was also stated that until the moment of the objection, the insurance contract would be valid; upon objection, the contract will be invalid with a retrospective effect. See Samim Ünan, Cüneyt Süzel and Melisa Konfidan 'Ankara Bölge Adliye Mahkemesi 14. Hukuk Dairesi Kararı (E. 2018/1751, K. 2020/45, T. 10.01.2020) Işığında Sigorta Sözleşmelerinde Sözleşme Öncesi Bilgilendirme Yükümlülüğünün İhlaline Bağlanan Yaptırım' 2022 (1) (1) Piri Reis Üniversitesi Deniz Hukuku Dergisi, 213.

contractual relationship starting from the objection.[76] According to the latter, the policyholder's non-objection within fourteen days would imply an assumption that the duty to inform has been performed. Therefore, it will not be possible for the policyholder to terminate the contract and claim damages under the Regulation on Information.[77]

A fourth view argues that the legal sanction of "objection" should be decided case by case by taking all circumstances of the case into consideration: [78] Accordingly, the objection will cause the invalidity of the terms included in the policy. If the objection is against the merits of the insurance contract, then it may result in causing the invalidity of the contract. The objection may also result in the end of the insurance contract with prospective effect, and finally, it may cause the mutual amendment of contract terms.

Another view[79] argues that in case the objection is for some contract terms (and not for the conclusion of the contract), then this objection would be subject to acceptance of the insurer: If the insurer finds the policyholder's objection rightful, then parties may agree on the amendment of the contract; but if the insurer considers this objection as unjust or even if it does not react to the objection promptly, then the policyholder might be able to seek compensation or terminate the contract under the Regulation on Information. Nevertheless, to claim damages or to terminate the contract, the policyholder must prove that he would not make the contract if he knew about the information which was not given to him before the contract conclusion. The policyholder must also use his termination right within a reasonable time. Otherwise, he would be understood to opt-out of continuing the contract with the existing conditions. If the objection relates to the contract conclusion, it will be either termination or avoidance depending on the circumstances, such as whether the insurance coverage has started or not. However, if the policyholder has not objected within fourteen days, then the policyholder will not be able to terminate the contract and claim damages under the Regulation on Information.

Finally, it is also argued that the 'objection' means avoidance of the contract under TCO Article 39.[80] According to this provision, "*Where the party who concluded the contract by mistake, fraud or duress, it is deemed that the contract has been ratified unless the party declares within one year beginning with the time when the mistake*

76 Özdamar (n 33) 366.

77 Özdamar (n 33) 366. In a later-dated study, Özdamar stipulates that it is not the intent of the law maker to exclude the policyholder's right to claim damages via TCC Art 1423/2. See Mehmet Özdamar, '6102 Sayılı Türk Ticaret Kanunu Bağlamında Sözleşme Öncesi Aydınlatma Yükümlülüğünü İhlal Eden Sigortacıya Uygulanacak Yaptırım Sorunu' (2013) 71(2) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 347, 357. Also, see Eldeklioğlu (n 33) 399.

78 Memiş (n 1) 148, 149.

79 Yazıcıoğlu (n 15) 413; Yazıcıoğlu and Şeker Öğüz (n 1) 114. For a similar view, see Hacı Kara, *Sigorta Hukuku* (Onikilevha 2021) 182.

80 Yetiş Samlı (n 29) 2994.

or fraud was discovered or the effect of duress ceased to exist, not to be bound by the contract or reclaims restitution for the performance made".[81] This view states that there is a similarity in terms of interests between the policyholder, who has not been informed at all or adequately about the issues that will affect his decision to enter into a contract with specific conditions on one side, and the wronged or deceived contracting party on the other. Objection to the conclusion of the insurance contract, as with the avoidance of the contract, will result in the final invalidation of the contract. However, since the retroactive effect of invalidity in contracts that create a permanent debt relationship is not considered appropriate on the grounds of the legal nature and justice of the business, it is accepted that the invalidity will not affect the validity of legal acts up to the moment of annulment. Accordingly, when the policyholder uses its right to object, the actions taken before the objection will not be affected.

iii. Author's View

All of the above-mentioned various views concerning the meaning of Article 1423(2) of the TCC illustrate very well how important it is to approach the matter meticulously. The above analysis regarding the PEICL and its related provisions sheds new light on the subject matter and allows another perspective to interpret the meaning and purpose of TCC Article 1423(2).

Consequently, it is the opinion of the author that the purpose of Article 1423(2) of the TCC is not to regulate the legal consequences of the breach of the duty to inform by closing the way to the remedies set out in the general provisions of the TCO. Rather, the aim of this provision is to establish a link between the general contract law on the incorporation of standard contract terms and the insurance law by taking into account the unique characteristics of contract conclusion in insurance practice.[82]

Hence in order not to leave the policyholder without insurance protection, it departs from the general contract law by allowing the insurer to rely on the silence of the policyholder, who received a modified acceptance even with substantially essential terms. Therefore, without additional performance, such as payment of the premium, the silence of the policyholder alone would be treated as an acceptance. Consequently, if the policyholder does not object to the insurer's counteroffer within 14 days, the policy will have a constitutive effect on the contract conclusion together with the standard insurance terms.[83]

81 See for the translation Çağlar Özel, *Turkish Code of Obligations* (2nd ed, Seçkin 2014) 103.

82 See, for a similar approach: Atamer and Ünan (n 1) 72; Taşkın (n 1) 90; Erbaş Açıkel (n 5) 84.

83 In case of non-objection, the wording of TCC Art 1423(2) is not clear as to the moment of the contract conclusion. On the question of whether the contract has been concluded ex nunc or ex tunc, different views had been expressed by German scholars with regard to VVG aF § 5a. See, for those views: Peter Schimikowski, 'Verbraucherinformation – Einbeziehung von AVB und Abschluß des Versicherungsvertrags' (1996) Rechts und Schaden 23(1), 4.

However, if the policyholder objects to the insurer's modified acceptance/ counteroffer within 14 days after receiving the policy, this objection will cause a rejection and the contract will not be concluded.[84] Therefore, the right of 'objection' included in Article 1423(2) of the TCC is neither termination nor avoidance of the insurance contract, and there is no justified reason to deem the policyholder's objection subject to the insurer's acceptance. The policyholder's right of objection is a tool to operate as an 'acceptance' (if not objected) or 'rejection' (if objected) against the insurer's counteroffer at the contract conclusion.

It should be noted that the old version of the German Insurance Contract Act dated 1908 (VVG aF) had a corresponding provision in Article 5a[85], which provided that "*If the insurer has not provided the policyholder with the insurance conditions when the application is made or has failed to provide consumer information in accordance with Section 10a of the Insurance Supervision Act, the contract is deemed to have been concluded on the basis of the insurance policy, the insurance conditions and other consumer information relevant to the content of the contract if the policyholder does not object within fourteen days after submission of the documents in text form*." This provision had been added to the VVG a.F. through the Third Implementing Act/ EEC for the VAG of 21.7.94 in order to maintain the practice hitherto implemented in Germany of sending the standard insurance terms (only) together with the insurance policy to the policyholder. [86] By allowing the policy model in the contract conclusion, this provision had a crucial role both in the inclusion of the standard insurance terms and in the conclusion of the contract.[87] During the modernisation studies of Turkish insurance contract law, instead of the new German VVG, which abandoned the policy model and provided extended duties on the insurer to inform and advise the policyholder, the VVG a.F. § 5a has been taken as a model law. Therefore, it is logical to approach TCC Article 1423(2) in the same way as accepted in German legal teaching as an instrument to incorporate the insurer's standard terms and conclude the contract.

In light of all these explanations, TCC Article 1423(2) should be read in conjunction with the rules of general contract law on contract conclusion and incorporation of standard contract terms. From this point of view, it can be concluded that the

84 According to the author, in such a case, the policyholder, who was not informed sufficiently in advance before the contract conclusion, can claim damages based on *culpa in contrahendo*, since the contract was not concluded due to a breach of the duty of information. See, for a supporting view: Demircioğlu (n 41) 227; Schmikowski (n 83) 4.

85 VVG a.F. § 5a: "*Hat der Versicherer dem Versicherungsnehmer bei Antragstellung die Versicherungsbedingungen nicht übergeben oder eine Verbraucherinformation nach § 10a des Versicherungsaufsichtsgesetzes unterlassen, so gilt der Vertrag auf der Grundlage des Versicherungsscheins, der Versicherungsbedingungen und der weiteren für den Vertragsinhalt maßgeblichen Verbraucherinformation als abgeschlossen, wenn der Versicherungsnehmer nicht innerhalb von vierzehn Tagen nach Überlassung der Unterlagen in Textform widerspricht.*"

86 Schmikowski (n 83) 3.

87 Schmikowski (n 83) 3. However, as a result of the modernisation of insurance law, this method of contract conclusion was abandoned with the new German Insurance Contract Act of 2008 (VVG).

construction of PEICL 2:502 and TCC 1423(2) seems almost to be the same with respect to the incorporation of risk exclusion clauses, which are sent firstly with the acceptance of the insurer. However, there are significant differences as well: Firstly, the one-month time period of objection provided in PEICL is longer than the 14-days period set out in TCC. Secondly and most importantly, in Turkish law, there is no specific duty imposed on the insurer to inform the policyholder about his right of objection and to highlight every variation from the offer combined with a right of compensation.

Within this context, in the case of non-objection, the question of whether the policyholder may terminate the contract and/or claim damages should be answered within the spirit of the general provisions of the TCO. It is the opinion of the author that "non-objection" alone would not constitute an obstacle either for termination or claim damages and can never be construed as an assumption that the duty to inform has been performed and the policyholder will not resist if it was not performed. While answering this question, the scope and the extent of the duty to inform should be elaborately examined. So, to the extent it is possible to extract a warning or highlight obligations from the *culpa in contrahendo* in the concrete case, one may infer a right to claim damages.[88]

Furthermore, it is the opinion of the author that the wording of TCC Article 1423(2), which states that '*the information explanation is not given*', has a narrow meaning and does not entail deficient or wrong information[89], which may cause mistake or fraud. Although the author disagrees with the view that 'objection' means avoidance under TCO Article 39, it is still possible to apply this provision to the extent that its own conditions are satisfied. Consequently, if the insurer gives deficient or wrong information with the purpose of convincing the policyholder to conclude the contract and this action has caused the policyholder to make the contract, then the policyholder may declare that it is not bound by the contract within a one-year period beginning from the date of the discovery of the fraud. It is assumed that a similar conclusion can be attained within the context of the PEICL in connection with PECL Article 4:107 in the case of the insurer's fraud.

3. After Contract Conclusion

If, after the conclusion of the contract, the user sends its standard contract terms, any terms which have not been agreed upon previously by the parties must be considered as an offer to amend the existing contract, and the silence of the other party cannot be considered as an acceptance.[90] According to TCO Article 21, such

88 See Özdamar (n 33) 357; Ünan (n 21) 28; Taşkın (n 1) 194; Omağ (n 1) 409; Kara (n 79) 183.

89 See also Schimikowski (n 83) 5.

90 Ayşe Havutçu, Açık İçerik Denetimi Yoluyla Tüketicinin Genel İşlem Şartlarına Karşı Korunması (Güncel Hukuk Yayınları 2003) 121.

terms would not become part of the insurance contract since the policyholder was never informed about these terms.[91] Nevertheless, TCC Article 1423(2), in line with PEICL 2:502, plays a dual function regarding the terms of the insurance contract and allows the insurer to add its standard terms at a later stage through amendment of the contract. Thus, if the policyholder does not object in due time, the existing agreement would be deemed to have been amended with the standard insurance terms.

However, should the policyholder object within 14 days to the addition of standard terms in total or to any term (e.g., a risk exclusion), this objection would not be an objection to the conclusion of the contract; however, in connection with TCO Article 21, the objected terms would not become part of the insurance contract. So, the insurer, who did not perform its duty to inform in a timely manner, cannot benefit from its own failure and argue that it would not conclude the insurance contract without that risk exclusion or without applying additional premium for such risk. The insurer should bear the consequences of its failure.

a. Special Protection

As explained above, PEICL allows the incorporation of standard insurance terms sent with the acceptance of the insurer in its policy, provided that the differences from the offer have been highlighted and the policyholder has been informed about his right of objection. Although TCC Art. 1423/2 is lacking in such a protective condition, TCC Article 1425(2) restitutes this position with the special protection granted to the policyholder.

It provides that "*the terms against the policyholder would be invalid if the policy includes terms different than the (written) offer or parties' agreement"*. According to this provision, the terms against the policyholder would be invalid if the policy includes terms different from the written offer or parties' agreement even though they have been incorporated into the contract through TCC Art. 1423(2). Therefore, although the incorporation of standard insurance terms is simpler than the principle set out in PEICL, the invalidity of disadvantaged terms in spite of their incorporation makes Turkish law more policyholder friendly.

However, this result seems to be rigid and not in compliance with the needs of the insurer who wishes to modify its terms upon its risk evaluation. Therefore, according to the author, the solution of the PEICL is more flexible, which allows the incorporation of standard terms at or after the contract conclusion, provided that the policyholder has been highlighted every variation and a right of objection has been granted.

91 Atamer and Ünan (n 1) 72.

Nevertheless, it should be considered that TCC Article 1425(2) only applies to a 'written offer', and its protective scope is minimal. Besides, it would be very difficult for the policyholder to prove that the policy is different from the written offer if it consists of the application form and/or the questionnaire provided by the insurer and remains with the insurer throughout the insurance period.

In this regard, PEICL Article 2:201(3) provides a good protective measure for the policyholder, which states: "*When the applicant applies for insurance cover on the basis of an application form and/or a questionnaire provided by the insurer, the insurer shall supply the applicant with a copy of the completed forms*". PEICL considers those documents as decisive evidential value for ex-post determination of the contents of the concluded insurance contract.[92]

Therefore, since the special protection of TCC Article 1425(2) has a narrow scope of application and is hard to prove, the author considers that the mechanism of PEICL Art 2:502 to incorporate the standard insurance terms is more effective in protecting the policyholder and more suitable to the needs of the insurer.

III. Incorporation of 'Surprising' Risk Exclusion Clauses

A standard contract term can be incorporated into the contract in one of the ways described above. However, such incorporation does not change the fact that in practice, the contracting parties very rarely pay close attention to standard contract terms because either they do not read them at all or only read them very superficially.[93] Therefore, the binding effect of the terms, which, due to the overall circumstances, fall completely outside the range of reasonable expectations of the other contracting party, can be found highly unjustified.

Thus, a review of surprising contract terms aims to protect the legitimate expectations of the other party because the customer should, in any case, whether it has read the general terms or not, be able to rely on the individual terms that are chiefly within the framework of its evaluation and which can be expected under the circumstances at the conclusion of the contract.[94]

It should be noted that the Directive (93/13/EEC) does not include this type of review.[95] The courts have usually tended to reason their decisions with consideration

92 See Basedow, Birds, Clarke, Cousy, Heiss, Loacker (n 7) 120.

93 Hans Schulte-Nölke, 'BGB § 305c Überraschende und Mehrdeutige Klauseln' in R Schulze (ed), *Bürgerliches Gesetzbuch Handkommentar* (11th edn, Nomos 2022) Rn 1; Hayrünnisa Özdemir, 'Genel İşlem Şartlarında Şaşırtıcı ve Beklenmedik Şartlar TBK m 21/II' (2015) İzmir Barosu Dergisi 80(3) 394, 396.

94 Jürgen Basedow, 'BGB § 305c Überraschende und Mehrdeutige Klauseln' in FJ Säcker, R Rixecker, H Oetker and B Limperg (eds), *Münchener Kommentar zum BGB Band 2* (8th edn, C.H.Beck 2019) Rn 1; Nölke (n 93) Rn 2.

95 The reason might be that it is extremely difficult to distinguish between the "surprising" terms and the clauses that are unfair in terms of content. See Basedow (n 94) Rn 4; Astrid Stadler, 'BGB § 305c Überraschende und Mehrdeutige Klauseln' in R Stürner, C Berger, HP Mansel, C Budzikiewicz, A Stadler, A Teichman (eds), *Jauernig Bürgerliches Gesetzbuch* (18th edn, C.H.Beck 2021) Rn 1.

of content wherever they have described a contract term as surprising.[96] Nevertheless, there might be cases in which the unpredictable terms are not unfair at the same time.[97] Therefore, some Member States, such as Germany, provide a review of surprising clauses (*Überraschende Klauseln*) and the unfairness test of standard contract terms.[98]

In the insurance sector, this seems to be a significant benefit for the policyholder for two reasons: Firstly, under this review, a clause, which cannot be considered contrary to good faith, might still be deemed as surprising and non-binding. Secondly, it grants that non-binding effect to surprising terms which constitute the essential elements of the contract, whereas the unfairness test does not provide such a possibility to review the essentials of the contract.[99]

In order to perform this review, a contract term must have been already incorporated in the contract.[100] The assessment takes place in three steps:[101] First of all, it must be determined which ideas and expectations the customer had and was allowed to have regarding the content of the concluded contract under the circumstances. Second, the content of the contested general contract terms is to be determined. Third, the question has to be asked whether the discrepancy between the customer's ideas and the content of the general term is so significant that the assumption is justified that it is a "surprising" clause. It should be noted that the unusual expectations, which only the customer in question associates with the content of the contract due to special personal experiences or ideas, do not deserve the protection of legitimate expectations.[102] Thus it is the ideas and expectations of an honest customer with an average experience that should be taken into account during the review.[103]

As mentioned above, both PEICL and TCC have special provisions departing from general contract law, which simplify the incorporation of general contract terms in the way of modifying the offer. In such a way, they allow the incorporation of risk exclusions firstly introduced to the policyholder with or after the acceptance, even if they relate to material deviations of the offer.[104]

96 See Basedow (n 94) Rn 4.

97 Nölke (n 93) Rn 1. See, for the difference of 'surprising terms' and 'unfair terms': Özdemir (n 93) 405.

98 See BGB § 305c.

99 See BGB § 307(3). See, also, Wolfgang Wurmnest, 'BGB § 307 Inhaltskontrolle' in FJ Säcker, R Rixecker, H Oetker and B Limperg (eds), *Münchener Kommentar zum BGB Band 2* (8th edn, C.H.Beck 2019) Rn 21.

100 Basedow (n 94) Rn 4.

101 See Basedow (n 94) Rn 6.

102 See Basedow (n 94) Rn 7.

103 See Basedow (n 94) Rn 7; Nölke (n 93) Rn. 2; Özdemir (n 93) 401. See Bridge (n 51) 544 for the criticisim that the reasonable understanding of the user of the standard terms, not the other party, must be taken into account. The question to be asked is: *Does the other party's conduct or inactivity justify the belief of the user that the other party has consented to the standard terms*?

104 A user of the standard terms should not be in a position to rely merely upon the awareness of the terms by the other party when standard terms are made available to the other party when the contract has already been concluded. See Bridge (n 51) 544.

Therefore, according to the author, the review of the risk exclusions from the point of the review of the surprising terms and to determine whether they are beyond the expectations of the policyholder is very significant for the true protection of the policyholder.

A. Incorporation of Surprising Terms Under PEICL

PEICL does not have a specific regulation for the 'surprising' terms. Hence a surprising term can be incorporated into the insurance contract in accordance with the above-mentioned principles. Nevertheless, a surprising term may be considered abusive and unfair under PEICL Art. 2:304(1) if contrary to the requirements of good faith and fair dealing, it causes a significant imbalance for the rights and obligations of the policyholder. In such a case, the abusive term would not be binding on the policyholder.[105]

Besides, it should be remembered that under PEICL, in order to be incorporated, all differences from the application must have been highlighted by the insurer. This condition requires that risk exclusion clauses included in the standard terms have been specifically drawn to the attention of the policyholder. Therefore, if the insurer highlights that the standard terms include risk exclusions, which are not covered within the main coverage, those exclusions would not be considered surprising from the side of the policyholder. In those cases, the policyholder's silence justifies the belief of the insurer that the policyholder has consented to its standard terms. It seems that PEICL has found a good way to deal with the surprising risk exclusions hidden in the standard insurance terms.

B. Incorporation of Surprising Terms Under Turkish Law

Unlike PEICL, surprising terms of standard contract terms are subject to review under Turkish law. According to TCO Art. 21, "*General contract terms contrary to the character of the contract and business are deemed unwritten*". This provision allows the review of surprising contract terms which have been incorporated into the insurance contract in case the policyholder did not object within 14 days upon receiving the standard insurance terms.

This type of control is a vital tool for the policyholder arising from general contract law, especially for those who would not benefit from TCC Article 1425(2) if a written offer was not given to the insurer. But unfortunately, it is not common for the Turkish

105 Nevertheless, pursuant to PEICL Art. 2:304(3)(b), terms that state the 'essential description of the cover' granted will not be subject to the unfairness test. Whether 'risk exclusion clauses' fall within the essential description of the cover can cause different interpretations. For explanations with regard to this, see Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) Art. 2:304 C3. According to Brand, core terms in insurance policies include terms, which stipulate premium, describe the perils insured against and excluded. See Oliver Brand, 'Requirements Regarding the Transparency of Standard Terms' in M Wandt and S Ünan (eds), *Transparency in Insurance Law* (Sigorta Hukuku Türk Derneği 2012) 53, 57.

courts to review the risk exclusion clauses on their surprising character. However, if carefully analysed, it can be seen that in practice, many of the disputes with respect to risk exclusion clauses may relate to their unusual character.

For instance, in a case decided by the Supreme Court, an insurance policy was automatically issued by the Bank due to a loan agreement for a concrete pump machine.[106] It was claimed that the policyholder was not informed about the risk exclusion, which states the damages that may occur after a traffic accident during the movement of mobile machinery on highways. The Court denied the case without conducting further review of the unfairness or unusualness of the risk exclusion with the reasoning that since the policyholder has not objected within fourteen days, the policy is valid with all its terms.

In a similar dispute arising from a life insurance contract concluded by means of telephone, a risk exclusion of coronary artery disease included in the policy, which was sent via electronic e-mail after the conclusion of the contract, was deemed valid since the insured had not objected within fourteen days.[107]

In another case, the policyholder had concluded an overseas health insurance policy because he would participate in a motorcycle tour abroad. The policyholder had an accident during the motorcycle tour and was seriously injured. When he asked for insurance payment, the insurer refused to make the payment based on the policy clause, which excludes 'use of motorcycle'. Although the policyholder argued that the insurer had not informed him about such a risk exclusion and thereby violated his duty to inform, the Court refused this claim with the same reasoning that within fourteen days, no objection had been made.[108]

The last example can be given relating to theft insurance for jewellery. According to the policy, it was stated that the gold in the workplace would be kept in a safe box. Since the gold found in the shop window had been stolen, the insurer denied the payment of insurance money. Although, the policyholder argued that the insurer did not inform him about the risk exclusions, the Court refused the claim with the same reasoning.[109]

Apart from those decisions, a judgment of the Regional Court of Ankara attracts our attention which did not apply the above-mentioned established reasoning in a case between a car rental company and an insurer about Casco insurance.[110] In this

106 Yargıtay 11 HD 21 April 2021, E 2020/5927 K 2021/3918.

107 Yargıtay 17 HD 19 February 2020, E 2018/1213 K 2020/1723.

108 Yargıtay 17 HD 13 February 2020, E 2018/4329 K 2020/1351.

109 Yargıtay 17 HD 12 December 2018, E 2018/4599 K 2018/10438.

110 Ankara Regional Court 14 HD 10 January 2020, E 2018/1751 K 2020/45. See, for the analysis of this judgment: Ünan, Süzel and Konfidan, 189 vd.

case, one of the renters did not return the car, and when the policyholder asked for insurance payment, the insurer refused the payment since the policy excluded the risk of abuse of trust. One of the arguments of the policyholder was that he was not informed about that exclusion.

Very interestingly, the court in the first instance took consideration of this argument by stating that "…*although it may be considered that the conditions in the policy may be valid due to the fact that the policy between the parties is not objected within the 14-day period under Article 1423 of the TCC, the damage should remain within the insurance coverage since the will of the parties by making a rent a car Casco covers the theft by abuse of trust*" and decided that the insurer shall pay the price of the car.

Upon the appeal of the insurer, the Regional Court reversed the judgment of the first instance court but attained the same result with different reasonings. According to the Regional Court, "…*when the insurer did not highlight or inform the policyholder and where it is clear that the policyholder suffered losses due to this, it would be fair that the insurer compensates the resulting loss wholly or partially depending on the policyholder's contributory negligence*". It was also stated that "…*the theft of the car belonging to the policyholder, which is insured by the Casco insurance of the insurer by misuse of trust, remains within the insurance coverage*". With these admissions, the Regional Court decided that although the right of objection was not used within 14 days, the policyholder may require compensation due to non-compliance with the duty to inform.

Although the outcome of this decision was highly welcomed, it has been criticised by legal scholars. The main reason for this criticism is that it involved an inconsistency by stating that on one side, the risk is within the insurance coverage, and on the other side, the compensation should be paid due to the breach of the duty to inform.[111]

As seen from the decisions of the first instance court and the Regional Court, there has been a tendency to protect the policyholder as being the weak party of the insurance contract. However, the legal reasoning is self-contradictory and inconsistent and therefore was rightfully subject to academic criticism.

If one applies previous outcomes of this paper to this case, the same result would have been achieved without any inconsistency in the reasoning. Because as a matter of fact, the theft of the car might be deemed as a usual risk that falls on the car rental company[112], unlike the abuse of trust by a friend who borrowed a policyholder's car. Therefore, the exclusion of the risk of abuse of trust could be considered surprising for a car rental company, which may not be the case for other policyholders. If such

111 According to this view, if the risk is not within the coverage, the only remedy available to the policyholder should be the payment of compensation. See Ünan, Süzel and Konfidan, 205.

112 See also Ünan, Süzel and Konfidan, 208.

risk exclusion is found surprising, it would be deemed as unwritten, so that the policyholder would be able to ask for the insurance payment. If not found surprising, then it would be a valid risk exclusion, justifying the rejection of payment by the insurer. In that scenario, compensating the policyholder might be questioned under *culpa in contrahendo* by taking into account the *contributory negligence*[113] of the policyholder who did not read the policy. Such a perspective would provide the courts with stronger and more consistent legal reasoning.

IV. Conclusion: Is the Duty to Inform under TCC Article 1423(2) Protective or Punitive for the Policyholder

The outcome of this study shows that both Turkish law and the PEICL have significant departures from general contract law in terms of the incorporation of standard insurance terms into the contract. This deviation is justified when the special characteristics of the insurance practice have been taken into account. However, such departure requires special protection of the policyholder, and both TCC (through Article 1425(2)) and the PEICL (through Article 2:502) establish their own mechanisms to this end.

However, TCC Article 1425(2) has a limited scope of application, and it is difficult for the policyholder to prove that the terms are different from its offer or agreement. Therefore, the review of surprising risk exclusion clauses becomes crucial for the protection of policyholders. Unfortunately, Turkish practitioners are not familiar with the review of standard insurance terms under TCO, and a review of surprising risk exclusion clauses has not been conducted in favour of policyholders yet.

The above-mentioned decisions are good examples to illustrate that risk exclusion clauses should not be set aside from judicial review if not objected to within 14 days. It is not the purpose of the author to argue that each and every risk exclusion clause, about which the policyholder has not been informed before the contract conclusion, should be invalid.

It is only argued that, by taking into account the simplification of the incorporation process, the risk exclusion clauses need at least to be reviewed from the perspective of a reasonable policyholder regarding their surprising and unexpected nature. Since the TCC does not involve a specific duty on the insurer to highlight or warn the policyholder about the inconsistencies of the cover and the policyholder's requirements, the only legal instrument that would serve the policyholder seems to be a review of risk exclusion clauses on their surprising character together with the *culpa in contrahendo* liability.

113 According to Ünan, Süzel and Konfidan, in insurance contracts concluded with consumers, not reading the policy would never cause contributory negligence. Such contributory negligence may only ocur in commerical insurance contracts. See Ünan, Süzel and Konfidan, 215.

Therefore, this study suggests the application of a two-prong test approach in cases where the insurer has not fulfilled its duty to inform before the conclusion of the contract, and where the policyholder has not objected within 14 days after having received the policy. Under such circumstances, if the insurer refuses to make the insurance payment because of a risk exclusion clause, then the following stages can be followed: Firstly, the court may examine whether the exclusion of the specific risk could be qualified as unexpected. If it is found to be surprising, then the risk exclusion in the policy will be invalid, and the risk will be covered by the insurance policy. In this scenario, there will be no need to decide on compensation because the risk is deemed to be within the scope of the coverage due to the overriding of the risk exclusion clause. However, if the risk exclusion clause is not found surprising, the risk will be covered by the policy. Consequently, in the second stage, the court may examine whether the insurer violated its duty to inform under *culpa in contrahendo* liability. The consequence of such violation might be compensation by taking into account the facts in the legal dispute, such as the method pursued during the conclusion of the contract, whether the policyholder is a consumer or merchant, or whether an insurance agency has been involved in the contract conclusion or not.

To sum up, construing Article 1423(2) of the TCC as an independent sanction from the judicial review and overriding of the standard insurance terms, in the sense to incorporate all the standard terms, if no objection has been raised within 14 days, would turn the duty to inform into a tool punishing rather than protecting the policyholder. To eliminate this, the abovementioned two-prong test approach can be employed as an instrument to find a consistent and fair legal solution.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.

Bibliography

Aksoy Dursun S, *Borçlar Hukukunda Hakimin Sözleşmeyi Tamamlaması* (Onikilevha 2008).

Antalya OG, *Marmara Hukuku Yorumu Borçlar Hukuku Genel Hükümler Cilt V/1-1* (2nd ed, Seçkin 2019).

Arıkan M, 'Die Haftung aus Culpa in Contrahendo' (2009) 17 (1) Selçuk Üniversitesi Hukuk Fakültesi Dergisi, 69-90.

Atamer Y, *Sözleşme Özgürlüğünün sınırlandırılması Sorunu Çerçevesinde Genel İşlem Şartlarının Denetlenmesi* (2nd ed, Beta 2001).

Atamer Y and Ünan S, 'Control of General and Special Conditions of Insurance Under Turkish Law with Special Regard to the Transparency Requirement' in Manfred Wandt and Samim Ünan (eds), *Transparency in Insurance Law* (Sigorta Hukuku Türk Derneği 2012) 69.

Bahtiyar M, 'Sigorta Poliçesi Genel Koşulları' (1997) 19(2) Banka ve Ticaret Hukuku Dergisi.

Basedow J, Birds J, Clarke M, Cousy H, Heiss H and Loacker L, *Principles of European Insurance Contract Law (PEICL)* (2nd edn, Ottoschmidt 2016).

Basedow J, 'BGB § 305c Überraschende und Mehrdeutige Klauseln' in FJ Säcker, R Rixecker, H Oetker and B Limperg (eds), *Münchener Kommentar zum BGB Band 2* (8th edn, C.H.Beck 2019).

Beenken M, 'Beratungspflichten nach der IDD und Ihre Umsetzung ins deutsche Recht' (2017) 44 (12) Rechts und Schaden, 617-621.

Brand O, 'Requirements Regarding the Transparency of Standard Terms' in M Wandt and S Ünan (eds), *Transparency in Insurance Law* (Sigorta Hukuku Türk Derneği 2012) 53-64.

Bridge MG, *The International Sale of Goods* (3rd ed, Oxford University Press 2013).

Demircioğlu HR, *Güven Esası Uyarınca Sözleşme Görüşmelerindeki Kusurlu Davranıştan Doğan sorumluluk (Culpa in Contrahendo Sorumluluğu)*, (Yetkin 2009).

Eldeklioğlu İA, '6102 Sayılı Türk Ticaret Kanunu ve Sigortacılık Mevzuatı Uyarınca Sigortacının Aydınlatma Yükümlülüğü' (2012) 18 (1) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 383-402.

Erbaş Açıkel A, 'İngilizce Sözleşme Koşullarının Sigorta Sözleşmesi İçeriğine Dahil Edilmesi' "*Prof. Dr. Rayegân Kender'e Saygı Günü" Sigorta Genel Şartlarının Düzenlenmesi, Denetlenmesi ve Uygulamada Ortaya Çıkan Sorunlar Sempozyumu* (Filiz 2020) 49-90.

Eren F, Borçlar Hukuku Genel Hükümler (17th ed, Yetkin 2014).

Feyzioğlu FN, *Borçlar Hukuku Genel Hükümler Cilt 1* (2nd ed, İstanbul Üniversitesi Yayınları 1976).

Furrer A, Muller Chen M and Çetiner B, *Borçlar Hukuku Genel Hükümler* (Onikilevha 2021).

Görener A, 'Culpa In Contrahendo Sorumluluğu', (2019) 36 (2) İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, 67-80;

Havutçu A, 'Genel İşlem Şartlarının Sözleşme ile İlişkilendirilmesinde Düzenleyen (GİŞ Kullanan) İçin Getirilen Külfetler' (2015) 80(3) İzmir Barosu Dergisi, 241-267.

Havutçu A, Açık İçerik Denetimi Yoluyla Tüketicinin Genel İşlem Şartlarına Karşı Korunması (Güncel Hukuk Yayınları 2003).

Hyvönen S, 'Information Obligations and Disinformation of Consumers: Finnish Law Report', in Gert Straetmans (ed), *Information Obligations and Disinformation of Consumers* (Springer 2019) 407-428.

Kara H, *Sigorta Hukuku* (Onikilevha 2021).

Keglević A, 'Pre-contractual Information Duty and Unfair Contract Terms-Open Questions and Dilemmas' in Insurer's Precontractual Information Duty (Sigorta Hukuku Türk Derneği 2013) 73-76.

Kender R, *Türkiye'de Hususi Sigorta Hukuku* (17th ed, Onikilevha 2021).

Kılıçoğlu A, *Borçlar Hukuku Genel Hükümler*, (24th ed Turhan 2020).

Kocayusufpaşaoğlu N, *Borçlar Hukukuna Giriş Hukuki İşlem Sözleşme* (7. Ed, Filiz 2017).

Kolding-Krøger CB, Aalykke Hansen R and Brofeldt A, 'The Reality of the Promised Increase in Customer Protection Under the Insurance Distribution Directive' in Pierpaolo Marano and Kyriaki Noussia (eds), *Insurance Distribution Directive* (Springer 2021) 395-439.

Kruisinga SA, 'Incorporation of Standard Terms According to the CISG and the CESL: Will These Competing Instruments Enhance Legal Certainty in Cross-Border Sales Transaction' (2013) 24 (3) European Business Law Review (341-362)

Lando O and Beale H, *Principles of European Contract Law (Part I and II)* (Wolters Kluwer 2000).

Magnus U, 'Incorporation of Standard Terms' in DiMatteo L, Janssen A, Magnus U and Schulze R (eds), *International Sales Law* (CH Beck, Hart, Nomos 2016).

Memiş T, *Sigorta Sözleşmesi Şartlarının Yargısal Denetimi* (Onikilevha 2016).

Nomer H N, *Borçlar Hukuku Genel Hükümler* (17th ed Beta 2020).

Oğuzman MK and Öz MT, *Borçlar Hukuku Genel Hükümler C. I* (17. Ed, Vedat 2019).

Omağ MK, 'Özel Sigorta Hukukunda Sigorta Ettirenlerin Korunması/Himayesi' in *Özel Sigorta Hukukuna Hakim İlke ve Kurumlar (1975-2016) Makaleler - Tebliğler* (Onikilevha 2019).

Ostrowska M, 'Information Duties Stemming from the Insurance Distribution Directive as an Example of Faulty Application of the Principle of Proportionality', in Pierpaolo Marano and Kyriaki Noussia (eds), *Insurance Distribution Directive* (Springer 2021) 279-292.

Özdamar M, '6102 Sayılı Türk Ticaret Kanunu Bağlamında Sözleşme Öncesi Aydınlatma Yükümlülüğünü İhlal Eden Sigortacıya Uygulanacak Yaptırım Sorunu' (2013) 71(2) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, 347-360.

Özdamar M, *Sigortacının Sözleşme Öncesi Aydınlatma Yükümlülüğü* (Yetkin 2009).

Özdemir H, 'Genel İşlem Şartlarında Şaşırtıcı ve Beklenmedik Şartlar TBK m 21/II' (2015) 80(3) İzmir Barosu Dergisi, 394-410.

Özel Ç, *Turkish Code of Obligations* (2nd ed Seçkin 2014).

Prölls E and Martin A, *Prölls/Möller Versicherungsvertragsgesetz* (31st edn CHBeck 2021).

Schulte-Nölke H, 'BGB § 305c Überraschende und Mehrdeutige Klauseln' in R Schulze (ed) *Bürgerliches Gesetzbuch: Handkommentar* (11th ed, Nomos 2022).

Serozan R, Baysal B and Sanlı KC, *Serozan Borçlar Hukuku Genel Bölüm – İfa, İfa Engelleri, Haksız Zenginleşme* (8th ed Onikilevha 2022).

Sevinç Kuyucu A, 'Sigorta Genel Şartlarının Hukuki Niteliği ve Uygulanacak Hükümlerin Belirlenmesine İlişkin Esaslar', "*Prof. Dr. Rayegân Kender'e Saygı Günü" Sigorta Genel Şartlarının Düzenlenmesi, Denetlenmesi ve Uygulamada Ortaya Çıkan Sorunlar Sempozyumu* (Filiz 2020) 1-48.

Schimikowski P, 'Verbraucherinformation – Einbeziehung von AVB und Abschluß des Versicherungsvertrags' (1996) 23(1) Rechts und Schaden, 1-6.

Stadler A, 'BGB § 305c Überraschende und Mehrdeutige Klauseln' in R Stürner, C Berger, HP Mansel, C Budzikiewicz, A Stadler and A Teichman (eds), *Jauernig Bürgerliches Gesetzbuch* (18th edn, C.H.Beck 2021).

Şeker Öğüz Z and Sevinç Kuyucu A, *Yeni Türk Ticaret Kanunu'nda Sigorta Hukuku* (Filiz 2011).

Şenocak K, 'Sigorta Sözleşmesini Kurmaya Yönelik İcap Beyanının Kabulü veya Reddi Yönünde İrade Beyanı Açıklanmadan Önce Sigortacının, İcaba Bağlılık Süresi İçerisinde Gerçekleşen Riziko'dan Dolayı Culpa In Contrahendo Sorumluluğu Söz Konusu Olabilir Mi?' (2007) 1-2 (11) Gazi Üniversitesi Hukuk Fakültesi Dergisi 297-320.

Taşkın M, *Krediye Bağlı Hayat Sigortası Sözleşmesi* (Onikilevha 2019).

Tekinay SS, Akman S, Burcuoğlu H and Altop A, *Tekinay Borçlar Hukuku Genel Hükümler* (7th ed, Filiz 1993).

Ünan S, 'Sigorta Genel Şartları ile İlgili Olarak Uygulamada Karşılaşılan Bazı Sorunlar' *Prof. Dr. Rayegân Kender'e Saygı Günü" Sigorta Genel Şartlarının Düzenlenmesi, Denetlenmesi ve Uygulamada Ortaya Çıkan Sorunlar Sempozyumu* (Filiz 2020) 177-198.

Ünan S, *Türk Ticaret Kanunu Şerhi Altıncı Kitap Sigorta Hukuku Cilt 1 Genel Hükümler (Madde 1401-1452)* (Onikilevha 2016).

Ünan S, 'Insurer's Pre-contractual Duties to Inform and Warn/Advice' in *Insurer's Precontractual Information Duty* (Sigorta Hukuku Türk Derneği 2013) 9-28.

Ünan S, Süzel C and Konfidan M, 'Ankara Bölge Adliye Mahkemesi 14. Hukuk Dairesi Kararı (E. 2018/1751, K. 2020/45, T. 10.01.2020) Işığında Sigorta Sözleşmelerinde Sözleşme Öncesi Bilgilendirme Yükümlülüğünün İhlaline Bağlanan Yaptırım' 2022 (1) (1) Piri Reis Üniversitesi Deniz Hukuku Dergisi, 189-221.

von Tuhr A, *Borçlar Hukukunun Umumi Kısmı Cilt: 1-2* (Çeviren Cevat Edege) (2nd ed, Olgaç Matbaası 1983).

Wandt M, 'Transparency in the Insurance Contract Law of Germany' in Pierpaolo Marano and Kyriaki Noussia (eds), *Transparency in Insurance Contract Law* (Springer 2019).

Wurmnest W, 'BGB § 307 Inhaltskontrolle' in FJ Säcker, R Rixecker, H Oetker and B Limperg (eds), *Münchener Kommentar zum BGB Band 2* (8th edn, C.H.Beck 2019).

Yazıcıoğlu E, 'Sigortacının Bilgilendirme (Aydınlatma) Yükümlülüğü' in Samim Ünan and Emine Yazıcıoğlu (eds), *Sigorta Hukuku Sempozyumları* (Onikilevha 2018) 391-422.

Yazıcıoğlu E, 'Zarar Sigortalarında Sigorta Himayesinin Sınırlandırılması ve Davranış Yükümlülüklerinin Teminat Şartı ya da İstisna Olarak Öngörülmesi Sorunu' Prof. Dr. Ergon A. Çetingil ve Prof. Dr. Rayegan Kender'e 50. Birlikte Çalışma Yılı Armağanı (İstanbul Üniversitesi Hukuk Fakültesi Yayınları 2007) 1185-1195.

Yazıcıoğlu E and Şeker Öğüz Z, *Sigorta Hukuku* (4th edn, Filiz 2021).

Yeşilova Aras E, 'Transparency in the Insurance Contract Law of Turkey' in Pierpaolo Marano and Kyriaki Noussia (eds), *Transparency in Insurance Contract Law* (Springer 2019) 459-484.

Yeşilova Aras E, 'Sigorta Sözleşmelerinde Genel İşlem Şartlarının Kullanılması' (2015) 80(3) İzmir Barosu Dergisi, 447-470.

Yetiş Samlı K, 'Sigortacının Aydınlatma Yükümlülüğünü Düzenleyen TTK m. 1423 Hükmüne İlişkin Bazı Değerlendirmeler' (2016) 22 (3) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 2977-3004.

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 99–117

DOI: 10.26650/annales.2022.71.0003
http://annales.istanbul.edu.tr/

Submitted: 29.06.2022
Accepted: 02.09.2022

Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Violation of the Right to A Fair Trial in Arbitration: Analysing the Turkish Court of Cassation's Decision of 10 February 2021

Emre Esen*

Abstract

Based on a recent Turkish Court of Cassation decision, this article puts forward that the right to a fair trial, embodied nearly in all legal systems and fundamental international regulations such as ECHR, must be respected in arbitration proceedings as well. Since member states indirectly exercise control over arbitration proceedings during the annulment or enforcement phase, member states' courts ensure that arbitrators comply with the principles of ECHR, specifically with the right to a fair trial. Additionally, most national laws impose a duty on arbitrators to observe the equality of the parties, which in turn serves to the application of fair trial principles. The right to a fair trial is also an essential part of public order, a violation of which shall lead to the annulment of arbitral awards or dismissal of the recognition and enforcement thereof. As a basic element of the right to a fair trial, the right to be heard encompasses the right to be informed about the allegations, defenses, and evidence that occupy the foreground of this article. This article first reviews the decision of the court of first instance, followed by the Court of Cassation decisions rendered upon the request for appeal and later, request for revision.

Keywords

Arbitration, Public Order, Right to A Fair Trial, Right to be Heard, Equality of Parties

* **Corresponding Author:** Emre Esen (Prof. Dr.), Istanbul University, Faculty of Law, Department of Private International Law, Istanbul, Turkiye. E-mail: emreesen@istanbul.edu.tr ORCID: 0000-0003-2411-4144

To cite this article: Esen E, "Violation of the Right to A Fair Trial in Arbitration: Analysing the Turkish Court of Cassation's Decision of 10 February 2021", (2022) 71 Annales de la Faculté de Droit d'Istanbul 99. https://doi.org/10.26650/annales.2022.71.0003

I. Introduction

The decision rendered by the 11th Civil Chamber of the Turkish Court of Cassation on 10 February 2021 is of great importance as it reveals, through a comprehensive legal analysis, that the parties' right to be heard and right to a fair trial must be respected in arbitration proceedings.

The dispute arose from a shareholders' agreement ('the Agreement') regarding a company ('the Company') established in Turkey. In 2010, the claimant, one of the shareholders, initiated arbitration proceedings before the "ICC Court of Arbitration" against two respondents, alleging breach of the Agreement, based on the arbitration clause therein. The claimant's breach of contract claim was based on the allegation that the shares of the Company lost value due to the behaviours and actions of the respondents, and that the claimant suffered loss therefrom.

The arbitral tribunal bifurcated the arbitration proceedings between liability and quantum. In the award of 13 December 2012 regarding liability, the arbitral tribunal ordered that the respondents were to jointly and severally pay for the damages suffered by the claimant. Regarding the calculation of the quantum, the parties submitted expert reports, and in addition, the respondents requested production of certain third party valuations of the Company but the claimant refused to provide them on the grounds that they were not expert reports prepared for the purposes of the arbitration and that they included confidential contemporaneous third party valuations by a leading accountancy firm. Thereupon, the arbitral tribunal issued a procedural order entitling the claimant to redact from those reports the names of their drafters and any information not relating to the valuation of the Company, ruling that the documents produced shall be exclusively for the use of respondents' counsel, valuation experts and the arbitral tribunal whilst leaving the door open to consider any additional restriction which may be required in relation to confidentiality provisions at the claimant's request.

Thus, the arbitral tribunal restricted respondents from viewing such valuation reports personally. Upon the request of the respondents, the arbitral tribunal ordered in the subsequent procedural order that, first, the port industry expert and the valuation expert of the respondents are also entitled to view such valuation reports. Second, the respondents' valuation expert was authorized to show a copy of its draft report to the respondents and discuss its contents with them, including any references to information contained in the third party valuations while the respondents continued to be restricted from having sight of any of the third party valuation reports personally.

The arbitral tribunal ordered in its final award (on quantum) on 19 June 2013 regarding the amount of compensation to be paid by the respondents to the claimant. The arbitral tribunal determined the amount of compensation upon the valuation

report of 18 March 2010 ('March 2010 Report') provided by the claimant under the restriction ordered by the arbitral tribunal.

II. Decision of the Court of First Instance

The claimant filed a lawsuit before Istanbul courts for the purposes of recognition and enforcement of the foreign arbitral award against only one of the respondents in the arbitration ('the respondent').

The respondent objected to recognition and enforcement of the foreign arbitral award on the grounds of different nature. One of those objections was that the procedural order of the arbitral tribunal, restricting the examination of the March 2010 Report -upon which the decision regarding amount of compensation was based- by the respondents personally.

According to the respondent, both the arbitral tribunal and the respondents had the opportunity neither to know the drafter(s) of the March 2010 Report nor to question them regarding the guidelines they adopted and the conclusions they had reached in the March 2010 Report, as the arbitral tribunal had entitled the claimant to redact from those reports the names of their drafters and any information not relating to the valuation of the Company. However, in the course of arbitration proceedings the report drafted by the claimant's expert was not taken as a basis of the arbitral decision as the conclusions thereof were refuted by the respondents and the same was true for the report prepared by the respondents' expert. Therefore, the arbitral tribunal did not abide by these reports prepared by the experts of the parties and required to take another report as a basis. In this respect, the fact that the respondents were not able to raise questions in the arbitration proceedings against those who drafted the March 2010 Report means that they were deprived of the opportunity to refute the principles adopted and the conclusions reached in such report. Moreover, it is not known by the respondents what kind of instructions the plaintiff gave to the drafters of the March 2010 Report. The respondents also requested submission of the financial models adopted in the March 2010 Report in order to carry out a sound assessment thereof. The respondents are of the opinion that it is not possible to understand and to examine the conclusions reached in the March 2010 Report without having knowledge with respect to the financial models adopted therein. However, the claimant rejected this request, citing the relevant procedural order (no.7) of the arbitral tribunal. Thus, the respondents were deprived of the opportunity to examine the financial models adopted in the March 2010 Report, which was taken as the basis for the determination of the compensation amount by the arbitral tribunal. In addition to these, the arbitral tribunal also did not know what information the claimant had redacted from the March 2010 Report, in line with the authority given to the claimant to redact any information not relating to the valuation of the Company.

In response to these claims and objections by the respondent, the claimant alleged that the respondent was not deprived of the opportunity to defend himself, as the respondent's lawyers, valuation experts, and port industry experts were allowed to review the March 2010 Report, which the respondent could not view personally; that the arbitrators examined the allegations of the expert appointed by the respondent and explained why they were not accepted in the arbitral award; that the March 2010 Report was kept hidden from the respondent because of commercial and technical reasons and this was in compliance with Article 9 of the 'International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration'; that since the March 2010 Report contained confidential information, the respondents' review thereof may have adverse consequences as the respondents had many disputes with the claimant; that the arbitral tribunal expanded, upon the request of respondent, the scope of the persons who were allowed to view the March 2010 Report and allowed it to be viewed by the port industry expert; and that the respondents were not deprived of the opportunity to submit their evidence in arbitration.

The Istanbul 8th Commercial Court of First Instance, in its decision[1] of 30 June 2016 (File no.2014/762, Decision no.2016/572), dismissed the request for recognition and enforcement of arbitral award on the ground that the arbitral award of 19 June 2013 was rendered in violation of the right to a fair trial and accordingly it violated the Turkish public order. The related part of the decision is as follows:

> The arbitral award of 19 June 2013 was given on the basis of a report which was drafted upon the instruction of the claimant, which the claimant initially refused to submit but later submitted in accordance with the procedural order of the arbitral tribunal regarding confidentiality, whose drafter was unknown even by the arbitral tribunal, and which was not allowed to be viewed by the respondent. At this point, an evaluation should be made regarding the right to a fair trial. The facts that the valuation report taken as a basis for the arbitral award was not drafted by an expert appointed by the arbitrators, that it did not have the character of an expert witness report submitted by the parties, and was only a report drafted within the claimant's own organization before the commencement of the case, that the identity of the person who drafted the report was kept confidential and was not disclosed to the respondent, that the report was not disclosed to the respondent as a whole, and that the financial models taken as a basis for the valuation were not disclosed to the respondent personally, are also related to two concepts regarding the public order. The first of these is the principle of publicity, and the other is the right to be heard, which is a part of the right/principle of the right to a fair trial. These principles are adopted by both Turkish law and international law (Article 36 of the Constitution and Article 6 of the ECHR). The right to a fair trial also comprises a real and effective legal protection. Otherwise, a trial in the state of law could not be ensured. This right serves to conduct the trial in accordance with the law and justice, and to render a fair decision. Again, in this way, the realization and protection of fundamental rights before the courts are ensured. The right to a fair trial is

1 Unpublished. Unofficial translation by the author.

more comprehensive than the right to be heard (Art.27), and comprises the latter as well. As a fundamental right, the right to a fair trial is a right granted to both parties as per the civil procedure law. This right continues as from the filing of a case until the end of the trial and until the end of the enforcement procedure upon any decision. The right to claim or defence and the right to a fair trial, which are secured pursuant to Article 36 of the Constitution, also comprise the right to be heard. Again, in the European Convention on Human Rights, the right to be heard is secured under the right to a fair trial. This right is also regarded as the right to express herself or the right to claim or defence. It is stipulated in Article 27 of the Code of Civil Procedure No. 6100 that parties have the right to be heard in connection with their own rights, and that this right comprises being informed about the trial, the right to explain and prove, the evaluation of courts by taking into account the explanations, and the concrete and clear justification of the decisions. The right to be heard is the most important element of the right to a fair trial, which is regulated in Article 36 of the Constitution and Article 6 of the European Convention on Human Rights. In this context, it is obligatory for the parties to be informed about the procedural actions taken either by judicial organs or by the other party. This information usually requires due service of process. As a rule, it is not possible to render a decision by conducting a trial without the parties' knowledge. The second element of this right is the right to explain and prove. The parties have the right to make a statement regarding the trial, to put forward and prove their claims and defences within this framework. Both parties benefit from this right equally. This is also referred to as the "equality of arms principle". The third element of this right is the full consideration and evaluation of the claims and defences of the parties by the judicial organs. The right to be heard is not a principle valid only for a certain trial or for a certain stage of a trial, rather, it is a principle that must be abided in all trials and at every stage of any trial. Since it is not possible to conceal a trial from the parties, the parties may exercise their right to be informed in full with regard to all transactions concerning the trial without being subject to any limitations, except for protection of the case file and for reliable administration of the trial. However, these restrictions shall not be in a nature of revoking the right to be informed, but may only be in the form of setting certain rules for the proper administration of proceedings. No matter that is not within the knowledge of the parties cannot be taken as a basis for the decision. In this context, for instance, taking an expert report as a basis for a decision without informing the party and without taking his/her opinion violates the right to be heard. The right to be informed also comprises the right to examine the case file. Parties and persons involved in the trial may also examine the minutes, information and documents within the scope of the case file. The parties and their attorneys cannot be prevented from examining the case file. The parties may examine all documents that affect and will constitute a basis for the decision. Preventing the review and examination of case material shall constitute a violation of the right to be heard. If sufficient examination opportunity is not provided for the information and documents in the case file, the right to explain will be executed incompletely due to misinformation. It should be emphasized that exceeding the principle of proportionality in limiting the principle of publicity in terms of abolition of the publicity of the parties in trial and its relevance to the right to prove, or concealing the trial from any party means a violation of the right to prove. This is generally expressed as the abolition of the publicity of the parties in the trial; and, in addition to the right to prove, this violates the right to a fair trial, the equality of

arms principle, and the right to be heard. Then in this case, one of the parties cannot obtain information regarding the content of certain evidence, against which he/she shall exercise the right to prove, and the trial would be conducted confidentially against him/her. Considering the above-mentioned stages, a valuation report drafted under the claimant's initiative before the commencement of arbitration was prioritized over the reports of expert witnesses who were appointed by the parties and subjected to cross-examination in the trial, and was taken as a basis for the judgment. This report, on the other hand, was submitted to the review of only the respondent's lawyers, valuation experts and port industry experts by the arbitral tribunal for confidentiality purposes, but was not allowed to be reviewed by the respondent itself. Before state courts or arbitral tribunals, concealing a document taken as a basis for the decision from any of the parties means abolition of publicity therefor. The abolition of the publicity will result in the violation of the right to be heard and, as explained above, in the restriction of the right to prove, as it limits the opportunities of the respondent, who is the real holder of the case and whose legal status will be directly affected by the decision at the end of the case, to be informed and to make a statement within the scope of this information. As the drafter or drafters of the report, which was taken as a basis of the award, were concealed from the respondent by the arbitral tribunal, it was concluded that the respondent was not given the opportunity to call the drafters for cross-examination in the trial, accordingly the rights to be informed and to make statements, which are the elements of the right to be heard, shall be deemed to have been violated, and the fact that the respondent's right to defence was limited by being deprived of the right to examine the report personally but only allowing his lawyers and consultants, and not being allowed to access information about which parts of the report had been redacted and what the financial models were based on, should be considered as a violation of the right of publicity and of the right to prove indirectly.

III. Court of Cassation Decision of 29 November 2018 upon the Request for Appeal

Upon the appeal of the decision by the claimant, the 11th Civil Chamber of the Court of Cassation reversed the judgment of the court of first instance with its decision[2] of 29 November 2018, File No.2016/14160, Decision No.2018/7501. The section of the judgment of the Court of Cassation regarding the right to a fair trial is as follows:

> On the other hand, by arguing that it was decided to redact the names of the persons who drafted the report and the parts that are not related to the market capitalization of (…) A.Ş. from the report called the 'March 2010 Report', which was taken as a basis for the award by the arbitral tribunal, to allow only the respondents' lawyers and experts to review the report, and to prohibit the respondent (…) and (…) Company officials from examining the report; the respondent argued that the right to a fair trial was violated in the arbitration proceedings, however, no concrete evidence was submitted to set forth that this conduct practiced by the arbitrators in the arbitration proceedings is contrary to the procedural rules that should be adopted and applied in the proceedings.

2 Unofficial translation by the author. For the Turkish version of the decision visit https://legalbank.net/belge/y-11-hd-e-2016-14160-k-2018-7501-t-29-11-2018/3380816/14160

IV. Court of Cassation Decision of 10 February 2021 upon the Request for Revision

Against this decision of the 11th Civil Chamber of the Court of Cassation of 29 November 2018, the respondent requested a revision of decision. With its decision[3] of 10 February 2021 File No.2019/2417 and Decision No.2021/1051, the 11th Civil Chamber ruled, by a majority vote, to accept the request of revision of the decision and to cancel the reversal decision of 29 November 2018. The section of the decision of the 11th Civil Chamber regarding the right to a fair trial is as follows:

> …The right to a fair trial concerns not only disputes arising within the scope of domestic law, but also disputes involving cross-border elements. This right is regarded among the "fundamental human rights" in Article 6 of the ECHR, to which Turkey is also a party, and among the basic human rights in Article 36 of our Constitution of 1982. In this context, among the basic elements of the right to a fair trial are the "right to be heard" and "the principle of access to court and the publicity of the trial". The right to a fair trial should not be restricted unless deemed necessary.
>
> As required by the right to be heard, both the claimants and the respondents should be able to freely express and prove their claims without encountering any obstacles before the judicial organs, and they should be able to rebut the claims of the other party freely without encountering any obstacles within the scope of the right to defence. In the context of the right to be heard, both parties should easily access to court. The right to access to court contains the access to evidence and documents in dispute easily. For this reason, the parties should be able to freely examine the evidence, and any matter that is not open to the knowledge of the parties should not constitute the basis for a decision.
>
> Even though 'protection of trade secrets' is a legitimate right in the legal world, the other party's right to be heard in a trial should not be violated by taking shelter behind this right. If any evidence subject to trial is to be concealed as a trade secret from the other party, there must be reasonable grounds for this, and this matter must be explained in a consistent and lawful manner, the principle of proportionality should not be exceeded or contradicted when it is necessary to protect the secrets.
>
> The framework of public order in domestic law was drawn by the General Assembly of the Court of Cassation as a 'violation of the basic values of Turkish law, the Turkish general sentiment of propriety and morality, the basic sense of justice on which Turkish laws are based, the fundamental rights and freedoms in the Constitution, the common principles prevailing in the international arena, the civilization level of civilized communities, political and economic regime, human rights and freedoms.' It is essentially left to the discretion of judges to determine whether the foreign decision subject to the recognition and enforcement request violates the Turkish public order. However, a judge has to take into account the basis of existence of private international law and the general principles of this law when using his/her discretion (Court of Cassation Assembly of Civil Chambers 26.11.2014 D. & 2013/1135-2014/973)

3 Unpublished. Unofficial translation by the author.

In the case at hand, pursuant to the procedural rules to be followed in the proceedings decided by the parties and approved by the arbitral tribunal, the parties are granted the right to submit a copy of their expert reports and evidence regarding the amount of loss suffered by the claimant to the arbitral tribunal, and to the other party simultaneously within a certain timetable, right of each party to simultaneously examine and respond to the evidence which is the subject of the other party's claim, and the expert reports they received during the trial, and to cross-examine the experts. As a matter of fact, both parties submitted the expert reports they obtained during the trial regarding the amount of loss to the case file as a whole, and none of these reports were kept secret from the other party. On the other hand, in order to strengthen its claim, the claimant also relied as evidence on the examination reports of 2008, 2009 and 2010, which were obtained long before the lawsuit in terms of the financial structure and market value of the (…) company, however, despite the obligation to submit a copy of these reports together with other evidence to the arbitral tribunal and a copy to the respondent in line with the dispute resolution timetable, and despite the respondent requested that these reports be submitted pointing out that the claimant had not still submitted them, the claimant refused to submit and this time the respondent applied to the tribunal. The arbitral tribunal ordered, in a procedural decision, the submission of these reports and transmittal of a copy to the respondent, however, this was, again, rejected by the claimant. A claim was made again by the respondent, and this time it was rejected by the claimant on the ground of confidentiality of trade secrets. Upon this request of the respondent, the arbitral tribunal ordered that only the relevant chapters regarding the valuation of the company of the claimant's review reports for the years 2009 and 2010 be submitted, that they may be submitted by redacting the names of the drafters and the sections of the report that are not relevant to the valuation, and that the reports can only be examined by the respondents' lawyers and valuation experts, not by the respondent personally. Upon submission of the 2009 and 2010 reports after redaction of information regarding the sections deemed appropriate by the claimant, lawyers and valuation experts of the respondents were able to only examine these reports limited with the section made available, however, this time, the respondents' experts were prohibited from sharing the draft of the report with the respondents personally and from making joint evaluations.

In its award, the arbitral tribunal determined the loss suffered by the claimant, based largely upon the March 2010 report from among the reports submitted by the claimant.

In enforcement cases, the enforcement court does not have the authority to review the award on the merits and on the discretion of the arbitrators, however, under Article 5 of the New York Convention, the court shall be able to freely evaluate whether the parties' rights of defence were restricted during the arbitration proceedings, and whether the decision taken by the arbitral tribunal is contrary to the Turkish public order, in particular for the case at hand. Regarding the examination of the March 2010 report, which was largely taken as a basis for the award, allowing the report to be submitted incompletely by hiding the names of the persons who drafted it, the part related to the financial model and method used in the calculation of the port value, and the part containing the purpose of this report in violation of the procedural rules agreed by the parties, concealing the original and the copy of the report from the respondent who suspects that such a report exists and that it may have been altered, also prohibiting the

> respondent from examining even the draft report prepared by the valuation expert of the respondent as can be seen from the disclosed parts of the report which is the basis of the award, preventing the respondents to cross-examine the drafters of these reports, not being able to base all this secrecy on any reasonable and legal basis, overshadowed the impartiality of the arbitral tribunal, and it has been concluded that the respondent's access to evidence and the right to defend themselves during the arbitration proceedings are severely violated.
>
> The restriction of the right to defence and thus the violation of the right to a fair trial also constitutes an evident violation of the Turkish public order.
>
> On the aforementioned grounds, the decision of the Court of First Instance rejecting the request for the enforcement of the award of 19 June 2013 rendered by the arbitral tribunal regarding the amount of loss suffered by the claimant is accurate due to the violation of Articles 5/1-b and 5/2-b of the New York Convention and clauses 62/1-b and d of the Code of PIL…[4]

Two members of the 11th Civil Chamber dissented the decision. The relevant part of the dissenting opinion is as follows:

> ...the fundamental basis of the right to be heard is the regulation regarding the right to legal remedies in Article 36/1 of the Constitution. Again, another basis of the right to be heard in the constitutional framework is the principle of the state of law (Cons. Art.2). There are three elements of the right to be heard. These are the right to demand information, the right to explain and prove, and the right to be considered. The right to be heard is a sub-element of the equitable trial element of the right to a fair trial. Therefore, the violation of the right to be heard, especially the fact that a right is not executed by the parties on the basis of equality, constitutes a violation of the right to a fair trial. Violation of the right to a fair trial is a matter of national and international public order, and therefore, the violation of this right should be perceived and evaluated as a violation of public order. In this case, the violation of the right to be heard during the arbitration proceedings, as a reason for annulment in the context of international arbitration, results in the violation of public order and is taken into account by the court ex officio. When it comes to the case at hand, after these statements, pursuant to the procedure approved by the arbitral tribunal, the parties were granted the right to submit a copy of the evidence regarding the amount of the claimant's loss to the arbitral tribunal and a copy to the other party within a specified timetable, and to simultaneously examine and respond to the evidence regarding the claim of the other party and the

4 It should be noted that, in the decision of 10 February 2021, the 11th Civil Chamber of the Court of Cassation made a distinction between the award of 13 December 2012 regarding liability and the award of 19 June 2013 regarding quantum and ruled that the court of first distance should have made a distinction between these bifurcated awards and should have determined availability of each award separately in terms of recognition and enforcement. Accordingly, the decision of 10 February 2021 of 11th Civil Chamber of the Court of Cassation coincides with the decision of 30 June 2016 of the Istanbul 8th Commercial Court of First Instance in terms of the reasons which bar the enforcement of the award of 19 June 2013 regarding quantum, namely restriction of the right to defence and thus the violation of the right to a fair trial and of the Turkish public order. Therefore, it has become final that the award of 19 June 2013 regarding quantum shall not be enforced in Turkey. However, the Istanbul 8th Commercial Court of First Instance had to rule on the issue whether the award of 13 December 2012 regarding liability may be recognized and in its decision of 11 November 2021 the Istanbul 8th Commercial Court of First Instance insisted on its decision of 30 June 2016 and ruled that the award of 13 December 2012 regarding liability may be recognized in Turkey. Now the file is before the General Assembly of Civil Chambers of the Court of Cassation to be solved whether the award of 13 December 2012 regarding liability may be recognized in Turkey.

expert reports obtained by the other party during the trial, and to cross-examine the experts who submitted the report. In addition to the report submitted by the respondent, the claimant relied on the special inspection report received in 2008, 2009 and 2010 in terms of the financial structure of the non-litigant company, and while the relevant parts of this report, on which the claimant relies as evidence, were allowed to be examined by the respondent's attorneys and company valuation experts, the respondent was prohibited to examine the report personally. Furthermore, the reason why the arbitral tribunal accepted claimant's report while rejecting the respondent's report is explained in the rendered award.

The order of the arbitral tribunal allowing examination of the relevant sections of the report, being the basis for the award, by the respondent's attorney and evaluation experts, and prohibiting the respondent from examining these reports personally may not be considered as a violation of the right to a fair trial and the right to be heard, in view of the case file and its annexes. Therefore, there is no violation of the Turkish public order in terms of the case at hand.

V. Legal Evaluation

The right to a fair trial brings the European Convention on Human Rights (Art.6) into mind at first. However, arbitrators are not under any obligation to directly observe the ECHR's rights and freedoms during arbitral proceedings, since they are not considered as being part of a state machinery, and thus not required to directly observe the ECHR and its standards[5]**.** Accordingly, states in whose jurisdiction arbitration proceedings are conducted, are neither directly responsible for the acts nor omissions of arbitrators unless, and only insofar as, the national courts were required to intervene[6]. Nevertheless, the responsibility of member states under the ECHR and thus the application of the ECHR to arbitration is engaged indirectly, i.e., through member states' failure to exercise certain control over arbitration proceedings and to ensure that such proceedings observed parties' basic human rights[7]. In this respect, as far as the member states' courts have the opportunity to audit the right to a fair trial during the annulment or recognition-enforcement phase, failure to make the necessary examination in this regard will result in the responsibility of the member states of the ECHR, and arbitrators are under an indirect obligation to observe the ECHR's rights and freedoms during arbitral proceedings, on the one hand.

On the other hand, most national arbitration laws impose a duty on arbitrators to act fairly or to observe the right to a fair trial or the principle of equality[8]. For

5 Jean-Francois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2006) 65

6 *See, e.g. R v. Switzerland*, App. no. 10881/84, ECmHR, 4 Mar. 1987.

7 Toms Krūmiņš, *Arbitration and Human Rights: Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR* (Springer 2020) 45. *See also Mutu/Pechstein v Switzerland*, App. no. 40575/10 and 67474/10, ECtHR, 2 Oct. 2018; *Beg S.P.A. v Italy*, App. no. 5312/11, ECtHR, 20 May 2021; *Tabbane v* S*witzerland*, App. no. 41069/12, ECtHR, 1 Mar. 2016.

8 *ibid.*

instance, according to Art. 8/B of the Turkish Code of International Arbitration 'The parties shall have equal rights and powers in arbitral proceedings. Each party shall be given the opportunity to assert his claims and defences[9]'.

In addition to these, the right to a fair trial is accepted as an essential element of the *public order*[10] and violation of *public order* in arbitral proceedings leads to annulment of arbitral awards or to dismissal of recognition or enforcement thereof.

Therefore, fair trial principles do not consist of the principles with which the state courts comply only. Arbitrators are also considered to be under the obligation to abide by the principles of fair trial and to treat the parties equally in arbitral proceedings[11]. In this respect, arbitrators must ensure full equality between the parties throughout the entire trial.

Embodied nearly in all national legal systems and in fundamental international regulations such as the ECHR, to be applied both in state courts and in arbitration, *the principle of equality* and *the right to be heard*, which are the basic elements of the right to a fair trial and which are deemed to have become the 'international minimum standards of procedural law', are regarded as the 'Magna Carta' of arbitration[12].

The principle of *equality of parties* in procedural law means that the parties have the opportunity to have equal influence on the decision rendered at the end of the trial, to have an equal opportunity to make claim thereof, and to defend themselves against the claims of the other party. Examining the evidence set forth by the parties, providing the parties with the opportunity to make claims and defences and granting them the right to speak are within the scope of the principle of equal treatment. It is considered as a violation of the principle of equality when one of the parties is not duly invited or is not granted the opportunity to examine documents or evidence[13].

On the other hand, the principle of equality of parties requires arbitrators to avoid biased behaviour, to maintain their impartiality in all matters, and to administer equal treatment between the parties in terms of procedural law during the trial. Therefore, the arbitrators giving priority to one of the parties in arbitral proceedings shall constitute a violation of the principle of impartiality of the arbitrators. Failure to comply with the principles of fair trial and the principle of *equality of the parties* in

9 Unofficial translation by the author.

10 Gary B. Born, *International Commercial Arbitration* vol III (Wolters Kluwer 3d ed. 2020) 3863; Cemal Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* (Beta 7th ed. 2019) 518; Ziya Akıncı, *Milletlerarası Tahkim* (Vedat Kitapçılık 5th ed 2020) 547 etc.

11 Gary B. Born, *International Commercial Arbitration* vol II (Wolters Kluwer 3d ed. 2020) 2326-2334 etc; Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration,* International and Comparative Law Quarterly 991 (2020) 1023.

12 Musa Aygül, *Milletlerarası Ticarî Tahkimde Tahkim Usûlüne Uygulanacak Hukuk ve Deliller* (On İki Levha Yayıncılık 2014) 113.

13 Güray Erdönmez, *Pekcanıtez Usûl Medenî Usûl Hukuku* (On İki Levha Yayıncılık 15th ed. 2017) 885.

arbitral proceedings also violate the Turkish public order[14]. Pursuant to Article V(2) (b) of the New York Convention, enforcement of foreign arbitral awards that are contrary to the public order of the state, where the enforcement is sought, may be refused[15].

The Right to be heard, which is one of the indispensable principles of procedural law and which constitutes the guarantee of a fair trial, requires that the parties have the right to be informed about the allegations and defences made, the right to respond to the claims of the other party, the right to present counter evidence, and the right to be given sufficient time for these transactions[16].

It is a *sine qua non* ingredient of a fair trial for an individual to be fully informed regarding the content of the trial concerning him/her, the transactions of the judicial authority and the evidence affecting the outcome of the trial. Otherwise, the trial would be secreted from the person judged, which, undoubtedly, cannot be considered legally acceptable.

It is not possible to preclude the parties from viewing the documents and information within the scope of a case file, or for a document, which is accessible by one of the parties, to be secreted from the other party. Matters that are not open to the knowledge of the parties cannot constitute a basis for the decision. Otherwise, it is not possible to regard it as a fair trial. Preventing the examination of allegations, defences and evidence by any party constitutes a violation of the *right to be heard*. All parties should be given the opportunity to equally examine all documents affecting the trial and forming the basis of the decision. If not possible, such documents should not be taken as a basis for the decision.

Accordingly, in terms of the case at hand, the following matters should be considered as contrary to fair trial principles:

(i) The March 2010 Report, on which the award is based, was drafted upon the instruction of the claimant before the lawsuit, and only the claimant knew the preparation purpose thereof;

(ii) the respondent did not know what kind of instructions were given by the claimant to the drafters of the report and on what assumptions was the report drafted;

(iii) the drafters of the report are only known by the claimant;

(iv) the arbitral tribunal issued a procedural order entitling the claimant to redact from the report, but the respondent was unaware of the redacted information;

14 Born, (n.10) 3863; Şanlı, (n.10) 518; Akıncı, (n.10) 547 etc.

15 Born, (n.10) 4046; Ergun Özsunay and Murat R Özsunay, *Interpretation and Application of the New York Convention in Turkey* in Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts (George A. Bermann ed., Springer 2017) 971.

16 Ejder Yılmaz, *Hukuk Muhakemeleri Kanunu Şerhi vol I* (Yetkin 4th ed. 2021) 1024; Erdönmez, (n.13) 867; Bantekas, (n.11) 1007.

(v) the arbitral tribunal restricted the report from being viewed by the respondents personally,

(vi) the drafters of the report should have been questioned in accordance with the arbitral tribunal's procedural order, but could not be cross-examined or questioned neither by the arbitral tribunal nor by the respondents;

(vii) the respondents were not even given the opportunity to examine the financial models which constituted the basis of the report.

With the attitude set forth above, the arbitral tribunal did not observe the principle of *equality of the parties*, which is one of the most basic requirements of a fair trial, and violated the *right to defence* and *right to be heard* of the respondents. On the other hand, this attitude of the arbitral tribunal, which is not based on any just and reasonable justification, indicates that the arbitral proceedings were conducted in favour of the claimant and against the respondents, and overshadows the impartiality of the arbitral tribunal. Enforcement of the arbitral award rendered in consequence of such a trial shall violate the Turkish public order, within the scope of Article V(2)(b) of the New York Convention.

At this point, it should be emphasized that the fact that arbitral tribunal allowed the March 2010 Report to be for the use of respondents' counsel, valuation experts and port value experts does not justify such an award to be based upon such a report. Violation of the right to defence, caused by the failure to recognize the right of the aforementioned report to be viewed and to be evaluated by the respondent personally, who is the beneficiary or the obligator of the rights and debts subject to the lawsuit, is not of a nature to be removed once the relevant report is examined by the counsel or experts appointed by the respondent. As stated in the report of the valuation expert appointed by the respondent, the facts that the calculations of the March 2010 Report, taken as a basis for determining the amount of compensation by the arbitral tribunal, were not given to the valuation expert, that the cash flow statements behind the evaluation were not legible, and therefore the valuation expert could not compare this report with his own report, reveals that enabling the valuation expert of the respondent to examine the March 2010 report is insufficient in terms of a healthy execution of the right to defence.

In regards to the judicial decisions, it should be underlined that the court of first instance rendered a glorious decision, as the court properly determined what this attitude of the arbitral tribunal means in law, correctly determined the basic concepts and principles concerning the issue, and also accurately determined the legal consequences of the violation thereof in the case of recognition and enforcement of the foreign arbitral award. The court of first instance made determinations worthy of commendation, by considering that it is obligatory for the parties to be informed about the transactions made by the judicial organs or the other party, that matters

not available for the knowledge of both parties cannot be taken as the basis of a decision, that preventing the viewing and examination of the case material by any party will be a violation of the right to be heard, that the right to explain will be executed incompletely in conclusion of incomplete information, that concealing a document taken as the basis of a judicial decision from any party of the trial shall mean eliminating the publicity of the party and restricting the right to prove, thus, the principle of equality of arms, the right to a fair trial and the right to be heard of the respondent, who is the real holder of the case and whose legal status will be directly affected by the decision at the end of the case, will be violated, and that the enforcement of such a foreign arbitral award shall be contrary to Turkish public order.

However, the issue was not fully understood in the decision of the 11th Civil Chamber of the Court of Cassation of 29 November 2018. In this decision the Court of Cassation concluded, in response to the respondent's claims that his right to a fair trial has been violated, that no concrete evidence was submitted, indicating that the conduct applied by the arbitrators in the arbitral proceedings is contrary to the procedural rules to be abided by in such arbitral proceedings. Violation of the right to a fair trial and breach of procedure are different legal concepts that fall under different subparagraphs of Article V of the New York Convention. In order for a violation of the right to a fair trial to occur, there does not necessarily have to be a breach of procedure. An award that complies with the rules governing the arbitral procedure may violate the right to a fair trial. For this reason, in the Court of Cassation's decision of 29 November 2018, it is not justifiable to regard breach of procedure as a prerequisite in order to accept violation of the right to a fair trial.

Moreover, the attitude of the arbitral tribunal, which violates the fair trial principles such as the principle of *equality of the parties* and *the right to be heard* and also undermines the principle of impartiality of the arbitrators, actually constitutes a breach of the arbitral procedure. The arbitration procedure, according to which the award was made, was governed by the ICC Arbitration Rules of 1998, and pursuant to Article 15(2) thereof, the arbitral tribunal shall act fairly and impartially, ensuring that each party has a reasonable opportunity to present its case. However, as presented and explained in detail above, the arbitral tribunal did not provide the respondent with reasonable opportunity to present his case, on the one hand, and acted contrary to the obligation to act fairly and impartially, on the other hand, and consequently violated Article 15(2) of the ICC Arbitration Rules of 1998; by hiding the purpose and the drafters of the March 2010 report and the financial models that constitute the basis thereof from the respondent, and thus, by depriving the respondent of the right to question and cross-examine the drafters of the report. The fact that the arbitral tribunal has taken such a report as a basis for determining the compensation amount evidently makes the relevant breach effective on the merits.

Violation of Article 15(2) of the ICC Arbitration Rules of 1998 by the arbitral tribunal constitutes an obstacle for enforcement of arbitral awards pursuant to Article V(1)(d) of the New York Convention, which stipulates that 'the arbitration procedure shall be conducted in accordance with the agreement of the parties or in case the agreement is unclear in accordance with the provisions of the local law in which the arbitration takes place'.

Besides, detailed regulations on taking and evaluation of evidence are not included in the ICC Arbitration Rules. The International Bar Association (IBA) has prepared the 'IBA Rules on the Taking of Evidence in International Arbitration' as a result of this common incident that usually occurs in regards to the institutional arbitration rules[17]. Considering that there are not enough regulations in the rules of international arbitration institutions regarding the submission and evaluation of evidence, it is evident that the IBA Rules fill a massive and crucial gap in the submission and evaluation of evidence in the field of international arbitration. But in order to apply these IBA Rules, they need to be chosen either by the arbitrators or by the parties[18].

It is stated in the Terms of Reference that the arbitral tribunal would apply the IBA Rules in matters falling within its scope but would not be bound by these rules. Nonetheless, as is evident from paragraph 26 of the final award, the respondent made certain statements regarding the IBA Rules during the disclosure discussions, and, as is evident from paragraph 27 of the final award, the claimant relied on the IBA Rules while objecting to the respondent's statements on this matter. These statements mean that the parties have a mutual and compatible will in terms of matters covered by the IBA Rules and the obligation to enforce the IBA Rules. Moreover, as is evident from paragraph 28 of the final award, the fact that the arbitral tribunal settled this conflict between the parties as per the procedural order no.7, and that the IBA Rules constituted basis thereof, indicates that both parties as well as the arbitral tribunal agreed upon the application of IBA Rules.

The third paragraph of the IBA Rules in the preamble introduces a very basic principle in terms of this topic: 'The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.' In accordance with the Article 3(1) of the IBA Rules, all documents relied on by the parties shall be submitted to the arbitrators and to the other party. Pursuant to Article 3(13) of the IBA Rules, any document submitted or produced by a party or a non-party in the arbitration and not otherwise in the public domain shall be kept confidential by the arbitral tribunal and the other parties, and

17 Gary B. Born, *International Commercial Arbitration vol I*, (Wolters Kluwer 3d ed. 2020) 225.

18 Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press 2013) 30; Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Routledge 2012) 7.

shall be used only in connection with the arbitration. Pursuant to the Articles 5 and 6 of the IBA Rules, the expert report prepared by parties or by the arbitral tribunal shall contain the names and addresses of experts, a statement regarding his or her present and past relationship (if any) with any of the parties, a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions, and the cases on which the conclusions reached in the report are based, and the methods and information used in reaching these conclusions[19].

When the IBA Rules mentioned above are evaluated as a whole, it is evident that it is not possible for the names of the experts who drafted the report and for the methods they applied while reaching such conclusions to remain undisclosed, that it is not possible to hide the documents presented by the claimant as evidence from the respondent, and that concealment of the document submitted by one of the parties from the other party cannot be based on the principle of confidentiality, since the principle of confidentiality means that the documents presented in the arbitration may be concealed only from third parties[20].

Consequently, by concealing the relevant assumptions and data being the basis for the financial model of the March 2010 report and also the drafters and the purpose thereof, from the respondent, and by depriving the respondent from the opportunity to cross-examine the experts who drafted the report, the arbitral tribunal acted in violation of the IBA rules specified above.

Violation of the IBA Rules by the arbitral tribunal constitutes an obstacle for enforcement of arbitral awards pursuant to Article V(1)(d) of the New York Convention.

It is seen that there are certain breaches of procedure regarding the award in different respects. Accordingly, the determination of the Court of Cassation in its decision of 29 November 2018, regarding that there was no concrete evidence setting forth the breach of the arbitral procedure was totally groundless, and the request for enforcement should also have been rejected due to breach of procedure.

As a matter of fact, in its decision of 10 February 2021, rendered upon a request by the respondent for a revision of decision, the 11th Civil Chamber of the Court of Cassation stated that 'The examination of the March 2010 Report, which was largely taken as the basis for the award by the arbitral tribunal, violates the procedural rules agreed by the parties', and accepted that this attitude of the arbitral tribunal in the arbitral proceedings also constituted a breach of procedure.

Against the decision of the 11th Civil Chamber of the Court of Cassation of 29 November 2018, the respondent requested for a revision of decision. The Code of

19 Ashford, (n.18) 107; O'Malley, (n. 18) 333-334.

20 Ashford, (n.18) 12; O'Malley, (n. 18) 324.

Civil Procedure (CCP) no.6100 does not set forth a legal remedy in the form of a revision of a decision, however, it is stipulated in Provisional Article 3 of the CCP no.6100 that pursuant to the Provisional Article 2 of the Law on the Establishment, Duties and Powers of the Courts of First Instance and the Regional Courts of First Instance, the provisions of the Code of Civil Procedure (HUMK) n.1086 regarding the appeal shall continue to be applicable until the activation date of Regional Courts of Appeals to be announced in the Official Gazette, and the mentioned provisions also include the procedure of revision of decision.

As of 30 June 2016, which is the date of the decision by the Istanbul 8th Commercial Court of First Instance, since the Regional Courts of Appeals had not been activated yet, it was possible to request for the revision of the decision of the 11th Civil Chamber of the Court of Cassation of 29 November 2018 in accordance with the provisions of the CCP no.1068.

Considering the grounds for the revision of decision in the Article 440 of the CCP no.1086; the rejection of the respondent's claim regarding the right to a fair trial was based on the ground that there was a breach of procedure, which fall within the scope of the reason of revision provided as such: 'the objections that were put forward in the reply petition of the other party and that had an effect on the judgment were partially or completely left unanswered'. Furthermore, it can also be considered that 'the decision of the Court of Cassation is found to be contrary to the procedure and the *law*'.

The decision of 10 February 2021 rendered by the 11th Civil Chamber of the Court of Cassation accepting the request for revision of decision and cancelling the reversal decision of 29 November 2018 unanimously is quite justifiable. As the Court of Cassation decided; the parties should be able to examine the evidence freely and an issue that is not available for the parties should not constitute the basis of a decision as the right of access to court also connotes the right to easily access to the evidence and documents subject to the dispute, any party's right to be heard should not be harmed in a trial by hiding behind the protection of trade secrets though it is a legitimate right, the attitude of the arbitral tribunal on this matter is not based on any reasonable and legal basis and causes doubts regarding the impartiality of the arbitral tribunal, the respondent's access to evidence and defence rights were severely violated in the arbitral proceedings, and the restriction of the right to defence and thus the violation of the right to a fair trial constitute an evident violation of the Turkish public order.

However, the dissenting opinion was without merit. Because after making theoretical explanations about the right to be heard, the right to legal remedies, the state of law, the right to demand information, the right to explain and prove, the right to be considered, the right to a fair trial, and public order, and a very accurate

determination i.e. the violation of the right to be heard during the arbitration proceedings will result in violation of public order, the dissenting members reached the conclusion, completely contradicting with these explanations, that the order of the arbitral tribunal allowing examination of the relevant sections of the March 2010 Report, by the respondent's attorney and evaluation experts, and prohibiting the respondent from examining this report personally may not be considered as a violation of the right to a fair trial and the right to be heard, in view of the case file and its annexes, and therefore, there is no violation of the Turkish public order. The dissenting members couldn't explain the basis and justification of these opinions, and merely stated that there was no violation 'in view of the case file and its annexes'. The dissenting opinion was extremely inadequate, when compared with the well-reasoned, legally based and satisfactorily explained decisions of both the first-instance court and the Court of Cassation rendered upon the request for revision of decision.

Finally, it should be emphasized that, by prohibiting the respondent from viewing the March 2010 report, by concealing from the respondent the drafter and purpose thereof, by hiding the financial models based on the preparation thereof from both the respondent and the respondent's valuation expert, the arbitral tribunal not only violated the principles of fair trial such as the *equality of the parties* and the *right to be heard*, and not only damaged the principle of impartiality of the arbitrators, but also deprived the respondent of the opportunity to present his case. Pursuant to Article V(1)(b) of the New York Convention, any request for enforcement of an award has to be rejected if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or *was otherwise unable to present his case*.

If the respondent had the opportunity to learn who drafted the March 2010 report, for what purpose it was prepared, what the financial models were based on while drafting the report, and to question and to cross-examine the experts who drafted the report, he would have had the opportunity to refute the March 2010 report in the same way as he rebutted the valuation report submitted by the claimant's expert. However, the arbitral tribunal's attitude prevented the respondent from presenting his evidence and objections against the March 2010 Report and constitutes an obstacle for the enforcement of this arbitral award pursuant to Article V(1)(b) of the New York Convention.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.

Bibliography

Akıncı Z, *Milletlerarası Tahkim* (Vedat Kitapçılık 5th ed 2020)

Ashford P, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press 2013)

Aygül M, *Milletlerarası Ticarî Tahkimde Tahkim Usûlüne Uygulanacak Hukuk ve Deliller* (On İki Levha Yayıncılık 2014)

Bantekas I, 'Equal Treatment of Parties in International Commercial Arbitration' (2020) 69 (4) International and Comparative Law Quarterly 991-1011.

Born GB, *International Commercial Arbitration vol I*, (Wolters Kluwer 3d ed. 2020)

Born GB*, International Commercial Arbitration vol II* (Wolters Kluwer 3d ed. 2020)

Born GB, *International Commercial Arbitration vol III* (Wolters Kluwer 3d ed. 2020)

Erdönmez G, *Pekcanıtez Usûl Medenî Usûl Hukuku* (On İki Levha Yayıncılık 15th ed. 2017)

Krūmiņš T, *Arbitration and Human Rights: Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR* (Springer 2020)

O'Malley ND, *Rules of Evidence in International Arbitration: An Annotated Guide* (Routledge 2012)

Özsunay E and Özsunay MR, 'Interpretation and Application of the New York Convention in Turkey in Recognition and Enforcement of Foreign Arbitral Awards' in (George A. Bermann ed) *The Interpretation and Application of the New York Convention by National Courts* (Springer 2017)

Poudret JF and Besson S, *Comparative Law of International Arbitration* (Sweet & Maxwell 2006)

Şanlı C*, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* (Beta 7th ed. 2019)

Yılmaz E, *Hukuk Muhakemeleri Kanunu Şerhi vol 1* (Yetkin 4th ed. 2021)

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 119–219

DOI: 10.26650/annales.2022.71.0011
http://annales.istanbul.edu.tr/

Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Submitted: 10.10.2022
Revision Requested: 12.12.2022
Last Revision Received: 26.12.2022
Accepted: 30.12.2022
Published Online: 31.12.2022

Transformation From Soft Law to Hard Law of International Environmental Protection: Process, Basic Concepts and Principles – Part 1: "Common Heritage of Mankind", "Present and Future Generations", "Inter/Intra-generational Equity" and "Sustainable Development"

Mehmet Semih Gemalmaz*

Abstract

In this study transformation from soft law to hard law of international environmental protection is analysed within the historical perspective with a special emphasis on process, basic concepts and principles. In Part I of this study, firstly soft-hard law dichotomy and enforcement is examined and attention has been drawn to the 1972 Stockholm and the 1992 Rio Declarations. It follows the examination of "common heritage of mankind", "present and future generations", "inter/intra-generational equity", and "sustainable development" as the basic notions and principles which have roots in soft law and subsequently become an integral part of international environmental protection of hard law instruments. In Part 2 of the study which will be published in the subsequent issue, "no transboundary environmental harm", "precautionary", "environmental impact assessment" principles as well as "access to information and participation to decision-making processes" criteria have been analysed. As a whole in this study in addition to relevant international literature and soft/hard law documents some of the significant jurisprudence in its historical process have been referred to.

Keywords

Common Heritage of Mankind, Environmental Law, Sustainable Development, Present and Future Generations, Inter/Intragenerational Equity, 1972 Stockholm Declaration, 1992 Rio Declaration

* **Corresponding Author:** Mehmet Semih Gemalmaz (Prof. Dr.), İstanbul, Türkiye. E-posta: msgemalmaz@superonline.com
ORCID: 0000-0002-7686-5612

To cite this article: Gemalmaz MS, "Transformation from Soft Law to Hard Law of International Environmental Protection: Process, Basic Concepts and Principles – Part 1: "Common Heritage of Mankind", "Present and Future Generations", "Inter/Intra-generational Equity" and "Sustainable Development"", (2022) 71 Annales de la Faculté de Droit d'Istanbul 119. https://doi.org/10.26650/annales.2022.71.0011

Transformation From Soft Law to Hard Law of International Environmental Protection: Process, Basic Concepts and Principles – Part 1:

"Common Heritage of Mankind", "Present and Future Generations", "Inter/Intra-generational Equity" and "Sustainable Development"

A-) Legal Nature and Form of International Environmental Law Instruments

1. Soft/hard Law

It is usual to categorize international environmental rules in terms of 'soft-law' and 'hard-law', depending on whether or not they meet formal treaty criteria.[1]

In examining the question whether resolutions of the General Assembly carry any binding force, Sloan as early as 1948 concludes that "the judgment by the General Assembly as a collective world conscience is itself a force external to the individual conscience of any given State. It is submitted that in view of these considerations the 'moral force' of the General Assembly is in fact a nascent legal force".[2] Higgins in her 1963 study maintains that "resolutions of the Assembly are not *per se* binding: though those rules of general international law which they may embody are binding on member states, with or without the help of the resolution. But the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provides a rich source of evidence".[3]

Considering the issue within the parameter of international law in general[4], one may refer to, *inter alia*, Schachter's article published in 1977. The author stated that "the

1 Oscar Schachter, '*The Twilight Existence of Nonbinding International Agreements*' (1977) 71/2 AJIL 296; C. M. Chinkin, '*The Challenge of Soft Law: Development and Change in International Law*' (1989) 38/4 ICLQ 850; Günther Handl, '*Environmental Security and Global Change: The Challenge to International Law*' (1990) 1 Y.B. Int'l Envtl. L. 3, 7-8; Catherine Tinker, '*Environmental Planet Management by the United Nations: An Idea Whose Time Has Not Yet Come?*' (1990) 22/4 N.Y.U. J. Int'l L & Pol. 793, 800-803; Pierre-Marie Dupuy, '*Soft Law and the International Law of the Environment*' (1991) 12/2 Mich. J. Int'l L. 420; Peter H. Sand, '*UNCED and the Development of International Environmental Law*' (1992-93) 8/2 J. Nat. Resources & Envtl. L. 209, 212; Francesco Francioni, '*International 'Soft Law': A Contemporary Assessment*' in Vaughan Lowe and Malgosia Fitzmaurice (eds.) *Fifty Years of the International Court of Justice - Essays in Honour of Sir Robert Jennings* (Grotius Publications, Cambridge University Press 1996) 167; A. E. Boyle, '*Some Reflections on the Relationship of Treaties and Soft Law*', (1999) 48/4 ICLQ 901; Lluis Paradell-Trius, '*Principles of International Environmental Law: an Overview*' (2000) 9/2 RECIEL 93, 95-97.

2 F. Blaine Sloan, '*The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*' (1948) 25 BYBIL 1, 32 (According to Sloan, "there is, however, in the Charter no express undertaking to accept recommendations of the General Assembly similar to the agreement in Article 25 to accept and carry out decisions of the Security Council. On the other hand, it cannot be said that the Charter specifically negates such an obligation, and it may be possible to deduce certain obligations from the Charter as a whole which it would be impossible to establish from an express undertaking", *id.* 14.); further see, D. H. N. Johnson, '*The Effect of Resolutions of the General Assembly of the United Nations*' (1955-56) 32 BYBIL 97.

3 Rosalyn Higgins, The Development of International Law through the Political Organs of the United Nations, (Oxford University Press 1963) 5, *quoted in* S. K., Chatterjee, '*The Charter of Economic Rights and Duties of States: An Evaluation after 15 Years*' (1991) 40/3 ICLQ 669, 682 (According to the author "it may be unwise to dismiss the legal effect of all UN General Assembly resolutions, especially those pertaining to State responsibility", ibid.).

4 Francesco Francioni, '*International Soft Law*' (n. 1) 173. (The author referring to the İCJ's jurisprudence found that the **(i)** Court has contributed to furthering the development of the concept of soft law; **(ii)** this concept has been understood to include unwritten prescriptions such as general considerations of humanity; **(iii)** the Court has applied soft law contained in international documents, in particular General Assembly resolutions, and finally **(iv)** reference to soft law has been understood as a method for facilitating the process of their transformation into hard law.)

fact that nonbinding agreements may be terminated more easily than binding treaties should not obscure the role of the agreements which remain operative… As long as they do last, even non-binding agreements can be authoritative and controlling for the parties. There is no *a priori* reason to assume that the undertakings are illusory because they are not legal".[5] Chinkin who argued that "soft law instruments range from treaties, but which include only soft obligations ('legal soft law'), to non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organizations ('non-legal soft law'), to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles. The use of a treaty form does not of itself ensure a hard obligation".[6] The author concluded that "labeling (international) instruments as law or non-law disguises the reality that both play a major role in the development of international law and both are needed for the regulation of States' activities and for the creation of expectations".[7]

According to Dupuy, "soft law creates and delineates goals to be achieved in the future rather than actual duties, programs rather than prescriptions, guidelines rather than strict obligations".[8] But it is necessary to distinguish between the *substance* and the *instrument*. There may be cases "where the content of a formally non-binding instrument has been so precisely defined and formulated that, aside from the precaution of using 'should' instead of 'shall' to determine the proper behavior for concerned States, some of its provisions could perfectly be integrated into a treaty". Furthermore, there are numerous treaty provisions which the wording used is so 'soft' that seems "impossible to consider them as creating a precise obligation or burden on States parties".[9] In the view of Dupuy "the criteria used to identify 'soft' law should no longer be *formal*, i.e., based on the compulsory or non-compulsory character of the instrument, but instead *substantial*, i.e., *dependent on the nature and specificity of the behavior requested of the State*, whether or not it is included in a legally binding instrument"[10] (emphasis original).

5 Schachter '*The Twilight Existence of Nonbinding International Agreements*' (n. 1) 304. (The author also reminded that "not all nonbinding agreements are general and indefinite. Governments may enter into precise and definite engagements as to future conduct with a clear understanding shared by the parties that the agreements are not legally binding. The so-called 'gentlemen's agreements' fall into this category… In these cases the parties assume a commitment to perform certain acts or refrain from them. The nature of the commitment is regarded as 'non-legal' and not binding. There is nonetheless an expectation of, and reliance on, compliance by the parties", *ibid* 299.)

6 Chinkin, (n. 1) 851 (In view of the author soft law instruments "are frequently not only regulatory but are also intended to construct and programme the development towards a new economic structure", *ibid* 853. This is also true of soft law instruments in other subject areas, e.g. human rights, the UDHR of 1948 and the environment, the Stockholm Declaration on the Human Environment, *ibid* 853 note 13.).

7 *ibid* 866.

8 Dupuy, '*International Law of the Environment*' (n. 1) 428.

9 *ibid* 429.

10 *ibid* 430 (Dupuy added that "if the norm is included in a non-binding instrument, it should be considered presumptive evidence of the 'soft' nature of the norm; at the same time, the 'hard' or 'soft' nature of the obligation defined in a treaty provision should not necessarily be identified on the sole basis of the formally binding character of the legal instrument in which the concerned norm is integrated and articulated", *ibid*. Basing upon those arguments the author reminded that "one must avoid grouping texts of remote origins and character in order to demonstrate the development of an emerging 'soft' rule", *ibid* 431).

With regard to argument that some rules even when embodied in treaties may still be considered as 'soft undertakings' or in the words of Chinkin 'soft obligations'/'legal soft law', or in the words of Dupuy the criteria used "should no longer be formal, but instead substantial", Boyle observed that "this view focuses on the contrast between 'rules', involving clear and reasonably specific commitments which are in this sense hard law, and 'principles', which, being more open-textured or general in their content and wording can thus be seen as soft. From this perspective treaties may be either hard or soft, or both" as can be seen in the Convention on Climate Change. "In this category it is the content of the treaty provision which is decisive in determining whether it is hard or soft, not its form as a treaty".[11]

According to Sands, "rules of 'soft law', which are not binding, play an important role by pointing to the likely future direction of formally binding obligations, by informally establishing acceptable norms of behavior, and by 'codifying' or reflecting rules of international common law".[12] With respect to soft law as general norms or principles Boyle stated that "a treaty may be potentially normative, but still 'soft' in character, because it articulates 'principles' rather than 'rules'. They may lay down parameters which affect the way courts decide cases or the way an international institution exercises its discretionary powers. They can set limits, or provide guidance, or determine how conflicts between other rules or principles will be resolved. They may lack the supposedly harder edge of a 'rule' or an 'obligation', but they are certainly not legally irrelevant. As such, they constitute a very important form of law, which may be 'soft', but which should not be confused with 'non-binding' law".[13]

Turning to the principles in the international environmental law, according to Francesco there is an increasing role for soft law with respect to institutionalization of international cooperation to deal with issues of common concern, particularly in relation to concerns for the maintenance of peace and security, the protection of human dignity and the preservation of the earth's environment.[14] He added that "the manifestations of soft law may pave the way to the adoption of hard law in the form

11 Boyle, 'Reflections on Treaties and Soft Law' (n. 1) 901, 908.

12 Philippe Sands, '*Introduction*' in P. Sands (ed.) *Greening International Law* (Routledge 1994) xxii.

13 Boyle, 'Reflections on Treaties and Soft Law' (n. 1) 907, and also at 908 the author, with respect to principles provided in Article 3 of the Climate Change Convention, stated that "despite all these limitations they are not legally irrelevant". Consequently, it seems that Boyle was generally in line with the arguments raised by Chinkin and Dupuy quoted above. For similar arguments also see, Paradell-Trius, (n. 1) 95. (The author in this context quoted from Boyle's aforementioned article.); Also see, Ronald Dworkin, Taking Rights Seriously (Oxford 1977) 24-26 (Dworkin's frequently quoted view that principles and rules "point to particular decisions about legal obligations in particular circumstances, but they differ in character of the direction they give. Rules are applicable in an all-or-nothing fashion… (A principle) states a reason that argues in one direction, but does not necessitate a particular decision… All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one way or another"); further see, Sands, '*Introduction*' (n. 12) xxx.

14 Francioni, '*International Soft Law*' (n. 1) 174 (According to the author, the 1989 World Charter for Nature, and the 1992 Rio Declaration are less susceptible of being transformed into hard regulations, and their role is mainly that of providing a framework of principles, objectives and programmes to orient and legitimize further legislative action, *ibid* 175.).

of multilateral treaties with a vocation to universality. This has happened in the field of human rights, with regard to principles governing activities in outer space, with regard to the status of the international sea-bed".[15] Similarly, Strong argued that "the Rio Declaration and Agenda 21 are major new examples of 'soft law', based on political agreement rather than on legally binding instruments. Although not legally binding, they provide a basis for voluntary cooperation, which enables the action process to proceed expeditiously and paves the way for the negotiation of binding agreements. Although we cannot be satisfied with these as long-term substitutes for enforceable legal measures, we should not minimize their value".[16] In the same line P. Sand stated that "the very success of soft-law instruments in guiding the evolution of contemporary international environmental law has also produced a backlash effect: governments have become wary of attempts at formulating reciprocal principles, even when couched in non-mandatory terms, well knowing that 'soft' declarations or recommendations have a tendency to harden over time and to come back to haunt their authors".[17]

Unlike rules, principles "embody legal standards, but the standards they contain are more general than commitments and do not specify particular actions".[18] The limitations of principles should not be ignored. However, "properly constructed they can assist in interpreting obligations, defining parameters for new obligations, and filling legal gaps. They cannot, however, replace or override the critical mass of substantive rights and obligations necessary to give any principles precision and effect, even when the latter fall short of what the principles might appear to require".[19]

In view of Dupuy "international standards based on 'soft' law are not only available for use by international judges or arbitrators. They can also be of great help in everyday inter-State diplomacy. They may also effectively be taken into account by municipal judges in evaluating the legality, with regard to international law, of any internal administrative action having had or able to have some damaging impact on the environment beyond national boundaries… Albeit indirect, the legal effect of 'soft' law is nevertheless real."[20] Paradell-Trius observed that "principles, like rules, may have international legal significance and normative authority. Unlike

15 *Ibid*.

16 Maurice F. Strong, '*Beyond Rio: Prospects and Portents*' (1993) 4/1 Colo. J. Int'l Envtl. L. & Pol'y 21, 31-32; with respect to "voluntary cooperation", also see, Tinker (n. 1).

17 Sand, (n. 1); on the other hand, see, Douglas M. Johnston, '*Systemic Environmental Damage: The Challenge to International Law and Organization*' (1985) 12/2 Syracuse J. Int'l L. & Com. 255, 266 (According to the author "a modern practitioner of the normative approach is likely to be aware of the need to be creative through recourse to 'soft law' as well as 'hard law' concepts, adding less precise, concepts of 'responsibility' to more rigid concepts of 'obligation', but the normative approach still rests essentially on the concept of 'commitment'…").

18 Daniel Bodansky, '*The United Nations Framework Convention on Climate Change: A Commentary*' (1993) 18/2 Yale J. Int'l L. 451, 501.

19 H. Mann, '*Comment on the Paper by Philippe Sands*' in W. Lang (ed.) *Sustainable Development in International Law* (1995 Graham Trotman) 67, 71, *quoted in*, Paradell-Trius (n. 1) 97.

20 Dupuy, '*International Law of the Environment*', (n. 1) 435.

rules, however, principles do not directly prescribe conduct, but act as 'reasons' or 'considerations' inclining decision-makers to choose a particular course of action… Principles contained in framework conventions, for example, serve primarily to define parameters for new obligations and to facilitate further negotiations by the parties on more detailed commitments".[21] Sands stated that "the fact that legal principles, like rules, can have international legal consequences has focused attention on their content while being elaborated in recent treaties".[22]

2. Soft/hard Enforcement

As appeared in certain international environmental instruments, soft law standards or principles also lead to soft enforcement or implementation procedures. This relatively new form of enforcement procedures replace the traditional adversarial procedures of enforcement based on sanctions, international liability and compensation of damages.[23] According to Boyle "reliance on institutional machinery in the form of intergovernmental commissions and meetings of treaty parties as a means of coordinating policy, developing the law, supervising its implementation, resolving conflicts of interest and putting community pressure on individual States, meets these needs much more flexibly and effectively than traditional bilateral forms of dispute settlement".[24]

The Vienna "*Convention for the Protection of the Ozone Layer*"[25] of 22/03/1985 is the first environmental treaty in which a formal "noncompliance procedure" has been adopted. At the drafting process an attempt for an inclusion of a strong dispute resolution mechanism was failed.[26] Under the "*Montreal Protocol on Substances that Deplete the Ozone Layer*"[27] of 16/09/1987 (Article 8), as shown in this study below, first the non-compliance working group, which later becomes the implementation committee, was established at the first meeting of the parties in 1989. The

21 Paradell-Trius, (n. 1) 96 (In view of the author, prominent examples of reliance on soft law as part of the international environmental law-making process, including the formulation of principles, are the declarations of intergovernmental conferences, such as the 1972 Stockholm Declaration and the Rio Declaration, *ibid* 95.).

22 Philippe Sands, '*Principles of International Environmental Law'* (Cambridge University Press 2003) 233.

23 Francioni, '*International Soft Law*' (n. 1) 176 (According to the author "the most important reason for the increasing role of soft implementation procedures is the contemporary widening of the scope of application of the concept of *erga omnes* obligations. These obligations… have made it possible to picture the international community as the title holder of certain collective interests such as human rights and environmental quality", *ibid* 177.).

24 Alan E. Boyle, '*Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions*' (1991) 3/2 J. Envtl. 229, 230.

25 The "*Convention for the Protection of the Ozone Layer*", adopted on 22/03/1985 and entered into force on 22/09/1988; *reproduced in*, 26 ILM 1516 (1987). The 1985 Vienna Convention is largely a framework treaty; rather than laying down any specific measures for controlling emissions of chlorofluorocarbon gasses, it leaves these to be elaborated through subsequent protocols. See, Robin Churchill, '*International Environmental Law and the United Kingdom*', (1991) 18/1 J. L. & Soc'y. 155, 158.

26 Alexander Gillespie, '*Implementation and Compliance Concerns in International Environmental Law: The State of Art within Three International Regimes*', (2003) 7 N.Z. J. Envtl. L. 53, 54.

27 The '*Montreal Protocol on Substances that Deplete the Ozone Layer*', adopted on 16/09/1987 and entered into force on 01/01/1989; *reproduced in*, 26 ILM 1541 (1987).

Implementation Committee has given power to review complaints concerning the implementation of the Protocol by any party and to report to the Meeting of Parties.[28] As seen in this model of noncompliance procedure regimes the main aim is not to take controversial countermeasures, but rather to seek amicable solutions to anticipated noncompliance.[29] Under this regime the key functions which the intergovernmental bodies carried out are those of data and information gathering, receiving and considering reports on treaty implementation by States, facilitating independent monitoring, acting as a forum for reviewing the performance of individual States or the negotiation of further measures and regulations. Consequently, such bodies may acquire law enforcement, law-making and dispute settlement functions.[30] In this context, one may note that some international environment protection instruments do not even provide for sanctions.[31] Such type of soft law of international environmental protection, as well as their soft enforcement procedures, on the one hand, encourages States to become parties to these instruments, and on the other hand, facilitate the continuity of supervision of compliance with the standards laid down by these instruments.

The same type of dispute settlement mechanisms also seen in the instruments concerning the air pollution regime. For instance, Article 13 of the 1979 "*Convention on Long-Range Transboundary Air Pollution*"[32] states that "if a dispute arises between two or more Contracting Parties to the present Convention as to the interpretation or application of the Convention, they shall seek a solution by negotiation or by

28 Boyle, '*Saving the World?*' (n. 24) 244. Gillespie, (n. 26).

29 O. Yoshida, '*Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions*' (1999) 10/1 Colo. J. Int'l Envtl. L. & Pol'y 95, 123-127 (The author also argued that "in theory, countermeasures such as suspension or termination of multilateral treaties are not realistic approaches in environmental disputes, simply because one of the main problems of environment-related regulatory regimes is securing the participation of developing states that may not think much of diplomatic policy regarding global environment protection", *ibid* 126, note 145. Yoshida concluded that the Montreal noncompliance procedure "is not meant to supplant or replace traditional legal settlement procedures under the Vienna Convention", *ibid* 139); also see, Francioni, '*International Soft Law*' (n. 1) 177.

30 Boyle, '*Saving the World?*' (n. 24) 231 (The author listed arguments to indicate the advantages of such methods: **(i)** Community pressure and the scrutiny of other States in an intergovernmental forum may often be more effective than other more confrontational methods. **(ii)** Individual States may lack standing to bring international claims relating to the protection of global common areas, such as the high seas. In such cases accountability to international organizations may be the only practical remedy available, *ibid* 233.).

31 For example, see, **(i)** The "*Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions*" (the Oslo Sulphur Protocol) of 14/06/1994 (entered into force on 05/08/1998); available at, <http://www.unece.org/env/lrtap/pops> Article 5 provides reporting obligation, and Article 8 establishes an Implementation Committee. However, there is no a direct sanction norm. For reporting obligation, also see, Article 7 of the "*Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals*" adopted on 24/06/1998 (entered into force on 29/12/2003); available at, <http://www.unece.org/env/lrtap/pops>; Article 9 of the "*Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants*" adopted on 24/06/1998 (entered into force on 23/10/2003); available at, http://www.unece.org/env/lrtap/pops. **(ii)** Pursuant to Article 29 of the UNESCO "*Convention Concerning the Protection of the World Cultural and Natural Heritage*" of 23/11/1972, the States Parties undertake to submit reports concerning the measures that have adopted for the application of the Convention. These reports are transmitted to the World Heritage Committee which was established by the Convention in order to monitor the state of conservation of sites and monuments of universal interest of humankind, (Articles 8-14).

32 The "*Convention on Long-range Transboundary Air Pollution*" was adopted on 13/11/1979 and entered into force on 16/03/1983; available at, <http://www.unece.org/env/lrtap/full%20text/1979.CLRTAP.e.pdf>, also *reproduced in*, 18 ILM 1442 (1979). For an analysis of this Convention, see, Armin Rosencranz, '*The ECE Convention of 1979 on the Long-Range Transboundary Air Pollution*' (1981) 75/4 AJIL 975.

any other method of dispute settlement acceptable to the parties to the dispute." Pursuant to Article 10, paragraph 1, of the 1979 Convention the Executive Body was established, which has the main function to review the implementation of the Convention, (Article 10/2, a).[33]

The following Protocols adopted the same system with regard to settlement of disputes.[34] Among those, however, the Geneva "*Protocol concerning the Control of Emissions of Volatile Organic Compounds on Their Transboundary Fluxes*" (the VOC Protocol) of 18/11/1991 went further and in Article 3, paragraph 3, provides that "the Parties shall establish a mechanism for monitoring compliance with the present Protocol. As a first step based on information provided pursuant to article 8 or other information, any Party which has reason to believe that another Party is acting or has acted in a manner inconsistent with its obligations under this Protocol may inform the Executive Body to that effect and, simultaneously, the Parties concerned. At the request of any Party, the matter may be taken up at the next meeting of the Executive Body". Note that the aforementioned Executive Body, as Gillespie pointed out, established an Implementation Committee which was modeled, to a limited degree, "Montreal Protocol on Substances that Deplete the Ozone Layer" of 16/09/1987 and "the principles of non-complex, non-confrontational, transparent, facilitating technical and financial assistance and vesting final authority for decision making with the Executive Body."[35] In fact, the 'Executive Body' mentioned in 1991 VOC Protocol refers to the Executive Body constituted under Article 10/1 of the 1979 Convention. In light of the foregoing, it is not surprising that in accordance with Article 7, paragraph 1, of the Oslo "*Protocol on Further Reduction of Sulphur Emissions*" of 14/06/1994 the Implementation Committee has been established directly by the

33 Rosencranz, "*The ECE Convention of 1979*" (n. 32) 977-979.

34 For instance, see, the Geneva "*Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Long-Term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe (EMEP)*" of 28/09/1984 (entered into force on 28/01/1988; available at, <http://www.unece.org/env/lrtap/full%20text/1984.EMEP.e.pdf>), Article 7 (Settlement of Disputes) provides that "If a dispute arises between two or more Contracting Parties to the present Protocol as to its interpretation or application, they shall seek a solution by negotiation or by any other method of dispute settlement acceptable to the parties to the dispute". The Helsinki "*Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or Their Transboundary Fluxes by At Least 30 per cent*" of 08/07/1985 (entered into force on 02/09/1987; available at, <http://www.unece.org/env/lrtap/full%20text/1985.Sulphur.e.pdf>), Article 8 (Settlement of Disputes) provides that "If a dispute arises between two or more Parties as to the interpretation or application of the present Protocol, they shall seek a solution by negotiation or by any other method of dispute settlement acceptable to the parties to the dispute". Article 1, paragraph 3, refers to the Executive Body established in accordance with Article 10/1 of the 1979 Convention, and Article 4 (Reporting of annual emissions) requires each Party to provide annually to the Executive Body its levels of national annual sulphur emissions, and the basis upon which they have been calculated. In the same line, the Sofia "*Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes*" of 31/10/1988 (entered into force on 14/02/1991; available at, http://www.unece.org/env/lrtap/full%20text/1988.NOX.e.pdf), Article 12 provides identical provisions. Article 1, paragraph 3, refers to the Executive Body established in accordance with Article 10/1 of the 1979 Convention. Finally, the Geneva "*Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution concerning the Control of Emissions of Volatile Organic Compounds on Their Transboundary Fluxes*" (the VOC Protocol), of 18/11/1991 (entered into force on 29/09/1997; available at, <http://www.unece.org/env/lrtap/full%20text/1991.VOC.e.pdf>) Article 12 provides identical provisions with regard to dispute settlement.

35 Gillespie (n. 26) 55.

Protocol.[36] But the structure and functions of the Implementation Committee as well as procedures for its review of compliance were left to the decision of the first session of the Executive Body after the entry into force of the Protocol, (Article 7/3). In 1994 a text was adopted with respect to Structure and Functions of the Implementation Committee.[37] Also, both Article 9 of the "*Protocol on Heavy Metals*" of 24/06/1998 and Article 11 of the "*Protocol on Persistent Organic Pollutants*" of 24/06/1998 provide Implementation Committee.

Similarly, Article 15 (Review of Compliance) of the "*Protocol on Water and Health*"[38] of 17/06/1999 to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes provides for the following: "Multilateral arrangements of a *non-confrontational, non-judicial and consultative nature for reviewing compliance shall be established* by the Parties at their first meeting. These arrangements shall allow for appropriate public involvement". (Emphasis added). The objective of the compliance procedure is to facilitate, promote and aim to secure compliance with the obligations under the Protocol, with a view to preventing disputes. Following the entry into force of the Protocol on 04/08/2005, at the First Meeting of Parties, held in Geneva, on 17-19/01/2007, the Parties adopted the "Decision I/2 on Review of Compliance"[39] and elected the first Compliance Committee. Under Decision I/2, "Annex- Compliance Procedure" (para.1) clearly states that "the objective of this compliance procedure is to facilitate, promote and aim to secure compliance with the obligations, *with a view to preventing disputes*". Pursuant to (para.2) "*the compliance procedure shall be simple, facilitative, non-adversarial and cooperative in nature*, and its operation shall be guided by the principles of transparency, fairness, expedition and predictability". (Emphasis added). The Committee may examine compliance issues and make recommendations or take

36 Article 7, paragraph 1, of the 1994 Oslo Sulphur Protocol reads as follows: "An Implementation Committee is hereby established to review the implementation of the present Protocol and compliance by the Parties with their obligations. It shall report to the Parties at sessions of the Executive Body and may make such recommendations to them as it considers appropriate".

37 *Structure and Functions of the Implementation Committee as well as Procedures for its Review of Compliance*, EB.AIR/WG.5/CPR.13, para. 7(b), 1994.

38 The "*Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*", done in London, on 17/06/1999, and entered into force on 04/08/2005; available at, <http://www.unece.org/env/documents/2000/wat/mp.wat.2000.1.e.pdf> The 1999 London Protocol is the first international agreement of its kind adopted specifically to attain an adequate supply of safe drinking water and adequate sanitation for everyone, and effectively protect water used as a source of drinking water. Under Article 7 (Review and Assessment of Progress), the Parties are required to collect and evaluate data, and publish periodically the results of this collection and evaluation of data, and on that basis to review periodically the progress made in achieving the targets provided in the Protocol. The frequency of such publication, as well as the frequency of such reviews shall be established by the Meeting of the Parties. Furthermore, each Party is required to provide to the secretariat referred to in article 17, for circulation to the other Parties, a summary report of the data collected and evaluated and the assessment of the progress achieved. Pursuant to Article 16, the Meeting of the Parties shall keep under continuous review the implementation of this Protocol. Article 20 provides procedures for the settlement of disputes as regards to the interpretation or application of the Protocol.

39 *Report of the Meeting of the Parties to the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes on its First Meeting* (Geneva, 17-19 January 2007), ECE/MP.WH/2/Add.3; EUR/06/5069385/1/Add.3, 3 July 2007, "Decision I/2 – Review of Compliance"; available at, <http://www.unece.org/env/documents/2007/wat/wh/ece.mp.wh.2_add_3.e.pdf> But note that pursuant to (para. 36) of the "Compliance Procedure" provided by the Decision I/2, this compliance procedure shall be without prejudice to article 20 of the Protocol on the settlement of disputes.

measures if and as appropriate, (para.12). The Committee shall report on its activities at each ordinary meeting of the Parties and make such recommendations as it considers appropriate, (para.33). It is significant that in addition to "submissions" by the Parties (paras.13-14) or "referrals" by the joint secretariat (para.15), one or more members of the public may submit communications to the Committee concerning that Party's compliance with the Protocol, (paras.16-22). Note that the conditions required for such "communications" (para.18) and exceptions for such requirements (para.19) are parallel to the requirements for individual application under international human rights conventions. Furthermore, the Compliance Committee is also empowered to seek the services of experts and advisers, including representatives of NGOs or members of the public, as appropriate, (para.23/d). It is also noteworthy that the authors of submissions, referrals or communications are entitled to participate in the discussions of the Committee with respect to that submission, referral or communication, (para.30). In addition to measures indicated in (para.34), the Committee, taking into account the cause, type, degree and frequency of the non-compliance, may decide further measures, They include "(d) issue declarations of non-compliance; (e) give special publicity to cases of non-compliance; (f) suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Protocol; or (g) take such other non-confrontational, non-judicial and consultative measures as may be appropriate", (para.35/d-g). Finally attention should be drawn to the fact that the independence of the Committee, as well as a more liberal election process of the members of the Committee is also provided.[40]

Turning to the question of soft enforcement or implementation procedures, the significance and necessity of hard law cannot be entirely ignored particularly in cases of systematic breaches of obligations. As Francesco observed, "in these instances it would have little sense to exclude the operation of ordinary countermeasures under customary international law or under the Vienna Convention on the Law of Treaties. Soft law and soft remedies cannot be understood in such a way as to displace and curtail the operation of hard law".[41] Handl stated that "where basic constituent principles and 'hard' legal parameters are concerned, disputes should be amended both technically and politically to formal third-party decision-making in accordance with international law narrowly defined".[42]

40 Pursuant to (para. 36) of the "Compliance Procedure" provided by the Decision I/2, "the Compliance Committee shall consist of nine members, who shall serve in their personal capacity and objectively, in the best interests of the Protocol". (Para. 5) reads as follows: "The members shall be persons of high moral character and have recognized expertise in the fields to which the Protocol relates, including legal and/or technical expertise. They shall be elected by the Meeting of the Parties to the Protocol from among candidates nominated by the Parties, taking into consideration any proposal for candidates made by Signatories or by non-governmental organizations (NGOs) qualified or having an interest in the fields to which the Protocol relates."

41 Francioni, '*International Soft Law*' (n. 1) 178.

42 Günther Handl, '*Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio*', (1994) 5/2 Colo. J. Int'l Envtl. L. & Pol'y 305, 330.

Nevertheless, if the promising compliance regime model as provided by the "Protocol on Water and Health" of 17/06/1999 has been taken into account, the soft enforcement or implementation procedures of environmental law instruments appear to be an attractive option to be considered not only by States but also potential individual complainants.

3. Two Specific Environmental Declarations

In this context a special attention should be given to the 1972 Stockholm Declaration and the 1992 Rio Declaration.

i-) The 1972 Stockholm Declaration

The United Nations Conference on the Human Environment was held at Stockholm from 5 to 16 June 1972, which marked a turning point in the UN's role in the protection of the world environment. The "*Stockholm Declaration*"[43] ("Declaration of the United Nations Conference on the Human Environment"), adopted by the Conference on 16/06/1972 was designed to "inspire and guide the peoples of the world in the preservation and enhancement of the human environment". Stockholm Conference led to the establishment of the United Nations Environment Programme (UNEP).[44]

Note that in the UNGA Resolution 2894 (XXVII) of 15/12/1972 the General Assembly first reaffirmed the responsibility of the international community to take action to preserve and enhance the environment, and, in particular, the need for continuous international co-operation to this end (preamble), then took note "with satisfaction of the report of the United Nations Conference on Human Environment", (para.1).[45]

It may not be wrong to argue that the role had been played by the Universal Declaration on Human Rights (UDHR) of 10/12/1948 in the field of International Human Rights Law, the 1972 Stockholm Declaration assumed a similar function in the sphere of International Environmental Law.

This Declaration may be regarded as doing for the protection of the environment of the earth what the Universal Declaration of Human Rights of 1948 accomplished for the protection of human rights and fundamental freedoms.[46] After recalling

43 The "*Declaration of the United Nations Conference on the Human Environment*" ("Stockholm Declaration"), adopted on 16/06/1972, *in* Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/Rev.1, sec. 1, (1972); *reprinted in* 11 ILM 1416 (1972); also see, Barry E. Carter - Phillip R. Trimble, *International Law: Selected Documents*, (2001-2002 edition, Aspen Law and Business) 737-741.

44 Patricia Birnie, '*Environmental Protection and Development*', (1995) 20/1 Melb. U. L. Rev. 66, 80-84.

45 The UN General Assembly resolution 2994 (XXVII) on "*United Nations Conference on Human Environment*" was adopted on 15/12/1972 at its 2112th plenary meeting.

46 Shearer (n. 46) 365.

the arguments on the legal nature of the Universal Declaration of Human Rights of 10/12/1948, Sohn observed that "similarly, despite the statements by some of the conservative participants in the drafting of the Stockholm Conference that this document is not a binding legal instrument, it is quite likely that in the not too distant future a more enlightened view of the nature and stature of the Stockholm Declaration will be accepted. In the new ambiance of international relations thus established, this first step toward the establishment of international environmental law on a firm foundation might prove to be more decisive than originally anticipated. Having accepted the responsibility for the preservation and improvement of the human environment, the international community will find in the Stockholm Declaration a source of strength for later, more specific action".[47]

The authors who draw attention to the legal nature of the Declaration, and even express their doubts with regard the vague formulation of principles do nevertheless admit the value and, at least, potential effect of it. For example, in 1975, Falk argued: "There is not much reason to applaud the outcome at Stockholm, even though it came off better that could reasonably have been expected in view of the obstacles… Its value, if any, lay in providing a focus for attention, comment and criticism." The Declaration, "a non-binding document embodying idealistic sentiments which, although not expected to provide guidelines for governmental action, does nevertheless provide a framework for assessing reasonable behavior".[48] Twenty years later Birnie stated that "though formulated as a Declaration, a solemn for used in the UN to emphasize and enhance its importance (as, for example, in the Universal Declaration of Human Rights), and later endorsed by a Resolution of the General Assembly, "it had only status of the codes, namely that of a 'soft law', non-binding recommendation. In practice, however, it has proved influential".[49]

The influence of the 1972 Stockholm Declaration on the subsequent development of international environmental law is undeniable. As one commentator observed "one may say that what decides in practice the importance of one or another declaration is the influence on the further development of international and domestic law. From this point of view, without any doubt, the Stockholm Declaration became a turning point in the development of internal legislation concerning the environment adopted after 1972".[50] The Declaration provided foundations for the development of international environmental law. [51]

47 Louis B. Sohn, '*The Stockholm Declaration on the Human Environment*', (1973) 14/3 Harv. Int'l L. J. 423, 515.

48 Richard A. Falk, '*The Global Environment and International Law: Challenge and Response*', (1975) 23/3 Kan L. Rev. 385, 413-414.

49 Birnie, '*Environmental Protection and Development*' (n. 44) 84.

50 Janusz Symonides, '*The Human Right to a Clean, Balanced and Protected Environment*' (1992) 20/1 Int'l. J. Legal Info. 24, 25.

51 Shearer (n. 46) 369.

Although there were also views which question the customary law nature of the Stockholm Declaration[52], it is generally agreed that, at least some principles, in particular Principle 21, enshrined in the Stockholm Declaration acquired international customary law[53] character.[54] As Sohn observed soon after the adoption of the Declaration, "taking the document as a whole, one is nevertheless surprised that despite the generality of some provisions and their uncertain phrasing the general tone is one of a strong sense of dedication to the idea of trying to establish the basic rules of international environmental law. The development of the new notion that international law should no longer be purely an interstate system but should bring both individuals and international organizations into the picture, and the impact of the other modern idea that international law should have more social content and should become an instrument of distributive justice – have led to a new way of expressing the basic rules of international law."[55]

Although not legally binding or enforceable, the Stockholm Declaration has received broad-based recognition and acceptance in the international community as a result of the fundamental nature of the values expressed.[56] From a formal point of view, the 1972 Stockholm Declaration is only a non-binding resolution. However, many of its principles, particularly Principle 21, have been relied upon by governments to

52 Günther Handl, '*Human Rights and Protection of the Environment*' in A. Eide, C. Krause and A. Rosas (eds.) *Economic, Social and Cultural Rights* (second edition, Martinus Nijhoff, printed in the Netherlands, 2001) 303, 307 (Handl argued that "at the time of its adoption, Principle 1 –like much of the rest of the Stockholm Declaration on the Human Environment– was understood not to reflect customary law".); Shelton, '*What Happened in Rio to Human Rights?*' (1992) 3 Yearbook Int'l. Envtl. L. 75, 77 (Arguing that the General Assembly endorsed the Stockholm Declaration; thus far it has not proclaimed the existence of a right to environment.); Philip Alston, '*Conjuring up New Human Rights: A Proposal for Quality Control*' (1984) 78/3 AJIL 607, 612 ("The right to a clean environment was recognized for the first time in the framework of the United Nations in 1972… Although the General Assembly endorsed that Declaration in general terms, it has never specifically proclaimed the existence of a right to a clean environment, despite proposals that it do so".).

53 In the *North Sea Continental Shelf Cases* the ICJ held that customary international law requires "State practice" which should have been "both extensive and virtually uniform… and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved". See, North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands) [1969] ICJ Reports 43, para.74.

54 W. Paul Gormley, '*The Right to Safe and Decent Environment*', (1988) 28/1 Indian J. Int'l L. 1 ,13 (The author stated that "while not a formal treaty, the Stockholm Declaration at least had the tacit support of many State governments. It, therefore, be suggested that the principles contained in the Declaration constitute customary international law" at 13, and "the Stockholm Declaration constitutes customary international law" at 14 note 50.); Tinker, (n. 1) 802 (According to the author, "Principle 21 may now have achieved the status of customary international law".); Iveta Hodkova, '*Is There a Right to a Healthy Environment in the International Legal Order?*' (1991) 7/1 Conn. J. Int'l L. 65, 67; Melissa Thorme, '*Establishing Environment as a Human Right*' (1991) 19/2 Denv. J. Int'l L. & Pol'y 301, 314-315 (Thorme argued that in the process the Stockholm principles of environmental protection have become entrenched in municipal *opinio juris* and in customary international law through the general principles of law recognized by civilized nations and by the teachings of the most highly qualified publicists of various nations.); Mariea Clara Maffei, 'Evolving Trends in the International Protection of Species' (1993) 36 German YBIL 131, 150 (Referring Principle 21, the author stated that "this rule which is almost unanimously considered as customary international law is embodied in other conventions concluded even before the UNCHE".); Shearer (n. 46) 365 (According to the author, the Stockholm Declaration was essentially a manifesto, expressed in the form of an ethical code, intended to govern and influence future action and programmes, both at the national and international levels.); Aurelie Lopez, '*Criminal Liability for Environmental Damage Occurring in Times of Non-International Armed Conflict: Rights and Remedies*' (2007) 18/2 Fordham Envtl. L. Rev. 231, 256; Alexandre Kiss and Dinah Shelton, *Guide to International Environmental Law* (Martinus Nijhoff Publishers 2007) 36.

55 Sohn (n. 47) 513.

56 Tony Simpson and Vanessa Jackson, '*Human Rights and the Environment*' (1997) 14/4 Envtl. & Plan. L. J. 268, 271; also see, Shawkat Alam, 'The United Nations' Approach to Trade, the Environment and Sustainable Development' (2006) 12/3 ILSA J. Int'l & Comp. L. 607, 613.

justify their legal rights and duties. There is no doubt that the subsequent practice has been influenced by such provisions.[57]

Notwithstanding its non-binding character, the Stockholm Declaration is generally regarded as the foundation of modern international environmental law. Some of the principles laid down in the declaration are now "considered as part and parcel of general international law and as binding on governments, independent of their specific consent. In particular, Principle 21 has evolved into hard law".[58]

ii-) The 1992 Rio Declaration

Twenty years after the promulgation of the 1972 Stockholm Declaration the UNCED meeting held in Rio de Janeiro (Brazil) adopted the "*Rio Declaration on Environment and Development*" in June 1992.[59] It had the aim to clarify the rights and responsibilities of the States with regard to the environment.

It is true, there were some critical approaches as to the nature, significance and effect of the Rio Declaration, such as, "the Rio Conference did not usher in the 'New International Ecological Order' many had hoped for, nor was it probably a 'turning point in the history of civilization'…"[60], or "Rio did not produce enough binding new principles of international environmental law sufficient to protect the environment against known threats or secure its future" and "the necessary structural adjustments were not made at Rio – they were not even addressed"[61], or "the operative provisions in fact proceed to unravel the Stockholm Declaration, which it ironically was pretending to reaffirm"[62], or "the Rio Declaration, without any accompanying broad framework of action, improved very little on the Stockholm Declaration of 1972. Although linkage between the environment and development was recognized in the Rio Declaration and in Stockholm, little progress was made towards real integration of the environment and the development process".[63]

57 Dupuy, '*International Law of the Environment*' (n. 1) 422.

58 Marc Pallemaerts, '*International Environmental Law From Stockholm to Rio: Back to the Future*' in P. Sands (ed.) *Greening International Law* (The New Press 1994) 1, 2 (The author also added that "numerous principles and concepts which were first articulated in the Stockholm Declaration were subsequently incorporated not only in the preambles of international environmental treaties, but also in certain binding provisions, and even in the constitutions or other provisions of domestic law of various States", *id*.).

59 The "*Rio Declaration on Environment and Development*", the United Nations Conference on Environment and Development, meeting in Rio de Janeiro/Brazil, (A/CONF.151/5/Rev 1, 3–4 June 1992); *reproduced in*, 31 ILM 874 (1992).

60 Sand (n. 1) 227; David Freestone, '*The Road from Rio: International Environmental Law After the Earth Summit*', (1994) 6/2 J. Envtl. L. 193.

61 Geoffrey Palmer, '*The Earth Summit: What Went Wrong at Rio?*', (1992) 70/4 Wash. U. L. Q. 1005, 1008 (The author concluded that "Progress was, simply, insufficient, due to a general failure of political will. Rio produced too little, too late", *ibid* 1028.).

62 Pallemaerts (n. 58) 4.

63 Alam (n. 56) 620-621.

On the other hand, it seems, however, that a considerable number of scholars are in agreement that the 1992 Rio Declaration marks a significant milestone in the evolution of international law on the protection of the environment.[64] The Rio Conference may be seen as another incremental step in the evolution of international environmental law, adding further material to the growing body of legal norms in this field.[65] Some authors went even further to state that "history will record Rio as a pivot point, a time and a place where opportunity and awareness coalesced. The events of the summer of 1992 plainly were monumental; after Rio no world leader or educated citizen can avoid a share of responsibility for the fate of the world".[66] Maurice Strong, who was the Secretary-General of the 1992 Rio UN Conference, stated that the Stockholm Conference of 1972 first put the environment issue on the world agenda. Twenty years later, the Earth Summit in Rio de Janeiro "moved the environment issue into the center of economic policy and decision-making in virtually every sector of our economic life".[67] According to Kovar, "even if the Rio Declaration does not represent a bold advance, it is an important step forward, building on the foundations of the Stockholm Declaration".[68] Some authors argued that "the Rio Conference was a landmark world community event evincing a paradigmatic shift within the field of international law. The shift has resulted in the world community's acceptance of the position that Homo sapien-driven projects of economic development are to be evaluated in relation to their impact on mankind's natural environmental surroundings. Without doubt, the Rio Conference established new environmental ethics and a set of prescriptions… We accent the Declaration, because we view its twenty-seven principles as an assemblage of 'Grund-norms' (superior norms)".[69] The 1992 Rio Declaration, on the one hand, codified some existing international law, and on the other hand, attempted to develop some new law.[70]

64 Günther Handl '*Controlling Implementation'* (n. 42). But note that Handl, shortly before the adoption of the Rio Declaration, in his article published in 1991 noted the importance of "formal abandonment of the idea that the principle of individual state consent continues to represent a fundamental defining characteristic of the international legal system"; see, Handl, '*Environmental Security and Global Change*' (n. 1) 33. Referring to the quoted passage, Palmer commented that the Rio meeting did not establish institutions likely to be effective in producing a new approach to environmental problems. Rio did not elicit the one development that is essential to changing the condition of the global environment: (quoted from Handl's argument)". See, Palmer (n. 61) 1008.

65 Sand (n. 1) 211.

66 David H. Getches, '*The Challenge of Rio*', (1993) 4/1 Colo. J. Int'l Envtl. L. & Pol'y 1, 3 (The author also stated that the Rio Declaration may be viewed either as the greatest success or the greatest failure of Rio. It succeeded in garnering universal support, yet it failed to meet the expectations of many… Viewed positively, it is a notable announcement of the understanding of all countries that priorities should shift to environmentally and economically sustainable policies that can be maintained only through international collaboration", *ibid* 14.).

67 Strong (n. 16) 22.

68 Jeffrey D. Kovar, 'A Short Guide to the Rio Declaration', (1993) 4/1 Colo. J. Int'l Envtl. L. & Pol'y 140.

69 John Batt & David C. Short, '*The Jurisprudence of the 1992 Rio Declaration on Environment and Development: A Law, Science and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development*', (1993) 8/2 J. Nat. Resources & Envtl. L. 229, 230-231 (The authors concluded that the Rio Declaration demonstrates a clear-cut preference in favor of human dignity, ecological maintenance, and an equitable worldwide distribution of the eight values identified by those working within the law, science, and policy tradition", *ibid* 292. The mentioned eight values are affection, well-being, wealth, enlightenment, respect, skill, power and rectitude, *ibid* 249-291.).

70 Boyle, 'Reflections on Treaties and Soft Law' (n. 1) 904 (The author added that "it is not obvious that a treaty with the same provisions would carry greater weight or achieve its objectives any more successfully. On the contrary, it is quite possible that such a treaty would, seven years later, still have far from universal participation, whereas the Declaration secured immediate consensus support, with such authority as that implies", *id*.).

B-) Basic Principles and Standards of International Environmental Law

1. Common Good of Humankind and Future Generations

i-) The Notions of 'Common Heritage of Mankind' and of 'Present and Future Generations'

a) The Notion of 'Common Heritage of Mankind' in Soft-Law Instruments

With regard to the emergence of notion of 'common heritage of mankind'[71] (CHM) in the 20th century one may trace the concept as far back as the 1920s. However, as shown in my previous article[72], in the 1893 *Bering Sea Fur-Seals* arbitration case the notion of 'common interest of mankind' was explicitly used by the United States in its submissions before the arbitral tribunal.

The notion has been used particularly with regard to resources in common space areas, such as marine resources and ocean floor, outer space, the moon and Antarctica. It may be added that various international organizations and commentators have proposed that the "common heritage of mankind" regime extends or should extend to other resources such as the natural environmental resources, genetic resources, cultural heritage, and even seeds.[73]

71 Stephen Gorove, '*The Concept of 'Common Heritage of Mankind': A Political, Moral or Legal Innovation?*' (1972) 9/3 San Diego L. Rev. 390; Rudolph Preston Arnold, '*The Common Heritage of Mankind as a Legal Concept*' (1975) 9/1 The International Lawyer 153; Jon Van Dyke and Christopher Yuen, '*Common Heritage v. Freedom of the Seas: Which Governs the Seabed?*' (1982) 19/3 San Diego L. Rev 493; Rüdiger Wolfrum, '*The Principle of the Common Heritage of Mankind*' (1983) 43 ZaöRV 312 (Development of the CH principle, *ibid* 315-316; Content of the CH principle, 316-324.); L.F.E. Goldie, '*A Note on Some Diverse Meanings of 'the Common Heritage of Mankind"* (1983) 10/1 Syracuse J. Int'l L. & Com. 69; Bradley Larschan and Bonnie C. Brennan, '*The Common Heritage of Mankind Principle in International Law*' (1983) 21/2 Colum. J. Transnat'l L. 305; Alexandre Kiss, '*The Common Heritage of Mankind: Utopia or Reality?*' (1985) 40/3 International Journal 423; Christopher C. Joyner, '*The Common Heritage of Mankind*' (1986) 35 ICLQ 190. Alexander Charles Kiss, '*Conserving the Common Heritage of Mankind*', (1990) 59/4 Rev. Jur. U.P.R. 773; Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff Publishers, Published by Kluver Law International, 1998) (Especially see, under "Part II: The Application of the Common Heritage of Mankind in International Law. **5.** Outer Space and the Common Heritage of Mankind. **6.** The Law of the Sea and the Common Heritage of Mankind. **7.** Antarctica and the Common Heritage of Mankind. **8.** International Environmental Law and the Common Heritage of Mankind. **9.** International Human Rights Law and the Common Heritage of Mankind. **10.** The Legal Status of the Common Heritage of Mankind. Appraisal); Jennifer Frakes, '*The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?*' (2003) 21/2 Wisconsin Int'l L. J. 409; Chuanliang Wang - Yen-Chiang Chang, '*A New Interpretation of Common Heritage of Mankind in the Context of International Law of the Sea*' (2020) 191 Ocean. & Coast. Manag. 1.

72 M. Semih Gemalmaz, '*Introduction to International Environmental Law: From Initial Steps to Institution Building for the Conservation of Environment-Part 1*', (2021) 33/2 ERPL/REDP (120).

73 Baslar (n. 71) 108-109, 206; Petra Drankier, Alex G. Oude Elfring, Bert Visser and Tamara Takacs, '*Marine Genetic Resources in Areas beyond National Jurisdiction: Access and Benefit-Sharing*' (2012) 27/2 Int. J. Mar. Coast. L. 375; Konrad Jan Marciniak, '*Chapter 16. Marine Genetic Resources: Do They Form the Part of the Common Heritage of Mankind Principle?*' in *Natural Resources and the Law of the Sea: Exploration, Allocation, Exploitation of Natural Resources in Areas under National Jurisdiction and Beyond* (Arbitration & Practice 2017) 373 (Especially see, *ibid* 384-402, The interpretation of Common Heritage Principle under the Vienna Convention on the Law of Treaties" and under "UNCLOS".); Lee & Kim, '*Chapter 2. Applying the Principle of the Common Heritage of Mankind: An East Asian Perspective*' in Keyuan Zou (ed.) *Global Commons and the Law of Sea* (Koninklijke Brill NV, 2018) 15, 16; Karen N. Scott, '*Chapter 16. Protecting the Commons in the Polar South: Progress and Prospects for Marine Protected Areas in the Antarctic*' in Keyuan Zou (ed.) *Global Commons and the Law of Sea* (Koninklijke Brill NV, 2018) 326 (The concept of global commons as applied to the oceans has undergone a significant shift over the last fifty years: from the notion of open access and absence of exclusive sovereign control *(res communis*) to one based on principles of shared management

On the other hand it should be noted that relevant literature also discloses a critical approach to the concept of CHM.[74]

Sea-bed and ocean floor:

An Argentine jurist Jose Leon Suarez who was entrusted with the drafting of a report[75] on international rules concerning the exploitation of marine resources by the Experts Committee for the Progressive Codification of International Law, in his report presented in 1927 proposed that the living resources of the sea, and whales in particular, should be considered a *heritage of mankind*. According to Mr. Suarez there was a need to draft a new kind of treaty which would aim at the prevention of the destruction of living resources rather than merely settling disputes among fishermen.[76]

The need for an international law governing the deep seabed began in the late 1960s when the mining of valuable minerals found on the seabed floor became possible.[77] Arvid Pardo, Malta's former Ambassador to the United Nations (UN) and hailed as the forefather of the common heritage of mankind principle in the law of the sea.[78]

The term "CHM" was used by Mr. Arvid Pardo, Malta's Ambassador to the United Nations, in a memorandum supplementing his *note verbale* of 17/08/1967, with regard to preservation of the deep seabed for peaceful development in the

---

and responsibility, and in the case of the deep seabed and its mineral resources, a form of global commons distribution via the concept the common heritage of mankind, *ibid* 326.); Eleftheria Asimakopoulou and Essam Yassin Mohammad, '*Marine genetic resources in areas beyond national jurisdiction: a 'common heritage of mankind'* (February 2019) IIED (International Institute for Environment and Development) Briefing <http://pubs.iied.org/17498IIED>; Chuanliang Wang, '*On the Legal Status of Marine Genetic Resources in Areas Beyond National Jurisdiction*' (2021) 13/14: 7993 Sustainability 1 (The principle of CHM has its institutional foundation of the law of the sea and its legal connotation has constantly evolved in practices of the law of the sea. Consequently, the principle has the potential to become the applicable principle of the international legally binding instrument under UNCLOS on the Conservation and Sustainable Use of Marine Biodiversity of Areas beyond National Jurisdiction, *ibid* 1-2.); further see, Hua Zhang, '*Chapter 14. The Obligation of Due Diligence in Regulating the Marine Genetic Resources in Areas beyond National Jurisdiction*' in Keyuan Zou (ed.) *Global Commons and the Law of Sea (*Koninklijke Brill NV, 2018).

74 For instance, see, Werner Scholtz, '*Common Heritage: Saving the Environment for Humankind or Exploiting Resources in the Name of Eco-Imperialism?*' (2008) 41/2 Comparative and International Law Journal of Southern Africa (Comp. Int'l L. J. S. Africa) 27 (The author who critically examines the notion of CHM, argues that the application of CHM principle may benefit the rich to the detriment of the people of developing countries.).

75 Report of M. Jose Suarez on the "*Exploitation of the Products of the Sea*" Report to the Council of the League of Nations on the Questions Which Appear Ripe for Codification, League of L. Larry Leonard, '*Recent Negotiations toward the International Regulation of Whaling*' (1941) 35/1 AJIL 90, 90-91; with regard to whaling further see, Gemalmaz (n. 72).

76 Tullio Scovazzi, *The Evolution of International Law of the Sea: New Issues, New Challenges* (*Collected Courses of the Hague Academy of International Law* Vol. 286, Martinus Nijhoff Publishers, 2000) 90; further see, H. A. Smith, *The Law and the Custom of the Sea* (Stevens & Sons Limited, 1950) 63 (The author argued that: "If the view suggested is correct, that all maritime territory really consists of land submerged under water, it follows that the land lying at the bottom of the high seas is a 'no man's land', what the Roman law calls a *res nullius*, rather than *res communis*, something owned in common by all mankind.").

77 Lea Brilmayer & Natalie Klein, '*Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*', (2001) 33/3 N.Y.U. J. Int'l. L. & Pol. 703, 726; Rosanna Sattler, '*Transporting a Legal System for Property Rights: From the Earth to the Stars*', (2005) 6/1 Chi. J. Int'l. L. 23, 34-37.

78 Goldie (n. 71) 86. Harminderpal Singh Rana, '*Note, the 'Common Heritage of Mankind' & the Final Frontier: A Revaluation of Values Constituting the International Legal Regime for Outer Space Activities*', (1994) 26/1 Rutgers L.J. 225, 235; Baslar (n. 71) 31-37. Lee & Kim (n. 73) 16-17.

'interests of mankind'.[79] Ambassador Pardo stated: "The objective of the Maltese proposal was to replace the principle of freedom of the high seas by the principle of common heritage of mankind in order to preserve the greater part of ocean space as a commons accessible to the international community. The commons of the high seas, however, would be no longer open to the whims of the users and exploiters; it would be internationally administered. International administration of the commons and management of its resources for the common good distinguished the principle of common heritage from the existing traditional principle of the high seas as res communis."[80] But as shown below the notion of "CHM" was in fact first used by Argentine jurist Prof. Cocca in June 1967 in the UN Committee on Outer Space.[81] Ambassador Pardo understood the need for an international common body to exploit and distribute the resources.[82] Developing nations embrace this approach-referred to as the "common property" approach.[83]

Special attention had been given at the Law of the Sea Conference to the concept of "CHM" in order to turn this statement of political intent and moral obligation into a juridical obligation with respect to the deep seabed.[84] Much of this debate[85] lies in the contrary perspectives of developed and developing states.[86] Developed states veer towards the notion that the CHM allows the "common use of designated areas, while upholding traditional concepts such as freedom of the high seas and freedom of exploration." On the contrary, developing countries view the principle of CHM as having three goals: **(i)** the prevention of monopolization in these areas by developed nations at the expense of nations that lack technology or financing; **(ii)** the direct participation of developing nations in the international management of resource extraction, and **(iii)** favorable distribution of economic benefits to developing

79 The statement of Ambassador Arvid Pardo of Malta: '*Declaration and Treaty Concerning the Reservation Exclusively for Peaceful Purposes of the Seabed and of the Ocean Floor, Underlying the Seas Beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interests of Mankind*' UN Doc. A/AC.105/C.2/SR.75 (17 August 1967); also see, Gorove, '*Common Heritage of Mankind*' (n. 71) 390-391; Carol R. Buxton, '*Property in Outer Space: The Common Heritage of Mankind Principle vs. the 'First in Time, First in Right' Rule of Property Law*' (2004) 69 J. Air L. & Com. 689, 694.

80 Rana (n. 78) 228. Buxton (n. 79) 694.

81 Doc. A/AC.105/C.2/SR 75, (19/06/1967), cited in, Aldo Armando Cocca, '*The Advances in International Law through the Law of Outer Space'* (1981) 9/1-2 J. Space L. 13.

82 Brilmayer & Klein (n. 77).

83 Buxton (n. 79) 694.

84 René-Jean Dupuy, *The Law of the Sea: Current Problems* (Dobbs Ferry, Oceana Publications Inc. - Leiden, A. W. Sijthoff, 1974) 39; further see, Barnaby J. Feder, 'A Legal Regime for the Arctic' (1978) 6/3 Ecology L. Q. 785, 800.

85 Sattler (n. 77) 35-37.

86 Frakes (n. 21) (The author argued that the CHM principle is too indeterminate to be classified as customary law due to theoretical inconsistency in its interpretation. Consequently, the standard only binds those states that have signed the relevant treaties, *ibid* 410-411.); *Cf*., Wolfrum (n 71) 333 (To accept the common heritage principle to be part of international customary law the -following preconditions have to be met: The content of the principle must be distinct enough so as to enable it to be part of the general corpus of international law, and respective State practice accompanied by evidence of opinio juris must exist. Custom must finally be so widespread that it can be considered as having been generally accepted.).

nations.[87] Saying differently, technologically advanced, sea-faring nations felt that the resources should become the property of the nation that extracted them.[88] Smaller nations without the capabilities or funds to launch expeditions felt that the profits and benefits of the resources should be shared among all nations, since the high seas are international territory belonging equally to all nations.[89]

Only four months after the historic statement of Ambassador Pardo, the UN General Assembly, on 18/12/1967, adopted a resolution 2340 (XXII) on "*The question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, and the use of their resources in the interests of mankind*".[90] The General Assembly after recognizing the common interest of mankind in the sea-bed and ocean floor (Preamble, para.3), and that the exploration and use of the said area, as well as the subsoil thereof, should be conducted, among others, "for the benefit of all mankind" (para.4), emphasized the importance of preserving the said area "from actions and uses which might be detrimental to the common interests of mankind" (para.6). The resolution 2340 (XXII) of 1967 proves that Ambassador Pardo's terminological and/or conceptual suggestion has immediately been well-received by the General Assembly.[91]

A year later, the General Assembly in its resolution 2467 A (XXIII) on 21/12/1968 under the same title[92] declared, *inter alia*, that "it is in the interest of mankind as a whole to favor the exploration and use of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, for peaceful purposes", (Preamble, para.5), and also expressed its conviction that "such exploitation should be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, taking into account the special interests and needs of the developing countries", (Preamble, para7). In (Operative para.1) of the same resolution, the General Assembly established a Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, composed of 42 States; and in (Operative para.2, a) it instructed the said Committee to study the elaboration of the legal principles and norms in this field which would ensure that the

87 Rana (n. 78) 230.

88 Sattler (n. 77) 34-35.

89 Buxton (n. 79) 694. Sarah Coffey, '*Establishing a Legal Framework for Property Rights to Natural Resources in Outer Space*', (2009) 41/1 Case Western Reserve Journal of International Law (Case W. Res. J. Int'l. L.) 119, 129.

90 The UN General Assembly resolution 2340 (XXII) on "*Examination of the question of the reservation exclusively for pecaful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind*" was adopted on 18/12/1967 at its 1639th plenary meeting. All UNGA resolutions are accessible at, <http://daccess-dds-ny.un.org/doc/RESOLUTION>.

91 Indeed, the resolutions adopted by the General Assembly in 1966 (for example, resolution 2172 (XXI) on "*Resources of the sea*", or resolution 2173 (XXI) on "*Development of natural resources*", both adopted on 06/12/1966 at its 1485th plenary meeting) did not refer to the concept of 'common interest of mankind'.

92 The UN General Assembly resolution 2467 A (XXIII) (entitled same as the former resolution 2340 (XXII) of 1967) was adopted on 21/12/1968 at its 1752nd plenary meeting.

exploitation of the said resources "for the benefit of mankind", and that the regime to be established should "meet the interests of humanity as a whole".[93]

Under the same title of resolutions which subsequently resulted in the adoption of the 1970 "Declaration of Principles on the Sea-Bed" noted below, the UN General Assembly in its resolution 2574 A (XXIV) of 15/12/1969, again affirmed that the said area should be used exclusively for peaceful purposes and its resources should be utilized "for the benefit of all mankind" (Preamble, para.6), and declared that there was an urgent necessity of preserving this area from encroachment, or appropriation by any State, which could be "inconsistent with the common interest of mankind" (Preamble, para.7).[94] Although issued in a different context, the resolution 2602F (XXIV) of 16/12/1969 on "*Question of general and complete disarmament*"[95] gave recognition to "the common interest of mankind in the reservation of the sea-bed and the ocean floor exclusively for peaceful purposes" (Preamble, para.1).

Those initiations have eventually been resulted in the promulgation of the "*Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction*" of 17/12/1970 adopted by the UN General Assembly resolution 2749 (XXV).[96] Paragraph 1 of the 1970 Declaration provides that "the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the area, are the *common heritage of mankind*..." (Emphasis added). Thus, the former usage of the phrase 'common interest or benefit of mankind as a whole' finally turned into an explicit formulation of 'CHM'.[97]

93 It is significant to note that in Part B of the resolution 2467 B (XXIII) of 21/12/1968, the General Assembly specifically focused on the threat to the marine environment presented by pollution and other hazardous and harmful effects which might result from exploration and exploitation of the said areas, and stressed the need to promote effective measures of prevention and control of such pollution and to allay the serious damage which might be caused to the marine environment, and, in particular, to the living marine resources which constitute one of the mankind's most valuable food resources, (Preamble, paras.2 and 3).

94 The UN General Assembly resolution 2574 A (XXIV) (entitled same as the former resolution 2467 A (XXIII) of 1968) was adopted on 15/12/1969 at its 1833rd plenary meeting. It may be added that Preambular paras.1 and 4) of Part D of the resolution 2574 also reaffirmed both the 1967 and 1968 resolutions explained above again referring the same concept in question.

95 The UN General Assembly resolution 2602 F (XXIV) on "*Question of general and complete disarmament*" was adopted on 16/12/1969 at its 1836th plenary meeting.

96 The "*Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction*" was adopted by the UN General Assembly Resolution 2749 (XXV) of 17/12/1970. This Declaration was adopted by a vote of 108 in favor to none against, with 14 abstentions. The text of the Declaration *reproduced in*, Brownlie, *Basic Documents in International Law* (1995) 124-128. *Cf.*, Article 136 of the UNCLOS of 10/12/1982.

97 Gorove, *'Common Heritage of Mankind'* (n. 71) 399-400. (The author, referring and noting discussions at the UN in the drafting process of the 1970 "Declaration of Principles on the Sea-Bed", stated that the idea that the seabed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction are the 'common heritage' of mankind was widely supported but not acceptable to all. A number of representatives felt that the concept of common heritage was neither realistic nor practical.) Wang & Chang (n. 71) (The authors argued that after Arvid Pardo recommended that the seabed and subsoil beyond national jurisdiction should be regarded as CHM, put forward the proposal of an international seabed system, the principle of CHM was perceived as the foundation of a specific marine legal regime. Later, the principle of CHM was stipulated, both in the General Assembly Resolution 2749 (XXV) and UNCLOS. However, there is no clear definition of its legal connotations.).

The notion of 'CHM' has subsequently been appeared in the first sentence of Article 29 of the "*Charter of Economic Rights and Duties of States*"[98] (CERDS) of 12/12/1974, in which the above quoted provision provided in (para.1) of the 'Declaration of Principles on the Sea-Bed' of 17/12/1970 has identically been repeated. Chapter III of the 1974 CERDS emphasizes the common responsibilities of all States towards the international community. Consequently, the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the area are to be regarded as the common heritage of mankind, which requires all States to ensure that "the exploration of the area and exploitation of its resources are carried out exclusively for peaceful purposes and that the benefits derived therefrom are shared equitably by all States."[99]

The aforementioned two resolutions of the UN General Assembly, namely the 'Declaration of Principles on the Sea-Bed' of 17/12/1970 and the 'Charter of Economic Rights and Duties' of 12/12/1974 have been declared to create customary international law.[100]

In the context of the international law of the sea, it is argued that the legal connotations of CHM are as follows: the subject of CHM is the aggregation of all States. Marine resources, which are seen as CHM, have the characteristics of extraterritoriality, sharing and legality. There are four main elements of CHM based on content elements considered: (i) No State shall claim or exercise sovereignty or sovereign rights over marine resources, which are seen as CHM, nor shall any State or natural or juridical person appropriate any part thereof. (ii) It must be used for the benefit of all mankind, taking into account the interests and needs of developing States in particular. (iii) It must be used exclusively for peaceful purposes. (iv) Take into account the protection of the marine environment and the sustainable use of marine resources. With the modification and refinement of the Area system, the connotations of CHM have been evolving.[101]

Outer space and moon:

Apart from resolutions concerning sea-bed and ocean floor, and even before the adoption of such resolutions, the notion 'common interest of mankind' has been incorporated into the resolutions dealt with the use of outer space.[102]

98 The "*Charter of Economic Rights and Duties of States*" (CERDS) was adopted by the UN General Assembly resolution 3281 (XXIX) on 12/12/1974; *reproduced in*, 14 ILM 251 (1975); also see, Ian Brownlie (ed.), *Basic Documents in International Law* (fourth edition, Clarendon Press, 1995) 240-254; Charles Chatterjee - David R. Davies and D.G. Cracknell, *Public International Law* (Old Bailey Press, 1996) 276-289. On the 1974 CERDS, see, Chatterjee (n.3).

99 P. N. Agarwala *'The New International Economic Order: An Overview'* (Pergamon 2015) 188.

100 Goldie (n.71) 74.

101 Wang & Chang (n. 71).

102 Ernst Fasan, '*The Meaning of the Term 'Mankind' in Space Legal Language*' (1974) 2/2 J. Space L. 125, 126; Leslie I. Tennen, '*Outer Space: A Preserve for All Humankind'* (1979-80) 2/1 Hous. J. Int'l L. 145. Cocca (n. 81); Goedhuis, '*Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law*' (1981) 19/2 Colum. J.

Indeed, the United Nations General Assembly in its resolution 1348 (XIII) on "*Question of the peaceful use of outer space*"[103], adopted on 13/12/1958, started its words by recognizing the "*common interest of mankind* in outer space" which should be used for peaceful purposes only, (Preamble, para.1), and stressed that the exploration and exploitation of outer space should be carried out for the benefit of mankind, (para.4). Thus the resolution 1348 (XIII) recognized the fact that the space contains innumerable resources that can be used to improve the human condition.[104] The General Assembly resolution of 1472 (XIV) on "*International co-operation in the peaceful uses of outer space*"[105] adopted on 12/12/1959 went further and recognized what it called the "common interest of mankind *as a whole*" in furthering the peaceful uses of outer space, (Preamble, para.1). In the same resolution the General Assembly also expressed the view that "the exploration and use of outer space should be only for the *betterment of mankind* and to the benefit of States irrespective of the stage of their economic or scientific development", (Preamble, para.2). (Emphasis added). The UN General Assembly resolution 1721 A (XVI) of 20/12/1961[106] under same heading, not only recognized the common interest of mankind in the peaceful uses of outer space, but also stated that space exploration and use should only be for the betterment of mankind, (Preamble paras.1 and 2), and prohibited national appropriation in outer space (Operative para.1/b). The General Assembly resolution 1884 (XVIII) adopted on 17/10/1963[107] referred to the GA resolution 1721 A (XVI) of 1961 and repeated the same phraseology, i.e. exploration and use of outer space should only be for the betterment of mankind, (Preamble para.1).[108] The General Assembly resolution 1884 (XVIII) further welcomes the expressions by the USSR and the USA of their intention "not to station in outer space any objects carrying nuclear weapons or other kinds of weapons of mass destruction", (para.1). The latter call of the General Assembly was

Transnat'l L. 213; Eric Husby, '*Sovereignty and Property Rights in Outer Space*' (1994) 3 J. Int'l. L. & Prac. 359; Buxton (n. 79); Ram Jakhu, ' *Legal Issues Relating to the Global Public Interest in Outer Space*' (2006) 32/1 J. Space L. 31, 34; Lynn M. Fountain, '*Creating Momentum in Space: Ending the Paralysis Produced by the 'Common Heritage of Mankind' Concept*' (2003) 35 Conn. L. Rev. 1753; Joanne Irene Gabrynowicz, '*Space Law: Its Cold War Origins and Challenges in the Era of Globalization*' (2004) 37 Suffolk U. L. Rev. 1041 (*Id* 1041-1047, the author discusses the Cold War origins of Space Law in the context of International Law.); Sattler (n. 77) 23-44; Jijo George Cherian & Job Abraham, '*Concept of Private Property in Space: An Analysis*' (2007) 2/4 J. Int'l. Com. L. & Tech. 211; Adam G. Quinn, '*The New Age of Space Law: The Outer Space Treaty and the Weaponization of Space*' (2008) 17/2 Minn. J. Int'l. L. 475; Coffey (n. 89); Francis Lyall and Paul B. Larsen, *Space Law: A Treatise* (Ashgate, 2009)193-197; Steven Freeland, '*For Better or for Worse? The Use of 'Soft Law' within the International Legal Regulation of Outer Space*' (2011) 36 Annals of Air and Space Law (Ann. Air & Space L.) 409; Steven Freeland, '*The Limits of Law: Challenges to the Global Governance of Space Activities*' (2020) 153/1 Journal & Proceedings of the Royal Society of New South Wales, (J. & Procee. R. S. New South Wales) 70-82.

103 The UN General Assembly resolution 1348 (XIII) on "*Question of the peaceful use of outer space*" was adopted on 13/12/1958 at its 792nd plenary meeting.

104 Tennen (n. 102) 146.

105 The UN General Assembly resolution 1472 (XIV) on "*International co-operation in the peaceful uses of outer space*" was adopted on 12/12/1959 at its 856th plenary meeting.

106 The UN General Assembly resolution 1721 A (XVI) on "*International co-operation in the peaceful uses of outer space*" was adopted on 20/12/1961 at its 1085th plenary meeting.

107 The UN General Assembly resolution 1884 (XVIII) on "*Question of general and complete disarmament*" was adopted on 17/10/1963 at its 1244th meeting.

108 Also see, Fasan (n. 102) 126.

subsequently transformed into a treaty obligation, i.e., into Article IV, paragraph 1, of the "*Outer Space Treaty*"[109] of 27/01/1967.[110]

The following step was the adoption of the "*Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*"[111] of 13/12/1963 by the General Assembly resolution 1962 (XVIII). Preambular (para.2) of the 1963 'Declaration of Legal Principles' recognized "*the common interest of all mankind* in the progress of the exploration and use of outer space for peaceful purposes", Preambular (para.3) emphasized that the exploration and use of outer space should be carried on for the betterment of mankind and for the benefit of States irrespective of their degree of economic or scientific development. Furthermore, while (Operative para.1) of the 1963 Declaration provided that the exploration and use of outer space should be carried on for the benefit and in the interests of all mankind, (Operative para.9) declared that astronauts shall be regarded by the States as "envoys of mankind".[112] As it will be shown below also the aforementioned principles and standards would then be inserted into the 1967 'Outer Space Treaty'.[113] Article I of the Outer Space Treaty provides that, "the exploration and use of outer space… shall be the *province of all mankind*". (emphasis added). It may be added that in the treaties regulating Outer Space, many of the goals as well as some basic principles are borrowed from the Antarctic System and from various treaties governing the high seas.[114]

Thus even before the adoption of the 1967 Outer Space Treaty it was realized that by denying the legality of such (sovereignty) claims the interests of the world community as a whole would be best served.[115] However it has to be underlined that the "common heritage" notion is still a subject of different views.[116]

109 The "*Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*" was adopted by General Assembly resolution 2222 (XXI), (Annex), on 19/12/1966, opened for signature on 27/01/1967, and entered into force on 10/10/1967.

110 Also see, Manfred Lachs, *The Law of Outer Space: An Experience in Contemporary Law-Making* (Sijthoff, 1972) 109.

111 The General Assembly resolution 1962 (XVIII) on "*Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*" was adopted on 13/12/1963 at its 1280th plenary meeting.

112 C. W. Jenks, *The Common Law of Mankind* (Frederick A. Praeger 1958) 246-247 argued that "presumably an 'envoy of mankind' can act as such only on behalf of mankind; he cannot therefore, in his capacity as an 'envoy of mankind', exercise the public authority of a particular State on its behalf, by any symbolical taking of possession as an assertion of a claim of sovereignty (in any case prohibited elsewhere in the (1963) Declaration", *cited in*, Fasan (n. 102) 128. Fasan, in 127 also refers to Zhukov, *Space Law* (International Relations Publishing House 1966) 39, who argues that the scientific exploration of outer space shall serve toward a better standard for all mankind; outer space is deemed the domain of the whole mankind.

113 The "*Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*", Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

114 Buxton (n. 79) 694; Quinn (n. 102) 483-484.

115 Goedhuis (n. 102) 214; Lachs (n 110) 42-43. Jakhu (n 102) 44.

116 The relevant argumentation may be summarized as follows: **(i)** Due to the differing interpretations of the Outer Space Treaty, the "common heritage" notion has been interpreted in two different ways. In view of the non-space actors, the language is typically interpreted to mean that outer space, all its resources, and any benefits derived there from should be equitably distributed. In view of the space actors, the phrase merely speaks to the optimism inherent in space exploration and places no limitations on them whatsoever. See, Husby (n. 102) 364; Fountain (n. 102) 1762 (The author argued that the principles articulated in the UN Space Treaties mean that there can be no private property in space.); Quinn (n. 102) 480. **(ii)** Furthermore, a similar disagreement arises with the Outer Space Treaty's non-appropriation clause (Article II).

In the subsequent resolutions on the same subject adopted in the late 1960s the General Assembly reaffirmed the common interest of mankind in furthering the exploration and use of outer space for peaceful purposes.[117] On the other hand, the General Assembly resolution 2130 (XX) on "*International co-operation in the peaceful uses of outer space*"[118] adopted on 21/12/1965 endorses the recommendations contained in the reports of the Committee on the Peaceful Uses of Outer Space concerning, *inter alia*, international sounding rocket launching facilities, potentially harmful effects of space experiments, (Section II, para.1).[119]

Consequently, before the 'Stockholm Declaration' was adopted in 1972, the necessity to combat against potentially harmful interference of space activities, the area of which is called the "common interest of mankind as a whole" was in fact recognized by the UN General Assembly.

It has already been noted that the term "CHM" was used by Ambassador Pardo, Malta's Ambassador to the United Nations, in a memorandum supplementing his *note verbale* of 17/08/1967, with regard to preservation of the deep seabed for peaceful development in the 'interests of mankind'. However, the notion of "CHM" had previously been introduced by Prof. Cocca in June 1967 in the UN Committee on Outer Space, i.e. not in the Seabed Committee.[120]

While the non-space actors, again, argue that outer space resources cannot be lawfully appropriated because they belong to all mankind. This interpretation acts as a virtual bar to mining outer space because one would need the permission of all mankind to proceed. Space actors argue that the non-appropriation clause refers to the permanent appropriation of celestial bodies by sovereign nations, not the consumption of resources by private actors. Under the latter understanding, private space actors would be allowed to mine space minerals. See, Fountain (n. 102) 1762-1763; Quinn (n. 102) 481. **(iii)** The use of non-binding norms has become increasingly prevalent in many areas of international law. The difficulty of formulating and enacting binding multilateral treaties, the diversity of States' interests and the increasing importance of private actors on the international level have contributed to this phenomenon. The term "soft law" is often used to describe such instruments, even though this is sometimes criticized as confusing and inappropriate. As regards the international regulation of outer space, non-binding norms have played an important role from the very beginning of space activities, augmenting a series of United Nations Treaties that codify the fundamental principles that apply to the exploration and use of outer space. This article analyses the function of soft law in the international legal system in general and for the development of international space law in particular. The legal status and effect of soft law instruments varies in accordance with the circumstances, and this adds to the complexity in assessing the precise value of such instruments. In this regard, this article offers some cautionary comments as to how they should be assessed in the realm of space activities, concluding that, even though soft law instruments play a useful role, they should not be regarded as something they are not i.e., legally binding norms. Instead, the finalization of additional hard law multilateral treaties, negotiated in the spirit of cooperation, will be the most effective legal means by which to maintain the peaceful exploration and use outer space in the future. See, Freeland, '*For Better or for Worse?'* (n. 102).

117 For example, see, the UN General Assembly resolution 2453 B (XXIII) on "*International co-operation in the peaceful uses of outer space*" was adopted on 20/12/1968, at its 1750th plenary meeting, (Preamble, para.4). In the same line, see, the UN General Assembly resolution 2601 A (XXIV) (under the same heading), adopted on 16/12/1969 at its 1836th plenary meeting, (Preamble, para.3).

118 The UN General Assembly resolution 2130 (XX) on "*International co-operation in the peaceful uses of outer space*" was adopted on 21/12/1965 at its 1408th plenary meeting. In Preamble (para.1) of the resolution 2130 (XX), the General Assembly referred to its resolutions 1962 (XVIII) and 1963 (XVIII), both adopted unanimously on 13/12/1963.

119 Cocca (n. 81) 20.

120 Doc. A/AC.105/C.2/SR 75, (19/06/1967), *cited in*, Cocca (n. 81) 15 (The author added that he "later proposed – in May 1970 – the 'Draft Agreement on the principles governing the activities of States in the use of natural resources of the moon and other celestial bodies' (UN Doc. A/AC.105/C.2/L.71 and Corr. 1 (1970), and UN Doc. A/AC.105/85, July 3, 1970, Annex II, at 1). Article 1 of this Draft agreement provides that 'The natural resources of the Moon and other Celestial Bodies shall be the common heritage of ALL MANKİND'. This is the first international text where the principle appeared. It was later examined in the Seabed Committee and towards the end of 1970 a UNGA resolution was adopted where reference was made to the concept of common heritage which was bore in 1954 during the Vth Congress of the International Astronautical Federation, Innsbruck, and applied to the law of outer space", *ibid*); also see, Jakhu (n. 102) 193.

Cocca, who introduced the notion of '*res communis humanitatis*' in relation to the rights of mankind argues that "the moon and other celestial bodies are, by virtue of the mentioned treaty the subsequent Outer Space Treaty (1967), a *res communis humanitatis*, which is a legal condition especially elaborated by law for this new field of human activity, and which is derived from the community of interests and benefits recognized in favor of mankind in outer space and celestial bodies".[121] The same author in his 1981 article argues with regard to the notion of *res communis* derived from Roman law that "from the moment that outer space and celestial bodies are subject to a *jus humanitatis*, it is proper to speak of a *res communis humanitatis*. The latin term 'humanitatis' is ambivalent means of and for. We are therefore referring to things – in the legal sense – belonging to and for Humankind".[122] Grove argues that "it has been suggested that the term '*res communis omnium*' would imply for every individual, and not just for every nation, the right to have an active part in and to be co-apropiator in the enjoyment of the thing under consideration. On the other hand, the phrase '*res communis humanitatis*' which bears close resemblance to the concept of 'common heritage of mankind' has been said better to express the idea that the right is limited to states".[123]

Although it is frequently argued that in The Outer Space Treaty, 1967 the concept of *res communis* was accepted to serve as a defence against sovereign appropriation of property[124], it is also argued that, "a *laissez-faire* philosophy in space does not exist for either private or public activities. Rather, the *corpus juris spatialis* contains provisions for, and prohibition against, certain uses of space".[125]

The space treaties were concluded during the Cold War and reflect Cold War fears and ambitions, with significantly less emphasis on modern day concerns about space resources, commercialization, and production.[126]

121 *Proc. 6*[th] *Colloquium on the Law of Outer Space*, 1963, 3-4, *quoted in*, Fasan (n. 102) 129 (According to Fasan, the legal notion of 'mankind' has a special meaning which indicates that mankind is just undergoing the painful process of becoming a new legal subject of international law, *ibid* 131).

122 Cocca (n. 81) 14.

123 Gorove, '*Common Heritage of Mankind*' (n. 71) 393-394. Gorove refers to: Enrico Scifoni, '*The Principle 'Res Communis Omnium' and the Peaceful Use of Space and Celestial Bodies*' (1970) Proc. 12 Coll. on Law of Outer Space 50, 51-52.

124 Cherian & Abraham (n. 102) 216 (According to the authors the common heritage of mankind principle, nations manage, rather than own certain designated international zones. No national sovereignty over these spaces exists, and international law (i.e., treaties, international custom) governs. The common heritage of mankind principle deals with international management of resources within a territory, rather than the territory itself. Developed nations interpret the principle as meaning that "anyone can exploit these natural resources so long as no single nation claims exclusive jurisdiction" over the area from which they are recovered. Simply stated, every nation enjoys access and each nation must make the most of that access. The heritage lies in the access to the resources, not the technology or funding to exploit them. The Common Heritage concept, formulated during the cold war era, though well intentioned, does not serve any useful purpose in the current scenario – the free market economy. The freedom granted to the states for exploration and use cannot be mired. The Common Heritage Concept binds nations and firms to make the most of what their access grants them. Thus, if a nation or firm is unable to properly exploit a resource found in international territories, then that resource should be left to a nation or firm that is able. This view is aligned with the "first in time, first in right" view of ownership. Industrialized nations promote this view because, unlike the limited access view of the developing world, unlimited access promotes and rewards private investment, *ibid* 214.).

125 Tennen (n. 102) 146.

126 Gabrynowicz (n. 102) 1043-1044; Coffey (n. 89) 124.

With regard to present commercial space activities by the US, one may note that infact almost forty years ago NASA was asked to advance commercial activity in space, while o explicit statutory policy existed until 1984. In that year Congress amended the Space Act and required NASA to seek and encourage to the maximum extent possible the fullest use of space.[127] Many countries with government space programs are rapidly becoming technologically and economically capable of implementing a viable space industry. Companies and entrepreneurs play an integral role in this multi-billion dollar enterprise.[128] A comprehensive legal system governing operations on celestial bodies, however, does not yet exist.[129]

Stockholm Declaration:

Coming to the 1972 'Stockholm Declaration' which directly involves environment protection, a number of provisions refer to the 'common good of mankind'. For example, in the Preamble paragraph 6 of the 1972 'Stockholm Declaration' explicitly states that "to defend and improve the human environment for present and future generations has become an *imperative goal for mankind*-a goal to be pursued together with".

With regard to the principles provided in the 1972 'Stockholm Declaration', while Principle 5 indicates that the non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and "to ensure that benefits from such employment are shared by all *mankind*", Principle 18 requires that science and technology must be applied, *inter alia*, to the solution of environmental problems and "*for the common good of mankind*". As a consequence, Principle 21, on the one hand, recognizes the sovereign right of States to exploit their own resources, and, on the other hand, places those States under the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

127 Sattler (n. 77) (Reference: National Aeronautics and Space Administration Authorization Act of 1985, Pub L No 98- 361, 98 Stat 422, codified at 42 USC § 2451 (2000).) The author further noted that, in 1998, Congress passed the Commercial Space Act, which directs NASA to use the International Space Station as a springboard for space commerce (42 USC § 14701 (1998).). The Act promotes the use of commercial launch services and emphasizes the importance of commercial providers in the operation, servicing, and use of the space station. It also provides some guidelines for space commercialization. Following adoption of the 1998 Act, NASA produced a "Commercial Development Plan" to implement its provisions. This plan calls for a nongovernmental organization (NGO) to manage future commercialization of space, but the plan description is almost silent as to how commercialization will actually be advanced by the organization, *ibid* 38-39.); also see, Gabrynowicz (n. 102) 1049-1050 (For a discussion of move and trend for commercialization and integration of government space systems, *id,* 1056-1057. For the emergence of private law for space, *ibid* 1061-1063.).

128 Fountain (n. 102) 1787; Further see, Coffey (n. 89) 123 (Currently, at least six nations and numerous private companies have plans to go to the moon in the near future. NASA's Vision for Space Exploration aims to send astronauts back to the moon in 2020 and to establish a permanently staffed base by 2024. The author also noted that while both public and private ventures are racing to use the moon's resources, the laws governing those resources have remained vague and unchanged for many years, *id,* 124.); Freeland, '*The limits of law*' (n. 102) 74 (The beginning of the 1990s saw the commercialization of space really start to expand rapidly. By 1998, the spend on commercial space had caught up to Governmental space expenditure. It has been estimated that the total value of the global commercial space "industry" in 2018 was approximately US $ 385 billion. This figure is anticipated to grow exponentially to somewhere between US $ 1-3 trillion by 2040.).

129 Sattler (n. 77) 44.

This approach in the field of environmental protection, which has been consistently reaffirmed in the subsequent relevant instruments, indicates the emergence of obligations of an objective character.[130]

The 1997 UNESCO Declaration:

The UNESCO "*Declaration on the Responsibilities of the Present Generations towards Future Generations*"[131], adopted on 12/11/1997, in Article 8 (common heritage of mankind) states that "the present generations may use the common heritage of humankind, as defined in international law, provided that this does not entail compromising it irreversibly."

As it will be examined below the notion of 'common heritage of humankind' has subsequently been inserted into legally binding instruments.

b) Basic Characteristics of the Notion of 'Common Heritage of Humankind'

As argued in the early 1970s, 'common heritage' is a new concept in international law with emerging content. It has been suggested that the concept has three characteristics: "absence of national property"; international "management of all uses", and "sharing of benefits".[132]

Cheng has described the notion of the 'common heritage of mankind' as follows: "The emergent concept of the common heritage of mankind,… while it still lacks precise definition, wishes basically to convey the idea that the management, exploitation and distribution of the natural resources of the area in question are matters to be decided by the international community… and are not to be left to the initiative and discretion of individual states or their nationals".[133] In the same line Francioni argued that "despite the fact that its precise legal implications still remain rather uncertain, there is a general consensus that the common heritage principle tends to create an obligation for individual states to use the resources of the international seabed area as well as those of outer space in a way that promotes not only national interests, but the well-being of mankind as a whole".[134] As Kiss stated "the common heritage is the complete territorial expression or at least the materialization of the common interest

130 *Cf.* Antonio Augusto Cançado Trindade, '*Human Rights and the Environment*' in Janusz Symonides (ed.), *Human Rights: New Dimensions and Challenges* (Manual on the Rights, UNESCO Publishing, Ashgate, 1998) 117, 123.

131 The "*Declaration on the Responsibilities of the Present Generations Towards Future Generations*" was adopted on 12/11/1997 by the General Conference of the UNESCO, meeting in Paris from 21 October to 12 November 1997 at its 29th session. In Preamble para.5 of the 1997 Declaration it is stressed that "full respect for human rights and ideals of democracy constitute an essential basis for the protection of the needs and interests of future generations."

132 '*Introduction to Part Three: The Emerging Ocean Regime*' in E. Borgese (ed.), *PACEM IN MARIBU* (1972) 161-162, *cited in*, Note (no author indicated), '*Thaw in International Law? Rights in Antarctica under the Law of Common Spaces*' (1978) 87/4 Yale L. J. 804-859, 847.

133 Bin Cheng, '*The Legal Regime of Airspace and Outerspace: The Boundary Problem, Functionalism versus Spatialism: The Major Premises*' (1980) 5 Annals Air and Space Law 323, 337, *quoted in*, Larschan and Brennan (n. 71) 319.

134 Francioni, 'Legal Aspects of Mineral Exploitation in Antarctica' (n. 202) 171.

of mankind".[135] Trindade argued that "despite semantic variations in international instruments on environmental protection when referring mankind, a common denominator of them all appears to be the common interest of mankind".[136] In early 1970s some authors[137] argue that the 'rights of mankind' should be distinguished from 'human rights', since while the latter indicates rights which individuals are entitled to on the ground of their belonging to the human race, the former relates to the rights of the collective entity which could not be analogous with the rights of individuals forming that entity.

The concept of "CHM", which was considered by Mr. Suarez in his 1927 report as a developing concept, and also suggested by Mr. Pardo in 1967, is today applied in the 1982 UNCLOS only with respect to mineral resources of the seabed beyond the limits of national jurisdiction.[138]

Referring to the drafting process of the United Nations Convention on the Law of the Sea (UNCLOS), Anand noted that many developing States argued that regional environmental concerns must be met within the framework of the law of the sea. They insisted on protection of the 'common heritage of mankind' concept in areas outside national jurisdiction. This concept symbolized their "interests, needs, hopes and aspirations… and serves as a useful rallying cry in support of their objectives".[139] According to Adede, who examines the issue in relation to the Law of the Sea Convention, the basic ideas of the concept of the 'common heritage of mankind' are: "*(a)* that the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (referred to as the Area), as well as the resources of the Area, are the common heritage of mankind; *(b)* that the area shall not be subject to appropriation by any means by states or persons, natural or juridical; *(c)* that the Area shall be reserved exclusively for peaceful purposes, and *(d)* that the exploration of the Area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole."[140]

As Christol argues the basic characteristics of the 'common heritage of mankind' notion may be listed as follows: **(i)** It is an enlargement of the traditional international legal principle of *res communis*; it rejects *the res nullius* perspective. It follows

135 Kiss, '*Conserving the Common Heritage of Mankind*' (n. 71) 774.

136 Trindade, '*Human Rights and the Environment*' (n. 130) 125.

137 Gorove, *'Common Heritage of Mankind'* (n. 71) 393 (The author also stated that "occasionally reference may also be found to this phrase even in the sense that it encompasses all ages embracing not only present but past and future generations as well. To some extent it is this vagueness in the general meaning of the term that makes acceptance of the phrase as a legal term particularly difficult", *ibid* 394.); also see, Fasan (n. 102) 130.

138 Scovazzi (n. 76) 93.

139 Ram Prakash Anand, '*Interests of the Developing Countries and the Developing Law of the Sea*' (1973) 4 Annals of Int'l Studies 13, 22, *quoted in*, Feder (n. 84) 826.

140 A. O. Adede, '*The System for Exploitation of the 'Common Heritage of Mankind' at the Caracas Conference*' (1975) 69/1 AJIL 31, 31, note 1.

that, like the high seas, such areas may not become the subject of appropriation by States. **(ii)** The principle seeks to benefit mankind generally by protecting the physical environment against unnecessary degradation. **(iii)** It endeavors to conserve the resources of the world for present and future generations. **(iv)** It seeks through agreement to achieve the goal of equitable allocation of such resources and benefits with particular attention to the needs of the developing countries. This is the essence of the *res communis humanitatus* concept. **(v)** It contemplates the presence or formation of an international regime containing such rules as may be necessary to insure the realization of the previously identified objectives. If necessary, the legal regime would lead to the establishment of an appropriate international inter-governmental governing body. **(vi)** The principle includes as an overriding mandate the expectation that all areas in which it applies will be used onl for peaceful purposes.[141]

c) The Notion of 'Present and Future Generations' in Soft-Law Instruments

With respect to notion of 'present and future generations', among various instruments, the UN Charter of 1945 may first be noted, since its Preamble clearly states that "We the peoples of the United Nations determined to save succeeding generations from the scourge of war..., to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women..."

Unlike the early stages of international environmental law where the focus was on economic interests, rather than conservation of resources[142], the notion of the preservation of the environment beyond mere national benefits and interests of the present generation has subsequently been evolved in the direction to recognize the rights of future generations which essentially imply the responsibility of the present generation to the succeeding ones.

Numerous UN General Assembly (UNGA) resolutions adopted as far back as the 1960s indicate the notion of the protection of the environment for present and future generations. For example, the UNGA Resolution 1629 (XVI) adopted on 27/10/1961 declared that "both concern for the future of mankind and the fundamental principles of international law impose a responsibility on all states concerning actions which might have harmful biological consequences for the

141 Carl Q. Christol, *The Modern International Law of Outer Space* (Pergamon Press, 1982) 286 (The author further stated that the common heritage of mankind principle, as a reflection of high principles of justice and equity, is a political-legal response to the world's unequal distribution of resources and human capabilities. It can facilitate the hope for a sharing of resource benefits", *ibid* 288.).

142 Edith Brown Weiss, '*International Environmental Law: Contemporary Issues and the Emergence of a New World Order*' (1992-93) 81/3 Geo. L. J. 675, 679-684 (The author also argued that "the international community is increasingly aware that it is important not only to monitor and research environmental risks, but also to reduce them. Thus, states have moved from international agreements that mainly address research, information exchange, and monitoring to agreements that require reductions in pollutant emissions and changes in control technology", *id*, 680. The provisions in the new agreements are generally more stringent and detailed than in previous ones, the range of subject matter broader, and the provisions for implementation and adjustment more sophisticated, *id.* 684.).

existing and future generations of peoples of other states, by increasing the levels of radioactive fallout", (para.2).[143]

The United Nations considered environmental issues for the first time at the 45th session of the Economic and Social Council (ECOSOC), when in Resolution 1346 (XLV) of 30/07/1968 it recommended that the General Assembly consider convening a United Nations conference on "problems of the human environment".[144] At its 23rd session the General Assembly adopted Resolution 2398 (XXIII) of 03/12/1968 convening a United Nations Conference on the Human Environment noting the "continuing and accelerating impairment of the quality of the human environment" (preamble, para.3) and its "consequent effects on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries" (para.4), thus relating the Charter to emerging environmental issues. The resolution also recognized that "the relationship between man and his environment is undergoing profound changes in the wake of modern scientific and technological developments", (para.1).[145] Thus the adoption of the General Assembly Resolution 2398 (XXIII) of 03/12/1968 was the first time that the United Nations explicitly recognized the linkage between environmental protection and human rights.[146]

Article 9, sub-paragraph 2, of the "*Declaration on Social Progress and Development*"[147] of 11/12/1969 reads as follows: "Social progress and economic growth require recognition of the common interest of all nations in the exploration, conservation, use and exploitation, exclusively for peaceful purposes and in the interests of all mankind, of those areas of the environment such as outer space and the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, in accordance with the purposes and principles of the Charter of the United Nations."

The UN General Assembly resolution 2849 (XXVI) of 20/12/1971 on "*Development and Environment*" declares that "the rational management of the environment is of fundamental importance for the future of mankind", (Preamble para.6).[148]

143 The UN General Assembly resolution 1629 (XVI) on "*Report of the United Nations Scientific Committee on the effects of atomic radiation*" was adopted on 27/10/1961 at its 1043rd plenary meeting.

144 The UN ECOSOC resolution 1346 (XLV) on "*Questions on convening an international conference on the problems of human environment*" was adopted on 30/07/1968 at its 1555th plenary meeting.

145 The UN General Assembly resolution 2398 (XXIII) on "*Problems of the human environment*" was adopted on 03/12/1968 at its 1733rd plenary meeting.

146 Symonides, '*The Human Right to a Clean, Balanced and Protected Environment*' (n. 50) 24.

147 The "*Declaration on Social Progress and Development*" was adopted by the UN General Assembly resolution 2542 (XXIV) of 11/12/1969 at its 1829th plenary meeting; *reproduced in*, UNHCHR, *Human Rights - A Compilation of International Instruments* (Volume I (First Part), United Nations, New York and Geneva, 2002) 435-445. Further see, Articles 13(c), 23 and 25(a) of the 1969 Declaration.

148 The UN General Assembly resolution 2849 (XXVI) on "*Development and Environment*" was adopted on 20/12/1971 at its 2026th plenary meeting. In (para.4/b) of the same Resolution it was recognized that "no environmental policy should adversely affect the present and future development possibilities of the developing countries".

The 1972 Stockholm Declaration:

Principle 1 the 1972 Stockholm Declaration declares the following: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for *present and future generations*."[149] In Principle 2 of the Stockholm Declaration the notion of 'present and future generations' once again emphasized with regard to safeguarding the natural resources for the benefit of these generations.[150]

Between Stockholm and Rio Declarations:

Only two years after the adoption of the Stockholm Declaration, the UN "*Charter of Economic Rights and Duties of States*" was adopted on 12/12/1974. Under Chapter III of the 1974 CERDS Article 30 declares, *inter alia*, that: "The protection, preservation and enhancement of the environment for the *present and future generations* is the responsibility of all States. All States shall endeavor to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries..." It is argued that both notions of 'common heritage of mankind' (Article 29) and 'present and future generations' (Article 30) of the 1974 CERDS "are sufficiently non-controversial provisions, and indeed, protection and preservation of the environment have in recent years been regarded as matters require the urgent attention of the international community".[151]

The UN General Assembly, in its resolution 42/100 on "*Human rights and scientific and technological developments*"[152] adopted on 07/12/1987, calls upon States "to take all necessary measures to place all the achievements of science and technology at the service of mankind and to ensure that they do not lead to the degradation of the natural environment", (para.3).

The UN General Assembly resolution 35/8 of 30/10/1980 on "*Historical responsibility of States for the preservation of nature for present and future generations*"[153] gave impulse to the recognition of this principle. In (para.1) of

149 Sohn (n. 47) 451-455 (commentary on Principle 1 of the Declaration) (Sohn argued that "it would have been an important step forward if the right to an adequate environment were put in the forefront of the statement of principles, thus removing the lingering doubts about its existence", ibid 455.).

150 Note that the World Health Organization (WHO) submitted a proposal stating the following: "Everyone has a fundamental right to an environment that safeguards the health of present and future generations for the full enjoyment of his basic human rights". See, Sohn (n. 47) 453.

151 Chatterjee (n. 3) 679.

152 The General Assembly resolution 42/100 on '*Human rights and scientific and technological developments*' was adopted on 07/12/1987 at its 93rd plenary meeting.

153 The UN General Assembly resolution 35/8 on '*Historical responsibility of States for the preservation of nature for present and future generations*' was adopted on 30/10/1980 at its 49th plenary meeting.

this Resolution the GA "proclaims the historical responsibility of States for the preservation of nature for present and future generations", and in (para.3) calls upon States, "in the interests of present and future generations, to demonstrate due concern and take the measures, including legislative measures, necessary for preserving nature, and also to promote international co-operation in this field". By resolution 44/228 of 22/12/1989, the UN GA decided to convene a *United Nations Conference on Environment and Development* ("UNCED"), which would mark the 20th anniversary of the 1972 Stockholm Conference. Resolution 44/228 indicates the objective of the Conference "as to promote the further development of international environmental law".[154]

Moreover, The Hague Declaration on the Environment of 11/03/1989, which was signed by representatives of 24 States, provides that it is the "duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere".[155]

The 1992 Rio Declaration and the 1993 Vienna Declaration:

While Principle 1 of the 1992 Rio Declaration states that "Human beings… are entitled to a healthy and productive life in harmony with nature", Principle 3 provides that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of *present and future generations*".[156]

Consequently, it is obligatory that economic development not to be conducted as to penalize future generations. "Present generations are to bind themselves to future generations through the link of generativity".[157] The latter formulation was subsequently included into (Part I, paragraph 11) of the "*Vienna Declaration and Programme of Action*"[158] of 25/06/1993 which stated that "the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations".

154 Sand (n. 1) 5-7.

155 '*Hague Declaration on the Environment*' of 11/03/1989, *reproduced in*, 28 ILM 1308 (1989); and '*Selected International Legal Materials on Global Warming and Climate Change*' (1990) 5 Am. U. J. Int'l L. & Pol. 513, 567-569; also see, Dupuy '*International Law of the Environment*' (n. 1) 428.

156 According to Kovar, "the first principle represents a victory for the proponents of a human-centered approach to the Rio Declaration". See, Kovar (n. 68) 124; (With regard to Principle 3, Kovar noted that the words "so as" was included at the final drafting session. He added that "these words, which replaced the words 'in order' subtly shifted the balance back from one where development would be a precondition to environmental protection, to one in which development is to be carried out *in such a way as* to meet equitably both developmental and environmental needs for present and future generations", *id.*, p.126. (Emphasis original)). Despite the clear wording of Principle 3 of the Rio Declaration, Maggio stated that "the Rio Declaration does not expressly… use the words "present and future generations". See, Gregory F. Maggio, '*Inter/intra-generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources*' (1997) 4/2 Buff. Envtl. L. J. 161, 211.

157 Batt & Short (n. 69) 251.

158 The '*Vienna Declaration and Programme of Action*' was adopted by the World Conference on Human Rights held in Vienna on 25/06/1993; *reproduced in*, UNHCHR, *Compilation of International Instruments* (Volume I (First Part), 2002) 43, 47. Furthermore, Part II, para.72 of the 'Vienna Declaration' requires the UN General Assembly to formulate "comprehensive and effective measures to eliminate obstacles to the implementation and realization of the Declaration on the Right to Development" and to recommend "ways and means towards the realization of the right to development by all States".

The 1997 UNESCO Declaration:

Article 1 of the UNESCO "*Declaration on the Responsibilities of the Present Generations towards Future Generations*" of 12/11/1997 recognizes the responsibility of the present generations to ensure that the needs and interests of present and future generations are fully safeguarded. Two provisions in the 1997 UNESCO Declaration directly involve conservation and protection of the environment. Article 4 (*Preservation of life on Earth*) provides that "the present generations have the responsibility to bequeath to future generations an Earth which will not one day be irreversibly damaged by human activity. Each generation inheriting the Earth temporarily should take care to use natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems and that scientific and technological progress in all fields does not harm life on Earth".[159]

"*Article 5 - Protection of the environment*

1. In order to ensure that future generations benefit from the richness of the Earth's ecosystems, the present generations should strive for sustainable development and preserve living conditions, particularly the quality and integrity of the environment.

2. The present generations should ensure that future generations are not exposed to pollution which may endanger their health or their existence itself.

3. The present generations should preserve for future generations natural resources necessary for sustaining human life and for its development.

4. The present generations should take into account possible consequences for future generations of major projects before these are carried out."

Article 5 of the 1997 UNESCO Declaration may be read in conjunction with Principle 3 of the 1992 Rio Declaration. The significance of Article 5 of the 1997 Declaration emanates from the recognition of two basic environmental law concepts, i.e., 'sustainable development' and, at least, implicitly 'environmental impact assessment'.

Resolutions of the UN Commission on Human Rights:

On its part the UN Commission on Human Rights in its resolution 1994/65 on "*Human rights and the environment*" of 09/03/1994 reiterated that the right to development must be fulfilled so as to meet equitably the developmental and environmental needs of *present and future generations* (para.2) and recognized that environmental damage has potentially negative effects on human rights and

159 The provisions in Article 4, as well as Article 3 of the 1997 UNESCO Declaration should be read in the light of Principles 1 and 2 of the 1972 Stockholm Declaration.

the enjoyment of life, health and a satisfactory standard of living, (para.3).[160] The Commission on Human Rights, in its Resolution 2000/72 on "*Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*" of 26/04/2000, in (para.3) categorically condemned the illicit dumping of toxic and dangerous products and wastes in developing countries, which adversely affects the human rights to life and health of individuals in those countries; and in (para.4) reaffirmed that illicit traffic and dumping of toxic and dangerous products and wastes constitute a serious threat to the human rights to life, health and a sound environment for every individual.[161]

The Commission on Human Rights, in its Resolution 2003/71 on "*Human rights and the environment as part of sustainable development*" of 25/04/2003, in (para.1) reaffirmed that peace, security, stability and respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity are essential for achieving sustainable development, and in (para.2) recalled that that environmental damage can have potentially negative effects on the enjoyment of some human rights.[162] The Commission on Human Rights, in its Resolution 2005/60 on "*Human rights and the environment as part of sustainable development*" of 20/04/2005, in preambular (para.7) took note that respect for human rights can contribute to sustainable development, including its environmental component, and in preambular (para.8) considered that environmental damage, including that caused by natural circumstances or disasters, can have potentially negative effects on the enjoyment of human rights and on a healthy life and a healthy environment, and in preambular (para.9) considered also that protection of the environment and sustainable development can also contribute to human well-being and potentially to the enjoyment of human rights.[163]

160 The Commission on Human Rights resolution 1994/65 on '*Human rights and the environment*' was adopted on 09/03/1994 at the 64th meeting, [Adopted without a vote. See chap. XVII. E/CN.4/1994/132]. Also see, The Commission on Human Rights resolution 1995/14 on '*Human rights and the environment*' was adopted on 24/02/1995 at the 41st meeting, [Adopted without a vote. See chap. VII. E/CN.4/1995/176]. Preambular (para.8) "Considering that the promotion of an environmentally healthy world contributes to the protection of the human rights to life and health of everyone" and Preambular (para.9) "Reaffirming that States have common but differentiated responsibilities and capabilities, as defined in Agenda 21"; and Operative (paras. 2 and 3) were same as the previous resolution.

161 The Commission on Human Rights resolution 2000/72 on "*Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*" was adopted on 26/04/2000 at the 66th meeting, [Adopted by a roll-call vote of 37 votes to 16].

162 The Commission on Human Rights resolution 2003/71 on '*Human rights and the environment as part of sustainable development*' was adopted on 25/04/2003 at the 62nd meeting, [Adopted without a vote. See chap. XVII, E/CN.4/2003/L.11/Add.7]. The Commission in operative (para.4) of the Resolution reaffirmed that everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms and calls upon States to take all necessary measures to protect the legitimate exercise of everyone's human rights when promoting environmental protection and sustainable development, and in (para.6) encouraged all efforts towards the implementation of the principles of the Rio Declaration, in particular principle 10, in order to contribute, inter alia, to effective access to judicial and administrative proceedings, including redress and remedy.

163 The Commission on Human Rights resolution 2005/60 on '*Human rights and the environment as part of sustainable development*' was adopted on 20/04/2005 at the 58th meeting, [Adopted without a vote. See chap. XVII, E/CN.4/2005/L.10/Add.17]. The Commission in operative (para.3) of the Resolution called upon States to take all necessary measures to protect the legitimate exercise of everyone's human rights when promoting environmental protection and sustainable development and reaffirms, in this context, that everyone has the right, individually and in association with others, to

The "*United Nations Millennium Declaration*"[164], adopted by the UN General Assembly resolution 55/2 of 08/09/2000, under "*Part I. Values and Principles*" lists certain "fundamental values" to be essential to international relations in the twenty-first century. One of them is as follows: "*Respect for nature*: Prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development. Only in this way can the immeasurable riches provided to us by nature be preserved and passed on to our descendants. The current unsustainable patterns of production and consumption must be changed in the interest of our future welfare and that of our descendants", (para.6). "*Part IV. Protecting Our Common Environment*" of the Millennium Declaration (para.21) requires special attention: "We must spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs".

ii-) The Notion of 'Common But Differentiated Responsibility'

With regard to the concept of *common but differentiated responsibility*, this notion was partially expressed in Principle 23 of the Stockholm Declaration of 1972.[165] While Principle 6 of the Rio Declaration of 1992 states that "the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority…", Principle 7 of the same Declaration stresses that States have a common but differentiated responsibilities to pursue sustainable development. In this Principle, the developed countries acknowledged the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment, and of the technologies and financial resources they command.

Despite the fact that in particular Principle 7 of the 1992 Rio Declaration was controversial and did not satisfy either developed or developing States, criticized as lacked any mention of the provision of financial and technological resources[166] from developed countries to the developing countries in the sense of a kind of

participate in peaceful activities against violations of human rights and fundamental freedoms; and in (para.5) encouraged all efforts towards the implementation of the principles of the Rio Declaration on Environment and Development, in particular principle 10, in order to contribute, *inter alia*, to effective access to judicial and administrative proceedings, including redress and remedy.

164 The '*United Nations Millennium Declaration*' was adopted by the UN General Assembly resolution 55/2 on 08/09/2000; *reproduced in*, UNHCHR, *Compilation of International Instruments* (Volume I (First Part), 2002) 69, 70. One of the other values indicated in (Part.I, para.6) of the Millennium Declaration is "*Solidarity*": "Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most". The other indicated value is "*Shared responsibility*": "Responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally…"

165 Principle 23 of the Stockholm Declaration states: "It will be essential in all cases to consider the systems of values prevailing in each country, and the extent of applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries."

166 Kovar (n. 68) 128-129.

compensation for environmental degradation (Principle 9 was not considered as sufficient to overcome such criticisms), nevertheless Principle 7 is still considered as "a major new contribution to international environmental law".[167] It is particularly because, "Principle 7 seems to recognize the notion of common but differentiated responsibilities as having significant legal implications, though whether it is a legal principle or just a political guideline is still open to debate".[168]

The General Assembly in its resolution 56/199 on "*Protection of global climate for present and future generations of mankind*"[169] of 21/12/2001 calls upon all States parties to continue to take effective steps to implement their commitments under the Convention, in accordance with the principle of common but differentiated responsibilities, (Operative para.2).

The principle of *common but differentiated responsibility* includes two elements. The first relates to "common responsibility of States to protect certain environmental resources. The second element relates to the need to take account of differing circumstances, particularly in relation to each State's contribution to particular environmental problems, and to its ability to respond to, prevent, reduce or control the threat".[170] As French puts "the most obvious reason for the existence of differential obligations is the different contributions States make to the present state of environmental degradation".[171] This notion plays a significant role in many international environmental regimes and this significance is likely to increase as developing States continue to take an active role in environmental policy and law-making.[172] But there are also some criticisms as well. As Handl argued, "a dilution of the normative demands on developing countries is likely to impede progress by those countries towards an adequate level of local environmental protection, the acquisition of technological know-how and managerial ability on which sustainable development locally will depend".[173]

167 Duncan French, '*Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*' (2000) 49/1 ICLQ 35, 38 (In view of the author it becomes apparent that international environmental law is adopting a much more flexible approach to global environmental issues to take account of the economic and social reality, *ibid* 41.).

168 Ibid 38 (The author also refers to Alexandra Kiss, '*The Rio Declaration on Environment and Development*' in L. Campiglio *et al.*, (eds.) The Environment after Rio: International Law and Economics (London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff, 1994) 61.).

169 The General Assembly resolution 56/199 on '*Protection of global climate for present and future generations of mankind*' was adopted on 21/12/2001 at its 90th plenary meeting.

170 Sands, '*Introduction*' (n. 12) xxxiv.

171 French, '*The Importance of Differentiated Responsibilities'* (n. 167) 47 (The author also refers to Chowdhury who argues that "contribution to global degradation being unequal, responsibility… has to be unequal and commensurate with the differential contribution to such degradation"); see, S. Chowdhury, '*Common but Differentiated Responsibility in International Environmental Law: from Stockholm (1972) to Rio (1992)*' in Denters E. M., Ginther K. and de Waart (Eds.) *Sustainable Development and Good Governance* (Brill 1995) 333.

172 French '*The Importance of Differentiated Responsibilities'* (n. 167) 59.

173 Handl, '*Environmental Security and Global Change*' (n. 1) 10.

iii-) Incorporation of The Notions of 'Common Heritage of Humankind' and of 'Present and Future Generations' into Legally Binding Instruments

In addition to above-mentioned soft law documents some of the "hard-law" (legally binding) instruments may also be listed in this context.

a) The notion in the instruments concerning the whaling regime

The failure of the international attempts to protect whale stocks under the "*Convention for the Regulation of Whaling*" adopted by the League of Nations on 24/09/1931, as well as the amendment on 08/06/1937[174] has already been discussed in my previous (2021) article. As early as 1938 a Norwegian expert while stressing that "to exploit any kind of wild animal to such a degree that is threatened by extinction is vandalism… It must not be said of our generation that we permitted them to be hunted in such a way that they were threatened by destruction"[175] was in fact recognizing the responsibility of the present generation to the future generations.

Preambular paragraph 1 of the "*International Convention for the Regulation of Whaling*"[176] (ICRW) of 02/12/1946 recognizes "the interest of the nations of the world in safeguarding for *future generations* the great natural resources represented by the whale stocks".[177] This expression implies the recognition that species should be preserved not only because of their economic value but also because of their own value.[178] The reference to the 'future generations' in the preamble of the 1946 Whaling Convention may be interpreted as allowing a policy of preservation of whales by the International Whaling Commission (IWC) and the promotion of non-lethal forms of exploitation of marine mammals.[179]

174 The '*Convention for the Regulation of Whaling*' was adopted at Geneva on 24/09/1931 and entered into force in 16/01/1935. '*Agreement for the Regulation of Whaling and Final Act*' was adopted on 08/06/1937; also see, Philip C. Jessup, '*The International Protection of Whales*' (1930) 24/4 AJIL 751-752, League of Nations Doc. C.196.M.70.1927.V, 120 et al, *reproduced in*, *AJIL (*Volume 20 Supp., 1926) 230. This report is also *cited in*, Leonard (n. 75) 90.

175 Birger Bergensen, '*The International Whaling Situation*' (1938) 1 Le Nord 112, 120, *cited in*, Leonard (n. 75) 112.

176 The '*International Convention for the Regulation of Whaling*' (ICRW) adopted on 02/12/1946 and entered into force on 10/11/1948; available at, <http://iwcoffice.org/commission/convention.htm#convention>; *reproduced in*, *AJIL* (Volume 43 Supp. No.4 1949) 174-184.

177 Generally see, Patricia W. Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching* (Vols.1 and 2, Oceana Publications Inc., New York, 1985); John Colombos, *The International Law of the Sea* (Longmans 1967) 417-420; Kiss and Shelton, (n. 54) 284-285; Scovazzi (n. 76) 187-193 *Principles of International Environmental Law* (n. 22) 590-597; Kimberly Davis, '*International Management of Cetaceans Under the New Law of the Sea Convention*' (1985) 3/2 B. U. Int'l L. J. 477; Kazuo Sumi, '*The 'Whale War' Between Japan and the United States: Problems and Prospects*' (1989) 17/2 Denv. J. Int'l L. & Pol'y 317; Nancy C. Doubleday, '*Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law*' (1989) 17/2 Denv. J. Int'l L. & Pol'y 373; Anthony D'Amato and Sudhir K. Chopra, 'Whales: Their Emerging Right to Life', (1991) 85/1 AJIL 21; Gregory Rose and Saundra Crane, '*The Evolution of International Whaling Law*' in Philippe Sands (ed.), *Greening International Law* (The New Press 1994) 159-181, 163-165; Judith Berger-Eforo, '*Sanctuary for the Whales: Will This Be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-First Century?*' (1996) 8/2 Pace Int'l L. Rev. 439; Patricia Birnie, '*Small Cetaceans and the International Whaling Commission*' (1997) 10/1 Geo. Int'l Envtl. L. Rev. 1; Maria Clara Maffei, '*The International Convention for the Regulating of Whaling*' (1997) 12/3 Int'l J. Marine & Coastal L. 287; further see, Laura L. Lones, '*The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation*' (1989) 22/3 Vand. J. Transnat'l L. 997 (The author examines the US Marine Mammal Protection Act of 1972, including 1984 amendments, in light of the relevant international instruments.); Gemalmaz (n. 72) (Under heading "Marine mammals").

178 Maffei, '*Convention for the Regulating of Whaling*' (n. 177) 301.

179 Scovazzi (n. 76) 191.

But at the same time the ICRW establishes a linkage between "to provide for the proper conservation of whale stocks" and "to make possible the orderly development of the whaling industry", (Preamble, para.7). That is why some commentators argue that the ICRW is based on the concept of "ecodevelopment or sustainable development".[180]

Pursuant to Article III, paragraph 1, of the Whaling Convention, the Contracting Governments agree to establish an International Whaling Commission (IWC). Article IX of the Convention imposes duty upon Contracting Governments to take measures to criminalize the breaches of the standards laid down by the Convention. The IWC is an example of a greater global concern to contract to protect the global commons.[181]

Some authors emphasized the existence value of other living creatures in addition to human beings. They examine the issue under six stages: free resource, regulation, conservation, protection, preservation and entitlement. The argument is based on the view that whales should be used in a manner that does not cause the death of these animals.[182] This argument although seems to be supported by many States and NGOs, also subjected to criticism that it contradicts with the views and needs of traditional consumers of whale products[183] other than for instance indigenous peoples in the Arctic.[184]

At the UN Conference on the Human Environment held in Stockholm in 1972, the United States proposed a ten-year moratorium on commercial whaling. Dr. R. White, Administrator of the National Oceanic and Atmospheric Agency in support of the proposal for a ten-year moratorium on commercial whaling stated that "world whale stocks must be regarded as the *heritage of all mankind* and not the preserve of any one or several nations… We feel that strong action in restoring the world's whale stocks is a matter of great urgency…"[185] (Emphasis added). The recommendation for the moratorium was finally adopted in the Plenary by a vote of 53 in favor to none against, with 3 abstentions (Brazil, Japan and Spain). The adopted recommendation was incorporated as Recommendation 33 into the Action Plan for the Human Environment which states: "It is recommended that Governments agree to strengthen the International Whaling Commission, to increase international research efforts and

180 Sumi (n. 177) 324.

181 Berger-Eforo (n. 177) 454.

182 D'Amato and Chopra (n. 177) 28-50; Rose and Crane (n. 177) 167.

183 Maffei, '*Convention for the Regulating of Whaling*' (n. 177) 290-291; also see, Sumi (n. 177) 318 (Sumi argues that the Japanese communities the whale is not only a food source, but also a basis of their cultural identity According to the author, unlike the US whalers who made use only of the oil, Japanese whaling industry was practical in using all parts of the whale in a productive manner. The author, in p.355, further noted that: "Since the Japanese had regarded whales as a kind of fish, little thought had been given to conservation of wildlife or marine mammals. For a long time, the Japanese considered whale resources not as *res communis*, but as *res nullius*. *It was not until the 1970s that Japan came to understand the real need for conservation of whale resources as a common heritage of mankind*".) (Emphasis added).

184 Doubleday (n. 177).

185 U.S. Press Release, HE/13/72, 1-2, 09/06/1972, *quoted in*, Sumi (n. 177) 329.

as a matter of urgency to call for an international agreement, under the auspices of the International Whaling Commission and involving all Government concerned, for a ten year moratorium on commercial whaling".[186]

In 1982 IWC at its 34th meeting passed an amendment to the Whaling Convention that created a moratorium on commercial whaling, which provided that "catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero…" However, this moratorium binds only those who agree to be constrained. Japan, the Soviet Union, Chile, Norway and Peru objected to the moratorium and were not bound. Peru withdrew its objection in July 1983. Japan claimed that its opposition was not only commercial but also cultural, citing a "desire for whale meat (that) has traditional roots deeply imbedded in the Japanese psych". In 1984, Japan accepted the moratorium decision on commercial whaling by the IWC under the diplomatic pressure of the United States.[187]

The 1982 moratorium relates only to commercial whaling; it provides two exceptions. First exception is "aboriginal subsistence whaling", the other is carried out under "scientific whaling". Some States, in particular Japan, continue to conduct scientific whaling, and in practice it in fact conceals commercial whaling. The ignorance of the Scientific Committee's recommendations and the conclusions of the IWC has eventually resulted in an Application to the International Court of Justice. As shown in Chapter 3 of this study below, on 31/05/2010, Australia initiated proceedings against Japan regarding "Japan's continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II'), in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling ('ICRW')[188], as well as its other international obligations for the preservation of marine mammals and the marine environment".[189] That case has been entered in the Court's General List under the title: "*Whaling in the Antarctic* (*Australia v. Japan*)".

Since the 1946 ICRW is an instrument for whaling, which does not necessarily exclude the requirement of sustainable whaling, it might be going too far to turn a convention *on whaling* into a convention *for the preservation of whales*.[190] Thus it

186 UN Doc. A/CONF.48/14/Rev.1, 12.

187 Lones (n. 177) 1021; Maffei, '*Convention for the Regulating of Whaling*' (n. 177) 293-294; Sumi (n. 177) 319-320, 335-336, 365 (The author also noted that the 1982 moratorium decision was adopted without any recommendation of the Scientific Committee which is contrary the requirement provided in Article V, paragraph 2(b), of the ICRW, ibid 325.); Berger-Eforo (n. 177) 454.

188 Australia ratified the 1946 ICRW on 01/12/1947, and it entered into force for Australia on 10/11/1948. Japan lodged its notice of adherence on 21/04/1951, and it entered into force for Japan on the same day.

189 "*Whaling in the Antarctic (Australia* v. *Japan)*", Application of 31 May 2010, para.2. Also see, ICJ, Press release, No.2010/16 of 1 June 2000, "*Australia institutes proceedings against Japan for alleged breach of international obligations concerning whaling*", accessible at, www.icj-cij.org/docket/files/148/15953.pdf

190 Maffei, '*Convention for the Regulating of Whaling*' (n. 177) 302. (Emphasis original)

may be argued that, in order to meet changing expectations for the conservation of whales which is the interest of both present and future generations, it would not be less practicable to enter into negotiations in order to conclude a specific convention rather than to attempt to amend the existing Convention.

The first UN Conference on the Law of the Sea adopted a resolution on "*Humane killing of marine life*"[191] on 25/04/1958, in which States are requested to prescribe, "by all means available to them, those methods for the capture and killing of marine life, especially of whales and seals, which will spare them suffering to the greatest extent possible".

The "*Convention on International Trade in Endangered Species*"[192] (CITES) of 03/03/1973 indicates six species of cetaceans which are threatened with extinction (Article II, and Appendix 1) and prohibits their trade among parties. However, it does not list any cetaceans that may subsequently become threatened by extinction (Article II, Appendix 2, the second Appendix does not list cetaceas).[193]

In this connection one may also refer to Article 65 of the 1982 UN "*Convention on the Law of the Sea*"[194] (UNCLOS) which requires States to "cooperate with a view to the conservation of marine mammals". Article 120 of the UNCLOS provides that "Article 65 also applies to the conservation and management of marine mammals in the high seas".[195] The UNCLOS is potentially vital for conservation of cetaceans. It presents the opportunity for the development of truly effective international regulation of whaling through the IWC.[196] Unlike other marine living resources of the sea, "the exploitation of these animals can be prohibited, limited or regulated, irrespective of the fact that they are in danger of extinction or their stocks are being depleted".[197]

The Parties to the "*Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic*"[198]signed by some whaling States on 09/04/1992, express their common concerns for the rational management, conservation and optimum utilization of the living resources of the sea in accordance with generally accepted principles of international law as reflected in the 1982

191 The UN Conference on the Law of the Sea resolution on "*Killing of Marine Life*" was adopted on 25/04/1958, UN Doc. A/CONF.13/L.56; *reproduced in*, (1958) 52 AJII 866.

192 The "*Convention on International Trade in Endangered Species of Wild Fauna and Flora*" (CITES), adopted on 03/03/1973 and entered into force on 01/07/1975.

193 With respect to the 1973 CITES and the protection of cetaceans, see, Lones (n. 177) 1020.

194 The "*Convention on the Law of the Sea*" (UNCLOS), done at Montego Bay, Jamaica, on 10/12/1982 and entered into force on 16/11/1994.

195 On the potential of the Articles 65 and 120 of the UNCLOS on the conservation of whales, see, Davis (n. 177) 501-506.

196 Davis (n. 177) 492, 518.

197 Scovazzi (n. 76) 190.

198 The "*Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic*" was signed at Nuuk on 09/04/1992 by Faeroe Islands and Greenland (Denmark), Norway and Iceland, and entered into force on 08/07/1992.

UNCLOS, (Preamble, para.2). Thus the 1992 Agreement covers whales as well. Although the 1992 North Atlantic Marine Mammals Agreement does not refer to the notions of 'common heritage' and 'present and future generations', the reference to 'common concern' is noteworthy. It establishes the North Atlantic Marine Mammals Commission (NAMMCO) (Article 1), the objective of which is to contribute to the conservation, rational management and study of marine mammals in the North Atlantic, (Article 2). The functions of the NAMMCO are listed in Article 4. According to the 1992 Agreement, it is without prejudice to the obligations of the parties under other international agreements, (Article 9). It follows that there may be a potential conflict as between this Agreement and the 1946 ICRW, and in case of such a conflict, the 1946 ICRW prevails.[199]

However, the "*Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area*"[200] (ACCOBAMS) of 24/11/1996, which was concluded within the framework of the Bonn 'Convention on the Conservation of Migratory Species of Wild Animals' of 23/06/1979, the Parties recognize that "cetaceans are an integral part of the marine ecosystem which must be conserved for the benefit of present and future generations, and that their conservation is a common concern", (Preamble, para.3). Thus, the 1996 Agreement, unlike the above-mentioned North Atlantic Marine Mammals Agreement of 1992, explicitly refers to the notion of 'present and future generations'. The purpose of the 1996 ACCOBAMS is to achieve and maintain a favourable conservation status for cetaceans. To this end, Parties undertake to prohibit and to take all necessary measures to eliminate, any deliberate taking of cetaceans, and to create and maintain a network of specially protected areas to conserve cetaceans, (Article II, para.1).

Although the following argument was presented in the context of protection of whales, it equally applies with equal force to a more general and broader concept of environmental protection: "…In the current stage of progression, nearly all nations accept the obligation of preservation… This anticipation of a stage of entitlement for a nonhuman species in international law is a revolutionary development. It takes seriously the fact that human beings are open systems – that our lives are dependent on our environment. The human race will live or die as the ecosystem lives or dies. International law can no longer be viewed as an artifact exclusively concerned with state and human interactions against a mere background called the environment.

199 Maffei, '*Convention for the Regulating of Whaling*' (n. 177) 304.

200 The "*Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area*" (ACCOBAMS) was adopted in Monaco on 24/11/1996 and entered into force on 01/06/2001. The 1996 ACCOBAMS establishes the following bodies in order to implement the purposes of the Agreement: a Meeting of Parties (Article III); a Secretariat of the Agreement (Article IV); two sub-regional coordination Units (Article V), and a Scientific Committee (Article VII), involving experts qualified in Cetaceans conservation science, established as a consultative body of the Meeting of the Parties.

Rather, other living creatures in the environment are players in a new and expanded international legal arena."[201]

b) The notion in the Antarctic Treaty System

Under the Antarctic Treaty system[202] the first instrument was the "*Antarctic Treaty*"[203], signed at Washington on 01/12/1959.

Preamble paragraph 1 of the 1959 Antarctic Treaty recognizes that "it is in the interest of *all mankind* that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord". Moreover, while Preambular paragraph 2 of the Treaty refers to international cooperation in scientific investigation in Antarctica, the next paragraph 3 states that "for the continuation and development of such cooperation on the basis of freedom of scientific investigation in Antarctica as applied during the International Geophysical Year accords with the interests of science and the *progress of all mankind*" (Emphasis added). Thus a connection has been established between identifying the region as falling within the domain of 'all mankind' and carrying-out scientific investigation in the area for the progress of 'all mankind'.

Chronologically, the first elements of the 'common heritage of mankind' appeared in the Antarctic Treaty of 1959.[204] Attention has to be drawn to the fact that although the terms 'all mankind' have been used in the 1959 Antarctic Treaty, it does not contain a specific reference to the common heritage principle, and "it could not have done so because, in 1959, the expression was not yet part of the international vocabulary".[205]

201 D'Amato and Chopra (n. 177) 50.

202 See, generally, Robert D. Hayton, 'The Antarctic Settlement of 1959' (1960) 54/2 AJIL 349; John Hanessian, 'The Antarctic Treaty 1959' (1960) 9/3 ICLQ 436; John Kish, *The Law of International Spaces (*A. W. Sijthoff, 1973) 170; Frank C. Alexander, Jr., 'Legal Aspects: Exploitation of Antarctic Resources: A Recommended Approach to the Antarctic Resource Problem' (1978) 33/2 U. Miami L. Rev. 371; M. C. W. Pinto, 'The International Community and Antarctica' (1978) 33/2 U. Miami L. Rev. 475; Note (n 132) 804; Christopher C. Joyner, 'Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas' (1981) 18/3 San Diego L. Rev. 415; Christopher C. Joyner, 'The Southern Ocean and Marine Pollution: Problems and Prospects', (1985) 17/2 Case W. Res. J. Int'l L. 165; Gillian Triggs, 'The Antarctic Treaty Regime: A Workable Compromise or a 'Purgatory of Ambiguity'?' (1985) 17/2 Case W. Res. J. Int'l L. 195; Benedetto Conforti, 'Territorial Claims in Antarctica: A Modern Way to Deal with an Old Problem' (1986) 19/2 Cornell Int'l L. J. 249; Christopher C. Joyner, 'Protection of the Antarctic Environment: Rethinking the Problems and Prospects' (1986) 19/2 Cornell Int'l L.J. 259; Francesco Francioni, 'Legal Aspects of Mineral Exploitation in Antarctica' (1986) 19/2 Cornell Int'l L. J. 163; Bruno Simma, 'The Antarctic Treaty as a Treaty Providing for an Objective Regime' (1986) 19/2 Cornell Int'l L. J. 189; Lee Kimball, 'Environmental Law and Policy in Antarctica' in P. Sands (ed.), *Greening International Law,* (The New Press, 1994) 122; Donald R. Rothwell, 'International Law and the Protection of the Arctic Environment' (1995) 44/2 ICLQ 280; Stuart B. Kaye, 'Legal Approaches to Polar Fisheries Regimes: A Comparative Analysis of the Convention for the Conservation of Antarctic Marine Living Resources and the Bering Sea Doughnut Hole Convention', (1995) 26/1 Cal. W. Int'l L. J. 75, 79-80; Patrizia Vigni, 'The Interaction between the Antarctic Treaty System and the Other Relevant Conventions Applicable to the Antarctic Area' in J.A. Frowein and R. Wolfrum (eds.), *Max Planck UNYB,* vol 4 (Kluwer Law International, 2000) 481; Sands, *Principles of International Environmental Law* (n. 22) 712-713; Arthur Watts, *International Law and the Antarctic Treaty System,* (Grotius Publications Ltd.,1992).

203 The "*Antarctic Treaty*" was signed in Washington on 01/12/1959 by the twelve nations (Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, United Kingdom, United States and USSR), and entered into force on 23/06/1961; available at <www.antarctic.ac.uk>; *reproduced in*, AJIL 477-483.

204 Kiss, 'Conserving the Common Heritage of Mankind' (n. 71) 774; further see, Armin Rosencranz, 'The Origin and Emergence of International Environmental Norms' (2003) 26/3 Hastings Int'l & Comp. L. Rev. 309-320 and 311 (The notion of common heritage of humankind made its first strong emergence in the Antarctic Treaty of 1959.).

205 Francioni, 'Legal Aspects of Mineral Exploitation in Antarctica' (n. 202) 171.

Moreover, it is observed that the 'equitable sharing of resources' as one of the fundamental elements of the common heritage principle has not been included in the Antarctic Treaty System.[206] It follows that, in order to apply to Antarctica UNCLOS norms which establish that the deep sea-bed is a part of the common heritage of mankind, this concept needs to be adapted to the peculiar legal characteristics of the area.[207]

Some authors argued that from its discovery, until the adoption of the Antarctic Treaty in 1959, Antarctica had been *terra nullius* (no man's land). As far back as the 1909, Scott, referring to discovery of the Spitzbergen archipelago in late 19th century and Norway and Sweden agreement in 1872 that the region should remain as it had been, no man's land (*terra nullius*), argued in relation to the arctic that "it would appear that arctic discovery as such vests no title, and that the arctic regions, except and in so far as they have been occupied, are in the condition of Spitzbergen, that is to say, no man's land".[208] In 1910 Balch went further to argue that "on general principles it would seem that both East and West Antarctica should become the common possessions of all of the family of nations".[209]

It is a fact that various nations had developed competing claims of sovereignty over the area.[210] Even before the adoption of the 1959 Antarctic Treaty, Jessup drew attention to the fact that since it became apparent that the resources of Antarctica were of great importance, it would no doubt become necessary to settle the conflicting claims to sovereignty.[211] In that connection it is argued that contiguity theory[212], discovery theory, effective occupation theory, minimal control theory and sector theory could not be appropriate theories to support territorial claims over or in Antarctica.[213]

---

206 Vigni (n. 202) 500 (Vigni also refers to, R. McDonald, '*The Common Heritage of Mankind'*, in (1995) Recht zwischen Umbruch und Bewahrung, Völkerrecht, Europarecht, Staatrecht: Festschrift für Rudolf Bernhardt, 54, who points out that no Antarctic norm provides, as the principle of equitable sharing does, that states which do not have the technical and financial means to carry out exploitation of resources, can enjoy the benefit deriving from the outcome of the exploitation of other states.).

207 *Ibid* 501 citing E Suy, 'Antarctica: Common Heritage of Mankind?' in J. Verhoeven - Ph. Sand - M. Bruce (eds.), *The Antarctic Environment and International Law* (1992) 96.

208 James B. Scott, 'Arctic Exploration and International Law' (1909) 3/4 AJIL 928, 941.

209 Thomas W. Balch, 'Arctic and Antarctic Regions and the Law of Nations' (1910) 4/2 AJIL 265, 275 (The author, among others and including doctrinal studies, also noted that "no nation has successfully asserted a claim to the possession of the Spitzbergen archipelago; on the contrary those islands have come to be regarded as a joint possession of all mankind", 274.).

210 Alexander, Jr. (n. 202) 373-379 and 387-395; Pinto (n. 202) 479-480; Triggs (n. 202) 197-199; Conforti (n. 202) 258.

211 Philip C. Jessup, 'Sovereignty in Antarctica' (1947) 41/1 AJIL 117.

212 See, J. Peter A. Bernhardt, 'Sovereignty in Antarctica', (1975) 5/2 Cal. W. Int'l L. J. 297-349 (The author further argued that "applying the contiguity principle to the Antarctic would be an unwarranted extension of an already overstretched idea… The contiguity principle has now for all practical purposes fallen into desuetude and has no adherents in modern international law. In the *Palmas Island Arbitral Award*, it was stated, 'the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law'…" 342.). For the *Palmas Island Arbitral*, see, "*The Island of Palmas Arbitral Award* (*United States v. Netherlands*)", Arbitral Award of 04/04/1928, *reproduced in* (1928) 22/4 AJIL 867-912 & 910-911.

213 Note (n. 132) 815-816 and references therein; furthermore on the question why other theories are not appropriate theories to support territorial claims over or in Antarctica, see 816-824.

The 1959 Antarctic Treaty imposed a moratorium on territorial claims. It temporarily freezes existing claims to territorial sovereignty in Antarctica, (Article IV).[214] The contracting parties agreed to administer Antarctica as if it were *terra communis* for thirty years in order to foster scientific research.[215] These provisions indicate the interim character of the 1959 Treaty.[216]

Nevertheless, in the legal literature starting from the 1970s numerous authors express views that the common heritage principle has to be applied to Antarctica.[217] The theories of territorial acquisition deriving from international law of the colonial era are inapplicable to Antarctica, and the 1959 Antarctic Treaty affirms the applicability of concepts of common rights to Antarctica.[218] It is argued that, like seas and outer space, Antarctica must be subject only "to the cooperative control of the world community".[219] Accordingly, "Antarctica is a *res communis omnium* to which the principle of common heritage of mankind applies… The common heritage principle, like most rules of international law, may be observed and implemented through self-imposed limitations, restraints, and safeguards so that states involved in mineral activities in Antarctica will behave not only *uti singuli*, in the pursuit of their national interest, but also *uti universi*, as interpreters and guarantors of the interests of mankind, in the conservation of the Antarctic environment and in the rational use of its resources".[220] Some authors argue that the concept of 'common concern of humankind', as a new variant on the common heritage principle, appears to be more suitable for the *sui generis* legal status of Antarctica. "Although it seems to be correct to consider the preservation of the Antarctic environment as an interest of all mankind, the 'common concern' principle nevertheless avoids the attribution to Antarctica of

214 Hayton (n. 202) 359; Triggs (n. 202) 199-204; Francioni, 'Legal Aspects of Mineral Exploitation in Antarctica' (n. 202) 165-168; Vigni (n. 202) 449.

215 Feder (n. 84) 821.

216 Hayton (n. 202) 360; Simma (n. 202) 203 (According to the author, the Antarctic Treaty regime has not acquired an 'objective' character, or validity *erga omnes*, through the operation of customary law, 205.).

217 Note (n. 132) 844-858; Pinto (n. 202) 478-479; Francioni, 'Legal Aspects of Mineral Exploitation in Antarctica' (n. 202) 171-174 and 182 (According to the author the principle of the common heritage of mankind is applicable to Antarctic resources.).

218 Note (n. 132) 828 (It is added: "This Note has defined a world common space as a space that is, or may become, of value to mankind generally and for which there has developed a practice or general expectation of common access, use, or control. Antarctica conforms to this definition. Antarctica therefore must be governed by the principles of international 'law of common spaces', and an international 'common-space' regime must be established", 848.).

219 *Ibid* 859 (Various commentators have analogized Antarctica to the seas. For instance, Goldblat argued that Antarctic resources should be exploited "in the interest of mankind, in the same way as the sea-bed and ocean floor are planned to be used"; see, *ibid* 846 note 201 citing Jozef Goldblat, 'Troubles in the Antarctic' (1973) 4 Bulletin of Peace Proposals 286, 287; further see, Alexander, Jr. (n. 202) 383 ("While it is certainly true that, in a physical sense, ice is different from water, that fact does not preclude the classification of some forms of ice as 'water', or perhaps as 'high seas' for juridical purposes".); however, compare Vigni (n. 202) 503 (According to the author, "with regard to the issue of the legal status of Antarctic seas, the norms on the law of the sea have revealed their inappropriateness for regulating such status due to the geographic and legal peculiarity of the area. The UNCLOS regime is, in fact, based on the concept of state sovereignty that is not embraced by the ATS at all.").

220 Francioni, 'Legal Aspects of Mineral Exploitation in Antarctica' (n. 202) 187-188 (The author as a conclusion added that "common resources may not be allocated according to the primitive *first come*, *first served* rule, but must be subject to some governance that will include effective access and equitable sharing today as tomorrow, for all participants of the world community and for future generations: In such a governance rests the true essence of the common heritage spirit", 188.).

the status of *res communis omnium*. The 'common concern' principle can be used to resolve the potentially endless conflict between the concept of 'common heritage of mankind' and the content of Article IV of the Antarctic Treaty which, although precluding new claims of sovereignty on Antarctic territory, does not definitively negate the legitimacy of preexisting claims."[221]

Although the 1959 Antarctic Treaty did not directly focus on environmental protection some of its provisions contribute to such protection in the region; such as the use of the region only for peaceful purposes, prohibition of military activities (Preamble, and Articles I, II and IX/1, a), prohibition of nuclear explosions in Antarctica and the disposal there of radioactive waste material (Article V/1). The first nuclear test ban was provided by the 1959 Antarctic Treaty.[222] Scholars have adopted the general postulate of the peaceful use of Antarctica. In late 1950s Jenks argued that "an agreement for the continued demilitarization of Antarctica coupled with mutual warning arrangements as a safeguard against any violation thereof would be an essential element in any such international regime".[223] Although no precise definition of the term 'peaceful purposes' has been given, "the intention of the signatories was that it should include all activity not clearly identified as military".[224] Furthermore, Article IX, paragraph 1/f, of the 1959 Treaty allows parties having consultative status to take additional measures concerning, among others, the "preservation and conservation of living resources in Antarctica".[225] Consequently, it seems possible to argue that one of the fundamental goals of the Antarctic Treaty is the preservation of the area in question.[226]

The 1959 Antarctic Treaty did not establish an administrative body to deal with implementation of these measures, which obviously created problems of enforceability.[227] Nevertheless, the Treaty provides for a "unique inspection system".[228] Pursuant to Article VII, paragraphs 1, 2 and 3, of the Treaty the Contracting Parties have the right to designate observers to carry out inspection, who have "complete freedom of access at any time to any or all areas of Antarctica".[229] Moreover, reporting arrangements are utilized under the Antarctic Treaty to assist in obtaining compliance

221 Vigni (n. 202) 501 (The author added that the 'common concern' principle, on the other hand, perfectly fits with the new trends of international law concerning the protection of the environment, 502.).

222 Kish (n. 202) 171-173 and 176-178; Alexander, Jr. (n. 202) 379.

223 Kish (n. 202) 175 citing C. W. Jenks, *The Common Law of Mankind* (n. 112) 380.

224 Hanessian (n. 202) 468.

225 *Ibid* 468-469; also see, Sands, *Principles of International Environmental Law,* (n. 22) 713; Joyner, 'Protection of the Antarctic Environment' (n. 202) 165.

226 Francioni, 'Legal Aspects of Mineral Exploitation in Antarctica' (n. 202) 175.

227 Sands, *Principles of International Environmental Law,* (n. 22) 713.

228 Hanessian (n. 202) 471. Hayton (n. 202) 360-361.

229 James Simsarian, 'Inspection Experience under the Antarctic Treaty and the International Atomic Energy Agency' (1966) 60/3 AJIL 502-510 and 503-507; Kish (n. 202) 175 citing C. W. Jenks, *The Common Law of Mankind* (n. 112) 176. Note (n. 132) 830.

with the provisions of the Treaty, according to which each party is required to provide advance information to other parties on activities to be taken in Antarctica.[230]

With regard to the question whether the Antarctic Treaty constitutes a model for the Arctic it is argued that the Antarctic Treaty might be of limited value as a model for structuring an environmentally sound regime in the Arctic; nevertheless, this Treaty is a worthy example which might aid creation of a special regime in the Arctic.[231]

Environmental protection concerns with regard to Antarctica, as well as the appearance of commercial whaling and sealing in the high seas around Antarctica and overexploitation of such marine mammals[232] leads to the adoption of the Brussels "*Agreed Measures on the Conservation of Antarctic Fauna and Flora*"[233] of 13/06/1964. The 1964 'Agreed Measures' designate the region a 'Special Conservation Area', in which the parties prohibit interference with native mammals or birds without prior authorization, for example, such authorization that may be granted only for scientific and educational research, (Preamble of the Agreed Measures, and Articles II, VI/1-2). Moreover, the 1964 'Agreed Measures' also establish 'Specially Protected Areas' whereby strict rules are required for such authorization, (Articles VI/3 and VIII).[234] Actions permitted under Specially Protected Areas should not jeopardize the natural ecological system existing in that Area, (Article VIII/4, b). Pursuant to Article VII/1 of the 1964 Agreed Measures, the Parties are required to take appropriate measures to minimize harmful interference within the Treaty Area with the normal living conditions of any native mammal or bird, or any attempt at such harmful interference.

The above-mentioned system was replaced by the "*Protocol to the Environmental Protection to the Antarctic Treaty*"[235] of 04/10/1991, when it entered into force in 1998. Preambular paragraph 8 of the 1991 Protocol reemphasized the notion of "mankind": The Parties "convinced that the development of a comprehensive regime for the protection of the Antarctic environment and dependent and associated ecosystems is in the *interest of mankind as a whole*".[236]

230 James (n. 229) 504.

231 Feder (n. 84) 821-822; in the same line, see, Rothwell (n. 202) 305 (Despite obvious similarities, it is not suggested that the Antarctic model should be adopted in the Arctic. Nevertheless, there are sufficient similar characteristics for the arctic States to learn from the southern experience.); Kaye, (n. 202) 79.

232 R. Tucker Scully, 'The Marine Living Resources of the Southern Ocean' (1978) 33/2 U. Miami L. Rev. 345-348; George A. Llano, 'Ecology of the Southern Ocean Region' (1978) 33/2 U. Miami L. Rev. 357, 363 and 366.

233 Agreed Measures on the Conservation of Antarctic Fauna and Flora (adopted 13 June 1964, entered into force 01 November 1982) < http://sedac.ciesin.org/entri/texts/acrc/aff64.txt.html>

234 Joyner, 'Protection of the Antarctic Environment' (n. 202) 266; Kimball (n. 202) 126; Sands, *Principles of International Environmental Law* (n. 22) 713.

235 The Protocol to the Environmental Protection to the Antarctic Treaty (adopted 04 October 1991, entered into force 14 January 1998) *reproduced in*, 30 ILM 1455 (1991).

236 Analysis on the 1991 Protocol, generally see, S. K. N. Blay, 'New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol' (1992) 86/2 AJIL 377-399; Francesco Francioni, 'The Madrid Protocol on the Protection of the Antarctic Environment' (1993) 28/1 Tex. Int'l L. J. 47-72; Catherine Redgwell, 'Environmental Protection in Antarctica: The 1991 Protocol' (1994) 43/3 ICLQ 599-634; Kimball (n. 202) 134-135 and 137; Sands, *Principles of International Environmental Law* (n. 22) 721-726.

The objective of the 1991 Protocol is to ensure comprehensive protection of the Antarctic environment and dependent and associated ecosystems, and it designates Antarctica as a "natural reserve, devoted to peace and science", (Article 2). Pursuant to 1991 Protocol the protection of the Antarctic environment is to be fundamental consideration in the planning and conduct of all human activities in Antarctica. This includes protection of Antarctica's "intrinsic value"[237] (including wilderness and aesthetic values) and its value as an area for the conduct of scientific research (especially research essential to understanding the global environment), (Article 3/1). Some authors found it doubtful whether States would have decided to recognize the intrinsic value of Antarctica, if the 1991 Protocol regulated the exploitation of natural resources.[238] Indeed, while Article 7 of the Protocol prohibits any activity relating to mineral resources other than scientific research, Article 25, paragraph 2 prohibits any mineral resource activities for a period of 50 years after the Protocol came into force. The environmental principles in the Protocol also include requirements for prior assessment of the environmental impacts of all activities and regular and effective monitoring to assess predicted impacts and to detect unforeseen impacts, (Article 3/2, a, b and c). The requirement of environmental impact assessment (EIA) of all activities is also indicated in (Articles 6/1, c; 6/3 and 8/1-4).

The 1991 Protocol establishes the Committee for Environmental Protection, (Article 11), empowered, *inter alia*, to provide advice and formulate recommendations to the Parties in connection with the implementation of this Protocol, including the operation of its Annexes, (Article 12/1). Furthermore, six Annexes have been drawn up: "Annex I - Environmental Impact Assessment"; "Annex II - Conservation of Antarctic Fauna and Flora"; "Annex III - Waste Disposal and Waste Management"; "Annex IV - Prevention of Marine Pollution" (adopted on 04/10/1991 and entered into force on 14/01/1998); and "Annex V - Area Protection and Management" (adopted on 18/10/1991 and entered into force on 24/05/2002). Finally, "Annex VI – Liability Arising From Environmental Emergencies"[239] (adopted on 14/06/2005, and as of Nov, 2021 it has not entered into force).

With respect to the Antarctic environmental protection regime three other treaties should also be noted. Chronologically they are: the "*Convention for the Conservation of Antarctic Seals*"[240] (CCAS) of 01/06/1972; the "*Convention on the*

237 As explained in may previous article Gemalmaz (n. 72, under heading "Nature and wildlife conservation"), the 1979 Bern Convention (Preamble para.3) indicates that species are to be protected because of their intrinsic value. Similarly, the United Nations "*World Charter for Nature*" of 28/10/1982 recognizes that "Every form of life is unique, warranting respect regardless of its worth to man" (Preamble).

238 Maffei, 'Evolving Trends in the International Protection of Species' (n. 54) 154.

239 Pursuant to Article 2/(b) of the Annex VI to the 1991 Protocol, "environmental emergency" means any accidental event that has occurred, having taken place after the entry into force of this Annex, and that results in, or imminently threatens to result in, any significant and harmful impact on the Antarctic environment.

240 The "*Convention for the Conservation of Antarctic Seals*" (adopted on 01 June 1972, entered into force 11 March 1978); *reproduced in*, 11 ILM 251 and 417 (1972).

Conservation of Antarctic Marine Living Resources"[241] (CCAMLR) of 20/05/1980, and the "*Convention on the Regulation of Antarctic Mineral Resource Activities*"[242] (CRAMRA) of 02/06/1988.

The 1972 CCAS is promulgated as a preventive measure, rather than in response to a threat to the species. Preamble paragraph 4 recognizes that this resource should not be depleted by over-exploitation, and hence that any harvesting should be regulated so as not to exceed the levels of the optimum sustainable yield.[243] The CCAS covers all six species of seal which breed in the Antarctic (Article 1, para.2), and prohibits the killing of both Ross and Antarctic fur seals and sets at low levels of catch limits and requires special permits, (Article 3/1; Article 4; Annex I-Permissible Catch; Annex 2-Protected Species; Annex 3-Closed Season and Sealing Season). The 1972 CCAS also establishes obligations on exchange of information as requiring each party to provide annual reports to other parties, as well as to the Scientific Committee for Antarctic Research, (Article 5/1-2 and Annex 6-Exchange of Information). Article 1/1 of this Convention acknowledges the legal status of Antarctica as established by article IV of the Antarctic Treaty.

The objective of 1980 CCAMLR is the conservation, including rational use, of Antarctic marine living resources, (Article II/1-2). The Preamble (para.9) of this Convention states that "it is the interest of all mankind to preserve the waters surrounding the Antarctic continent for peaceful purposes only". The 1980 CCAMLR, unlike the 1959 Antarctic Treaty, the 1964 Agreed Measures and the 1972 CCAS, covers the whole of the Southern Ocean, south of the biological boundary of the Antarctic Polar Front (Antarctic Convergence). It applies to the resources "which form part of the Antarctic marine ecosystem", (Article I.1). It follows that the CCAMLR is based on the "ecosystem approach", which takes account of the whole of the food chain and assesses the stocks of seals and seabirds as well as fish, squid and krill. Catch limits are set for all commercial fisheries and strict controls aim to minimize

241 The "*Convention on the Conservation of Antarctic Marine Living Resources*" (CCAMLR) (adopted on 20 May 1980, entered into force on 07 April 1982); *reproduced in*, 19 ILM 841 (1980).

242 The "*Convention on the Regulation of Antarctic Mineral Resource Activities*" (CRAMRA) (adopted 02 June 1988 and not entered into force) reproduced in 27 ILM 868 (1988). The CRAMRA could not enter into force after France and Australia decided not to sign the Convention. Generally see, Sands, *Principles of International Environmental Law,* (n. 22) 716-721; for an early analysis, see, Watts (n. 202) 221-248 (Despite the fact that it never entered into force due to a lack of sufficient ratifications, the Convention on the Regulation of Antarctic Mineral Resources, signed in Wellington in 1988, was a turning point in the evolution of the Antarctic Treaty. Contested from the start of negotiations by Third States that had claimed the right to take part with full rights in the formulation process, the Convention soon became the object of criticism also by certain of the countries that had participated in the drafting of the text. The Convention's failure to enter into force cannot be explained solely by the conflicts that emerged concerning the 'right' to take part in negotiations or by the content of the regulation for the operation of the Convention or by the proclamation, in certain key countries, of new environmental policies. The Convention's failure concerns more generally the legal definition of Antarctica's international status, which has remained vague due to ambiguity on the question of the individual claims to sovereignty. Extending the Treaty to encompass this aspect of cooperation in the Antarctic would have forced the parties to confront the legal-political problem of territorial claims on Antarctica and its resources, thereby laying to rest the age-old sovereignty question.).

243 Scully (n. 232) 347-348; Llano (n. 232) 366; Kimball (n. 202) 126; Kaye (n. 202) 81; Sands, *Principles of International Environmental Law,* (n. 22) 713-714.

illegal and unregulated fishing. Thus, the ecosystem approach does not only require that the exploitation of the resources must not deplete the harvested species, but also imposes a duty to refrain from the adverse effects of exploitation on other species and on the entire ecosystem. These conservation ends indicate that pollution-causing activities are clearly discouraged and prohibited.[244] The Contracting Parties which are not Parties to the 1959 Antarctic Treaty are obliged to comply with the 1964 "Agreed Measures", (Article V/2). Further, Article VI provides that nothing in the CCAMLR is to derogate from the rights and obligations under the 1946 International Whaling Convention.

The 1980 CCAMLR establishes two bodies. The first is the Commission for the Conservation of Antarctic Marine Living Resources, (Article VII/1). The functions of the Commission are regulated in Article IX, which include the formulation, adoption and revision of conservation measures on the basis of the best scientific evidence available, (Article IX/1, f). Since Article VI saves the rights and obligations derived from the 1946 Whaling Convention, it follows that the CCAMLR Commission seems unlikely to deal with seals and whales of the CCAMLR area.[245] As the second organ the 1980 CCAMLR establishes the Scientific Committee for the Conservation of Antarctic Marine Living Resources (Article IVX/1). One of the functions of the Scientific Committee is to "assess the effects of proposed changes in the methods or levels of harvesting and proposed conservation measures", (Article XV/2, d), which apparently indicates the recognition of the principle of 'environmental impact assessment'.

In the period between the 1980 CCAMLR and the 1988 CRAMRA, at the Conference of Heads of State or Government on Non-Aligned Countries held in New Delhi in March 1983 a resolution was adopted in which the Heads "expressed their conviction that, in the interest of all mankind, Antarctica should continue forever to be used exclusively for peaceful purposes, should not become the scene or object of international discord and should be accessible to all nations. They agreed that the exploration of the area and the exploitation of its resources shall be carried out for the benefit of all mankind, and in a manner consistent with the protection of the environment of Antarctica".[246]

244 R. F. Frank, 'The Convention on the Conservation of Antarctic Marine Living Resources', (1983) 13/3 Ocean Dev. & Int'l L. 291-346; Martin H. Belsky, 'Management of Large Marine Ecosystems: Developing a New Rule of Customary International Law' (1985) 22/4 San Diego L. Rev. 733-763 and 761-762; Joyner, 'Protection of the Antarctic Environment' (n. 202) 265; Watts (n. 202) 215-221; Maffei, 'Evolving Trends in the International Protection of Species' (n. 54) 146; Kaye (n. 202) 82-83; Sands, *Principles of International Environmental Law,* (n. 22) 714-715.

245 Kaye (n. 202) 86; also see, Maffei, 'Evolving Trends in the International Protection of Species' (n. 54) 289.

246 See, Francioni, 'Legal Aspects of Mineral Exploitation in Antarctica' (n. 202) 169 citing U.N. Doc. A/38/193 (1983) (The author also noted that the Heads of States of the Organization of African Unity adopted the Mauritions-sponsored resolution on 07/08/1985. The first paragraph of the operative part of the 1985 resolution, African leaders declared that "Antarctica to be the common heritage of mankind"; see, *ibid* 172, note.35.).

c) The notion in the instruments concerning conservation of natural resources and biological diversity

Preamble paragraph 6 of the "*African Convention on the Conservation of Nature and Natural Resource*"[247] of 15/09/1968 indicates that the Parties are willing to undertake "individual and joint action for the conservation, utilization and development of these assets by establishing and maintaining their rational utilization for the present and future *welfare of mankind*."[248] Article IV (Fundamental Obligations) of the "*African Convention on the Conservation of Nature and Natural Resources (Revised Version)*"[249] of 11/07/2003 imposes upon Parties the obligation to adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through preventive measures and the application of the precautionary principle in the interest of *present and future generations*. Furthermore, in Preambular paragraph 5 of the 2003 Revised African Convention the Parties affirm that the conservation of the global environment is a common concern of humankind as a whole, and the conservation of the African environment a primary concern of all Africans. [250]

The "*Convention on International Trade in Endangered Species*" (CITES) of 03/03/1973 recognizes that "wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and *the generations to come*", (Preamble, para.1). Similarly, in Preamble paragraph 2 of the "*Convention on the Conservation of Migratory Species of Wild Animals*"[251] of 23/06/1979 the Contracting Parties declared that they are "aware that each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilized, is used wisely".[252] In the Preambular paragraph 3 of the Council of Europe "*Convention on the Conservation of the European Wildlife and Natural Habitats*"[253] of 19/09/1979 the Parties recognized "that wild flora and fauna constitute *a natural heritage* of

247 The African Convention on the Conservation of Nature and Natural Resource (adopted on 15 September 1968, entered into force on 16 June 1969); *reproduced in*, Victor J. Orsinger, 'Natural Resources of Africa: Conservation by Legislation' (1971) 5 Afr. L. Stu. 29-55 and 36-39.

248 According to Article XVI of the 1968 African Conservation Convention, the Contracting States shall supply to Organization of African Unity with the text of laws, decrees, regulation and instructions in force in their territories, which are intended to ensure the implementation of the Convention, and also with reports on the results achieved in applying the provisions of the Convention. As one commentator observed, such functions are clearly supervisory. See, Alexandre Charles Kiss, 'Mechanisms of Supervision of International Environmental Rules' in Frits Kalshoven, Pieter Jan Kuyper and Johan G. Lammers (eds.), *Essays on the Development of the International Legal Order: in memory of Haro F. Van Panhuys* (Sijthoff and Noordhoff 1980) 99-114 and 102.

249 The "*African Convention on the Conservation of Nature and Natural Resources (Revised Version)*" (adopted on 11 July 2003, entered into force on 23 July 2016).

250 On the 2003 Convention, see, IUCN, *An Introduction to the African Convention,* (2004) 5-23.

251 The "*Convention on the Conservation of Migratory Species of Wild Animals*" (Bonn Convention) (adopted on 23/06/1979, entered into force on 01/11/1983); *reproduced in*, 19 ILM 15 (1980).

252 In the 1979 Bonn Convention the Parties recognize that wild animals "are an irreplaceable part of the earth's natural system" that have an increasing value "from environmental, ecological, genetic, scientific, aesthetic, recreational, cultural, educational, social and economic points of view", (Preamble).

253 The "*Council of Europe Convention on the Conservation of the European Wildlife and Natural Habitats*" (ETS No.104) (adopted on 19/09/1979, entered into force on 01/06/1982).

aesthetic, scientific, cultural, recreational, economic and *intrinsic* value that needs to be preserved and handed on to *future generations*". Under the EEC legislation one may refer to, for instance, the Council Directive 79/409/EEC of 02/04/1979 on the conservation of wild birds".[254] Preamble paragraph 3 of the 1979 EU Directive states that the species of wild birds "constitute a *common heritage* and effective bird protection is typically a trans-frontier environment problem entailing common responsibilities".

Article 1 of the "*International Undertaking on Plant Genetic Resources*"[255] of 1983 declares plant genetic resources to be a "heritage of mankind". Furthermore, it calls for international co-operation in "establishing or strengthening the capabilities of developing countries… with respect to plant genetic resource activities", (Article 6).

In the last Preambular paragraph of the "*Convention on Biological Diversity*"[256] of 05/06/1992 the Contracting Parties declared their determination "to conserve and sustainably use biological diversity for the benefit of *present and future generations*". Furthermore, this Convention in its preamble also refers to the concept of 'common concern of humankind': "The Contracting Parties… (affirm) that the conservation of biological diversity is a *common concern of humankind*…" In various Articles of this Convention obligations imposed upon States are formulated with a phrase "as far as possible and as appropriate" which implies the recognition of differentiated responsibility.[257]

In accordance with Article 1 of the "*Convention for the Conservation of Biological Diversity and the Protection of Priority Wild Areas in Central America*" of 05/06/1992, the objective of this regional instrument is to conserve biological diversity and the biological resources of the Central American region by means of sustainable use for the benefit of present and future generations, (Article 1).[258]

254 Council Directive 79/409/EEC of 02/04/1979 on the 'Conservation of wild birds'; OJ L 103, 1-18 (25 April 1979).

255 Food and Agriculture Organization (FAO), *International Undertaking on Plant Genetic Resources*, (1983), (Article 1. The objective of this Undertaking is to ensure that plant genetic resources of economic and/or social interest, particularly for agriculture, will be explored, preserved, evaluated and made available for plant breeding and scientific purposes. *This Undertaking is based on the universally accepted principle* that plant genetic resources are *a heritage of mankind* and consequently should be available without restriction.) (emphasis added.)

256 The "*Convention on Biological Diversity*" (CBD), (UN Doc. UNEP/Bio.Div./CONF/L.2), was adopted on May 1992 in Nairobi, and was opened for signature in Rio de Janeiro on 05/06/1992 at the UN Conference on Environment and Development, and entered into force on 29/12/1992; *reproduced in*, 31 ILM 818 (1992).

257 For instance, see, Articles 5, 7-11, and 14 of the 1992 Convention on Biological Diversity. Also see, French, '*The Importance of Differentiated Responsibilities'* (n. 167) 39. (According to the author, "despite the fact that the phrase as a whole is extremely ambiguous, the insertion of 'as far as possible' is an attempt to prevent developing State Parties relying too heavily upon 'as appropriate' for a justification for inaction".)

258 The original Spanish version of Article 1 of the 1992 "*Convention for the Conservation of Biological Diversity and the Protection of Priority Wild Areas in Central America*" reads as follows: "El objetivo de este Convenio es conservar al maximo posible la diversidad biologica, terrestre y costero-marina, de la region centroamericana, para el beneficio de las presentes y futures generaciones".

In the last preambular paragraph of the UN "*Convention to Combat Desertification*"[259] (UNCCD) of 17/06/1994 it is stated that the Parties to the Convention are determined "to take appropriate action in combating desertification and mitigating the effects of drought for the benefit of *present and future generations*". In the UNCCD in addition to some preambular paragraphs, particularly Articles 3(d), 5 and 6 clearly refer to the needs of developing countries; consequently the Convention recognizes the standard of differentiated obligations/responsibilities of States.

Article 1, paragraph 5, of the "*Protocol for the Implementation of the 1991 Alpine Convention on Soil Protection*"[260] of 16/10/1998 emphasizes the principle of prevention, which compromises the safeguarding of the functionality of soils and the possibility to use them for various purposes, and "their *availability to future generations*" with a view to sustainable development.

In addition to above-mentioned instruments the same notion also appears in some other instruments. For example, in Preamble paragraph 5 of the "*Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*" ("ENMOD Convention")[261] of 18/05/1977 the State Parties declared that the use of environmental modification techniques for peaceful purposes could improve the interrelationship of man and nature and contribute to the preservation and improvement of the environment for the benefit of *present and future generations*.

The "*Convention on the Transboundary Effects of Industrial Accidents*" (Industrial Accidents Convention) of 17/03/1992[262] emphasizes the special importance of protecting human beings and the environment against the effects of industrial accidents in the interest of present and future generations, (Preamble, para.1).

The Preamble paragraph 10 of the "*Protocol on Pollutant Release and Transfer Registers*"[263] ("Protocol on PRTRs") of 21/05/2003 the Parties expresses their desire "to provide a mechanism contributing to the ability of every person of present and future generations to live in an environment adequate to his or her health and well-being, by ensuring the development of publicly accessible environmental information systems".

259 The "*United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*" (adopted on 17/06/1994, entered into force on 26/12/1996) *reproduced in*, 33 ILM 1328 (1994).

260 The "*Protocol for the Implementation of the 1991 Alpine Convention on Soil Protection*" (adopted on 16/10/1998, entered into force on 18/12/2002); further see, Gemalmaz (n. 72).

261 The "*Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*" ("ENMOD Convention") adopted by Resolution 31/72 of the UN General Assembly at its 96th plenary meeting on 10/12/197. The ENMOD Convention was opened for signature on 18/05/1977 and entered into force on 05/10/1978; *reproduced in*, 16 ILM 88 (1977).

262 The "*Convention on the Transboundary Effects of Industrial Accidents*" (Industrial Accidents Convention) (17 March 1992); *reproduced in*, 31 ILM 1333 (1992).

263 The Protocol on Pollutant Release and Transfer Registers was adopted at an extraordinary meeting of the Parties to the Aarhus Convention at the meeting took place in the framework of the fifth Ministerial Conference 'Environment for Europe', Kiev, on 21/05/2003, and entered into force on 08/10/2009; available at, <http://treaties.un.org>. Thirty-six member States and the European Community signed the Protocol in Kiev.

d) The Notion in the Instruments Concerning Marine Protection and International Waters

The "*International Convention for the High Seas Fisheries of the North Pacific Ocean*" (INPFC) of 09/05/1952 establishes a conservation regime in order to "best serve the common interest of mankind", (Preamble, para.2). Moreover, the INPFC describes tuna and other fish as being of "common concern" to the parties, (Article II/8).

Some scholars draw attention to the fact that Article 136 should be read in conjunction with Article 133, which defines "resources" for the purpose of Part XI of the Convention, the notion of which only refers to non-living resources.[264] Nevertheless there are suggestions that the simple formulation of Article 136 of UNCLOS might be interpreted in a wider context.[265]

Article 136 of the UN "*Convention on the Law of the Sea*" of 10/12/1982 proclaims that the Area meaning the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, is the *common heritage of mankind*.[266] The phrase "beyond the limits of national jurisdiction" is called "the Area" in the UNCLOS. The concept 'common heritage of mankind' in the UNCLOS "presupposes a third kind of regime which is different from both the concept of sovereignty, which applies in the territorial sea and the exclusive economic zone, and the concept of freedom, which applies on the high seas".[267] The legal status of the Area and its resources is regulated in Article 137 of the Convention. While Article 137, paragraph 1, prohibits any claim by any State of sovereignty over any part of the Area or its resources, and does not allow appropriation any part thereof by any State or natural or legal person, which is in no case be recognized, paragraph 2 clearly indicates that "all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act". Furthermore, with respect to economic objectives of the notion of common heritage of mankind[268] Article 140 of the Convention provides that "activities in

264 Marciniak (n. 73) 382.

265 Baslar (n. 71) 206.

266 For an overview, see, Wolfrum (n. 71) 324-332 (The CH notion under UNCLOS. The author, in this context, concluded that: The common heritage principle as specified by Part XI of the Convention on the Law of the Sea contains the following elements: It stipulates that the sea-bed has to be regarded as the common heritage of mankind which will be represented by the Sea-Bed Authority as its trustee. However, mankind is not considered to be an active subject in deep seabed activities but remains only an object the interests of which have to be taken into account. Therefore in deep sea-bed mining the interests of peoples not having attained full independence - and thus not being represented in the Authority as their States did not adhere to the Convention - and of further generations have to be considered. As a logical consequence of the common heritage principle, any claim or exercise of sovereignty or sovereign rights over the deep sea-bed area and its resources as well as its appropriation are prohibited. The regime on the utilization of the deep seabed and of its resources contains the following elements: peaceful use, protection of the marine environment, activities to be carried out for the benefit of mankind as a whole, *ibid* 332.); as was already noted, also see, paragraph 1 of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction adopted by the UNGA Resolution 2749 (XXV) of 17/12/1970.

267 Scovazzi (n. 76) 117.

268 Joyner, 'The Common Heritage of Mankind' (n. 71) 196.

the Area shall be carried out for the benefit of mankind as a whole… taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status".

Preamble paragraph 6 of the "*Convention on Conservation of Nature in the South Pacific*"[269] of 12/06/1976, entered into force on 26/06/1990 reads as follows: "Desirous of taking action for the conservation, utilization and development of these resources through careful planning and management for the benefit of present and future generations". In Preamble paragraph 3 of the "*Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*"[270] ("Noumea Convention") of 24/11/1986, the Parties recognize their responsibility to preserve their natural heritage for the benefit and enjoyment of present and future generations.

The "Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean" of 10/06/1995 is the modified version of the "*Convention for the Protection of the Mediterranean Sea against Pollution*"[271] (Barcelona Convention) which was adopted on 16/02/1976 by the Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region for the Protection of the Mediterranean Sea, held in Barcelona. The original Convention has been modified by amendments adopted on 10/06/1995 by the Conference of Plenipotentiaries on the Convention for the Protection of the Mediterranean Sea against Pollution and its Protocols, held in Barcelona on 09-10/06/1996. The amended Convention was recorded as "*Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean*" (also known as, Barcelona Convention).[272] In Preambular paragraph 2 of the Barcelona Convention of 10/06/1995 the Contracting Parties stated that they are "fully aware of their responsibility to *preserve this common heritage* for the benefit and enjoyment of *present and future generations*". Pursuant to

269 The "*Convention on Conservation of Nature in the South Pacific*" (adopted on 12/06/1976, entered into force on 26/06/1990) <http://www.ecolex.org/server2.php/libcat/docs/TRE/Multilateral/En/TRE000540.txt>; furthermore see, the "*Convention on Conservation of Nature in the South Pacific*" (Apia Convention) (signed in Apia on 12/07/1976, entered into force on 26/06/1990). Generally see, P. Lawrence, 'Regional strategies for the implementation of environmental conventions: Lessons from the South Pacific?', (1994) 15 Australian YBIL 203-229.

270 The "*Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*" ('Noumea Convention') (adopted on 24/11/1986, entered into force on 22/08/1990); *reproduced in*, 26 ILM 38 (1987). In the same context also see, "*The Agreement Establishing the South Pacific Regional Environment Programme*" (Agreement Establishing SPREP), (adopted on 16/06/1993, entered into force on 31/08/1995) <http://www.sopac.org/sopac/docs/RIF/SPREP_Agreement%20Establishing%20SPREP.pdf>. In Preamble paragraph 2 of the 1993 SPREP Agreement the Parties declared that they were "Conscious of their responsibility to preserve their natural heritage for the benefit and enjoyment of present and future generations and their role as custodians of natural resources of global importance".

271 The "*Convention for the Protection of the Mediterranean Sea against Pollution*" (Barcelona Convention) was adopted on 16/02/1976 and entered into force on 12/02/1978. According to Article 13 of the Barcelona Convention of 16/02/1976, Contracting Parties designated United Nations Environmental Programme (UNEP) as responsible for carrying out secretarial functions, some of which imply supervisory functions; such as, "to consider inquiries by, and information from, the Contracting Parties, and to consult with them on questions relating to this Convention", (Art.13, paragraph iii). Pursuant to Article 20, the Contracting Parties shall transmit to the Organization reports on the measures adopted in the implementation of this Convention.

272 The "*Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean*" (Barcelona Convention) (adopted 10/06/1995, entered into force 09/07/2004).

Article 4, paragraph 3, of 1995 Convention, the Contracting Parties pledge themselves to take appropriate measures concerning the protection of the marine environment in the Mediterranean Sea area from all types and sources of pollution. Note that both Preambular para.2 and Article 4/3 of the 1995 Convention are identically taken from the 1976 original Convention.

The UN/ECE "*Convention on the Protection and Use of Transboundary Watercourses and International Lakes*"[273] of 17/03/1992 provides as one of the guiding principles that water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs. It may be noted that the "Protocol on Water and Health" of 17/06/1999 identically repeats the same provision in Article 5/a. It is noteworthy that both the 1992 Convention and the 1999 Protocol refer to the "present and future generations" notion in the Articles concerning guiding principles.

Unlike the aforementioned instruments, the UN "*Convention on the Law of the Non-navigational Uses of International Watercourses*"[274] of 21/05/1997 refers to the same notion in its Preamble in the following words: "Expressing the conviction that a framework convention will ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations", (Preamble, para.5).

e) The Notion in the Ozone Protection Instruments

In early 1990s the concept appeared, for instance, in the UN "*Framework Convention on Climate Change*"[275] (FCCC) of 09/05/1992. While in Preambular paragraph 23 of the FCCC the Contracting Parties declared that they are "determined to protect the climate system for present and future generations", Article 3, paragraph 1, of the Convention provided that "the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities". This element is drawn directly from the 1992 Rio Declaration.[276] A

273 The UN/ECE "*Convention on the Protection and Use of Transboundary Watercourses and International Lakes*" was adopted at Helsinki on 17/03/1992 and entered into force on 06/10/1996, United Nations, Doc. E/ECE/1267; reproduced in, 31 ILM 1312 (1992).

274 The "*Convention on the Law of the Non-navigational Uses of International Watercourses*" was adopted by the UN General Assembly Resolution 51/229 on 21/05/1997, and entered into force on 17/08/2014; *reproduced in*, 36 ILM 700 (1997). Preambular paragraph 6 affirms "the importance of international cooperation and good-neighbourliness in this field".

275 The Framework Convention on Climate Change (adopted 09 May 1992, entered into force 21 March 1994) *reproduced in*, 31 ILM 848 (1992); also see, Barry E. Carter - Phillip R. Trimble, (n. 43) 805-818. Preambular para.7 of this Convention refers to the 1972 Stockholm Declaration.

276 Boyle, 'Reflections on Treaties and Soft Law' (n. 1) 908. (In view of the author the elements of Article 3 "reflect principles which are not simply part of the Climate Change Convention, but which are also emerging at the level of general international law, even if it is as yet premature to accord them the status of customary international law. They are not expressed in obligatory terms: the use of 'should' qualifies their application, despite the obligatory wording of the chapeau sentence".)

special reference has been made to "the specific needs and special circumstances of developing country Parties" in Article 3/2 of the UNFCCC.[277]

Article 10 of the 1997 "*Kyoto Protocol*" provides that "All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, without introducing any new commitments for Parties not included in Annex I, but reaffirming existing commitments under Article 4, paragraph 1, of the Convention, and continuing to advance the implementation of these commitments in order to achieve sustainable development, taking into account Article 4, paragraphs 3, 5 and 7, of the Convention, shall…"

In that connection it may be noted that the General Assembly in its resolution 56/199 on "*Protection of global climate for present and future generations of mankind*"[278], adopted on 21/12/2001, after referring to its resolutions 50/115 of 20/12/1995, 51/184 of 16/12/1996, 52/199 of 18/12/1997 and 54/222 of 22/12/1999, its decision 55/443 of 20/12/2000 and other resolutions relating to the protection of the global climate for present and future generations of mankind, (Preamble para.1), in Operative (para.1) recalls the United Nations Millennium Declaration, in which heads of State and Government resolved to make every effort to ensure the entry into force of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and to embark on the required reduction of emissions of greenhouse gases, and calls upon States to work cooperatively towards achieving the ultimate objective of the United Nations Framework Convention on Climate Change". More recently, the General Assembly in its resolution 63/32 on "*Protection of global climate for present and future generations*"[279], adopted on 26/11/2008, recalls its resolutions 43/53 of 06/12/1988, 54/222 of 22/12/1999, 61/201 of 20/12/2006 and 62/86 of 10/12/2007 and other resolutions and decisions relating to the *protection of the global climate for present and future generations of mankind* (Preamble, para.1), and calls upon States to take urgent global action to address climate change in accordance with the principles identified in the Convention, including the *principle of common but differentiated responsibilities* and respective capabilities, and, in this regard, urges all countries to fully implement their commitments under the Convention, to take effective and concrete actions and measures at all levels, and to enhance international cooperation in the framework of the Convention, (Operative para.9). (Emphasis added).

277 Also see, Article 4, paragraph 8, of the UNFCCC, which refers to "specific needs and special situations of the least developed countries".

278 The General Assembly resolution 56/199 on "*Protection of global climate for present and future generations of mankind*" was adopted on 21/12/2001 at its 90th plenary meeting.

279 The General Assembly resolution 63/32 on "*Protection of global climate for present and future generations*" was adopted on 26/11/2008 at its 60th plenary meeting. The principle of 'common but differentiated responsibilities' is also referred to in Preamble paragraph 2 of this resolution.

f) The Notion in the Outer Space and Moon Instruments

Furthermore, by treaty, the moon and outer space are also considered as part of global commons and of the common heritage of humankind.[280]

For example, in Preambular paragraph 2 of the "*Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*"[281] of 27/01/1967, States Parties recognize "*the common interest of all mankind* in the progress of the exploration and use of outer space for peaceful purposes". As will be shown below, the 'common interest' principle does not appear only in its Preamble but also in the operative part of the Treaty. The 1967 'Outer Space Treaty' provides that the exploration and use of outer space[282] shall be carried out "for the benefit and in the interests of all countries", irrespective of their degree of economic or scientific development, and shall be the "*province of all mankind*", (Article I, sub-paragraph 1). It is further provided that "outer space, including the Moon and other celestial bodies shall be free for exploration and use by all States without discrimination of any kind and on basis of equality and in accordance with international law…", (Article I, sub-paragraph 2). Thus in the latter provision three complementary elements are indicated: the prohibition of discrimination, the recognition of the equality of all States and the requirement that the activities be conducted in accordance with international law. [283]

In short, the object and the purpose of the Outer Space Treaty are to enhance and protect the common interest of all humankind in the exploration and use of outer space for peaceful purposes.[284] The common interest principle in outer space is reinforced by other principles, such as the freedom of outer space and non-appropriation of outer space.[285]

Indeed, Article II of the 1967 'Outer Space Treaty' stipulates that "outer space, including the Moon and other celestial bodies, *is not subject to national appropriation* by claim of sovereignty, by means of use or occupation, or by any other means". (Emphasis added). Article II of the Treaty indicates the application

280 Generally see, Lachs (n. 110); Ogunsola O. Ogunbanwo, *International Law and Outer Space Activities* (Martinus Nijhoff Publishers, 1975); Christol (n. 141); Gerardine Meishan Goh, *Dispute Settlement in International Space Law* (Martinus Nijhoff Publishers, 2007) (Arguing the urgent need for the creation of a permanent authority to determine the basis of the corpus international and transnational space law, as well as the sectorialized dispute settlement mechanism); Lotta Viikari, *The Environmental Element in Space Law* (Martinus Nijhoff Publishers, 2008); Lyall and Larsen (n. 102); for examples from early literature, see, C. Wilfred Jenks, '*International Law and Activities in Space*' (1956) 5/1 ICLQ 99-114.

281 The "*Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*" (Outer Space Treaty') was adopted by General Assembly resolution 2222 (XXI), (Annex), on 19/12/1966, opened for signature on 27/01/1967, and entered into force on 10/10/1967.

282 Stephen Gorove, 'Freedom of Exploration and Use in the Outer Space Treaty: A Textual Analysis and Interpretation', (1971) 1/1 Denv. J. Int'l L. & Pol'y 93-107 and 104-106; Lachs (n. 110) 42-48; Ogunbanwo (n. 280) 214-216; Christol (n 141) 37-46; Lyall and Larsen (n 102) 53-80.

283 Lachs (n. 110) 44-45.

284 Jakhu (n. 102) 34.

285 Christol (n. 141) 47-48; Jakhu (n. 102) 39.

of the *res communis* principle to outer space, the moon and other celestial bodies. Thus, States have been prevented from "extending to them, and exercising within them, those rights which constitute attributes of territorial sovereignty".[286] As shown above, the latter principle was first stated in the General Assembly resolution 1721 (XVI) of 20/12/1961[287] and was subsequently inserted into the 'Declaration of Legal Principles'[288] of 13/12/1963. It follows that, if no national occupation on the part of States is possible, it is something common to all Humankind, considered as a whole.[289] It is noteworthy that as far back as 1950s Jenks argued that "space beyond the atmosphere is a *res extra commercium* incapable by its nature of appropriation on behalf of any particular sovereignty".[290] The prohibition of "national appropriation" in Article II of the 1967 Outer Space Treaty includes both sovereign rights and private property rights.[291]

The incorporation of the principles and basic ideas expressed in the earlier space resolutions into the 1967 Treaty confirmed their status as between the parties, and transformed them into treaty obligations. Moreover, those principles, particularly Articles I-III, have now the status of customary as well as treaty law, and thus binding on all States.[292]

The guarantee that the exploration, use, and exploitation of the space environment shall be "the province of all mankind", which is mentioned in the Preamble, Article 1/1 and Article 5 of the 1967 Treaty, thus inserted, for the first time[293], a concept having a major concern for 'all mankind' into an operative part of an international agreement.[294] The phrase 'the province of mankind' is not easy to interpret "as a matter of law. Rhetorically it adds a little gloss to the freedom of exploration and use in para.2 of Article I".[295] Some authors argue that the concept of 'province of all

286 Lachs (n. 110) 42-43. The author added that "neither priority in discovery nor the mastery of technical facilities could constitute a title to exclusive rights in this field", *ibid* 47.

287 The UN General Assembly resolution 1721 A (XVI) on "*International co-operation in the peaceful uses of outer space*" was adopted on 20/12/1961 at its 1085th plenary meeting, Part A, para.1(b). Also see, Christol (n 141) 48.

288 The General Assembly resolution 1962 (XVIII) on "*Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*" was adopted on 13/12/1963 at its 1280th plenary meeting. As was already noted the 1963 Declaration of Legal Principles also provides that the exploration and use of outer space shall be carried on for the benefit and in the interests of all mankind, (Operative para.1).

289 Cocca (n. 81) 14.

290 Jenks, 'International Law and Activities in Space' (n. 280). (Further, the author found it "desirable to start from the principle that title to the natural resources of the moon and of other planets and satellites should be regarded as vested in the United Nations and that any exploitation of such resources which may be possible should be on the basis of concessions, leases or licences from the United Nations", *ibid* 111, 114.)

291 Jakhu (n. 102) 46.

292 Lyall and Larsen (n. 102) 54, 59; Jakhu (n. 102) 48; Goedhuis (n. 102) 215.

293 As shown above the Antarctic Treaty of 01/12/1959 in its Preamble makes reference to "the interests of all mankind" in the exclusively peaceful use of Antarctica.

294 Christol (n. 141) 44; Jakhu (n. 102) 38.

295 Lyall and Larsen (n. 102) 62. (The authors added that "it is inappropriate to interpret OST Art.I as implying at that stage the existence of the notion of a regime of 'common heritage'… It was not in the minds of the negotiators and drafters of the OST that there should be such a common controlling regime (as is the case in Part XI of the 1982 UNCLOS) as the latter concepts of common heritage imply", *ibid* 64.)

mankind' is broader than, and different from, the legal principle of 'common heritage of all mankind'[296], as included in Article 11, paragraph 1, of the 1979 Moon and Other Celestial Bodies Agreement.

Pursuant to Article IV, sub-paragraph 1, of the 'Outer Space Treaty', States Parties undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner. Note that Preamble para.2 of the 1967 Treaty was taken from Preamble para.2 of the above-mentioned 1963 'Declaration of Legal Principles', which has already been indicated above under soft-law instruments.

In sum, one of the principles common in outer space treaties, namely the freedom of exploration and use as provided, for example, in Article I of the 1967 'Outer Space Treaty' is limited by a number of criteria or requirements including, *inter alia*, the activity should be carried out "for the benefit and interests of all countries", since outer space constitutes "the province of all mankind". The latter has thus lead the prohibition of national appropriation (Article II), limitations on military uses (Article IV), and avoidance of harmful contamination (Article IX).[297] Thus, the traditional international law principle, i.e. "everything not prohibited is permitted" indicated in the *Lotus* case in 1927 by the PCIJ, does not constitute a precedent in favor of unrestricted national uses and activities in outer space. [298]

Article IX of the 1967 Outer Space Treaty provides for avoidance of harmful contamination of outer space and celestial bodies and avoidance of adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter, which is completed by the duty, where necessary, to adopt appropriate measures for this purpose. In that connection, as examined below, Preamble, para.3, as well as Article I of the Nuclear Test Ban Treaty of 05/08/1963 may be noted. Moreover, it may be added that space technology provides an opportunity to improve more effective protection of the Earth's environment. As to the latter, among others, the 1986 UN "Remote Sensing Principles"[299] can be noted.[300]

On the other hand, it may be noted that the formulation that all astronauts are to be treated as "envoys of mankind in outer space" appear in (Operative para.9) of the

296 Jakhu (n. 102) 49.

297 Gorove, 'Freedom of Exploration and Use in the Outer Space Treaty' (n. 282) 100; Jakhu (n. 102) 41.

298 Christol (n. 141) 267; Jakhu (n. 102) 43.

299 "*Principles Relating to Remote Sensing of the Earth from Space*" was adopted by the UN General Assembly resolution 41/65 on 03/12/1986. Principle I of the 1986 Remote Sensing Principles provides that "the term 'remote sensing' means the sensing of the Earth's surface from space by making use of the properties of electromagnetic waves emitted, reflected or diffracted by the sensed objects, *for the purpose of improving natural resources management, land use and the protection of the environment*". (Emphasis added).

300 Generally see, Masami Onoda, 'Satellite Earth Observation as 'Systematic Observation' in Multilateral Environmental Treaties' (2005) 31/2 J. Space L. 339-411; 370-388 and 401-408.

1963 'Declaration of Legal Principles' was subsequently included in Article V of the 1967 Outer Space Treaty, and further elaborated by the 1968 Rescue Agreement.[301]

As it is argued in early 1970s "the world community has increasingly recognized the shared resource character of the atmosphere".[302] While some authors noted the vagueness attached to such expressions as 'province of mankind' and 'benefit of mankind' and the difficulty to identify the 'common interest of mankind' even though it implies that such an international interest exists as opposed to national interest in outer space[303]Others argued that "the phrase referring to the 'province of all mankind' is presently more of an expression of hope than that of actual content. The provision as it stands seems to be a compromise between the interests of the underdeveloped nations and those of the space powers". [304]

In relation to Article I of the Outer Space Treaty, it is argued that the 1959 Antarctica Treaty was also mentioned during the negotiations. It influenced the meaning given to the terms found in the Outer Space Treaty.[305] Furthermore, it is observed that the negotiators of the 1967 Treaty were aware of the *res communis* concepts applying to the ocean and were employing this analogy as they drafted the rules to be applied in the exploration, use, and exploitation of the space environment.[306] The function of the mankind principle "has been to unify and promote the terms and goals" of the Outer Space Treaty.[307] Before the adoption of the 1967 Treaty some commentators argued that although the common heritage doctrine is not yet developed to precise definition, it is a substantive doctrine capable of expansion to resolve future controversies.[308] It is further argued that in the field of space law fundamental legal principles, which include treating outer space as commons, preserving it for peaceful purposes, maintaining freedom of access and use, and promoting responsibility and cooperation in its use for the benefit of all are already in existence, should be maintained, the fact of the lack of clear definitions of these principles, and detailed regulations for ensuring their

301 The *Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space* (adopted 22 April 1968).

302 Samuel A. Bleicher, 'An Overview of International Environmental Regulation' (1972) 2/1 Ecology L. Q. 1, 66.

303 Ogunbanwo (n. 280) 214.

304 Gorove, 'Freedom of Exploration and Use in the Outer Space Treaty' (n. 282) 105.

305 Christol (n. 141) 39; Lyall and Larsen (n 102) 55-56 (The authors also noted that the 1963 Nuclear Test Ban Treaty was another international instrument affording some guidance in the negotiation and drafting of the 1967 Outer Space Treaty, *id.*, p.56. In the early 1950s Jenks argued: "Space beyond the atmosphere of the earth presents a much closer analogy to the high seas than to the airspace above the territory of a State… Any projection of territorial sovereignty into space beyond the atmosphere would be inconsistent with the basic astronomical facts''.); see, Jenks, 'International Law and Activities in Space' (n. 280) 103.

306 Christol (n. 141) 45. (The author added: "Mankind, through the utilization of the principle (of 'province of all mankind') would be able to enjoy the peaceful and orderly use of a *rea communis* resource… This principle is both legally and practically related to the provisions of Article 1, para.2 allowing freedom of access to celestial bodies and the free and equal exploration, exploitation, and use of the entire space environment", *ibid*.)

307 *Ibid* 46.

308 Tennen (n. 102) 153 citing C. Wilfred Jenks, *Space Law*, (1965) 193.

enforcement could not be denied. Furthermore, traditional analogies of the law of the sea and the Antarctica regime will no longer be sufficient.[309]

Further, it may be noted that pursuant to Article VI[310] of the 1967 Outer Space Treaty, Contracting Parties have agreed to accept international responsibility to regulate the activities of their nationals in space and to become international liable therefor. This is same in the 1979 Moon and Other Celestial Bodies Agreement, examined below, (Article 14). Article VII provides that a State is liable for damage caused to another State through its own space activities or of those subject to its jurisdiction, licensing and supervision. In that connection one may recall (para.8) of the 'Declaration of Legal Principles'[311] of 13/12/1963. Thus while Article VI involves "responsibility", Article VII is dealt with "liability" which refers to a legal obligation to make reparation to the victim State for the damage caused by the space object, however the damage may have been caused.[312] It is argued that the responsibility provided by the 1967 Outer Space Treaty imposes a "positive obligation" upon the Parties to ensure that the activities of their nationals in space are conducted in accordance with international law. It follows that "what is forbidden to States cannot be accomplished by private enterprise associations or individuals. The specific provisions of the *corpus juris spatialis* thus are applicable to both public and private entities".[313] Such an extension of responsibility and liability of a State to damage caused by its non-state entities constitutes a significant innovation in international law[314], which subsequently refined in the 1972 Liability Convention.[315]

Similarly, in Preambular paragraph 1 of the 1972 "*Convention on International Liability for Damage Caused by Space Objects*"[316] States Parties recognize "the *common interest of all mankind* in furthering the exploration and use of outer space for peaceful purposes".[317]

309 Goh (n. 280) 356. The author added that "peaceful settlement of disputes arising from contemporary and future activities in outer space must protect the basic principles of space law such as equitable access and military restraint while promoting the exploration and use of outer space for the benefit of all Humanity", *ibid*.

310 Bin Cheng, 'Article VI of the 1967 Space Treaty Revisited: 'International Responsibility', 'National Activities' and 'The Appropriate State' (1998) 26/1 J. Space L. 7-32.

311 The "*Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*" adopted by the General Assembly resolution 1962 (XVIII) on 13/12/1963 in (para.8) provides that a State which launches or procures the launch of an object into outer space, together with a State from whose territory such an object is launched, is internationally liable for damage to be caused to a foreign State or to its national or juridical persons.

312 Cheng, 'Article VI of the 1967 Space Treaty Revisited' (n. 310) 10.

313 Tennen (n. 102) 153 citing C. Wilfred Jenks, *Space Law*, (1965) 151; Cheng, 'Article VI of the 1967 Space Treaty Revisited' (n. 310) 29.

314 Lyall and Larsen (n. 102) 65-66.

315 Jakhu (n. 102) 52-53.

316 The "*Convention on International Liability for Damage Caused by Space Objects*", adopted by General Assembly resolution 2777 (XXVI), (annex), on 29/11/1971, opened for signature on 29/03/1972, and entered into force on 01/09/1972; available at, <www.oosa.unvienna.org>. The number of State Parties to the 1972 Liability Convention is fewer than the 1967 Outer Space Treaty.

317 Generally see, Lyall and Larsen (n. 102) 105-114.

In accordance with Article 4, paragraph 1, of the 1979 "*Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*"[318], "the exploration and use of the Moon shall be the *province of all mankind* and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. Due regard shall be paid to the interests of *present and future generations* as well as to the need to promote higher standards of living and conditions of economic and social progress and development in accordance with the Charter of the United Nations".[319] Pursuant to Article 11, paragraph 1, of the 1979 Moon and Other Celestial Bodies Agreement, "the Moon and its natural resources are *the common heritage of mankind*, which finds its expression in the provisions of this Agreement… "[320] (Emphasis added). Article 11/1 refers to para.5 of the same Article which states that the Parties to this Agreement "undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible". Article 11, paragraphs 2 and 3, of the Agreement forbids establishment of a right of ownership over the surface or the subsurface of the Moon or any areas thereof. In order to secure the implementation of the common heritage principle, Article 11/5 and Article 18 authorize the Parties to the Agreement to establish "an international regime"[321], the main purposes of the regime to be established include the orderly and safe development of the natural resources of the moon; the rational management of those resources and an equitable sharing by all States Parties in the benefits derived from those resources, (Article 11/7).

The principle of *res communis* is also incorporated into Article 11 of the 1979 Moon and Other Celestial Bodies Agreement.[322] Some authors argue that the rules governing space sovereignty are considered prime examples of the formation of instant custom. The rule that national sovereignty over air space does not extend into outer space is now customary international law.[323] It has to be pointed out that the 1979 Agreement, especially in the aforementioned provisions, determines the nature of the common heritage concept "as a legal principle".[324]

318 "*Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*", adopted by General Assembly resolution 34/68, (annex), on 05/12/1979, opened for signature on 18/12/1979, and entered into force on 11/07/1984; available at, <www.oosa.unvienna.org>. For commentary on the 1979 Agreement's entry into force, see, Carl Q. Christol, 'The Moon Treaty Enters into Force', (1985) 79/1 AJIL 163-168.

319 It is significant that Article 2 of the 1979 Agreement refers to, in addition to international law and the Charter of the UN, the "*Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United States*" adopted by the General Assembly resolution 2625 (XXV) of 24/10/1970.

320 For an analysis of "*the common heritage of mankind*" principle in the 1979 Agreement, see, Christol, 'The Moon Treaty Enters into Force', (n. 318); Jakhu (n. 102) 102-106; Lyall and Larsen (n. 102) 193-197.

321 Tennen (n. 102) 153 citing C. Wilfred Jenks, *Space Law*, (1965) 157.

322 Christol, 'The Moon Treaty Enters into Force', (n. 318) 164.

323 Andrew G. Haley, 'Law and the Age of Space' (1958) 5 St. Louis U. L. J. 1, 8; Joyner, 'The Common Heritage of Mankind' (n. 71) 196-197; J. Cameron and J. Abouchar, 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment' (1991) 14/1 B. C. Int'l & Comp. L. Rev. 1, 19-20; for the "precautionary principle" also see, Daniel Bodansky, 'Deconstructing the Precautionary Principle', in D. D. Caron and H. N. scheiber (eds.) *Bringing New Law to Ocean Waters,* (Koninklijke Brill N. V., 2004) 381-391.

324 Cocca (n. 81) 15; Christol, 'The Moon Treaty Enters into Force', (n. 318) 165.

On the other hand, Article 7, paragraph 1, of the 1979 Moon and Other Celestial Bodies Agreement has to be specifically noted as it requires States Parties to take measures to prevent the disruption of the existing balance of the Moon's environment in exploring and using the Moon, as well as to take measures to avoid harmfully affecting the environment of the Earth through the introduction of extraterrestrial matter. Article 7/1 of the 1979 Agreement in fact reflects the principle expressed in Article IX of the 1967 Outer Space Treaty.

Some commentators, after noting some new trends in the 2000s by several private entities in the U.S. and other countries that are 'selling' pieces of land on the Moon, argued that irrespective of the fact that such 'selling' has no legal basis, global public interest in outer space necessitates that clear rules must be established both at international and national levels. Whatever the substance of the future lunar regime may be, it should include the principle of common heritage of mankind. If this principle could be retained in the UNCLOS, there is no logical reason for excluding this principle from the future legal regime to govern the exploitation of the natural resources of the Moon and other celestial bodies.[325] Since state claims to sovereignty in space cannot exist, neither can title to immovable property on celestial bodies in space. The Moon and other celestial bodies in space as such are not available for ownership either by private individuals or by companies.[326]

g) The Notion in the Instruments Concerning Nuclear Disarmament, Nuclear Safety and Radioactive Waste Management

Nuclear disarmament:

In accordance with Article I, paragraph 1, of the "*Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*"[327] (Nuclear Test Ban Treaty) of 05/08/1963 Parties to this Treaty undertake to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control: (1) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas; or (2) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted.[328] Preamble paragraph 3 of the 1963 Treaty indicates that in order to achieve the discontinuance of all test explosions of nuclear weapons for

325 Jakhu (n. 102) 105-106.

326 Lyall and Larsen (n. 102) 185.

327 The "*Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*" (also called as "Limited/ Partial Test Ban Treaty"/PTBT) was signed in Moscow on 05/08/1963, ratified by the US Senate on 24/09/1963, and entered into force 10/10/1963.

328 It may be noted that the nuclear test ban provided in Article I/1 of the 1963 Nuclear Test Ban Treaty is the only limitation on the military use of the high seas.

all time as a consequence of the desire "to put an end to the contamination of man's environment by radioactive substances". However, unlike the 1971 Treaty examined below, the 1963 Nuclear Test Ban Treaty did not refer to the notion of 'the common interest of mankind'.

The "*Treaty on the Non-Proliferation of Nuclear Weapons*"[329] (NPT) of 01/07/1968, which aimed at limiting the spread of nuclear weapons globally, was based on the idea that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war and the consequent "devastation that would be visited on all mankind", (Preamble, para.1).[330] Article VII of the 1968 Treaty not only recognizes but in fact encourages any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories.

The objective of the "*Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof*"[331] of 11/02/1971 is the prevention of nuclear arms race on the sea-bed and the ocean floor, (Preamble para.2). Thus it aims at the prevention of radioactive contamination of the said environmental areas. The Parties undertake not to place on the sea bed, on the ocean floor or in the subsoil thereof, nuclear weapons or other weapons of mass destruction, or structures for launching, storing, testing or using such weapons, (Article I). The outer limit of the seabed zone is defined as the 12-mile limit referred to in the 1958 Convention on the Territorial Sea and the Contiguous Zone, (Article II). For the present purposes here the 1971 Treaty is noteworthy because the Contracting Parties explicitly recognize "the *common interest of mankind* in the progress of the exploration and use of the sea-bed and ocean floor for peaceful purposes", (Preamble, para.1).

It may also be noted that, some Judges of the International Court of Justice in the "*Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (*New Zealand v. France*)" Order of 22/09/1995[332] referred to the 1971 Treaty in order to support the

329 The "*Treaty on the Non-Proliferation of Nuclear Weapons*" (NPT) was adopted on 01/07/1968 and entered into force on 05/03/1970. Twenty five years after the entry into force of the NPT, at the 1995 NPT Review and Extension Conference held in New York at the United Nations from 17 April to 12 May 1995, States Parties agreed without a vote that "as a majority exists among States party to the Treaty for its indefinite extension, in accordance with Article X, Paragraph 2, the Treaty shall continue in force indefinitely". See, Decision 3 (NPT/CONF.1995/L.6) on 'Extension of the Treaty on the Non-Proliferation of Nuclear Weapons'. It may be added that the NPT does not establish a mechanism for noncompliance. In case of non-compliance with IAEA safeguards, the IAEA Board is to call upon the violator to remedy such non-compliance and should report the non-compliance to the UN Security Council and General Assembly.

330 Stephen Tromans, *Nuclear Law* (Second edition, Hart Publishing, 2010) 266-267.

331 The "*Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof*" (adopted on 11/02/1971, entered into force on 18/05/1972; <www.ecolex.org/server2>.

332 "Dissenting Opinion of Judge Koroma" appended to "*Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (*New Zealand v. France*)", Order of 22/09/1995, ICJ Rep [1995], 378-379.

view that "nuclear testing as such is not only prohibited, but would be considered illegal if it would cause radioactive fallout." The ICJ also refers to the 1971 Treaty, as well as outer space treaties in its Advisory Opinion of 08/07/1996 on "*Legality of the Threat or Use of Nuclear Weapons*".[333]

A further step was taken by the adoption of the "*South Pacific Nuclear Free Zone Treaty*"[334] (Treaty of Rarotonga) of 06/08/1985 in which it is stated that the prohibitions of implantation and emplacement of nuclear weapons on the seabed and the ocean floor and in the subsoil thereof contained in the 1971 Treaty, as well as the prohibition of testing of nuclear weapons in the atmosphere or under water, including territorial waters or high seas, contained in the 1963 Nuclear Test Ban Treaty apply in the South Pacific, (Preamble, paras.8 and 9). In Preamble paragraph 3 it is declared that "all countries have an obligation to make every effort to achieve the goal of eliminating nuclear weapons, the terror which they hold for humankind and the threat which they pose to life on earth".

The adoption of the "*Comprehensive Nuclear Test-Ban Treaty*"[335] (CTBT) of 10/09/1996 (and the Protocol of 24/09/1996) has provided more strengthful legal ground to support the arguments concerning incompatibility of nuclear weapons tests with the international law. Although the 1996 Treaty does not refer to the notions of humankind and present and future generations, the Parties also emphasize that this Treaty could contribute to the protection of environment, (Preamble, para.10).

Nuclear safety and radioactive waste:

In Preamble paragraph (iii) of the "*Convention on Nuclear Safety*"[336], opened for signature on 20/09/1994, the Contracting Parties reaffirm that "responsibility for nuclear safety rests with the State having jurisdiction over a nuclear installation", and in paragraph (v) of the Preamble the Parties declare that they are in aware of

333 "*Legality of the Threat or Use of Nuclear Weapons*", Advisory Opinion of 08/07/1996, ICJ Rep [1996] 248-249, para.58.

334 "*South Pacific Nuclear Free Zone Treaty*" was signed at Rarotonga (Cook Islands) on 06/08/1985 and entered into force on 11/12/1986. Under the 1985 Treaty each Party undertake, *inter alia*, to prevent in its territory the stationing of any nuclear explosive device (Article 5); the testing of any nuclear explosive device (Article 6); not to dump radioactive wastes and other radioactive matter at sea anywhere within the South Pacific Nuclear Free Zone, and to prevent such dumping by anyone in its territorial sea (Article 7). Moreover, the Treaty establishes a control system (Article 8), which includes reports and exchange of information (Article 9), consultations and review (Article 10), the application to peaceful nuclear activities of safeguards by the IAEA (Annex 2), and a complaints procedure, including special inspection carried out by inspectors (Annex 4).

335 The "*Comprehensive Nuclear Test-Ban Treaty*" was adopted on 10/09/1996 and has not entered into force. (General Assembly Resolution 10/09/1996, 35 ILM 1439.) Annex 2 to the Treaty lists the 44 States that must ratify the Treaty for it to enter into force. As of December 2001, 164 nations have signed the CTB and 89 states have ratified the treaty. However, as of 2018, 41 of the 44 Annex 2 states, those that have nuclear weapons or nuclear facilities whose signature and ratification are required to bring the treaty into force, have signed the treaty and 31 of these states have submitted their ratification of the treaty. For the recent developments see, Dieter Fleck, 'Nuclear Disarmament: The Interplay Between Political Commitments and Legal Obligations' (2018) 26/1 New Perspectives 56-62. As of November 2021 the CTBT has not entered into force.

336 The "*Convention on Nuclear Safety*" was adopted on 17/06/1994 by a Diplomatic Conference convened by the International Atomic Energy Agency (IAEA) at its Headquarters from 14-17/06/1994, opened for signature on 20/09/1994 and entered into force on 24/10/1996. As of July 2021 the 1994 Convention has 91 Parties, including EURATOM.

accidents at nuclear installations having the "potential for transboundary impacts". This Convention applies to the safety of nuclear installations, (Article 3). As regards to general obligations each Party undertakes to take, within the framework of its national legislation, the legislative, regulatory and administrative measures for implementing its obligations under the Convention (Article 4) and, to submit for review a report on the measures it has taken to implement such measures (Article 5). Article 9 requires Contracting Parties to ensure that prime responsibility for the safety of a nuclear installation rests with the holder of the relevant licence and shall take the appropriate steps to ensure that each such licence holder meets its responsibility. The 1994 'Nuclear Safety Convention' has been considered as a disappointing instrument both with regard to substantive standards/obligations and to the review system. As to the former the Convention emphasizes that the responsibility for nuclear safety is a domestic matter, it lacks specific provisions with respect to transboundary risks of the use of nuclear power; it contains no specific obligation to carry out environmental impact assessment across borders; it does not impose obligations to achieve a specific result.[337]

Although in Article 1, paragraph (ii), indicates the necessity "to establish and maintain effective defences in nuclear installations against potential radiological hazards in order to protect individuals, society and the environment from harmful effects of ionizing radiation from such installations" as one of the objectives of the 1994 'Nuclear Safety Convention', it does not refer to "the needs and aspirations of the present and future generations" as provided in Article 1, paragraph (ii) of the 1997 'Joint Convention on the Safety'.

The "*Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*"[338] was adopted on 05/09/1997 and opened for signature on 29/09/1997.[339] The Contracting Parties in Preamble paragraph 15 of the 1997 'Joint Convention on the Safety' recall Chapter 22 of Agenda 21 adopted in 1992, which reaffirms the paramount importance of the safe and environmentally sound management of radioactive waste.

The objectives of the 1997 'Joint Convention on the Safety' are, *inter alia*, to ensure that during all stages of spent fuel and radioactive waste management individuals,

337 Menno T. Kamminga, '*The IAEA Convention on Nuclear Safety*' (1995) 44/4 ICLQ 872-882, 877 (With respect to the review mechanism, the Convention's system is of the most rudimentary type and does not provide for independent verification of compliance, since it simply obliges each State party to submit periodic reports on the measures it has taken to implement its obligations, *ibid* 879; the review process is covered by confidentiality rule; NGOs are not permitted to attend the review meetings, and the Convention's supervisory system is not backed by provisions on non-compliance or any form of compulsory settlement of dispute, *ibid* 880.).

338 The '*Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management'* was adopted on 05/09/1997 by a Diplomatic Conference convened by the IAEA from 01-05/09/1997, opened for signature at Vienna on 29/09/1997, and entered into force on 18/06/2001; available at <TRE/Multilateral/En/TRE001273.txt (English)>. As of February 2022 there are 88 Parties, including EURATOM. Note that Article 39/4 allows international organizations to become Parties to this instrument

339 Tromans (n. 330) 374-375 and 400-401. The author especially discusses the inter-generational equity issues with regard to radioactive waste, *ibid* 374-375.

society and the environment are protected from harmful effects of ionizing radiation, "now and in the future, in such a way that *the needs and aspirations of the present generation are met without compromising the ability of future generations to meet their needs and aspirations*", (Article 1, paragraph ii). Both the safety requirements for spent fuel management (Article 4, paragraphs vi and vii) and radioactive waste management (Article 11, paragraphs vi and vii) require Contracting Parties to take appropriate steps "to avoid actions that impose reasonably predictable impacts on future generations greater than those permitted for the current generation" and to aim "to avoid imposing undue burdens on future generations". The 1997 'Joint Convention on the Safety' also calls on the Contracting Parties to review safety requirements and conduct environmental assessments both at existing and proposed spent fuel and radioactive waste management facilities, (Articles 8 and 15).

h) The Notion in Cultural and Natural Heritage Protection Instruments

The Hague "*Convention for the Protection of Cultural Property in the Event of Armed Conflict*"[340] of 14/05/1954 recognizes that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind", (Preamble, para.2). Article 1/a-c, of the 1954 Convention provides definition of cultural property. However, the 1954 Convention had failed to establish an effective international protection system. This gap was filled by the adoption of the Second Protocol[341] to the 1954 Convention on 26/03/1999.

While Preamble paragraph 2 of the UNESCO "*Convention Concerning the Protection of the World Cultural and Natural Heritage*"[342] of 23/11/1972[343] recognizes that "deterioration and disappearance of any item of the cultural and natural heritage constitutes a harmful impoverishment of the heritage of all nations of the world"[344], paragraph 6 stresses "that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the *world heritage of mankind as a whole*". Pursuant to Article 4 of the 1972 World Heritage Convention each State

340 The "*Convention for the Protection of Cultural Property in the Event of Armed Conflict*" was adopted at the Hague on 14/05/1954 and entered into force on 07/08/1956; available at, <http://www.unesco.org>; reproduced in, Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflict*, (Martinus Nijhoff Publishers 1988) 745-767.

341 The "*Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict*" was adopted at the Hague on 26/03/1999 and entered into force on 09/03/2004; available at, <http://www.unesco.org>.

342 Generally see, Francesco Francioni (ed.) The 1972 World Heritage Convention: A Commentary (Oxford University Press, 2008); also see, Maffei, 'Evolving Trends in the International Protection of Species' (n. 54) 140-142; Sands, *Principles of International Environmental Law*, (n. 22) 611-615.

343 The "*Convention Concerning the Protection of the World Cultural and Natural Heritage*" was adopted by the UNESCO General Conference at its seventeenth session on 16/11/1972, done on 23/11/1972 and entered into force on 17/12/1975; available at, <http://www.unesco.org>; *reproduced in*, Francioni (ed.) *The 1972 World Heritage Convention* (n. 342) 411-424.

344 In relation to Preamble para.2 of the 1972 World Heritage Convention one commentator argues that this "gives legal form to the anthropological notion that all humanity shares a common origin from *Homo sapiens* and a common natural environment that permits life on the planet". See, Francesco Francioni, '*The Preamble*', in Francioni (ed.) *The 1972 World Heritage Convention* (n. 342) 11, 15.

Party undertakes the "duty of ensuring the identification, protection, conservation, presentation and transmission to *future generations* of the cultural and natural heritage".

In relation to the notion of 'future generations' in Article 4 of the 1972 World Heritage Convention one may also refer to the UNESCO "*Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage*" adopted on 16/11/1972. The 1972 Recommendation, unlike Articles 1 and 2 of the 1972 Convention which use the words "outstanding universal value", identifies cultural and natural heritage as of "special value" (Rec., paras.1 and 2). Moreover, the 1972 Recommendation in its Preamble paragraph 5 states that "every country in whose territory there are components of the cultural and natural heritage has an obligation to safeguard this part of mankind's heritage and to ensure that it is handed down to future generations".

The notion of heritage within the meaning of the 1972 World Heritage Convention includes monuments, groups of buildings, sites (including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view[345]), natural features, geological and physiographical formations, and natural sites or precisely refined areas of outstanding universal value from the point of history, art, science, natural beauty or conservation, (Article 1 "cultural heritage" and Article 2 "natural heritage").

Attention may be drawn to the fact that Article 4 of the 1972 World Heritage Convention recognizes that such heritage "belongs primarily to the State" where they are situated on its territory. Furthermore, Article 6, paragraph 1, of the 1972 Convention reads as follows: "Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation." It is argued that "in spite of the broad language of the Preamble and of Article 6, paragraph 1, the Convention does not raise obligations for third states (unless they express their consent in this regard), and as such these states cannot breach an obligation that is not binding upon them".[346]

Some authors argue that since the properties constituting 'world heritage' remain strictly under the jurisdiction of each State on whose territory they are situated, it means that the concept of 'world heritage' is something different from the concept of

345 *Compare* Article XIV of the "*Treaty for Amazonian Cooperation*" of 03/07/1978, which requires the Contracting Parties to take effective measures for the conservation of ethnological and archeological wealth of the Amazon region, and to cooperate to that end.

346 Guido Carducci, 'Articles 4 - 7: National and International Protection of the Cultural and Natural Heritage', in Francioni (ed.) *The 1972 World Heritage Convention* (n. 342) 102-145, 142.

'common heritage of mankind', which is regulated by different principles.[347] In view of some commentators, it is clear that the concept of 'common heritage' appears to be broader than is usually understood.[348] It may be added that, in accordance with Article 6/1 of the 1972 World Heritage Convention, the States Parties also recognize that "such heritage constitutes a *world heritage* for whose protection it is the duty of the international community as a whole to co-operate." In that connection the emphasis on "belongs primarily" provided in Article 4 is noteworthy. Thus for the first time what is only 'heritage' under Articles 1 and 2 of the Convention becomes 'world heritage' in Article 6/1, which subsequently appears in Articles 7, 11/2 and 11/4.[349]

The 1972 World Heritage Convention is administered by the World Heritage Committee[350] (composed of 21 members) (Articles 8-11)[351], and a secretariat at UNESCO, and the General Assembly of States parties, (Articles 14, 16/1). Furthermore, the Convention establishes a World Heritage Fund, (Articles 13/6, 15 to 18).

With respect to the concept of 'cultural heritage' it may be added that Article 7 of the UNESCO "*Declaration on the Responsibilities of the Present Generations towards Future Generations*"[352] of 12/11/1997 explicitly indicates the responsibility of the present generations to identify, protect and safeguard the tangible and intangible cultural heritage, as well as to transmit this common heritage to future generations. Note that the "*UNESCO Universal Declaration on Cultural Diversity*"[353] of 02/11/2001 in Article 1 after noting that "cultural diversity is as necessary for humankind as biodiversity is for nature", adds that "it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations".

The "*UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage*"[354] was adopted on 17/10/2003 as a response of the international community

347 Maffei, 'Evolving Trends in the International Protection of Species' (n. 54) 141, note 33.

348 Kiss 'Conserving the Common Heritage of Mankind' (n. 71) 775; Thorme (n. 54) 325; Bernard K. Schafer, 'The Relationship Between the International Laws of Armed Conflict and Environmental Protection: The Need to Reevaluate What Types of Conduct are Permissible During Hostilities' (1989) 19/2 Cal. W. Int'l L. J. 287-325, 290.

349 Carducci (n. 346) 120 (The author added that through Article 6/1 "States Parties recognize the duty of the international community as a whole to cooperate for the protection of world heritage, at least in terms of general statements and philosophy of the instrument, and that the protection of heritage of outstanding universal value is a concern which goes beyond the territorial state concerned", *ibid* 121-122).

350 The full title is as follows: "Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value".

351 Tullio Scovazzi, '*Articles 8 - 11: World Heritage Committee and World Heritage List'*, in Francioni (ed.) The 1972 World Heritage Convention (2008) 147-199, 149-154 (Article 8).

352 The "*Declaration on the Responsibilities of the Present Generations Towards Future Generations*" was adopted on 12/11/1997 by the General Conference of the UNESCO, meeting in Paris from 21 October to 12 November 1997 at its 29th session.

353 The "*UNESCO Universal Declaration on Cultural Diversity*" was adopted on 02/11/2001 by the General Conference of the UNESCO, meeting in Paris at its 31st session.

354 The "*UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage*" was adopted on 17/10/2003 by the General Conference of the UNESCO, meeting in Paris at its 32nd session.

against the tragic destruction of the Buddhas of Bamiyan in Afghanistan. In Article I it is provided that "the international community recognizes the importance of the protection of cultural heritage and reaffirms its commitment to fight against its intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding generations."[355]

iv-) The Notion of 'Present and Future Generations' in the International Jurisprudence

In addition to normative grounds for the notion of rights of future generations and consequently the obligations of present generations to future generations for the preservation of the environment that may be found in various international instruments, it is now beyond doubt that the said concepts have been recognized by judicial decisions of international courts and tribunals.

For instance, in his Separate Opinion appended to "*Jan Mayen* (*Denmark v. Norway*)" Judgment of 14/06/1993 Judge Weeramantry when analyzing the concept of equity and intergenerational equity in international law stated that "the concept of wise stewardship (of natural resources), and their conservation for the benefit of future generations", (para.235).[356] He added that "respect for these elemental constituents of the inheritance of succeeding generations dictated rules and attitudes based upon a concept of an equitable sharing which was both horizontal in regard to the present generation and vertical for the benefit of generations yet to come", (para.242).[357]

Again Judge Weeramantry in his Dissenting Opinion appended to "*Request for an Examination of the Situation in the Nuclear Tests* (*New Zealand v. France*)" Order of 22/09/1995 stated that "the case before the Court raises, as no case before the Court has done, the principle of intergenerational equity - an important and rapidly developing principle of contemporary environmental law… The Court has not thus far had occasion to make any pronouncement of this rapidly developing field… (The case) raises in pointed form the possibility of damage to generations yet unborn".[358] Judge Palmer who was also dissident in the same case stated that "in its essence

355 In so far the protection of natural environment may be connected with the protection of cultural heritage of mankind, one may recall Articles 8/(2)(b)(ix) and 8/(2)(e)(iv) of the Rome Statute of the ICC, and Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia, which involve the intentional destruction of cultural heritage.

356 Separate Opinion of Judge Weeramantry appended to Maritime Delimitation in the Area between Greenland and Jan Mayen (*Denmark v. Norway*) [1993] ICJ Rep 211-279, 274, para.235. Judge Weeramantry added: "What emerges is a notion of equity broad-based upon global jurisprudence which speaks therefore with greater authority. Notions of the supremacy of international law, its impregnation with concepts of righteousness, the sacrosanct nature of earth resources, harmony of human activity with the environment, respect for the rights of future generations, and custody of earth resources with the standard of due diligence expected of a trustee are equitable principles stressed by those traditions – principles whose fuller implications have yet to be woven into the fabric of international law…", *ibid* 276-277, para.240.

357 *Ibid* 277, para.242.

358 Dissenting Opinion of Judge Weeramantry appended to *Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (*New Zealand v. France*) [1995] ICJ Rep 288, 341-342.

this case has to be understood as an environmental case. New technology has given humankind massive ability to alter the natural environment. The consequences of these activities need to be carefully analyzed and examined unless we are to imperil those who come after us", (para.114).[359]

The ICJ in its "*Legality of the Threat or Use of Nuclear Weapons*" Advisory Opinion of 08/07/1996, pronounced the great significance that it attaches to respect for the environment, not only for States but also *for the whole of mankind* in the following words: "The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, *including generations unborn*. The existence of the general obligations of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment", (para.29).[360] (Emphasis added). In the "*Legality of the Threat or Use of Nuclear Weapons*" Advisory Opinion of 08/07/1996, the Court also stated that "the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem and to cause genetic defects and illness in future generations", (para.35).[361]

In his Dissenting Opinion appended to the "*Legality of the Threat or Use of Nuclear Weapons*" Advisory Opinion of 08/07/1996, Judge Weeramantry stated that "at any level of discourse, it would be safe to pronounce that no one generation is entitled, for whatever purpose, to inflict such damage on succeeding generations… This Court, as the principal judicial organ of the United Nations, empowered to state and apply international law… must, in its jurisprudence, pay due recognition to the rights of future generations… The rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations".[362]

The ICJ in (para.53) of the "*Gabcikovo-Nagymaros Project*" Judgment of 25/09/1997 recalled its dictum stated in "*Legality of the Threat or Use of Nuclear Weapons*" Advisory Opinion of 08/07/1996.[363] Furthermore, in "*Gabcikovo-Nagymaros Project*"

359 Dissenting Opinion of Judge Sir Geoffrey Palmer appended to Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) [1995] ICJ Rep 419, para.114.

360 *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 08 July 1996, [1996], ICJ Rep 241-242, para.29.

361 *Ibid* 244, para.35.

362 Dissenting Opinion of Judge Weeramantry appended to Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 08 July 1996, [1996] ICJ Rep 455. Judge Weeramantry added that "the ideals of the United Nations Charter do not limit themselves to the present, for they look forward to the promotion of social progress and better standards of life, and they fix their vision, not only on the present, but on 'succeeding generations'. This one factor of impairment of the environment over such a seemingly infinite time span would by itself be sufficient to call into operation the protective principles of international law which the Court, as the pre-eminent authority empowered to state them, must necessarily apply", *ibid* 456; also see 502.

363 Gabcikovo-Nagymaros Project (Hungary v. Slovakia), [1997], ICJ Rep 41, para.53.

Judgment the Court also stated that "owing to new scientific insights and to a growing awareness of the risks for mankind - *for present and future generations* - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of *sustainable development*", (para.140). (Emphasis added).

v-) Inter-Generational Equity and Intra-Generational Equity

All these legally binding instruments refer to the principle of protecting the natural environment for *future generations*, as well as the notion of *common but differentiated responsibility*. Subsequently the concept of *common concern of humankind* has been developed. The latter concept has been linked to areas of the global commons and to areas falling only within a State jurisdiction. This concept implies a common responsibility to the issue based on its paramount importance to the international community as a whole.[364]

The concept of 'common concern of humankind' has been referred to in UN General Assembly resolutions[365] and the preambles of conventions. As one commentator observed "it is conceded that, if and once the concept of common concern of mankind becomes widely and unequivocally accepted, rights and obligations are bound to flow from it, then one is led to consider as its manifestation or even materialization the right to a healthy environment: within the ambit of the *droit de l'humanite*, the common concern of humankind finds expression in the exercise of the recognised right to a healthy environment, in all its dimensions…"[366]

364 Laura Horn, 'The Implication of the Concept of Common Concern of a Human Kind on a Human Right to a Healthy Environment', (2004) 1/2 MqJICEL 233-268, 244.

365 For example, see, the UN GA Resolution 43/53 of 27/01/1989 on "*Protection of global climate for present and future generations of mankind*", adopted at 70th plenary meeting; reproduced in, 'Selected International Legal Materials', (1990) 5 Am. U. J. Int'l L. & Pol. 525-528; see, Durwood Zaelke and James Cameron, 'Global Warming and Climate Change - An Overview of the International Legal Process' (1990) 5 Am. U. J. Int'l L. & Pol. 249-290, 269, 272. In (para.1) of the Resolution 43/53 the GA "recognizes that climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth", and in (para.2) "determines that necessary and timely action should be taken to deal with climate change within a global framework". Further see, the UN GA Resolution 44/207 on "*Protection of global climate for present and future generations of mankind*" was adopted on 22/11/1989, at its 85th plenary meeting. Under the same heading, the UN GA Resolution 45/212 was adopted on 21/12/1990 at its 71st plenary meeting. In the Resolution 45/212 the GA *reaffirms* its previous two resolutions (43/53 of 1988 and 44/207 of 1989) cited above. Furthermore, in the UN GA Resolution 46/169 on "*Protection of global climate for present and future generations of mankind*", adopted on 19/12/1991 at its 78th plenary meeting, and the UN GA Resolution 47/195, adopted on 22/12/1992 at its 93rd plenary meeting, the General Assembly *recalls* its resolutions 43/53 of 1988 and 44/207 of 1989 in which it recognized climate change as a common concern of mankind. Also see, above noted resolution, i.e. the General Assembly resolution 63/32 on "*Protection of global climate for present and future generations*" was adopted on 26/11/2008 at its 60th plenary meeting.

366 Antonio Augusto Cançado Trindade, '*The Contribution of International Human Rights Law to Environmental Protection, with special reference to Global Environmental Change'*, in B Weiss (ed.) Environmental Change and International Law: New Challenges and Dimensions (United Nations University Press, 1992) 245, 254; also see, Horn (n. 364) 260.

The concept of common heritage of mankind is mainly a concept of conservation and of transmission of a heritage to the future generations.[367]

Thus these principles are incorporated into international law. It seems that discussions on the appropriateness[368] of such conceptions as appeared in the 1980s and 1990s are now resolved in one way or another. As Weiss put in 1989: "We, as a species, hold the natural and cultural environment of Our planet in common, both with other members of the present generation and with other generations, past and future. At any given time, each generation is both a custodian or trustee of the planet for future generations and a beneficiary of its fruits. This imposes obligations upon us to care for the planet and gives us certain rights to use it".[369] Weiss emphasized that "the use of equity to provide equitable standards for allocating and sharing resources and benefits lays the foundation for developing principles of intergenerational equity. These principles can build upon the increasing use by the International Court of Justice of equitable principles to achieve a result that the Court views as fair and just".[370]

Weiss suggested the notion of "intergenerational equity" which "calls for equality among generations in the sense that each generation is entitled to inherit a robust planet that on balance is at least as good as that of previous generations".[371] The notion of intergenerational equity, on the one hand, outlines the responsibility of each generation to be fair to future generations in the use they make of their natural and cultural resource base", which is referred to as "inter-generational equity", and on the other hand, "refers to fair dealing in the consumption and exploitation of resources among and between members of the present generation" which is referred

367 Kiss 'Conserving the Common Heritage of Mankind', (n. 71) 776.

368 For example, see, Anthony D'Amato, 'Do We Owe a Duty to Future Generations to Preserve the Global Environment?'(1990) 84/1 AJIL 190-198.

369 Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, (Transnational, United Nations University, 1989) 17.

370 *Ibid* p.37.

371 Edith Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84/1 AJIL 198-207, 200 (The author proposed three basic principles of intergenerational equity. "First, each generation should be required to conserve the diversity of the natural and cultural resource base, so that it does not unduly restrict the options available to future generations in solving their problems and satisfying their own values, and should also be entitled to diversity comparable to that enjoyed by the previous generations. This principle is called 'conservation of options'. Second, each generation should be required to maintain the quality of the planet so that it is passed on in no worse condition than that in which it was received, and should also be entitled to planetary quality comparable to that enjoyed by previous generations. This is the principle of 'conservation of quality'. Third, each generation should provide its members with equitable rights of access to the legacy of past generations and should conserve this access for future generations. This is the principle of 'conservation of access'…", *ibid* 201-202. According to the author, "intergenerational planetary rights may be regarded as group rights, as distinct from individual rights, in the sense that generations hold these rights as groups in relation to other generations- past, present and future. They exist regardless of the number and identity of individuals making up each generation", *ibid* 203.); for the same arguments, also see, Weiss, 'In Fairness to Future Generations and Sustainable Development' (n. 369) 19, 22-24; further see, Lothar Gündling, '*Our Responsibility to Future Generations*' (1990) 84/1 AJIL 207-212; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, (Third Edition, Oxford University Press 2009) 119-122.

to as "intra-generational equity".[372] The theory of inter-generational equity "requires each generation to use and develop its natural and cultural heritage in such a manner that it can be passed on to future generations in no worse condition than it was received. Central to this idea is the need to conserve options for the future use of resources, including their quality, and that of the natural environment".[373] Schachter stated the following as minimum entailed by "intra-generational" equity: "It has become virtually platitudinous to suggest that everyone is entitled to the necessities of life: food, shelter, health care, education, and the essential infrastructure for social organization… It is scarcely startling to find that a similar principle has been advanced on the international level".[374] Unlike inter-generational equity, intra-generational equity deals with inequity within the existing economic system.[375]

Furthermore, rights of future generations have also been approached from the perspective of human rights. According to Alexandre Kiss, "the link between human rights and environment conservation is clear: human rights must be guaranteed also for the future, to the coming generations, and this implies the management of natural resources with the aim of not exhausting them. This applies, in particular, to economic and social rights. No State is entitled to behave in such a way that its actions deprive future generations of economic and social rights or annihilate all hope for future generations to achieve the objectives which, unfortunately, are all that these rights represent at the moment for a large part of mankind".[376]

The UNESCO "*Declaration on the Responsibilities of the Present Generations towards Future Generations*"[377], adopted on 12/11/1997, in its Preamble paragraph 6 emphasizes "the necessity for establishing new, equitable and global links of partnership and *intragenerational solidarity*, and for promoting *inter-generational solidarity* for the perpetuation of humankind". Thus the concepts of intragenerational equity and intergenerational equity innovated and developed by the international legal doctrine have been transformed into an international instrument.

It is argued that "despite the recognition of the common but differentiated responsibility principle, and the principles of intra and intergenerational equity

372 Maggio (n. 156) 163; also see, Alam (n. 56) 633 (The author added that "despite the recognition of the common but differentiated responsibility principle, and the principles of inter and intergenerational equity by the legal instruments dealing with sustainable development, the international community has done little to assist in the realization of these principles beyond mere pronouncements in the preambles of treaties and other documents", *ibid* 634.).

373 Birnie, Boyle and Redgwell (n. 371) 119.

374 Maggio (n. 156) 164 citing Oscar Schachter, *Sharing the World's Resources,* (Columbia University Press 1977) 16.

375 Birnie, Boyle and Redgwell (n. 371) 122.

376 Alexandre Kiss, 'Concept and Possible Implications of the Right to Environment', in K.H. Mahoney and P. Mahoney (eds.) *Human Rights in the Twenty-first Century, (*Kluwer Academic Publishers, 1993) 551-559, 553.

377 The "*Declaration on the Responsibilities of the Present Generations Towards Future Generations*" was adopted on 12/11/1997 by the General Conference of the UNESCO, meeting in Paris from 21 October to 12 November 1997 at its 29th session. In Preamble para.5 of the 1997 Declaration it is further stressed that "full respect for human rights and ideals of democracy constitute an essential basis for the protection of the needs and interests of future generations."

by the legal instruments dealing with sustainable development, the international community has done little to assist in the realization of these principles beyond mere pronouncements in the preambles of treaties and other documents".[378] The essence of the question with respect to the theory of inter-generational equity is the one focused on implementation.[379] While the general concept of an obligation to act responsibly with respect to the interests of future generations is understandable, "it does not in itself help to resolve the practical issues of how it is to be implemented".[380]

2. Sustainable Development

i-) Recognition and Scope of the Principle in Soft and Hard Law Instruments and International Jurisprudence

Article 1(1) of the "*Declaration on the Right to Development*"[381] of 04/12/1986 provides that "the right to development is an inalienable human right".[382] The Preamble to the Declaration on the Right to Development of 1986 clarifies the notion of development by stating that "development is a comprehensive, economic, social and cultural process which aims at the constant improvement and well-being of the entire population and of al1 individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom", (Preamble, para.2). According to Rosas, although the 1986 Declaration is not a binding instrument, "one could assert that the Declaration reflects general international law".[383] However, there are views which find the legal status of the right to development has been doubtful.[384]

The UN General Assembly, in its Resolution 42/186 of 11/12/1987, adopted the "*Environmental Perspective to the Year 2000 and Beyond*", which had been prepared by the Governing Council of UNEP. In this document, paragraph (a) emphasizes that "the achievement over time of such a balance between population and environmental

378 Alam (n. 56) 634.

379 Gündling (n. 371) 207-212.

380 Tromans (n. 330) 375.

381 The "*Declaration on the Right to Development*" was adopted by General Assembly resolution 41/128 on 04/12/1986; reproduced in, UNHCHR, Human Rights - A Compilation of International Instruments, Vol I (First Part, 2002) 454-458. The UN GA resolution 41/128 was adopted by 146 votes to 1 (USA) with 8 abstentions (Denmark, FRG, Finland, Iceland, Israel, Japan, Sweden and the UK). Preambular (para.11) reads as follows: "Considering that international peace and security are essential elements for the realization of the right to development".

382 See generally, Philip Alston and Mary Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement*, (Oxford University Press, 2005); Bard A. Andreassen and Stephen P. Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, (Second edition, Intersentia, 2010).

383 Allan Rosas, '*The Right to Development*', in A. Eide, C. Krause and A. Rosas (eds.) *Economic, Social and Cultural Rights,* (Second edition, Martinus Nijhoff Publishers, 2001) 119-130, 123; also see, Philip Alston, 'Making Space for New Human Rights: The Case of the Right to Development', (1988) 1 Harv. Hum. Rts. Y.B. 3-40, 21 (According to Alston "while the Declaration on the Right to Development reflects a wide range of political compromises hammered out over a five year period, it has succeeded more in restating and enshrining the competing and often contradictory visions of the different groups than in resolving them".).

384 Birnie, Boyle and Redgwell (n. 371) 118.

capacities as would make possible sustainable development, keeping in view the links between population levels, consumption patterns, poverty and the natural resource base..."

Some of the provisions of the 1992 Rio Declaration clearly refer to the concept of sustainable development. For example, Principle 1 states that "human beings are at the center of concerns for *sustainable development*". The wording of Principle 1 demonstrates that "the drafters' position is anthropocentric –man and his associated cultural endeavors are at the vital center of the sustainable development Project".[385] Principle 4 provides that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process". According to one commentator "Principle 4 is the closest the Rio Declaration comes to a definition of 'sustainable development, generally succeeding at finding the balance between development and environment considerations. The principle reflects a more action-oriented approach toward defining sustainable development than many of the Declaration's other principles".[386] Pursuant to Principle 27, States and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

Furthermore, Principle 12[387] of the Rio Declaration of 1992 provides the following: "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and *sustainable development in all countries*, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. *Unilateral actions*[388] to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus." (Emphasis added).

385 Batt & Short, (n. 69) 250.

386 Kovar, (n. 68) 127.

387 Kuei-Jung Ni, 'Contemporary Prospects for the Application of Principle 12 of the Rio Declaration', (2001) 14/1 Geo. Int'l Envtl. L. Rev. 1-33 (The author observed that "the WTO decisions suggest that the non-legally binding character of Principle 12 of the Rio Declaration does not prevent it from being a useful tool. It could be used to supplement the judgments that are required to take into account environmental protection. Hence, the Principle no longer remains a purely soft law, but has already been hardened by the relevant tribunals", *ibid* 32-33.).

388 With regard to the concept of "unilateral actions" in environmental law, see as an early analysis, Richard B. Bilder, 'The Role of Unilateral State Action in Prevention International Environmental Injury', (1981) 14/1 Vand. J. Transnat'l L. 51 (This article was initially written in 1973. The author defined unilateral action "as any action which a state takes solely on its own, independent of any express cooperative arrangement with any other state or international institution", ibid53. The author concluded that "unilateral state action to prevent international environmental injury is likely to play an important and continuing role in efforts to deal with international environmental problems… While multilateral actions seem generally preferable to unilateral action, effective multilateral arrangement in many cases may not be practically attainable. Unilateral action may be the only feasible alternative to inaction", ibid 95.); further see, Alfred P. Rubin, 'The International Legal Effects of Unilateral Declarations', (1977) 71/1 AJIL 1-30 (The author particularly focused on the ICJ's Judgment rendered in the *Nuclear Test* cases of 1974.); also see, Oscar Schachter, 'The Emergence of International Environmental Law', (1990) J. Int'l Aff. 457-493, 489.

Sustainable development is defined in the Brundtland Commission's report[389] as "development that meets the needs… of the present without compromising the ability of future generations to meet their own needs".[390] Brown Weiss has stated that "sustainable development implies that future generations have as much right as the present generation to a robust environment with which to meet their own needs and preferences… The notion that future generations have rights to inherit a robust environment provides a solid normative underpinning for environmentally sustainable development. In its absence sustainable development might depend entirely on a sense of noblesse oblige of the present generation".[391]

Article 3, paragraph 4, of the UN "Framework Convention on Climate Change" of 09/05/1992 provides that the Parties have a right to, and should, promote sustainable development. Article 3, paragraph 5, of the UNFCCC mandates that "the Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change…" As one commentator observed "this language merely repeats the first and second clause of Principle 12 of the Rio Declaration, and slightly changes certain words in order to accommodate the particular needs of this convention".[392]

In addition to some preambular paragraphs, Article 6 (conservation and sustainable use of biological diversity) and Article 10 (sustainable use of components of biological diversity), as well as Articles 8, 11-12, and 16-18, of the "Convention on Biological Diversity" of 05/06/1992 recognize the same concept. Pursuant to Article 1.1 of the "*International Treaty on Plant Genetic Resources for Food and Agriculture*" (ITPGRFA) the objectives of this Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security. Article 6.1 of the "ITPGRFA" provides that "the Contracting Parties shall develop and maintain appropriate policy

389 Brundtland Report, *Report of the World Commission on Environment and Development, Our Common Future* (1987) 43.

390 Strong (n. 16) 22 (According to the author, "in compelling terms the (Brundtland) Commission documented the case for sustainable development – the full integration of environmental and economic development – as the only sound means of ensuring both our environmental and our economic future".); Max V. Soto, 'General Principles of International Environmental Law', (1996) 3/1 ILSA J. Int'l & Comp. L. 193, 205-206; Maggio (n. 156) 162; Ida L. Bostian, 'Flushing the Danube: The World Court's Decision Concerning the Gabcikovo Dam', (1998) 9/2 Colo. J. Int'l Envtl. L. & Pol'y 401-427, 426.

391 Edith Brown Weiss, 'Environmentally Sustainable Competitiveness: A Comment', (1993) 102/ 8 Yale L. J. 2123-2142, 2123, 2124 (The author added that "actions today irreversibly degrade the environment, or impose such high remedial costs that degradation is effectively irreversible, burden future generations in that they will have fewer resources to meet increasing demands. No country should have the right to degrade the environment irreversibly for future generations in the name of national competitiveness", *ibid* 2126-2127. The author also stated that "environmentally sustainable development has become a criterion for evaluating all development efforts, whether in industrialized or in developing countries", *ibid* 2128.).

392 Ni (n. 387) 25.

and legal measures that promote the sustainable use of plant genetic resources for food and agriculture".[393]

Similarly, Article 3, paragraph 2 and Article 4, paragraphs 1-3, of the "Barcelona Convention" of 10/06/1995 also refer to the concept of sustainable development. Preambular paragraph 2 of the "Industrial Accidents Convention" of 17/03/1992 recognizes "the importance and urgency of preventing serious adverse effects of industrial accidents on human beings and the environment, and of promoting all measures that stimulate the rational, economic and efficient use of preventive, preparedness and response measures to enable *environmentally sound and sustainable economic development*". (Emphasis added).

Note that in the "*Gabcikovo-Nagymaros*" Judgment of 25/09/1997, the ICJ explicitly referred to the concept of sustainable development.[394] The ICJ's reliance on the principle of sustainable development in this case was identified as an example how a "principle" soft in character in a treaty but laying down parameters which affect the way courts decide cases had been used.[395]

In his Dissenting Opinion[396] appended to the "*Gabcikovo-Nagymaros*" Judgment of 25/09/1997, Judge Oda recognizes that "concern for the preservation of the environment has rapidly entered the realm of international law and that a number of treaties and conventions have been concluded on either a multilateral or bilateral basis, particularly since the Declaration on the Human Environment was adopted in 1972 at Stockholm and reinforced by the Rio de Janeiro Declaration in 1992, drafted 20 years after the Stockholm Declaration. It is a great problem for the whole of mankind to strike a satisfactory balance between more or less contradictory issues of economic development on the one hand and preservation of the environment on the other, with a view to maintaining sustainable development. Any construction work relating to economic development would be bound to affect the existing environment to some extent but modern technology would, I am sure, be able to provide some acceptable ways of balancing the two conflicting interests".

393 With regard to settlement of a dispute concerning the interpretation or application of the "ITPGRFA", the parties concerned shall seek solutions by negotiation, (Article 22.1). Article 22.3 provides that a Contracting Party may declare at any time that if a dispute not resolved in accordance with Article 22.1, it accepts one or both of the following means of dispute settlement as compulsory: (a) Arbitration in accordance with the procedure laid down in Part 1 of Annex II to this Treaty; (b) Submission of the dispute to the International Court of Justice. Under "*Annex II - Part 1. Arbitration*" of the "ITPGRFA" Article 6 provides: "The arbitral tribunal may, at the request of one of the parties to the dispute, recommend essential interim measures of protection".

394 Gabcikovo-Nagymaros Project Case [1997] ICJ Rep 77-78, para.140. The Court stated that "such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".

395 Boyle, 'Reflections on Treaties and Soft Law' (n. 1) 907, note 33.

396 Dissenting Opinion of Judge Oda appended to Gabcikovo-Nagymaros Project Case [1997] ICJ Rep 160-161, para.14.

It appears that the international community now reached a consensus that the States must pursue development which is environmentally, socially and economically sustainable. However, perspectives differ on addressing current needs within this paradigm without also prejudicing future needs; viewpoints diverge on the methodology for balancing the three phenomena.[397]

ii-) Concept of Sustainable Development in the EU Instruments

Prior to 1987, the EEC Treaty contained no mention of environmental protection. This does not mean that the Community did not produce legislation concerning the environment and its protection. In the period between 1973 and 1987, the Community passed over 150 environmental legislative acts.[398]

"**Single European Act**" of 1986:

The "*Single European Act*"[399] (SEA), which signed in February 1986 and entered into force on 01/07/1987, granted the EEC express environmental policy-creating and law-making powers.[400] The SEA introduced Title VII on the Environment, consisting of Articles 130r, 130s and 130t, into the Treaty of Rome.

Under "*Title VII – Environment*" (Article 130r, para.1) reads as follows: "Action by the Community relating to the environment shall have the following objectives: to preserve, protect and improve the quality of the environment; to contribute towards protecting human health; to ensure a prudent and rational utilization of natural resources."

These three objectives are accompanied by a number of policy maxims, such as the principle to take preventive action; the principle to rectify environmental damage, as a priority, at source, and "polluter pays" principle. They are not only to govern merely environmental activities, but environmental protection requirements are to be a component of the Community's other policies, (Article 130r, para.2).

Furthermore, when the Community prepares environmental measures it is required that the following considerations are to be taken into account: (i) available scientific and technical data; (ii) environmental conditions in the various regions of the Community; (iii) the potential benefits and costs of action or of lack of action, and (iv) the economic and social development of the Community as a whole and the balanced development of its regions, (Article 130r, para.3).

397 Maggio (n. 156) 170-171.

398 Christian Zacker, 'Environmental Law of the European Economic Community: New Powers Under the Single European Act', (1991) 14/2 B. C. Int'l & Comp. L. Rev. 249-278, 261; David Freestone, '*European Community Environmental Policy and Law*', (1991) 18/1 J. L. & Soc'y. 135.

399 The "*Single European Act*" (SEA) was signed in Luxembourg on 17/02/1986 and in The Hague on 18/02/1986, and entered into force on 01/07/1987; (OJ, L 169/1, (29/06/1987).

400 Davidson, J. Scott, 'The Single European Act and the Environment', (1987) 2/4 Int'l J. Estuarine & Coastal L. 259-263; Eileen Barrington, 'European Environmental Law: Before and After Maastricht', (1993) 2 U. Miami YBIL 79-89, 81-84.

But pursuant to (Article 130r, para.4), the Community shall take action in environmental matters if the above mentioned objectives can be attained better at Community level than at the level of the individual Member States. The second sentence in (para.4) is as follows: "Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures". Finally, (Article 130r, para.5) deals with the relationship of the Community and its member states vis-a-vis third countries and international organizations.

Consequently, (Article 130r) establishes Community policy and objectives concerning environmental matters. It is observed that "although the objectives in Article 130r are compulsory, they are not always mutually compatible. For example, an improvement of the quality of the environment does not necessarily result in rational utilization of natural resources".[401] The specific objectives enumerated in (Article 130r, para.1) are limited since they are exhaustive.[402] The criteria laid down in Article 130r, para.1, clearly provided not just the preservation of the environmental status quo, but also its improvement. Consequently, the improvement element essentially requires positive action by the EC and Member States.[403]

(Article 130s) clarifies the procedure for the Council in deciding the action to be taken by the Community. The Council, acting unanimously on a proposal from the Commission of the European Communities and after consulting the European Parliament and the Economic and Social Committee, decides on the actions to be taken by the Community. Sub-paragraph 2 of the same Article provides that the Council, by unanimous vote, defines those matters on which decisions are to be taken by a qualified majority.

The same Title, (Article 130t) provides that "the protective measures adopted, in common pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty." Action taken under Article 130 was subject to the principle of subsidiarity and to the general safeguard provision in Article 130T.[404]

Articles 130r to 130t made a significant contribution to the EC's environmental competences since it made it easier for the Community to pursue a proper environmental policy with its own objectives and criteria, as opposed to a mere harmonization of national policies. Perhaps the most important provision of the Treaty's new Title "Environment" is (Article 130r, para.2) as it makes environment

401 Dietrich Gorny, 'The European Environment Agency and the Freedom of Environmental Information Directive: Potential Cornerstones of EC Environmental Law', (1991) 14/2 B. C. Int'l & Comp. L. Rev. 279, 281.

402 Zacker (n. 398) 265.

403 Scott (n. 400) 261.

404 Freestone, '*European Community Environmental Policy and Law*' (n. 398) 137.

protection requirements a component of all other Community policies.[405] Up to 1987, the EEC Treaty did not mention the term "environment", although the Community has produced some important directives in the field, as well as ratified a considerable number of international environmental conventions.[406]

The SEA also added Article 100a to the Treaty, which was integrated into Part Three ("Policy of the Community"), under Title I-Common Rules. In adopting measures which have as their object the establishment and functioning of the internal market, the Council is required to decide by way of qualified majority and according to the co-operation procedure, (Article 100a, para.1). Paragraph 3 of the same Article indicates that the Commission, in its proposals involving environmental protection, will take as a base a high level of protection.[407] The ECJ in its 'Titanium Dioxide' case judgment of 1991[408], while set aside the Council Directive 89/1428 on waste from titanium dioxide industry, held, *inter alia*, that Article 100a, para.3, obliges the Commission, in the field of environmental protection, to take as a base a high level of protection.[409]

Soon after the entry into force of the SEA on 01/07/1987, the Council Regulation (EEC) No 2242/87 of 23/07/1987 on "*Action by the Community relating to the environment*" was issued.[410] The purpose of the Regulation was to draw a framework for the Community's financial contribution in carrying out certain specific measures under this Regulation. While Preambular paragraph 1 of the Council Regulation 2242/87 refers to, in particular, Article 130s of the SEA, paragraph 6 states that "action by the Community relating to the environment should have as its objective to preserve, protect and improve the quality of the environment, to contribute towards protecting human health, and to ensure a prudent and rational utilization of natural resources".

"**Declaration on the Environment**" of 1988:

The European Council meeting at Rhodes on 2 and 3 December 1988 issued a "Conclusions of the Presidency – European Council".[411] As stated in the Conclusions

405 Thomas Bunge, 'European Environmental Law: Community Legislation and Member States' Competences under the EEC Treaty', (1990) 59/4 Rev. Jur. U.P.R. 669-692, 682; Freestone, '*European Community Environmental Policy and Law*', (n. 398) 137.

406 Bunge (n. 405) 671-672.

407 Barrington (n. 400) 82.

408 Case C 300/89, (Commission of the European Communities v. Council of the European Communities) [1991] E.C.R. 2867, para.24. In this case the Council Directive 89/1428 had been adopted in accordance with Article 130s (unanimity and consultation), the Commission had proposed Article 100a (qualified majority and co-operation procedure) as its legal basis. The ECJ held that these two provisions could not be applied cumulatively, and under the circumstances of the case Article 100a was the proper legal basis, (Judgment, paras.21, 25).

409 Barrington (n. 400) 82-83.

410 Council Regulation (EEC) No 2242/87 of 23/07/1987 on 'Action by the Community relating to the environment'; OJ, L 207/8, (29/07/1987).

411 Available at, <http://www.europarl.europa.eu/summits/rhodes/rh1_en.pdf>

the Council "considers that protection of the environment is a matter of vital significance to the Community and to the rest of the world, and urges the Community and Member States to take every initiative and all essential steps, including at international level, in accordance with the fundamental lines of the statement set out in Annex I."

The Council in the aforementioned Annex I, titled "Declaration on the Environment"[412], placed the environment issue high on its own agenda and urged the Community to redouble its efforts in this field.

In paragraph 2 of that Declaration, it was stated that "the goals of the environmental protection laid down for the Community have recently been defined by the Single European Act. Some progress has been made in reducing pollution and in ensuring prudent management of natural resources. But these activities by themselves are not enough. Within the Community, it is essential to increase efforts to protect the environment directly and also to ensure that such protection becomes an integral component of other policies. *Sustainable development must be one of the over-riding objectives of all Community policies*". (Emphasis added).

"**Maastricht Treaty**" of 1992:

In Preambular paragraph 7 of the Maastricht Treaty ("Treaty on European Union")[413] of 07/02/1992, the signatories declare that they are "Determined to promote economic and social progress for their peoples, within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection…" Under Title I "Common Provisions" of Article B indicates the promotion of "economic and social progress which is balanced and sustainable" as one of the objectives of the Union.

The "Maastricht Treaty" ("*Provisions Amending the Treaty Establishing the European Economic Community with a View to Establishing the European Community*") of 07/02/1992[414] amended Article 2 to include as one of the Community's tasks the promotion of "sustainable and non-inflationary growth respecting the environment". Pursuant to Article 3(k), the activities of the Community include "a policy in the sphere of the environment".

The Maastricht Treaty also amends Articles 130r, 130s and 130t of the Treaty of Rome. In the amended Articles the new phrase Community's "policy on the environment" has been used, while it was "action by the Community relating to

412 Available at, <http://www.europarl.europa.eu/summits/rhodes/rh2_en.pdf>.

413 David Wilkinson, 'Maastricht and the Environment: The Implications for the EC's Environment Policy of the Treaty on European Union', (1992) 4/2 J. Envtl. L. 221-239; Barrington (n. 400) 84-89.

414 The "*Maastricht Treaty*" was adopted on 07/02/1992 and entered into force on 01/11/1993; OJ, C 191 (29/07/1992); available at, <http://www.eurotreaties.com/maastrichtec.pdf>.

environment" in the 1987 SEA and subsequent the Council Regulation (EEC) No 2242/87 of 23/07/1987.

Under "*TITLE XVI – Environment*" of the *Maastricht Treaty*, (Article 130r, para.1) added a new fourth objective relating to the Community's environmental actions: "promoting measures at international level to deal with regional or world-wide environmental problems". As shown above, *the Single European Act* of 1986 (Art.130r, para.1) sets out only three objectives. The added fourth objective in Article 130r, para.1, of the *Maastricht Treaty*, shows not only awareness with respect to global nature of environmental issues, but also indicates the intention of the Community to play a global role in this area.

With regard to policy maxims, in addition to previously indicated three principles, namely preventive action, rectification of environmental damage and polluter pays principle, the amended (Article 130r, para.2) of the 1992 *Maastricht Treaty* provides important contribution: The Community policy on the environment "shall aim at a high level of protection". The same provision further indicates that the policy on the environment "shall be based on the *precautionary principle*", which was lacking in (Art.130r, para.2) of the 1986 *SEA*.

Although there is some unclarity with respect to the application of the precautionary principle, some authors suggested that it might, for example, include "the requirement that protective measures should be developed before specific environmental hazards are evident, and that the onus of proof that environmental damage will not occur should be placed on the polluter. However, developing policies to counter an environmental threat before its cause has been established beyond doubt can be both technically and politically problematic".[415]

(Article 130r, para.2) of the *Maastricht Treaty* also provides another significant contribution. In order to understand that contribution one may recall (Article 130r, para.2) of the *Single European Act* of 1986 which only stated that "environmental protection requirements are to be a component of the Community's other policies", the same provision in the *Maastricht Treaty* provides clarification to this requirement, as well as extends its scope in the following words: "Environmental protection requirements must be integrated into the definition and implementation of other Community policies. In this context, harmonization measures answering these requirements shall include, where appropriate, *a safeguard clause allowing Member States to take provisional measures*, for non-economic environmental reasons, subject to a Community inspection procedure."[416] (Emphasis added).

415 Wilkinson (n. 413) 224.

416 However, some authors expressed their concerned that "it is difficult to know in advance wat 'non-economic environmental reasons' the Commission will accept without some guide-lines given by the case law of the ECJ or by a Communication of the Commission", see, Barrington (n. 400) 86.

With regard to elements to be taken into account in preparing environmental measures (Article 130r, para.3) of both the Single *European Act* of 1986 and *Maastricht Treaty* of 1992 are identical.

It seems that (Article 130r, para.4) of the *Maastricht Treaty* of 1992, without making significant change, simply combines (Article 130r, paras.4 and 5) of the *Single European Act* of 1986 which has been shown above.

Finally, (Article 130t) of the *Maastricht Treaty* of 1992 reads as follows: "The protective measures adopted pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission."

In light of (Article 130r, para.2) of the *Maastricht Treaty* of 1992, it is understood that it was the first time that an explicit provision concerning provisional measures for environmental protection purposes was included into the European Community legislation. It introduced important changes to the principles underlying European Community policy, and the way in which environmental legislation is decided and implemented.[417]

"**Amsterdam Treaty**" of 1997:

Under "*TITLE XIX – Environment*" of the *Amsterdam Treaty* of 1997[418], with regard to the Community policy on the environment (Article 174, para.1) lists four objectives. This provision is identical with the *Maastricht Treaty* of 1992 (Article 130r, para.1).

(Article 174, para.2) of the *Amsterdam Treaty* reads as follows:

> **2.** Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the *precautionary principle* and on the *principles that preventive action* should be taken, that *environmental damage* should as a priority be *rectified at source and that the polluter should pay*.
>
> In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure. (Emphasis added).

417 Wilkinson (n. 413) 222.

418 The "*Consolidated Version of the Treaty Establishing the European Community*" (97/C 340/03) (Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts) [1997] OJ C 340.

As seen, the content of (Article 174, para.2), including its subparagraph 2, of the *Amsterdam Treaty* is again identical with (Article 130r, para.2) of the *Maastricht Treaty* of 1992. It may be added that under "Section 4 – The Court of Justice" of the *Amsterdam Treaty* (Article 243) (*ex Article 186*) provides that "the Court of Justice may in any cases before it prescribe any necessary interim measures."

With regard to elements to be taken into account in preparing environmental measures (Article 130r, para.3) of both the 1986 *Single European Act* and the 1992 *Maastricht Treaty* and (Article 174, para.3) of the 1997 *Amsterdam Treaty* are identical: (i) available scientific and technical data; (ii) environmental conditions in the various regions of the Community; (iii) the potential benefits and costs of action or of lack of action, and (iv) the economic and social development of the Community as a whole and the balanced development of its regions.

(Article 174, para.4) of the *Amsterdam Treaty* of 1997 likewise repeats (Article 130r, para.4) of the *Maastricht Treaty* of 1992. The same similarity also appears in (Article 175)[419] of the *Amsterdam Treaty* of 1997 and (Article 130s) of the *Maastricht Treaty* of 1992.

Finally, (Article 176) of the *Amsterdam Treaty* of 1997 is same with (Article 130t) of the *Maastricht Treaty* of 1992, except the difference that while in the 1997 Treaty reference was made to (Article 175), in the 1992 Treaty it was (Article 130s).

In the preamble paragraph 8 of the "Consolidated Version of the Treaty Establishing the European Community" (97/C 340/03) ("*Treaty of Amsterdam*") it is provided that the signatories were "*Determined* to promote economic and social progress for their peoples, *taking into account the principle of sustainable development* and within the context of the accomplishment of the internal market and of reinforced cohesion and *environmental protection*, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields".

419 Some provisions of Article 175 of the Amsterdam Treaty of 1997 reads as follows:
Article 175 (*ex Article 130s*)
2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 95, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:
- provisions primarily of a fiscal nature;
- *measures concerning town and country planning, land use with the exception of waste management and measures of a general nature, and management of water resources*;
- measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.
The Council may, under the conditions laid down in the preceding subparagraph, define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority. (...)
4. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the environment policy.
5. *Without prejudice to the principle that the polluter should pay*, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, the Council shall, in the act adopting that measure, lay down appropriate provisions in the form of:
- temporary derogations, and/or
- financial support from the Cohesion Fund set up pursuant to Article 161.

The "*Consolidated Version of the Treaty Establishing the European Community*", under "Part One – Principles", Article 2 provides the following: "Article 2 – (*ex Article 2*) - The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community *a harmonious, balanced and sustainable development* of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, *a high level of protection and improvement of the quality of the environment*, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States". In accordance with Article 6 (*ex Article 3c*), *environmental protection requirements* must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular *with a view to promoting sustainable development*. (Emphasis added).[420]

"**Charter of Fundamental Rights of the EU**" of 2000:

Article 37 ("Environmental protection") of the "*Charter of Fundamental Rights of the European Union*"[421] of 07/12/2000 provides that "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of *sustainable development*." (Emphasis added).

Note that under the ECHR system the European Court of Human Rights has also made references to Article 37 of the 'EU Charter'.[422]

2001-2006 period documents:

"*Presidency Conclusions – Goteborg, European Council, 15 and 16 June 2001*"[423] agreed on a strategy for sustainable development and added an environmental

420 The "Consolidated Version of the Treaty Establishing the European Community" (97/C 340/03) (Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts [1997] OJ C 340 "Article 95 (*ex Article 100a*)", paragraphs 3 to 5 reads as follows: "**3.** The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, *environmental protection* and consumer protection, *will take as a base a high level of protection, taking account in particular of any new development based on scientific facts*. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective. **4.** If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the *protection of the environment* or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them. **5.** Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on *new scientific evidence relating to the protection of the environment* or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them." (Emphasis added).

421 The Charter of Fundamental Rights of the European Union, [2007] OJ, C 303.

422 For example, see, Separate Opinion of Judge Costa appended to *Hatton and Others v. the United Kingdom* (2001) ECtHR; also see, Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner (para.1) appended to the *Hatton and Others*, (GC) Judgment.

423 The Council of the European Union, 'Presidency Conclusions – Göteborg, European Council, 15 and 16 June 2001' <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en1.pdf>.

dimension to the Lisbon process for employment, economic reform and social cohesion. Under Title II "A Strategy For Sustainable Development",(para.19) states that "Sustainable development – to meet the needs of the present generation without compromising those of future generations – is a fundamental objective under the Treaties. That requires dealing with economic, social and environmental policies in a mutually reinforcing way. Failure to reverse trends that threaten future quality of life will steeply increase the costs to society or make those trends irreversible". In (para.20) the Council declared that with respect to a strategy for sustainable development it added a third element, i.e. "environmental dimension to the Lisbon strategy" and established "a new approach to policy making". Furthermore, "the Council is invited to finalize and further develop sector strategies for integrating the environment into all relevant Community policy areas with a view to implementing them as soon as possible", (para.32).

"Renewed EU Sustainable Development Strategy" of 2006:

In 2006, the Council adopted a document entitled "*Renewed EU Sustainable Development Strategy*"[424], which sets out a single, coherent strategy on how the EU will more effectively live up to its long-standing commitment to meet the challenges of sustainable development. Pursuant to paragraph 1 of this document "*Sustainable development means that the needs of the present generation should be met without compromising the ability of future generations to meet their own needs*", the formulation of which is an "objective" that governs "all the Union's policies and activities". (Emphasis added). It goes on saying that it aims at "the continuous improvement of the quality of life and well-being on Earth for present and future generations", and that it promotes, *inter alia,* the "environmental protection".

Under Title "Key Objectives" of the "*Renewed EU Sustainable Development Strategy*" of 2006, the first objective indicated to be focused on is "Environmental Protection". It reads: "Safeguard the earth's capacity to support life in all its diversity, respect the limits of the planet's natural resources and ensure a high level of protection and improvement of the quality of the environment. Prevent and reduce environmental pollution and promote sustainable consumption and production to break the link between economic growth and environmental degradation".

The "*Renewed EU Sustainable Development Strategy*" of 2006 under Title "Policy Guiding Principles" also lists a series of principles, which include, for example, "Solidarity within and between generations"; "Open and democratic society" (that refers also to guarantee citizens' right of access to information); "Involvement of citizens" (that includes enhancement of the participation of citizens in decision-

424 The Council of the European Union, 'Review of the EU Sustainable Development Strategy (EU SDS)|Renewed Strategy' Brussels 10117/06, 9 June 2006, <http://register.consilium.europa.eu/pdf/en/06/st10/st10117.en06.pdf>.

making, as well as informing citizens about their impact on the environment and their options for making more sustainable choices); "Policy Integration" (that refers to the notion of "balanced impact assessment"); and "Precautionary Principle" (that is formulated as "Where there is scientific uncertainty, implement evaluation procedures and take appropriate preventive action in order to avoid damage to human health or to the environment"), as well as "Makes Polluters Pay" (which means that "polluters pay for the damage they cause to human health and the environment").

"**Lisbon Treaty**" of 2007:

The "*Treaty of Lisbon*" was signed on 13/12/2007 and entered into force on 01/12/2009.[425] Amendments to the Treaty on European Union and to the Treaty Establishing the European Community are as follows:

The amended Article 2, paragraph 3, reads as follows: "The Union shall establish an internal market. *It shall work for the sustainable development of Europe* based on balanced economic growth and price stability, a highly competitive social market economy, *aiming at* full employment and social progress, and a high *level of protection and improvement of the quality of the environment*. It shall promote scientific and technological advance".

A new Chapter 1 "General Provisions on the Union's External Action" and Articles 10A and 10B were inserted: Article 10A, paragraph 2(d) and (f) states that "2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (…) (d) *foster the sustainable* economic, social and *environmental development* of developing countries, with the primary aim of eradicating poverty", "(f) help *develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development*".

A new Title I "Categories and Areas of Union Competence" and new Articles 2 A to 2 E were inserted. Article 2 B, paragraph 2 (e) indicates that "Shared competence between the Union and the Member States applies in the following principal areas: (…) (e) environment".

Under Title "Environment (Climate Change)" Article 174 was amended and in paragraph 1, the fourth indent was replaced by the following: "promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change". (Emphasis added).

425 The "*Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*" was signed at Lisbon on 13/12/2007 and entered into force on 01/12/2009, after being ratified by all the Member States; OJ 2007/C 306/01 (17/12/2007).

Article 175, paragraph 2, the second sub-paragraph was amended as follows: "The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph."

"**Consolidated Version of the Treaty on European Union**" of 2010:[426]

Preambular paragraph 9 states the following: "Determined to promote economic and social progress for their peoples, *taking into account the principle of sustainable development* and within the context of the accomplishment of the internal market and of *reinforced cohesion and environmental protection*, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields".

Article 3 (ex Article 2 TEU), paragraph 3 provides that "The Union shall establish an internal market. It shall work for the *sustainable development* of Europe based on balanced economic growth and price stability, a highly competitive social market economy, *aiming at* full employment and social progress, and *a high level of protection and improvement of the quality of the environment*. It shall promote scientific and technological advance".

Under Title V, Chapter 1 "General Provisions on the Union's External Action", Article 21, paragraph 2(d) and (f) read as follows: "2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (…) (d) foster the *sustainable* economic, social and *environmental development* of developing countries, with the primary aim of eradicating poverty; (…) (f) help *develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development*". (Emphasis added).

"**Consolidated Version of the Treaty on the Functioning of the European Union**" of 2010:[427]

Under Title I "Categories and Areas of Union Competence", while pursuant to Article 3(d) the Union shall have exclusive competence in the area of "the conservation of marine biological resources under the common fisheries policy",

426 The "*Consolidated Version of the Treaty on European Union*" [2010] OJ C 83/13.

427 The Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C 83/47.

in accordance with Article 4, paragraph 2 (e) shared competence between the Union and the Member States applies in the principal areas, including "environment".[428]

Under Title II "Provisions Having General Application", Article 11 (ex Article 6 TEC) indicates that "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*."

Under Title XX "Environment" Articles 191 to 193 take place. Article 191 (ex Article 174 TEC) lists four objectives. The only new element in Article 191, paragraph 1, is the reformulated fourth objective which reads as follows: "*promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change*". (Emphasis added).

Except the replacement of term "Union" instead of the term "Community" used in the previous texts (see, Article 174, para.2, of the *Amsterdam Treaty* of 1997 and Article 130r, para.2 of the *Maastricht Treaty* of 1992), Article 191, paragraph 2, including its subparagraph 2, of the "Consolidated Version of the Treaty on the Functioning of the European Union" of 2010 remains the same.

Consequently, an important element for the purposes of this study, i.e. emphasis on "provisional measures" ("environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States *to take provisional measures*") has been kept in force.

With regard to elements to be taken into account in preparing environmental measures, namely (i) "available scientific and technical data"; (ii) "environmental conditions in the various regions of the Union"; (iii) "the potential benefits and costs of action or of lack of action", and (iv) "the economic and social development of the Union as a whole and the balanced development of its regions" as appeared in Article 191, para.3, of the "Consolidated Version of the Treaty on the Functioning of the European Union" of 2010 are also the same (save the change of the term "Union")

428 Pursuant to Article 114 (ex Article 95 TEC), paragraph 3, of the "Consolidated Version of the Treaty on the Functioning of the European Union", the Commission, "in its proposals concerning health, safety, *environmental protection* and consumer protection, *will take as a base a high level of protection*, taking account in particular of any *new development based on scientific facts*. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective". (Emphasis added). This provision seems to serve to strengthen the precautionary principle. Article 114, paragraph 4 states that "if, after the adoption of a harmonization measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds… relating to the protection of the environment… it shall notify the Commission of these provisions as well as the grounds for maintaining them". Moreover, in accordance with paragraph 5 of the same Article, "if, after the adoption of a harmonization measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment… on grounds of a problem specific to that Member State arising after the adoption of the harmonization measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them". Furthermore, Article 177, subparagraph 2, provides that "A Cohesion Fund , set up in accordance with the same procedure shall provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure". The importance of Articles 114 and 177 emanate from the fact that, Article 192 (Title XX "Environment"), paragraphs 2 and 5, refer to the mentioned provisions.

with the former texts, (see, Article 130r, para.3, of both the 1986 *Single European Act* and the 1992 *Maastricht Treaty* and Article 174, para.3, of the 1997 *Amsterdam Treaty*).

Coming to Article 192 (ex Article 175 TEC) of the "Consolidated Version of the Treaty on the Functioning of the European Union" of 2010, one may observe some noteworthy changes.

For instance, Article 192, paragraph 2(b) provides the following: "2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to *Article 114* (in the former text, reference was made to "Article 95"), the Council acting unanimously in accordance *with a special legislative procedure* (in the former text, "on a proposal from the Commission")… shall adopt: (…) (b) measures affecting: (…) *quantitative management of water resources or affecting, directly or indirectly, the availability of those resources*" (in the former text, "measures of a general nature, and management of water resources").

Final subparagraph of paragraph 2 reads as follows: "The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph". (In the former text, "The Council may, under the conditions laid down in the preceding subparagraph, define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority").

Pursuant to Article 192, paragraph 5, "Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, such measure shall lay down appropriate provisions in the form of: — temporary derogations, and/or — financial support from the Cohesion Fund set up pursuant to Article 177".

Finally, except the change of the Article numbers referred to, Article 193 of the "Consolidated Version of the Treaty on the Functioning of the European Union" of 2010 ("The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission"), Article 176 of the *Amsterdam Treaty* of 1997 and Article 130t of the *Maastricht Treaty* of 1992 are the same.

Apart from the provisions regulated within the framework of specific Title "Environment", there are also some other provisions under different Titles in which environmental considerations have also been emphasized. For instance, under Title XXI "Energy", Article 194, paragraph 1, states that "in the context of the establishment

and functioning of the internal market and with regard to *the need to preserve and improve the environment*, Union policy on energy shall aim, in a spirit of solidarity between Member States…"

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.

Bibliography

'Introduction to Part Three: The Emerging Ocean Regime' in E. Borgese (ed.), PACEM IN MARIBU (1972).

'Selected International Legal Materials on Global Warming and Climate Change' (1990) 5 Am. U. J. Int'l L. & Pol. 513-634.

'Thaw in International Law? Rights in Antarctica under the Law of Common Spaces' (1978) 87/4 Yale L. J. 804-859.

Adede A. O., 'The System for Exploitation of the 'Common Heritage of Mankind' at the Caracas Conference' (1975) 69/1 AJIL 31-49.

Agarwala P. N., 'The New International Economic Order: An Overview' (Pergamon 2015)

Alam Shawkat, 'The United Nations' Approach to Trade, the Environment and Sustainable Development' (2006) 12/3 ILSA J. Int'l & Comp. L.

Alexander Jr. Frank C., 'Legal Aspects: Exploitation of Antarctic Resources: A Recommended Approach to the Antarctic Resource Problem' (1978) 33/2 U. Miami L. Rev.

Alston Philip, 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78/3 AJIL 607-621.

Alston Philip, 'Making Space for New Human Rights: The Case of the Right to Development', (1988) 1 Harv. Hum. Rts. Y.B. 3-40.

Alston Philip, Robinson Mary (eds.), Human Rights and Development: Towards Mutual Reinforcement, (Oxford University Press, 2005)

Anand Ram Prakash, 'Interests of the Developing Countries and the Developing Law of the Sea' (1973) 4 Annals of Int'l Studies 13, 22, quoted in, Feder (n. 84) 826

Andreassen Bard A., Marks Stephen P. (eds.), Development as a Human Right: Legal, Political and Economic Dimensions, (Second edition, Intersentia, 2010).

Arnold Rudolph Preston, 'The Common Heritage of Mankind as a Legal Concept' (1975) 9/1 The International Lawyer 153

Asimakopoulou Eleftheria, Mohammad Essam Yassin, 'Marine genetic resources in areas beyond national jurisdiction: a 'common heritage of mankind' (February 2019) IIED (International Institute for Environment and Development) Briefing http://pubs.iied.org/17498IIED

Balch Thomas W., 'Arctic and Antarctic Regions and the Law of Nations' (1910) 4/2 AJIL

Barrington Eileen, 'European Environmental Law: Before and After Maastricht', (1993) 2 U. Miami YBIL 79-89.

Baslar Kemal, The Concept of the Common Heritage of Mankind in International Law (Martinus Nijhoff Publishers, Published by Kluver Law International, 1998)

Batt John, Short David C., 'The Jurisprudence of the 1992 Rio Declaration on Environment and Development: A Law, Science and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development', (1993) 8/2 J. Nat. Resources & Envtl. L.

Belsky Martin H., 'Management of Large Marine Ecosystems: Developing a New Rule of Customary International Law' (1985) 22/4 San Diego L. Rev. 733-763.

Berger-Eforo Judith, 'Sanctuary for the Whales: Will This Be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-First Century?' (1996) 8/2 Pace Int'l L. Rev. 439-483.

Bernhardt J. Peter A., 'Sovereignty in Antarctica', (1975) 5/2 Cal. W. Int'l L. J. 297-349

Bilder Richard B., 'The Role of Unilateral State Action in Prevention International Environmental Injury' (1981) 14/1 Vand. J. Transnat'l L. 51-95.

Birnie Patricia W., International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching (Vols.1 and 2, Oceana Publications Inc., New York, 1985).

Birnie Patricia, 'Environmental Protection and Development', (1995) 20/1 Melb. U. L. Rev.

Birnie Patricia, 'Small Cetaceans and the International Whaling Commission' (1997) 10/1 Geo. Int'l Envtl. L. Rev. 1.

Birnie Patricia, Alan Boyle and Catherine Redgwell, International Law and the Environment, (Third Edition, Oxford University Press 2009).

Blay S. K. N., 'New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol' (1992) 86/2 AJIL 377-399.

Bleicher Samuel A., 'An Overview of International Environmental Regulation' (1972) 2/1 Ecology L. Q. 1, 66

Bodansky Daniel, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18/2 Yale J. Int'l L. 451-558.

Bodansky Daniel, 'Deconstructing the Precautionary Principle', in D. D. Caron and H. N. scheiber (eds.) Bringing New Law to Ocean Waters, (Koninklijke Brill N. V., 2004).

Bostian Ida L., 'Flushing the Danube: The World Court's Decision Concerning the Gabcikovo Dam', (1998) 9/2 Colo. J. Int'l Envtl. L. & Pol'y 401-427

Boyle A. E., 'Some Reflections on the Relationship of Treaties and Soft Law', (1999) 48/4 ICLQ 901; Lluis Paradell-Trius, 'Principles of International Environmental Law: an Overview' (2000) 9/2 RECIEL.

Boyle Alan E., 'Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions' (1991) 3/2 J. Envtl. 229-245.

Brilmayer Lea, Klein Natalie, 'Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator', (2001) 33/3 N.Y.U. J. Int'l. L. & Pol.

Brundtland Report, Report of the World Commission on Environment and Development, Our Common Future (1987).

Bunge Thomas, 'European Environmental Law: Community Legislation and Member States' Competences under the EEC Treaty', (1990) 59/4 Rev. Jur. U.P.R. 669-692

Cameron J., Abouchar J., 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment' (1991) 14/1 B. C. Int'l & Comp. L. Rev. 1, 1-27.

Carducci Guido, 'Articles 4 - 7: National and International Protection of the Cultural and Natural Heritage', in Francesco Francioni (ed.) The 1972 World Heritage Convention: A Commentary (Oxford University Press, 2008).

Cheng Bin, 'Article VI of the 1967 Space Treaty Revisited: 'International Responsibility', 'National Activities' and 'The Appropriate State' (1998) 26/1 J. Space L. 7-32.

Cherian Jijo George, Abraham Job, 'Concept of Private Property in Space: An Analysis' (2007) 2/4 J. Int'l. Com. L. & Tech. 211.

Chinkin C. M., 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38/4 ICLQ

Chowdhury S., 'Common but Differentiated Responsibility in International Environmental Law: from Stockholm (1972) to Rio (1992)' in Denters E. M., Ginther K. and de Waart (Eds.) Sustainable Development and Good Governance (Brill 1995).

Christol Carl Q., 'The Moon Treaty Enters into Force', (1985) 79/1 AJIL 163-168.

Christol Carl Q., The Modern International Law of Outer Space (Pergamon Press, 1982).

Churchill Robin, 'International Environmental Law and the United Kingdom', (1991) 18/1 J. L. & Soc'y.

Cocca Aldo Armando, 'The Advances in International Law through the Law of Outer Space' (1981) 9/1-2 J. Space L. 13.

Coffey Sarah, 'Establishing a Legal Framework for Property Rights to Natural Resources in Outer Space', (2009) 41/1 Case Western Reserve Journal of International Law (Case W. Res. J. Int'l. L.) 119-147..

Colombos John, The International Law of the Sea (Longmans 1967).

Conforti Benedetto, 'Territorial Claims in Antarctica: A Modern Way to Deal with an Old Problem' (1986) 19/2 Cornell Int'l L. J. 249

D'Amato Anthony, 'Do We Owe a Duty to Future Generations to Preserve the Global Environment?'(1990) 84/1 AJIL 190-198.

D'Amato Anthony, K. Chopra Sudhir, 'Whales: Their Emerging Right to Life', (1991) 85/1 AJIL 21-62.

Davis Kimberly, 'International Management of Cetaceans Under the New Law of the Sea Convention' (1985) 3/2 B. U. Int'l L. J. 477.

Doubleday Nancy C., 'Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law' (1989) 17/2 Denv. J. Int'l L. & Pol'y 373-394.

Drankier Petra, Elfring Alex G. Oude, Visser Bert and Takacs Tamara, 'Marine Genetic Resources in Areas beyond National Jurisdiction: Access and Benefit-Sharing' (2012) 27/2 Int. J. Mar. Coast. L. 375-433.

Dupuy Pierre-Marie, 'Soft Law and the International Law of the Environment' (1991) 12/2 Mich. J. Int'l L.

Dupuy René-Jean, The Law of the Sea: Current Problems (Dobbs Ferry, Oceana Publications Inc. - Leiden, A. W. Sijthoff, 1974)

Dyke Jon Van, Yuen Christopher, 'Common Heritage v. Freedom of the Seas: Which Governs the Seabed?' (1982) 19/3 San Diego L. Rev 493

F. Strong Maurice, 'Beyond Rio: Prospects and Portents' (1993) 4/1 Colo. J. Int'l Envtl. L. & Pol'y 21

Falk Richard A., 'The Global Environment and International Law: Challenge and Response', (1975) 23/3 Kan L. Rev. 385

Fasan Ernst, 'The Meaning of the Term 'Mankind' in Space Legal Language' (1974) 2/2 J. Space L.

Feder Barnaby J., 'A Legal Regime for the Arctic' (1978) 6/3 Ecology L. Q. 785, 800

Fountain Lynn M., 'Creating Momentum in Space: Ending the Paralysis Produced by the 'Common Heritage of Mankind' Concept' (2003) 35 Conn. L. Rev. 1753.

Frakes Jennifer, 'The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?' (2003) 21/2 Wisconsin Int'l L. J. 409

Francioni Francesco (ed.) The 1972 World Heritage Convention: A Commentary (Oxford University Press, 2008).

Francioni Francesco, 'International 'Soft Law': A Contemporary Assessment' in Vaughan Lowe and Malgosia Fitzmaurice (eds.) Fifty Years of the International Court of Justice - Essays in Honour of Sir Robert Jennings (Grotius Publications, Cambridge University Press 1996)

Francioni Francesco, 'Legal Aspects of Mineral Exploitation in Antarctica' (1986) 19/2 Cornell Int'l L. J. 163

Francioni Francesco, 'Legal Aspects of Mineral Exploitation in Antarctica' (n. 202) 169 citing U.N. Doc. A/38/193 (1983)

Francioni Francesco, 'The Madrid Protocol on the Protection of the Antarctic Environment' (1993) 28/1 Tex. Int'l L. J. 47-72.

Francioni Francesco, 'The Preamble', in Francioni (ed.) The 1972 World Heritage Convention.

Frank R. F., 'The Convention on the Conservation of Antarctic Marine Living Resources', (1983) 13/3 Ocean Dev. & Int'l L. 291-346.

Freeland Steven, 'For Better or for Worse? The Use of 'Soft Law' within the International Legal Regulation of Outer Space' (2011) 36 Annals of Air and Space Law (Ann. Air & Space L.) 409-445.

Freeland Steven, 'The Limits of Law: Challenges to the Global Governance of Space Activities' (2020) 153/1 Journal & Proceedings of the Royal Society of New South Wales, (J. & Procee. R. S. New South Wales) 70-82.

Freestone David, 'European Community Environmental Policy and Law', (1991) 18/1 J. L. & Soc'y. 135-154.

Freestone David, 'The Road from Rio: International Environmental Law After the Earth Summit', (1994) 6/2 J. Envtl. L. 193.

French Duncan, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities' (2000) 49/1 ICLQ 35-60.

Gabrynowicz Joanne Irene, 'Space Law: Its Cold War Origins and Challenges in the Era of Globalization' (2004) 37 Suffolk U. L. Rev. 1041.

Gemalmaz M. Semih, 'Introduction to International Environmental Law: From Initial Steps to Institution Building for the Conservation of Environment-Part 1', (2021) 33/2 ERPL/REDP (120)

Getches David H., 'The Challenge of Rio', (1993) 4/1 Colo. J. Int'l Envtl. L. & Pol'y.

Gillespie Alexander, 'Implementation and Compliance Concerns in International Environmental Law: The State of Art within Three International Regimes', (2003) 7 N.Z. J. Envtl. L. 53.

Goedhuis D., 'Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law' (1981) 19/2 Colum. J. Transnat'l L. 213.

Goh Gerardine Meishan, Dispute Settlement in International Space Law (Martinus Nijhoff Publishers, 2007).

Goldie L.F.E., 'A Note on Some Diverse Meanings of 'the Common Heritage of Mankind'' (1983) 10/1 Syracuse J. Int'l L. & Com. 69; Bradley Larschan and Bonnie C. Brennan, 'The Common Heritage of Mankind Principle in International Law' (1983) 21/2 Colum. J. Transnat'l L. 305

Gormley W. Paul, 'The Right to Safe and Decent Environment', (1988) 28/1 Indian J. Int'l L. 1.

Gorny Dietrich, 'The European Environment Agency and the Freedom of Environmental Information Directive: Potential Cornerstones of EC Environmental Law', (1991) 14/2 B. C. Int'l & Comp. L. Rev. 279-299.

Gorove Stephen, 'The Concept of 'Common Heritage of Mankind': A Political, Moral or Legal Innovation?' (1972) 9/3 San Diego L. Rev. 390

Gündling Lothar, 'Our Responsibility to Future Generations' (1990) 84/1 AJIL 207-212.

Handl Günther, 'Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio', (1994) 5/2 Colo. J. Int'l Envtl. L. & Pol'y 305.

Handl Günther, 'Environmental Security and Global Change: The Challenge to International Law' (1990) 1 Y.B. Int'l Envtl. L.

Handl Günther, 'Human Rights and Protection of the Environment' in A. Eide, C. Krause and A. Rosas (eds.) Economic, Social and Cultural Rights (second edition, Martinus Nijhoff, printed in the Netherlands, 2001).

Hanessian John, 'The Antarctic Treaty 1959' (1960) 9/3 ICLQ

Hayton Robert D., 'The Antarctic Settlement of 1959' (1960) 54/2 AJIL 349

Higgins Rosalyn, The Development of International Law through the Political Organs of the United Nations, (Oxford University Press 1963) 5, quoted in S. K., Chatterjee, 'The Charter of Economic Rights and Duties of States: An Evaluation after 15 Years' (1991) 40/3 ICLQ 669, 682 (According to the author "it may be unwise to dismiss the legal effect of all UN General Assembly resolutions, especially those pertaining to State responsibility", ibid.).

Hodkova Iveta, 'Is There a Right to a Healthy Environment in the International Legal Order?' (1991) 7/1 Conn. J. Int'l L. 65.

Horn Laura, 'The Implication of the Concept of Common Concern of a Human Kind on a Human Right to a Healthy Environment', (2004) 1/2 MqJICEL 233-268

Husby Eric, 'Sovereignty and Property Rights in Outer Space' (1994) 3 J. Int'l. L. & Prac. 359.

ICJ, Press Release No.2010/16 of 1 June 2000, "Australia institutes proceedings against Japan for alleged breach of international obligations concerning whaling", accessible at www.icj-cij.org/docket/files/148/15953.pdf.

Jakhu Ram, 'Legal Issues Relating to the Global Public Interest in Outer Space' (2006) 32/1 J. Space L. 31-110.

Jenks C. Wilfred, 'International Law and Activities in Space' (1956) 5/1 ICLQ 99-114.

Jenks C. Wilfred, The Common Law of Mankind (Frederick A. Praeger 1958).

Jessup Philip C., 'Sovereignty in Antarctica' (1947) 41/1 AJIL 117.

Jessup Philip C., 'The International Protection of Whales' (1930) 24/4 AJIL 751-752, League of Nations Doc. C.196.M.70.1927.V, 120 et al, reproduced in, AJIL (Volume 20 Supp., 1926).

Johnson D. H. N., 'The Effect of Resolutions of the General Assembly of the United Nations' (1955-56) 32 BYBIL 97-122.

Johnston Douglas M., 'Systemic Environmental Damage: The Challenge to International Law and Organization' (1985) 12/2 Syracuse J. Int'l L. & Com.

Joyner Christopher C., 'Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas' (1981) 18/3 San Diego L. Rev.

Joyner Christopher C., 'Protection of the Antarctic Environment: Rethinking the Problems and Prospects' (1986) 19/2 Cornell Int'l L.J. 259

Joyner Christopher C., 'The Common Heritage of Mankind' (1986) 35 ICLQ 190. Alexander Charles Kiss, 'Conserving the Common Heritage of Mankind', (1990) 59/4 Rev. Jur. U.P.R. 773

Joyner Christopher C., 'The Southern Ocean and Marine Pollution: Problems and Prospects', (1985) 17/2 Case W. Res. J. Int'l L.

July 2007, "Decision I/2 – Review of Compliance"; available at, <http://www.unece.org/env/documents/2007/wat/wh/ece.mp.wh.2_add_3.e.pdf>

Kamminga Menno T., 'The IAEA Convention on Nuclear Safety' (1995) 44/4 ICLQ 872-882

Kaye Stuart B., 'Legal Approaches to Polar Fisheries Regimes: A Comparative Analysis of the Convention for the Conservation of Antarctic Marine Living Resources and the Bering Sea Doughnut Hole Convention', (1995) 26/1 Cal. W. Int'l L. J. 75

Kimball Lee, 'Environmental Law and Policy in Antarctica' in P. Sands (ed.), Greening International Law, (The New Press, 1994)

Kish John, The Law of International Spaces (A. W. Sijthoff, 1973)

Kiss Alexandra, 'The Rio Declaration on Environment and Development' in L. Campiglio et al., (eds.) The Environment after Rio: International Law and Economics (London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff, 1994).

Kiss Alexandre and Shelton Dinah, Guide to International Environmental Law (Martinus Nijhoff Publishers 2007)

Kiss Alexandre Charles, 'Mechanisms of Supervision of International Environmental Rules' in Frits Kalshoven, Pieter Jan Kuyper and Johan G. Lammers (eds.), Essays on the Development of the International Legal Order: in memory of Haro F. Van Panhuys (Sijthoff and Noordhoff 1980) 99-114.

Kiss Alexandre, 'Concept and Possible Implications of the Right to Environment', in K.H. Mahoney and P. Mahoney (eds.) Human Rights in the Twenty-first Century, (Kluwer Academic Publishers, 1993).

Kiss Alexandre, 'The Common Heritage of Mankind: Utopia or Reality?' (1985) 40/3 International Journal 423

Kovar Jeffrey D., 'A Short Guide to the Rio Declaration', (1993) 4/1 Colo. J. Int'l Envtl. L. & Pol'y 118-140.

Lachs Manfred, The Law of Outer Space: An Experience in Contemporary Law-Making (Sijthoff, 1972).

Lee Seokwoo, KimJeong Woo, 'Chapter 2. Applying the Principle of the Common Heritage of Mankind: An East Asian Perspective' in Keyuan Zou (ed.) Global Commons and the Law of Sea (Koninklijke Brill NV, 2018).

Llano George A., 'Ecology of the Southern Ocean Region' (1978) 33/2 U. Miami L. Rev.

Lones Laura L., 'The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation' (1989) 22/3 Vand. J. Transnat'l L. 997.

Lopez Aurelie, 'Criminal Liability for Environmental Damage Occurring in Times of Non-International Armed Conflict: Rights and Remedies' (2007) 18/2 Fordham Envtl. L. Rev. 231, 256

Lyall Francis, Larsen Paul B., Space Law: A Treatise (Ashgate, 2009).

Maffei Maria Clara, 'The International Convention for the Regulating of Whaling' (1997) 12/3 Int'l J. Marine & Coastal L. 287.

Maffei Mariea Clara, 'Evolving Trends in the International Protection of Species' (1993) 36 German YBIL 131-187.

Maggio Gregory F., 'Inter/intra-generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources' (1997) 4/2 Buff. Envtl. L. J. 161-224.

Mann H., 'Comment on the Paper by Philippe Sands' in W. Lang (ed.) Sustainable Development in International Law (1995 Graham Trotman).

Marciniak Konrad Jan, 'Chapter 16. Marine Genetic Resources: Do They Form the Part of the Common Heritage of Mankind Principle?' in Natural Resources and the Law of the Sea: Exploration, Allocation, Exploitation of Natural Resources in Areas under National Jurisdiction and Beyond (Arbitration & Practice 2017).

Ni Kuei-Jung, 'Contemporary Prospects for the Application of Principle 12 of the Rio Declaration', (2001) 14/1 Geo. Int'l Envtl. L. Rev. 1-33

Ogunbanwo Ogunsola O., International Law and Outer Space Activities (Martinus Nijhoff Publishers, 1975).

Onoda Masami, 'Satellite Earth Observation as 'Systematic Observation' in Multilateral Environmental Treaties' (2005) 31/2 J. Space L. 339-411.

Pallemaerts Marc, 'International Environmental Law From Stockholm to Rio: Back to the Future' in P. Sands (ed.) Greening International Law (The New Press 1994) 1, 2

Palmer Geoffrey, 'The Earth Summit: What Went Wrong at Rio?', (1992) 70/4 Wash. U. L. Q. 1005-1028.

Pinto M. C. W., 'The International Community and Antarctica' (1978) 33/2 U. Miami L. Rev.

Quinn Adam G., 'The New Age of Space Law: The Outer Space Treaty and the Weaponization of Space' (2008) 17/2 Minn. J. Int'l. L. 475.

Rana Harminderpal Singh, 'Note, the 'Common Heritage of Mankind' & the Final Frontier: A Revaluation of Values Constituting the International Legal Regime for Outer Space Activities', (1994) 26/1 Rutgers L.J. 225-250.

Redgwell Catherine, 'Environmental Protection in Antarctica: The 1991 Protocol' (1994) 43/3 ICLQ 599-634.

Rosas Allan, 'The Right to Development', in A. Eide, C. Krause and A. Rosas (eds.) Economic, Social and Cultural Rights, (Second edition, Martinus Nijhoff Publishers, 2001) 119-130.

Rose Gregory, Crane Saundra, 'The Evolution of International Whaling Law' in Philippe Sands (ed.), Greening International Law (The New Press 1994) 159-181.

Rosencranz Armin, 'The Origin and Emergence of International Environmental Norms' (2003) 26/3 Hastings Int'l & Comp. L. Rev. 309-320

Rothwell Donald R., 'International Law and the Protection of the Arctic Environment' (1995) 44/2 ICLQ 280

Rubin Alfred P., 'The International Legal Effects of Unilateral Declarations', (1977) 71/1 AJIL 1-30

Sand Peter H., 'UNCED and the Development of International Environmental Law' (1992-93) 8/2 J. Nat. Resources & Envtl. L.

Sands Philippe, 'Introduction' in P. Sands (ed.) Greening International Law (Routledge 1994).

Sands Philippe, 'Principles of International Environmental Law' (Cambridge University Press 2003).

Sattler Rosanna, 'Transporting a Legal System for Property Rights: From the Earth to the Stars', (2005) 6/1 Chi. J. Int'l. L. 23

Schachter Oscar, 'The Emergence of International Environmental Law', (1990) J. Int'l Aff. 457-493.

Schachter Oscar, 'The Twilight Existence of Nonbinding International Agreements' (1977) 71/2 AJIL 296

Schafer Bernard K., 'The Relationship Between the International Laws of Armed Conflict and Environmental Protection: The Need to Reevaluate What Types of Conduct are Permissible During Hostilities' (1989) 19/2 Cal. W. Int'l L. J. 287-325

Scholtz Werner, 'Common Heritage: Saving the Environment for Humankind or Exploiting Resources in the Name of Eco-Imperialism?' (2008) 41/2 Comparative and International Law Journal of Southern Africa (Comp. Int'l L. J. S. Africa) 273-293.

Scott Davidson J., 'The Single European Act and the Environment', (1987) 2/4 Int'l J. Estuarine & Coastal L. 259-263.

Scott James B., 'Arctic Exploration and International Law' (1909) 3/4 AJIL 928, 941.

Scott Karen N., 'Chapter 16. Protecting the Commons in the Polar South: Progress and Prospects for Marine Protected Areas in the Antarctic' in Keyuan Zou (ed.) Global Commons and the Law of Sea (Koninklijke Brill NV, 2018).

Scovazzi Tullio, 'Articles 8 - 11: World Heritage Committee and World Heritage List', in Francioni (ed.) The 1972 World Heritage Convention (2008).

Scovazzi Tullio, The Evolution of International Law of the Sea: New Issues, New Challenges (Collected Courses of the Hague Academy of International Law Vol. 286, Martinus Nijhoff Publishers, 2000).

Scully R. Tucker, 'The Marine Living Resources of the Southern Ocean' (1978) 33/2 U. Miami L. Rev. 345-348.

Shelton Dinah, 'What Happened in Rio to Human Rights?' (1992) 3 Yearbook Int'l. Envtl. L. 75-93.

Simma Bruno, 'The Antarctic Treaty as a Treaty Providing for an Objective Regime' (1986) 19/2 Cornell Int'l L. J.

Simpson Tony, Jackson Vanessa, 'Human Rights and the Environment' (1997) 14/4 Envtl. & Plan. L. J.

Simsarian James, 'Inspection Experience under the Antarctic Treaty and the International Atomic Energy Agency' (1966) 60/3 AJIL 502-510 and 503-507; Kish (n. 202) 175 citing C. W. Jenks, The Common Law of Mankind (n. 112)

Sloan F. Blaine, 'The Binding Force of a 'Recommendation' of the General Assembly of the United Nations' (1948) 25 BYBIL 1.

Smith H. A., The Law and the Custom of the Sea (Stevens & Sons Limited, 1950).

Soto Max V., 'General Principles of International Environmental Law', (1996) 3/1 ILSA J. Int'l & Comp. L.

Suarez M. Jose "Exploitation of the Products of the Sea" Report to the Council of the League of Nations on the Questions Which Appear Ripe for Codification, League of L. Larry Leonard, 'Recent Negotiations toward the International Regulation of Whaling' (1941) 35/1 AJIL 90

Sumi Kazuo, 'The 'Whale War' Between Japan and the United States: Problems and Prospects' (1989) 17/2 Denv. J. Int'l L. & Pol'y 317-372.

Suy E., 'Antarctica: Common Heritage of Mankind?' in J. Verhoeven - Ph. Sand - M. Bruce (eds.), The Antarctic Environment and International Law (1992).

Symonides Janusz, 'The Human Right to a Clean, Balanced and Protected Environment' (1992) 20/1 Int'l. J. Legal Info.

Tennen Leslie I., 'Outer Space: A Preserve for All Humankind' (1979-80) 2/1 Hous. J. Int'l L. 145-158.

Thorme Melissa, 'Establishing Environment as a Human Right' (1991) 19/2 Denv. J. Int'l L. & Pol'y 301-342.

Tinker Catherine, 'Environmental Planet Management by the United Nations: An Idea Whose Time Has Not Yet Come?' (1990) 22/4 N.Y.U. J. Int'l L & Pol.

Triggs Gillian, 'The Antarctic Treaty Regime: A Workable Compromise or a 'Purgatory of Ambiguity'?' (1985) 17/2 Case W. Res. J. Int'l L. 195

Trindade Antonio Augusto Cançado, 'The Contribution of International Human Rights Law to Environmental Protection, with special reference to Global Environmental Change', in B Weiss (ed.) Environmental Change and International Law: New Challenges and Dimensions (United Nations University Press, 1992).

Trindade Cf. Antonio Augusto Cançado, 'Human Rights and the Environment' in Janusz Symonides (ed.), Human Rights: New Dimensions and Challenges (Manual on the Rights, UNESCO Publishing, Ashgate, 1998).

Tromans Stephen, Nuclear Law (Second edition, Hart Publishing, 2010)

Vigni Patrizia, 'The Interaction between the Antarctic Treaty System and the Other Relevant Conventions Applicable to the Antarctic Area' in J.A. Frowein and R. Wolfrum (eds.), Max Planck UNYB, vol 4 (Kluwer Law International, 2000) 481

Viikari Lotta, The Environmental Element in Space Law (Martinus Nijhoff Publishers, 2008).

Wang Chuanliang, 'On the Legal Status of Marine Genetic Resources in Areas Beyond National Jurisdiction' (2021) 13/14: 7993 Sustainability, https://doi.org/10.3390/su13147993.

Wang Chuanliang, Chang Yen-Chiang, 'A New Interpretation of Common Heritage of Mankind in the Context of International Law of the Sea' (2020) 191 Ocean. & Coast. Manag.

Watts Arthur, International Law and the Antarctic Treaty System, (Grotius Publications Ltd.,1992)

Weiss Edith Brown, 'Environmentally Sustainable Competitiveness: A Comment', (1993) 102/ 8 Yale L. J. 2123-2142.

Weiss Edith Brown, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1992-93) 81/3 Geo. L. J. 675-710.

Weiss Edith Brown, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84/1 AJIL 198-207.

Weiss Edith Brown, In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity, (Transnational, United Nations University, 1989).

Wilkinson David, 'Maastricht and the Environment: The Implications for the EC's Environment Policy of the Treaty on European Union', (1992) 4/2 J. Envtl. L. 221-239.

Wolfrum Rüdiger, 'The Principle of the Common Heritage of Mankind' (1983) 43 ZaöRV 312

Yoshida O., 'Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions' (1999) 10/1 Colo. J. Int'l Envtl. L. & Pol'y 95, 123-127

Zacker Christian, 'Environmental Law of the European Economic Community: New Powers Under the Single European Act', (1991) 14/2 B. C. Int'l & Comp. L. Rev. 249-278.

Zaelke Durwood, Cameron James, 'Global Warming and Climate Change - An Overview of the International Legal Process' (1990) 5 Am. U. J. Int'l L. & Pol. 249-290.

Zhang Hua, 'Chapter 14. The Obligation of Due Diligence in Regulating the Marine Genetic Resources in Areas beyond National Jurisdiction' in Keyuan Zou (ed.) Global Commons and the Law of Sea (Koninklijke Brill NV, 2018).

Annales de la Faculté de Droit d'Istanbul, 71: 221–263

DOI: 10.26650/annales.2022.71.0012
http://annales.istanbul.edu.tr/

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul

Submitted: 03.10.2022
Revision Requested: 11.10.2022
Last Revision Received: 12.10.2022
Accepted: 18.10.2022

RESEARCH ARTICLE

Droits et libertés fondamentaux du citoyen-salarié en droit du travail

Fundamental Rights and Freedoms of Citizen-Employee in Labour Law

Ali Güzel*, Deniz Ugan Çatalkaya, Hande Heper*****

Résumé
À compter des années 1980, et de nos jours, les droits et libertés fondamentaux, non seulement apparaissent et prennent une dimension particulière au sein de l'entreprise, mais englobent aussi tous les aspects de la vie privée et professionnelle du citoyen-salarié. Il s'agit essentiellement de l'apparition des droits et libertés fondamentaux du citoyen-salarié qui marquent l'évolution contemporaine de droit du travail. Car, les actes de l'employeur restreignant les libertés fondamentales forment l'essentielle du contentieux du travail. Pour cette raison, ce ne sont pas uniquement des droits nouveaux aux fonctions variées qui ont fait leur irruption en droit du travail, mais c'est en même temps une méthode spécifique qui a surgi dans le raisonnement judiciaire autour d'un principe général consacré par les législations aussi bien nationale qu'internationale.
De cette manière, dans cette étude, le sujet de sauvegarde des droits et libertés fondamentaux du citoyen-salarié a été abordé en trois parties : Dans la première partie il a été présenté un aperçu historique de ces droits et libertés, leur progrès inévitable et leur fonction indispensable en droit du travail. Quelques illustrations parmi les droits de la personne du salarié ont été examinées à la lumière de la doctrine et de la jurisprudence sous un deuxième titre. Étant donné que les droits et libertés fondamentaux du salarié se posent comme une limite au pouvoir de l'employeur, la troisième partie est consacrée à la conciliation du pouvoir et les libertés au sein de l'entreprise et avec la méthode de contrôle juridique qui s'appuie sur le principe de proportionnalité.

Mots-clés : les droits et libertés fondamentaux en droits du travail, le citoyen-salarié, la liberté d'expression, la vie privée du salarié, la proportionnalité, le droit du travail, le pouvoir de l'employeur

Abstract
Since the 1980s, fundamental rights and freedoms have not only appeared and taken on a particular dimension within employment but also started covering all aspects of citizen employees' private and professional lives. The appearance of citizen employees' fundamental rights and freedoms basically indicate the contemporary evolution of labour law. Due to this development, employer actions that restrict employees' fundamental freedoms have formed the essence of labour disputes. For this reason, not only have new rights with varied functions made their appearance in labour law; at the same time, a specific method has arisen in judicial reasoning around a general principle enshrined in both national and international legislation.

This study approaches the subject of the protection of citizen employees' fundamental rights and freedoms in three sections. The first section evaluates the historical overview of these rights and freedoms, their inevitable progress, and their essential function in labour law. The second section examines some examples of fundamental employee rights in light of doctrine and case law. Given that fundamental employee rights and freedoms arose to limit the power of

* **Corresponding Author:** Ali Güzel (Prof. Dr.), Kadir Has University, Faculty of Law, Department of Labor and Social Security Law, Istanbul, Turkiye. E-mail: aguzel@khas.edu.tr ORCID: 0000-0003-4957-9562

** Deniz Ugan Çatalkaya (Asst. Prof. Dr.), Kadir Has University, Faculty of Law, Department of Labor and Social Security Law, Istanbul, Turkiye. E-mail: deniz.ugan@khas.edu.tr ORCID: 0000-0002-7428-9500

*** Hande Heper (Dr.), Kadir Has University, Faculty of Law, Istanbul, Turkiye. E-mail: hande.heper@khas.edu.tr ORCID: 0000-0002-7730-1851

To cite this article: Guzel A, Ugan Catalkaya D, Heper H, "Fundamental Rights and Freedoms of Citizen-Employee in Labour Law", (2022) 71 Annales de la Faculté de Droit d'Istanbul 221. https://doi.org/10.26650/annales.2022.71.0012

employers, the third and final section is devoted to the reconciliation of power and freedoms within the workplace through the method of legal control based on the principle of proportionality.

Keywords
Fundamental Rights and Freedoms in Labour Law, Citizen Employee, Freedom of Expression, Right to Respect for Employees' Private Life, Proportionality, Labour Law, Employer's Power

Extended Summary

The fundamental rights of employees who are engaged and inserted in an organization directed by an employer and who are subject to the authority of the latter are nowadays considered basic structural components of the employment contract. Throughout the history of labour laws, which first bore witness to state interventions and collective struggles, the importance of recognizing fundamental rights concerning the protection of employees' physical well-being and collective rights has continued to grow, with individual rights having appeared more recently.

The right to respect for citizen employees' private life and their right of freedom of expression are the most conflicting fundamental rights and freedoms found in labour law these days. Due to the *intuitu personae* nature of the employment contract, employees act in accordance with the orders and instructions of the employer in the workplace where they spend most of their time. The right to respect for employees' private life primarily prohibits employers from intruding into the privacy of their employees' lives. However, this right may be limited, and the legitimate interests of the employer and the right to respect for employees' private life are noted to sometimes conflict.

One aspect of an employer's intrusion into an employee's private life concerns the health tests required by employers. In order for the tests to be applied to employees in accordance with the law, the employer must have a legitimate interest, the explicit consent of the employee must be obtained, the samples must be taken by the doctor due to its relation to the confidentiality of the person's health data, the results must be used in a way that does not infringe on employee confidentiality, and the test results must be accessible to the employee.

As a general rule, an employee's behaviour outside the workplace cannot be a reason for sanction or dismissal. However, an employee's behaviour may be contrary to their contractual obligations or objectively harm the employer's interests. Therefore, an employer should only be able to intervene in the life of an employee outside the workplace as a result of the employee violating their obligations arising from the employment contract or of damage to the employer's reputation and image.

Employers undoubtedly are able to control their employees' work and workplace as well as monitor their activities at work. For bag and cabinet searches to be

legal, the search must be based on an objective reason, and the employee must be informed. Additionally, employers undoubtedly also have the power to control the communication tools they provide during working hours and to monitor employees using cameras (video surveillance) in the workplace. For video surveillance, as for communication surveillance to be legitimate, the employer must first have a legitimate interest, and the employee must have been informed of the surveillance beforehand.

As citizens, employees both individually and collectively can explain their opinions on topics such as sports, science, and politics as well as express criticisms about their employer, whether in or outside the workplace. Employers may terminate the employment contract without compensation if an employee makes statements or acts that undermine the honour and dignity of the employer or a member of the employer's family or if the employee makes unfounded statements or accusations about the employer which are detrimental to the employer's honour and dignity. Criticisms that occur within or outside the workplace regarding the organization or working conditions and that reflect the truth despite being severe, shocking, or harsh, are accepted within the framework of employees' freedom of expression. Employees may also express their thoughts and share different moments of their lives using the Internet at work or outside of the workplace. As for freedom of political expression, the employee must additionally avoid statements that are likely to disturb the peace at work or that might negatively affect the work organization or work performance.

The exceptional nature of the employment relationship as a contractual relationship of power and as demonstrated by examples regarding the exercise of employee rights and freedoms in the workplace has created commonalities within democratic societies that are marked by the realization of fundamental rights and freedoms and the protection of human.

The principle of proportionality involves the inseparable consequence of the recognition of freedoms in labour relations. In conjunction with the emergence of employees' fundamental rights, a particular method has emerged in labour law regarding the judicial reasoning surrounding this principle.

The principle of proportionality and the method of legal control ensured by this principle originated in German administrative law and then appeared within the system of the European Court of Human Rights (ECtHR) through the influence of German law. This principle became the golden rule of European human rights case law and was admitted as being inherent within the Convention system in terms of seeking a fair balance between general interests and the imperatives of the protection of fundamental rights. Therefore, national courts and the ECtHR use this principle in a methodology composed of several elements for the effective protection of fundamental rights and freedoms.

This study approaches the subject of the protection of citizen employees' fundamental rights and freedoms in three sections. The first section evaluates a historical overview of these rights and freedoms, their inevitable progress, and their essential function in labour law. The second section examines certain examples of the employee's fundamental rights in light of doctrine and case law. Given that employees' fundamental rights and freedoms arose as a limit to employers' power, the third and final section is devoted to the reconciliation of power and freedoms within the workplace through the method of legal control based on the principle of proportionality.

Droits et libertés fondamentaux du citoyen-salarié en droit du travail

I. Introduction

La problématique des droits et libertés fondamentaux est d'apparition récente en droit du travail. Puisque pour les ouvriers du XIXe siècle et de la première moitié du XXe siècle, le problème des droits et libertés fondamentaux de l'individu, n'avait pratiquement aucun sens. Les longues journées de travail et les conditions précaires de la vie et du travail s'y opposaient aussitôt. Toute vie extra-professionnelle, sociale ou culturelle, était ainsi écartée. Les fondements des systèmes juridiques libéraux, le dogme comme « l'égalité » et « l'autonomie de la volonté » des sujets de droit privé, étaient aussi un important obstacle à cette évolution. La singularité des relations du travail est également par définition complexe, elle ne facilite pas la tâche : En premier lieu, la subordination, c'est-à-dire la soumission juridique du salarié au pouvoir de l'employeur, est l'antipode des principes généraux d'égalité et de liberté, voire de dignité qui irriguent la totalité des droits fondamentaux. En deuxième lieu, les règles qui composent le droit du travail ont été durant des siècles relative aux conditions du travail proprement dit. On est bien loin de la généralité de formulation et d'application des droits fondamentaux.

En d'autres termes, seule l'exigence de la protection de l'être physique et les droits collectifs des salariés étaient admis comme les droits du salarié, car ils se posaient comme des droits propres à ce dernier. Bien entendu, il ne faut pas oublier que ces droits collectifs (la liberté syndicale, le droit de grève, le droit à la négociation collective) ont eu un rôle important en tant que des vecteurs déterminants dans l'évolution du droit du travail.

Pourtant les droits et libertés fondamentaux de l'individu affirmés par les normes internationales et garantis par les constitutions étaient ignorés en droit du travail comme si on présupposait que le salarié était démuni de sa qualité de citoyen dès qu'il passe la porte de l'entreprise et se trouve au sein d'une relation de subordination. Il est souligné à juste titre que, le droit du travail et les droits fondamentaux du salarié paraissent donc à première vue s'exclure réciproquement.

À compter des années 1980 et de nos jours, les droits et libertés fondamentaux, non seulement apparaissent et prennent une dimension particulière au sein de l'entreprise, mais englobent aussi tous les aspects de la vie privée et professionnelle du citoyen-salarié. Il s'agit essentiellement de l'apparition des droits et libertés fondamentaux du citoyen-salarié qui marquent l'évolution contemporaine de droit du travail. Car, les actes de l'employeur restreignant les libertés fondamentales forment l'essentielle du contentieux du travail. Pour cette raison ce ne sont pas uniquement des droits nouveaux aux fonctions variées qui ont fait leur irruption en droit du travail, mais c'est en même

temps une méthode spécifique qui a surgi dans le raisonnement judiciaire autour d'un principe général consacré par les législations aussi bien nationale qu'internationale.

De cette manière, dans cette étude, le sujet de sauvegarde des droits et libertés fondamentaux du citoyen-salarié a été abordé en trois parties. Dans la première partie il a été présenté un aperçu historique de ces droits et libertés, leur progrès inévitable et leur fonction indispensable en droit du travail. Quelques illustrations parmi les droits de la personne du salarié ont été examinées à la lumière de la doctrine et de la jurisprudence sous un deuxième titre. Étant donné que les droits et libertés fondamentaux du salarié se posent comme une limite au pouvoir de l'employeur, la troisième partie est consacrée à la conciliation du pouvoir et les libertés au sein de l'entreprise avec la méthode de contrôle juridique qui s'appuie sur le principe de proportionnalité.

Il faut bien noter que la terminologie à adopter concernant le sujet de cette présente étude, donne lieu aussi aux discussions doctrinales : « droits de l'homme » ou « les droits de l'être humain » ou encore « les libertés fondamentales ». Ces différentes expressions doivent de nos jours être considérées comme synonymes, c'est pourquoi, le terme utilisé dans le titre de cet article (droits et libertés fondamentaux) n'exclut aucunement les autres termes.

II. Apparition récente en droit du travail, leur progrès inévitable et leur fonction indispensable

Les droits fondamentaux d'un salarié qui est engagé et inséré dans une organisation dirigée par l'employeur et qui est soumis sous l'autorité de ce dernier, sont considérés de nos jours comme des composants structurels de base du contrat de travail. Pourtant l'affirmation et la sauvegarde des droits fondamentaux dans le cadre de la relation du travail, parallèlement à la limitation progressive des pouvoirs patronaux, n'est qu'un résultat à une évolution récente des systèmes de droit du travail.

C'est-à-dire, la relation entre le contrat de travail et les droits fondamentaux, étant un thème commun aux ordres démocratiques contemporains, est malgré tout une problématique récente[1]. En effet, on a dû attendre les années 1960-1970 qui nous ont amené à la constitutionnalisation du droit du travail puis les années suivantes pour la perception moderne des droits fondamentaux, qui se réfère aux droits de citoyenneté du salarié dans le cadre du contrat de travail.

1 Elsa Peskine and Cyril Wolmark, *Droit du travail* (14th edn, Dalloz 2021) 233; Giles Auzero, Dirk Baugard and Emmanuel Dockès, *Droit du travail* (34th edn, Dalloz 2021) 868 ; José João Abrantes, *Contrat de travail et droits fondamentaux, Contribution à une dogmatique commune européenne, avec référence spéciale au droit allemand et au droit portugais* (Peter Lang 2000) 13, 19

A. Droits fondamentaux : Droits subjectifs de défense vis-à-vis de l'État

La conception libérale des droits fondamentaux de la fin du XVIIIe siècle, les appréhendait comme des droits subjectifs de défense vis-à-vis de l'État, car l'homme étant considéré comme le titulaire des droits individuels tout simplement par sa naissance[2] : il n'était exigé de l'État qu'une conduite négative ou bien une attitude d'abstention[3].

L'idée fondatrice de la Déclaration de 1789, exprimée par son premier article comme « *Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune* » accentuait la primauté de l'individu[4]. D'après cette idée de base, tout individu jouit, en cette seule qualité, des libertés et la société dans laquelle l'individu s'inscrit a pour finalité de garantir ces libertés[5]. Donc le niveau de garantie de la liberté des individus dépendait du degré de limitation de l'intervention de l'État qui était considéré comme l'unique force capable de menacer les libertés[6].

Selon cette conception libérale, vu que les droits individuels sont inhérents à la nature humaine, l'État ne les confère pas mais les reconnaît. La seule limite de ces droits sont les droits égaux de tous les autres hommes, tel qu'il est déclaré à l'article 4 de la Déclaration de 1789 comme suivant : « *la liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui ; ainsi l'exercice des droits naturels de chaque homme n'a pour bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la Loi* ». La liberté est protégée et assurée donc par la Loi, qui se révèle comme l'expression de la volonté générale. Selon cette idée manifestement influencée par Rousseau, l'homme contribue à l'élaboration de la Loi et en obéissant à la Loi, l'homme obéit à lui-même, car l'homme est libre![7]

Néanmoins, du fait des transformations sociales et économiques caractérisées par l'industrialisation, l'idée de l'exigence d'étayer la coexistence pacifique des libertés individuelles a déclenché l'évolution vers une nouvelle conception des droits fondamentaux.

2 Pour plus de détails concernant la tradition libérale, dont John Locke est un point de référence et qui considère qu'une liberté individuelle ne trouve sa limite que dans l'égale liberté d'autrui, voir Stéphanie Hennette-Vauchez and Diane Roman, *Droits de l'Homme et libertés fondamentales* (first edn, Dalloz 2013) 74-75; Louis Favoreu, Patrick Gaïa, Richard Ghevontian, Ferdinand Mélin-Soucramanien, Annabelle Pena, Otto Pfersman, Joseph Pini, André Roux, Guy Scoffoni and Jérôme Tremeau, *Droit des libertés fondamentales* (7th edn, Dalloz 2016) 9 ff

3 Abrantes (n1) 21; Şükran Ertürk, *İş İlişkisinde Temel Haklar* (Seçkin 2002) 28

4 Favoreu, Gaïa, Ghevontian, Mélin-Soucramanien, Pena, Pfersman, Pini, Roux, Scoffoni and Tremeau (n2) 20

5 Hennette-Vauchez and Roman (n2) 43-44

6 Voir Auzero, Baugard and Dockès (n1) 8 ff; Hennette-Vauchez and Roman (n2) 48; Favoreu, Gaïa, Ghevontian, Mélin-Soucramanien, Pena, Pfersman, Pini, Roux, Scoffoni and Tremeau (n2) 18 ff; Abrantes (n1) 21; Gill Bertrand Wandji Kemadjou, *Les droits et libertés fondamentaux du salarié: réflexion sur la hiérarchie des normes*, (Dphil thesis Université Paris 2 Panthéon-Assas 2007) 14; Ertürk (n3) 27-28

7 Hennette-Vauchez and Roman (n2) 48-49

B. Dimension objective des droits fondamentaux : Conception de l'État social de droit

La conception libérale des droits fondamentaux partait d'une hypothèse trop optimiste selon laquelle l'État était l'unique pouvoir qui pourrait menacer les libertés individuelles et que la société civile était composée d'un ensemble de relations entre individus égaux[8]. Toutefois une telle illusion a été réfutée par la réalité sociale.

Il est clair que l'égalité à la jouissance des droits ne crée pas toujours une égalité de fait, de cette manière les relations établies au sein des sociétés contemporaines sont des relations inégales. C'est pourquoi la nécessité de garantir l'exercice effectif des libertés dans les relations même entre les particuliers ne pouvait plus être ignorée. L'idée des libertés concrètes surgie avec le marxisme et la conception de l'État social a mené à un nouveau concept de droits fondamentaux qui met l'accent sur leur dimension objective. L'admission de cette dimension objective des droits fondamentaux signifie le passage du constitutionnalisme libéral, dont la seule préoccupation est la garantie de l'autonomie personnelle de l'individu au regard de l'État, vers le constitutionnalisme social, marqué par l'interventionnisme de l'État à des fins de solidarité et de justice sociale[9]. Ainsi, selon l'objectif de ce nouvel État qui jouit du droit et du devoir d'intervenir dans les relations entre les particuliers, d'assurer l'égalité sociale, apparaît une nouvelle catégorie des droits positifs distincts des libertés classiques, qui exigent une action positive de l'État comme la mise en œuvre de politiques de travail, de santé, d'habitation, d'enseignement etc. Il est toutefois crucial de noter que ces nouveaux droits aux prestations de l'État sont plutôt complémentaires des libertés classiques, en tant qu'ils visent à protéger aussi la personne humaine dans son intégralité[10]. Mais l'aspect le plus important de la nouvelle conception des droits fondamentaux réside dans son approche différente à l'homme : Il est désormais impossible de considérer l'homme hors des groupes sociaux dans lesquels il est intégré. On ne fait pas référence dorénavant à l'homme isolé mais on considère l'homme comme une *personne*, à la fois individu et citoyen, un être humain à la fois libre et engagé dans la société[11].

C. Intervention de l'État au niveau des relations privées : Modification du concept de l'autonomie de la volonté et la protection du contractant faible

Traduite par la maxime « qui dit contractuel, dit juste », la conception libérale du droit estimait qu'au niveau des relations privées, les parties libres et égales

8 Abrantes (n1) 23. Par exemple, le rapport de travail était conçu comme un simple échange contractuel d'un travail contre un salaire, entre les deux parties égales (Auzero, Baugard and Dockès (n1) 9)

9 Abrantes (n1) 25; Hennette-Vauchez and Roman (n2) 75; Ertürk (n3) 29, 51; Deniz Ugan, 'Les Droits Sociaux Fondamentaux Au Niveau Européen', in *Prof. Dr. Ali Güzel'e Armağan*, vol 1 (Beta 2010) 769

10 Abrantes (n1) 28

11 ibid 29

pouvaient autoréglementer leurs intérêts d'une manière juste. Donc la liberté contractuelle s'appuie sur une hypothèse d'égalité aussi bien juridique que réelle des contractants. Pourtant, la réalité contredit cette hypothèse : Sur le plan factuel et juridique, notamment dans quelques relations privées comme la relation du travail, les contractants ne disposent pas d'une liberté égale en aucun stade du contrat. Dans ce cas-là, le contractant le plus puissant peut facilement sacrifier à ses intérêts ceux de la contrepartie[12]. C'est pourquoi on a assisté à l'intervention de l'État par l'imposition des normes impératives prévoyant des limites à la liberté contractuelle pour protéger la partie faible, afin de contrebalancer ou bien de soulager l'inégalité factuelle entre les contractants.

Dans le domaine des relations du travail, en fait, pour le salarié qui ne possède que sa force de travail afin d'assurer sa subsistance il est vital de passer un contrat. Face à cette urgente nécessité du salarié, l'employeur qui détient le capital et qui est doté d'un pouvoir de direction au sein de son entreprise, ne peut être considéré comme un contractant qui agit effectivement sur un pied d'égalité. De même sur le plan juridique, le contrat de travail va engager le salarié dans une situation de soumission. C'est à cause de cette position d'infériorité évidente du salarié face à l'employeur et avec l'appui de l'idée de protection du salarié que le droit du travail s'est affirmé par rapport au droit civil qui était indifférent à la question sociale[13]. Les premières lois sociales -les conséquences de l'intervention étatique- dans la première moitié du XIXe siècle se sont bornées, au début, à la protection physique des salariés, particulièrement au travail des enfants et des femmes, les conditions d'hygiène et de sécurité dans les usines[14]. De même, en Turquie, suite à la proclamation de la république, avec la première loi concernant le travail, il a été reconnu le droit au repos hebdomadaire en 1924[15]. La première loi de travail de numéro 3008 a été ensuite adoptée en 1936.

D. Droits collectifs : Reconnaissance des instruments juridiques propres aux relations de travail

Suite à l'intervention législative aux relations individuelles de travail, c'est à partir de l'organisation croissante de la lutte des salariés au sein des associations professionnelles que le droit du travail va devenir autonome par rapport au droit civil, car le syndicat qui substitut au salarié -la partie faible quand il demeure isolé vis-à-vis l'employeur- va altérer le rapport de forces contractuel en faveur du salarié.

12 ibid 33; Ertürk (n3) 49

13 Ertürk (n3) 51; Nuri Çelik, Nurşen Caniklioğlu, Talat Canbolat and Ercüment Özkaraca, *İş Hukuku Dersleri* (34th edn, Beta 2021) 5; Abrantes (n1) 38-39

14 Philippe Waquet, *L'entreprise et les libertés du salarié, Du salarié-citoyen au citoyen-salarié* (Édition Liaisons, 2003)10; Peskine and Wolmark (n1) 233

15 Çelik, Caniklioğlu, Canbolat and Özkaraca (n13) 10

Lorsqu'il s'agit de la relation individuelle de travail, bien que ce rapport de forces soit sans doute manifestement inégal et défavorable pour le salarié, la représentation collective joue un rôle de contre-pouvoir nécessaire au stade de la réglementation des conditions de travail du salarié. C'est-à-dire la détermination collective des conditions de travail (l'autonomie collective) apparaît comme l'instrument crucial pour compenser la faiblesse du salarié par rapport à l'employeur permettant ainsi un certain degré de protection[16].

La liberté syndicale, l'autonomie collective et la grève deviennent donc des instruments juridiques spécifiques aux relations de travail que la plupart des constitutions attachent une attention particulière afin de sauvegarder les droits des salariés. En France, vers la fin de la XIXe siècle, on parlait de la liberté d'établissement des syndicats et c'est le Préambule de la Constitution de 1946 qui proclame ainsi, à côté des libertés politiques, la liberté d'adhésion et d'action syndicale, droit de grève parmi les droits sociaux[17]. En Turquie, après la deuxième Guerre Mondiale, suite à l'adhésion de la Turquie à l'Organisation des Nations Unies (ONU) et la création du Ministère du Travail on a assisté à l'adoption de plusieurs lois concernant les relations de travail. La Constitution de 1961, a en particulier une grande importance puisqu'à partir de cette date la Constitution a garanti le droit au travail, le droit au repos, le droit à une rémunération équitable, le droit syndical, le droit des conventions collectives et de grève et le droit de la sécurité sociale[18]. En 1963, s'appuyant ainsi à cette garantie constitutionnelle, la Loi des Syndicats (no 274) et la Loi de Convention Collective et de Grève (no 275) ont été adoptées.

Au niveau mondial, on assiste de même à l'énonciation d'une série de droits fondamentaux sur le plan politique et social dès la fin de la deuxième Guerre Mondiale[19]. Il faut d'abord citer la Déclaration universelle des droits de l'Homme adoptée en 1948, et la Déclaration de Philadelphie du 10 mai 1944, de l'Organisation Internationale du travail (OIT) qui a été créée en 1919 et qui est devenue une institution spécialisée de l'ONU en 1946. L'essentiel du droit international provient sans doute de l'activité normative de l'OIT. Le Pacte international relatif aux droits économiques, sociaux et culturels de 1966, de l'ONU porte aussi à ce sujet une grande importance. Au niveau européen, parmi les nombreuses normes qui ont été adoptées par le Conseil de l'Europe, il est indispensable de citer la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (CEDH), ainsi que la Charte sociale européenne. Il faut souligner à ce stade le système efficace de protection que

16 Waquet (n14) 25 ff; Abrantes (n1) 39 ff

17 Auzero, Baugard and Dockès (n1)13 ff

18 Çelik, Caniklioğlu, Canbolat and Özkaraca (n13) 13 ff

19 Voir Peskine and Wolmark (n1) 55 ff; Françoise Favennec-Héry and Pierre-Yves Verkindt, *Droit du travail* (7th edn, LGDJ 2020) 286 ff; Waquet (n14) 19 ff; Ali Güzel, 'İş Hukukunda Yetki ve Özgürlük', (2016) 15 (1) Prof. Dr. Turhan Esener'e Armağan Kültür Üniversitesi Hukuk Fakültesi Dergisi 93, 107 ff; Ugan (n9) 770 ff

fournit la CEDH grâce à l'existence d'un contrôle juridictionnel supranational qui s'articule autour de la Cour européenne des droits de l'homme (CourEDH). Enfin le droit communautaire joue un rôle de plus en plus marquant à propos de la sauvegarde des droits fondamentaux. À l'origine, bien qu'au plan communautaire les traités soient muets sur la question des droits et des libertés et de leur garantie, la Cour de justice des Communautés européennes (CJCE, devenue CJUE le 1er décembre 2009) a évoqué dès 1969, les droits fondamentaux de la personne, compris dans les principes généraux du droit communautaire dont elle assure le respect[20]. Dans la Charte des droits fondamentaux de l'Union européenne qui vient d'être intégrée dans le droit européen primaire avec le traité de Lisbonne en 2009, il y est prévu d'ailleurs un nombre important de droits sociaux.

E. Du salarié-citoyen au citoyen-salarié : Reconnaissance des droits et libertés fondamentaux en droit du travail

Dans la logique de l'histoire du droit du travail, on a témoigné au début avec l'intervention de l'État et les luttes collectives, la reconnaissance des droits fondamentaux concernant la l'hygiène et la santé des salariés en vue de les protéger notamment contre des accidents du travail et maladies professionnelles et les droits collectifs. Mais c'est plus récemment que les droits individuels du salarié sont apparus et l'importance de ces derniers ne cesse de croître[21].

Il a fallu attendre les années 1980 pour apercevoir que le salarié, bien qu'il soit un citoyen égal à tous les autres, se voit restreintes les possibilités de libre exercice de ses libertés dès qu'il entre dans l'entreprise, engage sa personnalité dans son travail et s'oblige à l'emploi de ses aptitudes physiques, psychiques et techniques pour réaliser les buts de l'employeur[22]. Cette activité salariée permanente et intense constitue une menace à ses droits puisqu'il ne s'agit pas d'une exécution ponctuelle d'une obligation mais l'exécution d'une prestation dans un cadre organisationnel de l'employeur et du respect continu d'un modèle de comportement extérieur à la volonté du salarié[23].

Il est donc indispensable de reconnaître l'entreprise en tant qu'un lieu où les pouvoirs reconnus à l'employeur entrent en tension avec le respect des droits et libertés du salarié qui ne perd pas sa qualité de citoyen et sa qualité d'être humain en passant la porte de l'entreprise. Le pouvoir de direction de l'employeur et le devoir d'obéissance corrélatif du salarié, s'exerçant par rapport à une prestation très

20 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECJ C-29/69. Voir Jérome Roux, *Droit général de l'Union européenne* (2nd edn, Litec 2008) 53; Ugan (n9) 776

21 Waquet (n14) 25

22 Voir Auzero, Baugard and Dockès (n1) 868 ff; Peskine and Wolmark (n1) 233 ff; Favennec-Héry and Verkindt (n19) 289 ff; Abrantes (n1) 42 ff; Güzel (n19) 109 ff; Deniz Ugan Çatalkaya, *İş Hukukunda Ölçülülük İlkesi* (Beta 2019) 273 ff

23 Abrantes (n1) 42-43

personnelle, sont un danger potentiel pour le libre développement de la personnalité et pour la dignité du salarié[24]. En d'autres termes, le pouvoir de direction de l'employeur est susceptible d'atteindre tous les droits du salarié qui s'exercent dans l'entreprise et de temps en temps même en dehors de l'entreprise.

Considérant alors l'entreprise comme une structure de pouvoir et la relation de travail comme un terrain qui n'est pas purement contractuel, la conclusion du contrat de travail n'implique aucunement la privation de droits que la Constitution reconnaît au salarié en tant que citoyen. Cette idée apparaît en France, avec le célèbre arrêt du Conseil d'État Peintures Corona, du 1e février 1980 qui consacre, en vue de limiter les prérogatives de l'employeur, un contrôle de légalité du règlement intérieur au regard des droits des personnes et des libertés individuelles et collectives[25]. Une reconnaissance législative éclairée par le rapport établi par le professeur Gérard Lyon-Caen[26], suit cette jurisprudence et on a prévu avec la loi du 4 août 1982, la prohibition des discriminations et l'obligation de respecter les droits et libertés fondamentaux dans le règlement intérieur. L'objet du rapport sur les libertés publiques et l'emploi expliqué dans son introduction met l'accent sur la recherche d'un équilibre entre le respect des prérogatives nécessaires au bon fonctionnement de l'entreprise d'une part et celui des libertés individuelles des candidats à un emploi et des salariés dans l'exécution du contrat de travail, d'autre part. Le législateur français a donc commencé par la modification du régime juridique du règlement intérieur pour encadrer et contrôler le pouvoir normatif de l'employeur dans le cadre des relations de travail. Le principe de l'interdiction de toute atteinte aux droits de la personne du salarié a été affirmé ensuite 10 ans plus tard avec l'article L. 1121-1 du Code du travail (ancien article L. 120-2), aux termes duquel : « *Nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives de restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché* » [27].

Différemment du droit Français, en droit Turc, il n'existe pas dans la législation du travail, une disposition générale visant à garantir la protection des droits et libertés fondamentaux du salarié. Néanmoins le devoir de respecter et de protéger les droits de la personne du salarié n'est pas dépourvu de fondement législatif et constitutionnel[28].

Tout d'abord, l'article 12 de la Constitution Turque de 1982 prévoit que chacun possède des droits et libertés fondamentaux qui sont individuels, inviolables,

24 Abrantes (n1) 42; Güzel (n19) 109; Ugan Çatalkaya (n22) ff

25 Peskine and Wolmark (n1) 234; Auzero, Baugard and Dockès (n1) 868; Waquet (n14) 83 ff; Ugan Çatalkaya (n22) 61

26 Gérard Lyon-Caen, *Les libertés publiques et l'emploi, Le rapport au ministère du Travail, de l'Emploi et de la Formation professionnelle* (La documentation Française, 1992)

27 Peskine and Wolmark (n1) 234; Auzero, Baugard and Dockès (n1) 868; Favennec-Héry and Verkindt (n19) 289-290; Waquet (n14) 83 ff

28 Voir Güzel (n19) 109 ff; Ugan Çatalkaya (n22) 274 ff

inaliénables et auxquels il ne peut renoncer. Le deuxième chapitre de la deuxième partie de la Constitution est consacré aux droits et devoirs de l'individu. Les articles concernant l'inviolabilité et intégrité physique et spirituelle de l'individu (art. 17), l'interdiction du travail forcé (art. 18), la liberté et la sécurité individuelles (art. 19), le secret de la vie privée (art. 20), l'inviolabilité du domicile (art. 21), la liberté de communication (art. 22), la liberté d'établissement et de voyager (art. 23), la liberté de religion et de conscience (art. 24), la liberté de pensée et d'opinion (art. 25), la liberté d'expression et de propagation de la pensée (art. 26), la liberté scientifique et artistique (art. 27), la liberté de fonder une association (art. 33), le droit d'organiser des réunions et des manifestations (art. 34), le droit de propriété (art. 35), la liberté de faire valoir ses droits (art. 36) sont des dispositions qui servent à garantir les droits de la personnalité de l'individu et donc de la même manière, du salarié.

Ces droits et libertés énoncés par la Constitution, sont-ils applicables dans le cadre des relations de travail ? L'article 11 qui précise le caractère impératif des dispositions de cette Constitution, élimine tous les doutes à ce propos. Elle prévoit que les dispositions de la Constitution sont des principes juridiques fondamentaux qui lient tous les organes de l'État, ainsi que du législatif, de l'exécutif et du judiciaire, les autorités administratives et toutes les autres institutions et personnes[29]. Il faut de plus ajouter que même s'il n'existe pas une disposition semblable à l'article L. 1121-1 du Code du travail français dans la législation du travail en Turquie, il y a une disposition relative au problématique de la limitation des droits et libertés fondamentaux. L'interdiction d'atteinte à un tel droit ou liberté et la proportionnalité d'une restriction légitime, est prévue par l'article 13 de la Constitution[30], aux termes duquel « *Les droits et libertés fondamentaux ne peuvent être limités que pour des motifs prévus par des dispositions particulières de la Constitution et en vertu de la loi, et pour autant que ces limitations ne portent pas atteinte à l'essence même des droits et libertés. Les limitations dont les droits et libertés fondamentaux font l'objet ne peuvent être en contradiction ni avec la lettre et l'esprit de la Constitution, ni avec les exigences d'un ordre social démocratique et laïque, et elles doivent respecter le principe de proportionnalité* ».

La gravité qui s'accroît sans cesse de la problématique de sauvegarde des droits de la personne du salarié, susceptibles d'être ingérés dans une relation de subordination s'est traduit plus récemment en droit Turc par l'adoption d'un article qui se trouve parmi les dispositions relatives au contrat de travail dans le Code des obligations (no

29 Voir Selim Kaneti, 'Anayasa Mahkemesi Kararlarına Göre Anayasa'nın Özel Hukuk Alanındaki Etkileri' (1988-1990) LIII (1-3) İÜHFM 199; Korkut Kanadoğlu, *Türk ve Alman Anayasa Yargısında Anayasal Değerlerin Çatışması ve Uyumlaştırılması* (Beta 2000) 30 ff; Ertürk (n3) 40 ff

30 Voir Fazıl Sağlam, *Temel Hakların Sınırlanması ve Özü* (Ankara Üniversitesi SBF Yayınları 1982) 141 ff; Oktay Uygun, *1982 Anayasası'nda Temel Hak ve Özgürlüklerin Genel Rejimi* (Kazancı 1992) 58 ff; Yüksel Metin, *Ölçülülük İlkesi – Karşılaştırmalı Bir Anayasa Hukuku İncelemesi* (Seçkin 2002) 209 ff; Ugan Çatalkaya (n22) 41 ff

6098, de 2011)[31]. En prenant en compte l'article 328 du Code suisse des obligations, le nouveau Code turc des obligations, introduit dans son article 417, une obligation de protection de la personnalité du salarié. L'article prévoit que l'employeur protège et respecte dans les rapports du travail, la personnalité du salarié ; et qu'il est obligé d'assurer une organisation conforme au principe de bonne foi et qu'en particulier, il veille à ce que les employés ne soient pas harcelés sexuellement et moralement et qu'ils ne soient pas, le cas échéant, désavantagés en raison de tels actes qu'ils pourraient subir. De surcroît, une protection des données personnelles a été mise en place par l'article 419 du même Code qui dispose que l'employeur ne peut traiter des données concernant le salarié que dans la mesure où ces données portent sur les aptitudes du salarié à exécuter son emploi ou sont nécessaires à l'exécution du contrat de travail.

III. Illustrations des droits et libertés fondamentaux du salarié

Les droits à la personnalité sont des droits qui ne sont pas limités et liés à la vie, à l'intégrité physique et spirituelle, sexuelle, à la santé, à la dignité, à la vie privée, aux libertés, à la parole, à la voix, au nom et aux valeurs humaines[32]. Ces valeurs de la personne sont légalement protégées dans le cadre des droits de la personne et des libertés fondamentales. En droit du travail, les exemples des illustrations des droits et libertés fondamentaux du salarié les plus importantes sont la liberté du travail, la liberté religieuse, la liberté d'expression et le droit au respect de la vie. Dans cette étude, nous examinerons seulement le droit au respect de la vie privée et la liberté d'expression du citoyen-salarié qui sont les plus conflictuels aujourd'hui.

A. Droit au respect de la vie privée / à une vie personnelle du salarié

1. La notion en droit du travail

En réalité, la vie du salarié, se divise en deux parties par rapport au temps et au lieu : la « vie professionnelle », c'est-à-dire le temps accordé au travail et le lieu où il travaille sous l'autorité de l'employeur, et la « vie privée » qui est en dehors de cette partie de sa vie. Cependant, l'évolution de la perception des libertés et droits fondamentaux et les changements technologiques et économiques dans les relations du travail ont conduit à brouiller les limites des parties de la vie du salarié[33] et ont causé à une interprétation très large du concept « vie privée du salarié ».

31 Güzel (n19) 111 ff; Çelik, Caniklioğlu, Canbolat and Özkaraca (n13) 390 ff; Sarper Süzek, *İş Hukuku* (21nd edn, Beta 2021) 412 ff; Ugan Çatalkaya (n22) 281 ff

32 Rona Serozan, *Medeni Hukuk – Genel Bölümler / Kişiler Hukuku* (Vedat 2018) 454. Pour d'autres définitions du droit de la personnalité voir Mustafa Dural and Tufan Öğüz, *Türk Özel Hukuku Cilt II – Kişiler Hukuku* (Filiz 2021) 8; M. Kemal Oğuzman and Nami Barlas, *Medeni Hukuk* (Vedat 2021) 162; Ahmet Sevimli, *İşçinin Özel Yaşamına Müdahalenin Sınırları* (Legal 2006) 27; Güzel (n19) 105-106; Ugan Çatalkaya (n22) 275 ff

33 Güzel (n19) 114

En ce sens, les données définissant l'identité de la personne (nom, voix, image, résidence, etc.), les éléments qui composent la vie de la personne (famille, opinion politique, religion, etc.), l'intimité corporelle (santé, sexualité, etc.) et la relation avec les autres personnes sont incluses dans la notion de vie privée[34]. L'essence de ce concept repose principalement sur l'intimité de la personne et de droits de la personnalité. Cependant, la vie privée ne se limite pas à la protection de la dignité, de l'orientation sexuelle, du mode de vie, de l'intégrité physique et corporelle de la personne, mais contient également l'établissement de relations avec d'autres personnes dans la sphère publique. Exprimer leurs pensées, agir dans le cadre de ces pensées et d'améliorer leurs relations avec d'autres personne. Par conséquent, le respect de la vie privée signifie protéger l'intimité des aspects de la vie que la personne ne souhaite pas partager avec les autres, ainsi que protéger la vie sociale et la sphère de vie qu'elle souhaite partager et développer avec les autres[35]. La Cour européenne des droits de l'homme considère que le droit au respect de la vie privée et familiale prévu à l'article 8 de la Convention européenne des droits de l'homme ne peut être interprété de manière restrictive[36]. Selon la jurisprudence de la CourEDH, le droit d'établir et de développer des relations avec d'autres personnes est évalué dans le cadre de l'article 8, ainsi que pour la protection de l'intégrité physique et mentale, de l'identité personnelle, des informations personnelles, de la sexualité et de la dignité[37].

En droit turc, la vie privée d'une personne est protégée au niveau constitutionnel. Conformément à l'article 20 de la Constitution, « *Toute personne a le droit d'exiger le respect de sa vie privée et de sa vie familiale. L'intimité de la vie privée et familiale est inviolable* ». Et puis, la Cour constitutionnelle turque perçoit le champ de la vie privée aussi large que la CourEDH : « *La vie privée est un concept large qui ne se prête pas à une définition exhaustive. En attendant, cette notion protège des éléments tels que l'intégrité matérielle et morale d'un individu, son identité physique et sociale, son nom, son orientation sexuelle, sa vie sexuelle, etc. Les données personnelles, l'amélioration de soi et la vie familiale relèvent également de ce droit* »[38]. En suivant

34 Valérie Berset-Bircher, *Les systèmes d'information et la vie privée du salarié, Analyse en droit européen, en droit suisse et en droit français* (DPhil thesis l'Université de Strasbourg) 82

35 Hennette-Vauchez and Roman (n2) 464; Auzero, Baugard and Dockès (n1) 876; Güzel (n19) 114; Ugan Çatalkaya (n22) 286

36 Auzero, Baugard and Dockès (n1) 876; Güzel (n19) 114; Ugan Çatalkaya (n22) 286; Hande Heper, *İş İlişkisinde İşçinin İradesi* (Seçkin 2022) 464

37 *Niemietz c. Allemagne* Req no 13710/88, (CourEDH, 16 décembre 1992) para 29; *Sidabras c. Lituanie* Req nos 55480/00, 59330/00, (CourEDH 27 juillet 2004) para 43; *Peck c. Royaume-Unis* Req no 44647/98 (CourEDH, 28 novembre 2003) para 57; *Özpınar c. La Turquie* Req no 20999/04, (CourEDH, 19 octobre 2010) para 45; *Barbulescu c. Roumanie* Req no 61496/08, (CourEDH, 5 septembre 2017) para 70; *López Ribalda et autres c. Espagne* Req nos 1874/13, 8567/13, (CourEDH, 17 octobre 2019) para 88. Voir aussi Jean-François Renucci, *Droit européen des droits de l'Homme, Droits et libertés fondamentaux garantis par la CourEDH* (6th edn, LGDJ 2015) 228 ff; Laurance Burgorgue-Larsen, *La Convention européenne des droits de l'homme* (2nd edn, LGDJ 2015) 133 ff; Evra Çetin, *İnsan Hakları Avrupa Sözleşmesi'nin 8-11. Maddeleri Bağlamında Çalışanların Hakları* (Onikilevha 2015) 104 ff; Anne-Marie Dougin, 'Libertés individuelles et relations de travail: un aperçu de la jurisprudence de la Cour européenne des Droits de l'Homme' , in Philippe Auvergnon (ed) *Libertés individuelles et relations de travail : le possible, le permis et l'interdit ?* (Presses Universitaires de Bordeaux 2011) 208-209.

38 Cour Constitutionnelle Turque, Req no. 2017/14907 para 33; voir aussi Cour Constitutionnelle Turque, Req no. 2018/4144 para 31

la jurisprudence de la CourEDH, la Cour constitutionnelle Turque admet que la vie privée peut s'étendre à la vie sociale, c'est-à-dire à la sphère publique, et que sous certaines conditions, une personne peut avoir une attente légitime de protection de sa vie privée dans l'espace de la sphère publique[39].

En raison de la nature « intuitu personae » du contrat de travail[40], le salarié agit conformément aux ordres et aux instructions de l'employeur dans le lieu de travail où il passe la plupart de son temps[41]. Par conséquent, comme l'État doit respecter la vie privée de ses citoyens, il est également important de protéger la vie privée du salarié travaillant dans une relation de dépendance vis-à-vis de l'employeur. Le droit du salarié au respect de sa vie privée comprend le respect de la vie privée/confidentialité de sa vie privée mais sans s'y limiter. On peut dire que la vie privée, qui relève du droit personnel du salarié, implique tous les comportements du salarié qui ne relèvent pas du pouvoir de l'employeur, que ce soit pendant le temps de travail ou en dehors du travail. L'espace de vie privée/personnelle du salarié est accepté comme son propre domaine d'autonomie, où l'employeur ne peut pas interférer. Par conséquent, même dans sa vie professionnelle, il existe une sphère d'autonomie où le salarié peut agir sans être limité par la volonté d'un tiers, à savoir l'employeur et en tant qu'individu libre, le salarié pourra agir comme il veut, à sa manière, dans cette sphère[42].

En droit français, la notion de « vie privée » a d'abord été utilisée pour limiter le pouvoir de l'employeur, mais plus tard il a été admis que cette notion avait un contenu étroit et on a pensé que les préférences personnelles dans la vie sociale telles que la participation aux réunions, le vote, l'expression de préférences politiques devaient aussi être inclus dans ce concept. Pour cette raison, l'idée de séparer la vie en lieu de travail et la vie en dehors du lieu de travail avec les concepts de « vie non professionnelle » et de « vie professionnelle » a été acceptée; mais après, cependant, grâce au champ concernant la vie privée du salarié étant effectivement valable sur le lieu de travail, les notions de « vie professionnelle » et de « vie personnelle » ont été préférées à cette distinction[43].

39 Court Constitutionnelle Turque, Req no. 2013/1614, 3.4.2014, §31-34; voir aussi Cour Constitutionnelle Turque, Req no. 2013/9660, 21.5.2015, §30-33.

40 Sur le nature « intuitu personae » du contrat de travail, voir aussi Ali Güzel, 'Ekonomik ve Teknolojik Gelişmelerin Işığında Hizmet Sözleşmesinin " Intuitus Personae" Niteliği Üzerinde Yeniden Düşünmek' in *Halid Kemal Elbir'e Armağan* (İstanbul Üniversitesi Hukuk Fakültesi 1996) 167 ff; Marie-Annick Peano, 'L'intuitus personae dans le contrat de travail' (1995) Dr soc 129 ff; Ugan Çatalkaya (n22) 272 ff

41 Deniz Ugan Çatalkaya, 'Kişisel Yaşamı Kapsamında İşçinin, İşverence 'Ulaşılabilir Olmama' Hakkı' (2016) LXXIV (Özel Sayı Prof. Dr. Fevzi Şahlanan'a Armağan) İÜHFM 737

42 Martine Barbier-Gourves, *La volonté du salarié dans le rapport de travail* (DPhil thesis Université Lyon II 2010) 348; Bernard Bossu, 'L'ascension du droit au respect de la vie personnelle', (2015) vol 26 La Semaine Juridique Social 1

43 Sur l'évolution de la notion en droit du travail français, voir, Berset-Bircher (n34) 77 ff; Cédric Jacquelet, *La vie privée du salarié à l'épreuve des relations de travail* (PUAM 2008) 43 ff; Waquet (n14) 116 ff; Philippe Waquet, 'La vie personnelle du salarié' in *Droit syndical et droits de l'homme à l'aube du XXIe siècle, Mélanges en l'honneur de Jean-Maurice Verdier* (Dalloz 2001) 514; Patrice Adam, 'Vie personnelle/vie professionnelle: une distinction en voie de dissolution?', (2013) Le Droit Ouvrier 432 ff; Auzero, Baugard and Dockès (n1) 876 ff

Le droit au respect de la vie privée interdit d'abord à l'employeur l'intrusion dans l'intimité de la vie du salarié. De plus, c'est ce droit qui a aussi interdit de poser des questions sur la vie privée du candidat ou du salarié, si les informations demandées ne sont pas dans le but d'apprécier sa capacité à occuper l'emploi sur l'évaluation de ses aptitudes professionnelles et si elles ne représentent pas un lien objectif, direct et nécessaire avec l'emploi proposé ou avec l'évaluation des aptitudes professionnelles[44]. Cependant, ce droit peut être limité car il n'est pas absolu. On constate que les intérêts légitimes de l'employeur (tels que la liberté d'entreprise, la santé et la sécurité au travail) et le droit au respect de la vie privée s'opposent parfois.

2. Le droit au respect de la vie privée du salarié en dehors du (lieu de) travail

Le pouvoir de l'employeur est essentiellement limité à l'organisation du travail. Ce pouvoir ne doit pas dépasser le cadre des heures de travail, la conduite et l'organisation du travail, et ne doit pas non plus intervenir dans la vie du salarié en dehors du travail. En règle générale, tout ce qui est en liaison avec la vie en dehors du travail/lieu de travail est extérieur au contrat de travail, étranger au pouvoir de l'employeur[45]. Par conséquent, l'employeur n'a aucun commentaire à dire (autrement dit, n'a pas de parole) sur l'espace de la vie privée du salarié, et le salarié pourra agir et préférer conformément à sa propre volonté.

Un aspect de l'intrusion de l'employeur dans la vie privée du salarié en dehors du lieu de travail concerne les tests sanitaires exigés par les employeurs. L'employeur peut vouloir savoir si le salarié a une situation de dépendance qui affectera sa santé ou sa performance. Cependant, les données sur l'état de santé du salarié ou du candidat-salarié sont liées au droit à la vie privée et sont considérées comme relevant des données privées. Pour cette raison, ceci ne doit pas être considéré comme les tests ordinaires, ce qui signifie une intrusion dans les droits personnels du salarié, s'il existe une méthode moins intrusive pour atteindre l'objectif souhaité, cette méthode doit être utilisée en premier[46]. Par exemple, pour cette raison, les tests de routine d'alcool et de drogue, qui sont incompatibles avec la nature du travail et qui interviennent dans le droit du respect de la vie privée du salarié en dehors du lieu de travail, seront considérés comme illégaux.

Pour que les tests soient appliqués aux salariés conformément à la loi, premièrement, l'employeur doit avoir un intérêt légitime pour effectuer ces tests concernant les

44 Süzek (n31) 320-321; Sevimli (n32) 151-152 ; Ertürk (n3) 66; Ugan Çatalkaya (n22) 311; Peskine and Wolmark (n1) 239; Auzero, Baugard and Dockès (n1) 878-879; Erbil Beytar, *İşçinin Kişiliğinin ve Kişisel Verilerinin Korunması* (1st edn, Onikilevha 2018) 164; Elif Küzeci, *Kişisel Verilerin Korunması* (4th edn, Onikilevha 2020) 457; Gaye Burcu Yıldız, *İşverenin Eşit İşlem Yapma Borcu* (Yetkin 2008) 203-204; Ersun Civan, *İşçinin Yan Yükümlülükleri* (Beta 2021) 276 ff; Yiğitcan Çankaya, *İş İlişkisinde İşçinin Özel Yaşamının Gizliliği* (Beta 2021) 136; Heper (n36) 190

45 Lyon-Caen (n26) 156

46 Heper (n36) 467

données personnelles du salarié. Ensuite, puisqu'il est lié à la confidentialité des données de santé de la personne comme le sang, l'urine, la salive, etc., ces échantillons doivent être prélevés par le médecin et les résultats doivent être utilisés d'une manière qui ne portent pas atteinte à la confidentialité[47].

Deuxièmement, ces tests sont généralement effectués dans le but d'assurer la santé et la sécurité au travail. Pour que les candidats et les salariés soient soumis à ces tests sanitaires, même si l'employeur a un motif juste et légitime en matière de santé et de sécurité au travail, le consentement explicite du salarié doit être obtenu, les tests doivent être effectués de manière confidentielle et les résultats doivent être accessibles au salarié et ouverts à l'inspection, finalement les tests appliqués par l'employeur doivent respecter le principe de proportionnalité[48]. Par exemple, en droit français, la Cour de cassation accepte les conditions strictes pour les tests. Selon la Cour de cassation française, le contrôle d'alcoolémie doit être justifié par les fonctions du salarié et par le risque pour les personnes et les biens que ferait encourir un état d'ébriété ; le contrôle doit être prévu par le règlement intérieur et ses modalités doivent permettre la contestation du résultat obtenu[49].

En règle générale, le comportement du salarié qui n'est pas toléré par la société dans sa vie en dehors du lieu de travail ou ses actes illégaux ne peuvent entraîner le licenciement ou la sanction du salarié. Cependant, le comportement du salarié peut être contraire à ses obligations contractuelles et peut aussi objectivement nuire aux intérêts de l'entreprise[50]. Par conséquent, l'intervention de l'employeur dans la vie du salarié en dehors du lieu de travail ne peut être possible qu'en raison de la violation des obligations du salarié découlant du contrat de travail / de la profession[51], ou de l'atteinte à la réputation et à l'image de l'employeur[52]. En examinant la notion d'atteinte à la réputation et à l'image de l'employeur, la Cour de cassation française demande que la détresse causée par le comportement du salarié en dehors du lieu de travail ait une intensité et une objectivité suffisante, et précise qu'en cas pareil, le contrat peut être rompu. La Cour de cassation précise que pour apprécier la détresse constatée, deux éléments doivent être pris en compte: l'objet spécifique de l'entreprise et la fonction du salarié sur le lieu de travail. Ce qu'il faut comprendre de l'objet spécifique de l'entreprise, c'est l'image que l'entreprise essaie de créer sur le marché en présence de ses clients actuels et potentiels. Et ce qu'il faut comprendre de la fonction du salarié, c'est que le salarié occupe un emploi qui nuira à l'image de

47 Ugan Çatalkaya (n22) 329-330; Sevimli (n32) 167-168

48 Auzero, Baugard and Dockès (n1) 878; Ugan Çatalkaya (n22) 311 ff, 323 ff

49 Cass soc 31 mars 2015 (PB), n.13-25436. Voir aussi Peskine and Wolmark (n1) 238

50 Aurélia Dejean de la Batie, *Le réfus du salarié* (Dphil Université des Sciences Sociales de Toulouse 2000) 120; Heper (n36) 472

51 Voir Jacquelet (n43) 239 ff

52 Çetin (n37) 101; Sevimli (n32) 240

l'employeur. Par exemple, si le salarié travaillant comme cadre responsable dans une banque faisait un chèque sans provision en se présentant comme quelqu'un d'autre, il ne serait pas compatible avec l'objectif de l'entreprise d'être fiable aux yeux des clients et du public et cela causera un effet négatif en termes de réputation de l'entreprise; mais si ce salarié est un employé travaillant à la cafétéria de la banque, puisque son travail n'est pas lié à la fonction de la banque, il ne causera donc aucun effet négatif qui nuira à l'image de l'employeur[53].

3. Le droit de respect de la vie privée du salarié au travail

L'employeur peut sans aucun doute contrôler le travail, le lieu de travail et surveiller les activités de ses salariés. Avec le développement des nouvelles technologies, les mécanismes de contrôle (inspection) des employeurs se sont diversifiés, et pour cette raison, la limite entre la vie privée du salarié et celle qu'il mène à l'occasion de son travail est d'autant plus fragilisée. Soulignons que la limite du pouvoir de contrôle de l'employeur sur le salarié est assurée par l'inviolabilité de la personnalité du salarié et le droit de respect de sa vie privée[54]. Il faut ajouter qu'avec l'évolution des technologies de l'information, des téléphones portables, du courrier électronique, etc. les outils sont accessibles par tous à tout moment, garantissant que chaque information soit toujours accessible. Dans les relations d'affaires, cette situation a créé la perception que le travailleur doit se tenir prêt à travailler 24 heures sur 24 et 7 jours sur 7. Cela révèle la nécessité de différents mécanismes de protection comme « *le droit à la déconnexion* »[55], afin de protéger la vie personnelle et le droit au repos du salarié.

Les fouilles des sacs du salarié et des armoires dédiées à leur usage individuel est une méthode fréquemment utilisée par les employeurs, généralement dans le but d'assurer la sécurité du travail et du lieu de travail. Cependant, le droit au respect de la vie privée comprend également la protection des biens physiques appartenant au salarié et garantit que la personne a une attente juste et raisonnable de confidentialité. Pour que les fouilles des sacs et des armoires soient légales, la recherche doit être fondée sur un motif objectif et le salarié doit être informé. Contrairement à l'ouverture des armoires, la doctrine turque accepte que la fouille de sac du salarié ne soit possible qu'avec l'accord du salarié[56]. En droit français, la Cour de cassation impose trois

53 Voir aussi Jacquelet (n43) 274-275; Heper (n36) 473 ff

54 Güzel (n19) 116

55 Voir Ugan Çatalkaya (n41) 737 ff; Deniz Ugan Çatalkaya, 'Çalışma Saatleri Dışında Zihniniz Halen İş ile mi Meşgul? Özel Yaşam İle İş Yaşamı Arasındaki Sınırların Bulanıklaşması ve Ulaşılabilir Olmama Hakkı Üzerine' in Başak Baysal, Nilay Arat (eds) *KHAS Hukuk Bülteni 2020-2021 Akademik Yılı Derlemesi* (Onikilevha 2021) 333 ff; Gülsevil Alpagut, 'Teknolojik Gelişmelerin İşçilik Haklarına Etkisi – Daimi Ulaşılabilirlik' in *Prof. Dr. Turhan Esener III. İş Hukuku Uluslararası Kongresi* (Seçkin 2021) 334 ff; Sevil Doğan, 'Dijitalleşmenin Çalışma Yaşamına Etkisi: İşçinin Ulaşılamama Hakkı' , in Prof. Dr. Kübra Doğan Yenisey and Dr. Öğr. Üyesi Seda Ergüneş Emrağ (eds) *İş Hukukunda Yeni Yaklaşımlar IV* (Onikilevha 2021) 109 ff; Çankaya (n44) 246 ff

56 Civan (n44) 47 ff; Sevimli (n32) 212 ff; Selen Uncular, *İş İlişkisinde İşçinin Kişisel Verilerinin Korunması* (Seçkin 2014) 230 ff; Çankaya (n44) 223

conditions à l'employeur pour fouiller les sacs appartenant aux salariés, sauf cas exceptionnel comme une alerte à la bombe : Premièrement, l'employeur est obligé d'informer le salarié sur le droit de refuser la fouille, deuxièmement, il doit obtenir l'accord du salarié et troisièmement, effectuer la fouille en présence d'un témoin[57]. Sachant que le respect d'une procédure n'est pas suffisant, encore l'atteinte de la vie privée du salarié doit être proportionnée au but recherché[58]. Ajoutons que la fouille du sac et/ou l'ouverture des armoires doit être effectuée en présence du salarié.

Le droit au respect de la vie privée impose également à l'employeur de ne pas accéder aux éléments susceptibles de révéler la vie privée, notamment les courriers, fichiers informatiques et documents personnels du salarié. C'est aussi une entrave apportée par la liberté de communication du salarié[59]. Cependant, le blocage en question offre une protection relative, et avec l'autorité de contrôle de l'employeur, il devient possible sous certaines conditions d'accéder au contenu des outils de communication tels que les courriers, les téléphones et les courriels.

Tout d'abord, il ne fait aucun doute que l'employeur a le pouvoir de surveiller et de contrôler les outils de communication professionnels pendant les heures de travail. Toutefois, la condition préalable à la réalisation de ce contrôle est que le salarié en soit informé auparavant conformément au principe de transparence[60] et que ces informations soient au contrôle[61]. Comme admis dans les arrêts de la CourEDH[62], lorsque le salarié n'est pas informé, il convient d'admettre que le salarié a l'attente raisonnable à la confidentialité que les outils tels que les téléphones et les ordinateurs qu'il doit utiliser dans le cadre de son travail ne soient pas écoutés ou supervisé. La Cour constitutionnelle turque a également déclaré qu'en l'absence d'une notification claire aux salariés, il devrait être admis que le salarié s'attendrait raisonnablement à ce que l'employeur n'interfère pas avec la correspondance, et cette attente devrait être préservée[63].

Bien qu'il soit possible de contrôler les moyens de communication fournis par l'employeur pour l'exécution du travail, cette autorité ne confère pas à l'employeur un domaine de contrôle illimité. Outre l'information du salarié, l'intervention de l'employeur dans les droits fondamentaux du salarié doit avoir un but légitime et la méthode utilisée pour atteindre ce but doit être proportionnée[64]. Dans ses arrêts, la CourEDH examine en détail s'il existe des conditions pour que la surveillance

57 Cassation sociale française, 11 février 2009, Liais. Soc., 26 février 2009, no 15311

58 Sevimli (n32) 110, 220

59 Sevimli (n32) 196; Çetin (n37) 89

60 Sevimli (n32) 206; Zeki Okur, *İş Hukuku'nda Elektronik Gözetleme* (Legal 2011) 89; Çankaya (n44) 262

61 *Bărbulescu c. Roumanie* Req no 61496/08 (CourEDH, 5 septembre 2017) §133

62 *Halford c. Royaume-Uni* Req no 20605/92 (CourEDH, 25 juin 1997) §43 ff; Voir aussi Civan (n44) 69 ff, Dougin (n37) 210-211

63 Cour Constitutionnelle Turque, Req no. 2016/13010 (17 septembre 2020) JO 14.10.2020, 31274

64 Ugan Çatalkaya (n22) 346; Okur (n60) 105 ff

soit considérée comme licite, ainsi que la condition préalable pour que le salarié ait connaissance de l'inspection. Dans l'arrêt *Bărbulescu*, la Cour a tracé une véritable feuille de route pour l'examen de la correspondance sur le lieu de travail: La surveillance doit être légitimement justifiée et limitée à ce qui est strictement nécessaire, l'information du salarié doit inclure exactement ce que l'inspection implique. Les résultats de surveillance ne doivent pas avoir de conséquences pour le salarié autre que le but du contrôle, et la surveillance doit donc être effectuée d'une manière moins préjudiciable aux libertés du salarié[65].

Bien qu'il soit généralement admis que le fichier, courrier ou dossier dans les outils de communication fournis par l'employeur sont sous son contrôle et il peut en voir le contenu, ce pouvoir est limité quand le nom du fichier ou l'objet du courriel est personnel. S'il est entendu que l'objet du fichier, du courrier postal ou électronique sur l'ordinateur est « personnel », l'employeur ne pourra pas les contrôler[66]. Par contre en droit français, les fichiers qui ne sont pas spécialement classés comme « personnels » ou « privés » sont considérés comme professionnels donc l'employeur peut contrôler ces documents comme il le veut. La Cour de cassation française interprète également très étroitement les noms du dossier ou les objets du courrier utilisé par le salarié pour indiquer qu'il est personnel[67]. Par exemple, selon La Cour, il est possible que le salarié ait nommé certains dossiers sur l'ordinateur de l'employeur qui lui ont été remis sur le lieu de travail avec ses initiales ou comme « mes documents », ces nominations ne sont pas suffisantes pour les considérer comme des dossiers personnels[68].

Le fait que les dispositifs de caméras puissent être placés n'importe où parce qu'ils peuvent être réduits à des dimensions microscopiques, que les personnes puissent être surveillées avec des téléphones portables ou qu'elles puissent être suivies avec des appareils placés dans les voitures améliore également les possibilités des employeurs de surveiller les salariés[69]. Comme la surveillance des courriels électroniques, pour que la vidéosurveillance soit légitime, il faut d'abord que l'employeur ait un intérêt supérieur[70] et que le travailleur ait été préalablement informé de cette surveillance[71]. Assurer la sécurité peut être donné comme un exemple d'un avantage supérieur. Cependant, le contrôle des activités du salarié ne sera pas considéré comme un motif légitime de la vidéosurveillance[72].

65 *Bărbulescu c. Roumanie* §121; voir Ugan Çatalkaya (n22) 343 ff

66 Heper (n36) 484

67 Auzero, Baugard and Dockès (n1) 879-880; Peskine and Wolmark (n1) 240

68 Cassation sociale française, 21octobre 2009, no 07-43.877; 10 mai 2012, no 11-13.384

69 Heper (n36) 485

70 Alpagut (n55) 310; Sevimli (n32) 199 ff; Ugan Çatalkaya (n22) 357; Civan (n44) 64; Uncular (n56) 233 ff; Çankaya (n44) 256. Pour les exemples sur les intérêts supérieurs de l'employeur voir, Okur (n60) 129

71 Peskine and Wolmark (n1) 241; Sevimli (n32) 206; Okur (n60) 89 ff; Çankaya (n44) 254-255

72 Alpagut (n55) 311; Okur (n60) 96 ff; Ugan Çatalkaya (n22) 357. Voir aussi Recommandation CM/Rec (2015) 5 du Comité des Ministres aux États membres sur le traitement des données à caractère personnel dans le cadre de l'emploi, <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c3f7e> (28.9.2022)

B. Liberté d'expression du salarié

1. Aperçu général

La protection des droits personnels et de la vie privée du salarié est aujourd'hui au premier plan, notamment lorsqu'on examine le problème de la liberté d'expression.

Puisque la pensée fait partie du monde intérieur, de la perception unique de chaque personne, elle ne peut pas être interférée tant que ces pensées ne sont pas partagées avec le monde extérieur. Par conséquent, pour que la liberté de pensée ait un sens réel, cette pensée doit s'exprimer librement[73]. En d'autres termes, la liberté de pensée ne peut être réalisée qu'avec l'existence de la liberté d'expression. Un individu peut réaliser sa personnalité dans un environnement où il peut librement s'exprimer et discuter de ses pensées. La capacité d'une personne à s'exprimer librement pour le développement de sa personnalité inclura également le lieu de travail où elle passe la majeure partie de son temps quotidien. Donc la CourEDH considère la liberté d'expression comme l'un des fondements essentiels d'une société démocratique et aussi comme l'une des conditions primordiales du progrès et de l'épanouissement de chacun[74].

Conformément à l'article 26 de la Constitution, « *Chacun possède le droit d'exprimer, individuellement ou collectivement, sa pensée et ses opinions et de les propager oralement, par écrit, par l'image ou par d'autres voies* ». Et puis, l'article 10 de la Convention européenne des droits de l'homme stipule que toute personne a droit à la liberté d'expression et il est précisé que la liberté d'expression comprend la liberté d'opinion et la liberté de recevoir et de communiquer des informations et des idées. Cependant, la liberté d'expression n'est pas une liberté absolue. Pour cette raison, les deux dispositions en question réglementent aussi les finalités pour lesquelles cette liberté peut être restreinte. Ensuite, la restriction de la liberté d'expression comme les autres libertés et droits fondamentaux, doit être prévue par la loi et doit respecter la parole et l'esprit de la Constitution, les exigences de l'ordre social démocratique et de la République laïque, et le principe de proportionnalité[75].

En tant que citoyen, le salarié, individuellement ou collectivement, peut expliquer ses opinions sur le sport, la science, la politique etc., et également exprimer ses critiques à l'égard de son employeur/entreprise, dans l'entreprise ou en dehors du

73 Sezgi Öktem Songu, 'Anayasal Bir Temel Hak Olarak İfade Özgürlüğünün İşçi Açısından İşyerindeki Yansımaları' (2013) 15 (Özel sayı Prof. Dr. M. Polat Soyer'e Armağan) DEÜHFD 609

74 *Handyside c. Royaume-Unis,* Req no 5493/72, (CourEDH, 7 décembre 1976) §49. Voir aussi Hennette-Vauchez and Roman (n2) 90; Dougin (n37) 222

75 Voir la Constitution de la République Turquie, art. 13, 16; la Convention européenne des droits de l'Homme, art. 10; la Déclaration universelle des droits de l'homme, art. 29; voir aussi Hennette-Vauchez Roman (n2) 391; Ugan Çatalkaya (n22) 371; Hande Heper, 'Düşünceyi Açıklama Hakkının Çalışma Yaşamındaki Görünümü: İşçinin İfade Özgürlüğü' (2022) 3 (74) Çalışma ve Toplum 1901, 1905

lieu de travail[76]. Selon l'article 417 du Code des obligations turc, l'employeur, qui est censé protéger la personnalité du salarié, doit respecter la liberté d'expression du salarié conformément au principe de la bonne foi objectif[77]. D'autre part, en vertu de l'article 396 de la même loi, le salarié a l'obligation d'agir loyalement dans la protection des intérêts légitimes de l'employeur[78]. En droit turc, avec l'article 25 du Code du travail (no 4857, de 2003), une restriction légale a été apportée à la liberté d'expression du salarié. En vertu de cette disposition, l'employeur peut rompre le contrat de travail pour faute grave (sans indemnité), si le salarié fait des déclarations ou des actes qui portent atteinte à la dignité et à l'honneur de l'employeur ou d'un membre de sa famille, ou si le salarié fait des notifications et des accusations infondées à l'encontre de l'employeur qui sont au détriment de l'honneur et de la dignité[79]. Par conséquent, la liberté d'expression du salarié et l'obligation de loyauté du salarié peuvent parfois entrer en conflit et la liberté d'expression du salarié peut être limitée face aux intérêts légitimes de l'employeur.

En droit français, la restriction de la liberté d'expression du salarié a été formulée par la Chambre sociale : « *Sauf abus, le salarié jouit, dans l'entreprise et en dehors de celle-ci, de sa liberté d'expression à laquelle seules des restrictions justifiées par la nature de la tâche à accomplir et proportionnées au but recherché peuvent être apportées* »[80]. Donc la liberté d'expression du salarié n'est limitée que par deux notions « l'obligation de loyauté » et « l'abus du droit »[81]. Il est admis que l'abus correspond à l'usage de termes injurieux, diffamatoires ou excessifs. Ces termes, si leurs utilisations sont abusives, deviennent des motifs de licenciement du salarié[82].

Pour que l'intrusion dans la liberté d'expression du salarié soit licite, elle doit respecter le principe de proportionnalité. Dans l'équilibre des intérêts du salarié et de l'employeur, la nature du travail et la position du salarié jouent un rôle important en déterminant le champ de la liberté d'expression du salarié. Dans le contrôle de proportionnalité, les critères comme le contexte dans lequel les expressions utilisées ont été prononcées, la largeur de l'auditoire auquel l'explication s'adressait, l'ancienneté du travailleur, s'il avait agi de la même manière auparavant, etc. devraient également être abordés. A cet égard, les restrictions à imposer à la liberté d'expression du salarié ne doivent pas le dissuader d'exercer sa liberté d'expression et son droit

76 Auzero, Baugard and Dockès (n1) 882; Öktem Songu (n73) 626; Erhan Birben, 'İşçinin Özel Yaşamı Nedeniyle İş Sözleşmesinin Feshi', in Prof. Dr. Tankut Centel (ed) *İş Hukukunda Genç Yaklaşımlar II* (Beta 2018) 161

77 Voir aussi Çelik, Caniklioğlu, Canbolat and Özkaraca (n13) 384 ff; Süzek (n31) 412 ff

78 Voir aussi Çelik, Caniklioğlu, Canbolat and Özkaraca (n13) 330 ff; Süzek (n31) 360 ff; Hamdi Mollamahmutoğlu, Muhittin Astarlı and Ulaş Baysal, *İş Hukuku* (7th edn, Lykeion 2022) 602-603; Ömer Ekmekçi and Esra Yiğit, *Bireysel İş Hukuku Dersleri* (3rd edn, Onikilevha 2021) 357

79 Voir aussi Çelik, Caniklioğlu, Canbolat and Özkaraca (n13) 674 ff; Süzek (n31) 695 ff

80 Cassation sociale française, 16 décembre 2009, no 08-44.830

81 Waquet (n14) 184-185

82 Peskine and Wolmark (n1) 245; Auzero, Baugard and Dockès (n1) 882-883

de pétition. La Cour constitutionnelle turque, dans le contrôle de proportionnalité lorsqu'elle apprécie si l'intrusion de la liberté d'expression du salarié est nécessaire dans une société démocratique, prend en considération les critères comme le motif du requérant, le fondement juridique et factuel de la déclaration, la manière de la déclaration, les interprétations possibles de la déclaration, les effets sur l'employeur et la sanction subie par le salarié[83].

2. Les déclarations du salarié sur l'employeur et le travail

Le salarié peut critiquer l'organisation et les conditions du travail, expliquer sa pensée sur les problèmes qu'il rencontre au travail afin de trouver des solutions à ces problèmes. Semblable en droit français[84], tant que les critiques reflètent la vérité et ne constituent pas des insultes, les critiques lourdes (blessantes), offensantes, choquantes et dures sont acceptées dans le cadre de la liberté d'expression du salarié. Bien que les critiques ne soient pas complètement vraies, elles sont recherchées pour avoir un grain de justesse et de vérité[85].

De nos jours, l'internet est devenu très important, pratiquement indispensable dans la vie de la personne. Facebook, Twitter, Instagram etc. sont aujourd'hui des formes communes de la jouissance de la liberté d'expression[86]. Les salariés peuvent aussi exprimer leurs pensées et partager les différents moments de leur vie en utilisant ces outils au travail ou en dehors du travail. De plus, les réseaux sociaux permettent aux salariés de trouver une solution rapide quand ils partagent ses problèmes professionnels grâce à la vitesse organique de la diffusion de l'information. Principalement, il n'est pas possible pour l'employeur d'intervenir dans la liberté d'expression restant dans la vie privée du salarié en dehors du lieu de travail[87]. Pour que de tels déclarations du salarié permettent à l'employeur d'intervenir, ils doivent nuire à la paix sur le lieu de travail, être contraires aux politiques du lieu de travail (en particulier dans les entreprises de tendance) et créer des situations qui nuiront à l'image et à la marque de l'employeur/l'entreprise. En outre, puisque les critiques faites par les cadres supérieurs à l'employeur ou à l'entreprise sur les médias sociaux causeront plus de dégâts à l'employeur, la liberté d'expression de ces personnes (les cadres supérieurs) est interprétée plus étroitement.[88].

83 Cour Constitutionnelle Turque, *İlter Nur* Req no. 2013/6829 (14 avril 2016) JO 14.6.2016, 29742

84 Peskine and Wolmark (n1) 245; Auzero, Baugard and Dockès (n1) 882-883

85 Güzel (n19) 121; Öktem Songu (n73) 636 ff; Civan (n44) 205; Heper (n75) 1907. Voir aussi Cour cassation turque 22 ch, 14.6.2016, 16290/17802; 5.5.2016, 2015/8023, 2016/13598, Lexpera İçtihat Bankası

86 Hennette-Vauchez and Roman (n2) 389

87 Güzel (n19) 115 ff; F. Burcu Savaş Kutsal and Şelen Kolan, 'Paylaşmadan Önce Dikkat! İşçilerin İşyeri Dışında Sosyal Medya Kullanımları Üzerine Hukuki Bir Değerlendirme' (2019) 16 (62) LİHSGHD 491, 505-506; Birben (n76) 163; Heper (n75) 1909

88 Savaş Kutsal and Kolan (n87) 507; Ugan Çatalkaya (n22) 375-376; Civan (n44) 216

En droit turc, la Cour de cassation considère principalement les déclarations sur les réseaux sociaux qui n'insultent pas ou ne harcèlent pas l'employeur, les membres de la famille de l'employeur ou un autre salarié de l'employeur, dans le cadre de la critique générale et de la liberté d'expression. Par exemple, dans un litige devant la Cour de cassation, un salarié de banque a déclaré sur les réseaux sociaux que son employeur, contrairement aux autres banques, ne paye pas les heures supplémentaires supprimées par l'État et a mentionné « *combien d'entre nous sont gênés d'en parler aux gens qui demandent notre salaire?* ». La Cour de cassation considère ces publications du salarié comme relevant de la liberté d'expression, même s'il est de la nature d'une vive critique[89]. La Cour constitutionnelle aussi stipule qu'afin de parvenir à un juste équilibre entre la liberté d'expression du salarié et le droit de protéger l'honneur et la réputation de l'employeur, les critères comme « où, avec qui et dans quelles conditions les expressions d'opinion sont partagées », « le but de la personne qui a déclaré », « qu'il soit de bonne foi ou non », « si sa liberté d'expression est utilisée uniquement pour nuire à des tiers », « l'importance du débat public mené », « le poids de la contribution apportée ou des mots utilisés à ce débat public », « leur impact sur la vie de la personne » sont considérés[90].

Dans ce point, une décision de la Cour de cassation française concernant les propos insultants du salarié sur les réseaux sociaux qui dépassent les limites de la critique à l'encontre de l'employeur est également importante au regard de notre droit. Dans les faits, une salariée avait rejoint sur Facebook un groupe d'amis (quatorze personnes) ayant créé une page intitulée « *extermination des directrices chieuses* ». Sur cette page, la salariée avait fait profiter les membres de ce groupe de son expérience en la matière, en se livrant à des propos insultants, dont la teneur exacte n'est pas mentionnée dans l'arrêt, à l'égard de sa supérieure hiérarchique qui était aussi son employeur. Et quand l'employeur a pris connaissance de ces propos, la salariée avait été licenciée pour faute grave. Celle-ci avait contesté la faute grave, mais aussi et surtout le caractère réel et sérieux de son licenciement. La Cour de cassation a indiqué que les propos insultants de la salariée ont été partagés dans un groupe fermé de quatorze personnes, c'est à dire que la salariée a déclaré ses opinions dans une conversation privée (non pas une conversation publique), donc elle a décidé que les propos insultants de la salariée ne constituaient pas une cause réelle et sérieuse de licenciement[91].

Une autre manifestation de la liberté d'expression du salarié est le droit de dénoncer des actes de l'employeur/l'entreprise illicites ou suspectés de l'être. Le droit d'alerte du salarié (*whistleblowing/alerte professionnelle - alerte éthique*)

89 Cour cassation turque 22 ch, 14.06.2016, 16290/17802, Kazancı İçtihat Bankası

90 Voir Cour Constitutionnelle Turque, *Gülbiz Alkan*, Req no. 2018/33476 (7 novembre 2021) JO 30.12.2021, 31705

91 Cassation sociale française, 12 décembre 2018, no 16-11.690

peut être défini comme « la divulgation d'informations par le salarié concernant la corruption, l'illégalité ou la négligence d'actes et de transactions apprises sur le lieu de travail, conformément au principe de bonne foi »[92]. Donc en premier lieu, il est admis que le salarié (*le lanceur d'alerte*) doit agir de bonne foi, c'est-à-dire ne pas nuire à l'employeur ou en tirer un avantage pour lui-même, dans l'exercice de ce droit[93]. En second lieu, dans les réglementations et les décisions judiciaires nationales et internationales concernant le droit d'alerte, il est demandé que le salarié ait des motifs raisonnables/justifiables de croire que cette violation est réelle[94]. Mais ces deux conditions ne suffisent pas pour exercer le droit de divulgation conformément à la loi. Dans l'exercice du droit d'alerte, le salarié doit aussi agir de manière proportionnelle. Par conséquent, le contrôle de proportionnalité est effectué dans l'utilisation mesurée du droit d'alerte du salarié, et non dans la limitation (intrusion) d'un droit fondamental du salarié. L'équilibre que l'on essaie de créer ici est entre la liberté d'expression du salarié et les intérêts économiques de l'employeur. Donc, dans l'exercice de ce droit, le salarié est censé préférer la méthode qui causera le moins de dégâts aux intérêts économiques de l'employeur.

Cependant, il est difficile pour le salarié de déterminer quel outil causera le moins de dégâts aux intérêts de l'employeur dans l'exercice de ce droit. Par conséquent, il est important qu'il existe des réglementations positives protectrices pour que les salariés exercent ce droit et qu'il existe des règles documentées (écrites) concernant la procédure à suivre. À ce stade, on voit qu'au contraire du droit turc, le droit d'alerte et la protection du lanceur d'alerte est réglementé dans le droit du travail français. Dans le Code du travail français et dans la loi n°2022-401 du 21 mars 2022, il est stipulé que le salarié qui utilise le droit d'alerte ne peut faire l'objet d'une discrimination directe ou indirecte et la procédure que le salarié qui veut utiliser ce droit doit suivre. Et puis, conformément à la loi n°2022-401, les personnes morales de droit public ou de droit privé employant au moins 50 agents ou salariés ont l'obligation de mettre en place un dispositif de recueil et de traitement des signalements sécurisés et qui garantit la confidentialité de l'identité de l'auteur du signalement[95].

3. Les déclarations politiques du salarié au travail ou en dehors du travail.

Sans aucun doute, le salarié, en tant que citoyen, a le droit d'exprimer ses opinions politiques, d'être membre d'un parti politique et de participer à des activités politiques,

92 Ufuk Aydın, 'İş Hukuku Açısından İşçinin Bilgi Uçurması', (2002) 2 (2) AÜSBD 81

93 Voir *Guja c. Moldavie,* Req no 14277/04, (CourEDH, 12 février 2008); *Heinisch c. Allemagne*, Req no 28274/08, (CourEDH, 21 juillet 2011)

94 Voir Convention des Nations Unies contre la corruption, art 33; Directive 2019/1937/CE sur la protection des personnes qui signalent des violations du droit de l'Union, art 6; *Gawlink c. Liechtenstein*, Req no 23922/9, (CourEDH, 16 février 2021) ; Code du travail français, art L. 1132-3-3 et aussi Cassation sociale française, 8 juillet 2020, no18-13.593

95 Voir <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000045388745> 28.9.2022, voir aussi Peskine and Wolmark (n1) 246

tant sur le lieu de travail qu'à l'extérieur. Cela constituera une discrimination si l'employeur le traite différemment ou le licencie parce qu'il n'aime pas les opinions politiques du salarié[96]. De même, l'article 5 du Code du travail turc stipule que la discrimination ne peut être faite dans la relation de travail en raison de l'opinion politique. En exprimant ses opinions politiques sur le lieu de travail, le salarié doit éviter les déclarations susceptibles de perturber la paix au travail et d'affecter négativement l'organisation du travail et le rendement au travail. Sanctionner le salarié à cause de la perturbation de la paix au travail, nécessite une preuve concrète de cette situation négative[97].

En ce qui concerne les déclarations politiques du salarié en dehors du lieu de travail, la règle principale est que l'employeur ne peut pas interférer avec ces déclarations dans la vie privée du salarié[98]. Cependant, les déclarations faites notamment sur les réseaux sociaux peuvent dans certains cas être incompatibles avec les principes éthiques de l'entreprise ou la réflexion de ces propos sur le lieu de travail peut entraîner certaines négativités sur le lieu de travail ou dans l'environnement des clients, compte tenu de la nature du travail et la fonction du salarié[99]. La Cour de cassation turque précise également qu'un comportement du salarié socialement négatif et/ou une attitude du salarié socialement et éthiquement inacceptable peuvent être acceptés comme motif valable de licenciement si elle crée un effet négatif sur le lieu de travail[100].

On voit que la Cour de cassation fait une distinction selon qu'il y a ou non une expression insultante et menaçante afin que les propos politiques du salarié puissent faire l'objet d'un licenciement. À notre avis, cette distinction ne peut pas être considérée comme exacte. Puisque ces propos politiques ne sont pas une insulte ou menace faite directement à l'employeur ou à d'autres collègues, et si la déclaration ne trouble pas la paix au travail et n'a pas d'impact négatif sur la réputation de l'employeur, elle ne peut faire l'objet d'un licenciement. Même le fait que cette insulte constitue un crime et qu'une plainte pénale ait été déposée contre le travailleur pour cette déclaration et que le travailleur soit puni n'affectera pas cette situation à elle seule[101]. De même, conformément à l'article 25 du Code du travail turc, la sanction du salarié pour un crime n'est pas réglementée comme un motif valable de licenciement, pourtant la situation où l'absence du salarié dépasse le délai de préavis en cas de détention et d'arrestation est prévue comme une cause du licenciement légitime par l'employeur.

96 Çetin (n37) 381; Savaş Kutsal and Kolan (n87) 507; Birben (n76) 165; Civan (n44) 268; Heper (n75) 1920

97 Birben (n76) 165; Heper (n75) 1921

98 Civan (n44) 270-271; Birben (n76) 164

99 Heper (n75) 1921

100 Cour cassation turque 22 ch, 26.9.2018, 9967/20223, Lexpera İçtihat Bankası

101 Civan (n44) 273; Heper (n75) 1922

Soulignons que les salariés peuvent non seulement partager directement leurs opinions concernant l'employeur sur les réseaux sociaux, mais également soutenir ces opinions, images et photos en cliquant sur le bouton « J'aime » sous les mots, images et photos partagées par quelqu'un d'autre. Sans aucun doute, les mentions « J'aime » doivent être considérées dans le cadre de la liberté d'expression. Cependant, il sera admis qu'il existe une différence entre partager une opinion et supporter une opinion en cliquant sur le bouton « J'aime » dans le cadre de la liberté d'expression. Dans un arrêt de la Cour européenne des droits de l'homme contre la Turquie, la Cour relève que l'acte d'ajouter une mention « J'aime » sur un contenu ne peut être considéré comme portant le même poids qu'un partage de contenu sur les réseaux sociaux, dans la mesure où une mention « J'aime » exprime seulement une sympathie à l'égard d'un contenu publié, et non pas une volonté active de sa diffusion[102]. Par conséquent, ces deux manifestations d'expression ne devraient pas être évaluées avec le même effet concernant la limitation de la liberté d'expression du salarié.

IV. Contrôle concernant les limites/restrictions à des droits et libertés fondamentaux du salarié

A. Pouvoir de l'employeur : Une menace pour les libertés et donc un pouvoir encadré

Les intérêts du salarié et de l'employeur coexistant dans l'entreprise constituent sans doute, l'exemple le plus flagrant des intérêts antagonistes. La recherche d'un équilibre entre les intérêts en conflit et de cette façon, l'exigence de la protection du salarié forment ainsi l'objet essentiel du droit du travail moderne ; car, la relation de travail est une relation de pouvoir dans laquelle l'employeur possède un pouvoir de direction qui lui donne la possibilité d'ingérer les droits et libertés du salarié.

Les droits et libertés de la personne du salarié dont on a présenté dans un panorama sous le titre précédent, ont conduit le droit du travail moderne à se pencher sur le problème non plus de leur affirmation mais de leur exercice effectif. Pourtant la problématique de sauvegarde et surtout d'exercice effectif des droits de la personne du salarié n'est pas loin d'être compliquée et subtile.

D'après la formule bien connue en droit du travail, il est clair que le salarié ne cesse jamais d'être un citoyen aux portes de l'entreprise[103]. Le lien de subordination lié au contrat de travail ne démunie pas le salarié de ses droits et libertés fondamentaux. Il est possible pourtant qu'une restriction à ces droits et libertés soit justifiée ; puisqu'ils s'affrontent souvent les uns les autres[104].

102 *Melike c. Turquie*, Req no. 35786/19, (CourEDH, 15 juin 2021) para 51; Heper (n75) 1924 ff

103 Peskine and Wolmark (n1) 234; Favennec-Héry and Verkindt (n19) 284; Güzel (n19) 109; Ugan Çatalkaya (n22) 269

104 Peskine and Wolmark (n1) 236; Auzero, Baugard and Dockès (n1) 872; Abrantes (n1) 45

Toutefois le caractère personnel de la prestation du travail et le fait que le salarié engage sa personnalité en vue de d'accomplir cette prestation comportent toujours un risque de violation d'une liberté du salarié. L'évolution historique du droit du travail nous démontre elle-même qu'il est impossible d'ignorer ce risque. Même -ou surtout- dans le cadre des relations de travail du XXIe siècle, le besoin des mécanismes protégeant le citoyen-salarié dans ce rapport qui est à la fois contractuel et à la fois un rapport de pouvoir, s'accroît.

Il est essentiel à ce stade de souligner que le pouvoir de direction de l'employeur est un pouvoir encadré par les autres sources de droit du travail[105]. Il trouve d'abord ses limites dans la législation et la convention collective : Concernant les sujets déjà réglés par la Constitution, les lois, les règlements et la convention collective, l'employeur n'est plus capable d'utiliser son pouvoir. On condamne donc les décisions de l'employeur qui sont incompatibles avec les dispositions législatives et la convention collective. Le contrat individuel de travail qui est considéré à la fois comme la source du pouvoir de l'employeur, constitue aussi une limite à l'exercice par l'employeur de son pouvoir[106]. Plus les conditions de travail sont fixées par le contrat, plus le champ d'action de l'employeur se trouve restreint.

En outre, l'exercice du pouvoir est aussi limité par le but de son attribution à l'employeur. Puisque ce pouvoir de direction est un moyen fourni à l'employeur afin d'assurer la bonne marche de son entreprise, l'employeur ne peut exercer ce pouvoir que d'une façon conforme à sa finalité[107], sinon cela serait caractérisé comme un abus de droit. Le principe de bonne foi contribue donc à l'encadrement des pouvoirs de l'employeur[108]. L'employeur est obligé d'exercer avec loyauté les pouvoirs qu'il tient du contrat de travail et la bonne foi commande à l'employeur de s'abstenir de tout comportement rendant impossible au salarié l'accomplissement de sa prestation de travail. En d'autres termes, la bonne foi est un critère de conduite caractérisé par la loyauté et la fidélité à la parole, à la manière d'agir conformément aux règles de conduite honnête.

Le contrôle de la faute d'abus sur le fondement de la bonne foi renvoi principalement à une conception finaliste et permet au juge d'envisager les motifs poursuivis par l'employeur d'user une prérogative. Par exemple le fait que l'employeur n'invoque une clause de mobilité pas avec une motivation fondée sur une exigence dans l'entreprise mais pour harceler moralement le salarié en l'obligeant de changer de domicile, constitue un abus par l'employeur d'une prérogative issue d'une clause de mobilité, contrairement à sa finalité.

105 Voir Auzero, Baugard and Dockès (n1) 819 ff; Peskine and Wolmark (n1) 173 ff; Alexandre Fabre, *Le régime du pouvoir de l'employeur* (LGDJ 2010); Süzek (n31) 88 ff; Çelik, Caniklioğlu, Canbolat and Özkaraca (n13) 285; Güzel (n19) 182 ff

106 Auzero, Baugard and Dockès (n1) 819 ff; Peskine and Wolmark (n1) 174, 209 ff; Güzel (n19) 182; Süzek (n31) 88

107 Süzek (n31) 88; Kübra Doğan Yenisey, *La modification du contrat de travail, Etude de droit suisse et de droit français* (Schulthess 2005) 82.

108 Christophe Vigneau, 'L'impératif de bonne foi dans l'exécution du contrat de travail' (2004) Dr soc 711 ff; Abrantes (n1) 155 ff; Güzel (n19) 182 ff, Süzek (n31) 89

Il faut ajouter à ce stade qu'il est admis que la Cour de cassation française a vivifié le contrôle de la faute d'abus de droit dans un arrêt *Rochin*[109], en permettant un contrôle non seulement des motifs mais aussi de la manière d'exercice du pouvoir par l'employeur. En l'espèce, d'après la Cour il s'agissait de l'exercice abusif d'une clause de mobilité, puisque l'employeur avait imposé au salarié un déplacement immédiat alors que celui-ci se trouvait dans une situation familiale critique. De cette manière on comprend que le principe de bonne foi permet aussi d'imposer à l'employeur un comportement respectueux de la personne du salarié[110].

De toute façon, les droits de la personne du salarié se posent depuis leur apparition sur la scène du droit du travail comme une limite rigoureuse au pouvoir de l'employeur, un moyen d'encadrement du pouvoir qui se montre avec une méthode de contrôle judiciaire particulière qu'on va aborder sous le titre suivant.

La fonction essentielle de la reconnaissance des droits et libertés fondamentaux du salarié est sans doute la remise en cause de l'autorité de l'employeur[111] : Désormais, l'employeur ne peut plus être considéré comme le seul juge dans l'entreprise, doté d'un pouvoir sacré. Il s'avère donc nécessaire de répondre à la question de savoir si et jusqu'à quel point les intérêts de l'employeur justifient en l'espèce la limitation de la liberté individuelle du salarié[112]. En effet, d'une façon analogue aux autres domaines du droit, dans le droit du travail, ni le pouvoir, ni les libertés ne peuvent être perçus d'une façon absolue. La coexistence du pouvoir et des libertés dans l'entreprise, exige une conciliation qu'on appelle un *compromis pratique*[113] entre le pouvoir et les libertés ainsi qu'une détermination d'une limite au pouvoir afin de sanctionner une restriction excessive d'une liberté et dans la recherche de la juste mesure dans ce cadre[114].

B. Nécessité d'une méthode particulière pour l'encadrement du pouvoir en droit du travail : Justification et caractère proportionnel de l'atteinte à une liberté

1. Le résultat de la similarité entre la société démocratique et l'entreprise : L'émergence du contrôle de proportionnalité

La proportionnalité est la suite indissociable de l'entrée en force des libertés dans les relations de travail. Parallèlement à l'irruption des droits de la personne du salarié,

109 Cassation sociale française, 18 mai 1999, Dr soc 1999, 734

110 Vigneau (n108) 711

111 Peskine and Wolmark (n1) 234

112 Abrantes (n1) 126; Ugan Çatalkaya (n22) 270 ff

113 Sağlam (n30) 38 ff; Metin (n30) 195; Petr Muzny, *La technique de proportionnalité et le juge de la Convention Européenne des Droits de l'Homme Essai sur un instrument nécessaire dans une société démocratique* (PUAM 2005) 86; Abrantes (n1) 153; Ugan Çatalkaya (n22) 36 ff

114 Isabelle Cornesse, *La proportionnalité en droit du travail* (Litec 2001) 9, 13; Abrantes (n1) 152 ff; Ugan Çatalkaya (n22) 3

une méthode particulière a surgi en droit du travail dans les raisonnements judiciaires[115] autour d'un principe de proportionnalité qui a pris naissance dans le cadre du droit administratif et qu'on a fait recours ensuite au sein du droit constitutionnel en vue de sauvegarde des droits et libertés fondamentaux[116].

Le principe de proportionnalité, principe ancien en droit administratif allemand, intervient comme une limite générale au pouvoir discrétionnaire de l'Administration, qui impose un rapport d'adéquation entre les moyens et la fin poursuivie quand il s'agit d'une restriction apportée par l'État à une liberté[117]. Et, il est reconnu que la proportionnalité est un principe général en droit public. Cette reconnaissance a eu pour effet de lui ouvrir des horizons sur l'ensemble des branches du droit, ensuite et surtout sur les relations contractuelles de droit privé qui comportent en elles-mêmes un déséquilibre des parties[118].

Le principe de proportionnalité et la méthode de contrôle juridique assurée par ce principe a émergé ensuite dans le système de la CourEDH sous l'influence du droit allemand, il est devenu la « règle d'or de la jurisprudence européenne des droits de l'homme »[119] et il a été admis « inhérent au système de la Convention » [120] quand il s'agit d'une recherche d'un juste équilibre entre l'intérêt général et les impératifs de la sauvegarde des droits fondamentaux de l'individu. Même si la CEDH ne fait nulle part référence de manière directe et explicite à la terminologie de la proportionnalité, le principe ressort clairement de la formulation de quelques articles et de la jurisprudence relative aux articles 8 à 11 de la Convention, qui garantissent le droit au respect de la vie privée et familiale, du domicile et de la correspondance, la liberté de pensée, de conscience et de la religion, la liberté d'expression et la liberté d'association y compris la liberté syndicale[121]. En leur deuxième paragraphe, ces articles habilitent les États à limiter l'exercice de ces droits et libertés pour autant qu'il s'agisse de restrictions « prévues par la loi » et « nécessaires dans un société démocratique ».

115 Peskine and Wolmark (n1) 233; Antoine Mazeaud, 'Proportionnalité en droit social' (1998) (117) Petites affiches, 64

116 Cornesse (n114) 14; Ugan Çatalkaya (n22) 15 ff

117 Pour plus de détails sur les fondements du principe de proportionnalité en droit administratif, voir Michel Fromont, 'Le principe de proportionnalité' (1996) AJDA 156 ff; Cornesse (n114) 14 ff; Xavier Philippe, *Le contrôle de la proportionnalité dans les jurisprudences constitutionnelle et administrative françaises* (PUAM 1990) 7 ff, 43 ff; Ugan Çatalkaya (n22) 15 ff

118 Muzny (n113) 20-21; Philippe (n117) 45 ff; Ugan Çatalkaya (n22) 49 ff

119 Muzny (n113) 33

120 *Klass et autres c. Allemagne*, Req no 5029/71, (CourEDH, 6 septembre 1978) para 59. Avec les termes utilisés par la Cour: « *… la Cour doit rechercher si un juste équilibre a été maintenu entre les exigences de l'intérêt général de la communauté et les impératifs de la sauvegarde des droits fondamentaux de l'individu. Inhérent à l'ensemble de la Convention, le souci d'assurer un tel équilibre se reflète aussi dans la structure de l'article 1 ((P1-1).*» (*Sporrong et Lönnroth c. Suède*, Req no 7151/75, (CourEDH, 23 septembre 1982) para 69)

121 Marc-André Eissen, 'Le principe de proportionnalité dans la jurisprudence de la Cour européenne des droits de l'homme' in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (eds) *La Convention Européenne des Droits de l'Homme, Commentaire article par article* (Economica 1995) 66; Benoît Géniaut, *La proportionnalité dans les relations du travail* (Dalloz 2009) 383 ff; Ugan Çatalkaya (n22) 26

Démontrée par les illustrations de l'exercice des droits et libertés du salarié dans l'entreprise, la nature exceptionnelle de la relation de travail en tant que relation de contrat et de force ; crée des points communs avec une société démocratique[122] qui est marquée par la réalisation des droits et libertés fondamentaux et la protection de la dignité de la personne humaine. La notion de pouvoir constitue le premier point commun avec la société démocratique ; quant au deuxième point commun, il est le résultat automatique du premier. Il s'agit d'une nécessité d'encadrer le pouvoir en vue de protéger le salarié en tant que « personne » et « citoyen » avant tout.

Cette exigence d'encadrement et de contrôle du pouvoir de l'employeur, attribue au principe de proportionnalité, une place centrale en droit du travail, d'une façon similaire au droit administratif et constitutionnel. La proportionnalité n'est pas une fin en soi mais elle est instrumentalisée entre les mains du juge au service du respect des libertés en droit du travail[123]. Le contrôle étroit qu'elle assure en faveur des libertés contre les ingérences provenant de l'employeur ne pourrait être assuré par aucun instrument de droit privé, donc la proportionnalité par l'intermédiaire de sa méthode, a renforcé le contrôle judiciaire du pouvoir patronal. Même si il est admis qu'à partir de la liberté d'entreprendre garantie par la constitution, l'employeur jouit d'un pouvoir de direction dans l'organisation de l'entreprise, l'exercice de ce pouvoir est donc soumis au contrôle des juges, afin de protéger la dignité, les droits et libertés fondamentaux du salarié.

Il vaut mieux souligner à ce stade que le contrôle effectué par le juge présente deux exigences[124] : Premièrement, une exigence de justification qui impose que chaque décision restrictive d'un droit ou d'une liberté fondamentale soit justifiée par un but légitime. Deuxièmement, une exigence de proportionnalité qui apparaît comme la recherche d'une adéquation qualitative et quantitative de la mesure restrictive avec le but légitime. D'une part, la justification signifie la recherche de la cause objective de la décision et d'autre part, la proportionnalité vérifie sa mise en œuvre en fonction du but recherché[125]. Cela signifie que seul l'existence d'un motif légitime de l'employeur n'est pas suffisante pour considérer que la restriction à une liberté du salarié est fondée, il est aussi nécessaire que les moyens utilisés par l'employeur pour atteindre le but visé soient proportionnel, avec ce but. Donc l'exigence de justification n'est qu'une condition préalable au contrôle de la proportionnalité.

La pratique de la CourEDH s'interroge aussi tout d'abord sur la légitimité du but. Dans le cadre des droits dits conditionnels (art. 8 à 11), on retrouve ces causes

122 Güzel (n19) 96

123 Mazeaud (n115) 64

124 Cornesse (n114) 176-177; Ugan Çatalkaya (n22) 11-12

125 Cornesse (n114) 179

justificatives d'une ingérence étatique dans le deuxième paragraphe de ces articles[126]. Quant à la mise en œuvre de proportionnalité, la formule du premier paragraphe de ces dispositions a conduit la Cour à exercer un véritable contrôle de proportionnalité[127]. La Cour l'effectue en référence à l'objectif de protéger efficacement les droits fondamentaux : « *le but que les Parties Contractantes se sont proposé d'atteindre, d'une manière générale, au moyen de la Convention européenne des Droits de l'Homme, était une protection efficace des droits fondamentaux de l'Homme (...) Aussi la Convention implique-t-elle un juste équilibre entre la sauvegarde de l'intérêt général de la communauté et le respect des droits fondamentaux de l'homme, tout en attribuant une valeur particulière à ces derniers* » [128].

2. Le caractère dynamique, dichotomique et objectif du contrôle de proportionnalité

Il est inconcevable d'établir une hiérarchie *a priori* et absolue entre les droits et libertés à valeur constitutionnelle[129]. C'est pour cela qu'il est plus réaliste et plus juste d'aborder un conflit entre ceux-ci au cas par cas et que le juge apparait comme l'acteur idéal concernant la régulation de ce conflit d'intérêts. La proportionnalité permet au juge d'instaurer une hiérarchie légitime entre ces droits et libertés, pendant qu'il accomplit sa mission difficile d'assurer un juste équilibre entre les intérêts en cause dans chaque cas. Par conséquent, on parle d'une souplesse du contrôle de la proportionnalité, car elle permet une appréciation *in concreto* ce qui confère au contrôle de proportionnalité son caractère dynamique.

Un autre caractère essentiel de la proportionnalité est le fait qu'elle se présente comme la clé de la recherche de la conciliation entre les différents intérêts présents dans l'entreprise. C'est pour cela qu'on parle d'une dichotomie de l'exigence de proportionnalité : Il existe une ambivalence entre « limitation », d'une part et « légitimation », d'autre part[130]. C'est-à-dire que le principe de proportionnalité comporte deux fonctions : D'une part, en tant que limite des restrictions apportées aux droits et libertés fondamentaux, délimite l'ingérence. D'autre part, il rend légitime une ingérence qui ne dépasse pas cette limite.

Trois éléments autonomes mais cumulatifs gouvernent le contenu du principe de proportionnalité : Le principe d'aptitude (*Geeignetheit*), le principe de nécessité

126 Muzny (n113) 126; Géniaut (n121) 386 ff

127 Fromont (n117) 156 ff

128 *Affaire relative à certains aspects du régime de l'enseignement en Belgique*, Req no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, (CourEDH, 23 juillet 1968) para 5. Il est admis que dans cette affaire, la CourEDH a fait pour la première fois un contrôle de proportionnalité. Pour plus de détails voir Géniaut (n121) 384; Ugan Çatalkaya (n22) 83, 250 ff

129 Mustapha Mekki, *L'intérêt général et le contrat, Contribution à une étude de la hiérarchie des intérêts en droit privé* (LGDJ 2004) 373; Ugan Çatalkaya (n22) 107 ff

130 Voir Cornesse (n114) 32, 303 ff; Géniaut (n121) 78 ff; Françoise Bousez, 'La proportionnalité en droit du travail' in Bernard Teyssié (ed) *Standards, principes et méthodes en droit du travail* (Economica 2011) 123; Ugan Çatalkaya (n22) 36 ff

(*Erforderlichkeit*) et le principe de proportionnalité au sens étroit (*Verhältnismäßigkeit im engeren Sinne*)[131]. Le principe d'aptitude correspond à l'appropriation des moyens à la fin poursuivie. La mesure prise par l'employeur doit être susceptible d'atteindre son objectif légitime. Le principe de nécessité impose que l'employeur, tout en atteignant le but visé, choisisse le moyen qui porte l'atteinte la moins grave aux intérêts du salarié parmi tous les moyens. Ce critère de nécessité se trouve au centre du contrôle de proportionnalité effectué par la CourEDH. La Cour, pour concrétiser l'idée de nécessité, se sert comme point de départ d'une « société démocratique »[132].

Enfin, troisièmement le principe de proportionnalité au sens étroit, quant à lui, met en balance la gravité des effets de la mesure choisie et le résultat escompté du point de vue de l'employeur. Ce critère impose que la mesure ne heurte pas de manière excessive les droits de la personne du salarié[133].

Dans le cadre de ce contrôle, d'après le rapport de proportionnalité au sens étroit (*stricto sensu*) du terme, chaque litige est considéré dans les circonstances des faits (*in concreto*)[134]. C'est une appréciation concrète de la disproportion que se livre le juge. C'est surtout cette troisième étape du contrôle qui donne le caractère flexible ou bien dynamique à la proportionnalité. Pourtant il importe d'accentuer que ce caractère dynamique et pragmatique ne cause pas une imprévisibilité juridique. Car les principes d'aptitude et de nécessité confèrent une objectivité à ce contrôle quand il s'agit de déterminer si le moyen utilisé par l'employeur est objectivement propre pour atteindre le but visé et si le moyen recouru par l'employeur est celui qui est le moins attentatoire parmi les autres moyens susceptibles d'atteindre le même but. Le moyen le plus restrictif doit toujours rester *ultima ratio*.

Il faut ajouter que le souci d'imprévisibilité juridique à cause du caractère dynamique du contrôle de proportionnalité a été supprimé par la CourEDH qui a démontré dans sa jurisprudence fondée sur la proportionnalité, une méthodologie qui se développe, qui devient de plus en plus précise et qui fournit ainsi plus de prévisibilité. Dans son raisonnement concret constitutif de la proportionnalité, la Cour a recours à une interprétation effective comme moyen de réalisation des droits fondamentaux. Cette démarche interprétative à la lumière des valeurs partagées à un moment donné au sein de la société démocratique, permet à la Cour de garantir l'effectivité de ses solutions[135]. Ainsi, la Convention devient « *un instrument vivant*

131 Cette trilogie a été développée par la Cour constitutionnelle fédérale Allemande dans un arrêt '*Apothekenurteil*' de 1958 (11.6.1958, BverfGE 7, 377). Pour plus de détails, voir Philippe (n117) 44 ff; Fromont (n117) 156 ff; Géniaut (n121) 250 ff; Antonio Marzal Yetano, *La dynamique du principe de proportionnalité, Essai dans le contexte des libertés de circulation du droit de l'Union européenne* (DPhil thesis Université de Paris I Panthéon-Sorbonne 2013) 50 ff; Ugan Çatalkaya (n22) 63 ff

132 Muzny (n113) 129; Ugan Çatalkaya (n22) 76 ff, 84

133 Peskine and Wolmark (n1) 237

134 Cornesse (n114) 364

135 Muzny (n113) 133

qui doit se lire à la lumière des conceptions prévalant de nos jours dans les États démocratiques » [136] et cette interprétation évolutive apparaît comme la condition *sine qua non* du maintien de l'effectivité du système de la CEDH. Dans ce cas, la Convention qui est le fondement normatif de la jurisprudence de la CourEDH évolue au fur à mesure suivant les conditions de vie dans les sociétés démocratiques. C'est pour cela qu'il est admis que la légitimité de la jurisprudence de la Cour tirée de la norme, doit, à cause de son inconsistance et son caractère évolutif, se déplacer vers la légitimité procédurale[137]. Et la méthodologie du contrôle de proportionnalité effectué par la Cour sert d'instrument pour élaborer, au fil de sa jurisprudence des critères de plus en plus précis et affirmés, issus d'une appréciation dialectique et concrète. Par conséquent, la démarche du contrôle de proportionnalité permet le développement d'une jurisprudence cohérente et de plus en plus prévisible[138].

3. L'application de la proportionnalité à propos de sauvegarde des droits et libertés fondamentaux du salarié

Pour répondre à la question de savoir si une atteinte à un droit ou une liberté du salarié est légale ou pas ; il convient de vérifier, comme expliqué ci-dessus, deux exigences : La justification de l'atteinte (le but légitime) et le caractère proportionné de l'atteinte par rapport au but visé.

Dans un premier temps, l'employeur est obligé d'invoquer des motifs valables, légitimes, suffisamment forts comme par exemple, les nécessités de l'hygiène ou de la sécurité[139]. À défaut d'une justification légitime de la restriction, le juge va décider qu'il existe une violation de la liberté du salarié par la mesure restrictive, sans avoir besoin de passer au contrôle de proportionnalité. Le juge français évalue la légitimité de la restriction, sur le fondement de la formule « justifiées par la nature de la tâche à accomplir » de l'article L. 1121-1 du Code du travail. La Cour de cassation française considère par exemple que le contrôle du temps de travail d'un salarié qui dispose d'une liberté d'organisation, ne peut pas être accepté comme une justification valable pour la mise en place d'un système de géolocalisation[140].

En cas d'existence d'une justification, c'est-à-dire un but légitime, cette fois-ci, dans un second temps, il convient de vérifier la proportionnalité de la mesure[141]. Différemment du système prévu en droit allemand, il est considéré en droit français

136 Parmi de nombreux arrêts voir *Van der Mussele c. Belgique*, Req no 8919/80, (CourEDH, 23 novembre 1983) para 32; *Demir et Baykara c. Turquie*, Req no 34503/97, (CourEDH,12 novembre 2008) para 68, 146

137 Muzny (n113) 134

138 Ugan Çatalkaya (n22) 110

139 Peskine and Wolmark (n1) 236; Auzero, Baugard and Dockès (n1) 873

140 Cassation sociale française, 3 novembre 2011

141 Ugan Çatalkaya (n22) 305

que le contrôle de proportionnalité regroupe deux types[142]: Un contrôle de *modération* qui correspond en fait au principe de nécessité et un contrôle *d'excès* qui est dénommé au droit allemand le principe de proportionnalité au sens stricte.

Par exemple, dans une entreprise qui travaille sur des métaux précieux, pour un but légitime d'empêcher les vols, la mise en place d'un détecteur de métaux à la sortie et la fouille des sacs sont des mesures susceptibles d'empêcher les vols. Donc les deux mesures sont aptes à la réalisation du but. Mais sont-elles nécessaires, c'est-à-dire quelle est la mesure la moins attentatoire ? Dans cette deuxième phase du contrôle de proportionnalité, on exige de l'employeur la mise en place de la mesure la plus douce parmi tous les moyens appropriés. Donc dans cet exemple, la fouille des sacs -la mesure plus grave- ne parait pas nécessaire. Quant à la troisième phase, concernant le contrôle d'excès, il peut être considéré que par rapport à l'intérêt de l'employeur d'empêcher les vols, le fait que les salariés soient obligés de passer par un détecteur de métaux seulement à la sortie de l'entreprise ne constitue pas une atteinte disproportionnée. Pour autant on peut se demander, si l'employeur oblige une salariée enceinte de passer par ce détecteur, peut-on toujours parler d'une absence de disproportion entre les intérêts.

Les progrès technologiques qui multiplient et développent les moyens de surveillance et de contrôle dont l'employeur profite, renforcent le risque de violation des droits de la personne du salarié. Les sujets des requêtes faite à la CourEDH et l'approche de la Cour, nous montrent la nécessité d'avoir recours à un contrôle de proportionnalité plus stricte afin de pouvoir protéger les droits de la personne du citoyen-salarié.

Dans son célèbre arrêt *Bărbulescu*[143], à propos de la surveillance de la correspondance des salariés dans l'entreprise, la Cour a décidé qu'il y a eu une violation de l'article 8 de la Convention, pour le motif que les juridictions nationales ont manqué, d'une part, à vérifier en particulier, si le requérant avait été préalablement averti par son employeur de la possibilité que ses communications sur Yahoo Messenger soient surveillées et, d'autre part, à tenir compte du fait qu'il n'avait été informé ni de la nature ni de l'étendue de la surveillance dont il avait fait l'objet, ainsi que du degré d'intrusion dans sa vie privée et sa correspondance.

142 Peskine and Wolmark (n1) 237; Auzero, Baugard and Dockès (n1) 874. La négligence du critère d'aptitude par le juge français semble comme le résultat de l'influence de la jurisprudence de la CourEDH sur le droit français, car la CourEDH se focalise surtout sur la nécessité dans une société démocratique et la disproportion au sens stricte entre les intérêts en cause (Cornesse (n114) 73 ff, Panagiota Perraki, *La protection de la vie personnelle du salarié en droit comparé et européen - étude comparative des droits français, hellénique, britannique et européen* (DPhil thesis Université de Strasbourg 2013) 370; Ugan Çatalkaya (n22) 307)

143 *Barbulescu c. Roumanie*, Req no 61496/08, (CourEDH, 5 septembre 2017) para 140, pour une observation, voir H. Burak Gemalmaz, 'Çalışanların İnternet İletişiminin İşverence İzlenmesi Özel Yaşam Hakkına Aykırı mıdır?: AİHM Büyük Dairenin 05 Eylül 2017 Tarihli Barbulescu Kararı' < blog.lexpera.com.tr > 28.9.2022; dans le meme sens voir *Palomo Sánchez et autres c. Espagne*, Req nos 28955/06, 28957/06, 28959/06, 28964/06, (CourEDH, 12 septembre 2011)

La Cour, pour répondre à la question de savoir s'il s'agit d'une violation de l'article 8, montre aux autorités nationales les éléments qui doivent être pris en considération ; c'est-à-dire indique au juge national une méthodologie à suivre. La proportionnalité et les garanties procédurales contre l'arbitraire se posent comme des éléments essentiels de cette démarche[144].

Avec les termes de la Cour, les éléments constitutifs du contrôle assuré par la Cour sont exprimés comme ci-dessous :

> « i) *L'employé a-t-il été informé de la possibilité que l'employeur prenne des mesures de surveillance de sa correspondance et de ses autres communications ainsi que de la mise en place de telles mesures ? Si, en pratique, cette information peut être concrètement communiquée au personnel de diverses manières, en fonction des spécificités factuelles de chaque affaire, la Cour estime que, afin que les mesures puissent être jugées conformes aux exigences de l'article 8 de la Convention, l'avertissement doit en principe être clair quant à la nature de la surveillance et préalable à la mise en place de celle-ci.*
>
> ii) *Quels ont été l'étendue de la surveillance opérée par l'employeur et le degré d'intrusion dans la vie privée de l'employé ? À cet égard, une distinction doit être faite entre la surveillance du flux des communications et celle de leur contenu. Il faut également prendre en compte les questions de savoir si la surveillance des communications a porté sur leur intégralité ou seulement sur une partie d'entre elles et si elle a ou non été limitée dans le temps ainsi que le nombre de personnes ayant eu accès à ses résultats. Il en va de même des limites spatiales de la surveillance.*
>
> iii) *L'employeur a-t-il avancé des motifs légitimes pour justifier la surveillance de ces communications et l'accès à leur contenu même? La surveillance du contenu des communications étant de par sa nature une méthode nettement plus invasive, elle requiert des justifications plus sérieuses.*
>
> iv) *Aurait-il été possible de mettre en place un système de surveillance reposant sur des moyens et des mesures moins intrusifs que l'accès direct au contenu des communications de l'employé ? À cet égard, il convient d'apprécier en fonction des circonstances particulières de chaque espèce le point de savoir si le but poursuivi par l'employeur pouvait être atteint sans que celui-ci n'accède directement et en intégralité au contenu des communications de l'employé.*
>
> v) *Quelles ont été les conséquences de la surveillance pour l'employé qui en a fait l'objet ? De quelle manière l'employeur a-t-il utilisé les résultats de la mesure de surveillance, notamment ces résultats ont-ils été utilisés pour atteindre le but déclaré de la mesure?*
>
> vi) *L'employé s'est-il vu offrir des garanties adéquates, notamment lorsque les mesures de surveillance de l'employeur avaient un caractère intrusif ? Ces garanties doivent notamment permettre d'empêcher que l'employeur n'ait accès au contenu même des communications en cause sans que l'employé n'ait été préalablement averti d'une telle éventualité* ».

144 Voir Ugan Çatalkaya (n22) 343 ff

La procédure suivie par la Cour démontre clairement que le degré d'intrusion dans la vie privée (critère de nécessité et recours à la mesure la moins attentatoire) constitue le cœur du système de contrôle. De la même manière, quand il s'agit par exemple une vidéosurveillance dans l'entreprise, on constate que la Cour se réfère à la même méthodologie[145]. Dans l'arrêt *López Ribalda*, la Cour estime que les principes établis dans l'arrêt *Bărbulescu*, dont plusieurs sont tirés de la décision *Köpke* qui traitait de faits similaires à la présente espèce, sont transposables, *mutatis mutandis*, aux circonstances dans lesquelles un employeur peut mettre en place une mesure de vidéosurveillance sur le lieu de travail. Il est important de constater que la Cour accentue qu'il faut appliquer ces critères en tenant compte de la spécificité des relations de travail et du développement des nouvelles technologies, qui peut permettre des mesures de surveillance de plus en plus intrusives dans la vie privée des salariés[146].

Dans le cas d'espèce, le problème résidait surtout dans le fait que l'employeur n'avait pas rempli son obligation d'informer préalablement les salariés, d'une mise en place d'un système de vidéosurveillance et que quelques caméras orientées vers les caisses étaient cachées. C'est pour cela que la Cour a souligné que l'exigence de transparence et le droit à l'information qui en découle revêtent un caractère fondamental, en particulier dans le contexte des relations de travail, où l'employeur dispose à l'égard des salariés de pouvoirs importants dont il convient d'éviter tout abus.

Toutefois, même si la Cour a souligné l'importance de l'exigence de transparence et poursuivi les mêmes étapes du contrôle, elle a abouti à une conclusion critiquable et elle a décidé que l'information donnée à la personne faisant l'objet d'une surveillance et son ampleur, ne sont que l'un des critères à prendre en compte pour apprécier la proportionnalité d'une telle mesure dans un cas donné. La Grande Chambre a conclu dans le cas d'espèce qu'il n'y a pas de violation. Il vaut mieux souligner qu'on trouve que cette approche de la Cour affaiblie le système de sauvegarde des droits fondamentaux assuré par la proportionnalité.

V. Conclusion

Les transformations sociales et économiques caractérisées par l'industrialisation ont déclenché d'abord l'abandon inévitable de l'approche selon laquelle l'État est le seul pouvoir qui est susceptible de menacer les droits et libertés et ensuite l'abandon de l'idée que ces droits et libertés jouissent uniquement d'un effet vertical. C'est avec

145 *Köpke v. Germany*, Req no 420/07, (CourEDH, 5 octobre 2010); *López Ribalda et autres c. Espagne*, Req no 1874/13, 8567/13, (CourEDH, 17 octobre 2019); voir Ugan Çatalkaya (n22) 345

146 *López Ribalda et autres c. Espagne*, para 116. Pour plus détails sur cet arrêt voir Ugan Çatalkaya (n22) 358 ff, Şebnem Kılıç, 'İşverenin Yönetim Hakkı Işığında Bir İnceleme: AİHM Lopez Ribalda ve Diğerleri-İspanya Kararı' in Tankut Cent (ed) *İş Hukukunda Genç Yaklaşımlar IV* (Onikilevha 2020) 87 ff; pour la ciber surveillance en droit du travail, voir Burcu Savaş, 'İş Hukukunda Siber Gözetim' (2009) 3(22) Çalışma ve Toplum 97 ff

la constitutionnalisation du droit du travail, en d'autres termes suivant le fait qu'on s'est rendu compte de la personne ou bien de la qualité de citoyen du salarié que les droits et libertés fondamentaux se sont munis d'une efficacité directe horizontale. Désormais ils régissent les relations du travail et donc le salarié en tant que particulier peut les invoquer à l'encontre de son employeur.

Par conséquent, ce phénomène d'admettre l'exercice effectif des droits et libertés même dans l'entreprise a entrainé un besoin de compromis entre ces droits et libertés du salarié et le pouvoir de l'employeur. Les pratiques en droit Turc et dans les systèmes de droit étrangers, nous montrent clairement que, face à cette exigence de compromis, le principe de proportionnalité s'est posé comme le garant d'un juste équilibre entre les intérêts opposés et de cette façon comme le garant des libertés au sein de l'entreprise.

L'article L. 1121-1 du Code du travail français, dès qu'il a été adopté, est devenu un instrument qui sert au juge français d'effectuer un contrôle étroit de l'exercice du pouvoir patronal, sous l'influence de la jurisprudence de la CourEDH.

C'est pourquoi on trouve qu'il est bon et approprié d'adopter une disposition positive dans la législation du travail, conformément à la singularité des relations de travail et fournissant une pertinence à la démarche suivie par le juge au cours du contrôle de proportionnalité. À notre point de vue, le fait de prévoir dans une disposition de la Loi du travail, une obligation pour l'employeur de protéger la personnalité du salarié et les limites d'une restriction aux droits de la personnalité de ce dernier ; servira à accentuer l'indépendance et l'intégralité du droit du travail, ainsi que le souci d'assurer une garantie aux droits et libertés fondamentaux du salarié.

Il pourrait donc être suggéré *de lege ferenda* qu'une disposition comme suit soit prévue dans la Loi du travail turque : *« L'employeur est tenu de protéger la personnalité du salarié. Une restriction ne peut être apportée aux droits et libertés fondamentaux du salarié que si elle est justifiée par la nature de la tâche à accomplir et proportionnée au but recherché »*.

En outre, il vaut mieux à ce stade accentuer un développement très récent en droit français, concernant la sauvegarde de la liberté d'expression du salarié en tant que lanceur d'alerte : En 2022, des nouvelles provisions qui sont entrées en vigueur le 1e septembre, ont été ajoutées au Code du travail français par la loi n° 2022-401, afin de mieux protéger le salarié qui révèle ou signale, de manière désintéressée et de bonne foi, un crime ou un délit, une violation grave et manifeste d'un engagement international régulièrement ratifié ou approuvé par la France, d'un acte unilatéral d'une organisation internationale pris sur le fondement d'un tel engagement, de la loi ou du règlement, ou une menace ou un préjudice graves pour l'intérêt général, dont

elle a eu personnellement connaissance. Dans le but de protéger ce salarié (lanceur d'alerte) contre tout traitement discriminatoire, il est prévu que les lanceurs d'alerte ne peuvent faire l'objet de discrimination directe ou indirecte, y compris dans le processus de recrutement et que le salarié qui utilise le droit d'alerte en conformité avec la loi, n'est pas pénalement responsable. L'adoption de cet article L. 1121-2 sous le titre « Droits et libertés dans l'entreprise » du Code du travail qui s'était composé jusqu'au septembre 2022 uniquement de l'article L. 1121-1, peut être considérée comme l'indicateur de l'accroissement du souci d'assurer une meilleure garantie à l'exercice effectif des libertés dans l'entreprise.

Comité de lecture: Revue par les pairs à l'extérieur
Contributions des auteurs : Conception/Plan de l'étude : A.G., D.U.Ç., H.H. ; Saisie des données : A.G., D.U.Ç., H.H. ; Analyse/Interprétation des données : A.G., D.U.Ç., H.H. ; Rédaction du Manuscrit : A.G., D.U.Ç., H.H. ; Révision Critique du Manuscrit : A.G., D.U.Ç., H.H. ; Validation Finale et Responsabilité : A.G., D.U.Ç., H.H.
Conflit d'intérêts: L'auteur n'a pas de conflit d'intérêts à déclarer
Divulgation financière: L'auteur a déclaré que l'article proposé n'a pas reçu de soutien financière

Peer-review: Externally peer-reviewed.
Author Contributions: Conception/Design of study: A.G., D.U.Ç., H.H.; Data Acquisition: A.G., D.U.Ç., H.H.; Data Analysis/Interpretation: A.G., D.U.Ç., H.H.; Drafting Manuscript: A.G., D.U.Ç., H.H.; Critical Revision of Manuscript: A.G., D.U.Ç., H.H.; Final Approval and Accountability: A.G., D.U.Ç., H.H.
Conflict of Interest: The authors have no conflict of interest to declare.
Financial Disclosure: The authors declared that this study has received no financial support.

Doctrine citée

Abrantes JJ, *Contrat de travail et droits fondamentaux, Contribution à une dogmatique commune européenne, avec référence spéciale au droit allemand et au droit portugais* (Peter Lang 2000)

Adam P, 'Vie personnelle/vie professionnelle: une distinction en voie de dissolution?', (2013) Le Droit Ouvrier 431-444

Alpagut G, 'Teknolojik Gelişmelerin İşçilik Haklarına Etkisi – Daimi Ulaşılabilirlik' in *Prof. Dr. Turhan Esener III. İş Hukuku Uluslararası Kongresi* (Seçkin 2021) 317-338

Auzero G, Baugard D and Dockès E, *Droit du travail* (34th edn, Dalloz 2021)

Aydın U, *İş Hukukunda İşçinin Kişilik Hakları* (Anadolu Üniversitesi Yayınları 2002)

Aydın, Ufuk, 'İş Hukuku Açısından İşçinin Bilgi Uçurması', (2002) AÜSBD 2(2) 79-100

Barbier-Gourves M, *La volonté du salarié dans le rapport de travail* (DPhil thesis Université Lyon II 2010)

Berset-Bircher V, *Les systèmes d'information et la vie privée du salarié, Analyse en droit européen, en droit suisse et en droit français* (DPhil thesis l'Université de Strasbourg)

Beytar E, *İşçinin Kişiliğinin ve Kişisel Verilerinin Korunması* (1st edn, Onikilevha 2018)

Birben E, 'İşçinin Özel Yaşamı Nedeniyle İş Sözleşmesinin Feshi', in Prof. Dr. Tankut Centel (ed) *İş Hukukunda Genç Yaklaşımlar II* (Beta 2018) 135-169

Bossu B, 'L'ascension du droit au respect de la vie personnelle', (2015) vol 26 La Semaine Juridique Social 1-9

Bousez B, 'La proportionnalité en droit du travail' in Bernard Teyssié (ed) *Standards, principes et méthodes en droit du travail* (Economica 2011) 121-139

Burgorgue-Larsen L, *La Convention européenne des droits de l'homme* (2nd edn, LGDJ 2015)

Civan E, *İşçinin Yan Yükümlülükleri* (Beta 2021)

Cornesse I, *La proportionnalité en droit du travail* (Litec 2001)

Çankaya Y, *İş İlişkisinde İşçinin Özel Yaşamının Gizliliği* (Beta 2021)

Çelik N, Caniklioğlu N, Canbolat T and Özkaraca E, *İş Hukuku Dersleri* (34th edn, Beta 2021)

Çetin E, *İnsan Hakları Avrupa Sözleşmesi'nin 8-11. Maddeleri Bağlamında Çalışanların Hakları* (Onikilevha 2015)

Dejean de la Batie A, *Le réfus du salarié* (Dphil Université des Sciences Sociales de Toulouse 2000

Doğan S*, "Dijitalleşmenin Çalışma Yaşamına Etkisi: İşçinin Ulaşılamama Hakkı", in Prof. Dr. Kübra Doğan Yenisey and Dr. Öğr. Üyesi Seda Ergüneş Emrağ (eds) İş Hukukunda Yeni Yaklaşımlar IV (Onikilevha 2021) 109-144*

Doğan Yenisey K, *La modification du contrat de travail, Etude de droit suisse et de droit français* (Schulthess 2005)

Dougin A-M, 'Libertés individuelles et relations de travail: un aperçu de la jurisprudence de la Cour européenne des Droits de l'Homme' , in Philippe Auvergnon (ed) *Libertés individuelles et relations de travail : le possible, le permis et l'interdit ?* (Presses Universitaires de Bordeaux 2011) 207-230

Dural M and Öğüz T, *Türk Özel Hukuku Cil II – Kişiler Hukuku* (Filiz 2021)

Eissen M-A, 'Le principe de proportionnalité dans la jurisprudence de la Cour européenne des droits de l'homme' in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (eds) La Convention Européenne des Droits de l'Homme, Commentaire article par article (Economica 1995) 65-81

Ekmekçi Ö and Yiğit E, *Bireysel İş Hukuku Dersleri* (3rd edn, Onikilevha 2021)

Ertürk Ş, *İş İlişkisinde Temel Haklar* (Seçkin 2002)

Fabre A, *Le régime du pouvoir de l'employeur* (LGDJ 2010)

Favennec-Héry F and Verkindt PY, *Droit du travail* (7th edn, LGDJ 2020)

Favoreu L, Gaïa P, Ghevontian R, Mélin-Soucramanien F, Pena A, Pfersman O, Pini J, Roux A, Scoffoni G and Tremeau J, *Droit des libertés fondamentales* (7th edn, Dalloz 2016)

Fromont M, 'Le principe de proportionnalité' (1996) AJDA 156

Gemalmaz HB, 'Çalışanların İnternet İletişiminin İşverence İzlenmesi Özel Yaşam Hakkına Aykırı mıdır?: AİHM Büyük Dairenin 05 Eylül 2017 Tarihli Barbulescu Kararı' < blog.lexpera.com.tr > 28.9.2022

Géniaut B, *La proportionnalité dans les relations du travail* (Dalloz 2009)

Güzel A, 'Ekonomik ve Teknolojik Gelişmelerin Işığında Hizmet Sözleşmesinin "Intuitus Personae" Niteliği Üzerinde Yeniden Düşünmek' in *Halid Kemal Elbir'e Armağan* (İstanbul Üniversitesi Hukuk Fakültesi 1996) 167-195

Güzel A, 'İş Hukukunda Yetki ve Özgürlük', (2016) 15 (1) Prof. Dr. Turhan Esener'e Armağan Kültür Üniversitesi Hukuk Fakültesi Dergisi 93-126

Hennette-Vauchez S and Roman D, *Droits de l'Homme et libertés fondamentales* (first edn, Dalloz 2013)

Heper H, *İş İlişkisinde İşçinin İradesi* (Seçkin 2022)

Heper H, 'Düşünceyi Açıklama Hakkının Çalışma Yaşamındaki Görünümü: İşçinin İfade Özgürlüğü' (2022) 3 (74) Çalışma ve Toplum 1901-1934

Jacquelet C, *La vie privée du salarié à l'épreuve des relations de travail* (PUAM 2008)

Kanadoğlu K, *Türk ve Alman Anayasa Yargısında Anayasal Değerlerin Çatışması ve Uyumlaştırılması* (Beta 2000)

Kaneti S, 'Anayasa Mahkemesi Kararlarına Göre Anayasa'nın Özel Hukuk Alanındaki Etkileri' (1988-1990) LIII (1-3) İÜHFM 199-211

Kılıç Ş, 'İşverenin Yönetim Hakkı Işığında Bir İnceleme: AİHM Lopez Ribalda ve Diğerleri-İspanya Kararı' in Tankut Cent (ed) *İş Hukukunda Genç Yaklaşımlar IV* (Onikilevha 2020) 87-134

Küzeci E, Kişisel Verilerin Korunması (4th edn, Onikilevha 2020)

Lyon-Caen G, *Les libertés publiques et l'emploi, Le rapport au ministère du Travail, de l'Emploi et de la Formation professionnelle* (La documentation Française, 1992)

Marzal Yetano A, *La dynamique du principe de proportionnalité, Essai dans le contexte des libertés de circulation du droit de l'Union européenne* (DPhil thesis Université de Paris I Panthéon-Sorbonne 2013)

Mazeaud A, 'Proportionnalité en droit social' (1998) (117) Petites affiches 64-69

Mekki M, *L'intérêt général et le contrat, Contribution à une étude de la hiérarchie des intérêts en droit privé* (LGDJ 2004)

Metin Y, *Ölçülülük İlkesi – Karşılaştırmalı Bir Anayasa Hukuku İncelemesi* (Seçkin 2002)

Mollamahmutoğlu H, Astarlı M and Baysal U, *İş Hukuku* (7th edn, Lykeion 2022)

Muzny P, *La technique de proportionnalité et le juge de la Convention Européenne des Droits de l'Homme Essai sur un instrument nécessaire dans une société démocratique* (PUAM 2005)

Oğuzman MK and Barlas N, *Medeni Hukuk* (Vedat 2021)

Okur Z, *İş Hukuku'nda Elektronik Gözetleme* (Legal 2011)

Öktem Songu S, 'Anayasal Bir Temel Hak Olarak İfade Özgürlüğünün İşçi Açısından İşyerindeki Yansımaları' (2013) 15 (Özel sayı Prof. Dr. M. Polat Soyer'e Armağan) DEÜHFD 606-650

Peano MA, 'L'intuitus personae dans le contrat de travail' (1995) Dr soc 129-138

Peskine E and Wolmark C, *Droit du travail* (14th edn, Dalloz 2021)

Perraki P, *La protection de la vie personnelle du salarié en droit comparé et européen - étude comparative des droits français, hellénique, britanique et européen* (DPhil thesis Université de Strasbourg 2013)

Philippe X, *Le contrôle de la proportionnalité dans les jurisprudences constitutionnelle et administrative françaises* (PUAM 1990)

Renucci JF, *Droit européen des droits de l'Homme, Droits et libertés fondamentaux garantis par la CEDH* (6th edn, LGDJ 2015)

Roux J, *Droit général de l'Union européenne* (2nd edn, Litec 2008)

Sağlam F, *Temel Hakların Sınırlanması ve Özü* (Ankara Üniversitesi SBF Yayınları 1982)

Savaş B, 'İş Hukukunda Siber Gözetim' (2009) 3(22) Çalışma ve Toplum 97-132

Savaş Kutsal B and Kolan Ş, 'Paylaşmadan Önce Dikkat! İşçilerin İşyeri Dışında Sosyal Medya Kullanımları Üzerine Hukuki Bir Değerlendirme' (2019) 16 (62) LİHSGHD 491-562

Serozan R, *Medeni Hukuk – Genel Bölümler / Kişiler Hukuku* (Vedat 2018)

Sevimli A, *İşçinin Özel Yaşamına Müdahalenin Sınırları* (Legal 2006)

Süzek S, *İş Hukuku* (21st edn Beta 2021)

Ugan D, 'Les Droits Sociaux Fondamentaux Au Nivaeau Européen', in Prof. Dr. Ali Güzel'e Armağan, vol 1 (Beta 2010) 769-789

Ugan Çatalkaya D, 'Kişisel Yaşamı Kapsamında İşçinin, İşverence 'Ulaşılabilir Olmama' Hakkı' (2016) LXXIV (Özel Sayı Prof. Dr. Fevzi Şahlanan'a Armağan) İÜHFM 737-755

Ugan Çatalkaya D, *İş Hukukunda Ölçülülük İlkesi* (Beta 2019)

Ugan Çatalkaya D, 'Çalışma Saatleri Dışında Zihniniz Halen İş ile mi Meşgul? Özel Yaşam ile İş Yaşamı Arasındaki Sınırların Bulanıklaşması ve Ulaşılabilir Olmama Hakkı Üzerine' in Başak Baysal, Nilay Arat (eds) *KHAS Hukuk Bülteni 2020-2021 Akademik Yılı Derlemesi* (On İki Levha 2021) 139-157

Uncular S, *İş İlişkisinde İşçinin Kişisel Verilerinin Korunması* (Seçkin 2014)

Uygun O, *1982 Anayasası'nda Temel Hak ve Özgürlüklerin Genel Rejimi* (Kazancı 1992)

Vigneau C, 'L'impératif de bonne foi dans l'exécution du contrat de travail' (2004) Dr soc 706-714

Waquet P, 'La vie personnelle du salarié' in *Droit syndical et droits de l'homme à l'aube du XXIe siècle, Mélanges en l'honneur de Jean-Maurice Verdier* (Dalloz 2001) 513-524

Waquet P, *L'entreprise et les libertés du salarié, Du salarié-citoyen au citoyen-salarié* (Édition Liaisons, 2003)

Wandji Kemadjou GB, *Les droits et libertés fondamentaux du salarié: réflexion sur la hiérarchie des normes*, (Dphil thesis Université Paris 2 Panthéon-Assas 2007)

Yıldız GB, *İşverenin Eşit İşlem Yapma Borcu* (Yetkin 2008)

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 265–307

DOI: 10.26650/annales.2022.71.0002
http://annales.istanbul.edu.tr/

Annales de la Faculté de Droit d'Istanbul

Submitted: 06.08.2021
Revision Requested: 06.09.2021
Last Revision Received: 20.09.2021
Accepted: 21.09.2021

RESEARCH ARTICLE

European Union Law and Mitigation of Artificial Intelligence-Related Discrimination Risks in the Private Sector: With Special Focus on the Proposed Artificial Intelligence Act

Salih Tayfun İnce*

Abstract

Integrating AI systems into decision-making processes in the private sector may place the right to non-discrimination in danger. In order to illustrate this threat, risky fields in the private sector, namely employment, banking, advertising, pricing and insurance, were investigated in this paper with authentic examples of AI-related discrimination. Then, the current EU non-discrimination laws and data protection laws were examined, and it was found out that these EU laws do not have the necessary tools to tackle specific risks arising from AI-related discrimination in the private sector. Therefore, there is an immediate need for new EU legislation equipped with tools which explicitly target AI-related discrimination risks in the private sector. The proposed AI Act may provide new tools against AI-related discrimination in the private sector. Thus, this paper analyzes the proposed AI Act in terms of its potential impacts on mitigating AI-related discrimination risks. Due to the cradle-to-grave approach adopted by the proposed AI Act, providers and users of high-risk AI systems are required to comply with various specific ex-ante and ex-post obligations. It is found out that these obligations can contribute to the mitigation of AI-related discrimination by providing new legal tools. However, these tools are not sufficient in the face of AI-related discrimination risks. Therefore, it is concluded that the crucial need for specific legislation to mitigate AI-related discrimination risks in the private sector is still present.

Keywords

Artificial Intelligence, Discrimination, AI-Related Discrimination, European Union Law, Non-Discrimination Laws, Data Protection Law, European Union Artificial Intelligence Act Proposal

* **Corresponding Author:** Salih Tayfun İnce (Res. Asst. / Ph.D. Candidate), Fatih Sultan Mehmet Vakif University, Faculty of Law, Commercial Law Department, Istanbul, Turkiye / Philipps-University of Marburg, Faculty of Law, Marburg, Germany. E-mail: stince@fsm.edu.tr
ORCID: 0000-0002-0750-8152

To cite this article: Ince ST, "European Union Law and Mitigation of Artificial Intelligence-Related Discrimination Risks in the Private Sector: With Special Focus on the Proposed Artificial Intelligence Act", (2022) 71 Annales de la Faculté de Droit d'Istanbul 265.
https://doi.org/10.26650/annales.2022.71.0002

I. Introduction

The right to non-discrimination is a fundamental right obtained as a consequence of prolonged and enduring struggles in human history. As a political and legal achievement, it is imperative to protect this right in the face of the emergent risks caused by the utilization of artificial intelligence ("**AI**") systems ("**AI-related discrimination**"). However, most of the current laws and regulations against discrimination are not tailored to mitigate AI-related discrimination risks. Hence, the necessity of new interpretational approaches or new legal tools for the prevention of AI-related discrimination risks should be investigated. Since this is a very extensive subject of study, the jurisdictional and sectorial scope of this investigation is restricted in this paper. The European Union ("**EU**") law was chosen as the target jurisdiction of this investigation because the EU law is considered as one of the most developed and influential legal systems concerning non-discrimination laws. Moreover, recent efforts of the EU, such as the proposal for the regulation of AI systems, should be investigated since these efforts may provide new tools against AI-related discrimination. The sectorial scope of the investigation is narrowed to the private sector. The underlying reason for this choice is the inadequacy of academic studies regarding AI-related discrimination risks in the private sector, although utilization of AI systems may cause discrimination risks in the private sector as well as the public sector. As a consequence of these reasons, this paper aims to investigate legal safeguards in the EU law against AI-related discrimination risks in the private sector.

To achieve this aim, this paper's working definition of AI is specified in Part II. Then, the utilization of AI-based decision-making by business organizations is briefly explained. In Part III, discrimination is defined with a legal approach. After that, how AI-related discrimination risks occur is explained with examples. Then, difficulties in tackling these risks are indicated. In Part IV, risky fields for AI-related discrimination in the private sector are investigated. AI-related discrimination risks in employment, banking, advertising, personal pricing and insurance are explained with authentic examples. In Part V, current legal safeguards in EU law against discrimination are reviewed. In particular, EU non-discrimination laws and EU data protection laws are investigated in terms of their suitability for preventing AI-related discrimination risks in the private sector. Afterwards, the European Commission's Proposal for Artificial Intelligence Act ("**proposed AI Act**") is examined as to whether it may provide new tools for mitigation of AI-related discrimination risks. In the course of this examination, legal form, preparation and objectives of the proposed AI Act, its risk-based approach, obligations imposed on providers and users of high-risk AI systems, examples regarding the proposed AI Act's impacts on AI-related discrimination in the private sector and other new legal opportunities provided by the proposed AI Act for mitigation of AI-related discrimination risks in the private sector are addressed.

II. AI And Decision Making

A. AI

AI is considered an umbrella term[1] with many definitions. Adoption of different AI definitions is possible according to the specific goals and contexts of research. Therefore, it is not surprising that there is no consensus on the definition of AI[2]. Nevertheless, a working definition of AI is necessary on which to base subsequent explanations and claims in this paper.

A working definition should be suitable for the intended research and adequately concrete to enable the researcher to work with it directly[3]. This paper approaches AI from a legal perspective. It attempts to investigate the nature and reciprocal consequences of AI's operation in the non-discrimination law sphere. Since EU law is the target jurisdiction, a legal definition made by EU authorities or bodies should be chosen. The definition of AI provided by the proposed AI Act is adopted in this paper as the most up to date legal definition of AI. The adoption of this definition would also be useful since the impacts of the proposed AI Act in terms of AI-related discrimination in the private sector will be analysed in this paper as well.

The proposed AI Act defines AI as a "*software that is developed with one or more of the techniques and approaches listed in Annex I[4] and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with.*[5]" This is a conceptual definition of AI with a list of relevant techniques and approaches. In the explanatory memorandum of the proposed AI Act, it is claimed that this definition is clear enough to provide legal certainty and flexible enough to accommodate future developments

1 The Royal Society, 'Explainable AI: the basics' (Policy briefing) (2019) <royalsociety.org/ai-interpretability> accessed 20 June 2021. Pages 5 and 7.

2 Stan Franklin, 'History, Motivations, and Core Themes' in Keith Frankish and William W. Ramsey, (eds.), *The Cambridge Handbook Of Artificial Intelligence* (Cambridge University Press, UK 2014) 15; Stephen Lucci and Danny Kopec, *Artificial Intelligence in the 21st Century: A Living Introduction* (Mercury Learning and Information, USA 2016) 4; Max Craglia, (ed.) et al., 'Artificial Intelligence: A European Perspective' (Joint Research Centre Working Papers) (2018) 19; The Federal Government of Germany, 'Artificial Intelligence Strategy' (2018) <https://www.ki-strategie-deutschland.de/home.html?file=files/downloads/Nationale_KI-Strategie_engl.pdf> accessed 20 June 2021. Page 4; Frederik J. Z. Borgesius, **'**Strengthening legal protection against discrimination by algorithms and artificial intelligence' (2020) 24 10 The International Journal of Human Rights 1572, 1573; Sofia Samoili and et al., 'AI Watch. Defining Artificial Intelligence. Towards An Operational Definition And Taxonomy Of Artificial Intelligence' (Joint Research Centre Technical Reports) (Luxembourg 2020) 7.

3 Pei Wang 'On the Working Definition of Intelligence' (1995) <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.55.5012> accessed 20 May 2021. Page 3.

4 "*(a) Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning; (b) Logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems; (c) Statistical approaches, Bayesian estimation, search and optimization methods."* Commission (EC) 'Proposal for a Regulation Of The European Parliament And Of The Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts' COM(2021) 206 final, 21 April 2021. Annex I. ("the proposed AI Act")

5 Article 3 of the proposed AI Act (n 4).

at the same time[6]. In fact, the provision of the list of techniques and methods, which is open to amendments, makes this definition future-proof. However, the extensiveness of its scope may obstruct spot-on identification of AI systems[7].

The proposed AI Act's AI definition includes machine-learning ("**ML**") approaches in its Annex I for the AI techniques and approaches since most of today's ground-breaking developments in the field of AI stem from ML techniques. As a consequence, people mostly use the term ML when they refer to AI[8]. Comprehension of features that separate ML systems from classical computer programming is necessary to understand AI-related discrimination risks explained in the subsequent parts of this paper.

Given ML's role in the development of current AI systems, learning ability is the most distinctive characteristics of ML systems. Classical computers are machines that only execute pre-written instructions (programs) input by humans. After the emergence of ML with learning ability, dynamic decision-making processes that may not be instructed, predicted, or even understood by human designers are developed[9]. These ML systems may produce rules by discovering patterns from the data set. They may apply these rules to new data and may generate original (unexpected) results. As a consequence of this process, ML systems are considered to be based on training instead of explicit programming[10]. Since human intervention in and understanding of some ML systems are limited, ML processes may cause problems regarding explainability and transparency. These problems may aggravate detection and mitigation of discrimination risks in AI-based decision-making procedures[11].

B. AI-Based Decision-Making

Business organizations are required to make numerous decisions about their investment plans, employment issues, manufacturing, provision of their goods and services, advertisements, etc. Human decision-making can be a long and laboured

6 The proposed AI Act (n 4), 18.

7 It is asserted that this definition covers all information technology systems. Jussi Mäkinen, 'The EU's AI Regulation Proposal – How to Fix It?' (2021) <https://teknologiateollisuus.fi/en/ajankohtaista/eus-ai-regulation-proposal-how-fix-it> accessed 20 June 2021.

8 Frederik Z. Borgesius, 'Discrimination, Artificial Intelligence and Algorithmic Decision-making' (Study Report) (Council of Europe, Strasbourg 2018) <https://rm.coe.int/discrimination-artificial-intelligence-and-algorithmic-decision-making/1680925d73> accessed 20 June 2021. Page 9.

9 Yavar Bathaee, 'The Artificial Intelligence Black Box And The Failure Of Intent And Causation' (2018) 31 2 Harvard Journal of Law & Technology 890, 891; The Royal Society (n 1), 6.

10 The Royal Society, 'Machine Learning: The Power And Promise Of Computers That Learn By Example' (Report) (2017) <royalsociety.org/machine-learning> accessed 20 June 2021. Page 16; Craglia et al. (n 2), 20; Blagoj Delipetrev, Chrisa Tsinarakli and Uros Kostić, 'Historical Evolution of Artificial Intelligence' (Technical Report) (Publications Office of the European Union, Luxembourg 2020) https://publications.jrc.ec.europa.eu/repository/handle/JRC120469 accessed 20 June 2021. Page 11.

11 Therefore, assessment and monitoring of the ML systems in terms of discrimination risks should be done according to their dynamic and autonomous features. Wolfgang Wahlster and Christoph Winterhalter, 'German Standardization Roadmap On Artificial Intelligence' (German Institute for Standardization and DKE German Commission for Electrical, Electronic & Information Technologies of DIN and VDE) (2020) <https://www.din.de/resource/blob/772610/e96c34dd6b12900ea75b460538805349/normungsroadmap-en-data.pdf> accessed 20 June 2021. Page 82.

process if the factors that have to be considered through this process are too much, and relations among these factors are complex. AI systems can shorten and expedite decision-making processes by employing various techniques[12]. Additionally, better prediction and resource allocation, improved operations, and personalized digital solutions are some benefits of deploying AI systems. Due to these advantages, important decisions historically taken by humans in various fields, such as health care, public services, justice, farming, education, energy and transportation, security, climate change[13] and so on, are currently made by AI systems[14].

The utilization of AI in decision-making processes ("**AI-based decision-making**") may occur in different ways. An AI system may become an assistant for a human to provide information and insights in specific domains when needed. It is called assistant AI[15]. Furthermore, humans may constantly collaborate with AI systems to augment the overall intelligence to make decisions on complicated cases[16]. These systems are named augmented AI[17]. Moreover, AI systems, which have the capacity for autonomous decision-making, may make decisions without human intervention. They are called autonomous AI systems[18]. All of these AI systems may carry AI-related discrimination risks at different levels according to the particular features of the systems, such as their autonomy level, intended purpose and place of use. A more detailed explanation regarding how these systems may cause discrimination risks is provided in the next part[19].

III. AI-Related Discrimination

A. Discrimination

It is essential to employ a discrimination definition of the relevant EU laws since this paper is concerned about legal safeguards against AI-related discrimination in the EU laws. Moreover, interpretation of the EU laws is as important as their literal content. Hence, the jurisprudence of the Court of Justice of the European Union

12 Council of Europe, 'Algorithms and Human Rights: Study On The Human Rights Dimensions Of Automated Data Processing Techniques (In Particular Algorithms) And Possible Regulatory Implications' (Study Report) (DGI(2017)12) (2018) 26.

13 The proposed AI Act (n 4), 18.

14 The White House, 'Big Data: Seizing Opportunities, Preserving Values' (Report) (2014) 64; Joshua A. Kroll et al., 'Accountable Algorithms' (2017) 165 University of Pennsylvania Law Review 633, 636.

15 Florian Möslein, 'Robots in the Boardroom: Artificial Intelligence and Corporate Law' in Woodrow Barfield, and Ugo Pagallo (eds.), *Research Handbook on the Law of Artificial Intelligence* (Edward Elgar, UK 2018) 649, 657; Kathleen Walch, 'Is There A Difference Between Assisted Intelligence Vs. Augmented Intelligence?' *Forbes*. (12 January 2020) <https://www.forbes.com/sites/cognitiveworld/2020/01/12/is-there-a-difference-between-assisted-intelligence-vs-augmented-intelligence/?sh=3300950426ab> accessed 20 June 2021.

16 Delipetrev, Tsinarakli and Kostić (n 10), 17.

17 Möslein (n 15), 657; Walch (n 15).

18 Möslein (n 15), 657; Walch (n 15).

19 See Part III-2.

("**CJEU**") plays a decisive role. Although CJEU does not rule on the compatibility of national rules with the EU laws, it officially provides national courts with guidance on interpreting the EU laws in order to decide whether their national laws are compatible with the EU laws. While providing this guidance, the CJEU manifests fundamental principles regarding the definition and properties of discrimination. Additionally, the European Court of Human Rights ("**ECtHR**") case law provides guidance for the implementation of the abstract EU laws in concrete cases. Although AI-related discrimination will be examined separately in the next subpart and a more detailed analysis of the EU laws in terms of AI-related discrimination will be provided in part V, definitions of and conceptual approaches to the discrimination in the EU laws and jurisprudence of the CJEU and the ECtHR are briefly provided below.

Discrimination is divided into two main subcategories in the EU laws - direct and indirect discrimination. "*(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1*[20]" according to the EU Employment Equality Directive. The EU Racial Equality Directive further states that

> "*Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*[21]"

As it is evident from the latter definition, the EU law focuses on the discriminatory effects of the treatment/action rather than the intent of the alleged discriminator and the neutrality of the provisions. Likewise, the CJEU considers that

> "*indirect discrimination may stem from a measure which, albeit formulated in neutral terms, that is to say, by reference to other criteria not related to the protected characteristic, leads, however, to the result that particularly persons possessing that characteristic are put at a disadvantage*[22]."

This neutral criterion or practice that would put persons of a protected class at a particular disadvantage amounts to indirect discrimination and shall be prohibited, "*unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*[23]." As a concrete example of indirect

20 Article 2(2) of Council Directive (EC) 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303.

21 Article 2(2)(b) of Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180. The part of 'persons of a racial or ethnic origin' can be replaced with 'persons from protected classes' to procure a universal definition for indirect discrimination.

22 See, Case C-83/14, "*CHEZ Razpredelenie Bulgaria" AD v Komisia za zashtita ot diskriminatsia,* (Judgment of the Court (Grand Chamber) of 16 July 2015, 94.

23 See, Case C-83/14, "*CHEZ Razpredelenie Bulgaria" AD v Komisia za zashtita ot diskriminatsia,* (Judgment of the Court (Grand Chamber) of 16 July 2015, 111.

discrimination, the CJEU was of the opinion that a department store company which excluded part-time employees from its occupational pension scheme, where that exclusion affected a far greater number of women than men, infringed on the right to equal pay without discrimination based on sex, "*unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex*[24]".

In the same vein, the ECtHR considers possible justifications for the investigated treatment and proportionality of the means in its decisions regarding the right to non-discrimination. Hence, a difference in treatment can be qualified as discriminatory "*if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved*[25]."

In the light of the discrimination definitions provided in EU laws and relevant CJEU and ECtHR precedents, discrimination may occur directly or indirectly. Consideration of the relevant provision's textual content is prioritized for the direct discrimination assessment. On the other hand, indirect discrimination is assessed by considering its actual effects since the textual content of the provision is already neutral. However, the CJEU and the ECtHR consider certain criteria such as (objective) justification by a legitimate aim, necessity, and proportionality of the means in order to decide whether the investigated practice, which is found indirectly discriminatory, is allowable.

B. AI-Related Discrimination

AI systems may provide societal and economic benefits for society and various industries. However, some AI systems may cause new risks or adverse consequences as well[26]. AI-related discrimination risk is one of these emergent risks[27]. Although AI and algorithmic decision-making seem neutral, rational, and unbiased, they may have adverse effects on fundamental rights, including the right to non-discrimination[28].

24 See, Case 170/84, *Bilka-Kaufhaus GmbH and Karin Weber von Hartz*, (Judgment of the Court) of 13 May 1986, 31.

25 *Biao v. Denmark (Grand Chamber)* (App no 38590/10) ECHR 24 May 2016, 90.

26 The European Consumer Organization, 'Automated Decision Making And Artificial Intelligence - A Consumer Perspective' (Report) (2018) <https://www.beuc.eu/publications/beuc-x-2018-058_automated_decision_making_and_artificial_intelligence.pdf> accessed 20 June 2021. Page 5; Rowena Rodrigues, 'Legal and human rights issues of AI: Gaps, challenges and vulnerabilities' (2020) 4 Journal of Responsible Technology <https://doi.org/10.1016/j.jrt.2020.100005> accessed 20 June 2021. Page 1; the proposed AI Act (n 4), 1 and 17.

27 Sue Newell and Marco Marabelli, 'Strategic opportunities (and challenges) of algorithmic decision-making: A call for action on the long-term societal effects of 'datification'' (2015) 24 Journal of Strategic Information Systems 3, 6; The European Consumer Organization, 'AI Rights for Consumers' (Report) (2019) <https://www.beuc.eu/publications/beuc-x-2019-063_ai_rights_for_consumers.pdf> accessed 20 June 2021. Page 5.

28 The White House (n 14), p. 46 and 51; Council of Europe (n 12), p. 26; European Union Agency for Fundamental Rights, '#BigData: Discrimination in data-supported decision making' (Report) (2018) Doi:10.2811/343905, 2; Borgesius (n 8) 7; Philipp Hacker, 'Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies against Algorithmic Discrimination under EU Law' (Pre-print version) (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3164973&download=yes> accessed 20 June 2021. Page 43; European Union Agency for Fundamental Rights, 'Getting the Future Right-Artificial Intelligence and Fundamental Rights' (2020) Doi:10.2811/774118, 68-74; the proposed AI Act (n 4) 21.

In fact, AI systems may carry potential risks for violation of fundamental rights. However, these risks can be actualized with the implementation of these systems by people[29]. Thus, the terminology of 'AI-related discrimination', which makes room for the recognition of human impact on these types of discrimination, is preferred in this paper to refer to discrimination that occurs as a result of the implementation and application of AI systems by people[30].

The nature of the AI systems and the fields in which they are utilized requires the application of differentiation techniques such as classifications, clustering, and categorizations. Since AI systems are mostly "black boxes[31]", AI-based decision-making procedures relying on said differentiation techniques being opaque[32]. Therefore, it is difficult to detect whether these decisions are based on discriminatory reasons under the disguise of differentiation techniques[33]. If the discriminatory characteristic of an AI-based decision-making process cannot be proven, legal tools and mechanisms for the protection of the right to non-discrimination cannot be activated. In order to understand underlying reasons for the AI-related discrimination and fulfil this burden of proof, Barocas and Selbst's explanations regarding which primary steps of AI-based decision-making may lead to discriminatory outcomes can be useful[34][35]. These steps, which are the definition of target variable and class labels, labelling and collection of training data, using feature selection and proxies, and how they can cause AI-related discrimination risks are explained in the subsequent paragraphs.

29 Jon Kleinberg et al., 'Discrimination in the Age of Algorithms' (2018) 10 Journal of Legal Analysis 113, 137; Benjamin Wagner et al., 'Algorithms and human rights. Study on the human rights dimensions of automated data processing techniques and possible regulatory implications' (Study Report) (DGI(2017)12) (2018) <https://rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5> accessed 20 June 2021. Page 8.

30 There are other denominations in the literature regarding these discrimination risks, such as digital discrimination or algorithmic discrimination. Maddelena Favaretto, Eva De Clercq and Bernice Simone Elger, 'Big Data and discrimination: perils, promises and solutions. A systematic review' (2019) 6 Journal of Big Data <https://doi.org/10.1186/s40537-019-0177-4> accessed 20 June 2021; Raphaële Xenidis, 'Tuning EU equality law to algorithmic discrimination: Three pathways to resilience' (2020) 27 6 Maastricht Journal of European and Comparative Law. However, this paper prefers the term "AI-related discrimination" since it is wide enough to cover all discrimination risks that have a relation with AI systems.

31 Bathaee (n 9), 893; European Commission's High-Level Expert Group on Artificial Intelligence, 'A Definition of AI: Main Capabilities and Disciplines' (2019) (Report) <https://digital-strategy.ec.europa.eu/en/library/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines> accessed 20 June 2021. Page 5.

32 Epistemic opacity has been an unavoidable problem in computer science. Users do not (cannot) know every (or epistemically relevant) element of the computer processes between input and output due to their cognitive inadequacy. Paul Humphreys, **'**The philosophical novelty of computer simulation methods' (2008) 169 Synthese 615. <https://doi.org/10.1007/s11229-008-9435-2> accessed 20 June 2021. Page 618-619. This problem aggravated with the emergence of new AI techniques such as ML.

33 Borgesius (n 8), 10.

34 Solon Barocas and Andrew D. Selbst, 'Big Data's Disparate Impact' (2016) 104 California Law Review 671, 677-694.

35 Similar to Barocas and Selbst (n 34), David Danks and Alex John London, 'Algorithmic Bias in Autonomous Systems' (2017) IJCAI'17: Proceedings of the 26th International Joint Conference on Artificial Intelligence 4691-4697 provides a taxonomy of reasons for AI-related discrimination as follows: training data bias, algorithmic focus bias, algorithmic processing bias, transfer context bias and interpretation bias. For the meta-analysis of studies explaining different reasons for AI-related discrimination, see Favaretto, De Clercq, and Elger (n 30), 13. For another taxonomy, see Kleinberg et al. (n 29), 139 ff.

Defining target variables and class labels[36] is required for the identification of a problem in AI-based decision-making procedures. For some decisions, such as spam filtering or fraud detection, these definitions are easier due to the binary nature of the categories: spam or not spam, fraud or not fraud. In contrast, some decisions require data engineers to define target variables from scratch and create new classes. For instance, it is exceptionally subjective to determine criteria[37] which measures the creditworthiness of a person. In the same vein, the definition of the best candidate for a job is a creative (artistic) task for data engineers as well as employers[38]. Therefore, subjectivity regarding definitions of target variables and class labels for these types of decisions may cause disproportionate adverse effects on some protected groups[39].

Secondly, the features of training data may lead to discrimination in AI decision-making since training data shape the model. Then, the model creates certain outcomes. A data set may be biased because of defective data collection that leads to incorrect, partial, non-representative or over-representative data[40] or biased data labelling based on biased prior decisions. If the training data is biased as a result of these reasons, the model based on this data will be biased as well.[41] Thus, decisions which are compatible with the right to non-discrimination cannot be expected from these AI systems that are supplied with biased training data[42].

Another AI decision-making step that can lead to discrimination is feature selection. This is the process of determining categories of data that will be considered (focused, weighted) for the decision-making[43]. These categories should be determined sufficiently in detail. Otherwise, necessary distinctions cannot be discovered in the process of AI decision-making. This may cause exclusion of certain people because of over-generalization of the representations. For example, AI systems may attribute more value to having graduated from certain reputable colleges instead of more job specific qualifications in recruitment decisions. If disproportionately fewer people from protected classes graduated from these reputable colleges, these people may systemically be excluded in the employment process because of the irrelevant or unelaborate feature selection[44].

36 The target variable is "*what data miners are looking for.*" And, class labels' role is to "*divide all possible values of the target variable into mutually exclusive categories."* Barocas and Selbst (n 34), 678.

37 Barocas and Selbst (n 34), 715.

38 Raphaële Xenidis and Linda Senden, 'EU non-discrimination law in the era of artificial intelligence: Mapping the challenges of algorithmic discrimination' in Ulf Bernitz et al. (eds.), *General principles of EU law and the EU digital order* (Kluwer Law International 2020) 151 ff.

39 Barocas and Selbst (n 34), 677-680.

40 Barocas and Selbst (n 34), 684 and 687; European Union Agency for Fundamental Rights (n 28, 2018), 5.

41 Barocas and Selbst (n 34), 681-682; Danks and London (n 35), 4692.

42 A specific manifestation of this reason is the "feedback loop". These occur when an AI system with learning ability uses its biased outputs as its inputs that generate new biased outputs in future operations. Hence, discrimination is perpetuated and reinforced. Xenidis (n 30), 740.

43 Danks and London (n 35), 4693.

44 Barocas and Selbst (n 34), 688-689.

The existence of proxies for class-membership is yet another problem for AI-based decision-making[45]. Criteria for rational and well-informed decision-making may happen to bring proxies for a class membership since membership of a protected class may be encoded in another piece of data[4647]. Consideration of these factors may cause indirect discrimination of people from protected classes, although determination of these criteria aims to make a rational and well-informed assessment[48]. Exclusion of certain factors, which may serve as a proxy for protected classes, from AI-based decision-making process may not guarantee the mitigation of AI-related discrimination[49].For instance, exclusion of race and ten other variables, which may serve as a proxy for race, does not diminish the discriminatory treatment between different races in terms of credit-riskiness assessment[50]. Therefore, various ex-ante and ex-post requirements[51] should be stipulated by the laws and regulations instead of mere exclusion of certain factors from the AI-based decision-making processes[52].

Apart from the abovementioned problems, detection and mitigation of AI-related discrimination risks become complicated because of proof requirements, masking techniques, automation bias, technical and legal inabilities, inadequate access to data and code, and the requirement of actual world implementations. These factors are explained in the subsequent paragraphs.

The inclination of AI systems to cause indirect discrimination[53] requires closer monitoring and stronger proof since detection and prevention of indirect discrimination is more difficult than direct discrimination. Hence, proof of a seemingly neutral rule or decision, which disproportionally affects a protected group of people, is required. For instance, an AI system may learn from previous loan applications data sets

45 Kleinberg et al. (n 29), 137.

46 It is called "redundant encodings". Cynthia Dwork et al., 'Fairness Through Awareness, Proceedings of the 3rd Innovations in Theoretical Computer Science Conference' (2012) ITCS '12 (Association for Computing Machinery) 214, 226.

47 Devin G. Pope and Justin R. Sydnor, 'Implementing Anti-Discrimination Policies in Statistical Profiling Models' (2011) 3 American Economic Journal: Economic Policy, 206.

48 Barocas and Selbst (n 34), 691-692. For authentic examples of proxy discrimination in different areas of the private sector, see Part IV.

49 Bundesanstalt für Finanzdienstleistungsaufsicht, 'Big data meets artificial intelligence: Challenges and implications for the supervision and regulation of financial services' (2018) (Study) <https://www.bafin.de/SharedDocs/Downloads/EN/dl_bdai_studie_en.html> accessed 20 June 2021. Page 40; European Union Agency for Fundamental Rights (n 28, 2018), 9. It is also claimed that censoring certain data may obstruct the detection of biases and discriminations in AI-based decision-making systems. Betsy Anne Williams et al., 'How Algorithms Discriminate Based on Data they Lack: Challenges, Solutions, and Policy Implications' (2018) 8 Journal of Information Policy 78, 79; European Union Agency for Fundamental Rights (n 28, 2018), 9.

50 Talia B. Gillis and Jan L. Spiess, 'Big Data and Discrimination**'** (2019) 86 The University of Chicago Law Review 459, 460 and 469.

51 Summary and assessment of methods to mitigate proxy discrimination risks, see Anya E. R. Prince and Daniel Schwarcz, 'Proxy Discrimination in the Age of Artificial Intelligence and Big Data' (2020) 105 Iowa Law Review 1257, 1300-1317.

52 For a proposed method that reaches a compromise between fairness and predictive accuracy without excluding certain data, see Pope and Sydnor (n 47), 207 ff.

53 Council of Europe (n 12), 27-28; Hacker (n 28), 9 and 11; Sandra Wachter, Brent Mittelstadt and Chris Russell, 'Why Fairness Cannot Be Automated: Bridging The Gap Between EU Non-Discrimination Law And AI' (Draft) (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547922> accessed 20 June 2021. Page 45.

that people from certain neighbourhoods are more likely to default on their loan. Therefore, this system may consider postal codes of these areas as negative factors for the prediction of future defaults. If these neighbourhoods correlate with racial origin, it may happen to cause discrimination against people from a protected group[54].

AI-based decision-making systems may also provide tools which mask intentional discrimination[55]. Users of AI-based decision-making systems may intentionally utilize more complex and remote proxies to get their desired decisions in a discriminatory manner. Therefore, policies against AI-related discrimination should consider intentional and unintentional types of discriminations together[56].

Automation bias and the technical and legal difficulty of examination of AI systems aggravate the elimination of AI-related discrimination. Wagner argues that "*the human being may often be led to 'rubber stamp' an algorithmically prepared decision, not having the time, context or skills to make an adequate decision in the individual case*.[57]" Moreover, people have a tendency to follow computer-generated advice since they believe that this advice is neutral and unbiased[58]. In fact, this belief causes "automation bias.[59]" Therefore, if an AI system is utilized in the decision-making process, human intervention or oversight do not always guarantee prevention or rectification of AI-related discrimination.

Detection of AI-related discrimination also requires examination of the code or algorithm while it is processing real world data. This requirement involves two problems. First of all, private organizations tend to withhold their AI systems because of intellectual property, trade secrets or company bylaws[60]. Therefore, it is not easy to examine these AI systems without compulsory regulations. Second, the examination of AI systems in simulated labs does not provide adequate results for complex systems. Thus, these AI systems should be examined while real users are using them[61].

54 Borgesius (n 8), 13.

55 Barocas and Selbst (n 34), 692-693.

56 Nevertheless, AI systems may cause unintentional discrimination more than intentional discrimination because of their complex structure. Borgesius (n 8), 19.

57 Wagner, et al. (n 29), 8.

58 Council of Europe (n 12), 38; European Union Agency for Fundamental Rights (n 28, 2018), 5.

59 Borgesius (n 8), 8 footnote 6. Article 14(4)(b) of the proposed AI Act (n 4).

60 Balázs Bodo et al., 'Tackling the algorithmic control crisis-the technical, legal, and ethical challenges of research into algorithmic agents' (2017) 19 Yale Journal of Law & Technology 133, 175; European Union Agency for Fundamental Rights (n 28, 2018), 7; Aaron Rieke, Miranda Bogen and David G Robinson, 'Public scrutiny of automated decisions: Early lessons and emerging methods' (Upturn and Omidyar Network Report) (2018) <https://www.data.govt.nz/assets/Uploads/Public-Scrutiny-of-Automated-Decisions.pdf> accessed 20 June 2021. Page 19; Borgesius (n 2), 1583; Wachter, Mittelstadt and Russell (n 53), 10.

61 Rieke, Bogen and Robinson (n 60), 19; Susanne Beck et al., 'Künstliche Intelligenz und Diskriminierung Herausforderungen und Lösungsansätze' (Whitepaper from Plattform Lernende Systeme) (2019) <https://www.plattform-lernende-systeme.de/publikationen-details/kuenstliche-intelligenz-und-diskriminierung-herausforderungen-und-loesungsansaetze.html> accessed 20 June 2021. Page 9.

IV. Selected Risky Fields for AI-Related Discrimination in the Private Sector

A. Employment

The recruitment and placement of employees requires a continuous assessment and selection process. Employers aim to employ the best candidate for the vacant positions. Therefore, they attempt to match the qualifications of the candidates with the requirements of the jobs. After recruitment, employers are required to make decisions regarding the promotion of the staff or termination of employment contracts. For a long time, humans carried out these processes. However, the integration of AI systems into these processes has dramatically increased[62] because AI systems conduct these processes faster and better than humans. As a consequence, these processes have dramatically transformed with the integration of AI systems[63].

Despite the advantages of utilizing AI systems in employment and placement, these systems may cause discrimination because of the underlying systematic reasons explained above[64]. For instance, it was detected that an AI system used by Amazon to screen job applications was discriminating against women. The reason behind this discrimination was the system's self-learning from previous biased data[65]. In other words, the AI system was reinforcing the prior pattern of discrimination.

Sometimes, even the distribution of job advertisements by AI systems may cause discriminatory effects. According to a research experiment, Facebook distributes job advertisements among its users in a way that may cause the ascription of stereotypical affinities to specific groups, such as disproportionate distribution of cashier positions to female users and taxi driver positions to black users. Similarly, another study shows that an AI-based job advertisement system, which is explicitly designed as gender neutral, delivered an advertisement promoting job opportunities in the science, technology, engineering and math fields to men more than women[66]. These distributions may have discriminatory effects, such as exclusion from some parts of the labour market and information, on people from protected classes[67].

62 Pauline T. Kim, 'Data-Driven Discrimination at Work' (2017) 58 3 William & Mary Law Review 857, 860.

63 According to a study, 72% of the resumes uploaded to commonly used applicant tracking systems (ATS) are eliminated from the recruitment process before a human reviews them. Accesswire, '72% of Resumes are Never Seen by Employers' (16 February 2016) <https://www.accesswire.com/436847/72-of-Resumes-are-Never-Seen-by-Employers> accessed 20 June 2021.

64 For underlying reasons of AI-related discrimination risks, see Part III-2.

65 Jeffrey Dastin, 'Amazon scraps secret AI recruiting tool that showed bias against women' *Reuters* (11 October 2018) <https://www.reuters.com/article/us-amazon-com-jobs-automation-in...-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G> accessed 20 June 2021.

66 Anja Lambrecht and Catherine E. Tucker, 'Algorithmic Bias? An Empirical Study of Apparent Gender-Based Discrimination in the Display of STEM Career Ads' (2019) 65 7 Management Science 2966 ff.

67 Muhammad Ali et al., 'Discrimination Through Optimization: How Facebook's ad Delivery Can Lead to Skewed Outcomes' (2019) Proceedings of the ACM on Human-Computer Interaction. <https://arxiv.org/pdf/1904.02095.pdf> accessed 20 June 2021. Page 2.

Although criteria for employment may seem rational and reasonable at first glance, applying these criteria by AI systems in employment processes may cause indirect discrimination due to proxies. Therefore, employers who realize these adverse effects may prefer to remove these criteria from their selection process. For instance, it is believed that employee engagement and retention positively correlate with the distance between the home and the workplace. However, some firms do not consider this criterion in their AI-based employment decision-making systems since the distance from the workplace and living in certain neighbourhoods may also serve as a proxy for people from protected classes, especially in the US[68].

B. Banking

Credit institutions determine whether they will provide credit or how much credit they will provide to a person by assessing the creditworthiness of the relevant person. Income, performance of prior loans, solvency and property ownership are some of the criteria used in creditworthiness assessment. If humans carry out this the assessment, it may take a very long time, as was the case until recently. Additionally, humans' limited cognitive capacity prevents assessment of complex data together. In today's credit market, thousands of complicated transactions occur every second. Hence, credit institutions employ AI systems to assess the creditworthiness of people fast enough to catch up with the speed of the market. Thanks to their velocity, it is evident that AI systems are better at complex data assessment for making credit decisions[69].

Notwithstanding the advantages of utilization of AI systems in credit transactions mentioned in the previous paragraph, the risk of AI-related discrimination continues to be present[70]. The use of AI-based decision-making systems "*may only shift the locus of discrimination from the bank manager's desk to the programmer's computer screen or to the data scientists' training sets*[71]" since human programmers and data engineers may consciously or unconsciously reflect their biases in the operation and outcomes of AI systems.

It was found in a landmark study that AI-based credit services assign extra interest in mortgage transactions of people from protected classes[72]. Another study conducted

68 Don Peck, 'They're Watching You at Work' *Atlantic* (December 2013) <http://www.theatlantic.com/magazine/archive/2013/12/theyre-watching-you-at-work/354681> accessed 20 June 2021.

69 Bundesanstalt für Finanzdienstleistungsaufsicht, (n 49), 78.

70 Bundesanstalt für Finanzdienstleistungsaufsicht, (n 49), 82. According to a recent survey conducted among global financial sector leaders, "*between 48% and 58% of all respondents believe that mass AI adoption would exacerbate market-level risks"* of privacy breaches, biases and discrimination in financial markets. World Economic Forum, 'Transforming Paradigms A Global AI in Financial Services Survey' (2020) (Report) <http://www3.weforum.org/docs/WEF_AI_in_Financial_Services_Survey.pdf> accessed 20 June 2021. Page 64.

71 Kristin Johnson, Frank Pasquale and Jennifer Chapman, 'Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Innovation' (2019) 88 2 Fordham Law Review 499, 506.

72 Robert Bartlett et al., 'Consumer-Lending Discrimination in the FinTech Era' (National Bureau of Economic Research Working Papers 25943) (2019) 21.

in the US asserts that although utilization of AI systems for lending decisions may increase the predictive accuracy of the decision-making procedures, people from certain groups such as Blacks and White Hispanics, are disproportionately less likely to benefit from the adoption of these systems[73]. Similarly, it is claimed that Apple's credit application algorithm discriminates against women[74]. All of these examples indicate that the utilization of AI-based decision-making in the banking sector has a significant potential for discrimination.

C. Advertisement and Pricing

In capitalist understanding, profit maximization is the primary goal of undertakings. To reach this goal, they have to introduce their goods and services to their target group via advertisement. Additionally, they have to optimize the price of their goods and services considering the supply and demand equilibrium of the specific market. As a result of reaching relevant customers and determining optimum price simultaneously, undertakings maximize their profit. AI-based decision-making systems can be utilized for the improvement of these processes of advertisement and pricing.

The recent dramatic increase in electronic commerce contributes to the success of AI systems by feeding these systems with big data. People's prior shopping transactions, products waiting in their online shopping baskets, their favourite items, their comments and reviews and even how much time they spent on a page of a specific item or how long their mouse cursor stays on a particular product generate big data. Thanks to the processing of these big data by AI systems, undertakings may determine their target group more precisely than ever[75]. For example, Target's AI system can detect pregnant customers (even before these customers find out about their pregnancy!) by reviewing their shopping items and send them pregnancy or baby-related advertisements[76].

Apart from its benign uses, the utilization of AI systems in advertising and pricing may lead to discriminatory outcomes. For example, research revealed that Facebook

73 Andreas Fuster et al., 'Predictably Unequal? The Effects of Machine Learning on Credit Markets' (2020). *SSRN* <https://ssrn.com/abstract=3072038> accessed 20 June 2021. Page 53-54.

74 Neil Vigdor, 'Apple Card Investigated After Gender Discrimination Complaints' *The New York Times* (10 November 2019) <https://www.nytimes.com/2019/11/10/business/Apple-credit-card-investigation.html> accessed 20 June 2021; Leo Kelion, 'Apple's 'sexist' credit card investigated by US regulator' *BBC* (11 November 2019) <https://www.bbc.co.uk/news/business-50365609> accessed 20 June 2021.

75 The White House (n 14), 40; Newell and Marabelli (n 27), 5.

76 Kashmir Hill, 'How Target Figured Out A Teen Girl Was Pregnant Before Her Father Did' *Forbes* (16 February 2012) <https://www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/?sh=415c8bfe6668> accessed 20 June 2021; The European Consumer Organization (n 26), 8.

provides advertisers with the opportunity to exclude certain races[77, 78] and ages[79] from advertisement target groups. Another research revealed that Google displays better job advertisements to male users than female users[80]. These examples show that AI-based advertisement may debar certain groups of people from certain goods, services, and professional opportunities.

Moreover, the processing of big data regarding customer behaviours may provide predictions regarding customers' reaction to price changes. Hence, AI systems utilized in pricing may classify the customers according to their price sensitivity[81]. By using this information, the undertakings can charge different prices for the same product[82]. For example, it was found that a company providing online tutoring services charged different prices to customers from different racial backgrounds. Because of this price differentiation, people with Asian background paid more for the same service[83]. Another example of AI-related discriminatory pricing is the consideration of a customer's place of residence in pricing. It was claimed that people residing in rural areas are charged more money than people living in large cities for the same product by some online shops in the US[84]. The reason behind this price differentiation is the lack of competition or difficulty to reach physical shops in rural areas. Since rural areas are inhabited by impoverished people, this kind of price differentiation may cause poor people to pay more for the same products on average. Therefore, it is the reinforcement of social inequality and discrimination as well[85].

77 Julia Angwin, Ariana Tobin and Madeleine Varner, 'Facebook (still) letting housing advertisers exclude users by race' *ProPublica* (21 November 2017) <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin> accessed 20 June 2021.

78 The word 'race' is used in this paper to ensure consistency with the terminology of legal sources. It should be noted that the concept of race is a social (human-invented) construct instead of a biologically proven phenomenon.

79 Julia Angwin, Noam Scheiber and Ariana Tobin, 'Dozens of companies are using Facebook to exclude older workers from job ads' *ProPublica* (20 December 2017) <https://www.propublica.org/article/facebook-ads-age-discrimination-targeting> accessed 20 June 2021.

80 However, researchers underlined that they could not detect the reasons for these outcomes since the online advertisement system with its various components such as Google, advertisers, websites, and users provide limited visibility for the researchers. Amit Datta, Michael Carl Tschantz and Anupam Datta, 'Automated Experiments on Ad Privacy Settings A Tale of Opacity, Choice, and Discrimination' (2015) Proceedings on Privacy Enhancing Technologies <https://www.andrew.cmu.edu/user/danupam/dtd-pets15.pdf> accessed 20 June 2021. Page 1 and 13.

81 The European Consumer Organization, 'The Use Of Big Data And Artificial Intelligence In Insurance' (Report) (2020) <https://www.beuc.eu/publications/beuc-x-2020-039_beuc_position_paper_big_data_and_ai_in_insurances.pdf> accessed 20 June 2021. Page 6.

82 Bundesanstalt für Finanzdienstleistungsaufsicht, (n 49), 42; Borgesius (n 8), 16.

83 Julia Angwin, Surya Mattu and Jeff Larson, 'The tiger mom tax: Asians are nearly twice as likely to get a higher price from Princeton Review'. *ProPublica* (1 September 2015) <https://www.ProPublica.org/article/asians-nearly-twice-as-likely-to-get-higher-price-from-princeton-review> accessed 20 June 2021.

84 Jennifer Valentino-Devries, Jeremy Singer-Vine and Ashkan Soltani, 'Websites vary prices, deals based on users' information' *Wall Street Journal* (24 December 2012) <https://www.wsj.com/articles/SB10001424127887323777204578189391813881534> accessed June May 2021.

85 Borgesius (n 8), 36.

D. Insurance

The insurance sector is essentially based on the principle of differentiation between risky and non-risky insureds[86]. In order to predict the risk levels and determine respective premiums, the insurers have always relied on the statistical analysis of data[87] regarding personal characteristics and habits of insureds, such as smoking, alcohol consumption, age or occupation[88], and properties of the insured events. These data were in a limited and simple nature in terms of volume and diversity since they were taken directly from the customers. Today, AI systems are fuelled with big data collected through various technological sources[89]. Since the processing of big data provides a larger amount of granular data about the customers, AI systems can perform predictive risk analysis for insurers far better than traditional statistics [90]. Insurers may also determine optimum premiums due to more granular customer segmentation[91]. Apart from the core processes of insurance such as risk assessment and price optimization, AI systems can be used in other phases of the insurance process such as advertising, continuous customer communication, claims handling and fraud detection[92].

Although AI systems may benefit insurers in various ways[93], utilization of AI systems in the insurance sector may pose new problems. AI-related discrimination risk is one of these nascent issues[94]. Although discrimination in the insurance sector is a long-standing problem, the AI-based decision-making process may aggravate this problem in terms of its scale and speed[95]. Due to this process, people with certain characteristics and habits may be excluded from insurance coverage because either the insurer does not want to insure these people, or these people cannot afford high premiums[96]. As a result, an AI-based decision-making process with excessive

86 Ronen Avraham, 'Discrimination and Insurance' in Kasper Lippert-Rasmussen (ed.), *The Routledge Handbook of the Ethics of Discrimination*, (Routledge, UK 2018) 335 ff.; Gillis and Spiess (n 50), 459; Borgesius (n 2), 1584.

87 International Association of Insurance Supervisors, 'Issues Paper on the Use of Big Data Analytics in Insurance' (2020) <https://www.iaisweb.org/page/supervisory-material/issues-papers//file/89244/issues-paper-on-use-of-big-data-analytics-in-insurance> accessed 20 June 2021. Page 10; Michele Loi and Markus Christen, 'Choosing how to discriminate: navigating ethical trade-offs in fair algorithmic design for the insurance sector' (2021) Philosophy & Technology <https://doi.org/10.1007/s13347-021-00444-9> accessed 20 June 2021. Page 1.

88 Frederick Schauer, 'Statistical (and non-statistical) discrimination' in Kasper Lippert-Rasmussen (ed.), *The Routledge Handbook of the Ethics of Discrimination*, (Routledge, UK 2018) 42, 51.

89 The White House (n 14), 41; Newell and Marabelli (n 27), 4; European Union Agency for Fundamental Rights (n 28, 2018), 2.

90 Rick Swedloff, 'Risk classification's Big Data (r)evolution' (2014) 21 Connecticut Insurance Law Journal, 339, 341; International Association of Insurance Supervisors (n 87), 7.

91 Herb Weisbaum, 'Data Mining Is Now Used to Set Insurance Rates; Critics Cry Foul' *CNBC* (16 April 2014) <https://www.cnbc.com/2014/04/16/data-mining-is-now-used-to-set-insurance-rates-critics-cry-fowl.html#:~:text=You%20might%20not%20like%20the,to%20provide%20you%20that%20coverage> accessed 20 June 2021; International Association of Insurance Supervisors (n 87), 8; Loi and Christen (n 87), 2.

92 International Association of Insurance Supervisors (n 87), 14; Loi and Christen (n 87), 2.

93 Swedloff (n 90), 341-342; Bundesanstalt für Finanzdienstleistungsaufsicht, (n 49), 103.

94 The European Consumer Organization (n 81), 3; Loi and Christen (n 87), 23.

95 International Association of Insurance Supervisors (n 87), 12.

96 Bundesanstalt für Finanzdienstleistungsaufsicht, (n 49), 126; International Association of Insurance Supervisors (n 87), 19; The European Consumer Organization (n 81), 3.

fragmentation of customer groups and better predictions may endanger the risk-pooling function of the insurance[97] by excluding people from insurance coverage[98].

Direct discrimination can generally be mitigated due to the removal of certain factors such as race, gender or religions of the insurance applicants from the decision-making process. However, indirect discrimination via proxies is a serious problem for AI-based decision-making in the insurance sector since excluding some criteria from the decision-making process does not eliminate indirect discrimination risks. For instance, a journalistic investigation claims, "*men named Mohammed were charged almost £1,000 more for insurance than those called John.*[99]" Similarly, it was revealed that the postcode of the insurance applicants may dramatically affect the calculation of the insurance premium[100]. The UK Financial Conduct Authority discovered that some insurance firms use their or third party datasets "*within their pricing models which may contain factors that could implicitly or potentially explicitly relate to race or ethnicity.*[101]" As indicated in these cases, AI-based decision-making systems may calculate different premiums according to the specific information regarding the insurance applicant, such as name and postcode. Since this information may serve as a proxy for the race, gender, or religion of the applicants, people from protected classes may be exposed to AI-related discrimination[102].

Apart from AI-related discrimination caused by proxies, AI-based decision-making systems may reproduce human biases or historical discrimination in the insurance sector. If an AI system is fed with data regarding previous insurance transactions, this AI system may reproduce discriminatory outcomes. For instance, insurers were charging more premiums for African-Americans since race-based premium calculation was not prohibited until the passage of the Civil Rights Act in 1964 in the US[103]. If an AI system uses the last 250 years' insurance records of the US as the training data, it is an inevitable outcome that this AI system will calculate more premiums for African-American insurance applicants. Even the race of the applicant

97 Borgesius (n 8), 36; The European Consumer Organization (n 81), 8.

98 International Association of Insurance Supervisors (n 87), 8.

99 Ruqaya Izzidien, 'Higher insurance if you're called Mohammed? That's just the start of institutionalized Islamophobia' *NewStatesman* (23 January 2018) <https://www.newstatesman.com/politics/uk/2018/01/higher-insurance-if-you-re-called-mohammed-s-just-start-institutionalised> accessed 20 June 2021; Natalie Corner, 'Revealed: How your name, your ethnicity, and even your e-mail address could be adding hundreds of pounds to your car insurance premium' *Dailymail* (29 June 2018) <https://www.dailymail.co.uk/femail/article-5896561/How-email-address-add-hundreds-car-insurance-premium.html> accessed 20 June 2021; Harry Kretchmer, 'Insurers 'risk breaking racism laws'' *BBC* (9 February 2018) <https://www.bbc.com/news/business-43011882> accessed 20 June 2021.

100 Harvey Jones, 'When the wrong postcode puts insurance out of your reach' *The Guardian* (30 October 2016) <https://www.theguardian.com/money/2016/oct/30/wrong-postcode-puts-insurance-out-of-reach> accessed 20 June 2021.

101 Financial Conduct Authority, 'Pricing practices in the retail general insurance sector: Household insurance' (2018) <https://www.fca.org.uk/publication/thematic-reviews/tr18-4.pdf> accessed 20 June 2021. Page 15.

102 The European Consumer Organization (n 81), 4 and 12.

103 Jim Probasco, 'The Insurance Industry Confronts Its Own Racism' *Investopedia* (1 September 2020) <https://www.investopedia.com/race-and-insurance-5075141#citation-9> accessed 20 June 2021.

disregarded in the process, proxies may lead the AI system to designate African-American applicant to charge more premium.

Last but not least, it should be noted that the consequences of AI-generated predictions in the insurance sector are different from the consequences in other sectors, such as medical diagnosis or sentencing[104], since the increase of the predictive accuracy only in the insurance sector may dramatically scale up the AI-related discrimination risks, as it is explained above. Therefore, there should be a trade-off between predictive accuracy and non-discrimination in the insurance sector. Insurers are required to compromise between accuracy and non-discrimination[105] by implementing certain techniques that may mitigate AI-related discrimination risks.

V. Legal Safeguards in European Law Against AI-Related Discrimination

A. Current Laws and Regulations

1. General

General provisions against discrimination exist in different international treaties and conventions that members of the EU are party to [106]. Also, Article 14 of the European Convention on Human Rights[107] ("**ECHR**") states:

> "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*[108]"

With similar wording, Article 21(1) of the European Charter of Fundamental Rights ("**ECFR**")[109] prohibits

> "*any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.*"

104 Loi and Christen (n 87), 2.

105 Loi and Christen (n 87), 8.

106 Article 7 of the Universal Declaration of Human Rights, UNGA Res 217/A (10 December 1948); Article 26 of the International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49; Article 21 of the Charter of Fundamental Rights of the European Union, 2012/C 326/02 OJ C 326, [2012].

107 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 20 June 2021.

108 Article 1 of Protocol 12 to the European Convention on Human Rights extends the scope of the protection against discrimination from "*rights and freedoms set forth in this Convention"* to "*any right set forth by law."* Nevertheless, "*Article 1 protects against discrimination by public authorities. The article is not intended to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination in relations between private persons.*" Council of Europe, 'Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms' (2000) <https://rm.coe.int/09000016800cce48> accessed 20 June 2021. Page 5-6.

109 Charter of Fundamental Rights of the European Union (n 106).

Although the ECFR provides the widest scope for non-discrimination laws ("*any discrimination on any ground*"), it only applies to EU public bodies and member states[110]. Therefore, relations in the private sector, which this paper focuses on, are not affected directly by these primary laws. Additionally, abstract provisions of these laws regarding the right to non-discrimination require concrete secondary legislation that provides detailed and concrete information about the application.

Secondary sources of EU law, such as EU consumer law, EU competition law and freedom of information law, may be used as legal tools to prevent AI-related discrimination, although these fields are practically untested for this purpose as of yet[111]. On the other hand, EU non-discrimination laws and EU data protection laws may be more promising secondary sources of EU law due to their close connection with the context[112]. Thus, the subsequent paragraphs discuss whether these laws may provide an efficient legal structure to prevent risks arising from AI-related discrimination.

2. EU Non-discrimination Laws

EU non-discrimination laws mainly consist of four directives, the Racial Equality Directive (2000/43/EC), the Employment Equality Directive (2000/78/EC), the Gender Goods and Services Directive (2004/113/EC) and the Recast Gender Equality Directive (2006/54/EC)[113]. There are two main problems regarding the implementation of these directives against AI-related discrimination in the private sector. First of all, the ability to invoke these directives' is restricted in the private sector. In other words, these directives may be applied to private relations if, and only if, they are transposed into relevant national laws. Secondly, these directives do not contain direct provisions for AI-related discrimination risks because only human discrimination is considered in the preparation phase of these directives[114]. Due to these problems, general explanations regarding these directives, which are abundant in the literature, are not provided below. Instead of this, the suitability of the current EU non-discrimination laws as tools for mitigating AI-related discrimination is examined, and suggestions for necessary amendments and new legislations are presented in the subsequent paragraphs.

110 Wachter, Mittelstadt and Russell (n 53), 13.

111 Borgesius (n 8), 26; Borgesius (n 2), 1582.

112 Borgesius (n 2), 1576.

113 Although there is a proposal for a horizontal directive that covers all discrimination grounds, it has not been legislated yet. For the proposal see, European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181} /* COM/2008/0426 final - CNS 2008/0140 */.

114 The European Consumer Organization (n 27), 5; The European Consumer Organization (n 81), 12; Xenidis (n 30), 738. Similarly, the anti-discrimination law in the United States is criticized as well because it does not provide the necessary tools to address AI-related discrimination. Barocas and Selbst (n 34), 694; Kroll et al. (n 14), 636.

Although AI systems generate and process complex and composite classifications, EU non-discrimination law is based on a 'single axis' discrimination model. In other words, EU non-discrimination law does not explicitly address intersectional discrimination[115]. However, the nature of AI-related discrimination is so complex and compounded that it may mostly lead to intersectional discrimination[116]. Regulations, auditing authorities and de-biasing mechanisms may not catch the AI-related intersectional discrimination if it is not considered explicitly in legislation[117]. For instance, black women can be victims of intersectional discrimination based on race and gender[118]. According to a research, around one-fourth of all discrimination in the EU is "*multiple in nature*.[119]" Therefore, ideal non-discrimination laws should capture the complex experience of discrimination to protect people from intersectional discrimination caused by the application of AI systems. Indeed, the EU non-discrimination law[120] is proposed to address intersectional discrimination caused by AI systems[121]. Additionally, the Gender Equality Strategy of the EU adapts disaggregation of data as the method to detect intersectional discrimination[122]. For example, a predictive AI system's accuracy would be evaluated via the partition of the data based on age, gender and intersection of age and gender, as well as the assessment of the aggregated data[123][124].

Sector-specific rules and their *raison d'être* should be considered in the preparation of laws and regulations[125]. Hence, AI-related discrimination risks in different sectors, such as employment, banking, advertising, and insurance, should be separately investigated to reveal the seriousness of the risks. Then, it should be decided whether it is necessary to improve current laws and regulations in the face of AI-related discrimination risks[126].

115 Xenidis (n 30), 741.

116 Xenidis (n 30), 739.

117 Xenidis (n 30), 741.

118 Xenidis (n 30), 739.

119 European Commission, 'Special Eurobarometer Discrimination in the EU in 2015' (Report) (2015).

120 For instance, it is recognized that "*women are often the victims of multiple discrimination*." Recital 14 of the Council Directive (EC) 2000/43 (n 23).

121 Xenidis (n 30), 738 and 742.

122 "*To get a complete picture of gender-based violence, data should be disaggregated by relevant intersectional aspects and indicators such as age, disability status, migrant status and rural-urban residence."* European Commission, 'A Union of Equality: Gender Equality Strategy 2020–2025' [2020] COM (2020) 152.

123 Xenidis (n 30), 741.

124 However, the CJEU rules that new categories of protected groups cannot be created by the combination of existing categories. For instance, the Court did not assess the combined effect of discrimination based on sexual orientation and age together. Case C443/15, *David L. Parris v Trinity College Dublin and Others* (Judgment of the Court (First Chamber) 24 November 2016).

125 For example, the balance between freedom of contract and protection of consumers should be considered in consumer transactions. Borgesius (n 8), 37; Borgesius (n 2), 1585.

126 Borgesius (n 8), 37.

Moreover, machine learning's reliance on statistical correlations and inferences is not compatible with the essentialist nature of the discrimination concept designated in the EU non-discrimination laws[127]. In order to comply with EU non-discrimination law, membership of a protected class can be disregarded as a factor in AI-based decision-making processes. Although it seems that membership of a protected class is not considered in the decision-making process, other factors may cause discrimination via serving as proxies. For instance, the 'distance to work' criteria in job applications may lead to discrimination since different neighbourhoods –particularly peripheries- can have different racial or socio-economic profiles[128]. Therefore, formalist compliance to EU non-discrimination law does not guarantee mitigation of AI-related discrimination risks, as it is explained above[129]. In order to mitigate proxy-based discrimination risks caused by AI systems, EU non-discrimination laws should stipulate manifold measures against AI-related discrimination risks as well as adapt structural interpretation of the protected grounds instead of an essentialist interpretation[130].

Lastly, the dynamic nature of the AI systems may lead to new discrimination risks that are not compatible with an exhaustive list of protected classes in the EU secondary non-discrimination laws[131]. Race, gender and sexual orientation are protected characteristics that are 'traditionally' protected by non-discrimination laws. However, AI systems with original data processing may invent new classes via differentiation[132]. For example, data processing may differentiate people according to their financial status or price sensitivity[133]. When these newly invented classes do not match with the characteristics of legally protected groups, non-discrimination laws cannot be applied[134]. Therefore, instead of or in addition to the exhaustive lists, general conditions for establishing protected classes should be determined and incorporated into the non-discrimination laws[135]. Hence, member states may utilize these conditions while they are transposing these EU laws into their national laws.

127 Xenidis (n 30), 745.

128 Peck (n 68); Borgesius (n 8), 29.

129 See Part III-2.

130 Xenidis (n 30), 738 and 748.

131 Borgesius (n 2), 1584; Wachter, Mittelstadt and Russell (n 53), 11; Xenidis (n 30), 738.

132 Scott R. Peppet, 'Regulating the Internet of Things: first steps toward managing discrimination, privacy, security, and consent' (2014) 93 Texas Law Review 85, 93; The White House (n 14), 53; Rodrigues (n 26), 3.

133 Borgesius (n 8), 35.

134 Borgesius (n 8), 35.

135 For a similar suggestion see, Christophe Lacroix, 'Preventing discrimination caused by the use of artificial intelligence' (Report of Committee on Equality and Non-Discrimination at Council of Europe) (2020) 16.

3. EU Data Protection Laws

EU data protection laws may provide some tools to protect people from AI-related discrimination risks. The main sources of data protection laws in the EU are EU's General Data Protection Regulation[136] ("**GDPR**") and Council of Europe's Data Protection Convention 108[137] ("**Modernised Data Protection Convention 108**").

The most relevant provision of the GDPR that may contribute to the mitigation of AI-related discrimination is Article 22. It prohibits fully automated decision-making, including profiling, if the decision has legal or "*similarly significant effects for the person*." A court decision or decision about entitlement for social grants or a contract cancellation decision are considered decisions with legal effects for the person[138]. Decisions about employment or credit applications may be considered decisions with similarly significant effects for the person[139]. However, the "*similarly significant effects*" concept is open to discussion. For example, it is not easy to decide whether personal pricing or targeted advertising pass the significant effect threshold. These decisions may pass the said threshold if they bar people from certain goods and services[140].

Decisions that meet the criteria of Article 22, paragraph 1 of the GDPR cannot be taken on a fully automated basis. However, decisions, which are necessary for the performance of or entering into a contract and authorized by EU or member state law to which the controller is subject, and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests or based on the data subject's explicit consent, are regarded as an exception[141]. Article 22 of the GDPR is criticized by scholars in terms of its effectiveness and comprehensiveness[142]. Many automated decisions may be out of the scope of Article 22. Even a superficial intervention (rubber stamping) by a human may bring a decision out of the scope of Article 22[143]. Human intervention in automated decision systems does not guarantee prevention or rectification of AI-related discrimination because of the automation bias[144].

136 Council Regulation (EC) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119.

137 Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data CM/Inf(2018)15-final [2018].

138 Borgesius (n 8), 23. Article 29 of the Data Protection Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 Wp251rev.01. [2018] 21.

139 Recital 71 of the General Data Protection Regulation 2016/679 (n 136).

140 Article 29 of the Data Protection Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 Wp251rev.01. [2018] (n 138), 22.

141 Article 22(2) of the General Data Protection Regulation 2016/679 (n 136); Article 29 of the Data Protection Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 Wp251rev.01. [2018] (n 138), 23.

142 Lilian Edwards and Michael Veale, 'Slave to the algorithm: Why a right to an explanation is probably not the remedy you are looking for' (2017) 16 Duke Law & Technology Review 18, 44; Sandra Wachter, Brent Mittelstadt and Chris Russell, 'Counterfactual explanations without opening the black box: automated decisions and the GDPR' (2018) 31 2 Harvard Journal of Law & Technology, 842, 880 ff.

143 Borgesius (n 8), 24.

144 See Part III-2.

Article 9(1)(c) of the Modernised Data Protection Convention 108 enables every individual "*to obtain, on request, knowledge of the reasoning underlying data processing where the results of such processing are applied to him or her.*" Thus, the Modernised Data Protection Convention 108 provides a more comprehensive "right to explanation" than GDPR since it does not require a decision, which is taken in a fully automated manner and has a significant effect[145].

Another promising tool against AI-related discrimination is the data protection impact assessment ("**DPIA**") that is required by the GDPR and the Modernised Data Protection Convention 108 for certain situations[146]. Article 35, paragraph 1 of the GDPR obliges controllers to conduct a DPIA if "*the processing is likely to result in a high risk to the rights and freedoms of natural persons.*" Moreover, if an organization takes decisions in a fully automated way and these decisions may "*produce legal effects concerning the natural person or similarly significantly affect the natural person*", the performance of a DPIA becomes obligatory according to Article 35 paragraph 3 of the GDPR. Similarly, Article 10(2) of the Modernised Data Protection Convention 108 requires controllers and processors to "*examine the likely impact of intended data processing on the rights and fundamental freedoms of data subjects prior to the commencement of such processing.*" A DPIA must involve the assessment of unfair or illegal discrimination risks[147]. Therefore, the performance of DPIA can be considered an ex-ante tool for the detection and mitigation of AI-related discrimination risks[148].

Despite the existence of some tools against AI-related discrimination, enforcement of data protection laws may not always create an effective result. Data protection laws apply to the processing of personal data when it is related to identifiable persons. Therefore, collective data processing such as predictive modelling is not in the scope of data protection laws[149]. Furthermore, the "right to explanation" provided by data protection laws may be of no use because of the lack of meaningful and incomprehensible explanations due to the AI systems' complexity and black box nature[150]. Hence, experts attempt to develop transparency-enhancing systems to provide meaningful and understandable explanations regarding the structure,

145 Borgesius (n 8), 24; Borgesius (n 2), 1580.

146 An impact assessment is defined as "*a tool used for the analysis of possible consequences of an initiative on a relevant societal concern or concerns, if this initiative can present dangers to these concerns, with a view to supporting informed decision-making whether to deploy this initiative and under what conditions, ultimately constituting a means to protect these concerns."* Dariusz Kloza et al., 'Data protection impact assessments in the European Union: complementing the new legal framework towards a more robust protection of individuals' (d.pia.lab Policy Brief) (2017) <https://cris.vub.be/files/32009890/dpialab_pb2017_1_final.pdf> accessed 20 June 2021. Page 1.

147 Borgesius (n 8), 22.

148 European Union Agency for Fundamental Rights (n 28, 2018), 8.

149 Borgesius (n 8), 24; Borgesius (n 2), 1581.

150 Jenna Burrell, 'How the machine 'thinks': understanding opacity in machine learning algorithms' (2016) Big Data & Society Doi:10.1177/2053951715622512, 4.

operation, and outcomes of AI systems[151]. In order to support these efforts, the feature of interpretability may be required for important automated decisions, such as credit applications and employment, taken in the private sector[152], as it is legally required in algorithmic trading[153].

B. A New Legal Safeguard Against AI-Related Discrimination: The Proposed AI Act

1. Legal Form, Preparation and Objectives of the proposed AI Act in terms of AI-related Discrimination Risks

The current EU laws, including non-discrimination and data protection laws, do not contain express provisions addressing AI-related discrimination risks. Significant problems regarding their transposition, interpretation, and enforcement in terms of AI-related discrimination are explained above. Therefore, they are inadequate to solve problems arising from AI-related discrimination. Although there are self-regulation efforts to prevent AI-related discrimination[154], protection of human rights, e.g. right to non-discrimination, cannot be left to self-regulation. Thus, there is a need for new mandatory legal sources to mitigate AI-related discrimination risks[155].

The choice of legal instrument to regulate emerging technologies has a significant influence on effective enforcement. Therefore, the combination of different legal tools such as statutes and guidelines should be considered. Although statutes contain broad principles consistent with the emerging technologies, their application in practice can be difficult. That being said, publishing guidelines by regulatory authorities can be more useful since regulators can monitor the implementation of these guidelines[156]. As a consequence, legislation of a statute and implementation of this statute by the relevant regulatory authority with the help of guidelines may provide better enforcement. Considering these facts, the European Commission introduced its regulation, Proposal for An Act of Artificial Intelligence, on 21 April

151 Mireille Hildebrandt and Serge Gutwirth, 'Concise Conclusions: Citizens Out of Control' in Mireille Hildebrandt and Serge Gutwirth (eds.) *Profiling the European Citizen: Cross-Disciplinary Perspectives* (Springer, 2008) 367.

152 Aaron Rieke, Miranda Bogen, and David G. Robinson, 'Public scrutiny of automated decisions: Early lessons and emerging methods' (Upturn and Omidyar Network Report) (2018) <https://www.data.govt.nz/assets/Uploads/Public-Scrutiny-of-Automated-Decisions.pdf> accessed 20 June 2021. Page 6 and 30.

153 Borgesius (n 8), 34.

154 Fairness, Accountability, and Transparency in Machine Learning, <https://www.fatml.org/> accessed 20 June 2021; Future of Life Institute, 'The Asilomar AI principles' (2017) <https://futureoflife.org/ai-principles/> accessed 20 June 2021; The Montreal Declaration for Responsible AI (2017) <https://www.montrealdeclaration-responsibleai.com/the-declaration> accessed 20 June 2021; The Partnership on AI to Benefit People and Society, <https://www.partnershiponai.org/about/> accessed 20 June 2021.

155 Christina Angelopoulos et al., 'Study Of Fundamental Rights Limitations For Online Enforcement Through Self-Regulation' (Study Report of Institute for Information Law, University of Amsterdam) (2016) <https://scholarlypublications.universiteitleiden.nl/access/item%3A2869513/view> accessed 20 June 2021. Page 78; Borgesius (n 8), 27; The European Consumer Organization (n 81), 12.

156 Borgesius (n 8), 33.

2021[157]. The legal form of a 'regulation' is preferred as the choice of legal instrument since a regulation's direct applicability can ensure uniform application of new rules in the single (physical and digital) market[158][159]. Any guidelines will also be issued according to the proposed AI Act may enhance its enforcement[160].

It is also important to underline that the European Commission affirmed that the ECFR and secondary legislations on non-discrimination, gender equality, consumer production and data protection are considered in the preparation of the proposed AI Act to ensure consistency between these legal sources[161].

The proposed AI Act may provide new opportunities and tools for mitigation of AI-related discrimination risks since its precise aim is to ensure the protection and effective enforcement of fundamental rights along with the use and governance of AI systems[162]. In particular, the right to non-discrimination and equality between women and men are emphasized as the fundamental rights the protection of which will be promoted and enhanced by the proposed AI Act [163].

2. Risk-based Approach

Although certain AI practices are prohibited because of their unacceptable risk[164], the proposed AI Act takes the risk-based approach instead of blanket regulation for all AI systems[165] to proportionally[166] intervene in the market. This legal framework primarily considers the intended purpose and usage area of the AI systems[167] instead of considering these systems exclusively[168]. According to this approach, "*AI systems that pose significant risk to the health and safety or fundamental rights of persons*[169]*"*

157 The proposed AI Act (n 4).

158 The proposed AI Act (n 4), 7. The proposed AI Act (n 4) is identified as an inevitable outcome of the Digital Single Market strategy. The proposed AI Act (n 4), 10.

159 As a matter of fact, the scope of territorial application of the proposed AI Act extends beyond the single market since the proposed AI Act comprehends high-risk AI systems deployed even outside of the EU if outcomes of these systems are used in the EU, or they affect natural persons located in the EU. The proposed AI Act (n 4), 20; Article 2(1) of the proposed AI Act (n 4).

160 Commissioner of the Internal Market, Thierry Breton's comment on the proposed AI Act: "*We will be the first continent where we will give guidelines. So now if you want to use AI applications, go to Europe. You will know what to do and how to do it.*" Javier Espinoza and Madhimuta Murgia, 'Europe attempts to take leading role in regulating uses of AI' *Financial Times* (24 April 2021) <https://www.ft.com/content/360faa3e-4110-4f38-b618-dd695deece90> accessed 20 June 2021.

161 The proposed AI Act (n 4), 4 and 20.

162 The proposed AI Act (n 4), 3.

163 The proposed AI Act (n 4), 11.

164 Article 1(b) and Article 5 of the proposed AI Act (n 4).

165 The proposed AI Act (n 4), 8.

166 The proposed AI Act (n 4), 7.

167 Article 7(2) of the proposed AI Act (n 4).

168 Jorge Liboreiro, 'The higher the risk, the stricter the rule': Brussels' new draft rules on artificial intelligence' *Euronews* (21.4.2021) <https://www.euronews.com/2021/04/21/the-higher-the-risk-the-stricter-the-rule-brussels-new-draft-rules-on-artificial-intellige> accessed 20 June 2021.

169 The proposed AI Act (n 4), 3 and 17; Article 7(1)(b) of the proposed AI Act (n 4).

are qualified as high-risk AI systems. Potential risks to fundamental rights, including the right to non-discrimination, protected by the ECFR are considered while classifying the risk level of the AI systems[170]. When an AI system is qualified as a high-risk AI system because of its effect on fundamental rights, obligations stipulated in the proposed AI Act will be implemented. Hence, fundamental rights, including the right to non-discrimination, will have an extra level of protection provided by the proposed AI Act.

For non-high-risk AI systems, encouragement and inducement of codes of conduct formation are recommended in the proposed AI Act [171]. Such codes may be established concerning "*environmental sustainability, accessibility for persons with disability, stakeholder participation in design and development of AI systems and diversity of development teams*.[172]" The proposed AI Act does not prejudice the application of other legislations to non-high-risk AI systems for the mitigation of AI-related discrimination risks. For instance, the General Product Safety Directive[173] is mentioned in the proposed AI Act as the safety net for non-high-risk AI systems[174].

In conclusion, the proposed AI Act may provide extra tools for mitigation of AI-related discrimination risks since AI systems that may adversely affect fundamental rights, including non-discrimination, are qualified as high-risk AI systems according to the risk-based approach, and detailed obligations are set forth for these systems. In other words, obligations stipulated in the proposed AI Act can be used as tools to prevent AI-related discrimination risks since the scope of the proposed AI Act covers the discriminatory AI systems thanks to the risk-based approach.

3. Obligations of High-risk AI System Providers

The proposed AI Act obliges high-risk AI systems to comply with a group of horizontal compulsory requirements for their trustworthiness[175]. Requirements regarding "*quality of data sets used*[176]*, technical documentation*[177]*, and record-keeping*[178]*, transparency and provision of information to users*[179]*, human oversight*[180]*,*

170 The proposed AI Act (n 4), 24.

171 Article 69 of the proposed AI Act (n 4); the proposed AI Act (n 4), 9 and 36.

172 Article 69 of the proposed AI Act (n 4); the proposed AI Act (n 4), 16 and 36.

173 Council Directive (EC) 2001/95 of the European Parliament and of the Council of 3 December 2001 on general product safety [2001] OJ L 11.

174 The proposed AI Act (n 4), 37.

175 Chapter 2 of the proposed AI Act (n 4).

176 Article 10 of the proposed AI Act (n 4).

177 Article 11 of the proposed AI Act (n 4).

178 Article 12 of the proposed AI Act (n 4).

179 Article 13 of the proposed AI Act (n 4).

180 Article 14 of the proposed AI Act (n 4).

and robustness, accuracy, and cybersecurity[181]" are indicated as mandatory requirements for high-risk systems to mitigate risks against fundamental rights[182].

As evident from explanations in the following paragraphs, most of the obligations stipulated in the proposed AI Act are addressed to providers of AI systems[183]. Therefore, without considering the designer or the developer of the system, the provider[184] (or the manufacturer if the system is not placed on the market or put into service independently from the manufacturer's product) is obliged to bear the liability arising from non-compliance with obligations set forth in the proposed AI Act regarding placement of the high-risk AI system into the market or putting it into service[185]. Determination of liability structure for the use of high-risk AI systems may incentivize liable persons or organizations to take necessary measures, such as measures against discrimination risks.

The proposed AI Act contains ex-ante obligations such as testing and risk management. Moreover, ex-post obligations, such as post-market monitoring and bias monitoring, provide transparency and traceability for the effectiveness of redress mechanisms for affected persons[186].

As a part of ex-ante obligations, high-risk AI systems are required to have CE marking according to the proposed Act[187]. Acquiring the procedure of CE marking[188] will guarantee the conformity of AI systems with all relevant EU-wide harmonized standards[189]. Moreover, conformity assessment for high-risk AI systems should be performed before their placement on the market[190] or entering into service[191][192]. Compliance of AI systems with obligations of the proposed AI Act should be evaluated in the conformity assessment[193]. For some of the AI systems listed in Annex III (2-8), providers may conduct conformity assessments without the involvement of

181 Article 15 of the proposed AI Act (n 4).

182 The proposed AI Act (n 4), 29.

183 Specific criteria are set by Article 28 of the proposed AI Act (n 4) for the consideration of distributors, importers, users or any other third parties as providers.

184 The provider is defined in Article 3(2) of the proposed AI Act (n 4) as "*a natural or legal person, public authority, agency or other body that develops an AI system or that has an AI system developed with a view to placing it on the market or putting it into service under its own name or trademark, whether for payment or free of charge.*"

185 The proposed AI Act (n 4), 31.

186 The proposed AI Act (n 4), 11.

187 The proposed AI Act (n 4), 33.

188 For the procedure of CE marking, see European Commission**,** 'Internal Market, Industry, Entrepreneurship and SMEs' **<**https://ec.europa.eu/growth/single-market/ce-marking/manufacturers_en> accessed 20 June 2021.

189 For the list of harmonised standards, see European Commission, 'Harmonised Standards' <https://ec.europa.eu/growth/single-market/european-standards/harmonised-standards_en> accessed 20 June 2021.

190 Placing on the market is defined in Article 3(9) of the proposed AI Act (n 4) as "*the first making available of an AI system on the Union market.*"

191 Putting into service is defined in Article 3(11) of the proposed AI Act (n 4) as "*the supply of an AI system for first use directly to the user or for own use on the Union market for its intended purpose.*"

192 The proposed AI Act (n 4), 32.

193 The proposed AI Act (n 4), 32.

third parties such as independent experts or notified bodies. In other words, much of high-risk AI systems' compliance with provisions of the proposed AI will be ensured through self-assessment. Although the self-assessment approach will be welcomed by the AI providers[194], it would be better either to restrict these categories requiring self-assessment or to oblige providers to get conformity assessments by third parties[195]. Otherwise, conformity assessment will simply be a tick-box procedure for many of the AI systems[196]. Hence, it may neither provide a reliable enforcement environment for the conformity assessment stipulated in the proposed AI Act nor create adequate public trust toward AI systems that is also aimed at the proposed AI Act.

Substantial modification of the AI systems requires a new conformity assessment. The proposed AI Act recognizes the 'learning' feature of the AI systems by exempting changes to the algorithm and its performance due to 'learning' if rules for change via learning are pre-determined by the provider and evaluated in the conformity assessment[197]. Apart from this exemption, if it is realized that the system is no longer in conformity with the proposed AI Act, the provider is required to take appropriate corrective actions such as bringing that system into conformity or withdrawing or recalling the system[198]. The ex-ante obligations of risk and conformity assessment and CE marking may promote the compliance-by-design approach[199]. Hence, it may help early detection and mitigation of AI-related discrimination risks.

The proposed AI Act requires continuous human oversight for the use of high-risk AI systems[200]. Prevention or minimization of the risks to health, safety or fundamental rights is indicated as the aim of human oversight. Individuals assigned to human oversight tasks should have the necessary information and experience to fulfil their obligations. In fact, the proposed AI Act explicitly states that individuals assigned to human oversight roles have to pay attention to automation bias to prevent the risk of overreliance on the outcomes of AI systems. Although human oversight does not guarantee the prevention of AI-related discrimination, it may help early detection and mitigation of AI-related discrimination risk by providing an extra filter.

194 Natalie Pettinger-Kearney et al., 'The EU's proposed AI Regulation' (2021) <https://www.freshfields.com/en-gb/our-thinking/campaigns/digital/artificial-intelligence/the-eus-proposed-ai-regulation/> accessed 20 June 2021.

195 Sarah Chander and Ella Jakubowska, 'EU's AI law needs major changes to prevent discrimination and mass surveillance' *EDRI* (2021) <https://edri.org/our-work/eus-ai-law-needs-major-changes-to-prevent-discrimination-and-mass-surveillance/> accessed 20 June 2021.

196 Mark MacCarthy and Kenneth Propp, 'Machines Learn That Brussels Writes the Rules: The EU's New AI Regulation' *Lawfare Blog* (28 April 2021) <https://www.lawfareblog.com/machines-learn-brussels-writes-rules-eus-new-ai-regulation> accessed 20 June 2021.

197 The proposed AI Act (n 4), 33.

198 Article 21 of the proposed AI Act (n 4).

199 Friederike Reinhold and Angela Müller, **'**Algorithm Watch's response to the European Commission's proposed regulation on Artificial Intelligence – a major step with major gaps' (Report) (22 April 2021) <https://algorithmwatch.org/en/response-to-eu-ai-regulation-proposal-2021/> accessed 20 June 2021.

200 Article 14 of the proposed AI Act (n 4).

As is explained above, the opacity and black-box nature of the AI systems restrain people from learning and challenging the discriminatory outcomes of AI-based decision-making procedures. The proposed AI Act sets forth the establishment of stand-alone high-risk AI systems registry[201], where the providers will submit meaningful information[202] regarding features and conformity assessment results of AI systems[203]. Thus, transparency toward the public would be increased[204]. Thanks to this registration, people affected by these systems may get more information about relevant AI systems. Information provided in the registration may help these affected people challenge these AI systems' outcomes in terms of non-discrimination laws.

As an ex-post obligation, post-market monitoring is stipulated in the proposed AI Act. Preparation of post-market monitoring plan and performance of post-market monitoring[205] by the providers is required for high-risk AI systems[206] to mitigate risks arising from AI systems. Thus, the providers are required to inform the relevant authorities if the use of their systems leads to a violation of national or EU law protecting fundamental rights, including the right to non-discrimination[207]. Another ex-post obligation is bias monitoring, which involves the examination of training, validation and testing data and operation of AI systems regarding possible biases, which is set forth in the proposed AI Act[208][209]. Both of these ex-post obligations provide very useful tools for the detection and mitigation of AI-related discrimination risks because these obligations are compatible with the learning feature of the emergent AI systems. Thanks to these ex-post obligations, unpredictable changes in the outcomes of an AI-based decision-making system would be monitored in terms of whether these changes cause AI-related discrimination risks.

For the entire life cycle of high-risk AI systems, clear obligations to ensure compliance with fundamental rights are stipulated[210]. The establishment and maintenance of risk management systems throughout the entire life cycle of high-

201 Article 13(3) of the proposed AI Act (n 4).

202 For the information to be submitted upon the registration of high-risk AI systems, see Annex VIII of the proposed AI Act (n 4)

203 The proposed AI Act (n 4), 12.

204 The proposed AI Act (n 4), 33.

205 The post-market monitoring is defined in Article 3(25) of the proposed AI Act (n 4) as "*all activities carried out by providers of AI systems to proactively collect and review experience gained from the use of AI systems they place on the market or put into service for the purpose of identifying any need to immediately apply any necessary corrective or preventive actions.*"

206 Article 61 of the proposed AI Act (n 4).

207 Article 62 of the proposed AI Act (n 4); the proposed AI Act (n 4), 36.

208 Article 10(2)(f) and 10(4) of the proposed AI Act (n 4).

209 It has been criticized that although the explanatory memorandum strongly emphasises risks of algorithmic bias, the provisions of the proposed AI Act only moderately refer to performance and publishing of assessments regarding discrimination. MacCarthy and Propp (n 196).

210 The proposed AI Act (n 4), 3.

risk AI systems are stipulated in the proposed AI Act[211]. A risk management system would facilitate the identification, analysis and mitigation of risks associated with the AI systems. For instance, if an AI system has the capacity to create discrimination risks, necessary measures can be taken promptly due to the risk management system. In the same vein, providers are required to establish a quality management system for high-risk AI systems[212]. This quality management system involves the systemization and documentation of procedures stipulated in the proposed AI Act[213]. The quality management system is like a folder that contains all relevant information and documentation regarding the relevant AI system. Therefore, a quality management system may provide a holistic view for the detection and mitigation of AI-related discrimination risks.

4. Obligations for High-risk AI System Users

The proposed AI Act mainly addresses providers of high-risk AI systems in terms of their obligations and their relationship with users[214]. Within this framework, it is also underlined that users must fulfil other obligations under EU laws or national laws[215]. Nevertheless, the proposed AI Act imposes some subsidiary obligations to users explained in the subsequent paragraphs. As seen in the following explanations, these obligations are not sufficiently explained in the proposed AI Act and the performance of these obligations is subject to case-specific instructions given by providers. Because of its unclarity and subsidiarity, this approach may induce a significant uncertainty regarding the compliance responsibilities of users[216].

According to the proposed AI Act, users[217] should use the high-risk AI systems in compliance with user's instructions given by providers[218]. Similarly, users are expected to use the information given by providers[219] for DPIA under Article 35 of the GDPR

211 Article 9 of the proposed AI Act (n 4).

212 Article 17 of the proposed AI Act (n 4).

213 Article 17 of the proposed AI Act (n 4).

214 Chander and Jakubowska (n 195); MacCarthy and Propp (n 196).

215 Article 29(2) of the proposed AI Act (n 4).

216 Dan Whitehead, 'AI & Algorithms (Part 3): Why the EU's AI regulation is a groundbreaking proposal' Hogan Lovells Engage (3 May 2021) <https://www.engage.hoganlovells.com/knowledgeservices/viewContent .action?key= Ec8teaJ9VaqLasZjnzVtGsxgHJMKLFEppVpbbVX%2B3OXcP3PYxlq7sZUjdbSm5FIetvAtgf1eVU8%3D&nav= FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQ0qFfoEM4UR4%3D&emailtofriendview= true&freeviewlink= true> accessed 20 June 2021.

217 User is defined in Article 3(4) of the proposed AI Act (n 4) as "*any natural or legal person, public authority, agency or other body using an AI system under its authority, except where the AI system is used in the course of a personal non-professional activity.*"

218 Instructions for use are defined in Article 3(15) of the proposed AI Act (n 4) as "*the information provided by the provider to inform the user of in particular an AI system's intended purpose and proper use, inclusive of the specific geographical, behavioural or functional setting within which the high-risk AI system is intended to be used.*" The proposed AI Act (n 4) specifies the necessary information that should be provided in the user's guide in Article 13(3).

219 Article 13 of the proposed AI Act (n 4).

or Article 27 of Modernised Data Protection Convention 108 as well[220]. Users are also required to keep automatically generated log records[221]. These records may be used as evidence if examination of the AI system's operation procedure or its outcome is required in a legal procedure regarding the investigation of AI-related discrimination claims. Hence, this obligation provides more traceability and transparency for the operation and outcomes of AI-based decision-making procedures.

Furthermore, the proposed AI Act requires users to ensure the relevancy of the input data to the intended purpose of the high-risk AI system, to the extent that users have control over the input data [222]. It is an essential obligation from the point of AI-related discrimination because if irrelevant input data is used in an AI system, this system may produce biased decisions. For instance, a person's religion should not be a relevant input in an AI-based decision-making system for employment, except in specific situations[223]. If the religion of a candidate is considered positive or negative input data, this decision-making process produces discriminatory outcomes based on religion. In order to prevent these types of discriminatory risks, users of AI systems are charged with the supervision of the input data's relevancy to the intended purpose of the AI system.

5. Prospective Impacts of the Proposed AI Act on AI-related Discrimination Risks in Private Sector

The list of areas in which the uses of AI systems are qualified as high-risk is provided in Annex III of the proposed AI Act. Education and vocational training, employment, workers management and access to self-employment and access to and enjoyment of essential private services are the areas in the private sector that are listed in Annex III. The Explanatory Memorandum of the proposed AI Act provides explanations regarding the classification of AI systems used in these areas. In the light of these explanations, the impact of the proposed AI Act on AI-related discrimination in the private sector will be discussed in the following paragraphs.

AI systems can be utilized in employment for many purposes such as advertising vacancies, recruitment, and selection, making decisions about promotion, termination and task allocation, assessment of fulfilment of contractual commitments and

220 Article 29(6) of the proposed AI Act (n 4).

221 The proposed AI Act (n 4), 32.

222 Article 29(3) of the proposed AI Act (n 4).

223 There can be some definite exceptions that a profession has to be performed by a member of a specific religion. For example, an animal slaughtered by a non-Muslim (or nonmember of People of the Book) is not considered halal in mainstream Islamic belief. Therefore, a slaughterhouse may consider candidates' religion in the process for the recruitment of a slaughterer. (The author notes that the ethicality of animal slaughter and meat consumption is getting more debated day by day.) In a similar case, the CJEU ruled that a job application could be rejected only if the nature of the occupational activity concerned or the circumstances in which it is carried out have a strong connection to the ethos of the institution. Also, this requirement must be proportional. See, Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (Judgment of the Court (Grand Chamber) of 17 April 2018).

supervision of behaviours and performance of employees. As it is explained above[224], it is likely that these AI systems may cause discrimination against protected classes. Hence, these systems may risk fundamental rights, including the right to non-discrimination. Meanwhile, these AI systems may affect the professional career and livelihood of persons. Due to these reasons, these AI systems should be classified as high-risk AI systems according to the Explanatory Memorandum of the proposed AI Act [225].

Outcomes of AI systems regarding access to education and vocational training may affect the educational or professional career and thereby, the livelihood of people. As illustrated with the examples above[226], improper design and utilization of these systems may lead to discriminatory outcomes, including reinforcement of previous patterns of discrimination or creating new types of discrimination. Hence, these AI systems may cause a violation of the right to non-discrimination. Therefore, these AI systems should be classified as high-risk systems according to the Explanatory Memorandum of the proposed AI Act[227].

AI systems can be used to determine whether a person can enjoy certain private or public services such as financial resources, accommodation, electricity, and telecommunication services. For instance, a person's credit score or creditworthiness evaluated by AI systems may determine this person's access to these services. As explained above[228], AI-based decision-making in banking may cause discrimination based on sexual orientation, gender, age, and race by either reproducing former patterns of discrimination or producing new types of discrimination. Thus, these AI systems should be qualified as high-risk systems according to the Explanatory Memorandum of the proposed AI Act [229][230]. For assessment of creditworthiness and credit scoring, the Explanatory Memorandum of the proposed AI Act sets an exemption for small-scale providers[231] who put AI systems into service for their own use. The rationale behind this exemption is the limited degree of their effect and the existence of alternatives on the market[232].

224 See Part IV-1.

225 The proposed AI Act (n 4), 26-27.

226 See Part III-2.

227 The proposed AI Act (n 4), 26.

228 See Part IV-2.

229 The proposed AI Act (n 4), 27.

230 US House Financial Services Committee Chair Maxine Waters cited this approach as an example while she argues that AI discrimination in the lending needs to be tackled with legislation. Ted Knutson, 'AI Lending Discrimination Needs To Be Tackled With Legislation Says House Financial Services Chair' *Forbes* (7 May 2021) <https://www.forbes.com/sites/tedknutson/2021/05/07/ai-lending-discrimination-needs-to-be-tackled-with-legislation-says-house-financial-services-chair/?sh=7d233f205c7d> accessed 20 June 2021.

231 The small-scale provider is defined in Article 3(3) of the proposed AI Act (n 4) as a "*provider that is a micro or small enterprise within the meaning of Commission Recommendation 2003/361/EC.*"

232 The proposed AI Act (n 4), 27.

As a result of the above-mentioned classifications of AI systems, in the areas of employment, education, vocational training and finance, as high-risk AI systems, obligations stipulated by the proposed AI act will be imposed to providers and users of these systems. Hence, extra safeguards against AI-related discrimination will be provided for an important part of the AI systems used in the private sector.

6. Other Legal Tools Provided by the Proposed AI Act for the Mitigation AI-related Discrimination Risks

In order to challenge AI-related discrimination, the fact that an AI system is used in the decision-making process should be known in the first place either by the affected individuals or by the relevant authorities. The proposed AI Act provides individuals and the relevant authorities with a right to information about the use of AI systems. Providers of AI systems, regardless of the AI systems' risk level, are required to inform[233] natural persons regarding their interaction with AI systems, unless it is obvious[234]. There are two problems regarding this obligation. First, the nature of the information is not specified. Therefore, providers may confine themselves to a simple notification without detailed information regarding the features of the relevant AI system. Therefore it would be better that the proposed AI Act could specify the content of this disclosure obligation in order to prevent interpretation of this obligation as a simple disclosure notification. Secondly, there should be an "*interaction with AI systems*" to inform the affected persons. Interaction with an AI system is a vague concept. Speaking with chat-bots may be easily thought of as interaction with an AI system. Yet, is it considered interaction with an AI system when an AI system processes personal data to assess persons' creditworthiness or job applications? If the answer is negative, there will be no information requirement toward affected persons regarding the application of many AI systems[235]. This concept may be clarified before the legislation of the proposed AI Act. If it does not happen, relevant authorities may provide necessary clarification with their guidelines and decisions. As a last resort, courts would clarify this concept with their interpretations in their decisions.

As an enhancement for the transparency and information obligations, the proposed AI Act ensures accessibility for the relevant authorities, such as market surveillance authorities, national public authorities and bodies, to documentation created under this Act[236]. Individuals who learn about their interaction with AI systems and the equality bodies that have access to the documentation respectively may use this information and access authorization to detect and tackle AI-related discrimination risks.

233 The nature of the information is not specified. Therefore, providers may confine themselves with a simple notification without detailed information regarding the features of the relevant AI system.

234 Article 52 of the proposed AI Act (n 4); The proposed AI Act (n 4), 14.

235 MacCarthy and Propp (n 196).

236 Article 64 of the proposed AI Act (n 4), 36.

Although an AI system complies with the proposed AI Act, this AI system may put the protection of fundamental rights in jeopardy. In this case, the proposed AI Act obliges operators of this harmful AI system to take necessary measures to remove this risk[237]. As a consequence of this obligation, AI-related discrimination risks are required to be mitigated if these risks occur despite compliance of the AI system with the provisions of the proposed AI Act.

According to the proposed AI Act, the European Commission is entitled to amend specific lists and requirements mentioned in Annexes of the proposed AI Act to enhance adaptation[238]. Although this power may adversely affect the predictability regarding the regulation[239], it provides the proposed AI Act with a dynamic nature that is necessary to deal with AI systems. Since the AI field is changing rapidly, emergent AI techniques and approaches may be absorbed into the scope of the proposed AI Act thanks to this opportunity. Hence, any new AI system that may cause a violation of non-discrimination rights can be added to the Annexes and thereby, discrimination risks caused by these emergent AI systems can be mitigated without any delay. In order to enhance the benefit of this dynamic nature in the mitigation of AI-related discrimination, this amending process should include civil society and affected people in a democratic and inclusive way[240].

Despite the tools explained in the previous paragraphs, the proposed AI Act has been criticized since it does not introduce a new and more convenient complaint and recourse mechanism for people affected by the AI-based decision-making systems[241]. Moreover, it does not explicitly address the issue of burden of proof in case of alleged breaches[242]. Since it can be very challenging to prove causal links between the operation of AI-based decision-making systems and the damage, it would be better that the proposed AI Act provides facilitating rules for the benefit of people adversely affected from non-compliance of AI systems to the provisions of the proposed AI Act[243].

VI. Conclusion

In today's market conditions, business organizations need better predictions and faster decision-making processes. AI systems, equipped with ML techniques, may

237 Article 67 of the proposed AI Act (n 4).

238 The proposed AI Act (n 4), 37; Articles 4 and 7 of the proposed AI Act (n 4).

239 Mäkinen (n 7).

240 Chander and Jakubowska (n 195).

241 Chander and Jakubowska (n 195); The European Consumer Organization, 'EU proposal for artificial intelligence law is weak on consumer protection' (Report) (2021) <https://www.beuc.eu/publications/eu-proposal-artificial-intelligence-law-weak-consumer-protection/html> accessed 20 June 2021.

242 Yannick Meneceur, 'European Commission's AI regulation proposal: between too much and too little?' *LinkedIn* (23 April 2021) <https://www.linkedin.com/pulse/european-commissions-ai-regulation-proposal-between-too-meneceur/> accessed 20 June 2021.

243 For a similar suggestion regarding AI-related discrimination and burden of proof, see Hacker (n 28), 22; Lacroix (n 135), p. 17.

satisfy these needs. However, the integration of AI systems into decision-making processes in the private sector may produce some unintended effects as well. These effects may threaten the protection of some fundamental rights. The right to non-discrimination is one of these fundamental rights at risk. Yet, some fields in the private sector are more vulnerable to discrimination risks caused by the implementation of AI systems. In order to illustrate the significant impact of AI systems on human life and fundamental rights, risky fields in the private sector, namely employment, banking, advertising, pricing and insurance, are investigated with authentic examples of AI-related discrimination in this paper. Hence, it is concluded that the increasing use of AI-based decision-making and the significant influence of these decisions on people's lives and fundamental rights necessitate delicate legal approaches.

Current EU non-discrimination laws and EU data protection laws may provide some tools to mitigate AI-related discrimination risks in the private sector. However, these tools are not enough to tackle specific risks arisen from AI-related discrimination - risks such as intersectional discrimination and proxy discrimination - since these laws are tailored for human discrimination. Although the mechanisms stipulated in these existing laws may be activated through wide interpretations, such an approach can only provide temporary solutions. Therefore, there is an immediate need for new legislation equipped with tools specifically targeting AI-related discrimination risks. In this respect, the proposed AI Act may provide new tools against AI-related discrimination in the private sector since it aims to prevent the breach of fundamental rights via the implementation of AI systems in the public and private sectors. Hence, this paper gives wide coverage to an examination of the proposed AI Act in terms of mitigating AI-related discrimination risks.

According to the risk-based approach adopted by the proposed AI Act, AI systems that may cause a violation of fundamental rights, including the right to non-discrimination, are categorized as high-risk AI systems. Due to the cradle-to-grave approach adopted by the proposed AI Act, providers' and users' of high-risk AI systems are required to comply with specific ex-ante and ex-post obligations. Conformity assessment, CE marking, the establishment of EU-wide public AI registry, human oversight, post-market monitoring, bias monitoring, right-to information about AI-human interactions, right to access for relevant authorities to documentation created under this Act and subsidiary obligations for users, such as compliance with user's instructions given by providers, supervision of automatically generated log records and ensuring relevancy of the input data to the intended purpose of AI system are some of these obligations.

In this paper, the said obligations are analysed in terms of their prospective impacts on the mitigation of AI-related discrimination risks. It was found that provisions of the proposed AI Act can provide new legal safeguards against AI-related discrimination risks in the private sector. However, these legal safeguards are not adequate in the

face of intractable AI-related discrimination risks. Therefore, the vital need for new legislation regarding mitigation of AI-related discrimination risks is still present. It is expected that criticism regarding AI-related discrimination risks, indicated in this paper and other papers, should be considered in the legislation process of the proposed AI Act and other new legislations.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.
Acknowledgement: This article is an extended and revised version of a paper prepared for Recht der Digitalisierung seminar at the Philipps-University of Marburg, Germany. The author sincerely thanks Prof. Dr. Florian Möslein, LL.M. (London) and Prof. Dr. Johannes Buchheim, LL.M. (Yale), for their insightful feedback and encouraging comments.

Bibliography

Accesswire, '72% of Resumes are Never Seen by Employers' (16 February 2016) <https://www.accesswire.com/436847/72-of-Resumes-are-Never-Seen-by-Employers> accessed 20 June 2021.

Ali M et al., 'Discrimination Through Optimization: How Facebook's ad Delivery Can Lead to Skewed Outcomes' (2019) Proceedings of the ACM on Human-Computer Interaction. <https://arxiv.org/pdf/1904.02095.pdf> accessed 20 June 2021.

Angelopoulos C et al., 'Study Of Fundamental Rights Limitations For Online Enforcement Through Self-Regulation' (Study Report of Institute for Information Law, University of Amsterdam) (2016) <https://scholarlypublications.universiteitleiden.nl/access/item%3A2869513/view> accessed 20 June 2021.

Angwin J, Mattu S and Larson J, 'The tiger mom tax: Asians are nearly twice as likely to get a higher price from Princeton Review'. *ProPublica* (1 September 2015) <https://www.ProPublica.org/article/asians-nearly-twice-as-likely-to-get-higher-price-from-princeton-review> accessed 20 June 2021.

Angwin J, Scheiber N and Tobin A, 'Dozens of companies are using Facebook to exclude older workers from job ads' *ProPublica* (20 December 2017) <https://www.propublica.org/article/facebook-ads-age-discrimination-targeting> accessed 20 June 2021.

Angwin J, Tobin A and Varner M, 'Facebook (still) letting housing advertisers exclude users by race' *ProPublica* (21 November 2017) <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin> accessed 20 June 2021.

Avraham R, 'Discrimination and Insurance' in Lippert-Rasmussen K. (ed.), *The Routledge Handbook of the Ethics of Discrimination*, (Routledge, UK 2018), pp. 335-347.

Bartlett R et al., 'Consumer-Lending Discrimination in the FinTech Era' (2019) (National Bureau of Economic Research Working Papers 25943).

Barocas S and Selbst A D, 'Big Data's Disparate Impact' (2016) 104 California Law Review, 671-732.

Bathaee Y, 'The Artificial Intelligence Black Box And The Failure Of Intent And Causation' (2018) 31:2 Harvard Journal of Law & Technology, 890-938.

Beck S et al., 'Künstliche Intelligenz und Diskriminierung Herausforderungen und Lösungsansätze' (2019) (Whitepaper from Plattform Lernende Systeme) <https://www.plattform-lernende-systeme.de/publikationen-details/kuenstliche-intelligenz-und-diskriminierung-herausforderungen-und-loesungsansaetze.html> accessed 20 June 2021.

Biao v. Denmark (Grand Chamber) (App no 38590/10) ECHR 24 May 2016.

Bodo B et al., 'Tackling the algorithmic control crisis-the technical, legal, and ethical challenges of research into algorithmic agents' (2017) 19 Yale Journal of Law & Technology, 133-180.

Borgesius F Z, 'Discrimination, Artificial Intelligence and Algorithmic Decision-making' (Study Report) (Council of Europe, Strasbourg 2018) <https://rm.coe.int/discrimination-artificial-intelligence-and-algorithmic-decision-making/1680925d73> accessed 20 June 2021.

Borgesius F J Z, **'**Strengthening legal protection against discrimination by algorithms and artificial intelligence' (2020) 24 10 The International Journal of Human Rights, 1572- 1593.

Bundesanstalt für Finanzdienstleistungsaufsicht, 'Big data meets artificial intelligence: Challenges and implications for the supervision and regulation of financial services' (2018) (Study) <https://www.bafin.de/SharedDocs/Downloads/EN/dl_bdai_studie_en.html> accessed 20 June 2021.

Burrell J, 'How the machine 'thinks': understanding opacity in machine learning algorithms' (2016) Big Data & Society Doi:10.1177/2053951715622512.

Case 170/84, *Bilka-Kaufhaus GmbH and Karin Weber von Hartz*, (Judgment of the Court of 13 May 1986.)

Case C-83/14, "*CHEZ Razpredelenie Bulgaria" AD v Komisia za zashtita ot diskriminatsia,* (Judgment of the Court (Grand Chamber) of 16 July 2015).

Case C443/15, *David L. Parris v Trinity College Dublin and Others* (Judgment of the Court (First Chamber) of 24 November 2016).

Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V*. (Judgment of the Court (Grand Chamber) of 17 April 2018).

Chander S and Jakubowska E, 'EU's AI law needs major changes to prevent discrimination and mass surveillance' *EDRI* (2021) <https://edri.org/our-work/eus-ai-law-needs-major-changes-to-prevent-discrimination-and-mass-surveillance/> accessed 20 June 2021.

Charter of Fundamental Rights of the European Union, 2012/C 326/02 OJ C 326, [2012].

Commission (EC) 'Proposal for a Regulation Of The European Parliament And Of The Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts' COM(2021) 206 final, 21 April 2021.

Corner N, 'Revealed: How your name, your ethnicity, and even your e-mail address could be adding hundreds of pounds to your car insurance premium' *Dailymail* (29 June 2018) <https://www.dailymail.co.uk/femail/article-5896561/How-email-address-add-hundreds-car-insurance-premium.html> accessed 20 June 2021.

Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180.

Council Directive (EC) 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303.

Council Directive (EC) 2001/95 of the European Parliament and of the Council of 3 December 2001 on general product safety [2001] OJ L 11.

Council of Europe, 'Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms' (2000) <https://rm.coe.int/09000016800cce48> accessed 20 June 2021.

Council of Europe, 'Algorithms and Human Rights: Study On The Human Rights Dimensions Of Automated Data Processing Techniques (In Particular Algorithms) And Possible Regulatory Implications' (Study Report) (DGI(2017)12) (2018).

Council Regulation (EC) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119.

Craglia M et al., 'Artificial Intelligence: A European Perspective' (Joint Research Centre Working Papers) (2018).

Danks D and London A J, 'Algorithmic Bias in Autonomous Systems' (2017) IJCAI'17: Proceedings of the 26th International Joint Conference on Artificial Intelligence, 4691-4697.

Dastin J, 'Amazon scraps secret AI recruiting tool that showed bias against women' *Reuters* (11 October 2018) <https://www.reuters.com/article/us-amazon-com-jobs-automation-in...-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G> accessed 20 June 2021.

Data Protection Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 Wp251rev.01. [2018].

Datta A, Tschantz M C and Datta A, 'Automated Experiments on Ad Privacy Settings A Tale of Opacity, Choice, and Discrimination' (2015) Proceedings on Privacy Enhancing Technologies <https://www.andrew.cmu.edu/user/danupam/dtd-pets15.pdf> accessed 20 June 2021.

Delipetrev B, Tsinarakii C and Kostić U, 'Historical Evolution of Artificial Intelligence' (Technical Report) (Publications Office of the European Union, Luxembourg 2020) https://publications.jrc.ec.europa.eu/repository/handle/JRC120469 accessed 20 June 2021.

Dwork C et al., 'Fairness Through Awareness, Proceedings of the 3rd Innovations in Theoretical Computer Science Conference' (2012) ITCS '12 (Association for Computing Machinery), 214–226.

Edwards, L and Veale M, 'Slave to the algorithm: Why a right to an explanation is probably not the remedy you are looking for' (2017) 16 Duke Law & Technology Review, 18-84.

Espinoza J and Murgia M, 'Europe attempts to take leading role in regulating uses of AI' *Financial Times* (24 April 2021) <https://www.ft.com/content/360faa3e-4110-4f38-b618-dd695deece90> accessed 20 June 2021.

European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation [2008] {SEC(2008) 2180} {SEC(2008) 2181} /* COM/2008/0426 final - CNS 2008/0140 */.

European Commission, 'Special Eurobarometer Discrimination in the EU in 2015' (Report) (2015).

European Commission's High-Level Expert Group on Artificial Intelligence, 'A Definition of AI: Main Capabilities and Disciplines' (2019) (Report) <https://digital-strategy.ec.europa.eu/en/library/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines> accessed 20 June 2021.

European Commission, 'A Union of Equality: Gender Equality Strategy 2020–2025' [2020] COM (2020) 152.

European Commission, 'Internal Market, Industry, Entrepreneurship and SMEs' <https://ec.europa.eu/growth/single-market/ce-marking/manufacturers_en> accessed 20 June 2021.

European Commission, 'Harmonised Standards' <https://ec.europa.eu/growth/single-market/european-standards/harmonised-standards_en> accessed 20 June 2021.

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 20 June 2021.

European Union Agency for Fundamental Rights, '#BigData: Discrimination in data-supported decision making' (Report) (2018) Doi:10.2811/343905.

European Union Agency for Fundamental Rights, 'Getting the Future Right-Artificial Intelligence and Fundamental Rights' (2020) Doi:10.2811/774118.

Fairness, Accountability, and Transparency in Machine Learning <https://www.fatml.org/> accessed 20 June 2021.

Favaretto M, De Clercq E and Elger B S, 'Big Data and discrimination: perils, promises and solutions. A systematic review' (2019) 6 Journal of Big Data <https://doi.org/10.1186/s40537-019-0177-4> accessed 20 June 2021.

Financial Conduct Authority, 'Pricing practices in the retail general insurance sector: Household insurance' (2018) <https://www.fca.org.uk/publication/thematic-reviews/tr18-4.pdf> accessed 20 June 2021.

Stan F, 'History, Motivations, and Core Themes' in Keith Frankish and William W. Ramsey, (eds.), *The Cambridge Handbook Of Artificial Intelligence* (Cambridge University Press, UK 2014).

Fuster A et al., 'Predictably Unequal? The Effects of Machine Learning on Credit Markets' (2020). *SSRN* <https://ssrn.com/abstract=3072038> accessed 20 June 2021.

Future of Life Institute, 'The Asilomar AI principles' (2017) <https://futureoflife.org/ai-principles/> accessed 20 June 2021.

Gillis T B and Spiess J L, 'Big Data and Discrimination**'** (2019) 86 The University of Chicago Law Review, pp. 459-487.

Hacker P., 'Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies against Algorithmic Discrimination under EU Law' (Pre-print version) (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3164973&download=yes> accessed 20 June 2021.

Heinrichs B, 'Discrimination in the age of artificial intelligence' (2021) AI & Society Springer. <https://doi.org/10.1007/s00146-021-01192-2> accessed 20 June 2021.

Hildebrandt M and Gutwirth S, 'Concise Conclusions: Citizens Out of Control' in Hildebrandt M and Gutwirth S (eds.) *Profiling the European Citizen: Cross-Disciplinary Perspectives* (Springer, 2008).

Hill K, 'How Target Figured Out A Teen Girl Was Pregnant Before Her Father Did' *Forbes* (16 February 2012) <https://www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/?sh=415c8bfe6668> accessed 20 June 2021.

Humphreys P, **'**The philosophical novelty of computer simulation methods' (2008) 169 Synthese, pp. 615-626 <https://doi.org/10.1007/s11229-008-9435-2> accessed 20 June 2021.

International Association of Insurance Supervisors, 'Issues Paper on the Use of Big Data Analytics in Insurance' (2020) <https://www.iaisweb.org/page/supervisory-material/issues-papers//file/89244/issues-paper-on-use-of-big-data-analytics-in-insurance> accessed 20 June 2021.

International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

Izzidien R, 'Higher insurance if you're called Mohammed? That's just the start of institutionalized Islamophobia' *NewStatesman* (23 January 2018) <https://www.newstatesman.com/politics/uk/2018/01/higher-insurance-if-you-re-called-mohammed-s-just-start-institutionalised> accessed 20 June 2021.

Johnson K, Pasquale F and Chapman J, 'Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Innovation' (2019) 88 2 Fordham Law Review 499-529.

Jones H, 'When the wrong postcode puts insurance out of your reach' *The Guardian* (30 October 2016) <https://www.theguardian.com/money/2016/oct/30/wrong-postcode-puts-insurance-out-of-reach> accessed 20 June 2021.

Kelion L, 'Apple's 'sexist' credit card investigated by US regulator' *BBC* (11 November 2019) <https://www.bbc.co.uk/news/business-50365609> accessed 20 June 2021.

Kim P T, 'Data-Driven Discrimination at Work' (2017) 58 3 William & Mary Law Review, pp. 857-936.

Kleinberg J et al., 'Discrimination in the Age of Algorithms' (2018) 10 Journal of Legal Analysis pp. 113-174.

Kloza D et al., 'Data protection impact assessments in the European Union: complementing the new legal framework towards a more robust protection of individuals' (d.pia.lab Policy Brief) (2017) <https://cris.vub.be/files/32009890/dpialab_pb2017_1_final.pdf> accessed 20 June 2021.

Knutson T, 'AI Lending Discrimination Needs To Be Tackled With Legislation Says House Financial Services Chair' *Forbes* (7 May 2021) <https://www.forbes.com/sites/tedknutson/2021/05/07/ai-lending-discrimination-needs-to-be-tackled-with-legislation-says-house-financial-services-chair/?sh=7d233f205c7d> accessed 20 June 2021.

Kretchmer H, 'Insurers 'risk breaking racism laws'' *BBC* (9 February 2018) <https://www.bbc.com/news/business-43011882> accessed 20 June 2021.

Kroll J A et al., 'Accountable Algorithms' (2017) 165 University of Pennsylvania Law Review, 633-705.

Lacroix C, 'Preventing discrimination caused by the use of artificial intelligence' (Report of Committee on Equality and Non-Discrimination at Council of Europe) (2020).

Lambrecht A and Tucker C E, 'Algorithmic Bias? An Empirical Study of Apparent Gender-Based Discrimination in the Display of STEM Career Ads' (2019) 65 7 Management Science, 2966-2981.

Liboreiro J, 'The higher the risk, the stricter the rule': Brussels' new draft rules on artificial intelligence' *Euronews* (21.4.2021) <https://www.euronews.com/2021/04/21/the-higher-the-risk-the-stricter-the-rule-brussels-new-draft-rules-on-artificial-intellige> accessed 20 June 2021.

Loi M and Christen M, 'Choosing how to discriminate: navigating ethical trade-offs in fair algorithmic design for the insurance sector' (2021) Philosophy & Technology <https://doi.org/10.1007/s13347-021-00444-9> accessed 20 June 2021.

Lucci S and Kopec D, *Artificial Intelligence in the 21st Century: A Living Introduction* (Mercury Learning and Information, USA 2016).

MacCarthy M and Propp K, 'Machines Learn That Brussels Writes the Rules: The EU's New AI Regulation' *Lawfare Blog* (28 April 2021) <https://www.lawfareblog.com/machines-learn-brussels-writes-rules-eus-new-ai-regulation> accessed 20 June 2021.

Mäkinen J, 'The EU's AI Regulation Proposal – How to Fix It?' (2021) <https://teknologiateollisuus.fi/en/ajankohtaista/eus-ai-regulation-proposal-how-fix-it> accessed 20 June 2021.

Meneceur Y, 'European Commission's AI regulation proposal: between too much and too little?' *LinkedIn* (23 April 2021) <https://www.linkedin.com/pulse/european-commissions-ai-regulation-proposal-between-too-meneceur/> accessed 20 June 2021.

Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data CM/Inf(2018)15-final [2018].

Möslein F, 'Robots in the Boardroom: Artificial Intelligence and Corporate Law' in Barfield W and Pagallo U (eds.), *Research Handbook on the Law of Artificial Intelligence* (Edward Elgar, UK 2018) 649-669.

Newell S and Marabelli M, 'Strategic opportunities (and challenges) of algorithmic decision-making: A call for action on the long-term societal effects of 'datification'' (2015) 24 Journal of Strategic Information Systems, 3-15.

Peck D, 'They're Watching You at Work' *Atlantic* (December 2013) <http://www.theatlantic.com/magazine/archive/2013/12/theyre-watching-you-at-work/354681> accessed 20 June 2021.

Peppet S R, 'Regulating the Internet of Things: first steps toward managing discrimination, privacy, security, and consent' (2014) 93 Texas Law Review, 85-176.

Pettinger-Kearney N et al., 'The EU's proposed AI Regulation' (2021) <https://www.freshfields.com/en-gb/our-thinking/campaigns/digital/artificial-intelligence/the-eus-proposed-ai-regulation/> accessed 20 June 2021.

Pope D G and Sydnor J R, 'Implementing Anti-Discrimination Policies in Statistical Profiling Models' (2011) 3 American Economic Journal: Economic Policy, 206–231.

Prince A E R and Schwarcz D, 'Proxy Discrimination in the Age of Artificial Intelligence and Big Data' (2020) 105 Iowa Law Review, 1257-1318.

Probasco J, 'The Insurance Industry Confronts Its Own Racism' *Investopedia* (1 September 2020) <https://www.investopedia.com/race-and-insurance-5075141#citation-9> accessed 20 June 2021.

Reinhold F and Müller A, **'**Algorithm Watch's response to the European Commission's proposed regulation on Artificial Intelligence – a major step with major gaps' (Report) (22 April 2021) <https://algorithmwatch.org/en/response-to-eu-ai-regulation-proposal-2021/> accessed 20 June 2021.

Rieke A, Bogen M and Robinson D G, 'Public scrutiny of automated decisions: Early lessons and emerging methods' (Upturn and Omidyar Network Report) (2018) <https://www.data.govt.nz/assets/Uploads/Public-Scrutiny-of-Automated-Decisions.pdf> accessed 20 June 2021.

Rodrigues R, 'Legal and human rights issues of AI: Gaps, challenges and vulnerabilities' (2020) 4 Journal of Responsible Technology <https://doi.org/10.1016/j.jrt.2020.100005> accessed 20 June 2021.

Samoili S et al., 'AI Watch. Defining Artificial Intelligence. Towards An Operational Definition And Taxonomy Of Artificial Intelligence' (Joint Research Centre Technical Reports) (Luxembourg 2020).

Schauer F, 'Statistical (and non-statistical) discrimination' in Kasper Lippert-Rasmussen (ed.), *The Routledge Handbook of the Ethics of Discrimination*, (Routledge, UK 2018), 42-53.

Swedloff R, 'Risk classification's Big Data (r)evolution' (2014) 21 Connecticut Insurance Law Journal, 339-373.

The European Consumer Organization, 'Automated Decision Making And Artificial Intelligence - A Consumer Perspective' (Report) (2018) <https://www.beuc.eu/publications/beuc-x-2018-058_automated_decision_making_and_artificial_intelligence.pdf> accessed 20 June 2021.

The European Consumer Organization, 'AI Rights for Consumers' (Report) (2019) <https://www.beuc.eu/publications/beuc-x-2019-063_ai_rights_for_consumers.pdf> accessed 20 June 2021.

The European Consumer Organization, 'The Use Of Big Data And Artificial Intelligence In Insurance' (Report) (2020) <https://www.beuc.eu/publications/beuc-x-2020-039_beuc_position_paper_big_data_and_ai_in_insurances.pdf> accessed 20 June 2021.

The European Consumer Organization, 'EU proposal for artificial intelligence law is weak on consumer protection' (Report) (2021) <https://www.beuc.eu/publications/eu-proposal-artificial-intelligence-law-weak-consumer-protection/html> accessed 20 June 2021.

The Federal Government of Germany, 'Artificial Intelligence Strategy' (2018) <https://www.ki-strategie-deutschland.de/home.html?file=files/downloads/Nationale_KI-Strategie_engl.pdf> accessed 20 June 2021.

The Montreal Declaration for Responsible AI (2017) <https://www.montrealdeclaration-responsibleai.com/the-declaration> accessed 20 June 2021.

The Partnership on AI to Benefit People and Society <https://www.partnershiponai.org/about/> accessed 20 June 2021.

The Royal Society, 'Machine Learning: The Power And Promise Of Computers That Learn By Example' (Report) (April 2017) <royalsociety.org/machine-learning> accessed 20 June 2021.

The Royal Society, 'Explainable AI: the basics' (Policy briefing) (2019) <royalsociety.org/ai-interpretability> accessed 20 June 2021.

The White House, 'Big Data: Seizing Opportunities, Preserving Values' (Report) (2014).

Universal Declaration of Human Rights, UNGA Res 217/A (10 December 1948).

Valentino-Devries J, Singer-Vine J, and Soltani A, 'Websites vary prices, deals based on users' information' *Wall Street Journal* (24 December 2012) <https://www.wsj.com/articles/SB10001424127887323777204578189391813881534> accessed June 2021.

Vigdor N, 'Apple Card Investigated After Gender Discrimination Complaints' *The New York Times* (10 November 2019) <https://www.nytimes.com/2019/11/10/business/Apple-credit-card-investigation.html> accessed June May 2021.

Wachter S, Mittelstadt B and Russell C, 'Counterfactual explanations without opening the black box: automated decisions and the GDPR' (2018) 31 2 Harvard Journal of Law & Technology, 842-887.

Wachter S, Mittelstadt B and Russell C, 'Why Fairness Cannot Be Automated: Bridging The Gap Between EU Non-Discrimination Law And AI' (Draft) (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547922> accessed 20 June 2021.

Wagner B et al., 'Algorithms and human rights. Study on the human rights dimensions of automated data processing techniques and possible regulatory implications' (Study Report) (DGI(2017)12) (2018) <https://rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5> accessed 20 June 2021.

Wahlster W and Winterhalter C, 'German Standardization Roadmap On Artificial Intelligence' (German Institute for Standardization and DKE German Commission for Electrical, Electronic & Information Technologies of DIN and VDE November 2020) <https://www.din.de/resource/blob/772610/e96c34dd6b12900ea75b460538805349/normungsroadmap-en-data.pdf> accessed 20 June 2021.

Walch K, 'Is There A Difference Between Assisted Intelligence Vs. Augmented Intelligence?' *Forbes*. (12 January 2020) <https://www.forbes.com/sites/cognitiveworld/2020/01/12/is-there-a-difference-between-assisted-intelligence-vs-augmented-intelligence/?sh=3300950426ab> accessed 20 June 2021.

Wang P, 'On the Working Definition of Intelligence' (1995) <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.55.5012> accessed 20 May 2021.

Weisbaum H, 'Data Mining Is Now Used to Set Insurance Rates; Critics Cry Foul' *CNBC* (16 April 2014) <https://www.cnbc.com/2014/04/16/data-mining-is-now-used-to-set-insurance-rates-critics-cry-fowl.html#:~:text=You%20might%20not%20like%20the,to%20provide%20you%20that%20coverage> accessed 20 June 2021.

Whitehead D, 'AI & Algorithms (Part 3): Why the EU's AI regulation is a ground breaking proposal' *Hogan Lovells Engage* (3 May 2021) <https://www.engage.hoganlovells.com/knowledgeservices/viewContent.

action?key=Ec8teaJ9VaqLasZjnzVtGsxgHJMKLFEppVpbbVX%2B3OXcP3PYxlq7sZUjdb-Sm5FIetvAtgf1eVU8%3D&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQ0qF-foEM4UR4%3D&emailtofriendview=true&freeviewlink=true> accessed 20 June 2021.

Williams B et al., 'How Algorithms Discriminate Based on Data they Lack: Challenges, Solutions, and Policy Implications' (2018) 8 Journal of Information Policy, 78-115.

World Economic Forum, 'Transforming Paradigms A Global AI in Financial Services Survey' (2020) (Report) <http://www3.weforum.org/docs/WEF_AI_in_Financial_Services_Survey.pdf> accessed 20 June 2021.

Xenidis R, 'Tuning EU equality law to algorithmic discrimination: Three pathways to resilience' (2020) 27(6) Maastricht Journal of European and Comparative Law, 736-758.

Xenidis R and Senden L, 'EU non-discrimination law in the era of artificial intelligence: Mapping the challenges of algorithmic discrimination' in Ulf Bernitz et al. (eds.), *General principles of EU law and the EU digital order* (Kluwer Law International 2020), 151-182.

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 309–348

DOI: 10.26650/annales.2022.71.0004
http://annales.istanbul.edu.tr/

Submitted: 25.01.2022
Accepted: 06.04.2022

Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Contractual Performance Facing Covid-19: A Comparative Analysis

Zafer Kahraman*

Abstract

Covid-19 is a social disaster, an unforeseen and unavoidable event affecting most of the pre-existing contracts, which has occurred beyond the control of the parties. The drastic measures taken by governments to protect public health, emanated some radical changes in the circumstances on which most of the contracts were based.

The impact of Covid-19 differs in various contracts. It adversely affects some of the contracts by preventing or impeding the disadvantaged party to perform, whereas in some other cases it causes a radical change in circumstances generating an excessive difficulty to the fulfillment of the contract, which renders performance unreasonable and the contract unfair. It is also possible that the contract might even not be affected by the pandemic. In short, it renders some contracts impossible and for some others, it makes them unreasonably difficult to perform. This article focuses on the agreements "infected" by the Covid-19 pandemic, by studying its legal implications.

Within the framework of this article, the legal nature of the pandemic will be presented and its impact on the contracts will be discussed. The aim is to provide both academic analysis and an idea of the way civil law and common law systems are coping.

Keywords

Law, Covid-19, Force Majeure, Hardship, Frustration, Contract law

* **Corresponding Author:** Zafer Kahraman (Assoc. Prof. Dr.), Bahçeşehir University, Faculty of Law, Department of Civil Law, Istanbul, Turkiye. E-mail: zafer.kahraman@law.bau.edu.tr ORCID: 0000-0002-9303-1062

To cite this article: Kahraman Z, "Contractual Performance Facing Covid-19: A Comparative Analysis", (2022) 71 Annales de la Faculté de Droit d'Istanbul 309. https://doi.org/10.26650/annales.2022.71.0004

Introduction

We live in the aftermath of the Covid-19 outbreak, which was declared an international pandemic by the World Health Organization in March 2020, following a dramatic increase in the number of cases since the first reported case in December 2019. This caught humanity unprepared despite all the intellectual and technological advancements that we have made.

Indeed, there have been some examples of pandemics in human history. Still, Covid-19 might be considered an unprecedented event in the modern world regarding the reaction of the countries which took drastic measures never seen before up to this level. The pandemic sparked a range of responses from various public and private actors, particularly governments immediately reacted in different ways. We can observe that all countries have been affected by the Covid-19 pandemic up until now and many of them imposed prohibitions in order to protect public health, which caused a negative effect on their economies and lifestyle.

In terms of contract law, this situation has caused some major difficulties in the ongoing contractual relations and in performing some obligations. There have been some negative side effects of the measures taken. Especially the lockdowns or travel bans created various problems on legal ground, and it is highly probable that this may originate unusual conflicts in the future. The pandemic affects directly existing contracts, creating a major change in circumstances.

The effect of the Covid-19 pandemic on contracts is widely considered to be the leading topic in most countries. Legal systems differ significantly in their approach to how changes of circumstances may have an effect upon the contract. The question is not only about how significant this change of circumstances must be in order to give rise to a remedy, but also about the choice of the remedy.

This article focuses on the agreements "infected" by Covid-19 pandemic, studying its legal implications in comparative law. Within the framework of this work, the legal nature of the pandemic will be presented and its impact on contracts will be discussed. The aim is to provide both an academic analysis and an idea of the way the civil law and the common law systems are coping.

The article is structured in two overall parts. First, the legal nature, the terminology and the qualification of the Covid-19 pandemic will be analyzed and second, the legal remedies in case of a breach of contract resulting from it will be handled.

I. The Legal Nature, The Terminology and The Qualification of the Covid-19 Pandemic

A. The Legal Definition of the Covid-19 Pandemic

Deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction, the World Health Organization made the assessment that Covid-19 could be characterized as a pandemic[1]. A pandemic is defined as an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people[2].

The pandemic is an unfortunate event resulting from unforeseeable circumstances. Because of this situation, a state of emergency has been declared by some countries, lockdown, travel bans, mandatory rules for wearing masks, various prohibitions and other possible measures have been taken in order to put social distance between people. The usual flow of life has been changed, in the entire world, because of the restrictions and prohibitions imposed by the governments. Most of workplaces are still closed, most white-collar workers work from home, distance education continues, and travel restrictions still exist in different ways.

As a result of these measures, the usual flow of life has been altered to a more cautious lifestyle and economic activities have been affected by this. In short, Covid-19 has changed human life, and that negatively influenced many legal relationships in business. Hence, in terms of law, the pandemic can be described as a social disaster that shakes human social existence [3], highlighting social and economic shortcomings and causing drastic measures in response which inevitably create many legal conflicts.

There is no uniform understanding of what a disaster is within the law doctrine. We can hardly find a definition in the international law. The recently adopted United Nations International Law Commission (ILC) draft convention on the "protection of persons in the event of disasters", which provides a framework of rights and responsibilities during disasters, uses the definition "a calamitous event or series of events resulting in a widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, seriously disrupting the functioning of society[4]". However, the ILC articles and commentaries, which point out hurricanes and earthquakes, do not reference pandemics[5].

1 Listings of WHO's Response to Covid-19 (2020), <https://www.who.int/news/item/29-06-2020-covidtimeline> accessed 27 February 2021.

2 Heath Kelly, '*The Classical Definition of a Pandemic is not Elusive*' (2011) Bull World Health Org 540, 541.

3 Başak Baysal and Murat Uyanık and Selim Yavuz, '*Koronavirüs 2019 ve Sözleşmeler*' in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 269, 271.

4 Art. 3, G.A. Res. 71/141 (Dec. 13, 2016) and G.A. Res. 73/209 (Dec. 20, 2018)

5 Alp Öztürk, '*Covid-19: Just Disastrous or the Disaster Itself? Applying the ILC Articles on the Protection of Persons in the Event of Disasters to the Covid-19 Outbreak*' (2020) 24 American Society Of Int'l Law, <https://www.asil.org/insights/volume/24/issue/6/covid-19-just-disastrous-or-disaster-itself-applying-ilc-articles> accessed 27 February 2021.

In short, the pandemic should be defined as a social disaster, which may cause different legal repercussions on the contracts. In the following section, the difference in the terminology between the Civil law and the Common law concepts will be clarified and the distinction between these concepts will be analyzed with their legal implications.

B. The Legal Terminology related to the Covid-19 Pandemic

First of all, we need to clarify the terminology associated with Covid-19 and distinguish the *force majeure,* frustration, impossibility and hardship in order to elaborate the legal consequences of Covid-19 on contracts.

The first hurdle to overcome is the understanding of *force majeure* in comparative law. For this reason, we will handle this in the first subtitle below and then we will distinguish between *force majeure* and hardship.

1. The Term of *Force Majeure* in Various Legal Systems

The term "*force majeure*" is French and stands for greater or superior force, which is commonly used to describe a supervening, unavoidable event causing a major change in circumstances, which could not have been prevented by any means.

Despite changing circumstances, the contract is law between parties, and it imposes a duty on each party to perform its obligations as they are set out. The common law does not recognize a defense of *force majeure* or allow for adjustment or termination of the contract on the grounds of changed circumstances. In common law, the *force majeure* is a contractual term which cannot be invoked unless being included in the contract. That is why, in practice, many contracts contain a force majeure or hardship clauses because in the absence of such clauses, in common law, an unforeseen post-formation event will lead to the parties being excused or released from their obligations only in a narrow range of circumstances under the frustration doctrine. Unlike *force majeure*, frustration needs not be referred to or included in a contract and might be invoked by any party.

According to the frustration doctrine, a contract may be discharged or set aside on the ground of frustration where an unforeseen event, subsequent to the date of the contract, renders the performance of the contractual obligations physically or commercially impossible, or excessively difficult, impracticable or expensive, or destroys the utility which the stipulated performance had to either party[6]. The frustration doctrine and its subsequent expansion came to be known in the United Kingdom as discharge by "frustration" and in the United States as discharge by

6 *Autry v. Republic Productions, Inc*. (1947) 30 Cal.2d 144.

"impossibility, impracticability and frustration of purpose". This difference in terminology reflects the wider scope of the American (than that of the English) doctrine, the latter being reluctant to recognize "impracticability" (as opposed to "impossibility")[7]. In American law, frustration is defined in § 454 of the (first) Restatement of Contracts, as not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved[8]. In the United States, a distinction has also been made between frustration of performance and frustration of purpose[9].

Hence, according to common law, the *force majeure* is merely a contractual design covering unexpected post-formation events and determining their legal consequences. However, the frustration doctrine is applied when any contractual force majeure provisions do not cover a supervening event which renders the contract impossible or impracticable to fulfill, or performance becomes substantially different from the original obligations undertaken by the parties at the moment of entry into the contract.

In civil law, it is difficult to find a statutory definition of *force majeure*. A rare exception is article 1218 of the French Civil Code, which states that "*in contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor*."

In civil law doctrine, the concept of *force majeure* is defined as an external supervening event that inevitably leads to a breach of an obligation, which cannot be foreseen or avoided[10]. This must be, despite the exercise of diligence and utmost care, an unforeseeable, unavoidable supervening event not attributed to the affected party[11]. According to civil law, the *force majeure* is an event which prevents and

7 Guenter Treitel, '*Some Comparative Notes on English and American Contract Law*' (2002) 55 Smu L Rev 357, 360.

8 Tyrrell Williams, '*Restatement of the Law of Contracts of the American Law Institute, Sections 454-469, with Missouri Annotations*' (1933) 18 St Louis L Rev 181.

9 Hans Smit, '*Frustration of Contract, A Comparative Attempt at Consolidation*' (1958) 58 Columbia L Rev 287.

10 Henri Deschenaux and Pierre Tercier, *La responsabilité civile* (Stæmpfli 1982) 62; Charles André Junod, *Force majeure et cas fortuit dans le système suisse de la responsabilité civile* (Georg 1956) 27; Rolf H. Weber, *OR art. 103 in Berner Kommentar, Schweizerisches Zivilgesetzbuch, Das Obligationenrecht*, (Stæmpfli 2002) Art. 103, para 48; Franz Schenker, *Die Voraussetzungen und die Folgen des Schuldnerverzugs im Schweizerischen Obligationenrecht* (Univ-Verlag 1988) para 307; Haluk Tandoğan, *Türk Mesuliyet Hukuku* (2nd edn Vedat 2010) 464; Fikret Eren, *Sorumluluk Hukuku Açisindan Uygun Illiyet Bağı Teorisi* (Ankara Üniversitesi Hukuk Fakültesi 1975) 176; Fikret Eren, *Borçlar Hukuku Genel Hükümler* (24nd ed. 2019) para 1731; Selahattin Sulhi Tekinay and Sermet Akman and Haluk Burcuoğlu and Atilla Altop, *Borçlar Hukuku Genel Hükümler* (Filiz 1993) 1003; O. Gökhan Antalya, *Borçlar Hukuku Genel Hükümler* (2nd ed. Seçkin 2019) para 2586; Özer Seliçi, *Özel Hukukta Mücbir Sebep ve Uygulanış Tarzı in Sorumluluk Hukukunda Yeni Gelişmeler III Sempozyumu* (İstanbul Üniversitesi Hukuk Fakültesi 1980) 61; Bundesgesetzentscheidung [Swiss Official Journal] [hereinafter "BGE"] 111 II 433; BGE 102 II 262; BGE 91 II 474, 487-488; BGE 88 II 283, 291.

11 Abdullah Pulat Gözübüyük, *Mücbir Sebepler Beklenmeyen Haller* (Kazancı 1977) 66-67; Eren, (n.10-Obligations) para 1733-1744; Rona Serozan, *Borçlar Hukuku Genel Bölüm, Ifa-Ifa Engelleri-Haksiz Zenginleşme* (Filiz 2006) Vol 3, §15 para 4; Erzan Erzurumluoğlu, *Türk İsviçre Borçlar Hukuku Sistemine Göre Borçluya Yüklenemeyen Nedenlerden Dolayı Edimin Yerine Getirilememesi* (1970) 37-38; H. Tamer İnal, '*Sözleşmenin Kurulması Esnasında Öngörülemeyen Sonraki İfa İmkansızlığı ve Mücbir Sebep'* (2014) Kazancı Hukuk Araştırmaları Dergisi, 115-164.

impedes the affected party from fulfilling the contract, and which causes unavoidably the violation of an obligation. In short, according to civil law, *force majeure* is a supervening event causing impossibility.

Indeed, the parties to the contract may agree upon a different definition and they can even determine the legal consequences within their contract, thanks to the freedom of contract. They may agree upon terms which seek to provide solutions for unforeseen or unexpected circumstances. In this case, the contractual design will be given priority rather than the statutory results of the impossibility.

Natural disasters of all kinds such as earthquakes, storms, floods, fires, wars, riots, strikes, volcanic eruptions, pandemics may be considered as *force majeure*[12], which are widely accepted as causes creating "impossibility of performance" in the doctrine. It should be highlighted that in the case of *force majeure*, the supervening event must be objectively unavoidable, which means that nobody can avoid the occurrence of this event or prevent its undesired consequences, despite all kinds of precautions taken according to the actual knowledge and technology[13]. As a result, according to civil law, the *force majeure* must not be incorporated in a contract in order to be invoked because it leads, by definition, to impossibility.

It should be added that many international legal documents contain provisions on the *force majeure*, describing it with unanimity, as an unforeseen, unavoidable and external post-contractual event which prevents or impedes unavoidably the performance of the contractual obligations. For example, *force majeure* is defined by The International Chamber of Commerce (ICC) Force Majeure Clause 2020[14], as the occurrence of an event or circumstance which prevents or impedes a party from performing one or more of its contractual obligations under the contract. According to this definition, the impediment must be beyond reasonable control, could not have been reasonably foreseen at the time of the conclusion of the contract, and its effects could not have been reasonably avoided or overcome by the affected party.

A similar explanation of *force majeure* can be found in article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), which states that "*a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences*."

12 Turkish Court of Cassation [hereinafter "TCC"] General Assembly on the unification of the conflicting judgments (6 May 2016) E. 2015/1, K. 2016/1; TCC General Assembly (27 June 2018) E. 2017/90, K. 2018/1259.

13 Junod (N.10) 155; Tandoğan (N.10) 465; Eren, (n.10-Obligations) para 1742; Tolga Özer, *Özel Hukukta Mücbir Sebep Beklenmeyen Hal Covid-19 Yorumu* (Vedat 2020) 22.

14 ICC Force Majeure and Hardship Clauses 2020 <https://iccwbo.org/content/uploads/sites/3/2020/07/icc-forcemajeure-introductory-note.pdf> accessed 27 February 2021.

In article 8:108 of the Principles of European Contract Law (PECL)[15] it is stated that "*a party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences*."

Similarly, the Unidroit Principles of International Commercial Contracts (PICC)[16] state in article 7.1.7 that "*non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences*."

Accordingly, FIDIC Conditions of Contract for Construction (FIDIC Red Book, 2017 edition) sub-clause 18.1 defines force majeure as "*an exceptional event or circumstance which (i) is beyond a Party's control; (ii) the Party could not reasonably have provided against before entering into the Contract; (iii) having arisen, such Party could not reasonably have avoided or overcome; and (iv) is not substantially attributable to the other Party*." It should be mentioned that in the FIDIC (2017), the term "*Force Majeure*", which was used in the first edition, was replaced with "*Exceptional Event*", but the definition and the non- exhaustive list of events or circumstances remained substantially the same.

In light of the above explanations, *force majeure* is generally defined as an unforeseen, unavoidable supervening event or circumstance, which happens after the formation of the contract and beyond the control or the inducement of the affected party. This definition leads to the "impossibility".

2. The Distinction Between *Force Majeure* and Hardship

It is important to understand that, in civil law, *force majeure* and hardship are two different principles, in their preconditions and in their legal consequences. *Force majeure* applies to cases where performance has become impossible because of an event beyond one party's control although all reasonable precautionary measures had been taken.

In the light of aforementioned explanations, *force majeure* is an event, which causes by definition the impossibility. However, hardship deals with cases where the agreed performance is basically still possible even though some underlying facts have

15 The Principles Of European Contract Law [hereinafter "PECL"], https://www.trans-lex.org/400200/_/pecl/ accessed 27 February 2021.

16 The Unidroit Principles of International Commercial Contracts [hereinafter "PICC"], <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> accessed 27 February 2021.

substantially changed to the extent that fulfilling the contractual obligations does not make any economic sense anymore. If the disastrous event does not absolutely cause a breach of obligation for everybody, but creates an excessive difficulty performing this obligation, it should be known as hardship.

Hardship is based on the fact that the underlying circumstances of the contract radically change after the formation of the contract, in a way the parties did not foresee at that time, and although in theory the contractual obligations are still performable, the balance between mutual obligations designed by the parties has been lost and it makes little sense from an economic viewpoint. In hardship, the contract becomes unfair and unreasonable for the disadvantaged party.

Therefore, the breach of a contract is not objectively unavoidable in hardship cases[17]. There is hardship where an unforeseen, inevitable and external supervening event fundamentally alters the balance preset by the parties to the contract, to the level that it becomes not impossible, but unbearable for the disadvantaged party to perform.

This distinction leads us to make a legal assessment in the understanding of these two concepts: *Force majeure* renders the performance impossible and breaks the chain of causation between non-performance and the obligor's actions[18]. In contrast, hardship causes neither impossibility nor frustration, but it renders the performance excessively difficult[19].

The distinction is not absolute, it should be assessed regarding to circumstances[20]. In order to distinguish between the two concepts, the judge has to understand the circumstances, assess the features of the situation and decide upon all the complexity inherent in social disaster cases[21]. Both are unexpected, unforeseen, inevitable, external and extraordinary events. It is highly possible that the same event may have different affects on different contracts.

In short, *force majeure* prevents unavoidably the performance[22], whereas hardship renders it excessively difficult[23]. It could be said that in cases of hardship, the

17 Tandoğan (n.10) 466; Tamer Pekdinçer and İrem Toprakkaya-Babalık, '*Koronavirüs Salgınının Sözleşmelere Etkisi, İfa İmkânsızlığı, İfa Güçlüğü ve Uyarlama' in Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 303, 316.

18 Tandoğan (n.10) 468; Tekinay et all (n.10) 1003; Eren, (n.10-Obligations) para 1745; Antalya (n.10) para 2586.

19 Hale Şahin, *Mücbir Sebep Nedeniyle Borcun Ifa Edilememesi* (Onikilevha 2020) 78.

20 Eren, (n.10-Obligations) para 1734.

21 Tekinay et all (n.10) 1004; Ş. Barış Özçelik, '*Covid-19 Salgını Çerçevesinde Alınan Önlemlerin Sözleşme Hukuku ve Mücbir Sebep Kavramı Açısından Değerlendirilmesi' in Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 283, 284.

22 Antalya (n.10) para 2605.

23 Şahin (n.19) 79.

impossibility is not objective but "subjective"[24]. It must be pointed out that subjective inability to perform does not lead to impossibility, however if it may result from hardship. Hardship is an extraordinary and unforeseen event, which alters the balance in the obligation on an unexpected scale, creating an unreasonable and unfair situation for the disadvantaged party[25].

In civil law, force majeure is covered by the impossibility and the hardship by the theory of *imprévision* (in French law) or *Wegfall der Geschäftsgrundlage* (in German law) which both describes the legal situation in which the economic balance of the contract, has fundamentally changed[26]. These theories are widely accepted in civil law countries and applied in hardship cases to adjust the contract in order to adapt it to the radically changed circumstances.

In common law, the frustration doctrine covers not only the frustration because of impossibility but also frustration arising from different reasons such as the frustration of purpose (in United Kingdom and United States) or the impracticability (in the United States). Herein appears the essential difference in nature between frustration, hardship and *force majeure*. This is made clear by a definition of frustration which has been given by Lord Radcliffe in the case of *Davis Contractors, Ltd. v. Fareham U.D.C.*[27]: "*Frustration occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do*."

According to this explanation, the frustration is certainly broader than the concept of *force majeure* and encompasses to some extent the features of the French concept of *imprévision* and the German concept of Wegfall *der Geschäftsgrundlage.* However, there is a significant distinction between both systems in cases of hardship. When a contract is frustrated, in common law, a judge cannot amend or adjust it to the new situation. Frustration simply discharges the contract and the defendant will be excused from paying whereas in civil law, the judge would certainly rule in favor of an amendment to the contract since, due to the changed circumstances, the contract essentially lost economic balance[28].

24 Tekinay et all (n.10) 909; Serozan (n.11) § 15 para 1.

25 Gözübüyük (n.11) 162; TCC General Assembly (7 May 2003) E. 2003/13-332, K. 2003/340.

26 A. H. Puelinckx, '*Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances*' (1986) 3 J. Intl Arb 47, 50.

27 *Davis Contractors, Ltd. v. Fareham U.D.C. (*1956) A.C. 696 (HL) 728-729.

28 Puelinckx (n.26) 51.

C. The Legal Qualification of Covid-19

It must be highlighted that it is not Covid-19 itself which affects the contractual relationships, but the imposed measures taken worldwide do. Therefore, it must be clarified that the culprits are the drastic and high-scale measures taken against Covid-19, which make the obligation difficult or impossible to perform. However, because they are all reactions against Covid-19, which stays at the center of the subject, the pandemic should be deemed as the main reason for the impact on contracts, resulting from the measures taken by the countries affected by the outbreak.

With the lexicon of the pandemic, it may be argued that Covid-19 may "infect" or not contractual relationships. If a contract has not been negatively affected by the measures taken against the pandemic, if the balance in the contract has not been significantly altered in the disadvantage of one party, it means that Covid-19 did not have a negative impact on this legal relationship. In that case, one must admit that the contract in question remains untouched by the pandemic.

To illustrate, the income of a supermarket may not have been adversely affected because of its delivery services or a restaurant may increase its profits thanks to take-out services. In those examples, despite the lockdown, these hypothetical businesses in question are not "infected" by Covid-19. Hence, it would be a misjudgment to call automatically for *force majeure* or hardship in their possible future legal disputes.

Nevertheless, it is probable that Covid-19 had an impact on some contractual relationships, which are adversely affected by the measures taken by the public authorities. In some cases, it may prevent or impede the disadvantaged party to perform[29], in some other cases it may create an excessive difficulty that makes performance extremely difficult. The assessment should be done case by case[30]. Even after the assessment has been made correctly, the main problem stays the same, which is to determine how the risks will be allocated between the parties who found themselves in this situation, coming from this self-induced supervening event[31].

It should be noted that the parties may identify, thanks to the freedom of contract, what circumstances should be considered as *force majeure* or hardship and they can determine the legal consequences of these[32]. It is also possible to guarantee the performance despite the impossibility or excessive difficulty resulting from *force majeure* or hardship[33].

29 Murat Aydoğdu and Ali Haydar Yağcıoğlu, '*Kovid-19 Salgınının Borç İlişkilerine ve Yargılamaya Etkileri*' *in Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 22.

30 Özer (n. 13) 24.

31 Pascal Pichonnaz, '*Un droit contractuel extraordinaire ou comment régler les problèmes contractuels en temps de pandémie'* (2020) Sondernummer der Zeitschrift für Schweizerisches Recht 137, 140.

32 Pichonnaz (n.31) 140; Tandoğan (n.10) 468; Antalya (n.10) para 1667; Baysal et all (n.3) 269 and 271.

33 Leyla Müjde Kurt, Borçlunun Sorumlu Olmadığı Sonraki İmkânsızlık (Yetkin 2016) 180 *ff.*; Pekdinçer and Toprakkaya-Babalık (n.17) 307; Zafer Kahraman, Saf Garanti Taahhütleri (Vedat 2017) 73.

In light of the above explanations, it should be admitted that the impact of Covid-19 on contracts must be analyzed case by case, taking into account its effects. On the one hand, it is clear that Covid-19 is an unforeseen, inevitable and external event which caught the entire world unprepared. On the other hand, its legal implications differ in various contracts. It renders some contracts impossible and for some other, it makes it difficult to perform them. It is also possible that the contract might not even be affected by the pandemic.

In the section below, the legal remedies of non-performance due to the adverse effects of Covid-19 will be assessed.

II. The Legal Remedies in Case of Breach of Contract Resulting from the Covid-19 Pandemic

In the section above, it has been scrutinized that the prohibitions and measures taken by the states in response to Covid-19 causes some significant changes in circumstances, which may negatively affect contractual relations. The affected (or with the lexicon of the pandemic -"infected") contracts suffer mostly from strict impossibility or excessive difficulty, which prevents or impedes the disadvantaged party to fulfil his or her part of the bargain. The common law and the civil law remedies (with the remedies specified in PICC, PECL and CISG articles), in case of breach of contract (or non-performance) resulting from the Covid-19 pandemic, will be analyzed in the following subtitles.

A. Common Law Remedies

The changed market circumstances caused by the Covid-19 pandemic rendered some contracts excessively difficult to fulfil and some others impossible. This has led affected parties to non-performance and they seek legal remedies for this. In this context, two well-known common law concepts are being tested: the doctrine of frustration and the contractual remedy of *force majeure* (or hardship, which recently attracts attention). The contractual remedies, the doctrine of frustration and its legal consequences will be analyzed below.

1. Contractual Remedies

The contract is generally defined as a legally enforceable agreement, a bargain between the parties[34], to which each party has given his assent on the basis of the circumstances as they believed them to be at the time of the formation of the contract. The contract binds each party to fulfil obligations which necessarily contain a balance to which the parties have agreed and therefore an allocation of

34 Paul Richards, *Law of Contract* (11th edn Pearson 2013) 10-11.

risks between the parties[35]. It is possible that the contract contains a clause which anticipates and identifies the case as *force majeure* or *hardship,* and determines the legal consequences of it, as well. The doctrine of frustration will not be applicable if the relevant risks have been addressed and allocated by the contract terms.

Hence, the frustration operates only where the contract does not deal properly or at all with the supervening event[36]. If the contract dictates what will happen in case of the anticipated supervening event occurring, either by an express or an implied term, there is no room for the doctrine of frustration[37].

In this case, the contractual clause will be applied to the changing circumstances. Indeed, this clause only comes into effect when a supervening event beyond the control of either party occurs and renders the contract impossible or impracticable to fulfil. The intent is to allocate the risk from events that are well outside of normal business risks. The words used in the force *majeure* (or hardship) clause will describe the events or acts that trigger relief from obligations. This clause enables the parties to a contract to suspend or terminate their obligations.

The key question is whether the Covid-19 pandemic qualifies as a *supervening event*. It caught the entire world unprepared. In this regard, it is unexpected. However, the words used in the *force majeure* (or hardship) clause and the nature of the contract may dictate whether Covid-19 constitutes a supervening event. These clauses usually cover events such as an act of God, war, riots, strikes, earthquakes, floods, fires, government restrictions, epidemics, pandemics or public health emergencies. Hence, Covid-19 likely falls into these broad categories of events, even though it is not named in the contract.

Force majeure (or hardship) clauses sometimes include a catch-all phrase such as *"(...) or any other cause beyond the parties' control"*. While in one case the court have allowed parties to use this phrase for events not stated or unrelated to those in the *force majeure* clause[38], in another case it is rejected[39]. I suggest that it must be interpreted regarding the overall clause, and the clause must cover Covid-19 if the implied intent of the parties is in favor.

Therefore, if there is a clause to terminate the contract because of changing circumstances due to Covid-19, the right to terminate arises under the contract rather than by the operation of the doctrine of frustration. Stipulations to that effect

35 John Cartwright, *Contract Law, An Introduction to the English Law of Contract for the Civil Lawyer* (3rd edn Hart 2016) 260.

36 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd* (1942) AC 154.

37 Janet O'Sullivan, *The Law Of Contract* (8th edn Oxford University Press 2018) para 14.7.

38 *Chandris v Isbrandtsen Moller Co Inc* (1951) 1 K.B. 240 (20 July 1950).

39 *Tandarin Aviation Holdings Ltd. v Aero Toy Sore LLC* (2010) 2 Lloyd's Rep 668.

are effective; provided that they are not uncertain in their terms and that there is compliance with any notice requirement[40].

Nonetheless, if the contract does not include a *force majeure* (or hardship) clause or it does but a pandemic is not included, it may be possible for the parties to rely on the common law doctrine of frustration, which discharges the contract when the contract is frustrated.

2. The Doctrine of Frustration

In Common law, the starting point of contract law is "*pacta sunt servanda"*, which translates from Latin as "agreements must be kept." It may be accurately described as a "bedrock principle of contract law[41]." It means that agreements must be respected in all circumstances. This philosophy is still at the heart of the matter in modern times, for reasons of legal certainty and stability. The typical example of this strict approach is the English case of *Paradine v. Jane*[42] where Jane was the tenant of Paradine's estate for a number of years while the German prince Rupert occupied the estate himself for three years by military force. In this case, the Kings Bench nevertheless decided that Jane had to pay rent for that period. This rigid interpretation prevailed in the United Kingdom until Blackburn J's famous judgment in *Taylor v. Caldwell (1863)*[43], where the destruction of a music hall which had been hired out for the giving of a series of concerts was held to have discharged the contract of hire. In Blackburn J's words, "both parties are excused" from further performance because "*in contracts in which the performance depends on the continued existence of a given person or a thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance*[44].".

According to the court, the parties must have intended that the contract would no longer bind them if it became impossible to perform[45]. This was a turning point in common law, as the case in which common law moved away from the doctrine of absolute contracts (the rigid interpretation of *pacta sunt servanda*) to the modern doctrine of discharge by supervening events[46].

While the implication of a term was the original technique used by the court to justify the setting aside of the contract, modern courts no longer rely on this, as

40 *Channel Island Ferries Ltd v Sealink UK Ltd* (1988) 1 Lloyd's Rep 323.

41 *Davis v GN Mortgage Corp*. (2003) F. Supp. 2d 950, 244

42 *Paradine v. Jane*, 82. Eng. Rep. 897.

43 *Taylor v Caldwell* (1863) 3 B & S 826, QB.

44 *3 B & S* 826, 840.

45 Cartwright (n.35) 261-262.

46 Guenter Treitel, *Frustration and Force Majeure* (3rd edn Sweet & Maxwell 2014) para 2-022.

the second leading case demonstrates[47]. In *Davis Contractors Ltd v. Fareham Urban District Council* (1956)[48], the court recognizes commercial impracticability rather than impossibility. It was clearly not impossible for Davis to carry out their contractual obligations. They fulfilled their obligations, and they had been paid for so doing. Their submission was that it was not fair to hold them to the contract price in these changed circumstances. According to Lord Radcliffe, frustration occurs also in the change of circumstances, which renders the obligations radically different from that which was undertaken by the contract. This is accepted as the overall test for frustration in the modern law[49].

Similarly, Lord Simon in *National Carriers Ltd v Panalpina (Northern) Ltd*[50] states the test to be: "*Frustration of contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such a case, the law declares both parties to be discharged from further performance*."

Therefore, the doctrine of frustration is designed to cover the case where the parties have not made provision for a change in circumstances, and the new circumstances have the effect of radically altering the nature of contractual obligations[51]. The party seeking relief from their obligations under the contract, relying on this doctrine, has the burden of proof to show the contract was frustrated.

Indeed, the frustrating supervening event must occur after the formation of the contract, and it must be unexpected, unforeseeable or uncontemplated by the parties[52]. The failure by the parties to deal with a known risk should indicate the parties' willingness to bear the consequences of that risk materializing. In addition, the event must not be induced by the party seeking discharge[53].

Hence, the hallmark of frustration is that it refers to a supervening event not reasonably contemplated by the parties at the time of contracting which radically alters the foundation of the contract or renders it physically or legally impossible, illegal or

47 Ewan McKendrick, *Contract Law, Text, Cases And Materials* (8th edn Oxford University Press 2017) 695.

48 *Davis Contractors Ltd v. Fareham Urban District Council* (1956) AC 696, HL

49 *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* (1982) AC 724.

50 *National Carriers Ltd v Panalpina (Northern) Ltd* (1981) A.C. 675.

51 Cartwright (n.35) 264.

52 *Walton Harvey Ltd v Walker and Homfrays Ltd* (1931) 1 Ch 274.

53 *J Lauritzen AS v. Wijsmuller BV ("The Super Servant Two")* (1990) 1 Lloyd's Rep 1, p. 707.

impracticable to perform[54]. It should be noted that disappointed expectations or mere inconvenience do not of themselves give rise to frustrated contracts. A person claiming radical change would have to show that the contract became futile or even impossible, not just less than expected[55]. In the *Nema*, Lord Roskill stated that the doctrine of frustration should be dealt with seriously, and it should "*not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent bargains*[56]."

It is not possible to discuss all the circumstances in which the doctrine of frustration applies because these are innumerable. However, it is possible to identify certain typical situations such as unavailability of the subject matter of the contract[57], non-occurrence of an event central to the contract[58], inability to comply with the specified manner of performance[59], supervening illegality[60] etc.

Finally, the question is, is Covid-19 a frustrating event? The answer will vary on a contract by contract basis as it has the potential to impact different contracts in different ways. The aforementioned explanations show that it will essentially depend upon whether the existence of coronavirus renders further performance of the contract impossible, illegal or something different from what was contemplated by the parties when entering into the contract.

In determining whether Covid-19 frustrates a given contract, the courts will construe the terms of the contract in light of the nature and content of the contract, examine the economic effects of the new circumstances, compare performance of the relevant contractual obligation in the original circumstances (the old obligation) with a performance of the same obligation in the new circumstances (the new obligation) to whether the contract has radically or fundamentally changed.

It is clear that the measures taken in response to Covid-19 (such as travel bans, prohibitions of some activities or lockdowns, government decrees, quarantine zones, cancellation of events and the introduction of emergency legislation) affect some of the contracts. Some contracts have become impossible as a result of the consequences of Covid-19. The impossibility remains under the doctrine of frustration unless there is a contractual *force majeure* clause[61].

54 Mary Charman, *Contract Law* (4th edn Routledge 2007) 216; P.A. Chandler '*Self-Induced Frustration, Forseeability and Risk*' (1990) 41 N. Ir. Legal Q. 362.

55 *Maritime National Fish Ltd v Ocean Trawlers* (1935) AC 524, PC; *Amalgamated Investment & Property Co. Ltd v. John Walker & Sons Ltd* (1977) 1 WLR 164; *Herne Bay Steamboat Co. v. Hutton* (1903) 2 KB 683.

56 *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* (1982) AC 724, 752.

57 *Taylor v Caldwell* (1863) 3 B & S 826; *Morgan v. Manser* (1948) 1 KB 184; *Condor v Barron Knights* (1966) 1 WLR 87.

58 *Krell v. Henry* (1903) 2 KB 740; *Herne Bay Steamboat Co. v. Hutton* (1903) 2 KB 683 ("Coronation cases").

59 *Tsakiroglu & Co. Ltd v. Noblee Thorl GmbH* (1962) AC 93; *Eugenia* (1964) 1 All ER 161.

60 *Metropolitan Water Board v Dick Kerr and Co Ltd* (1918) AC 119; *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* (1944) AC 265.

61 Richards (n.34) 440-441.

It should be noted that, in common law, the impossibility must be permanent in order to frustrate the contract. Therefore, with respect to Covid-19, in order to rely on frustration, the main hurdle to overcome would be the ability to demonstrate that the impossibility is permanent, and not just temporary or transient. Nonetheless, most effects of Covid-19 seem temporary. However, if time is of the essence for performing a fundamental term in a contract, and such a performance is utterly prevented by the Covid-19 pandemic, the contract could be deemed as frustrated.

In the case that the Covid-19 pandemic does not cause impossibility, but excessive difficulty in the fulfillment of the contract, the doctrine of frustration may still be effective unless the parties agree upon a contractual hardship clause.

In short, the Covid-19 pandemic is a supervening and an extraordinary event which is unavoidable, unforeseeable and beyond the control of the parties by its nature. If it affects a contractual relation, causing impossibility or excessive difficulty to the level that the agreed obligation radically alters, the disadvantaged party may rely on the doctrine of frustration, unless of course they agreed upon a contractual remedy.

3. Legal Consequences of Frustration

Frustration is often an "all or nothing" outcome: either the parties are entirely released, or they remain liable to perform[62]. It is worth noting that if an unforeseen event causes frustration, discharge occurs automatically, not through the choice of one of the contracting parties[63]; the parties to the contract are released from having to perform future matters of law.

Therefore, if Covid-19 changes the circumstances, satisfying the test for frustration, the contract is terminated. The effect of this remedy is significantly different from the remedies which most of the civil law systems will recognize in such a context. According to the doctrine of frustration, the termination is not retroactive, but it terminates for the future (*ex nunc*) with prospective effects[64]. When a contract is terminated, the primary obligations of the parties are discharged in so far they have not yet accrued due to be performed. However, those obligations which have already accrued due are left undisturbed. In brief, the loss lay where it fell, which means that all duties end at the point of frustration, any money paid remaining paid, any money due remaining due[65].

62 Michael H. Whincup, *Contract Law and Practice: The English System and Continental Comparisons* (5th edn Kluwer Law International 2006) para 12.4; Cartwright (n.35) 268; Hugh Beale and Christian Twigg-Flesner, *'COVID-19 and English Contract Law*' <https://www.intersentiaonline.com/publication/coronavirus-and-the-law-in-europe/28> accessed 27 February 2021.

63 *Hirji Mulji v Cheong Yue Steamship Co Ltd* (1926) AC 497.

64 *Chandler v. Webster* (1904) 1 KB 493.

65 Charman (n.54) 220; Cartwright (n.35) 267.

Hence, in effect, both parties are released automatically from performance of the contract in the future[66]. Nevertheless, there is no automatic reversal (restitution) of the performance which has been rendered under the contract before termination. In brief, the termination discharges the future primary obligations whereas it does not disturb the past performance.

In case of a breach of contract which justifies termination, the innocent party may is entitled to sue for damages for the loss which arises from the breach. In case of frustration, nonetheless, there is no claim for damages because, by definition, neither party is at fault in the occurrence of the supervening event.

Hence, on the one hand, all obligations finish at the point of frustration[67]. On the other hand, the termination *ex nunc* (non-retroactive) of the contract, without restoring the parties to their original positions in which they were placed before they entered into the contract, can leave one party at a significant disadvantage[68].

However, in the case of *Fibrosa*[69], Viscount Simon was critical of the *Chandler* case and found that it would apply only where there has been no failure of the consideration. However, in the circumstances, there was a failure of the consideration as Fibrosa had received none of the machinery ordered, because of a frustrating event occurred after the deposit had been paid. It was held that the deposit was recoverable since there was a total failure of the consideration. Nevertheless, it would not be possible if there had already been partial performance of the contract by the seller.

In the United Kingdom, in order to offer a solution to this problem, the Parliament passed the Law Reform (Frustrated Contracts) Act 1943 to give the court certain powers to adjust the financial positions of the parties after frustration has taken effect. Section 1 (2) of the Act gives right to the recovery of the sums paid (or that became payable) before the time of discharge. However, if the party to whom the sums have been paid (or payable) has incurred expenses in performance of the contract before the time of discharge, the court may allow him or her to retain a sum up to the total of his or her expenses. The decision on the sum to be awarded is within the court's discretion[70].

Section 1 (3) states that, if before the time of discharge one party has conferred a benefit on the other which has not yet been paid for under the contract, the court may require the party who received the benefit to pay for it. In this case, the sum payable is again at the court's discretion.

66 M. P. Furmston, Geoffrey Chevalier Cheshire, Cecil Herbert Stuart Fifoot, *Cheshire, Fifoot and Furmston's Law of Contract* (16th edn Oxford University Press 2012) 731-732; O'Sullivan (n.37) para 14.54.

67 *Chandler v. Webster* (1904) 1 KB 493; *Cutter v. Powell* (1795) 6 TR 320.

68 Cartwright (n.35) 267.

69 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] UKHL 4.

70 *Gamerco SA v ICM/Fair Warning (Agency) Ltd* (1995) 1 WLR 1226.

It should be noted that, in common law, the court cannot require the parties to renegotiate, nor can the court itself impose a new contract. There is no doubt that it would be in the best interests of both parties to renegotiate the terms of the contract to avoid losing the whole transaction due to frustration. However, this is a commercial matter which must be solved between the parties. That is why, in common law, a power it is not accepted a for the court to intervene in this way. The House of Lords has rejected even an express duty to negotiate in good faith[71].

B. Civil Law Remedies

The Covid-19 pandemic and the measures taken in response has significantly changed market circumstances and rendered the performance of some contracts excessively difficult and some others impossible. The negatively affected parties seek legal remedies for this new situation. In this context, the termination of the contract because of impossibility, the adjustment because of hardship and the contractual remedies will be handled below.

1. Termination Because of Impossibility

a. Statutory Provisions on the Impossibility Extinguishing Obligation

In civil law, the concept of impossibility is usually accepted as a cause for the termination of the obligations. According to the Swiss Code of Obligations article 119 and the Turkish Code of Obligations article 136 "*an obligation is deemed extinguished where its performance is made impossible by after-formation circumstances not attributable to the obligor. In a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses his counter-claim to the extent it has not yet been satisfied.*"

Similarly, section 275 of the German Civil Code (*Bundesgesetzbuch*) states that "*a claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person*."

Accordingly, in article 1351 of the French Civil Code, it is stated that "*impossibility of performing the act of performance discharges the debtor to the extent of that impossibility where it results from an event of force majeure and is definitive unless he had agreed to bear the risk of the event or had previously been given notice to perform*."

In addition, article 1218 of the French Civil Code, which offers a satisfying definition of force majeure states the consequences as follows: "*the occurrence*

71 *Walford v Miles* (1992) 2 AC 128

of an event which is beyond the control of the obligor, which could not have been reasonably foreseen at the time of the entry into the contract and the effects of which cannot be avoided by appropriate measures and which prevents performance of its obligation by the obligor. If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1. (termination because of impossibility)"

The Italian Civil Code also sets forth protections for parties whose obligations are no longer capable of being performed due to a supervening impossibility (*impossibilità sopravvenuta*) not imputable to the same parties. In particular, article 1256 provides for the extinguishment of an obligation if its performance becomes impossible for an event not imputable to the obligor. If the impossibility is only temporary, the obligor would not be liable for the delay, but when it continues up to a time when the obligor is no longer to be deemed to be obligated, based on the underlying reason and the nature of the relevant obligation, or that the other party has no longer an interest in receiving the obligor's fulfillment, the obligation will expire. In addition, article 1463 dictates that a party released from an obligation that has become impossible, is not entitled to claim the performance from the other party of the relevant agreement. In a nutshell, the agreement would terminate with the full release of the parties.

In light of the above statutory findings, it may be deduced that the impossibility extinguishes the obligation. This doctrine flows from the Roman law saying "*impossibilium nulla obligatio"*, which translates as "impossibility (*Unmöglichkeit*) nullifies the obligation". It should be noted that the impossibility of performance causes the automatic termination of the obligation[72]. At the moment of impossibility, the obligor is discharged from the obligation, without being held responsible for the non-performance.

b. Discussions on the Aspects of Impossibility

As for the impossibility, it is important to clarify some discussions held by the civil law doctrine. First, some argue, in the doctrine, that the impossibility must be objective in order to terminate the obligation[73]. The opposing opinion in the Swiss-Turkish doctrine inspired by § 275 of the German Civil Code (BGB), argues that

72 Pascal Pichonnaz, *Impossibilité et exorbitance* (Univ. Fribourg 1997) para 999-1000; Max Keller and Christian Schöbi, *Das Schweizerische Schuldrecht* (Helbing und Lichtenhahn 1984) Vol.4, 187; Wolfgang Wiegand, 'OR art. 119' *in Basler Kommentar zum Schweizerischen Privatrecht, Obligationenrecht* (6th edn Helbing Lichtenhahn 2015) Art. 119 para 11; Kurt (n.33) 213.

73 Keller and Schöbi (n.72) 187; Eren (n.10-Obligations) 1330; Mustafa Dural, *Borçlunun Sorumlu Olmadığı Sonraki İmkânsızlık* (Fakülteler 1976) 89.

the impossibility, whether it is objective or subjective, triggers the ending of the obligation[74].

In my humble opinion, in order to rely on impossibility, the performance should be impossible for everybody, which means that the impossibility must be objective. According to this approach, the "subjective" impossibility is a pseudo-impossibility because the subjective inability to perform does not lead to impossibility, however it may be resulting from hardship[75]. Letting the subjective impossibility terminate the obligation, would lead lawyers to uncertainty in the reliance on the impossibility and would leave no room for hardship, where the contract does not terminate but prevails thanks to an adjustment or modification[76].

To illustrate, a lease agreement of a workplace closed by a government's decree face an objective impediment beyond his or her control, which prevents the lessor to perform his obligation to grant the usage of the leased place. In this scenario, there is without doubt an impossibility. In a different scenario, despite not facing any kind of prohibition, a lessee of a shop might find himself or herself in difficulty to pay his rent because his or her income decreased significantly due to the pandemic. In this latter case, the payment is still possible, though the shopkeeper may rely on hardship.

Second, it is significantly important to determine whether the impossibility is permanent. When the obligation becomes impossible permanently, there is no doubt that it extinguishes. Nevertheless, the impossibility might be temporary in some cases where the performance of the obligation becomes impossible for a definite or indefinite period of time. In those cases, impossibility persists during that specific period, though, when the impossibility is removed, when the conditions return to normal, obligations become performable again. I suggest that the contract is "paralyzed", which means temporarily "in suspense" during the time that impossibility continues.

In light of the above explanations, if an obligation becomes impossible due to the prohibitions or measures taken against the Covid-19, which occurred after the conclusion of the contract, it may be assessed that the contract is suspended until

74 Ingeborg Schwenzer, *Schweizerische Obligationenrecht, Allgemeiner Teil* (5th edn Stämpfli 2009) para 64.09; Andreas Von Tuhr and Arnold Escher, *Allgemeiner Teil Des Schweizerischen Obligationenrecht* (3rd edn Schulthess 1974) Vol.2, 94; Tekinay et all (n.10) 909; Serozan (n.11) § 15 para 1. It should be pointed out that the § 275 BGB, the wording makes clear, applies to all types of impossibility. However, it draws a line between practical and factual impossibility because the section provides a different legal consequence for practical impossibility: the obligor's obligation does not automatically fall away, but the obligor is granted a right to refuse performance. *See* Reinhard Zimmermann, *The New German Law Of Obligations* (Oxford University Press 2005) 47. In this case, the performance is not impossible, but practically unreasonable. That is why it is called in the doctrine as "pseudo-impossibility". *See* Hartmut Braunschneider, *Das Skript Schuldrecht, Allgemeiner Teil* (Bund-Verlag 2002) 139.

75 Ahmet M. Kılıçoğlu, *Borçlar Hukuku Genel Hükümler* (16th edn Turhan 2012) 843. See also Bruno Von Büren, *Schweizerische Obligationenrecht, Allgemeiner Teil* (Schulthess 1964) 390. In this case, the § 275 of the German Civil Code grants the obligor a defense to refuse the performance even before renegotiating or adjusting it. See Jan Dirk Harke, *Allgemeines Schuldrecht* (Springer 2010) para 218.

76 Pichonnaz (n.72) 303-305.

the end of the pandemic. It means that the contract does not terminate permanently because the impossibility is not permanent. The temporary impossibility is not named in statutes, however it may find recognition thanks to the partial impossibility. In my humble opinion, it is a partial impossibility, which is not partial in quantity but in time.

In article 137 of the Turkish Code of Obligations, the partial impossibility leads to the termination of the impossible part of the obligation, unless it is not reasonable to separate the contract from this part. In such case, the contract would be deemed impossible entirely. Accordingly, under article 1464 of the Italian Civil Code, in the event a party's performance has become impossible only in part, the other party may request a proportional reduction of its (counter) obligation and, absent any reasonable interest in receiving only part of the originally agreed performance, also claim termination of the agreement.

To illustrate, when the use of a workplace is prohibited as a measure against the pandemic, it becomes impossible for the lessor to grant the lessee the use of the leased place. In this case, since the workplace is closed by a mandate of the public authority, the impossibility is objective[77]. In this scenario, the lease agreement faces a temporary impossibility during which no obligation arise from it, although the mutual obligations, which are generated from before the time of the impossibility, prevail. In the end, when the prohibitions cease to exist, the contract comes back to life from the "paralyzed", "infected" state. For that reason, it is argued in the doctrine that it might be considered a "postponement[78]", which in my opinion is not correct because the obligations are not postponed but they are void as long as the impossibility continues.

In doctrine, it is suggested that the temporary impossibility leads the obligor to default[79]. From this point of view, the consequences of the default will arise for the contracts facing Covid-19 prohibitions, which grant the obligee the right to terminate the contract without the compensation[80]. I think this opinion is not correct. The default of the obligor requires a feasible, performable obligation[81]. Accordingly, it is defined as the failure of the obligor to fulfill an obligation while he could[82]. Hence, the impossibility and the default cannot exist together.

77 Kurt (n.33) 111; Ş. Barış Özçelik, '*Sözleşmeden Doğan Borçların İfasında Hukukî İmkânsızlık ve Sonuçları*' (2014) 63(3) Ankara Üniversitesi Hukuk Fakültesi Dergisi, 569, 577-578.

78 Aslı Makaracı Başak and Seda Öktem Çevik, '*Koronavirüsün İşyeri Kira Sözleşmelerine Etkisi'* in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 393, 398.

79 Tekinay et all (n.10) 909; Eren (n.10-Obligations) 1067; Dural (n.73) 107; Kurt (n.33) 170; Pekdinçer and Toprakkaya-Babalık (n.17) 311-312.

80 Özçelik (n.21) 286; Tolga Özer, '*Covid-19 Salgınının İş Yeri Kiralarında Kiracının Kira Bedelini Ödeme Borcuna Etkisi'* in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 451, 455.

81 Tandoğan (n.10) 469; M. Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler* (2017) Vol.1, para 1526; Tekinay et all (n.10) 912; Eren (n.10-Obligations) 1120; Antalya (n.10) para 2430; Hüseyin Hatemi and Kadir Emre Gökyayla, *Borçlar Hukuku Genel Hükümler* (4th edn Vedat 2017) § 26, para 59; Ayşe Havutçu, *Tam Iki Tarafa Borç Yükleyen Sözleşmelerde Temerrüt ve Müspet Zararin Tazmini* (Dokuz Eylül Üniversitesi Hukuk Fakültesi 1995) 24.

82 Serozan (n.11) § 17 para 1; Antalya (n.10) para 2431.

In my opinion, due to the temporary impossibility, the obligations of the lessor and the lessee are void until the moment where the impossibility disappears, and the contract starts to generate obligations from the moment when the contract becomes performable again. In short, I suggest that, in cases of impossibility resulting from Covid-19, the contract stops generating obligations during the time of the impossibility and waits in suspense. However, it restarts to generate obligations after the impossibility created by Covid-19 disappears.

It is also worth noting that the obligor, released from the obligation due to the impossibility, is not liable for compensation because he cannot be held responsible by *force majeure*, which is in fact a supervening event occurring without the inducement of the obligor.

Third, it is important to determine the consequences of the prolonged suspense. It is possible that a prolonged suspense becomes unbearable for the parties and this might reach a point where expecting them to wait for the continuation of the contract becomes incompatible with the principle of good faith. In that case, the contract may be terminated for a just cause. It is understandable because the affected party may seek relief from the contract relying on the principle of good faith, after a long time of suspense[83].

In this approach, it is not clear how long the parties must wait for the end of the suspense and when they can terminate the contract due to the prolonged impossibility. It should be under the court's discretion to evaluate the duration of this period according to the circumstances[84].

According the opposing view, the obligee has the right to seek performance as long as the benefits of the performance prevail, or may apply the consequences of the default, without the compensation[85].

In my opinion, it is not possible to apply for default provisions as long as the impossibility continues. However, termination for default could be done if the obligor does not perform after the impossibility ends, without the possibility to seek compensation because the obligor cannot be held responsible for the impossibility.

Nonetheless, if a long period of suspense is against the hypothetical intents of the parties, if it is clear that such a contract would not be concluded if the length of the temporary impossibility was foreseen, the entire contract should be deemed as terminated due to the impossibility[86].

83 Baysal et all (n.3) 277.

84 TCC General Assembly (28 Avril 2010) E. 2010/15-193, K. 2010/235.

85 Emre Cumalıoğlu, '*Covid-19 (Yeni Korona Virüs) Pandemisinin Özel Hukuk Sözleşmelerine Etkisinin; İmkânsızlık, Amacın Bozulması, Uyarlama ve Ödemezlik Def'i Bakımından Değerlendirilmesi'* in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 295, 296.

86 F. Gündoğdu and N. Ural, *'Koronavirüs (Covid-19) Tedbirlerinin Kira Sözleşmelerine Etkisi*' in *Covid-19 Salgınının*

Fourth, in the case of impossibility resulting from *force majeure*, it is worth questioning whether the supervening event must be self-induced. The French Supreme Court rejected this approach in two separate cases where the obligor could not perform his duty because he was sick, stating that the event must be unforeseen and unavoidable to be deemed as force majeure. It should not be necessarily originating from an external source than the affected party[87]. However, this is overruled by two recent cases in which the court reinstalled the requirement of exteriority from the affected party[88]. In the end, the new reform of the law of obligations in 2016 states the core elements of force majeure as unforeseeability, unavoidability and occurring beyond control of the affected party.

I think that it suffices to determine whether the obligor is at fault in the occurrence of the supervening event. In the case of the event causing post-formation impossibility, happening beyond his control, he or she must be discharged from his or her obligation because of impossibility. That is why, in Swiss-Turkish and German law, to be discharged with no liability, one must have clean hands in the occurrence of impossibility. In the doctrine it is called post-formation impossibility without fault.

It should be noted that the principle of good faith imposes that each party is at all times obliged to use all reasonable endeavors to reduce any loss in the performance of the contract[89]. This compels an early warning obligation in order to mitigate the undesired effects of the matter, which will increase the damage. According to this, the affected party shall give notice of the event without delay to the other party.

Similarly, article 136 of the Turkish Code of Obligations defines the duty to notify without delay that the performance became impossible in order to prevent the situation from aggravating or the damage from increasing. It is also stated that if the obligor does not comply with these duties, he will be held responsible for the additional damages arising from his failure to comply. In short, the obligor will have to compensate for the damage, which could have been prevented from occurring if he had notified the impossibility at the first appropriate time and had taken measures to reduce the loss[90].

Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler (Onikilevha 2020) 372.

87 French Cour de Cassation [hereinafter "CCass"] Assemblée plénière [Ass.Pl.] (14 Avril 2006) 02-11.168; CCass 1ère civ. [First Civil Chamber] (30 October 2008) 07-17134.

88 CCass soc. [Social Chamber] (16 May 2012) 10-17.726; CCass 3e civ [Third Civil Chamber] (15 October 2013) 12-23126.

89 Dural (n.73) 131; Haluk Nami Nomer, *Borçlar Hukuku Genel Hükümler* (Beta 2017) para 184.2.

90 Oğuzman and Öz (n.81) para 1820; Kılıçoğlu (n.75) 847.

2. Adjustment or Termination of The Contract Because of Hardship

a. The Doctrine

The fundamental principle of the sanctity of contracts (*pacta sund servanda*) implies that the terms of a contract are law between the parties, and therefore means that neglect of their respective obligations is a breach of the contract. This indicates that the parties must remain loyal to the balance of interests they have established while concluding the contract, and fulfill their obligations in accordance with their commitments[91]. According to this principle, agreements must be kept in all circumstances[92].

It is related to the freedom of contract. This principle presupposes that the parties are free to design their contract by calculating the possible risks, which might negate the purpose of their mutual understanding[93]. Indeed, they conclude the contract recognizing that the future cannot be predicted with certainty and taking into account the possible risks that may arise in the future. They undertake obligations despite the uncertainty which the future holds[94]. They form the contract with their anticipations for the future, which becomes the basis of the contract[95].

Nevertheless, it is possible that an unforeseen and unavoidable supervening event occurs after the formation of the contract and significantly disrupts the intra-contractual balance established by the parties, to the extent that it becomes unbearable or unreasonable for one party to honor his obligations as undertaken. If the balance preset in contract was distorted significantly in favor of one party, it would be against the principle of good faith to enforce the contract to the other party, as if nothing had happened. This would result in impracticability of the performance, and the bargain becomes unfair[96].

---

91 Karl Larenz, *Geschäftsgrundlage und Vertragserfüllung* (3rd edn C.H. Beck 1963) 161; Jacques Bischoff, *Vertagsrisiko Und Clausula Rebus Sic Stantibus* (Schulthess 1983) 7-8; Hasan Erman, '*Borçlar Hukukunda Akit Serbestisi ve Genel Olarak Sınırlamaları'* (1973) Istanbul Üniversitesi Hukuk Fakültesi Mecmuasi 601 *ff.*; Başak Baysal, *Sözleşmenin Uyarlanması* (Onikilevha 2009) 5; Rona Serozan, '*Karşılıklı Sözleşmelerde Baştan Dayatılmış veya Sonradan Oluşmuş Edimler Arası Dengesizliğin Uyarlama Yoluyla Düzeltilmesi*' in *M. Kemal Oğuzman'ın Anısına Armağan (2000)* 1013 *ff.*; Antalya (n.10) para 1474 *ff.*; Kılıçoğlu (n.75) 252; Pekdinçer & Toprakkaya-Babalık (n.17) 304.

92 Seçkin Topuz, *Türk-Isviçre ve Alman Borçlar Hukukunda Denge Bozulmasi ve Ifa Güçlüğü Durumlarinda Sözleşmeye Müdahale* (Yetkin 2009) 64.

93 Antalya (n.10) para 1475.

94 İbrahim Kaplan, Hakimin Sözleşmeye Müdahalesi (3rd edn Yetkin 2013) 112; Baysal (n.91) 5; Topuz (n.92) 65; Haluk Burcuoğlu, *Son Mahkeme Kararlari Ve Yargitay Kararlari Işığında Hukukta Beklenmeyen Hal Ve Uyarlama* (Filiz 1995) 6-7; Şener Akyol, *Dürüstlük Kurali ve Hakkın Kötüye Kullanilması Yasağı* (Vedat 1995) 77; Talya Şans Uçaryılmaz, Bona Fides (Dürüstlük Kuralı) (Yetkin 2019) 307.

95 Necip Kocayusufpaşaoğlu, '*İşlem Temelinin Çökmüş Sayılabilmesi İçin Sosyal Felaket Olarak Nitelenebilecek Olağanüstü Bir Olayın Gerçekleşmesi Şart Mıdır?'* in *M. Kemal Oğuzman'ın Anısına Armağan (2000)* 506; Tekinay et all (n.10) 1005; Ayşe Arat, *Sözleşmenin Değişen Şartlara Uyarlanması* (Seçkin 2006) 58-59; Ümmühan Kaya, '*Sözleşmenin Uyarlanmasında Sonradan Değişen Şartlar ve Öngörülemezlik İlkesi'* in *Prof. Dr. Cevdet Yavuz'a Armağan* (2012) 1569, 1573.

96 Paul Oertmann, *Die Geschäftsgrundlage, ein neuer Rechtsbegriff* (A. Deichert 1921) 138; Tekinay et all (n.10) 1003; Eren (n.10-Obligations) 368.

This is called the doctrine of *Clausula rebus sic stantibus*, which makes a contract disregarded because of an unforeseen fundamental change of circumstances rendering the terms of the contract unfair and unreasonable for one of parties, even though the performance is still possible at a much higher cost or with great difficulty[97]. This doctrine flows from the principle of good faith[98].

The German doctrine of the *Wegfall der Geschäftsgrundlage* and the French doctrine of *imprévision* emanate from the *Clausula rebus sic stantibus* doctrine. According to these, an unforeseen and unavoidable supervening event, which occurs beyond the control of the affected party, may cause a radical change in circumstances, which renders the contract unfair and the performance unreasonable. It disrupts the basic intent of the parties, which cannot be achieved or realized in the absence of an existing environment, for example, the prevailing economic and social order, the value of the currency, normal political conditions, etc. In those cases, contracts affected by the radical change in circumstances may be adjusted or amended because of the excessive difficulty of the performance for the disadvantaged party[99].

The doctrine of *Wegfall der Geschäftsgrundlage* is codified in the section 313 of the German Civil Code which states that "*if circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke."*

The doctrine of *imprévision* is explained in article 1195 of the French Civil Code states that "*If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to*

97 Kemal Tahir Gürsoy, *Hususi Hukukta Clausula Rebus Sic Stantibus (Emprevizyon Nazariyesi)* (1950) 90; Karl Oftinger, *Cari Akitlerin Temellerinde Buhran İcabı Tahavvül (Clausula Rebus Sic Stantibus Hakkında)* (1942) 8 İÜHFDM, 612; Eren (n.10-Obligations) 502; Arat (n.95) 29-30.

98 Oğuzman and Öz (n.81) para 1836; Kılıçoğlu (n.75) 255; Kenan Tunçomağ, '*Borcun İfasında Aşırı Güçlük ve Alman Yargıtayı'* (2011) 1, 7 Marmara Hukuk Araştırmaları Dergisi 87 *ff.*; Nomer (n.89) para 183.4. *See also* TCC General Assembly (30 October 2002) E. 2002/13-852, K. 2002/864.

99 Baysal (n.91) 16 *ff.*; Topuz (n.92) 69-70.

perform his obligations during renegotiation. In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine."

Similarly, the "excessive difficulty in performance" is regulated in article 138 of the Turkish Code of Obligations, which states that "*if an unforeseen event occurring without the inducement of the obligor, changes the circumstances to the level that enforcing the contract to the disadvantaged party would be against the principle of good faith, and if the obligor did not perform yet or he performed with a reservation, he may seek for adjustment of the contract from the court. In case it is not possible to adjust, he may terminate the contract*."

Different from the above mentioned provisions, article 1467 of the Italian Civile Code states that "*in contracts with continuous or periodical execution or adjourned execution and in case that the obligation of one of the parties has become excessively onerous due to extraordinary and unpredictable events, the party who is obliged to such performance can demand the dissolution of the contract with the effects laid down in art. 1458. The dissolution cannot be demanded if the supervening onerosity is part of the normal risk of the contract. The party against which the dissolution is demanded can prevent this by offering to modify equitably the conditions of the contract*."

It should be noted that, unlike the United Kingdom or most of the US states, the civil law legal systems impose a general duty of acting in good faith, which covers the exercise of rights and the performance of obligations[100]. The principle of good faith (*bona fides*) itself may lead civil law courts to adjust or terminate the contract upon the request of the disadvantaged party

Anyway, social disasters are prime examples for the application of these doctrines which offers the way of adjustment in case of hardship[101]. The Covid-19 pandemic is unfortunately becoming the best example of social disasters. It caused a significant and unprecedented change in the usual social and economic life. It is probable that a great number of contracts have been affected by that radical change in circumstances. Hence, when a contract faces the pandemic, it is possible that the prohibitions imposed by the government or its other undesired consequences may create hardship, which renders the performance excessively difficult, unfair and even unreasonable but still possible in theory[102].

100 The § 242 of the German Civil Code, the art. 2 of the Swiss Civil Code, the art. 2 of the Turkish Civil Code, the art. 1134 of the French Civil Code and the art. 1467 of the Italian Civil Code.

101 Burcuoğlu (n.94) 10-11; Pekdinçer and Toprakkaya-Babalık (n.17) 316.

102 Pichonnaz (n.72) para 772; Baysal et all (n.3) 279.

b. The Requirements

Based on all of the aforementioned provisions, it is possible to make a list of the required conditions for adjustment or termination because of hardship, which will be handled in the following paragraphs below.

First of all, there should be a radical change in the balance between the obligations agreed upon by the parties, originating from a post-formation supervening event. Because of this event, the main balance established by the parties, the main reason of the contract is lost, which renders the contract unfair or unreasonable[103]. The change in circumstances must render the contract so unfair that asking for performance amid the new circumstances would be against the principle of good faith[104].

In practice a fundamental change in the balance of the contract may manifest itself in two different but related ways. The first is characterized by a substantial increase in the cost for one party performing its obligation. The second manifestation of hardship is characterized by a substantial decrease in the value of the performance received by one party, including cases where the performance no longer has any value at all for the receiving party. This might be due to changes in market conditions or the frustration of the purpose for which the performance was required.

Second, it is a crucial point that the events causing hardship must be unforeseeable when the parties are entering into the contract, which means that the encountered change in circumstances must be beyond the anticipations of any reasonable person. The change in circumstances cannot cause hardship if they could reasonably have been taken into account by the disadvantaged party at the time the contract was concluded[105]. It implies *per se* that the change in circumstances takes place or becomes known to the disadvantaged party after the conclusion of the contract.

It should be highlighted that the hardship is typically relevant in long-term contracts because of the requirement of unforeseeability. However, this happens not only in long term contracts, but it might also occur in short term contracts[106], or sometimes the change in circumstances is gradual and has already begun but the final result of this cannot be predicted.

---

103 Nurten Ince, *Der Wegfall Der Geschäftsgrundlage Nach Deutschem Und Türkischem Recht* (2015); Baysal (n.91) 130; Ferhat Canbolat, Sözleşmelerde Amacın Gerçekleşmesi, Çökmesi ve Boşa Çıkması (Yetkin 2012) 218; Ayşe Arat, '*Küresel Salgının İşyeri Kiralarına Etkisi ve Çözüm* in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 283, 284.

104 Oğuzman and Öz (n.81) para 1837; Antalya (n.10) para 1598 *ff*.; Arat (n.103) 443; Semih Yünlü, '*Küresel Salgının Sözleşmelere Etkisi: Corona Virüsü (Covid-19) Olağanüstü Örneği*' in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 323, 332-334.

105 Kılıçoğlu (n.75) 257; Antalya (n.10) para 1602; Yünlü (n.104) 333-334; Pekdinçer and Toprakkaya-Babalık, (n.17) 317.

106 TCC General Assembly (30 October 2002) E. 2002/13-852, K. 2002/864.

Third, the supervening event must be beyond the control of disadvantaged party. It means that the change in circumstances must not be induced by the party who seeks adjustment. It implies also that the supervening event must be unavoidable.

Fourth, the disadvantaged party may seek for adjustment of the contract to restore intra-contractual balance only if he has not yet fulfilled his obligation or if he performed with a reservation[107]. Hence, once a party has performed with no reservation, he is no longer entitled to invoke a substantial increase in the costs of its performance or a substantial decrease in the value of the performance he receives as a consequence of a change in circumstances[108].

Fifth, there should be an adjustment gap, which emerges when there is no contractual remedy, no specific clause for modification of the contract[109]. The court is entitled to fill this gap upon the request of the disadvantaged party, indeed in the existence of the hardship[110].

Moreover, adjustment is not possible in case the disadvantaged party had assumed the risk of the change in circumstances. If the risks are expressly or tacitly taken over by a party in a contract, or if the party has undertaken to bear the risks of hardship, he cannot request adjustment of the contract relying on the hardship.

In short, the statutory provisions grant, in the existence of aforementioned criteria, the authority to resort to the court for restoring the radical imbalance created by an unforeseen, unavoidable and supervening event. The adjustment or termination in these conditions are not automatic, but it should be done upon the request of the disadvantaged party.

c. Requesting Adjustment or Termination Because of Covid-19

The Covid-19 pandemic, which must be considered a social disaster, generated legal impediments and economic difficulties in the course of life and business. This emanated some radical changes in the circumstances on which most of the contracts were based[111]. It is clear that that worldwide effect of Covid-19 and the drastic measures taken by the governments in response, are unforeseen and unavoidable by the parties to almost all the pre-existing contracts in question. The entire event has generally occurred and developed beyond the control of the parties. All these explanations point out the fact that Covid-19 may, without doubt, be the reason for

107 Oğuzman and Öz (n.81) para 1837; Eren (n.10-Obligations) 508; Kılıçoğlu (n.75) 258.

108 Eren (n.10-Obligations) 507; Arat (n.95) 115.

109 Eren (n.10-Obligations) 506; Arat (n.95) 165 *ff*.; Pekdinçer and Toprakkaya-Babalık (n.17) 318; Antalya (n.10) para 1661.

110 Kaplan (n.94) 146.

111 TCC 3rd Civil Chamber (4 June 2021) E. 2021/3452 K. 2021/6001.

hardship, in case of course the pandemic has significantly and negatively affected this contractual relation[112].

Once Covid-19 is indicated as hardship in a case, after an investigation of the specific effects of the pandemic on the contractual relation in question, first of all, the disadvantaged party must rely on the contractual remedies, stipulated in hardship clauses, if one exists[113]. In such a case, the hardship clause incorporated in the contract will be relied upon if it covers the events giving rise to hardship.

Second, in cases where there is no contractual remedy stipulated in the contract, the parties must search for an amiable solution by renegotiation. The duty to renegotiate, as the duty to mitigate, flows from the principle of good faith[114]. In case renegotiations end with success, the parties modify their contract, restoring the balance between their mutual obligations within their freedom of contract, which grants them the liberty to design the future of their agreements according to their own freewill.

Nonetheless, if the parties fail to reach an agreement within a reasonable period of time, the disadvantaged party may resort to the court to request adjustment or termination. How long a party must wait before resorting to the court will depend on the complexity of the issues to be settled and the particular circumstances of the case.

In this case, the court which finds that a hardship situation exists may react in a number of different ways. A first possibility is for it to adjust the contract with a view to restoring its balance. In so doing the court will seek to make a fair distribution of the losses between the parties[115]. The judge may distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances[116]. In this difficult task, the court may, upon request, change the content of the contract by using different methods, which include extending the performance period, changing the place of performance, reducing or abolishing the default interest, changing the level of quality required, increasing or decreasing the price, etc[117].

Another possibility would be for a court to terminate the contract when this is reasonable[118]. In this case, the terms of the termination will be determined by the court. In civil law, the contracts of successive performance, which originate from continuing obligations, terminate for the future (*ex nunc*) with prospective effects,

112 TCC 3rd Civil Chamber (4 June 2021) E. 2021/3452 K. 2021/6001.

113 Baysal et all (n.3) 271.

114 Pichonnaz (n.31) 143; Başak Baysal, '*Yeniden Müzakere Ödevi'* in prof. Dr. Hasan Erman'a Armağan (2015) 185 *ff*.; Nurten İnce, '*Yeniden Müzakere Etme Borcu Mu Külfeti Mi?'* (2017) 33,1 Batider 179 *ff*.

115 Arat, *supra* note 103, at 446-447.

116 Eren (n.10-Obligations) 507; Arat (n.95) 166-167; Kaplan (n.94) 159; Antalya (n.10) para 1663; Pekdinçer & Toprakkaya-Babalık, *supra* note 17, at 320.

117 Eren (n.10-Obligations) 508; Oğuzman and Öz (n.81) para 1838; Antalya (n.10) para 1665.

118 Antalya (n.10) para 1656.

because it is impossible to undo the time's effect for the past[119], whereas the contracts of instant performance terminate *ex tunc* with retrospective effects, which means that the parties will reestablish the *status quo.*

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or break off negotiations contrary to good faith and fair dealing.

C. The Remedies Offered by International Legal Principles

The *force majeure* and *hardship* concepts are also dealt with by some important international legal documents, such as the Unidroit Principles of International Commercial Contracts (PICC)[120], the Principles of European Contract Law (PECL)[121]. Notably, some legal principles have been offered particularly for Covid-19 in the ELI Principles for the Covid-19 Crisis[122].

The first paragraphs of articles 8:108 of PECL and 7.1.7 of the PICC state unanimously that the affected party's non-performance is "excused" if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. It is obvious that the mentioned articles regulate the case of *force majeure* which causes impossibility.

In the second paragraphs of these articles, it has been clarified that where the impediment is only temporary the excuse provided by these articles has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the obligee may treat it as such. It means that he will be excused for non-performance because of a prolonged delay.

In the last paragraphs, an early warning obligation in order to mitigate the undesired effects of the force majeure is imposed on the non-performing party. The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

As mentioned above, the hardship is also covered within the articles of PICC and PECL. The concept is defined in article 6.2.2 of the PICC and the paragraphs (1) and (2) of article 6:111 of the PECL.

119 Özer Seliçi, *Borçlar Kanununa Göre Sözleşmeden Doğan Sürekli Borç Ilişkilerinin Sona Ermesi* (Fakülteler 1977) 37 *ff.*

120 <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> accessed 27 February 2021.

121 <https://www.trans-lex.org/400200/_/pecl/> accessed 27 February 2021.

122 European Law Institute <www.europeanlawinstitute.eu> accessed 27 February 2021.

In article 6.2.2 of the PICC, it is stated that "*there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party*."

Similarly, according to the first and second paragraphs of article 6:111 of the PECL *"(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished. (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that: (a) the change of circumstances occurred after the time of conclusion of the contract, (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear."*

Then, the legal consequences are dealt in article 6.2.3 of the PICC and paragraphs (3) and (4) of article 6:111 of the PECL.

In article 6.2.3 of the PICC, the legal consequences of the hardship is stated as following: "*(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time, either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium."*

In the third and fourth paragraphs of article 6:111, it is stated that "*(2) If performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, (...) (3) If the parties fail to reach agreement within a reasonable period, the court may: (a) terminate the contract at a date and on terms to be determined by the court ; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances. In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing*."

Since hardship consists in a fundamental alteration of the balance of the contract, these articles in the first instance entitle the disadvantaged party to request the other party to enter into renegotiation of the original terms of the contract with a view to adjust them to the changed circumstances. This duty flows again from the principle of good faith. It should be noted that this duty is mentioned in the ELI Principles for the COVID-19 Crisis[123] as well.

The request for renegotiations must be made without undue delay. The disadvantaged party must indicate the grounds on which the request for renegotiations is based, so as to permit the other party better to assess whether or not the request for renegotiations is justified. Failure to set forth the grounds on which the request for renegotiations is based may be the same as the breach of duty.

Indeed, both the request for renegotiations by the disadvantaged party and the conduct of both parties during the renegotiation process are subject to the general principle of good faith.

If the parties fail to reach agreement on the modification of the contract to the changed circumstances within a reasonable time, they are authorized to resort to the court. Such a situation may arise either because the non-disadvantaged party completely ignored the request for renegotiations or because the renegotiations, although conducted by both parties in good faith, did not have a positive outcome.

The court may, upon request, adjust the contract to the changed circumstances, allocating risks and losses between parties or terminate it only when this is reasonable.

Conclusion

The Covid-19 pandemic, affecting the entire world unprecedentedly, should be considered a social disaster, because it radically changes the usual flow of life, the normal circumstances of the markets due to the restrictions and prohibitions imposed by the governments in response to it. The measures taken by the governments, imposed in order to protect public health, emanated some radical changes in the circumstances on which most of the contracts were based. It is clear that the worldwide effect of Covid-19 and the drastic measures taken by the governments in response, are unforeseen and unavoidable by the parties to almost all of the pre-existing contracts in question. The entire event has generally occurred and developed beyond the control of the parties.

With the lexicon of the pandemic, it may be argued that the Covid-19 may "infect" or not the contractual relationships. If the contract has not been negatively affected by the measures taken against the pandemic, if the balance in the contract has not been

123 European Law Institute <www.europeanlawinstitute.eu> accessed 27 February 2021.

significantly altered in the disadvantage of one party, it means that Covid-19 did not have a negative impact on this legal relationship. In that case, one must admit that the contract in question remains untouched by the pandemic.

Nevertheless, it is probable that Covid-19 had an impact on some contractual relationships, which are adversely affected by the measures taken by the public authorities. In some cases, it may prevent or impede the disadvantaged party to perform, in some other cases it may create an excessive difficulty that makes performance extremely difficult. The assessment should be done case by case because it causes different impacts on the contracts.

In case the Covid-19 pandemic adversely affects a contract, different concepts may be associated to it in legal terminology. The very first notion which attracts attention is *force majeure* which is generally defined as an unforeseen, unavoidable supervening event or circumstance, which happens after the formation of the contract and beyond the control or the inducement of the affected party. Natural disasters of all kinds such as earthquakes, storms, floods, fires, wars, riots, strikes, volcanic eruptions, pandemics may be considered *force majeure*, which are widely accepted as causes creating "impossibility of performance" in the doctrine. By definition, the Covid-19 pandemic may be considered force majeure, in case it arises impossibility to perform.

The second crucial notion which should be highlighted is hardship, which changes the underlying circumstances of the contract, after the formation of the contract, in a way the parties did not foresee at that time, and although in theory the contractual obligations are still performable, the balance between mutual obligations designed by the parties has been lost and it does not make sense from an economic viewpoint. In hardship, the contract becomes unfair and unreasonable for the disadvantaged party.

The distinction, in a nutshell, between those concepts may be explained as the *force majeure* prevents unavoidably the performance whereas the hardship renders it excessively difficult. The legal implications of Covid-19 may differ in various contracts. It renders some contracts impossible and for some others, it makes them difficult to perform. It is also possible, as mentioned above, that the contract might even not be affected by the pandemic.

It is important to note that in common law, *force majeure* and hardship are mere contractual terms which cannot be invoked unless being incorporated in the contract. According to this approach, those are contractual clauses covering unexpected post-formation events and determining their legal consequences.

The common law does not recognize a defense of *force majeure* or allow for adjustment or termination of the contract on the ground of changed circumstances, because the starting point of contract law is "*pacta sunt servanda"*, which translates

from Latin as "agreements must be kept". However, the doctrine of frustration has been developed as a cause for discharge of the frustrated contract by "impossibility, impracticability and frustration of purpose" in cases where there is no contractual remedy agreed upon.

In civil law, the basic principle of the contract law is also "*pacta sunt servanda",* which implies that the terms of a contract are law between the parties, and therefore means that neglect of their respective obligations is a breach of the contract. Nevertheless, the impossibility of performance arising from post-formation supervening events extinguishes the obligation. This doctrine flows from the Roman law saying "*impossibilium nulla obligatio"*, which translates as "impossibility nullifies the obligation".

It should be noted that, in civil law, the impossibility of performance causes the automatic termination of the obligation. At the moment of impossibility, the affected party is discharged from the obligation, without being held responsible for non-performance.

Concerning impossibility, the frustration doctrine offers termination, which is not retroactive but for the future (*ex nunc*) with prospective effects. In this approach, when a contract is terminated, the primary obligations of the parties are discharged in so far they have not yet due to be performed. However, those obligations which are already due, are left undisturbed. In common law, there is only little room for restitution. In United Kingdom, the Law Reform (Frustrated Contracts) Act 1943 give the court certain powers to adjust the financial positions of the parties after frustration has taken effect.

Nonetheless, in civil law, the termination takes effect for the future (*ex nunc*) only when the contracts of successive performance are ending, because it is impossible to undo the time's effect for the past. Whereas the contracts of instant performance terminate *ex tunc* with retrospective effects, which means that the parties will reestablish the *status quo,*

Impossibility must be objective and permanent in order to terminate the contract. Although, the temporary impossibility arising from cases such as the Covid-19 pandemic, renders the contract impossible for a time and thus "paralyzes" it or puts it in suspense. The affected contract stops generating obligations during the period of impossibility. This approach may be held in civil law which acknowledges the partial impossibility, however the doctrine of frustration, in common law, does not admit the impossibility if it is temporary.

In some cases where Covid-19 renders the contract impossible, both legal systems offer the same solution, which is the termination of the contract, with some differences

in the consequences. It is also possible that Covid-19 renders the performance excessively difficult, rather than impossible. In the latter cases, the pandemic may be the reason for hardship, if it has radically and negatively affected this contractual relation.

In cases of hardship, it is crucial to note that the doctrine of frustration or the statutory remedies offered by civil law will not be applicable if the relevant risks have been addressed and allocated by the contract terms. In this case, the freedom of contract prevails, and the parties will have to rely on the clauses of the contract.

Unless there is no other contractual clause which covers the hardship in question the doctrine of frustration offers only the termination of the contract. Nevertheless, in civil law, there are statutory remedies established for adjustment of the affected contract by resorting to the court in order to restore balance lost, only after the failure of the renegotiations imposed on the parties because of the principle of good faith.

According to this approach, the parties may modify their contract themselves thanks to the freedom of contract. In case they fail to agree upon a solution for the hardship, either of the parties may resort to the court in order to seek adjustment or termination of the contract. The court may, upon this request, adjust the contract to the changed circumstances, allocating risks and losses between parties or terminate it only when this is reasonable.

In addition to the remedies offered by common law and civil law, *force majeure* and hardship are regulated in the Unidroit Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL), and *force majeure* takes place in the United Nations Convention on Contracts for the International Sale of Goods (CISG). The definitions and legal effects of these are similar to the explanations held by civil law.

In conclusion, civil law offers the remedies of termination and adjustment against the impossibility or the changing circumstances arising from Covid-19, whereas the doctrine of frustration developed by common law provides only the remedy of termination when the contract is frustrated because of the pandemic. In my humble opinion, the option to seek adjustment in hardship originated from Covid-19 bestows superiority to the remedies offered by civil law versus common law.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.

Bibliography

Akyol Ş, *Dürüstlük Kuralı ve Hakkın Kötüye Kullanılması Yasağı* (Vedat 1995).

Antalya OG, *Borçlar Hukuku Genel Hükümler* (2nd ed. Seçkin 2019).

Arat A, '*Küresel Salgının İşyeri Kiralarına Etkisi ve Çözüm* in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 283.

Arat A, *Sözleşmenin Değişen Şartlara Uyarlanması* (Seçkin 2006).

Aydoğdu M and Yağcıoğlu AH, '*Kovid-19 Salgınının Borç İlişkilerine ve Yargılamaya Etkileri*' *in Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020).

Baysal B and Uyanık M and Yavuz S, '*Koronavirüs 2019 ve Sözleşmeler*' in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 269.

Baysal B, '*Yeniden Müzakere Ödevi'* in Prof. Dr. Hasan Erman'a Armağan (2015) 185.

Baysal B, *Sözleşmenin Uyarlanması* (Onikilevha 2009).

Beale H and Twigg-Flesner C, *'COVID-19 and English Contract Law*' <https://www.intersentiaonline.com/publication/coronavirus-and-the-law-in-europe/28> accessed 27 February 2021.

Bischoff J, *Vertagsrisiko Und Clausula Rebus Sic Stantibus* (Schulthess 1983)

Braunschneider H, *Das Skript Schuldrecht, Allgemeiner Teil* (Bund-Verlag 2002).

Burcuoğlu H, *Son Mahkeme Kararlari Ve Yargitay Kararları Işığında Hukukta Beklenmeyen Hal Ve Uyarlama* (Filiz 1995).

Canbolat F, Sözleşmelerde Amacın Gerçekleşmesi, Çökmesi ve Boşa Çıkması (Yetkin 2012).

Cartwright J, *Contract Law, An Introduction to the English Law of Contract for the Civil Lawyer* (3rd edn Hart 2016).

Chandler PA, '*Self-Induced Frustration, Forseeability and Risk*' (1990) 41 N. Ir. Legal Q. 362.

Charman M, *Contract Law* (4th edn Routledge 2007).

Cumalıoğlu E, '*Covid-19 (Yeni Korona Virüs) Pandemisinin Özel Hukuk Sözleşmelerine Etkisinin; İmkânsızlık, Amacın Bozulması, Uyarlama ve Ödemezlik Def'i Bakımından Değerlendirilmesi'* in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 295.

Deschenaux H and Tercier P, *La responsabilité civile* (Stæmpfli 1982).

Dural M, *Borçlunun Sorumlu Olmadığı Sonraki İmkânsızlık* (Fakülteler 1976).

Eren F, *Borçlar Hukuku Genel Hükümler* (24nd ed. 2019).

Eren F, *Sorumluluk Hukuku Açısından Uygun İlliyet Bağı Teorisi* (Ankara Üniversitesi Hukuk Fakültesi 1975).

Erman H, '*Borçlar Hukukunda Akit Serbestisi ve Genel Olarak Sınırlamaları'* (1973) Istanbul Üniversitesi Hukuk Fakültesi Mecmuası 601.

Erzurumluoğlu E, *Türk İsviçre Borçlar Hukuku Sistemine Göre Borçluya Yüklenemeyen Nedenlerden Dolayı Edimin Yerine Getirilememesi* (1970).

European Law Institute <www.europeanlawinstitute.eu> accessed 27 February 2021.

Furmston MP, Cheshire GC, Fifoot CHS, *Cheshire, Fifoot and Furmston's Law of Contract* (16th edn Oxford University Press 2012).

Gözübüyük AP, *Mücbir Sebepler Beklenmeyen Haller* (Kazancı 1977).

Gündoğdu F and Ural N, *'Koronavirüs (Covid-19) Tedbirlerinin Kira Sözleşmelerine Etkisi*' in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 372.

Gürsoy KT, *Hususi Hukukta Clausula Rebus Sic Stantibus (Emprevizyon Nazariyesi)* (1950)

Harke JD, *Allgemeines Schuldrecht* (Springer 2010).

Hatemi H and Gökyayla KE, *Borçlar Hukuku Genel Hükümler* (4th edn Vedat 2017).

Havutçu A, *Tam İki Tarafa Borç Yükleyen Sözleşmelerde Temerrüt ve Müspet Zararın Tazmini* (Dokuz Eylül Üniversitesi Hukuk Fakültesi 1995).

İnal HT, '*Sözleşmenin Kurulması Esnasında Öngörülemeyen Sonraki İfa İmkansızlığı ve Mücbir Sebep'* (2014) Kazancı Hukuk Araştırmaları Dergisi, 115.

İnce N, '*Yeniden Müzakere Etme Borcu Mu Külfeti Mi?'* (2017) 33,1 Batider 179.

İnce N, *Der Wegfall Der Geschäftsgrundlage Nach Deutschem Und Türkischem Recht* (2015).

Junod CA, *Force majeure et cas fortuit dans le système suisse de la responsabilité civile* (Georg 1956).

Kahraman Z, Saf Garanti Taahhütleri (Vedat 2017).

Kaplan İ, Hakimin Sözleşmeye Müdahalesi (3rd edn Yetkin 2013)

Kaya Ü, '*Sözleşmenin Uyarlanmasında Sonradan Değişen Şartlar ve Öngörülemezlik İlkesi'* in *Prof. Dr. Cevdet Yavuz'a Armağan* (2012) 1569.

Keller M and Schöbi C, *Das Schweizerische Schuldrecht* (Helbing und Lichtenhahn 1984) Vol.4.

Kelly H, '*The Classical Definition of a Pandemic is not Elusive*' (2011) Bull World Health Org 540.

Kılıçoğlu AM, *Borçlar Hukuku Genel Hükümler* (16th edn Turhan 2012).

Kocayusufpaşaoğlu N, '*İşlem Temelinin Çökmüş Sayılabilmesi İçin Sosyal Felaket Olarak Nitelenebilecek Olağanüstü Bir Olayın Gerçekleşmesi Şart Mıdır?'* in *M. Kemal Oğuzman'ın Anısına Armağan (2000)* 506.

Kurt LM, Borçlunun Sorumlu Olmadığı Sonraki İmkânsızlık (Yetkin 2016).

Larenz K, *Geschäftsgrundlage und Vertragserfüllung* (3rd edn C.H. Beck 1963)

Listings of WHO's Response to Covid-19 (2020), <https://www.who.int/news/item/29-06-2020-covidtimeline> accessed 27 February 2021.

Makaracı-Başak A and Öktem-Çevik S, '*Koronavirüsün İşyeri Kira Sözleşmelerine Etkisi'* in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 393.

McKendrick E, *Contract Law, Text, Cases And Materials* (8th edn Oxford University Press 2017).

Nomer HN, *Borçlar Hukuku Genel Hükümler* (Beta 2017).

O'Sullivan J, *The Law Of Contract* (8th edn Oxford University Press 2018).

Oertmann P, *Die Geschäftsgrundlage, ein neuer Rechtsbegriff* (A. Deichert 1921).

Oftinger K, *Cari Akitlerin Temellerinde Buhran İcabı Tahavvül (Clausula Rebus Sic Stantibus Hakkında)* (1942) 8 İÜHFDM, 612.

Oğuzman MK and Öz T, *Borçlar Hukuku Genel Hükümler* (2017) Vol.1.

Özçelik ŞB, '*Covid-19 Salgını Çerçevesinde Alınan Önlemlerin Sözleşme Hukuku ve Mücbir Sebep Kavramı Açısından Değerlendirilmesi' in Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 283.

Özçelik ŞB, '*Sözleşmeden Doğan Borçların İfasında Hukukî İmkânsızlık ve Sonuçları*' (2014) 63(3) Ankara Üniversitesi Hukuk Fakültesi Dergisi, 569.

Özer T, '*Covid-19 Salgınının İş Yeri Kiralarında Kiracının Kira Bedelini Ödeme Borcuna Etkisi'* in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 451.

Özer T*, Özel Hukukta Mücbir Sebep Beklenmeyen Hal Covid-19 Yorumu* (Vedat 2020).

Öztürk A, '*Covid-19: Just Disastrous or the Disaster Itself? Applying the ILC Articles on the Protection of Persons in the Event of Disasters to the Covid-19 Outbreak*' (2020) 24 American Society Of Int'l Law, <https://www.asil.org/insights/volume/24/issue/6/covid-19-just-disastrous-or-disaster-itself-applying-ilc-articles> accessed 27 February 2021.

Pekdinçer T and Toprakkaya-Babalık İ, '*Koronavirüs Salgınının Sözleşmelere Etkisi, İfa İmkânsızlığı, İfa Güçlüğü ve Uyarlama' in Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 303.

Pichonnaz P, '*Un droit contractuel extraordinaire ou comment régler les problèmes contractuels en temps de pandémie'* (2020) Sondernummer der Zeitschrift für Schweizerisches Recht 137.

Pichonnaz P, *Impossibilité et exorbitance* (Univ. Fribourg 1997).

Puelinckx AH, '*Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances*' (1986) 3 J. Intl Arb 47

Richards P, *Law of Contract* (11th edn Pearson 2013).

Schenker F, *Die Voraussetzungen und die Folgen des Schuldnerverzugs im Schweizerischen Obligationenrecht* (Univ-Verlag 1988).

Schwenzer I, *Schweizerische Obligationenrecht, Allgemeiner Teil* (5th edn Stämpfli 2009).

Seçkin Topuz, *Türk-Isviçre ve Alman Borçlar Hukukunda Denge Bozulmasi ve Ifa Güçlüğü Durumlarinda Sözleşmeye Müdahale* (Yetkin 2009).

Seliçi Ö, *Özel Hukukta Mücbir Sebep ve Uygulanış Tarzı in Sorumluluk Hukukunda Yeni Gelişmeler III Sempozyumu* (İstanbul Üniversitesi Hukuk Fakültesi 1980) 61.

Seliçi Ö, *Borçlar Kanununa Göre Sözleşmeden Doğan Sürekli Borç Ilişkilerinin Sona Ermesi* (Fakülteler 1977).

Serozan R, '*Karşılıklı Sözleşmelerde Baştan Dayatılmış veya Sonradan Oluşmuş Edimler Arası Dengesizliğin Uyarlama Yoluyla Düzeltilmesi*' in *M. Kemal Oğuzman'ın Anısına Armağan (2000)* 1013.

Serozan R, *Borçlar Hukuku Genel Bölüm, Ifa-Ifa Engelleri-Haksiz Zenginleşme* (Filiz 2006) Vol 3.

Smit H, '*Frustration of Contract, A Comparative Attempt at Consolidation*' (1958) 58 Columbia L Rev 287.

Şahin H, *Mücbir Sebep Nedeniyle Borcun Ifa Edilememesi* (Onikilevha 2020).

Tandoğan H, *Türk Mesuliyet Hukuku* (2nd edn Vedat 2010).

Tekinay SS and Akman S and Burcuoğlu H and Altop A, *Borçlar Hukuku Genel Hükümler* (Filiz 1993).

The Principles Of European Contract Law ["PECL"], <https://www.trans-lex.org/400200/_/pecl/> accessed 27 February 2021.

The Unidroit Principles of International Commercial Contracts ["PICC"], <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> accessed 27 February 2021.

Treitel G, '*Some Comparative Notes on English and American Contract Law*' (2002) 55 Smu L Rev 357.

Treitel G, *Frustration and Force Majeure* (3rd edn Sweet & Maxwell 2014).

Tunçomağ K, '*Borcun İfasında Aşırı Güçlük ve Alman Yargıtayı'* (2011) 1, 7 Marmara Hukuk Araştırmaları Dergisi 87.

Uçaryılmaz TŞ, Bona Fides (Dürüstlük Kuralı) (Yetkin 2019).

Von Büren B, *Schweizerische Obligationenrecht, Allgemeiner Teil* (Schulthess 1964).

Von Tuhr A and Escher A, *Allgemeiner Teil Des Schweizerischen Obligationenrecht* (3rd edn Schulthess 1974) Vol.2.

Weber RH, *OR art. 103 in Berner Kommentar, Schweizerisches Zivilgesetzbuch, Das Obligationenrecht*, (Stæmpfli 2002)

Whincup MH, *Contract Law and Practice: The English System and Continental Comparisons* (5th edn Kluwer Law International 2006).

Wiegand W, 'OR art. 119' *in Basler Kommentar zum Schweizerischen Privatrecht, Obligationenrecht* (6th edn Helbing Lichtenhahn 2015).

Williams T, '*Restatement of the Law of Contracts of the American Law Institute, Sections 454-469, with Missouri Annotations*' (1933) 18 St Louis L Rev 181.

Yünlü S, '*Küresel Salgının Sözleşmelere Etkisi: Corona Virüsü (Covid-19) Olağanüstü Örneği*' in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 323.

Zimmermann R, *The New German Law Of Obligations* (Oxford University Press 2005).

Cases

Turkish law:

TCC General Assembly on the unification of the conflicting judgments (6 May 2016) E. 2015/1, K. 2016/1

TCC General Assembly (27 June 2018) E. 2017/90, K. 2018/1259

TCC General Assembly (7 May 2003) E. 2003/13-332, K. 2003/340

TCC General Assembly (28 Avril 2010) E. 2010/15-193, K. 2010/235

TCC General Assembly (30 October 2002) E. 2002/13-852, K. 2002/864

TCC 3rd Civil Chamber (4 June 2021) E. 2021/3452 K. 2021/6001

Swiss law:

BGE 111 II 433

BGE 102 II 262

BGE 91 II 474

BGE 88 II 283, 291

French law:

CCass Assemblée plénière (14 Avril 2006) 02-11.168

CCass 1ère civ. (30 October 2008) 07-17134

CCass soc. (16 May 2012) 10-17.726

CCass 3e civ (15 October 2013) 12-23126

Common law:

Amalgamated Investment & Property Co. Ltd v. John Walker & Sons Ltd (1977) 1 WLR 164
Autry v. Republic Productions, Inc. (1947) 30 Cal.2d 144
Chandler v. Webster (1904) 1 KB 493
Chandris v Isbrandtsen Moller Co Inc (1951) 1 K.B. 240 (20 July 1950)
Channel Island Ferries Ltd v Sealink UK Ltd (1988) 1 Lloyd's Rep 323
Condor v Barron Knights (1966) 1 WLR 87
Cutter v. Powell (1795) 6 TR 320
*Davis Contractors, Ltd. v. Fareham U.D.C. (*1956) A.C. 696 (HL) 728
Davis v GN Mortgage Corp. (2003) F. Supp. 2d 950
Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd (1944) AC 265
Eugenia (1964) 1 All ER 161
Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] UKHL 4
Gamerco SA v ICM/Fair Warning (Agency) Ltd (1995) 1 WLR 1226
Herne Bay Steamboat Co. v. Hutton (1903) 2 KB 683
Hirji Mulji v Cheong Yue Steamship Co Ltd (1926) AC 497
J Lauritzen AS v. Wijsmuller BV ("The Super Servant Two") (1990) 1 Lloyd's Rep 1
Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd (1942) AC 154
Krell v. Henry (1903) 2 KB 740
Maritime National Fish Ltd v Ocean Trawlers (1935) AC 524, PC
Metropolitan Water Board v Dick Kerr and Co Ltd (1918) AC 119
Morgan v. Manser (1948) 1 KB 184
National Carriers Ltd v Panalpina (Northern) Ltd (1981) A.C. 675
Paradine v. Jane, 82. Eng. Rep. 897
Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (1982) AC 724
Tandarin Aviation Holdings Ltd. v Aero Toy Sore LLC (2010) 2 Lloyd's Rep 668
Taylor v Caldwell (1863) 3 B & S 826, QB
Tsakiroglu & Co. Ltd v. Noblee Thorl GmbH (1962) AC 93
Walford v Miles (1992) 2 AC 128
Walton Harvey Ltd v Walker and Homfrays Ltd (1931) 1 Ch 274

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 349–390

DOI: 10.26650/annales.2022.71.0005
http://annales.istanbul.edu.tr/

Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Submitted: 20.04.2022
Revision Requested: 06.09.2022
Last Revision Received: 09.09.2022
Accepted: 24.09.2022
Published Online: 14.11.2022

Performance of Characteristic Obligation in Multiple Places under Brussels I Recast Article 7(1)(b): Legal Certainty and Predictability over "a Close Connection"

Banu Şit Köşgeroğlu*

Abstract

This article offers a critique of the teleological interpretation of the provision of Art. 7(1)(b) of the Brussels I Regulation Recast, adopted by the Court of Justice of the European Union, in relation to the cases where there are several places of performance. First, the nature of the jurisdiction rules in civil law is discussed and the main purpose of the special jurisdiction rules is identified. In this context, it is emphasized that legal certainty and predictability are the main objectives of the jurisdiction rules, while proximity is an instrument to achieve these main objectives. Secondly, the "principal place of performance" approach of the Court of Justice of the European Union regarding the provision of Art. 7(1)(b), in cases where there are several places of performance, is discussed. It is demonstrated that the Court of Justice of the European Union's quest for the "closest link" is not in accordance with the spirit of the Recast. Aside from the difficulty of determining the principal place of performance; the search for the closest link being the basis of the determination of the principal place of performance is criticized. Additionally, this approach is remarkable as to how it is close to the application of *"forum (non) conveniens"* in *common law*. As a result, it is proposed to abandon the "principal place of performance" approach in cases where the place of performance is located in several Member States; and it is argued that it is necessary to recognize that the courts of several places of performance are competent.

Keywords

Private International Law, International Procedural Law, International Jurisdiction, Place of Performance, Brussels I Regulation Recast, Article 7(1).

* **Corresponding Author:** Banu Şit Köşgeroğlu (Assoc. Prof. Dr.), Hacettepe University, Faculty of Law, International Private Law Department, Ankara, Turkiye. E-mail: banusit@hacettepe.edu.tr ORCID: 0000-0001-8407-9446

To cite this article: Sit Kosgeroglu B, "Performance of Characteristic Obligation in Multiple Places under Brussels I Recast Article 7(1)(b): Legal Certainty and Predictability over "a Close Connection"", (2022) 71 Annales de la Faculté de Droit d'Istanbul 349.
https://doi.org/10.26650/annales.2022.71.0005

Introduction

The main purpose of the special jurisdiction rules in the Brussels I Regulation Recast (Recast)[1] is to build a system of jurisdiction which ensures legal certainty and predictability. It is assumed that the requirement of close connection is met by criteria used in these rules such as place of performance or *forum delicti*. In this direction, teleological interpretation requires that the competent court is predictable in terms of Art. 7(1), just as other jurisdiction rules in the Recast. Art. 7(1)(b) is developed with Art. 5(1)(b) of the Brussels I Regulation[2] as a result of the problems caused by the provision of Art. 5(1) of the Brussels Convention[3], and the criticisms leveled at this provision point to two fundamental developments: Firstly, the obligation in dispute is narrowed down to the characteristic obligation for certain types of contracts and thus, the issue of fragmentation based on several obligations that are the subject of the dispute is solved. Secondly, in determining the place of performance of the obligation, the method of applying the law applicable to the contract has been abandoned, and instead, determining the place of performance based on facts in an autonomous manner is adopted. However, it is seen that, especially in cases where there are places of performance in several Member States for a characteristic obligation, the approach of the Court of Justice of the European Union (CJEU) in relation to the rule of the place of performance in Art. 7(1)(b) contradicts the teleological interpretation and tends toward an evaluation of *forum conveniens*. In the decisions of the CJEU, the approach that if there are several places of performance for a characteristic obligation, one of these places should be identified under the name "principal or main place of performance", is put forth. In *Color Drack GmbH v. Lexx International Vertriebs GmbH,*[4] regarding a dispute related to a sales contract, the phrase "principal place of performance"; then, in a dispute related to a service contract, the search for "main place of performance", were expressed. Thus, in cases where the performance of the characteristic obligation is dispersed in several Member States, for each specific dispute, the court(s) to which the case is filed, should determine where the place of the predominant performance for the characteristic obligation is located. This approach needs to be examined from various angles.

First of all, the rule of the place of performance of the characteristic obligation is designed to point to a single place and contributes to predictability with this feature.

In addition, the jurisdiction rules in the civil law system in general and in the Recast are the rules that are already assumed to indicate the court of proximity. As a

1 Council Regulation (EU) 1215/2012 on jurisdiction and the recognition of judgments in civil and commercial matters [2012] OJ L351/1.

2 Council Regulation (EC) 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters [2001] OJ L012/1.

3 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/32.

4 Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-03699.

matter of fact, when the Preamble of the Recast is analyzed in paragraphs 15 and 16, the presence of a close relationship between the dispute and the court is expressed as the element that will ensure legal certainty and predictability. Therefore, further investigation of the close relationship in each individual case contradicts the reason for the existence of the jurisdiction rules.

Moreover, the function of the jurisdiction rules in the Brussels regime in the framework of recognition and enforcement should be considered. In the Brussels regime, there is no indirect jurisdiction review by the court of recognition and enforcement. The underlying reason for this is that the jurisdiction rules in the Recast point at a real and substantial relationship between the dispute and the court. The lack of a real relationship between the dispute and the deciding court, which is among the obstacles to recognition and enforcement in national legal systems, is not included in the Recast because it is accepted that the jurisdiction rules in the Recast are based on such a real and substantial relationship. The important point is that decisions rendered by the courts of Member States are easily recognized and enforced within the European Union (EU); in ensuring this, it was sought that the court of the Member State that rendered the decision is competent on a solid basis. In other words, the jurisdiction rules in the Recast are the rules that constitute a presumption of a real and substantial relationship, taking into account functionality in terms of recognition.

In this sense, the jurisdiction rule based on the place of performance is built upon the assumption that the court of the place of performance is the court having a close connection. In this case, the rule essentially has the function of pointing to a single place. In other words, the concept of the place of performance has acquired a function as a criterion of jurisdiction to bear legal effect in the field of civil procedure law. This function is based on the presumption that the place of performance points to a single place. However, in the sense of substantial law, the performance of an obligation in several places is possible.

In this study, firstly, the main purpose and nature of jurisdiction rules in light of the civil law paradigm are discussed. It is determined that a specific jurisdiction criterion is required to make a specific court competent. Then, the role of the "close relationship" is evaluated within the framework of the function of the jurisdiction rules in the Brussels regime. In particular, it seems that legal certainty and predictability characterize both the civil law system and the Brussels regime. Finally, it is examined how the rule of the place of performance should be interpreted in cases where there are several places of performance for the characteristic obligation.

I. Civil Law Paradigm on Jurisdiction

A. General Aspects of Jurisdiction Systems

The most effective way to present the civil law paradigm is to compare it with the United States (U.S.) paradigm.[5] This paradigm difference put forth by *Michaels* sheds light on the evaluation of the place of performance rule in the civil law jurisdiction system. However, first of all, the differences between these two legal systems regarding jurisdiction should be cited.

In terms of how states regulate the domestic and international jurisdiction, two basic approaches that differ from a technical standpoint, between the U.S. law[6] and the civil law (European) systems can be mentioned. In U.S. law, the courts have considerable flexibility and discretion in determining their own jurisdiction. In addition, there is no separate system of international jurisdiction in U.S. law.[7] In contrast, in the civil law system, the jurisdiction rules are set by the legislator and the courts have little discretion.[8]

In addition to the methodical difference in question, there are practices regarding jurisdiction in both legal systems which differ, chiefly the *forum non conveniens* doctrine[9] adopted in U.S. law.[10] As will be mentioned below, the basic approach of the two legal systems to jurisdiction is different, and therefore there are differences in methodical and practical aspects.[11]

5 Ralph Michaels, 'Two Paradigms of Jurisprudence' (2006) 27 Mich. J. Int'l L. 1013.

6 In the text, the phrase "U.S. law" is used to refer to the law of the United States of America (USA). While, as an object of comparison with the civil law system, either *common law* or Anglo-American law is taken as a basis, it became necessary to depart from this method in relation to the issue of "jurisdiction", which is a subject of law of civil procedure. This is mainly, as will be seen below, because the way the issue of jurisdiction is handled in the civil law system and the way the issue of jurisdiction is handled in U.S. law differ from each other. English law has long been part of the EU system of jurisdiction. Therefore, the concepts of Anglo-American law, including English law, or *common law* are not used; and English law is excluded from this comparison.

7 Trevor C Hartley, 'Basic Principles of Jurisdiction in Private International Law: The European Union, The United States and England' (2021) ICLQ 2. For how in U.S. law the principles of jurisdiction are formulated in terms of disputes involving the law of several states, which can be called interstate; and how these rules are then also applied in terms of disputes of an international character, see Hartley, 13.

8 Helene Van Lith, *International Jurisdiction and Commercial Litigation* (T.M.C. Asser Press 2009) 4; Pietro Franzina and Ralph Michaels, 'Jurisdiction, Foundations' (2017) Encyclopedia of Private International Law 1044-1045; Simona Grossi, *The U.S. Supreme Court and the Modern Common Law Approach* (Cambridge University Press 2015) 136 ff.

9 *Forum non conveniens* is developed by the Scottish courts and adopted by the English courts in order to mitigate the impact of the lack of international jurisdiction rules. See William Tetley, 'Mixed Jurisdictions: common law vs civil law (codified and uncodified)' (Part II) (1999-4) Rev. dr. unif. 879-880. It can be said that it is a doctrine that has also influenced American law and that it is one of the elements of the flexible appearance of the American system of powers.

10 Grossi (n 7) 149.

11 As a result, it is stated by various authors that these differences have been instrumental in the failure to realize the project for uniformity in jurisdiction under the umbrella of the Hague Conference which is sought after and worked upon. See Michaels (n 10) 1009. However, there have also been some assessments in the doctrine that differences between the two systems do not prevent the uniformization of the rules of jurisdiction. See Grossi (n 7) 104 ff. It was aimed to prepare a convention on the jurisdiction on civil and commercial matters and recognition and enforcement of foreign judgments under the umbrella of the Hague Conference; however, negotiations were not concluded and, finally, the part of the project on the "jurisdiction" issue was postponed and was opened for signature with the *Convention of 30 June 2005 on Choice of Courts* in 2005 and with *the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* in 2019. For an explanation regarding this, see https://www.hcch.net/en/publications-and-studies/details4/?pid=6843&dtid=61.

Basically, in both systems, the jurisdiction of the courts is shaped by the connection with the parties and/or the subject of the case. In the U.S. system, the courts consider themselves competent or not based on the principle of minimum contacts instead of specific rules within the framework of their discretion. In the European system, on the other hand, hard and fast rules have been accepted by legal systems, relying on a long history. It is clear today that both systems approach the issue from a perspective close to each other, in terms of theoretical framework, and it can be said that theories of fairness[12] serve as a common ground. Indeed, both the U.S. system and the civil law system are united on the need to ensure that the jurisdiction of the courts is fair. Thus, in these two systems, the tools used to consider the courts competent are different from each other, but the common point is that the jurisdiction of courts complies with the requirements of justice.

In other words, it is understood that the basis of the jurisdiction of the courts lies in the need to determine the court that is appropriate, convenient and fair in terms of jurisdiction.[13] In this context, the rules or assessments related to the jurisdiction of the courts in the two systems in question may differ from each other. In the civil law system, while the jurisdiction of courts is determined by hard and fast rules, in U.S. law, jurisdiction is determined by courts on a case-by-case basis with principles such as the minimum contacts test based on the principle of *due process* (as in the U.S. Constitution).[14] However, there is a difference in paradigm at a deeper level than differences in legal technique between these two systems.[15]

B. Different Paradigms of Jurisdiction

1. The U.S. System

The U.S. jurisdiction system pays attention to the (vertical) relationship between the court and the parties; it is important whether it is fair to consider the court in a particular place as having jurisdiction over the defendant. In this sense, the relationship of the claimant with the court is not decisive; it is sufficient that the defendant is in a relationship with the court with the minimum points of contact, even if the claimant has no relationship with the court.[16] The notion that the defendants will be subject to the jurisdiction of the state only if sufficient connections exist is presented as the protection of defendants at the constitutional level by the principle of *due process*. It should be emphasized that in this aspect, in fact, the right to a trial and the jurisdiction

12 Arthur Taylor von Mehren, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983-1984) 6 Tel Aviv U. Stud. L. 54 ff.

13 ibid [118].

14 Michaels (n 10) 1006-1022.

15 Michaels (n 10) 1027 ff. See also Christof Von Dryander, *'Jurisdiction in Civil and Commercial Matters under the German Code of Civil Procedure'* (1982) 16 No 4 Int'l Lawyer 672 ff.

16 Michaels (n 10) 1031.

of the courts in terms of location are not distinguished in the U.S. system.[17] Although this point of view creates the perception that it is a defendant-friendly system, it is actually envisaged that the American system is claimant-friendly and if the approach that a person can be sued at a place only if there is sufficient connection based on the principle of *due process* is not adopted, there would be an imbalance.[18]

It cannot be said that the briefly mentioned features above depict the U.S. system in its entirety. It should be noted that not only the vertical relationship between the court and the parties and the dispute is taken into consideration, but also the jurisdiction of other state courts, as required by the federal structure, thanks to the principle of *due process*.[19] Regarding the consideration of the jurisdiction of the courts of another state in respect of disputes of an international character, in fact, interstate practice is taken as the basis. But it is noted that some mechanisms, such as the *forum non conveniens* doctrine, soften the one-sidedness of the jurisdiction system in terms of disputes of an international character.[20]

2. The Civil Law System

The rules regarding the jurisdiction of the courts in legal systems adopting the civil law system are pre-defined within the scope of various laws and regulations. International jurisdiction is also determined by the rules of internal jurisdiction in the majority of legal systems.

The purpose of the civil law jurisdiction system is to grant jurisdiction to the most appropriate local court with jurisdiction rules. With the allocation of jurisdiction to the court of the domicile of the defendant, and with special jurisdiction rules introduced in addition to that, it is preferred to allocate jurisdiction to the court of a specific place (Member State) based on a close connection *(relevant factor)*.[21] For instance, in the rule of jurisdiction for contractual disputes, the place where the contract

17 For an explanation regarding that in the civil law system, unlike the U.S. system, "jurisdiction" is understood as jurisdiction in terms of venue, see Peter F Schlosser, 'Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems' (1996) 45 U. Kan. L. Rev., 19 ff.

18 Michaels (n 10) 1053. About the advantageous aspects of the American system for the claimant, see Hartley (n 6) 15. Accordingly, the first advantage of the American system is that the *contingency fee* is paid depending on whether the case is won. Secondly, in American law, the approach toward *pre-trial discovery* is also more advantageous compared to the civil law system. Thirdly, the possibility of jury evaluation, especially in cases for compensation, makes it possible for large sums to be decided on. For these reasons, claimants may prefer American courts in international disputes.

19 Michaels (n 10) 1033-1034.

20 Michaels (n 10) 1036-1037.

21 Michaels (n 10) 1043. It may be accepted that the defendant may have several domiciles by the relevant legal system(s). From the point of view of this possibility, it becomes clear the rule of jurisdiction based on the domicile of the defendant may not correspond to a single location in all cases. As a matter of fact, in the Jenard Report on the Brussels Convention, it is set forth that, the defendant's domicile is mentioned as a rule to give jurisdiction to a single local court; exceptionally, if the defendant has a domicile in several countries, in accordance with the law of several Member States, this issue can be solved in accordance with the principle of *lis pendens* and provisions on related cases. See *Council Report on the Convention on jurisdiction and enforcement of judgments in civil and commercial matters* [1979] (Jenard Report), OJC 59, 16-17.

was concluded and/or the place of performance of the contract is considered to be connected with an understanding based on Roman law.[22] From the point of view of U.S. law, both local courts may consider themselves competent if there is a sufficient degree of connection.[23] However, in the civil law system, jurisdiction is established based on a connecting factor for each legal category. In the Brussels Convention, the Brussels I Regulation and the Recast, this place was laid down as the court of the place of performance for contracts.[24]

The approach in the European system and, accordingly, in the Brussels regime, exhibits a horizontal appearance. One or several certain forum(s) is (are) pointed towards and it is determined which of the relevant forums have jurisdiction. Thus, the horizontal relationship between forums comes to the fore. From this point of view, in the civil law system, it can be said that the search for determining which court out of those in multiple places – countries is the most appropriate court in terms of litigation predominates.[25]

Indeed, the main purpose of the Recast is expressed as the uniformization of jurisdiction rules in civil and commercial matters and thereby the recognition and enforcement of decisions rendered by the courts of Member States in a quick and simple manner.[26] For this purpose, a distinction has been made between disputes related to several EU Member States and disputes related to non-EU countries in the Recast, and the jurisdiction of the courts of Member States was determined mainly in terms of disputes related to several EU Member States.[27]

The fundamental principle in determining the competent court is searching for the most appropriate place among relevant countries, that is, the most closely connected

22 In German, French and Italian law, the jurisdiction of the courts of the place where the contract was concluded and/or the place of performance of the contract had been recognized. See Von Dryander (n 15) 684-685.

23 In U.S. law, the place where the contract was concluded or the place of performance, although not considered insignificant, is also not considered a sufficient connection for jurisdiction alone. See Von Dryander (n 15) 685.

24 Michaels (n 10) 1043. It can be seen that there is an exception to the perspective that a single connecting factor should be taken as the basis for each legal category for torts and that the court of the place where the harmful event occurred and the court of the place where the damage occurred are conferred jurisdiction; on how these two places actually point at alternative connecting factors regarding the interpretation of "the place where the harmful event occurred", see Michaels (n 10) 1043-1044. In addition, in the Jenard Report, it is stated that the purpose of the Brussels Convention is to ensure the highest possible degree of legal certainty with the rules of jurisdiction; with the wording of the Convention *"To this end, the rules of jurisprudence codified in Title II determine which State's courts are most appropriate to assume jurisprudence, taking into account all relevant matters;..."* See Jenard Report (n 21) 15.

25 Michaels (n 10) 1045. See also Jenard Report (n 21) 15.

26 Preamble of Recast, para. 4.

27 Michaels (n 10) 1044. In the jurisdiction system, for which the first step was taken by the Brussels Convention, it was ensured that the courts of other Member States, along with the court of the domicile of the defendant, were granted jurisdiction with special jurisdiction rules. Thus, if the court of general jurisdiction is in one Member State, a case can be filed in another Member State if there is a competent court there in accordance with the rules of special jurisdiction. In other words, the aim here is to find alternative competent courts in cases where the defendant's domicile is within the EU, just as in national legal systems. From another point of view, if it is taken into account that, as a rule, the defendant's domicile can only be located in one Member State, it is ensured that the courts of other Member States to which the dispute is connected are also competent. In addition, it is prevented that cases against defendants who are located in another Member State are filed in courts of Member States that are competent in accordance with their internal jurisdiction rules. See Jenard Report (n 21) 17.

forum for each legal category. Of course, several courts may be competent at the same time under different jurisdiction rules. However, it is provided that a certain forum will be competent in accordance with each jurisdiction criterion such as "place of performance".[28] Accordingly, in contractual disputes, it is obvious that a case can be filed at the court of the place of performance along with the court of the defendant's domicile. However, the issue is that the criterion of the place of performance points to one place, and, as mentioned below, there has been a debate about whether the place of performance should point to one place due to the nature of this criterion in particular.

European thinking about jurisdiction is considered "international" as well.[29] What is meant by this is the assumption that it is possible to grant jurisdiction to courts of several relevant countries due to the nature of the jurisdiction, and that the one that is closely related among them is determined by the jurisdiction rules.

Considering the paradigm difference between the U.S. system and the civil law system, the main goal of both systems is to ensure fairness in identifying the competent court. But these two systems proceed in different ways for the realization of fairness. Since, in the U.S. system, the relationship between the defendant and the court is taken as the basis, the need for the court's consideration of itself as competent over the defendant to produce fair results brings the purpose of fairness to the fore; in the European system, determining which of the courts of relevant countries are closely connected contains the purpose of fairness.[30] In this system, the defendant is protected not against the state, but against the claimant, who can choose the forum among several forums.[31] The fact that the special jurisdiction rules are based on the close connection between the dispute and the court ensures that the defendant will not be sued in an inappropriate court.

C. General Evaluation of Paradigm Difference

The right of access to court being provided at the constitutional level in the civil law system serves to protect claimants.[32] Hence, it can be said that, in the U.S. system, the principle of *due process* plays an important role in terms of protecting defendants from being sued unfairly; in the civil law system, the right of access to court protects the right to sue. The approaches of these systems to the issue of jurisdiction at the constitutional level are demonstrated in this way: The U.S. jurisdiction system prevails protecting defendants against unfair claims in a claimant-friendly[33] structure; in the civil law system, the right of claimants to access to court is guaranteed at a

28 Michaels (n 10) 1046.

29 Michaels (n 10) 1047.

30 Michaels (n 10) 1048-1049.

31 Michaels (n 10) 1049.

32 Michaels (n 10) 1053.

33 Schlosser (n 17) 37.

constitutional level, against defendants where a case can be filed against them is predictable under "hard and fast rules".[34]

From this point of view, the difference of paradigm between the two systems reveals the following issue: the provision of jurisdiction rules in an abstract manner and in advance, in the civil law system, is focused on ensuring predictability from the point of view of the defendant, and in this sense, the system protects the defendant. Therefore, the evaluation[35] of which party is advantageous in terms of each jurisdiction rule or the investigation of, in terms of the jurisdiction criteria that symbolize the connection with the subject of the dispute, such as the place of performance, which one offers more favorable opportunities for the parties, has no decisive importance in terms of the paradigm underlying the jurisdiction rules.

D. Civil Law Paradigm and the Place of Performance Rule

When evaluating the characteristics of the paradigm of the civil law system in terms of the place of performance rule, the approach of determining the *closely connected* court as the court of *a certain place* must be discussed.

In the civil law system, the rules of jurisdiction hypothetically refer, through abstraction, to the closely connected court. The criterion of the place of performance reveals the hypothetical nature of this approach. As mentioned above, when the contractual relationship is evaluated as a whole, it is assumed that the place of performance in the field of contracts, like the place of commission in torts, is the criterion pointing to the closely connected court. This assumption can be attributed to the fact that the place of performance has historically been considered[36] a place closely connected with the contract.[37]

34 Michaels (n 10) 1053-1054.

35 In the civil law system, the paradigm of jurisdiction provides predictability with the jurisdiction rules, for the defendant, and in this sense, the notion that the defendant is being protected, also applies to the jurisdiction rules in which the concern for the protection of the weak side is taken into consideration. Indeed, as a result of the application of these jurisdiction rules, the fact that the claimant has the opportunity to file a case at his own domicile and the defendant is relieved of the burden of filing a case at his domicile does not change the paradigm underlying these rules.

36 The jurisdiction rules in the civil law system date back to Roman law. In the Roman and early medieval periods, it was accepted that the jurisdiction of courts is based on the consent of the parties because of the principles of *submission*. As a result of migration and increasing commercial relations and the parties leaving the place where the dispute arose, the approach of protecting the defendant by setting forth the requirement that cases be filed *somewhere connected with the case* emerged. The acceptance of cases being filed at the place where the defendant resided *(actor sequitur forum rei)* as of the date of the filing the case or the execution of the contract in the Code of *Justinian*, represents this approach. The later exceptions to this general rule, namely the special jurisdiction rules, are also formulated *as connected to* the place of performance of the contract, the place of commitment of the tort and the location of the goods. See Friedrich Juenger, 'Judicial Jurisdiction in the United States and in the European Communities: A Comparison' (1984) 82 Mich. L. Rev. 1203-1204; Albert A Ehrenzweig, 'The Transient Rule of Personal Jurisdiction: The "Power" Myth and *Forum Conveniens'* (1956) 65 Yale L. J. 297.

37 It should also be examined, in the field of conflict of laws, whether the factors that lead to the abandonment of the place of performance in favor of the domicile or place of the business of the obligor of the characteristic obligation, with the assumption that it points to the closely connected law, will affect the use of this concept as a jurisdiction criterion. In particular, the evolution of the characteristic obligation to the place of performance, under the jurisdiction rule based on the place of performance with Art. 5(1)(b) of the Brussels I Regulation, brings into question whether a similar trend will occur in the long run.

In the civil law system, the need to determine a closely connected court, which is one of the main features of the paradigm of jurisdiction, should be taken as the basis in the interpretation of the place of performance, and thus the place of performance should be interpreted coherently with the characteristics of the system as a whole. More clearly, if the place of performance must point to a single place for a particular contractual relationship, then the need for its identification as a specific place, such as "the place of performance of a characteristic obligation", would come into question, and, as will be seen below, this approach was accepted by the Brussels I Regulation to some extent.[38]

Thus, the fact that the place of performance points to a single place is in accordance with the general approach of the civil law system. Accordingly, it should be recognized that the most suitable place for special jurisdiction in terms of the whole contractual relationship is the place of performance. This is evident from the Brussels regime. Indeed, the Brussels I Regulation transformed the place of performance rule in the Brussels Convention Art. 5(1), to the place of characteristic performance for certain categories of contracts. Thus, the place of characteristic performance is narrowed down to a single place. This proves that the place of performance rule is both intended for the entire contract and should point to a single place. As discussed below, with the provision of Art. 5(1) of the Brussels Convention, which is the basis of the Brussels regime, the place of performance of the obligation in dispute has determined the jurisdiction; however, as a result of the problems created by this rule and the criticisms directed to the rule,[39] the place of performance of the characteristic obligation became preponderant. The same trend has been maintained with the Recast, which came into force in 2015.

In the Swiss Civil Procedure Code, the place of performance of the characteristic obligation is taken as the basis for the determination of the competent court without going for an obligation-based distinction (Art.31). In the same direction, in Art. 113 of the Swiss Federal Act on Private International Law, it has been adopted that, in case the place of performance of the characteristic obligation is in Switzerland, the court of that place is competent.

38 Additionally, the evolution of the place of performance, especially in the field of conflict of laws, has also led to the conclusion that the place of characteristic performance is taken as the basis for a long time. Although this evolutionary process has given rise to an approach that puts the obligor of the characteristic obligation at the center in the field of conflict of laws, recently, opinions have been expressed that, in the field of conflict of laws, the connecting factor of the place of performance of the characteristic obligation should be returned to. See Chukwuma Samuel Adesina Okoli, *Place of Performance: A Comparative Analysis* (Hart Publishing 2020) 120 ff.

39 Jenard Report (n 21) 23. In addition, the provision of Art. 5(1) of the Brussels Convention determines jurisdiction in terms of contracts of any type and nature by accepting the place of performance as the criterion of jurisdiction and taking a single element of the contractual relationship as the basis. Although legal certainty or predictability is ensured in this way, this jurisdiction rule has been subjected to intense criticism due to problems such as the fact that some other connecting factors that may be as important as the place of performance have not been taken into account or the place of performance cannot be localized when it comes to negative obligations. Georges A L Droz, 'Delendum est forum contractus' (1997) Recueil Dalloz, Chronique 351-356; Lennart Pålsson, 'The Unruly Horse of the Brussels and Lugano Conventions: The Forum Solutionis' Festkrif für Ole Lando (Copenhagen 1997) 259 ff.; Vincent Heuzé, 'De quelques infirmités congénitales du droit uniforme: l'exemple de l'article 5-1 de la Convention de Bruxelles du 27 septembre 1968' (2000) Revue critique de droit international privé 595 ff.

The place of performance rule should also be evaluated in terms of its connection with the notion that the defendant is to be protected against the claimant in the civil law system. As mentioned above, in addition to the fact that the court of the defendant's domicile has general jurisdiction, the system's approach regarding the protection of the defendant is evident, mainly, on the rules of jurisdiction pointing to a specific place *a priori*, therefore, by ensuring predictability. It is understood that the special jurisdiction rules and the place of performance in this context are functional for the defendant in terms of predictability. The principle of the narrow interpretation of the special jurisdiction rules in the Recast should also be taken into account. Accordingly, the general rule is that if the defendant's domicile is in a Member State, the case is filed in that place.[40] In the same direction, the place of performance should also not refer to several obligations or places. This point of view is reflected by the Brussels I Regulation as predominance accorded to the court of the place of characteristic performance. Therefore, as will be discussed below, the possibility that the characteristic obligation will be performed in several places was actually probably not foreseen by those who drew up the rule.

II. Fragmentation Problem under Brussels Convention Art. 5(1)

The rule of place of performance "of the obligation in dispute" that is contained in Art. 5(1) of the Brussels Convention and kept, to a limited extent, by the Brussels I Regulation and the Recast, is criticized from various aspects, such as being determined according to *lex causae* and leading to *forum actoris*.[41] One of the points of criticism has been that the rule has led to a fragmentation of jurisdiction. The courts of several places of performance being competent, for a particular contractual relationship, depending on whether several obligations are in dispute, is presented as an undesirable outcome. In other words, the fragmentation of jurisdiction in the case of different obligations has been a focus of criticism.

As a matter of fact, in *Ets. A. De Bloos v. Bouyer*, it was stated that the purposes of the Brussels Convention were aimed at not allowing, as much as possible, the possibilities that would lead to several courts being competent in relation to a single contract, and therefore the provision of Art 5(1) should be interpreted as referring to the obligation in dispute.[42] However, it is understood that, in practice, the disputes arising from a contractual relationship can be brought before the courts of different Member States.[43] Thus, it can be seen that the parties to a contractual relationship

40 Michaels (n 10) 1049-1050.

41 See Justin Newton, *The Uniform Interpretation of the Brussels and Lugano Conventions* (Hart Publishing 2002) 160 ff; Droz (n 45) 355; Jonathan Hill, 'Jurisdiction in Matters Relating to a Contract under Brussels Convention' (1995) 44 ICLQ 593 ff; Thomas Kadner Graziano, 'Jurisdiction under article 7 no. 1 of the recast Brussels I regulation: disconnecting the procedural place of performance from its counterpart in substantive law. An analysis of the case law of the ECJ and proposals de lege lata and de lege ferenda' (2015) 16 Yearbook of Private International Law 178 ff.

42 Case C-14/76 *Ets. A. De Bloos v Bouyer,* [1976] ECR 1498 [9-11].

43 Hill (n 41) 603-604.

may conclude that the place of performance of each obligation on which they base their claims may lead to courts in different countries being competent. For instance, in terms of claims arising from a service contract between A and B, each party may file a case in the court of the place of performance of the counterparty's obligation.[44]

The problem of fragmentation arising from the interpretation of Art. 5(1) by the CJEU is more clearly seen, especially in complex relationships involving multiple obligations. The general rule formulated in *Ets. A. De Bloos v. Bouyer* is that if it is alleged that the defendant has violated two obligations that have a place of performance in two separate countries, the provision of Art. 5(1) leads to the fragmentation of jurisdiction among these two Member States.

The problem of fragmentation due to the place of performance of multiple obligations has been discussed in the case *Shenavai v. Kreischer*[45]*,* but a total solution has not been brought. In the decision, it was concluded that the theory of the obligation in dispute cannot provide a solution in terms of disputes related to several obligations arising from a contract and being the basis of the claimant's claims; in the case of several obligations, the principal obligation *(accessorium sequitur principale)* may serve as a guiding light in terms of the jurisdiction.[46] In other words, the principle of the principal obligation being determined and the secondary obligations following the principal obligation has been emphasized. However, this principle does not truly solve the fragmentation problem, since it is understood that the principal obligation that the CJEU mentions is the defendant's principal obligation, not the principal obligation arising from the contract.[47]

In addition, the problem of determining the principal obligation may raise various possibilities. In the case *Leathertex Divisione Synthetici SpA v. Bodetex BVBA*[48], the CJEU has accepted that the court of each place of performance is competent if the principal obligation cannot be determined. It has been determined that two main problems arise from this approach:

Firstly, the principal obligation is not easy to determine for the court without resorting to the law applicable to the contract.[49] This uncertainty also jeopardizes

44 Hill (n 41) 604.

45 Case C-266/85 *Shenavai v Kreischer* [1987] ECR 251.

46 See *Shenavai v Kreischer,* (n 45) [19]. Here, the rule of *accessorium sequitur principale* was used, in determining the competent court, in the sense that the secondary obligation follows the principal obligation and is based on the place of performance of the principal obligation.

47 Hill (n 41) 604.

48 Case C-420/97 *Leathertex Divisione Sintetici SpA v Bodetex BVBA* [1999] ECR I-6779.

49 The rule of *accessorium sequitur principale*, namely the *principal* obligation being taken as the basis, can also lead to uncertainty because there may be doubts about which obligation of the defendant constitutes the principal (fundamental) obligation, and *Union Transport Plc v. Continental Lines S.A.* is presented as an example of this. In this case, the defendant's two obligations in relation to the cargo transportation transaction are to determine the means of transportation and to allocate it for the transportation. The claimant filed a case in an English court on the grounds that the place of performance of the obligation to determine the means of transport is the United Kingdom; the defendant objected, arguing

the purpose of the competent court to be predictable. Secondly, the fragmentation of jurisdiction is not an ideal solution. The fragmentation may be identified in two cases: (i) if the two separate obligations that are breached are of equal weight; (ii) if *the same obligation* is to be performed in different countries according to the contract. In the first case, two separate courts will probably be found to be competent for two separate breaches according to the law applicable to the contract. In fact, there are several obligations, none of which can be considered a principal obligation. In this case, the determination of the competent court on the basis of the rule of obligation that is in the dispute does not seem to be possible. According to Briggs, the logic of the rule is based on the close connection between the dispute and the court, and if there is no principal obligation, there should also not be a court whose jurisdiction will be established based on its connection with the dispute.[50]

In the second case, the claimant can file a case at each place of performance where the breach occurred.[51] Although the CJEU does not want the court to be competent in terms of only part of the dispute from a procedural point of view, in the case *Leathertex*, it glossed over this problem and stated that the claimant can file a case in the court of the domicile of the defendant if he prefers.[52]

III. Fragmentation Problem under Brussels I Regulation Art. 5(1)(b) and Recast Art. 7(1)(b)

With the provisions of Art. 5(1)(b) of the Brussels I Regulation and Art. 7(1)(b) of the Recast, it has been accepted that there is a single place of performance for the entire contract in sales and service contracts. In other words, the place of performance is the same place in terms of all obligations arising from the contract.[53] Thus, there will be no fragmentation in terms of different obligations, and the consideration of claims that are not related to the performance of the obligation within the framework of this rule is seen as an appropriate solution.[54] The main purpose here is that, if the general jurisdiction rule is to be set aside, special jurisdiction is allocated to a single forum. In this way, the characteristic obligation is used to determine a single place of performance for the entire contract. Although this term has not been explicitly used

that the principal obligation is the obligation to allocate the means of transport, and the obligation to determine the means of transport is not decisive from the point of view of jurisdiction. However, the English court has declared itself competent, on the grounds that the obligation to determine the means of transportation is the principal obligation, and the place of performance of this obligation is the United Kingdom. Although the decision is well-founded, it is clear that the issue of jurisdiction carries uncertainty from the defendant's point of view. See *Union Transport Plc v. Continental Lines S.A. Tu* [1992] Lloyd's LR 1, 229). See also Hill (n 41) 607.

50 Adrian Briggs, *Civil Jurisdiction and Judgments*, 6th ed. (Informa law from Routledge 2015) 227-228.

51 Arthur Poon, 'Determining the Place of Performance under Article 7(1) of the Brussels I Recast' (2021) 70 ICLQ 648.

52 *Leathertex v Bodetex* (n 48) [41].

53 Peter Mankowski, *Special Jurisdictions, Article 5, Brussels I Regulation,* (European Law Publishers 2007) 136; Andrew Dickinson and Eva Lein, *The Brussels I Regulation Recast* (Oxford University Press 2015) 153; Graziano (n 41) 184 ff.

54 Mankowski (n 53) 136; Graziano (n 41) 184 ff.

as in the Rome I Regulation, it is accepted that paragraph (b) reflects the principle of characteristic obligation in an absolute manner and refers to the place of delivery of the goods or the place of provision of services in this context.[55]

As a result of taking the characteristic obligation as a basis, the court of the place of performance of the characteristic obligation has been rendered competent in terms of claims arising from secondary obligations, including compensation claims. Thus, with regard to Art. 5(1) of the Brussels Convention, the problem of fragmentation of jurisdiction based on different obligations has been solved. However, in fact, the problem of fragmentation has not been fully solved because there still exists a possibility that the obligation in dispute, that is, the place of performance of the characteristic obligation, may be located in several Member States.

As a matter of fact, the probability that the goods will be delivered by the seller at several points is discussed in the case *Color Drack GmbH v Lexx International Vertriebs GmbH*[56]. The CJEU, in this case, has provided that, the "principal place of delivery" be accepted as the place of performance under the *center of gravity* approach and the principal place of delivery be determined according to "economic criteria" as a general rule. Thus, in fact, it seems that the CJEU has introduced a new jurisdiction rule, but has not determined which economic criteria will be decisive.[57] It is not clear whether the value of the goods or their prices will be taken as the basis. Pursuant to the decision, if it is not possible to determine the actual place of delivery, it is possible for the claimant to choose one of the multiple places of delivery and file a case at this place.[58]

In the case *Color Drack*, several places of delivery were located in the same Member State, and the decision of the CJEU was formed accordingly. In terms of cases where several places of delivery are split among Member States, it seems that the CJEU does not want the *Color Drack* decision to be taken as the basis in such a way as to give the claimant the opportunity to choose the court. However, it has been stated that the same principle should also apply if several places of delivery are located in different Member States; this has been confirmed by the CJEU, especially in terms of service contracts, as discussed below.[59] Thus, the limitation proposed by the CJEU has actually become ineffective, at least in terms of service contracts.

As a result, in cases where several places of delivery are located in different Member States, if the principal place of delivery can be determined, the jurisdiction of

55 Mankowski (n 53) 136; Dickinson and Lein (n 53) 153.

56 *Color Drack* (n 4).

57 Dickinson and Lein (n 53) 153-154.

58 *Color Drack* (n 4) [42].

59 See Dickinson and Lein (n 53) 154.

this court is confirmed, while if the principal place of delivery cannot be determined, it is controversial if the claimant can file a case at any of the places of delivery in different Member States regarding the entirety of the obligation.[60]

First, the ambiguity of the "economic criteria" stands out. For instance, if the amount of sale, the market value of the goods, or net profit is taken as the basis, it may be possible to identify different places of performance. Since the close relationship between the dispute and the court depends more on the facts, determining the correct criteria and assessing their weight requires fine-tuning.[61] If it is a long-term sales contract, the problem arises as to which period the criteria will be taken as the basis. Determination of the place of performance based on the facts may require the examination of the provisions of the contract and, accordingly, referring again to the law applicable to the contract as in the *Tessili* formula. Thus, in fact, a result that was tried to be prevented by the provision of Art. 7(1)(b) may occur again.

Secondly, in cases where the principal place of delivery cannot be determined, the claimant is granted an unlimited right to choose. Although the wording of Art. 7 (1)(b) does not allow it, it is not appropriate to expand the scope of the article in this way. In fact, this interpretation contradicts the CJEU's approach of narrow interpretation of the jurisdiction rules. In fact, since the different delivery locations in the case *Color Drack* remain within the borders of a single Member State, it is concluded that this interpretation does not have a serious impact on predictability. There is no doubt that it is more difficult for a defendant to defend himself before a foreign court than to defend himself before a court of another place in the country where he resides. The CJEU has also applied the "economic criteria" in terms of obligations performed in different Member States, especially in the case of service contracts, and has taken its approach in *Color Drack* as the basis. It is clear that this approach undermines legal certainty and predictability in the jurisdiction regarding contractual disputes.[62]

The definition of the place of performance in service contracts in Art. 7(1)(b) of the Recast has the same purpose as the provision on the place of performance in sales contracts. Accordingly, in terms of service contracts, also a single court to be determined in accordance with the *autonomous* approach should be competent. The place where the service is provided or will be provided points to the place of performance for jurisdictional purposes in relation to disputes arising from such contracts. In sales contracts, compared to the place of delivery of the goods, it is more difficult to identify the place where the service is provided because the abstract nature of the services and the variety of services that are provided make it difficult to

60 Briggs (n 50) 234.

61 Poon (n 51) 649.

62 Poon (n 51) 651.

connect them to a particular place, and to determine whether they have been provided or will be provided in a particular place.[63]

Some decisions of the CJEU contain comments on the determination of the place of performance in service contracts and evaluate the problems that have arisen. *Peter Rehder v. Air Baltic Corporation*[64] stands out as one of the significant decisions in terms of the place of performance in service contracts. In this decision, in determining the competent court regarding the dispute arising from the contract of carriage by air, both the place of departure and the place of destination of the aircraft have been accepted as the place of performance.[65] The claimant has been given the right to choose one of these two places. Thus, it became possible for passengers to file a case in their own domicile, which is usually the place of departure of the aircraft. In fact, there are no two performance places here; the characteristic obligation is the obligation of the airway. CJEU made an interpretation regarding where the service was provided and it has been accepted that it will be deemed to have been provided in both places. *Rehder* has been criticized in particular for not giving due attention to the concept of predictability. Accordingly, it is not sufficient if the defendant can only foresee the number of places in which they might be sued, no matter how large that number potentially could be[66] because, in terms of predictability, the significant point is that it should be clear where the case will actually be filed. Therefore, when the claimant has a free-standing choice close to *forum shopping,* predictability is undermined.[67]

Similarly, in *Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade TU*[68], it was discussed how to determine the place of provision of services if the commercial agent makes transactions in several countries. The CJEU pointed out the need to designate a single place for the entirety of the contract and it stated that it was necessary firstly to look at the contract between the parties. Accordingly, if there is no clarity in the contract between the parties regarding the place of provision of services, the place of provision of services is in most cases the place where the commercial agent conducts the activities for the performance of the contract. In other words, in parallel with *Color Drack* related to sales contracts, the place of the main provision of services has been adopted. The CJEU also stated that the provision of services in this place should not contradict the contract. In the event that the place of the main provision of services cannot be determined, the case can be filed at the domicile of the commercial agent pursuant to the decision. As a justification for this

63 Dickinson and Lein (n 53) 154.

64 Case C-204/98 *Rehder v Air Baltic Corporation* [2009] ECR I-6073.

65 ibid [43].

66 Poon (n 51) 652.

67 Poon (n 51) 652.

68 Case C-19/09 *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* [2010] ECR I-2161.

opinion, it has been stated that the commercial agent's obligation is the characteristic obligation and that the commercial agent is the one who provides the services in terms of jurisdiction.[69] However, this solution is criticized as it deviates from the secondary approach adopted in *Color Drack.* Also, its potential to lead to *forum actoris* is considered a drawback.[70]

As can be seen, in determining the place of performance in service contracts, multiple places of performance has also emerged as a problem, and *Wood Floor* has gained an important place in this sense. According to the decision, if possible, it is necessary to determine a single place as the place where the services are provided. The Recast Preamble (para. 15)[71] requires that in line with the purpose of predictability, the place where the services are provided or will be provided should be determined under the contract. This place is the place where, within the framework of the commercial agency contract, the commercial agent prepares, negotiates, and concludes legal actions on behalf of the principal. According to the contract between the parties, the place where the services are mainly provided also meets the need for proximity, since this place is connected with the dispute due to the nature of the services. If from the provisions of the contract, it is not clear where the services are mainly provided because there are several places of performance, or because there is no clarity in the contract, but if the commercial agent has already provided the services, if appropriate, alternatively, the actual place where the agent most often conducts its activities for the performance of the contract should be taken as the basis. However, the fact that the services have been provided in this place should not contradict the will of the parties as far as it is understood from the contract. For this purpose, it may be necessary to take into account the facts related to the case, such as the time spent in these places and the importance of the activities carried out. The national court where the case is filed must decide whether it is competent in the light of the evidence presented. Finally, if the place of the main provision of the services is not understood from the provisions of the contract or from the place where it is actually provided, it should be determined by another tool that meets the criterion of predictability and proximity. For the said purposes of Art. 7(1)(b) of the Recast, the domicile of the commercial agent should be taken as the basis for the place of main provision of services. This location is always obvious when considering certainty and predictability. In addition, it is closely related to the dispute, since the commercial agent will probably provide a significant part of the services in this place.[72]

69 ibid [34].

70 Dickinson and Lein (n 53) 155; Poon (51) 653.

71 The decision was made during the period of the Brussels I Regulation. In the text of the decision, a reference was made to para. 11 of the Preamble of the Brussels I Regulation and the equivalent of this reference in the Recast is shown in the text above.

72 *Wood Floor* (n 68) [41]-[42].

Thus, with *Wood Floor*, important points have been made. First, it is envisaged that, if possible, a single place shall be identified as the place where the services are provided. Secondly, the domicile of the agent being taken as the basis depends on the fact that this place is really connected with the dispute, as a result of the assessment of the facts, and usually, the commercial agent performs a significant part of its activities in this place.[73] In *Wood Floor*, in case the place of the main provision of services cannot be determined, it is stated that, the opportunity to file a case at the commercial agent's domicile sets the ground for *forum actoris*, and this result is incompatible with the purpose of the special jurisdiction rules.[74] Therefore, the fact that the commercial agent files a case at his domicile, in fact, does not meet the close connection requirement. When the court at the commercial agent's domicile is deemed competent, this gives rise to the assumption that one of the places where the services are provided is this place.[75] The CJEU also stated that the commercial agent will probably provide a significant part of the services at this place. In other words, it was sought to legitimize the jurisdiction of the court at the commercial agent's domicile on the grounds that, in fact, this place meets the proximity need in terms of connection with the dispute.

In fact, it should be considered that the claimant will not be the commercial agent at all events, that is, the performer of the characteristic obligation; the client may also be the claimant, and in such a case, the court at the domicile of the defendant under the general rule, and the court at the domicile of the agent will overlap. Therefore, the domicile of the commercial agent, is actually not always a legitimate ground, if proximity is kept in the foreground. However, it is functional in terms of ensuring legal certainty and predictability.

IV. Proposal for a Return to the General Jurisdiction Rule

Within the scope of both Art. 7(1)(a) and Art. 7(1)(b), regarding cases where there are multiple places of performance, it was not possible to find a substantial solution by interpreting the obligation in dispute or the place of performance. Taking *Besix S.A. v. WABAG* as the basis in particular, not applying Art. 7(1) in the case of several places of performance at all and instead, taking the general jurisdiction rule set forth in Art. 4 as the basis is proposed.[76]

In *Besix*, it was stated by the CJEU that "a single place" should be determined in interpreting the "place of performance" of the obligation in dispute in Recast

73 *Wood Floor* (n 68) [42].

74 Poon (n 51) 653.

75 The CJEU has consistently accepted, since *Care GmbH v KeySafety Systems Srl*, that the place of performance should be determined on the basis of facts; that is, the place where the services are actually provided should be taken as the basis. See Case C-386/05 *Car Trim GmbH v KeySafety Systems Srl* [2010] ECR I-1255.

76 Poon (n 51) 654.

Art. 7(1)(a).[77] Indeed, as stated by AG Alber, in this case,[78] the court of the place of performance refers to a single place, not to several places.[79]

The opinion given by AG Bot in *Color Drack*[80] also stands out as it supports the return to the general jurisdiction rule. It was stated by AG Bot, in this case, that, in cases where there are several places of performance, the *Besix* decision may be taken as basis; that the rule set forth in Art. 5(1)(b) (currently, in Art. 7(1)(b)) may not be applied, as according to this rule, the courts of several Member States may potentially be competent and therefore the purpose of predictability cannot be realized. In the same direction, considering the purpose of predictability and the difficulties brought by the provision of Art. 5(1)(a), it is assumed that Art. 5(1)(a) also cannot be applied; and if several places of performance are split among several Member States, the competent court must be determined in accordance with the general jurisdiction rule.

In *Wood Floor*, AG Trstenjak has evaluated the *Besix* decision; however, she concluded that this decision cannot be taken as the basis in *Wood Floor*. The main grounds put forward by AG Trstenjak can be summarized as follows:

- Application of the general jurisdiction rule in cases where there are several places of performance of the characteristic obligation, contradicts the purpose of Art. 7(1)(b) because Art. 7(1)(b) requires the determination of the place of performance in sales and services contracts autonomously. Since the Recast provides for the place of performance as a special jurisdiction rule, it would be more appropriate for the purpose of the Regulation to try to ensure the implementation of the provision of Art. 7(1) before returning to the general jurisdiction rule.[81]

- Although the economic criteria bring uncertainty, if it is possible to determine the principal place of performance, the court of this place should be competent. If this place cannot be determined, the domicile of the obligor of the characteristic obligation should be considered the place where the services are provided.

Poon is of the opinion that these grounds (and others) put forward by AG Trstenjak do not constitute an obstacle to taking *Besix* as the basis in cases where there are several places of performance, and defended the application of the general jurisdiction rule:

According to Poon, firstly, even though *Besix* is about the place of performance of the obligation in dispute which is currently set forth in Art. 7(1)(a) [Brussels

77 Case C-256/00 *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG), Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzchmar GmbH & Co. KG (Plafog)* (2002) ECR I-01699 [29].

78 ibid, Opinion of AG Siegbert Alber, para. 61.

79 ibid.

80 *Color Drack* (n 4), Opinion of AG Bot, para. 115, fn.30.

81 *Wood Floor* (n 68), Opinion of AG Trstenjak, para. 88.

Convention Art. 5(1)], there is no reason to interpret the concepts set forth in the provision of Art. 7(1)(b) differently.[82] Also, the manner in which the provision of Art. 7(1)(b) will be applied in cases where there are several places of performance has not been satisfactorily demonstrated in the decisions of the CJEU. The inadequacy of the approach of determining the principal place of performance in accordance with the economic criteria was also noted by AG Trstenjak;[83] the difficulties related to determining the principal place of performance are also pointed at in the doctrine.[84] Even so, in the process from *Color Drack* to *Wood Floor*, the determination of the principal place of performance in accordance with the economic criteria came to the fore. Thus, it has been accepted that the principal place of performance refers to the closely connected court.

Nonetheless, as noted by Poon, the teleological interpretation of Art. 7(1)(b) is not in all cases supportive of the determination of the competent court according to economic criteria because the principal place of performance does not always indicate the most closely connected place.[85] In particular, where there are several places of performance in a sales contract, i.e., delivery is to be made in several Member States, none of the places of delivery may be much more closely connected than others. For instance, in an example where defective goods were delivered in several Member States, if goods have been delivered at rates close to each other in each Member State, the court of the country in which the products have been delivered at a certain slightly higher rate will be considered competent as the court of the principal place of performance. However, this court will not actually be the court of the place most closely connected to the dispute.[86] Hence, interpreting the provision of Art. 7(1)(b) to cover disputes involving several places of performance is actually neither in accordance with the wording of the provision nor with its purpose as a special jurisdiction rule.[87] The economic criteria approach may not create a disadvantage in terms of the predictability of the competent court in simple cases. Especially in the case of obligations to be fulfilled in two Member States, if 90% of the goods are delivered in one of these countries, it can be predicted that the economic criteria will point to this country as the principal place of performance.[88] However, in complex commercial relations, when deliveries are made to multiple Member States at rates close to each other, it would be necessary to use trial-and-error by applying to the court to determine which place of performance carries weight, and the competent

82 Poon (n 51) 654.

83 *Wood Floor* (n 68), Opinion of AG Trstenjak, para. 78-79.

84 Dickinson and Lein (n 53) 153-154; Poon (n 51) 649.

85 The focus of the teleological interpretation is the detection of the closely connected court. See Poon (n 57) 656.

86 See Poon (n 51) 656.

87 Poon (n 51) 656.

88 Poon (n 51) 656-657. However, in such an example, if 10% of the goods delivered in another Member State are defective, the initiation of a case in the court of the place where 90% of the goods were delivered, which is determined as the principal place of performance, would contradict the need for a close connection between the dispute and the court.

court being able to be determined beforehand and thus, ensuring predictability, for the defendant, would not be possible.[89]

According to Poon, it is important to establish, in a proper way, the relation between the general jurisdiction rule set forth in Art. 4 and the provision of Art. 7(1). Under one opinion, it is claimed that the provision of Art. 7(1) gives the claimant an advantage and that, with Art. 7(1), the opportunity to choose granted to the claimant is secured in principle;[90] it is also suggested that Art. 7 should not be interpreted narrowly.[91] However, the notion that the provision should not be interpreted narrowly contradicts the established practice of the CJEU, and the Preamble of the Recast (para. 15) clearly states that the jurisdiction should be based mainly on the defendant's domicile, with a few exceptions with definite limits. Actually, it is true that the provision of Art. 7(1) provides the claimant with an alternative court, but this should not mean that the CJEU may extend the provision of Art. 7(1) and that the claimant may make a choice between Art. 4 and Art. 7(1) in cases where there is no close connection between the dispute and the court.[92]

As it can be seen, it seems reasonable from various points of view to return to the general jurisdiction rule in cases where there are several places of performance. Mainly, problems related to the determination of the principal place of performance within the scope of Art. 7(1)(b) have been pointed out. At the heart of the interpretation of the principal place of performance lies the desire to determine the court that is closely (most closely) connected to the dispute (contract). In contrast, while it is suggested that the general jurisdiction rule should be applied, the points put forward are that the principal place of performance may not point to the closely connected court in every case, and legal certainty and predictability should be preferred.

Thus, the problem of identifying the competent court in cases where there are multiple places of performance was actually considered as a priority problem in the Brussels regime among the purposes of the special jurisdiction rules.[93] In other words, in disputes where the legal certainty and predictability, which is the general purpose of the system, and the need for a close connection, which is its "specific" purpose, confront each other, the question as to which of them has priority in terms of Art. 7(1) is identified as a question and it is stated that legal certainty and predictability should be the priority. [94] According to Poon, legal certainty and predictability considerations in cases where there are several places of performance justify the application of the

89 Poon (n 51) 657.

90 Ulrich Magnus and Peter Mankowski, *Brussels I Bis Regulation: Commentary* (Otto Schmidt 2016) 177, 186.

91 ibid 114; Dickinson and Lein (n 53) 140.

92 Poon (n 51) 656.

93 Poon (n 51) 661-662.

94 Poon (n 51) 661-662.

general rule set forth in Art. 4, by abandoning the provision of Art. 7(1).[95] Although the abandoning of the provision of Art. 7(1) is not accepted in the doctrine, it can also be seen that there are no clear results from the decisions of the CJEU aimed at determining the close connection between the court and the dispute.[96] Indeed, it is stated that it is not easy to reach a conclusion where the close connection is ensured and legal certainty and predictability are not sacrificed.[97]

V. The Main Aim of the Rules of Jurisdiction: Legal Certainty and Predictability

A. Legal Certainty and Predictability through Proximity

As can be seen from the analysis of the paradigm of the civil law system above, the most basic function of the jurisdiction rules in the civil law system is to protect the defendant against the claimant's secured right of access to courts by ensuring predictability. The logic of the fact that the special jurisdiction rules can perform this basic function is based on the fact that there is a real connection between the dispute and the court. Thus, it is assumed that, in fact, the special jurisdiction rules indicate the court of the place that is closely connected to the dispute. Therefore, connecting factors such as the place of performance and the place of commission of tort are taken as a basis. The need that there should be a close connection between the dispute and the court is a tool for the realization of legal certainty and predictability.

In other words, the main purpose of the jurisdiction rules is to determine the competent court in such a way as to ensure legal certainty and predictability. In particular, special jurisdiction rules are rules that are assumed to refer to a closely connected court by nature and use connecting factors such as place of performance, and place of commission of tort as an indicator of close connection. From a teleological point of view, on the other hand, the main purpose of these rules is to point at the competent court in a way that is certain and predictable in advance. As a matter of fact, while examining the Preamble of the Recast, in para. 15 and 16, the presence of a close connection between the dispute and the court is expressed as the element that will realize legal certainty and predictability. Thus, it turns out that the purpose that should be taken as the basis for the interpretation of the jurisdiction rules from an objective point of view is legal certainty and predictability.

Indeed, proximity ("a close connection") can only be seen as an attribute of special jurisdiction rules. As explained in the Jenard Report on the Brussels Convention,

95 Poon (n 51) 662.

96 Poon (n 51) 662.

97 Poon (n 51) 662.

"Adoption of the 'special' rules of jurisdiction is also justified by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it. Thus, to take the example of the *forum delicti commissi*, a person domiciled in a Contracting State other than the Netherlands who has caused an accident in The Hague may, under the Convention, be sued in a court in The Hague. This accident cannot give other Netherlands court jurisdiction over the defendant. On this point, there is thus a distinct difference between Article 2 and Articles 5 and 6 due to the fact that in Article 2 domicile is the connecting factor".

As can be seen, it has been stated that, in comparison with the determination of the court with general jurisdiction depending on the defendant, the special jurisdiction rules refer to the court of the place that is connected with the dispute. This explanation also shows that the competent court is closely connected to the dispute due to the nature of the special jurisdiction rules; the connecting factors that are assumed to be closely related to the dispute are used as the jurisdiction criterion. Otherwise, the purpose of the rules of special jurisdiction is not the investigation of the closely or most closely connected place in each concrete dispute.

The jurisdiction rule of the place of performance of the characteristic obligation is also formulated on the assumption that the place of performance is a place that is already closely connected to the dispute. Therefore, the consideration that should be taken into account when determining the place of performance that has been previously provided for to indicate a certain place for a contractual relationship should be legal certainty and predictability. In fact, it is doubtful that the proximity criterion serves as a guide in terms of determining the place of performance, as will be seen below. This point of view has introduced the search for the principal place of performance in cases where there are several places of performance. It is obvious that the evaluations for the principal place of performance remain very weak in terms of legal certainty and predictability. Because the defendant cannot predict in which place the case can be filed, the court of which place will consider itself competent as a closely connected court cannot be certain.

Below, it is demonstrated that the provision introduced by Art. 5(1)(b) of the Brussels I Regulation and kept by Art. 7(1)(b) of the Recast, is, in fact, beyond preventing the division of the obligation in dispute, drafted to point at a single place of performance for all disputes arising from the contract, and in this direction, it is explained that in cases where there are several places of performance, the rule should be interpreted in line with legal certainty and predictability. In other words, it is clear that the rule does not give the court the task of determining the closely connected court in terms of each concrete dispute.

B. Characteristic Obligation and a Single Place of Performance

1. Specific Obligation is the Characteristic Obligation

As mentioned above, with the Brussels I Regulation, the rule of the place of performance of the obligation in dispute as set forth in Art. 5(1) of the Brussels Convention has been revised in such a way as to grant jurisdiction to the court of the place of performance of the characteristic obligation in terms of sales and service contracts.[98] Thus, the problem of fragmentation of jurisdiction in terms of the possibility that several obligations may be the subject of dispute has been solved.[99] In other words, in the event that several obligations are the subject of a dispute, the need to determine the principal obligation has disappeared in accordance with the decisions of the CJEU because it has been accepted that the obligation in dispute is the characteristic obligation. That is to say, the jurisdiction for contractual disputes is attached to the characteristic obligation.[100] This approach proves that the EU legislator did not prioritize the proximity criterion between the dispute and the court while drafting the provision of Art. 5(1)(b) and Art. 7(1)(b) because it is also likely that contractual disputes are not related to the performance of the characteristic obligation. In determining the place of performance of the characteristic obligation, by taking as the basis the place of delivery for sales contracts and the place of provision of services for service contracts, certainty is ensured,[101] and it is no more necessary to apply *lex causae* to determine the place of performance. In particular, it is important that the place of performance is defined independently of legal systems, subject to a purely factual criterion with reference to the provisions of the contract or the place of physical delivery of the goods.

The most fundamental characteristic of the provision of Art. 7(1)(b) of the Recast, which determines the place of performance in sales contracts as the place of delivery of the goods is that, as mentioned above, the place of performance is determined, as based on facts, *independently* of the law applicable to the contract. In the Commission Proposal on the Brussels I Regulation, it was stated that this approach aims to determine the place of performance in a pragmatic way based only on a factual criterion.[102]

In terms of service contracts, the special definition regarding the place of performance set forth in the provision of Art. 7(1)(b) of the Recast, has the same

98 About the process of transformation of the rule of the place of performance of the obligation in dispute into the performance rule of the characteristic obligation in terms of sales and employment contracts, see Okoli (n 38) 187-192.

99 Mankowski (n 53) 136.

100 Mankowski (n 53) 136.

101 Mankowski (n 53) 136; Dickinson and Lein (n 53) 153.

102 *Commission Proposal for the 2001 Regulation*, COM (1999) 348 final [14 July 1999] Explanatory Memorandum 14.

purpose as the provision regarding the place of performance regarding sales contracts. In accordance with the decisions of the CJEU, in terms of service contracts, the court of a certain place to be determined under an autonomous approach should be competent.[103] The place where the service is provided or will be provided points to the place of performance to establish jurisdiction in relation to disputes arising from such contracts. In sales contracts, compared to the place of delivery of the goods, it is more difficult to identify the place where the service is provided because the abstract nature of the services and the variety of services that are provided - to be provided make it difficult to connect them to a particular place, to determine whether they have been provided or will be provided in a particular place.[104] As mentioned above, this difficulty manifests itself, especially when the services are provided in several countries.

Consequentially, with Art. 7(1)(b), the characteristic obligation is shown, concretely, as the obligation of the seller and the provider of services and the arguments regarding that the characteristic obligation may be indefinite have been set aside,[105] and the way in which the place of performance of the characteristic obligation is to be determined is also identified. The fact that, with *Car Trim,*[106] the place of delivery or provision of services is embodied as the place where the goods are actually delivered to the purchaser or the place where the services are provided, shows once again that the rule serves legal certainty and predictability.

2. A Single Place of Performance for all Contractual Matters

The allocation of jurisdiction to the court of the place of performance for sales contracts and service contracts with Art. 5(1)(b) of the Brussels I Regulation, is important, not only because it provides for the place of performance of which obligation will be taken as the basis, but because it allocates jurisdiction to the court of the place of performance of the characteristic obligation for all disputes arising from a contract *("in matters relating to a contract"*). It is ensured that the dispute is subject to the same jurisdiction rule in cases where it is not related to the performance of the obligation. Thus, it can be seen that the jurisdiction rule for the place of performance of the characteristic obligation is a jurisdiction rule that applies to the entire contractual relationship. In fact, the adoption of this approach demonstrates that the jurisdiction rules indicate the connected court on the basis of the relationship or legal category from which the dispute arises. That is, the

103 Briggs (n 50) 232.

104 Dickinson and Lein (n 53) 154.

105 See Hill (n 41) 611-612.

106 In *Car Trim*, the CJEU stated that the place where the goods are physically delivered or supposed to be physically delivered to the purchaser at the final destination is the place that is the most compatible with the purposes and the general structure of the Regulation. It is also emphasized that this criterion is largely predictable and that it also meets the need for proximity as long as it ensures a close connection between the contract and the court. *Car Trim* (n 75) [60]-[62].

court that the "contract" is closely related to or the "tort" is closely related to is indicated.[107]

It is clear that the jurisdiction rule of the place of performance should also be understood in this sense because the jurisdiction rule of the place of performance of the characteristic obligation indicates the competent court not only in cases where the characteristic obligation is in dispute, but also in relation to the entire contract.[108] Accordingly, the provision introduced by the Brussels I Regulation clarifies that the jurisdiction rules are not actually focused on the connection between the specific subject of dispute and the court. Therefore, even if pointing to a closely related court will be considered a secondary purpose and will be taken as the basis for the interpretation of the jurisdiction rules, it becomes evident that the teleological interpretation does not actually require examination of the relationship between the "specific subject of dispute" and the court in each case. The important point is that there is a close connection between the "contract" and the court, so that the court of the place of performance of the characteristic obligation, as a specific criterion to ensure this, has been granted jurisdiction. Otherwise, it is already impossible to establish a close connection in terms of each dispute arising from the contract. For instance, from the point of view of invalidity claims, it is obvious that the court of the place of performance of the characteristic obligation is not closely connected.

As a matter of fact, one of the issues discussed during the period of the Brussels Convention was that the rule of the place of performance of the obligation in

107 Special jurisdiction rules use connecting factors of the place of commission of tort and the place of performance, similar to each other, for categories of tort and contracts. As mentioned above, these rules have a history stretching back to Roman law. However, it can be seen today that the relationship between the contract and the place of performance is different from the relationship between the tort and the place of commission. A dispute arising from a tort is singular and consists of a claim for compensation. Therefore, it does not give rise to a debate about whether there is a close connection between the dispute arising from a tort and the place of commission (place of damage).
In turn, disputes of different types and natures arise from the contractual relationship. See Hill (n 41) 615. It can be seen that, if the requirement that the jurisdiction rules establish a close connection between the "dispute" and the court is sought, it is impossible for any type of dispute to be closely connected to the place of performance. As will be discussed below, this also applies to the place of performance of the characteristic obligation. Therefore, in terms of the rule of the place of performance, a close connection is actually a relationship that is assumed to be established, as a general category, between the contract and the court with the connecting factor of the place of performance. Therefore, to seek the requirement that the place of performance should be closely connected to each specific dispute, would contradict the assumption that the jurisdiction rules demonstrate *a priori* the closely connected court. The uncertainty about whether the contract or the dispute will be taken as the basis for the determination of a close connection is actually reflected in the decisions of the CJEU. It has been stated in the Jenard Report on the Brussels Convention that the special jurisdiction rules are based on a legitimate basis due to the close connection between the dispute and the court (Jenard Report (n 21) 22); in *Besix*, which is the example taken as the basis for this, it was stated that the close connection between the dispute and court is important in terms of special jurisdiction rules (*Besix* (n 77) [30]). In contrast, in *Color Drack*, it is stated that the special jurisdiction rule set forth in Art. 5(1) of the Brussels I Regulation is based on the close connection between the "contract" and the court (*Color Drack* (n 4) [22], [23], [40]). Also, in the Preamble of the Brussels I Regulation (para. 11-12), the terms "subject-matter of the litigation" and "action" were used directly, instead of the word "dispute", thus it was stated that there should be a close connection between the subject of the case and the court. There is no doubt that the subject of the case is the "contract" in a broad sense. Therefore, by the literal interpretation of the relevant texts, it is understood that, the place of performance is a jurisdiction rule that is preferred, not because it points at the relationship between the dispute at hand and the court, but because it points at the relationship between the contract and the court.

108 The CJEU held that the rule of special jurisdiction in matters relating to a contract establishes the place of delivery as the autonomous linking factor to apply to all claims founded on one and the same contract for the sale of goods rather than merely to the claims founded on the obligation of delivery itself. See *Color Drack* (n 4) [26].

dispute did not in any case point to the court of a place that is closely connected to the dispute. Where the specific dispute was not related to the performance of the obligation, due to the lack of a close connection between the dispute and the place of performance, the rule of the place of performance of the obligation in dispute was considered insufficient in terms of the criterion of close connection.[109] The same inadequacy, as can be seen, also applies to the place of performance of the characteristic obligation.[110] Because the fact that the place of performance of the characteristic obligation is determinative can in some cases ensure that the court of the place to which the dispute is actually connected is granted jurisdiction, but it is not possible to establish this connection in terms of all types of disputes. Therefore, from the point of view of the criterion of close connection, there is in fact not a very big difference between the theory of specific obligation and the theory of characteristic obligation. However, the rule of the place of performance of the characteristic obligation may be preferred since it does not lead to a problem of fragmentation on the basis of obligation, in contrast, the rule of the place of performance of the obligation is in dispute because the place of performance of the characteristic obligation is determined as a certain place.[111] However, if the place of performance of the characteristic obligation is in several countries, it is again inevitable that the courts of several countries will be competent.

As a result, the place of performance of the characteristic obligation does not have the function, in all cases, of indicating the court that is closely connected to the "dispute". This place has been recognized as a closely connected place, to which the category of contracts, in general, is connected. Thus, it is ensured that the competent court may be determined in advance, in accordance with the purpose of legal certainty and predictability. Therefore, it seems that the jurisdiction rule of the place of performance does not have the purpose of determining the court that is closely connected to the "subject of the specific dispute"; the main purpose of the rule is to ensure predictability by granting jurisdiction to the court of the place of performance of the characteristic obligation that is assumed to be closely connected for the whole contractual relationship. However, since the specific purpose of the special jurisdiction rules in practice is considered to establish a close connection, the purpose of determining the closely connected court serves as the guide in the interpretation of these rules.

109 Hill (n 41) 598-601.

110 Hill (n 41) 618; Poon (n 51) 641.

111 Hill (n 41) 611; Mankowski (n 53) 136; Dickinson and Lein (n 53) 153.

C. Objective of Proximity and *Forum Conveniens*

1. The closest connection

In the decisions of the CJEU, close connection was considered as the specific purpose of the special jurisdiction rules, and the determination of the closely or most closely connected place was construed as the purpose of the place of performance rule.[112] In fact, in the *Besix* decision, by stating that *"... it appears that Article 5(1) of the Brussels Convention is not apt to apply in a case such as that in the main proceedings, where it is not possible to determine the court having the closest connection with the case..."*, it was pointed out that the most closely connected court should be determined in order to apply the place of performance rule.[113]

The influence of this point of view is seen in *Color Drack*. It has been noted that, since several places of performance are located in the same Member State in this case, predictability is not actually compromised, and it has been accepted that, since the courts of the same Member State have been granted jurisdiction, the requirement for close connection is also met. It was stated that the place of principal performance refers to the court most closely connected to the contract, and in order to determine the most closely connected court, a ranking was made among the places of performance.[114] Thus, in cases where there are several places of performance, the search for the determination of the "most closely connected" court has been undertaken, with an interpretation that actually goes beyond the purpose of the rule.[115]

While the determination of the place of principal performance has been accepted in this way in cases where there are several delivery places in sales contracts, the same approach has been adopted, in terms of service contracts, in principle, with *Wood Floor*. But before *Wood Floor*, in *Rehder*, it was stated, by referring to the evaluations in *Color Drack*, that the place most closely connected to the contract, that is, the place of the principal provision of services, should be determined in order

112 See *Shenavai v Kreischer* (n 45) [6]; *Besix* (77) [31]-[32]. See also *Wood Floor* (n 68), Opinion of AG Trstenjak, para. 71.

113 See *Besix* (n 77) [48]; *Color Drack* (n 4) [22]. It should be noted here that in some other decisions of the CJEU, ensuring predictability from the point of view of the defendant in determining the place of performance of the obligation in dispute was considered superior to the need for close connection. See Case C-288-92 *Custom Made Commercial Ltd v Stawa Metallbau GmbH*, [1994] ECR I-2913.

114 *Color Drack* (n 4) [40].

115 As mentioned above, in the Jenard Report, the function of the special jurisdiction rules to indicate the "most closely" connected court was not mentioned, as it was stated that *"Adoption of the special rules of jurisdiction is also justified by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it"*. See Jenard Report (n 21) 22. Similarly, in the Preamble of the Brussels I Regulation (para. 12), providing that, "In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice", again "a close connection" was put forth as the basis of special jurisdiction rules; meanwhile, the purpose of special jurisdiction rules to determine the most closely connected court is not mentioned.

to grant jurisdiction to the court of a single place of performance.[116] In *Rehder*, due to the nature of the services provided, it was not possible to identify a single place that was most closely connected; on the contrary, the interpretation that the services were provided in two separate places was adopted by the CJEU. Therefore, in fact, in *Rehder*, it was out of the question that the services were provided in several places. However, as a result of the fact that the place of performance cannot be determined as a single place in terms of jurisdiction in the contract of carriage in question, the CJEU has accepted that a case can be filed in two separate places, taking into account the nature of the services provided.

In *Wood Floor*, the statement in *Color Drack* that the "place of performance must be understood as the place with the closest linking factor between the contract and the court having jurisdiction" was cited.[117] Following that, it was noted that "... concerning the provision of services, when there are multiple places of delivery of the goods the 'place of performance' must be understood as the place with the closest linking factor, which, as a general rule, will be at the place of the main provision of services";[118] thus, on the grounds that the principal place of performance is the place most closely connected to the contract, it was accepted that it was the place of performance mentioned in Art. 7(1)(b). It was also set forth that the principal place of performance should be determined in accordance with economic criteria. Additionally, it was stated that determining the place of the main provision of services in accordance with the provisions of the contract will realize the purpose of close connection, since this place is naturally connected with the dispute.[119]

As can be seen, in cases where the performance takes place in several Member States, the "place of performance" referred to in Art. 7(1)(b) is adopted as the "principal place of delivery" and the "place of the main provision of services" *within the framework of the closest linking factor*. In other words, the decisive element in the interpretation of the concept of the place of performance has been the criterion of close connection. However, the most closely connected place has not been identified as a predetermined and predictable place. On the contrary, the task of determining the principal place of performance is left to the courts for consideration on a case-by-case basis of which the guiding criteria is the economic criteria.

116 *Rehder* (n 64) [38]. In this decision, it was noted that *"the factors on which the Court based itself in order to arrive at the interpretation set out in Color Drack are also valid with regard to contracts for the provision of services, including the cases where such provision is not effected in one single Member State"* (Rehder (n 64) [36]-[37]), demonstrating that in the case *Color Drack*, the presence of several places of performance in one Member State was not a determining factor.

117 *Wood Floor* (n 68) [31].

118 *Wood Floor* (n 68) [33].

119 *Wood Floor* (n 68) [39]: *"The determination of the place of the main provision of services according to the contractual choice of the parties meets the objective of proximity, since that place has, by its very nature, a link with the substance of the dispute"*.

2. Autonomous interpretation of place of delivery and place of provision of services

Art. 5(1)(b) of the Brussels I Regulation and Art. 7(1)(b) of the Recast requires that the place of performance is to be determined, not in accordance with *lex causae*, but as a specific place in accordance with the contract and concrete facts. The fundamental assumption regarding this rule is the assumption that the goods are delivered (will be delivered) in a certain place or the services are provided (will be provided) in a certain place. Allocating jurisdiction on this place is based on the fact that this place is predetermined or determinable. It is accepted that, if this place is not determined under the contract, it should be determined according to the facts.[120] The rule allows the determination of the "specific place" where the characteristic obligation will be performed (the place of delivery or the place of provision of services) in the light of facts. Thus, there would be no need to determine the place of performance based on substantial rules of *lex causae*.

The principle of autonomous interpretation should be evaluated separately for cases where there are several places of performance because here, it goes beyond determining the place of delivery of goods or the place of provision of services (or where they are to be provided) as a specific place, based on the contract and concrete facts.

Firstly, the need to determine the factual place of performance, should not include determining the place of principal performance. It is clear that the purpose of the Recast is not to determine, in cases where the performance of the contract is split among several Member States, the weight of these places of performance on the basis of facts.

In cases where there are several places of performance, here, an interpretation that is different from the one in designating the place of performance in the light of facts under Art. 7(1)(b) is made. The place of performance is apparent, but it is spread over several Member States. In this case, should one of these places of performance be selected for the purpose of jurisdiction? Since in the decisions of the CJEU, the determination of the most closely connected court is considered the purpose of the jurisdiction rule, the concept of the principal place of performance has been put forward and it has been accepted that this place should be taken as the basis for jurisdiction. However, this place is not determined in a predictable way (such as the domicile of the obligor of the characteristic obligation).

The search for the place of principal performance in each dispute goes beyond the purpose of identifying the place of performance of the characteristic obligation on a factual basis under an autonomous approach because, in a contractual relationship,

120 *Commission Proposal* (n 102) 14. See also *Car Trim* (n 75) [57]-[62].

the place of delivery or the place where the services are provided (will be provided) can be understood, as a specific place, from the provisions of the contract or specific conditions. The autonomous interpretation is functional in this sense and does not prevent the predictability. In addition, the principle of autonomous interpretation is limited to the activity of determining a specific place of delivery or place of provision of services. However, making an interpretation on which of the multiple places of delivery or places of provision of services will be selected as the principal place of performance in accordance with economic criteria is contrary to the limited function of the autonomous approach. Therefore, in cases where there are several places of performance, the determination of the place of principal performance based on facts is not appropriate for the procedural function of the place of performance for jurisdiction.

3. Place of principal performance and forum (non) conveniens

The parties may have agreed on multiple places of performance in a contractual relationship. The evaluation of the close connection as a purpose in taking one of these places as the principal place of performance is also open to criticism, since the main purpose of the special jurisdiction rules is not the establishment of a close connection. In other words, acting with the purpose of determining the most closely connected court actually compromises legal certainty and predictability because in order to determine the most closely connected court in each dispute, the principal place of performance must also be determined. It is explained by Trstenjak herself, in *Wood Floor*, that, due to the uncertainty of economic criteria, it is not easy to determine the principal place of provision of services.[121]

However, at this stage, the evaluation of proximity as a purpose of the jurisdiction rules and search for the principal place of performance (to indicate the most closely connected court) would lead to the *de facto* application of *forum (non) conveniens*.[122] Indeed, as can be seen from the CJEU decisions, the purpose of determining the court most closely connected to the dispute plays a role in determining the principal place of performance.

In accordance with the *forum (non) conveniens* doctrine*,* originating from *common law,* in case the court determines, for a specific dispute, that the court of another place would be more proper in terms of jurisdiction, it would then grant a stay on the ground of *forum non conveniens*. According to *Spiliada Maritime Corporation v.*

121 *Wood Floor* (n 68), Opinion of AG Trstenjak, para. 78-79.

122 The *forum non conveniens* doctrine is compatible with the jurisdiction paradigm of *common law*; it is part of it. In fact, in the Brussels regime, it is possible to dismiss or suspend subsequent cases if a case is filed in the courts of several Member States, thanks to *lis pendens* and measures related to connected cases. However, while applying *lis pendens* and provisions related to connected cases, aimed at coordinating the jurisdiction of courts and preventing the conflicting decisions, the court of which place is more appropriate in terms of jurisdiction is not examined.

Cansulex Ltd.[123]*,* which is a cornerstone for the *forum non conveniens* doctrine, *"...it is not, for the court seised, a simple question of practical or personal "convenience", associated in particular with the burdening of the court, but rather a question concerning the objective appropriateness of the forum for trial of the dispute."*[124]

In accordance with the forum non conveniens, the court to which the case is filed must establish that another forum is clearly more appropriate in terms of jurisdiction. This enables the appropriate court for the trial to be identified, that is to say *"that with which the action [has] the most real and substantial connection"*.[125]

In particular, the approach of determining the principal place of performance, in cases where there are several places of performance, means that the court to which the case is filed determines whether it is competent by the empirical method within the framework of the circumstances of each dispute. In other words, the determination of the most closely connected court has been adopted as the purpose[126] and further, the investigation of the specific conditions of the dispute in accordance with economic criteria, in the determination of such a place, has been proposed. Therefore, in cases where there are several places of performance, the court examines whether it is the most closely connected court, i.e., whether it is the *forum conveniens*. If the court of the place of performance where the case was filed is not the court of the principal place of performance, the case must be dismissed due to lack of jurisdiction. However, in this way, it is also shown, albeit indirectly, that in fact, another forum (the court of the principal place of performance) is the court most closely connected to the dispute.

This practice, which comes close to the doctrine of *forum non convenies*, is both against the purpose of the jurisdiction rules in the civil law system to serve legal certainty and predictability and makes difficult the application of the place of performance rule in cases where there are several places of performance. In addition, the difficulty of determining the principal place of performance should not be overlooked.

D. The Possibility that the Principal Place of Performance Cannot be Determined

The solutions proposed in the *Color Drack* and *Wood Floor* decisions of the CJEU in relation to the case in which the principal place of performance cannot be determined are different. While in *Color Drack*, the claimant was granted the

123 *Spiliada Maritime Corporation v Cansulex Ltd.,* [1987] AC 460.

124 ibid 474.

125 ibid 477-478, para. (e).

126 In the decisions of the CJEU, determining the closest or closely connected court was adopted as the purpose of the special jurisdiction rules and in cases where there are several places of performance this approach led to the emergence of a concept (as the principal place of performance) which eliminates predictability in terms of jurisdiction.

opportunity to choose one of multiple places of performance[127], in *Wood Floor*, it was set forth that the case may be filed at the domicile of the agent.[128]

In *Color Drack*, granting the claimant the right to choose does not, in fact, create a serious unpredictability of the outcome, since the places of performance are located in the same Member State. However, granting the claimant the right to choose in cases where multiple places of performance are split among different Member States, has been criticized for leading to *forum shopping*.[129] In fact, the CJEU has confined the right to choose to the cases where the places of delivery are in the same Member State.[130] Therefore, in cases where multiple places of performance are located in different Member States, the claimant should not be given the opportunity to choose one of these places.

In *Wood Floor*, a different step was taken and it was accepted that the court where the agent is domiciled has jurisdiction.[131] As a justification, it was stated that, *"that place can always be identified with certainty and is therefore predictable. Moreover, it has a link of proximity with the dispute since the agent will in all likelihood provide a substantial part of his service there"*.[132] As seen, in *Wood Floor*, it was determined that the domicile of the agent ensures legal certainty and predictability; however, with the assumption that the agent would provide a substantial part of his service there, the close connection to the dispute was emphasized. In other words, once again, the search for a close connection has come to the fore in the preference of this solution. In connection with this point of view, the criticism that the commercial agent's domicile may not always be the place closely connected to the dispute has been put forward. It has been stated that, especially if the services are not provided in this place, for example, if only preparatory work is carried out in this place[133] and the services themselves are provided in another place, the domicile of the commercial agent may not be the place closely connected to the dispute.[134]

It can be seen that since in the decisions of the CJEU it was sought to determine the most closely connected place, the criticisms have the same basis. In other words, it

127 *Color Drack* (n 4) [42].

128 *Wood Floor* (n 68) [42].

129 Poon (n 51) 652.

130 *Color Drack* (n 4) [44].

131 *Wood Floor* (n 68) [42].

132 *Wood Floor* (n 68) [42].

133 For the opinion that preparatory activities can be considered as the provision of services within the scope of Art. 7(1)(b), see Magnus and Mankowski (n 90) 189.

134 Poon (n 51) 654. It was also criticized that if the court where the agent is domiciled has jurisdiction, then the claimant can sue in their own domicile which means a potential of *forum actoris*. See Poon (n 51) 653. However, it is seen that the claimant may also not be the commercial agent, that is, the obligor of the characteristic obligation, in each case; that the client may be the claimant and that in accordance with the general jurisdiction rule, the court of the domicile of the defendant and the court of the domicile of the obligor of the characteristic obligation may overlap. Therefore, the criticism regarding *forum actoris* may be considered as a weak criticism, as, for instance, in the case of deficient performance of service, the possibility that the client may be the claimant would be higher.

has been tried to demonstrate that a close connection with the dispute cannot actually be established.

VI. Search for Solutions within the Scope of Art. 7(1)(b) of the Brussels I Recast

A. Opinion that the General Jurisdiction Rule Should be Returned to and Search for Another Competent Court with Reference to the Characteristic Obligation

As can be seen above, the jurisdiction rule of the place of performance has been introduced to point to a single place in order to ensure legal certainty and predictability. It should be noted that the place of performance of the characteristic obligation, especially in sales and service contracts, is specifically designated, with the Brussels I Regulation, as to grant jurisdiction to the court of a specific place. This jurisdiction rule is based on the presumption that the place of performance is a place that is already closely connected to the contract. The fact that the place of performance is specified for sales and service contracts guarantees predictability from the point of view of the defendant. However, in cases where there are multiple places of performance, determining the most closely connected place, not predictability, has been the point of departure for the jurisdiction.

In fact, the CJEU introduced a new jurisdiction rule with the principle of *"principal place of delivery"*, in *Color Drack*. However, it did not determine which economic criteria will be taken as the basis for this place. Thus, it has been accepted that the principal place of performance will mean the place of performance of the characteristic obligation in cases where there are multiple places of performance. In response to this approach, the opinion that the provision of Art. 7(1) should not be applied and the general jurisdiction rule should be returned to if there are multiple places of performance, noting especially the difficulties in the determination of the principal place of performance and that, even if it is determined, it would not indicate the court closely connected with the dispute, in any case.

However, returning to the general jurisdiction rule should be considered as a last resort, which should be treated with caution because the special jurisdiction rules not only provide an alternative forum to the claimant. At the same time and more importantly, it is also in the defendant's interest to be sued before the court to which the case is connected. In cases where there are multiple places of performance within a country, it might be reasonable to return to the general jurisdiction rule due to a single place of performance not being determinable. In other words, if the defendant's domicile is in Paris; if the places of performance are in Lyon, Grenoble,

and Marseille, filing the case in Paris would not create a serious disadvantage and would be predictable for the defendant. However, the Brussels regime is a system of jurisdiction in which several Member States are involved. Considering the court of the defendant's domicile as competent in a dispute where the places of performance are split among other Member States while the defendant's domicile is in Germany, would mean, even though it is predictable, that there will be only one competent court in the EU. However, in such a case related to several Member States, the main point is that the court(s) connected with the dispute should be indicated in a predictable manner, besides the general jurisdiction rule. Namely, a return to the general jurisdiction rule means a denial of the purpose and function of the existence of special jurisdiction rules.

In *Wood Floor*, AG Trstenjak prioritized the implementation of the special jurisdiction rule before the general jurisdiction rule. Although this approach is well-grounded, a permanent and predictable solution can be provided for the problem of multiple places of performance, by granting jurisdiction to the court of a specific place, instead of formulating a jurisdiction rule that is hard to apply, such as the principal place of performance. Hence, if a solution is to be sought within the scope of Art. 7(1)(b), making the characteristic obligation decisive can be considered because Art. 7(1)(b) has, in the allocation of jurisdiction, acted starting from the characteristic obligation. Taking the domicile of the performer of the characteristic obligation as the basis, due to the fact that the place of performance of the characteristic obligation cannot be determined, seems particularly satisfactory from the point of view of predictability. There is no doubt that this place is connected with the contractual relationship by characteristic obligation. As can be seen from the foregoing, it is not the determination of the court most closely connected to each dispute that is important, but the determination of the court of a place that is connected with the contract. However, setting forth that this place is the domicile of the performer of the characteristic obligation carries the danger of *forum actoris*; in addition, if it is taken into consideration that in most cases, the claimant will be the purchaser or the client, in fact, the domicile of the performer of the characteristic obligation overlaps with the domicile of the defendant determined under the general jurisdiction rule. Thus, the rule of the domicile of the performer of the characteristic obligation either leads to *forum actoris*, or overlaps with the rule of the domicile of the defendant; that is, it does not imply an alternative court. In this case, it does not seem possible to formulate another jurisdiction rule in which the characteristic obligation will be the point of departure.

B. Acknowledging that the Courts of Several Places of Performance are Competent Depending on Several Places of Performance

As discussed above, in cases where there are several places of performance of the characteristic obligation, the main problem is the concept of "principal place of performance". It is clear that this concept is used to identify the "most closely connected" court. But again, as considered above, the jurisdiction rules are not actually aimed at indicating the most closely connected court.[135] In particular, the purpose of the special jurisdiction rules is to grant jurisdiction to the court of a place that is connected to the relationship or incident that is the subject of the dispute, to ensure predictability. It is aimed that this place is a specific place. For this purpose, the rule of the place of performance of the obligation in dispute set forth in Art. 5(1) of the Brussels Convention is turned into the rule of the place of performance of the characteristic obligation, at least for certain types of contracts, with the Brussels I Regulation.

Although it seems that the place of performance of the characteristic obligation solves the problem of fragmentation based on obligation, the problem of fragmentation based on the place of performance could not be eliminated. At this point, it should be taken into account that the Brussels jurisdiction rules do not actually prevent the courts of several places from being competent in the same dispute; that these rules coordinate the competent courts within the EU and indicate the competent courts allocating the jurisdiction. *Lis pendens* and the provisions for related cases are functional in terms of preventing the pending or related cases and the issuance of conflicting decisions.

Since at the basis of the special jurisdiction rules lies the allocation of jurisdiction to the connected court, it should be accepted that the court of each place of performance is in fact connected to the contract in cases where there are several places of performance. As the purpose of the jurisdiction rules is not to identify the most closely connected court, a ranking of proximity should not be made for these places of performance. The fact that the places of performance are split among several Member States indicates that the courts of these places are sufficiently connected with the contract because it is clear that the court of the principal place of performance of the characteristic obligation also does not have an adequate connection with the dispute if the non-performance of a monetary obligation or the validity of the contract is the subject of the dispute. Therefore, the determining factor here should not be the connection with the specific dispute. Especially the determination of the most closely

135 This terminology belongs to the conflict of laws methodology. The determination of the most closely connected law is the main purpose of the conflict of laws rules. Conflict of laws rules use connecting factors, which are assumed to indicate the most closely related law. In addition, it is imperative that the conflict of laws rules indicate a particular law as the most closely connected law, since the court cannot apply the law of several states to a particular dispute at the same time. A law must be determined and applied. However, it is not the determination of the most closely connected court that is important when establishing the jurisdiction of the courts. The courts of several states may be closely connected to a contractual relationship. The existence of *lis pendens* and rules regarding related actions in the civil law system demonstrates that it is usual for the courts of several places to be competent.

connected place of performance is an ambitious approach that exceeds the purpose of the jurisdiction rule of the place of performance.

In the event that the courts of several places of performance have jurisdiction, fragmentation should be considered as a complication of the rule. As noted, within the framework of *lis pendens* and the rules on related cases, the defendant is prevented from having to defend himself before the courts of several places. The important point here is that it is a fact that can be foreseen by the defendant that the courts of several places of performance would be competent. There is no doubt that these places are connected by a contractual relation, even if to different degrees. It should be clearly accepted that it is not necessary to determine the most closely connected place of performance (the principal place of performance), as well as that the court of each place of performance is competent. The fact that the dispute is not related to performance or the part of the characteristic obligation that is performed at a specific place of performance also does not prevent the jurisdiction rule from allocating jurisdiction. As can be seen from the foregoing, the purpose is not the determination of the court most closely connected to the specific dispute in each specific case.

Thus, recognizing that the courts of each place of performance are competent in fact leads to the consequence that any court to which the case is filed would consider itself competent depending on whether it finds that the place of performance is within its jurisdiction. Therefore, a court of a Member State would not consider itself incompetent on the grounds that the principal place of performance is located in another Member State. Another important point here is that from the point of view of the defendant, the principal place of performance is unpredictable until a decision regarding jurisdiction is rendered. However, if the courts of each place of performance are considered competent in cases where there are several places of performance, it is clear that this will ensure predictability for the defendant.

VII. Several Places of Performance from the point of Relationship Between Jurisdiction and Recognition and Enforcement

A. Structure of the Brussels Regime and Allocation of Jurisdiction to Several Courts Under Jurisdiction Rules

The system established by the Brussels Convention is a system restricted to the legal systems of Member States, containing provisions on *lis pendens* and related cases, and ultimately aimed at facilitating the recognition and enforcement of court decisions issued in other Member States.[136] It is also necessary to determine whether this feature of the system will have an impact on the interpretation of the jurisdiction rules.

136 See Jenard Report (n 21) 7-8.

It should be taken into consideration that, as the special jurisdiction rules actually allow, in case where the domicile of the defendant is located in a Member State, and the courts of other Member States are competent, the Brussels regime allows the courts of other Member States to be competent; for instance, it provides that, if the same case is initiated both at the domicile of the defendant and the place of performance of the obligation, the second case should be dismissed on the ground of *lis pendens*; in case of related cases, it enables the suspension of the case initiated later.

Accordingly, if the defendant's domicile is within the EU, the court of another Member State may also be competent under the special jurisdiction rules.[137] Thus, in the Brussels regime, as in a system of jurisdiction belonging to a single country, it was made possible to file a case both at the defendant's domicile and at the court of another place that is competent under the special jurisdiction rules. The provisions on *lis pendens* and related cases are drawn up to prevent abuse of this mechanism and the issuance of conflicting decisions. Thus, it should be taken into account that the Brussels regime is built similar to a jurisdiction system of a single country[138] and it should be established that it allows the initiation of cases at the courts of several Member States. It is also possible that there may be several competent courts in accordance with different jurisdiction rules, as well as several competent courts in accordance with the same jurisdiction rule. In fact, the existence of several places of performance of the characteristic obligation is not the sole example. It may be seen that the defendant may have several domiciles by the relevant legal system(s). From the point of view of this possibility, it becomes clear that the jurisdiction rule of the defendant's domicile may also not correspond to a single place in all cases.[139]

B. Indirect Jurisdiction in Recognition and Enforcement

The main purpose of the Brussels Convention, which is the first instrument of regulation of the Brussels regime, was determined as to facilitate the recognition and enforcement of judgments within the Community. In order to achieve this goal, the Convention has introduced provisions to reduce the likelihood of the issuance of conflicting decisions by the courts of Member States.

The requirement that is among the conditions for recognition and enforcement in national legal systems is that the jurisdiction of the court that rendered the decision is not excessive and has a real connection with the dispute. Considering that the Brussels regime is mainly sought to facilitate recognition and enforcement within the

137 However, if the defendant's domicile is not in a Member State, then the jurisdiction rules in the law of the relevant state apply, and not the special jurisdiction rules in the Brussels regime.

138 See Jenard Report (n 21) 13.

139 See fn. 21.

EU borders, the introduced jurisdiction rules are based on the presumption that there is a real and substantive connection between the court and the dispute or the parties. In other words, a decision made by a court that considers itself competent in accordance with the jurisdiction rules set forth in the Brussels regulations is considered to have been made by the court of another Member State that is appropriate in terms of jurisdiction; the jurisdiction of the court that rendered the decision, as a rule, is not examined. Therefore, the main point is to recognize that first of all the jurisdiction rules in the Brussels regime are based on the assumption that there is a real connection between the court and the dispute. Accordingly, the place of performance rule constitutes the presumption of a substantive and real connection between the dispute and the court. For instance, when the decision of the Hamburg court, as the court of the place of performance, is to be enforced in Milan, it is not examined whether the jurisdiction of the Hamburg court is based on a real connection. The reason for not carrying out this examination is that the Hamburg court has deemed itself competent in accordance with the jurisdiction rules contained in the Brussels regulations that facilitate recognition and enforcement. If the courts of several places of performance are competent, it should be taken into consideration that, by virtue of both *lis pendens* and the measures regarding connected cases, the issuance of conflicting decisions can be prevented. Therefore, from the point of view of recognition and enforcement, the degree to which the activity of performance, which is the basis of the jurisdiction of the court that renders the decision, should not be investigated at the recognition and enforcement stage, which is already the reason for the existence of the jurisdiction rules in the Brussels regime.

In other words, the real and substantial connection is already the basis of the rules, it is not possible and logical to examine it in each individual case. If it is to be examined whether the court is really the court of the place of performance in each case, the question arises as to why hard and fast jurisdiction rules exist. Therefore, the method of testing the proximity, such as determining the principal place of performance in each dispute, should be abandoned. In fact, if the performance of a single obligation is physically split among different Member States, it should be recognized that each place of performance has the potential to establish jurisdiction in a predictable way from the point of view of the defendant, instead of using the proximity test to choose one of these places.

The logic of not examining indirect jurisdiction in recognition and enforcement also requires this. If the court hearing the case considered itself competent, by examining whether the place of performance is the principal place of performance in the case at hand, the recognition and enforcement court also has to examine indirect jurisdiction, which is exactly what the Brussels regime is trying to avoid. That is, the recognition and enforcement court does not examine indirect jurisdiction on the

assumption that the jurisdiction of the court rendering the decision is based on a real and substantive connection. Thus, if, in cases where there are several places of performance, a sub-variation of the rule of the place of performance as "the principal place of performance" is developed and determined in accordance with economic criteria in each dispute, then, the non-examination of indirect jurisdiction by the recognition and enforcement court would be devoid of legitimacy.

In other words, when the place of delivery or the place where the services are provided is multiple, it should be seen as a fact that the place of performance may point to multiple places in terms of a particular obligation. Even though the Brussels I Regulation, has reduced the obligation to the characteristic performance in order to eliminate the problems created by Art. 5(1) of the Brussels Convention and thus partially eliminated the problem of fragmentation based on several obligations, the possibility of multiple places of performance of the same obligation has either not been evaluated as a problem or has not been anticipated. This issue, which is discussed by the decisions of the CJEU, should not make the rule of the place of performance unenforceable. As a solution, it should be preferred to accept as a principle that the courts of multiple places of performance are competent, rather than developing sub-rules regarding the place of performance.

Conclusion

The search for a solution for cases where the place of performance is located in multiple Member States is based on the requirement that the jurisdiction rules, with an understanding from the past, point to the court of the most closely connected place. In this context, it has been accepted that the main purpose of the special jurisdiction rules is legal certainty and predictability; and that their specific purpose is to allocate jurisdiction to the most closely connected court. Thus, the search for a closely connected court was decisive in the teleological interpretation of the special jurisdiction rules.

The approach of determining the principal place of performance in cases where multiple places of performance are split among Member States is the result of the search for the most closely connected court. The uncertainty of the economic criteria, taken as the basis for the principal place of performance, and therefore the difficulty of determining the principal place of performance, has already been inarguably demonstrated. However, the view that the general jurisdiction rule should be returned to in the face of the difficulty of determining the principal place of performance (and the fact that the principal place of performance, as suggested in the doctrine, does not point to a closely connected court in all events) ignores the important function of the special jurisdiction rules in the Brussels regime. On the other hand, the determination

of the closely connected court under the name of the principal place of performance in each specific case, turns into a search for the *forum conveniens*. It is obvious that this approach is incompatible with the basic structure of the civil law system. In addition to undermining predictability, the principal place of performance approach contradicts the basic structure of the system.

In this study, it is emphasized that

- the rule of performance of the characteristic obligation set forth in Art. 7(1)(b) should be interpreted in light of the paradigm of the civil law system for the purpose of predictability.
- Thus, it should be considered normal for multiple places of performance to grant jurisdiction to courts in multiple Member States.
- Since the return to the general jurisdiction rule leads to the result that only one local court within the EU is competent, this would not be in accordance with the multilateral and broad geographical structure of EU integration.
- Allocation of jurisdiction to multiple courts is usual in the Brussels regime; *lis pendens* and the provisions on related cases complement this mechanism.

Therefore, it should be accepted that the courts of multiple places of performance are competent, and the approach of choosing one of these places based on some unclear criteria should be abandoned. Ensuring predictability from the point of view of the defendant would be possible in this way.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.

Bibliography

Briggs, A, *Civil Jurisdiction and Judgments*, 6th ed. (Informa law from Routledge 2015).

Dickinson A and Lein, E, *The Brussels I Regulation Recast* (Oxford University Press 2015).

Droz, G A L, 'Delendum est forum contractus' (1997) Recueil Dalloz, Chronique 351-356.

Ehrenzweig, A A, 'The Transient Rule of Personal Jurisdiction: The "Power" Myth and *Forum Conveniens'* (1956) 65 Yale L. J. 289-314.

Franzina, P and Michaels, R, 'Jurisdiction, Foundations' (2017) Encyclopedia of Private International Law 1042-1051.

Graziano, T K, 'Jurisdiction under article 7 no. 1 of the recast Brussels I regulation: disconnecting the procedural place of performance from its counterpart in substantive law. An analysis of the case law of the ECJ and proposals de lege lata and de lege ferenda' (2015) 16 Yearbook of Private International Law 169-217.

Grossi, S, *The U.S. Supreme Court and the Modern Common Law Approach* (Cambridge University Press 2015).

Hartley, T C, 'Basic Principles of Jurisdiction in Private International Law: The European Union, The United States and England' (2021) ICLQ 1-16.

Heuzé, V, 'De quelques infirmités congénitales du droit uniforme: l'exemple de l'article 5-1 de la Convention de Bruxelles du 27 septembre 1968' (2000) Revue critique de droit international privé 595-639.

Hill, J, 'Jurisdiction in Matters Relating to a Contract under Brussels Convention' (1995) 44 ICLQ 591-619.

Juenger, F, 'Judicial Jurisdiction in the United States and in the European Communities: A Comparison' (1984) 82 Mich. L. Rev. 1195-1212.

Magnus, U and Mankowski, P, *Brussels I Bis Regulation: Commentary* (Otto Schmidt 2016).

Mankowski, P, *Special Jurisdictions, Article 5, Brussels I Regulation,* (European Law Publishers 2007) 78-235.

Michaels, R, 'Two Paradigms of Jurisprudence' (2006) 27 Mich. J. Int'l L. 1004-1069.

Newton, J, *The Uniform Interpretation of the Brussels and Lugano Conventions* (Hart Publishing 2002).

Okoli, C S A, *Place of Performance: A Comparative Analysis* (Hart Publishing 2020).

Pålsson, L, 'The Unruly Horse of the Brussels and Lugano Conventions: The Forum Solutionis' Festkrif für Ole Lando (Copenhagen 1997) 259-282.

Schlosser, P F, 'Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems' (1996) 45 U. Kan. L. Rev. 9-48.

Poon, A, 'Determining the Place of Performance under Article 7(1) of the Brussels I Recast' (2021) 70 ICLQ 635-663.

Tetley, W, 'Mixed Jurisdictions: common law vs civil law (codified and uncodified)' (Part II) (1999-4) Rev. dr. unif. 678-738.

Van Lith, H, *International Jurisdiction and Commercial Litigation* (T.M.C. Asser Press 2009).

Von Dryander, C, *'Jurisdiction in Civil and Commercial Matters under the German Code of Civil Procedure'* (1982) 16 No 4 Int'l Lawyer 671-692.

Von Mehren, A T, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983-1984) 6 Tel Aviv U. Stud. L. 50-121.

Annales de la Faculté de Droit d'Istanbul, 71: 391–411

DOI: 10.26650/annales.2022.71.0014
http://annales.istanbul.edu.tr/

Submitted: 22.02.2022
Accepted: 23.03.2022

Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Künstliche Intelligenz und der Rechtsbegriff der Person Überlegungen zum Fall Argentinien

Artificial Intelligence and Reconsiderations on the Legal Concept of Person on the case of Argentina

Helga Maria Lell*

Zusammenfassung
In diesem Schriftstück werden die Möglichkeit und die Zweckmäßigkeit erörtert, den Begriff der elektronischen Person als Subtyp des Rechtsbegriffs der Person aufzunehmen. Hierzu wird die Empfehlung des Europäischen Parlaments vorgelegt und anschließend auf der Grundlage von zwei Achsen (beschreibende und normative Komponente) die elektronische Person mit menschlichen, legalen Personen und nichtmenschlichen Tieren vergleichen. Ebenso wird versucht, die möglichen Auswirkungen der Schaffung der elektronischen Person auf denselben Rechtsbegriff der Person zu beschreiben. Schließlich wird eine mögliche praktische Grundlage für diese Schöpfung angegeben, die auf einer sozialen Reaktion beruht.

Schlüsselwörter
Elektronische Person, Künstliche Intelligenz, Juristische Person, Argentinisches Rechtssystem

Abstract
This paper discusses the possibility and convenience of incorporating the notion of an electronic person as a subtype of the legal concept of a person. For this, the recommendation of the European Parliament is presented and then, based on two axes (descriptive component and normative component), the electronic person is compared with legal, human, and non-human animal persons. Likewise, an attempt is made to describe the possible impact of the creation of the electronic person on the same legal concept of person. Finally, a possible practical basis for said creation is indicated, based on a social reaction.

Keywords
Electronic Person, Artificial ıntelligence, Legal Person, Argentinean legal system

* **Corresponding Author:** Helga Maria Lell (Dr.), National University of La Pampa, Economic and Legal Sciences Faculty, Legal Sciences Research Center, Santa Rosa, Argentina. E-mail: helgalell@conicet.gov.ar ORCID: 0000-0001-7703-6341

To cite this article: Lell HM, "Artificial Intelligence and the Legal Concept of Person Considerations on the case of Argentina", (2022) 71 Annales de la Faculté de Droit d'Istanbul 391. https://doi.org/10.26650/annales.2022.71.0014

Extended Summary

This paper analyzes the link between the legal concept of "person" and the status of artificial intelligence in legal systems from a conceptual perspective. In this framework, some triggering questions include: Is there any space in which an artifact or human construction can be considered analogous to a human being? Is a conceptual category possible that can at some point allow for the linking of human actions and those generated by an artificial intelligence? Is there a common denominator that enables the meeting of robots and men / women? If there is, what (if anything) does the recognition of artificial intelligence say about the common denominator? What kind of social reaction gives rise to it and grounds it?

The starting point of this research is that, in the field of law, the concept of person has the potential to establish itself within a common scenario in which human beings and other kinds of entities act, as long as its meaning is established in such a way that enables a common interaction. To explain this, it is worth thinking that, in the legal field, "person" is often used in a merely technical sense: an entity capable of acquiring rights and obligations; but also, in many other definitions, this concept is used in a common way and linked to a moral prescription: the human being who deserves special legal treatment for having such a nature. In this framework, here it is described how, depending on the meaning adopted regarding the legal concept of person, artificial intelligence may or may not be conceived as a subtype of it. Likewise, some characteristics and consequences that the incorporation of the "electronic person" has on the legal concept of person are explained.

To do so, a comparison is made of the regulation proposed by the European Parliament with three types of persons recognized in the Argentine legal system: human persons, non-human animal persons, and legal persons.

The main debate, from a philosophical point of view, lies between the positivist and non-positivist (in a broad sense) positions. It is explained that depending on the perspective regarding what it is to be a person in law, problems may arise in admitting the incorporation of electronic persons under the common denominator. A positivist position will have no inconvenient: as long as the legal system attributes rights or obligations, there will be a person. Thus, we can have people with all the rights and obligations (such as human persons), people with some rights and obligations (such as legal persons), people with some rights (such as non-human animal people), and people with some obligations (electronic people). There are not too many characteristics in common between all of these parties. Perhaps the most conspicuous commonality between these groups is being the recipients of rights and/or obligations. We can also mention some kind of ability to interact with the environment.

Non-positivist positions are more varied. Some positions might recognize the usefulness of incorporating electronic persons. However, they could object to this admission due to the effect it has on the legal concept of person in general.

As a conclusion, it is stated that the notion of electronic person can cause theoretical damage to the semantics of the legal concept of person. On the one hand, this is because the concept may lose part of its prescriptive force at the same time that it reduces the definition to the current casuistry which is conditioned to the emergent. On the other hand, it has a practical advantage, which is to provide a tool to attribute liability for damages to an entity that is interacting with companies. The question is thus, as in the case of human persons, legal entities and non-human animal persons: is the concept of person the most useful and most convenient to achieve the desired effect with respect to artificial intelligence?

Künstliche Intelligenz und der Rechtsbegriff der Person Überlegungen zum Fall Argentinien

I. Einführung

Der Roboter Sophia mit humanoiden Gesichtszügen überrascht ihre Gesprächspartner immer wieder. Sophia hat ein Gesicht, das gestikuliert, bewegt seine Hände, scherzt und sogar versucht zu singen. Sie kann stimmige Gespräche führen, Fragen beantworten, Reaktionen interpretieren, mit einer großen Menge an Informationen umgehen und wurde zur saudischen Staatsbürgerin erklärt. Ist Sophia eine Person? Wenn sie als solches betrachtet würde, wäre es wegen seiner physischen Ähnlichkeit mit Menschen, wegen ihrer Fähigkeit zur Interaktion, wegen ihrer Fähigkeit, Umweltdaten zu verarbeiten, wegen ihrer Reaktionen, wegen ihrer Lernfähigkeit? Könnte Sophia bei Wahlen auf Augenhöhe mit ihren Mitbürgern ihre Stimme abgeben? Sollte Sophia Steuern zahlen? Könnte sie heiraten? Könnte sie eine andere Person wegen erlittenen Schadens verklagen? Mit anderen Worten: Können ein Roboter und ein Mensch für das Gesetz gleichwertig sein? Gibt es eine Möglichkeit, zwei so unterschiedliche wie gegensätzliche Elemente zusammenzubringen, nämlich das Natürliche und das Künstliche?

Der Fall von Sophia dient dazu, über die mögliche Überschneidung zwischen künstlichem und menschlichem Wesen nachzudenken. Beides Wesen, die sich nicht im selben materiellen Körper, sondern jetzt auf einer analytischen Ebene befindet. Gibt es eine Möglichkeit, in der ein Artefakt als analog zu einem Menschen betrachtet werden kann? Ist es möglich, eine konzeptionelle Kategorie zu erstellen, die es ermöglicht, irgendwann menschliche Handlungen mit solchen zu verknüpfen, die durch künstliche Intelligenz erzeugt werden? Gibt es einen gemeinsamen Nenner, der das Treffen von Robotern und Menschen ermöglicht? Wenn ja, was sagt die Anerkennung künstlicher Intelligenz über den jeweiligen gemeinsamen Nenner aus? Welche Art von sozialer Reaktion entsteht und unterstützt sie?

Der Rechtsbegriff der Person hat das Potenzial, sich in dem gemeinsamen Szenario zu etablieren, in dem Menschen und andere Wesenheiten handeln. Dieser Lage kann beispielsweise aus der Zuordnung von Rechtsfolgen zu einer Handlung resultieren, aber auch aus der Anerkennung von Rechten oder Pflichten, die auf bestimmten natürlichen Merkmalen beruhen. Im Rechtsbereich wird „Person" häufig nur im technischen Sinne verwendet: eine Wesenheit (egal welche), die in der Lage ist, Rechte zu erwerben und Verbindlichkeiten einzugehen. Aber auch in vielen anderen Fällen wird es im gewöhnlichen Sinne verwendet und ist mit einer moralischen Vorschrift verbunden: dem Menschen, der eine besondere rechtliche Behandlung verdient, und der Inhaber von Rechten ist, nur weil er Menschen ist. In diesem Rahmen wird hier beschrieben, wie künstliche Intelligenz je nach dem in Bezug auf den Rechtsbegriff

der Person angenommenen Sinn als Subtyp davon verstanden werden kann. Ebenso werden einige Merkmale und Konsequenzen angeführt, die die Einbeziehung der „elektronischen Person" auf den Rechtsbegriff der Person hätte.

II. „Person" als gemeinsamer Nenner

Foucault, im Buch *Die Ordnung der Dinge,* denkt über das Erstaunen nach, dass die Vorführung, als ob sie miteinander verbunden wären, von Elementen erzeugen kann, die unser Denken unmöglich zu denken finde[1]. Das Exotische an der chinesischen Enzyklopädie dieses literarischen Stücks sind nicht die Wesen, aus denen die Kategorien bestehen, sondern die Nähe, die zwischen Dingen entsteht, die für die kulturelle Konditionierung, aus der wir uns ihnen nähern, seltsam erscheinen. Wenn wir jedoch nachdenken, bemerken wir, dass, was begrifflich ist, die Ebene der Nebeneinanderstellung darstellt, auf der sich die verschiedensten Elemente befinden. Wir bemerken auch, dass diese Begegnung nicht zufällig ist, sondern auf der Grundlage mindestens eines gemeinsamen Merkmals organisiert ist, das sich als relevant genug ergab, um ein bindender Faktor zu werden.

Um nun zu klären, ob der Rechtsbegriff der Person diese beiden so unterschiedlichen Elemente, wie künstliche Intelligenz und Menschen, zusammenbringen kann, muss einen Ähnlichkeit-Punkt zwischen ihnen beiden gefunden werden.

Die Idee, dass der Rechtsbegriff der Person bezieht sich auf ein normatives Zuschreibungszentrum, kann auf zweierlei Weise interpretiert werden. Die erste ist streng positivistisch, mit einer formalistischen Tendenz, und besagt, dass jede Wesenheit, der Rechte oder Pflichten zugeschrieben werden, eine Person ist. Daher hängt der Inhalt des Rechtsbegriffs, von diesen Rechten und Pflichten ab. Ein berühmtes Beispiel für diese Position ist Kelsen, der in seinem Buch *Reine Rechtslehre* im Umgang mit dem Dualismus zwischen einer menschlichen und einer juristischen Person bekundete, dass beide Extreme in Wirklichkeit dasselbe Element sind. Biologische Faktoren sind irrelevant und jede Person im Rechtsbereich ist eine juristische Person. Aus diesem Grund ist es überflüssig, von einer „juristischen Person" zu sprechen[2]. Die zweite Form hat eine nicht positivistische Perspektive (im weiteren Sinne). Sie bestätigt, dass bestimmte Wesenheiten aufgrund ihrer mit der menschlichen Natur verbundenen Eigenschaften unvermeidlich Personen sind und dass dies notwendigerweise mit sich bringt, dass das positive Recht bestimmte Inhalte in Rücksicht nimmt[3]. Diese hermeneutische Dualität hat Auswirkungen darauf, wie künstliche Intelligenz in das Konzept der Person im Rechtsbereich einbezogen werden kann oder nicht.

1 Vgl. Michel Foucault, *Die Ordnung der Dinge: eine Archäologie der Humanwissenschaften* (Suhrkamp 2003) 3.

2 Vgl. Hans Kelsen, *Reine Rechtslehre* (Mohr Siebeck 1934) 313.

3 Beispiele für diese Stellung finden sich in Javier Hervada, 'Problemas que una nota esencial de los derechos humanos plantea a la filosofía del derecho' (1982) 9 *Persona y Derecho*, 243; Ilva Hoyos, *El concepto jurídico de persona* (Ediciones Universidad de Navarra 1989) und Daniel Herrera, *La persona y el fundamento de los derechos humanos* (EdUCA 2012).

Der positivistische Perspektive hätte nichts dagegen, KI als Person einzubeziehen. Der nicht Positivistische könnte Einwände dagegen erheben, obwohl dies von bestimmten Faktoren abhängen würde, wie zum Beispiel der Nähe zum fokalen Analog, dem Zweck des Gesetzes, der Natur der Person, unter anderem. Um diese Idee zu entwickeln, müssen zunächst andere Fragen angeschnitten werden.

III. Die mögliche Kategorie der „elektronischen Person"

Rechtswissenschaft, Jurisprudenz und Gesetzgebung mussten sich aufgrund der Entstehung neuer Phänomene weiterentwickeln. Die neuen Technologien, die immer schneller erneuert werden, haben die Kombination der bereits geltenden Vorschriften mit den Herausforderungen aus dem, was nicht vorgesehen ist, für die Entwicklung kohärenter Vorschriften erforderlich gemacht. Erhardt und Mona zeigen jedoch an, dass dieser Prozess noch nicht abgeschlossen ist und daher keine zufriedenstellende rechtliche Behandlung gefunden wurde[4]. Wie die Vorteile stärken und die Menschenrechte vor der „dunklen Seite" der künstlichen Intelligenz schützen, sind zwei eigene Herausforderungen der vierten industriellen Revolution[5]. Zu den weiterhin problematischen Fragen gehört die Frage, wie das Rechtssystem mit künstlicher Intelligenz und den fortschrittlichsten Robotern umgehen soll.

Zurzeit dreht sich die Hauptfrage darum, wie die Probleme der Zuschreibung von strafrechtlicher und zivilrechtlicher Verantwortung vor der Begehung unerlaubter Handlungen durch nichtmenschliche Wesenheiten und aufgrund von Prozessen, die die Planung der Hersteller überschreiten, gelöst werden können. Auch die Fragen sind über die ethischen Aspekte der Einverleibung in verschiedene wirtschaftliche, Bildungs-, Arbeits- und soziale Bereiche. In diesem Rahmen stellte das Europäische Parlament in seinem Entschluss vom 16. Februar 2017, bekannt als „Zivilrechtliche Regelungen im Bereich Robotik"[6], eine Reihe von Parametern auf. Hier ist die Empfehlung hervorzuheben, eine spezifische Rechtspersönlichkeit für autonome Roboter langfristig zu schaffen, damit diese als „elektronische Personen" betrachtet werden können. Dies würde die Haftung für Schäden erleichtern und die Feststellung eines Status in Fällen, in denen Roboter intelligente autonome Entscheidungen treffen oder unabhängig mit Dritten interagieren (Erwägungsgrund 59.f). Neben diesem Postulat sind weitere beinhaltet, die die Schaffung von speziellen Geldern und Versicherungen sowie die Aufstellung eines spezifischen Registers zur Identifizierung von Robotern empfehlen.

4 Vgl. Jonathan Erhardt & Martino Mona 'Rechtsperson Roboter – Philosophische Grundlagen für den rechtlichen Umgang mit künstlicher Intelligenz' in Sabine Gless & Kurt Seelmann (Hrsg.) *Intelligente Agenten und das Recht* (Nomos Verlagsgesellschaft 2016) 61, 63.

5 Vgl. Juan Corvalán, 'La primera inteligencia artificial predictiva al servicio de la Justicia: Prometea' (2017) XXXI 186 *La Ley,* 1.

6 Entschließung des Europäischen Parlaments vom 16. Februar 2017 mit Empfehlungen an die Kommission zu zivilrechtlichen Regelungen im Bereich Robotik (2015/2103(INL))

Andererseits wird darauf hingewiesen, dass eine Begriffsbestimmung dieser elektronischen Person, die verschiedene Phänomene der künstlichen Intelligenz umfassend betrachtet, berücksichtigt werden muss[7]:

a) die Fähigkeit, Autonomie durch Sensoren oder durch den Austausch von Daten mit ihrer Umgebung und den Austausch und die Analyse dieser Daten zu erhalten;

b) Fähigkeit für Selbsterlernen anhand der Erfahrung und Interaktion;

c) eine minimale Hardware;

d) Fähigkeit, ihr Verhalten und Handeln an die Umgebung anzupassen;

e) Nichtvorhandensein des Lebens im biologischen Sinne.

Das Obige ermöglicht es dann zu bestimmen, was ein elektronischer Agent ist, d. h. die Wesenheit, die potenziell eine elektronische Person werden kann. Abgesehen von der Empfehlung des Europäischen Parlaments gibt es in der wissenschaftlichen und akademischen Literatur jedoch keine allgemeine und einstimmig akzeptierte Begriffsbestimmung. Deshalb variiert die Interpretation in der Regel je nach den Aspekten, auf denen die verschiedenen wissenschaftlichen Bereiche, die das Thema anschneiden (zwangsläufig interdisziplinär) den Nachdruck legen[8]. Um dieses Problem komplexer zu machen, wird das Adjektiv „elektronisch", um zu klären, um welche Art von Person es sich handelt, wird häufig wegen seiner Abstraktion und damit seines Verlustes an Spezifität kritisiert[9].

Nach dem oben genannten Beschluss, die elektronische Person könnte zu einer Wesenheit werden, der Verpflichtungen zugeordnet werden können, obwohl es scheint, dass keine Notwendigkeit bestehen würde, Rechte zu regeln. Dieses Detail ist nicht von untergeordneter Bedeutung, da es sich vergleichsweise um eine neue Art von Person handeln würde: eine ohne Rechte, aber mit Pflichten.

IV. Der gemeinsame Nenner „Person" um die präskriptive Komponente

Der Rechtsbegriff der Person besteht aus zwei Komponenten: 1) einer beschreibenden, d. h. einer, die die Frage beantwortet, was erforderlich ist, um als Person im Gesetz betrachtet zu werden, und 2) einer vorschreibenden, die darauf hinweist, welcher Schutz und welche Lasten den Wesenheiten anzuerkennen, die mit diesem Status gekennzeichnet sind[10]. In diesem Abschnitt beziehen wir uns auf diese letzte Komponente und im nächsten auf die erste von beiden.

7 *Ibid*, siehe Punkt 1 und Anhang.

8 Vgl. Wettig und Zehender (n.4) 113-115

9 Vgl. Luis Alberto Valente, 'La persona electrónica' (2018) 49 *Anales De La Facultad de Ciencias Jurídicas y Sociales de La Universidad Nacional De La Plata*, 8, 12 und María José Santos González, 'Regulación legal de la robótica y la inteligencia artificial: retos de futuro' (2017) 4 *Revista jurídica de la Universidad de León* 25, 26-28.

10 Vgl. Héctor Morales Zúñiga, 'Estatus moral y el concepto de persona' *Problemas actuales de la filosofía jurídica* (Librotecnia 2015) 123.

Zurzeit werden mindestens drei Arten von Personen gemäß der rechtlichen Kasuistik angenommen. In Argentinien wurden beispielsweise drei Rechtssubjekte anerkannt: menschliche Personen, juristische Personen und nichtmenschliche tierische Personen[11]. Die Erste betrifft menschliche, physische oder natürliche Personen, die normalerweise als Personen mit Würde und Unverletzlichkeit kennzeichnet werden. Ebenso weist die amerikanische Menschenrechtskonvention darauf hin, dass in ihrem Rahmen zu verstehen ist, dass jede Person ein Mensch ist und daher Inhaber von Grundrechten ist (Paragraf 1.2)[12]. Die menschlichen Personen sind Kerne der Zuschreibung von Rechten und Pflichten, ohne dass diesbezüglich weitere Diskussionen geführt werden.

In der Rechtsordnung hatten menschliche Personen immer einen privilegierten Platz, da sie die Hauptempfänger von Schutz waren und noch dazu das Modell für Maßnahmen waren, die indirekt motiviert werden könnten[13]. Die Entstehung künstlicher Intelligenz in der Rechtsszene hat jedoch das Potenzial, die Rechtsgrundlagen und damit die Betrachtung bezüglich der Wesenheiten zu ändern[14].

Kann eine Gleichstellung zwischen Menschen und künstlicher Intelligenz versucht werden? Es ist nicht klar, ob der KI der Charakter eines analogen moralischen Subjekts zugewiesen werden kann, das ausschließlich der menschlichen Person entspricht. Dieser Charakter treibt die Idee der Verantwortung und der persönlichen Wesenheit an als ein von den Vorschriften gefordertes Potenzial[15]. Choprah und White weisen jedoch darauf hin, dass künstliche Intelligenz zwischen Gut und Böse unterscheiden könnte bei der Erkennung, wenn sie mit bestimmten Befehlen programmiert wurde, um autonom entscheiden zu können, in die entgegengesetzte Richtung zu gehen. Infolgedessen postulieren sie die Möglichkeit, KI als moralischen Agenten zu verstehen[16].

Die zweite Art von Person gehört zu den juristischen, moralischen oder idealen Personen, die künstliche Gestaltungen sind, um Handlungen auszuführen und auch Verpflichtungen aus der Bildung einer komplexen Zuschreibung Punkt einzugehen. Dieser Kern ist nicht nur die juristische Person selbst, sondern auch der Hintergrund der Beziehungen zwischen den Personen, aus denen er besteht. Mit anderen Worten,

11 Es sollte klargestellt werden, dass unter Berücksichtigung der Erfahrungen anderer Länder mindestens ein vierter Typ angeschlossen werden könnte, der sich auf das ökozentrische Paradigma und die Anerkennung der Rechtspersönlichkeit gegenüber der Natur bezieht. In diesem Sinne wurden in Kolumbien die Flüsse Atrato und Cauca zu Menschen erklärt, und in Bolivien und Ecuador kann die Natur anhand des Gesetzes bzw. der Verfassung Rechte haben.

12 Amerikanische Menschenrechtskonvention. OEA (1969).

13 Vgl. Erhardt & Mona (n.4) 63

14 Vgl. Thomas Burri, ' Künstliche Intelligenz und internationales Recht ' (2018) 42 *Datenschutz Datensich* 603, 607

15 Vgl. Carlos Muñiz, '"Para nosotros, para nuestra posteridad, y para todos los robots que quieran habitar el suelo argentino". ¿Puede la inteligencia artificial ser sujeto de derecho?' (2018) 22 *RCCyC* 1, 3.

16 Vgl. Samir Choprah & Laurence White, 'Artificial Agents - Personhood in Law and Philosophy'. *Proceedings of the 16th Eureopean Conference on Artificial Intelligence* (ECAI 2004) 635, 640.

es gibt keine juristischen Personen, ohne menschliche Personen, und alles, was auf sie entfällt, schließt indirekt auch die Menschen ein, aus denen sie besteht. Dies sollte allgemein verstanden werden, da beispielsweise eine Gesellschaft für seine Schulden mit seinem Vermögen haftet und je nach sozialer Art bis zu dessen Grenze, ohne ihrer Aktionäre darin einzubeziehen. Es gibt jedoch keine juristische Person, die Verpflichtungen aus eigenem Willen eingeht. Dies geschieht jedoch auf Betreiben seiner Führungsgremien, die diesen Willen bilden.

Juristische Personen haben ähnliche Eigenschaften wie menschliche Personen, wie zum Beispiel einen Wohnsitz, einen Namen und ein Vermögen. In diesem Sinne können sie Inhaber von Rechten und Pflichten sein, nur dass sie auf den in der Verfassung der jeweiligen Person angegebenen Gegenstand beschränkt sind. Das heißt, obwohl sie ein Kern für die Zuschreibung von Rechten und Pflichten sind, sind sie es in einer eingeschränkten Weise. Es ist möglich, eine juristische Person zu schaffen, die in eigenem Namen handelt, wenn verschiedene menschliche Anstrengungen und Kapital vereinigt werden müssen, um eine Handlung durchzuführen. Aber alle Entscheidungen werden von den realen Einzelwesen getroffen und umgesetzt, aus denen sie besteht. Mit anderen Worten, die juristische Person existiert und ist real, die Rechte und Pflichten entfallen auf sie, aber sie ist nicht unabhängig von den dahinterstehenden Subjekten. Sie hat kein autonomes Denken. Sie trifft keine eigenen Entscheidungen. Sie lernt nicht oder interagiert nicht unabhängig. Sie hat keine eigene Fähigkeit, Handlungen auszuführen. Deshalb ist ihr Charakter der Künstlichkeit ziemlich eindeutig, da sie ein Werkzeug ist, das das kollektive Handeln ermöglicht.

Wie Muñiz bemerkt, existieren juristische Personen für die Erfüllung ihres Ziels und dadurch unterscheiden sie sich von menschlichen Personen, die eine anthropologische Realität sind.[17]. Mit der juristischen Person kann eine Parallele gezogen werden, indem die Anerkennung des Charakters des Rechtssubjekts auf KI auf die Zwecke beschränkt ist, für die sie geschaffen wurde. In Bezug auf die Zuschreibung von Verantwortung bekundet dieser Autor, dass der Vergleich interessant wird, wenn die Perspektive der Realitätstheorie betrachtet werden. Künstliche Intelligenz könnte daher als eine reale Person betrachtet werden, die einige der Merkmale menschlicher Personen im Rechtssystem teilt. Das Problem ist, dass es im Fall von KI im Gegensatz zu diesen Theorien bei juristischen Personen kein Gremium gibt, das sich aus physischen Personen zusammensetzt, die Entscheidungen trifft und die von den Handlungen profitieren. Wir würden also diesen großen Unterschied zwischen juristischen und elektronischen Personen feststellen: Die ersteren können ohne menschliches Handeln nicht in der Welt agieren; die zweiten, obwohl in erster Linie von Menschen geschaffen, könnte schließlich Entscheidungen aus ihren

17 Vgl. Muñiz (n.15) 3

eigenen Prozessen treffen, ohne dass diese ihren Herstellern oder Programmierern zuzuschreiben wären.

Der dritte Typ ist der von nichtmenschlichen Tierperson und wird häufig theoretisch diskutiert. Im argentinischen Rechtssystem wurde diese Klasse in drei berühmten Fällen durch die Rechtsprechung anerkannt: der Orang-Utan Sandra, der Schimpanse Cecilia und der Hund Poli[18]. Das Hauptargument, um diesen Status anzuerkennen, dreht sich um die Empfindungen des Leidens und andere kognitive Fähigkeiten, die denen des Menschen ähnlich sind, die diese Wesenheiten aufgrund der Entwicklung ihres Nervensystems haben. Dies bedeutet, dass zur Vermeidung von Missbrauchssituationen durch Menschen Rechte gewährt werden. Es scheint jedoch unmöglich, Verpflichtungen für diese Wesenheiten festzulegen, wie zum Beispiel Steuern zu zahlen oder gemäß den Verkehrsregeln zu fahren. Dies macht sie nur zu Rechteinhabern.

In Bezug auf das, was zuvor erwähnt wurde, erklärt Muñiz[19], dass ein Problem hinsichtlich der Tiere normalerweise die rechtliche Unfähigkeit zur Ausübung und das Fehlen von Regeln bezüglich ihrer Vertretung ist. Da gibt es einen Unterschied in Bezug auf künstliche Intelligenz, da sie kein menschliches Eingreifen erfordert, um legal zu handeln.

Bisher konnten wir uns drei Arten von Menschen und drei Arten von Zuschreibungen von Rechten und Pflichten vorstellen: 1) eine vollständige Zuschreibung für menschliche Personen; 2) eine eingeschränkte für juristische Personen und 3) eine parteiische, die nur auf der Anerkennung von Rechten für nichtmenschliche tierische Personen beruht. Dies lässt uns erkennen, dass es als Person erkannt zu werden, ist es nur notwendig, ein Zuschreibung-Zentrum zumindest einiger Rechte zu sein, d. h. Gegenstand eines Rechtsschutzes zu sein.

Für den Fall, dass eine elektronische Person erstellt wird, würden wir eine Person mit einer horizontal asymmetrischen Rechtsposition in Bezug auf nichtmenschliche Tiere finden: nur einen Inhaber von Verpflichtungen. Dies wirkt sich auf das Rechtskonzept der Person aus, da es die Denkweise über das Verhältnis zwischen Rechten und Pflichten verändert. Traditionell wird argumentiert, dass Verpflichtungen das Gegenteil der subjektiven Rechte eines anderen Individuums sind. Bei elektronischen Personen können sie aus der Verletzung eines fremden Rechts immer und nur als Pflichtpersonen Rechtsbeziehungen eingehen. Künstliche Intelligenz scheint nicht in der Lage zu sein, Rechte zu besitzen, sondern nur

18 Siehe „Orangutana Sandra s/ recurso de casación s/ hábeas corpus " [2014] Bundeskammer für Strafkassation (Saal II), Argentinien; „F. c/ Sieli Ricci, Mauricio Rafael p/ maltrato y crueldad animal". [2015] Erstes Strafgericht von San Martín, Mendoza. Argentinien; „Presentación efectuada por AFADA respecto del chimpancé "Cecilia". Sujeto no humano" [2016]. Justizwesen von Mendoza (Drittes Garantien Gericht. Argentinien.

19 Cf. Muñiz (n.15) 2

Pflichten. Wenn das Vorstehende wahr wäre, würde die Person im Recht durch die Möglichkeit definiert werden, Gegenstand eines Rechtsschutzes und / oder einer Verpflichtung zu sein.

Um das Problem komplexer zu gestalten, würde der Status einer Person im Rechtsbereich nicht nur bedeuten, dass sie Rechten und Pflichten unterliegt, sondern laut Stone könnte es auch übertragt werden, als die Fähigkeit zu klagen und verklagt zu werden[20]. Der Satz von Rechten und Pflichten und damit der Gegenstand der Klage ist von der Art der Wesenheit abhängig[21].

Solum analysiert die Möglichkeit, dass künstliche Intelligenz Verfassungs-Rechte wie die Meinungsfreiheit besitze, und geht sogar so weit, über die Möglichkeit nachzudenken, dass dieselben Wesenheiten, wenn sie für diesen Zweck programmiert sind, Petitionen einreichen und zur Verteidigung ihres Falls begründen könnten. Darüber behauptet er, dass die Analyse verschiedener Argumente darüber, was die Person ist, nicht schlüssig sein könnte, um überzeugende Unterscheidungen zwischen Menschen und künstlicher Intelligenz zu erzeugen. Er merkt dazu, dass Artefakte immer menschliche Handlungen simulieren könnten und dass nicht alle menschlichen Handlungen mit einem Bewusstseinsgrad ausgeführt werden, der sich stark von dem der Datenverarbeitung unterscheidet[22].

In diesem Sinne argumentiert Laukyte, dass künstliche Agenten zumindest das Recht auf Eigentum und die Fähigkeit haben könnten, zu klagen und vor allem verklagt zu werden, da sie für ihre Handlungen verantwortlich sein könnten. In diesem Sinne, schließt er, gebe es nicht allzu viele Argumente, um ihren Status als „künstliche Menschen“ nicht anzuerkennen[23].

Choprah und White erklären, dass es notwendig wäre, über die Gewährung von Verfassungsrechten (von denen Menschen traditionell Empfänger sind) für künstliche Intelligenz zu erörtern. Tatsächlich genießen Unternehmen einige verfassungsmäßige Rechte, und einige Menschen (zum Beispiel Behinderte) haben Rechte, die sie ohne die Hilfe einer anderen Person nicht ausüben könnten. Für diese Aufgabe drücken sie die Notwendigkeit aus, die Sprachpraxis so umzugestalten, dass der Begriff der Person vom Begriff des Menschen getrennt wird[24].

20 Vgl. Christopher Stone, *Earth and Other Ethics: The Case for Moral Pluralism* (Harper & Row 1987) 26.

21 Vgl. Laurence Solum, ‘Legal Personhood for Artificial Intelligences’ (1992) 70(4) *North Carolina Law Review* 1231.

22 *Idem*.

23 Vgl. Migle Laukyte, ‘Artificial and Autonomous: A Person?’ in Gordana Dodig-Crnkovich, Antonino Rotolo; Giovanni Sartor; Judith Simon; Clara Smith (eds). *Social Computing, Social Cognition, Social Networks and Multiagent Systems. Social Turn* (Society for the Study of Artificial Intelligence and Simulation of Behaviour 2012) 66, 69.

24 Vgl. Choprah und White (n. 16) 637

V. Der gemeinsame Nenner „Person" um die beschreibende Komponente

Was erforderlich ist, um rechtlich als Person betrachtet zu werden, ist eines der komplexesten und am meisten diskutierten Fragen im Rahmen der Rechtsphilosophie. Ist eine Person jede Wesenheit, der Rechte und Pflichten zugeschrieben werden? Können Rechte und Pflichten jeder Wesenheit zugeschrieben werden? Die Beantwortung dieser Fragen erfordert die Untersuchung der beschreibenden Komponente des Begriffs „Person", d. h. der Satz von Faktoren, die es ermöglichen, diejenigen Elemente gegeneinander abzugrenzen, die unter diesem Nenner zusammengefasst sind, und diejenigen, die weggelassen werden. Die Untersuchung dieser Komponente ist keine einfache Aufgabe. Sie nicht nur eine klarere Definition der „Person" ermöglicht, sondern sich auch auf die vorgeschriebene Komponente auswirkt, d. h. auf wen die Rechte und / oder Verpflichtungen erkannt werden.

Die oben erwähnten Fragen weisen auf den Kern der Debatte zwischen Naturrechtsstellungen und rechtspositivistischen Stellungen hin. Während letztere befürworten, dass das Rechtssystem dasjenige ist, das die Rechtssubjekte auch außerhalb des Systems selbst schafft, betonen die ersteren Elemente der Natur, insbesondere der menschlichen Natur, als zentrale Bedeutung für die Erkennung von Analogien.

Wie bereits erwähnt, würden die positivistischen Stellungen bei der Erstellung des Merkmals-Katalog für die Betrachtung einer Wesenheit als Person nicht zu sehr auf ihre intrinsischen Eigenschaften eingehen. Im Gegenteil, es ist nur erforderlich, eine Voraussetzung zu erfüllen, dass ihm Rechte und / oder Pflichten zugeschrieben werden. Somit gibt es nichts von vornherein der Rechtsordnung, was darauf hinweisen zulässt, dass etwas eine Person ist oder nicht. Im Gegenteil, für diese Stellungen wird „Person" im Rechtsbereich nach dem Bestehen der Regeln definiert. Die Wesenheiten hätten nichts Eigenes, was es ermöglicht, ihnen Rechte und Pflichten zuzuschreiben, sondern die Persönlichkeit nur erscheint, wenn das Rechtssystem an ihnen anliegt.

Im Gegensatz dazu vertreten naturrechtliche Stellungen, dass es von den Wesen eigene Attribute gebe, die sie zu dem machen, was sie sind, und dass die Behandlung, die ihnen die kulturellen Bereiche geben, diese Natur nicht unterwerfen, verringern oder leugnen könnte[25]. In diesem Sinne kann das positive Recht nicht gegen das menschliche Wesen verstoßen und daher eine Reihe von Menschen- oder Naturrechten nicht leugnen. Deshalb wird anerkannt, dass Menschen Rechtssubjekte und im Rechtsbereich sind. Dieses Konzept vermischt sich mit einem moralischen Sinn, der die Menschenwürde und ihre Unverletzlichkeit anerkennt. Dies ist zum Teil

25 Hier werde ich mich der Länge halber nur auf einige Argumente konzentrieren. Zu zusätzlichen Informationen wird jedoch Solum (n.21, 1233) empfohlen. Da analysiert der Autor Vorstellungen von der Person, die mit dem Konzeptuellen, dem Anthropologischen, dem Paranoiden, dem Patrimonialen, dem Vermissten (Gewissen, Freiheit, Wille, Gefühle, Seele) usw. verbunden sind.

auf die historischen Veränderungen zurückzuführen, die die Semantik des Konzepts erfuhr[26].

Die naturrechtlichen Stellungen sind normalerweise anthropozentrisch, wenn sie definieren, was es bedeutet, eine Person zu sein, d. h. sie nehmen den Menschen als Vorbild. Dies bedeutet nicht, dass sie die Existenz anderer Arten von Subjekten innerhalb dieser Kategorie leugnen. Erstens gibt es keine Autoren, die juristischen Personen den Status von „Personen" verweigern. Sie werden einfach als künstliche Gestaltungen anerkannt, um die Handlungsfähigkeit des Menschen zu erweitern, jedoch ohne Unabhängigkeit von ihnen. Die Frage der nichtmenschlichen Tiere kann kontroverser sein, da es sowohl positive als auch negative Strömungen ihres Status als Person umfassen kann. Erstere können bestimmte Ähnlichkeiten mit Menschen argumentieren (wie zum Beispiel die Fähigkeit zu leiden oder den Wert des Lebens) und deshalb sind sie immer noch anthropozentrisch. Letztere können verschiedene Gründe haben, die hier nicht angesprochen werden, die jedoch von der Unfähigkeit zur Vernunft bis zur Unfähigkeit zur Erfüllung von Verpflichtungen reichen.

Was würde nun mit der elektronischen Person geschehen? Grundsätzlich basiert die Analogie zum Menschen auf der Möglichkeit, Entscheidungen autonom und interaktiv mit dem Umfeld zu treffen. Das heißt, mit einer gewissen Intelligenz, indem sie zu verstehen ist, als die Möglichkeit, unabhängig von den Programmierern Daten zu verarbeiten und neue Informationen zu generieren. Intelligenz als Faktor wäre also nicht ausschließlich für den Menschen, sondern auch für Artefakte, die darüber von ihren Herstellern und Betreibern getrennt sind. Diese Alternative umfasst, die Begriffsbestimmung von Intelligenz auf eine Reihe von Operationen zu reduzieren, die sich aus biologischen oder mechanischen Prozessen ergeben können[27]. Eine andere Option ist die von Searle erwähnte, bei der eine Art „Intelligenzsimulation" stattfinden könnte, eine Aktivität, die auch von Menschen ausgeübt werden könnte. Schließlich kann Intelligenz auch hier auf die Datenverarbeitung reduziert werden[28]. Ob auf die eine oder andere Weise, ob künstlich oder natürlich, Intelligenz würde aus einer Reihe von Datenverknüpfung, Prozessen und der Erzeugung neuer Informationen bestehen.

26 In Bezug auf die Entwicklung des Konzepts wird empfohlen, Francesco Viola 'El estatuto jurídico de la persona' (2015) XII 40 *Derecho y cambio social* 1, 3-12, und José Ferrater Mora. 'Persona'. *Diccionario de Filosofia* (Ariel 2004) 402, 402-404.

27 Vgl. Werner Sesink, *Menschliche und künstliche Intelligenz: Der kleine Unterschied* (Kett-Cotta 2012) 13.

28 Dieser Linguist lädt zu einer fantasievollen Übung ein, bei der eine Person in einem Raum mit chinesischen Schriftzeichen an den Wänden eingesperrt ist. Ihr wird auch ein Wörterbuch gegeben. Ebenso gibt es ein Glas, durch das eine Gruppe von Beobachtern sieht, was das Individuum in seiner Haft tut. Nach einer Weile beginnt die Person, die Zeichen im Buch und die an der Wand zu vergleichen, und leitet eine Reihe von Anweisungen daraus ab, um aus dem Raum zu kommen. Die Person kann kein Chinesisch, aber sie kann eine Reihe von Daten und Ähnlichkeiten verarbeiten. In den Augen der Beobachter scheint das Individuum die Sprache jedoch mit einem hohen Maß an Bewusstsein und Geschick zu beherrschen. Vgl. John Searle, *Minds, Brains and Science* (Harvard University Press 1984).

Die Frage, ob dieses Argument ausreicht, um künstliche Intelligenz in den Begriff der Person einzubeziehen, führt zu einer ersten Debatte darüber, ob Intelligenz ein entscheidender (wenn auch nicht ausschließlicher) Faktor dafür ist. Wenn zugegeben wird, dass dies der Fall ist, gibt es keine Einwände dagegen. Die daraus abgeleiteten Auswirkungen sind die Einschränkungen der Rechte und Pflichten, die sie möglicherweise haben. So wie Tiere keine Verpflichtungen haben, aber doch Rechte, wird die KI Verpflichtungen haben, aber keine Rechte. Wenn im Gegenteil die Verarbeitung von Daten und die Interaktion mit dem Umfeld von einer künstlichen Intelligenz nicht ausreicht, um diese Wesenheit als dem Menschen analog zu betrachten, bleibt dies außerhalb des Nenners.

Die Debatten über den Status elektronischer Personen im Recht drehen sich normalerweise nicht um diese ontologischen Bedenken, sondern orientieren sie sich an einem praktischen Kriterium. Wie aus dem Entschluss des Europäischen Parlaments hervorgeht, handelt es sich bei der elektronischen Person um eine Rechtskategorie, die aus technischer Sicht versucht, ein Problem zu lösen, das im Alltag auftritt und in Zukunft zunehmen wird: die Notwendigkeit, neue Formen der zivilrechtlichen Haftung für durch künstliche Intelligenz verursachte Schäden zu schaffen.

Die Tatsache, dass die Schaffung aus der Praxis analysiert wird, macht es jedoch nicht unnötig, darüber nachzudenken, wie sich diese neue Kategorie auf das Rechtskonzept der Person auswirkt.

VI. Die Auswirkungen auf das Rechtskonzept der Person

Wie oben erwähnt, wird der Rechtsbegriff der Person als die Wesenheit definiert, der Rechte und Pflichten zugeschrieben werden oder werden können. Diese Idee stammt aus einer Metapher, die diese Bedeutung mit den alten Theatermasken Griechenlands und Roms in Verbindung bringt. Die Masken ermöglichen, die Stimme der Figur hörbar zu machen, und gleichzeitig ein Bild zeigen, das mit der gespielten Rolle verbunden war. Die Entwicklung des Begriffs im Laufe der Geschichte hat ihn jedoch mit dem Hinweis auf Würde in Verbindung gebracht, hauptsächlich seit dem Konzil von Nicäa im Jahr 325[29]. Wie auch Corominas darauf hinweist, ist „Person" in der gemeinsamen Sprache mit einem menschlichen Individuum verbunden[30].

Die Verbindung zwischen „Person" und Mensch scheint heute und im täglichen Gebrauch unbestritten. Im Rechtsbereich wird dieser Begriff nun infrage gestellt, da entweder das menschliche Wesen für die Zuschreibung von Rechten und Pflichten

29 Bezüglich der Evolution und der semantischen Veränderungen oder vielmehr der Entwicklung zweier unterschiedlicher Konzepte des Begriffs „Person" von der Frühantike bis zur politischen Entwicklung des Christentums siehe José Maria Ribas Alba, *Persona: desde el derecho romano a la teología cristiana* (2nd ed Comares 2012) und Siegmund Schlossmann. *Persona und Prósopon im Recht und im christlichen Dogma* (Wissenschaftliche Buchgesellschaft 1968).

30 Vgl. Joan Corominas, 'Persona'. *Diccionario Crítico Etimológico Castellano e hispánico*. (Gredos 1981) 502.

irrelevant ist oder sich um ein solches Element handelt, das ontologisch Rechte besitzt, die nicht geleugnet werden können.

Wenn die historische Reise des Begriffs der Person zumindest im argentinischen Rechtssystem betrachtet wird, scheint sich die Idee der Menschlichkeit als Auswahlkriterium mit der Anerkennung dieses Status für andere Elemente zurückgezogen zu haben: nämlich juristische Personen und nichtmenschliche Tiere. Dies lässt darauf schließen, dass die Begriffsbestimmung der Person kommt auf Merkmalen wie der Möglichkeit des Leidens und der Wahrnehmung einiger kognitiver Merkmale oder der Interaktion mit dem Umfeld auf der Grundlage der Entscheidung einer Gruppe von Menschen. Daher zumindest eine Person Rechte haben können. Diese Bedingungen sind nicht kumulativ oder exklusiv, das heißt, ein Affe kann leiden, aber er interagiert nicht legal, wie es eine juristische Person beispielsweise durch Unterzeichnung eines Vertrags tun würde. Ihre Handlungen oder die Ereignisse, die auf sie entfallen, haben jedoch rechtliche Auswirkungen: Zum Beispiel führte die Traurigkeit der Affen zur Einführung des Habeas-Corpus, oder die Misshandlung eines Hundes führt zur gesetzlichen Haftung seines Täters[31]. Juristische Personen könnten andererseits Inhaber einiger Rechte und Pflichten sein, auch wenn sie beispielsweise nicht in der Lage sind, Leiden in einer Situation der Gefangenschaft oder des Missbrauchs zu zeigen (obwohl sie keine Bewegungsfreiheit haben).

Wenn künstliche Intelligenz in dieses Szenario einbezogen wird, geht das bestimmende Element nicht mehr vom Modell des Menschen als Gegenstand von Rechten von Natur aus, da die KI nur Verpflichtungen unterliegen würde. Ebenso wären das Leiden oder die Entwicklung eines Zentralnervensystems, das Handeln durch ein Kollegialorgan, allesamt irrelevante Merkmale. Dies ist, da Menschen, juristische Personen, nichtmenschliche tierische Personen und elektronische Personen die Fähigkeit gemeinsam haben würden, mit dem Umfeld so zu interagieren, dass Rechtsfolgen entstehen, die vom Rechtssystem als Personen anerkannt werden.

In diesen Begriffen wird der Rechtsbegriff der Person als gemeinsamer Nenner, der verschiedene Untertypen umfasst, als eine Wesenheit definiert, die in der Lage ist, Rechte und / oder Pflichten vom Rechtssystem als vorgeschriebene Komponente zu erhalten. Darüber besteht die beschreibende Komponente aus der operativen Fähigkeit, durch die Verarbeitung von Daten mit dem Umfeld zu interagieren und Entscheidungen

31 Es sei darauf hingewiesen, dass diese Aussage nicht zwangsläufig bestätigt, dass Tiere unbedingt Rechtssubjekt sind, obwohl die argentinische Rechtsprechung diesen Status in den genannten Fällen anerkannt hat. Debatten über die zivilrechtliche Haftung für Schäden an einem Tier und wer das Opfer ist, die kriminelle Figur des Tiermissbrauchs als Straftat, deren Opfer das Tier oder die Gesellschaft sein kann, ob „Tierrechte“ unter anderem einem Status der Menschen der Tiere oder einer ethischen Verantwortung von Menschen entsprechen, sind sie in der Akademie präsent und in Entwicklung. Da sie dem Thema dieses Werkes entkommen, wurde hier für eine Vereinfachung entschieden, die sich auf die Fälle konzentriert, die bereits von der Rechtsprechung festgelegt wurden. Obwohl diesbezüglich in den jeweiligen Entscheidungen Argumente enthalten sind, gibt es vielen Fragen, die natürlich auf diese Arbeit übertragen werden.

zu treffen, die Rechtsfolgen verpflichtender Natur haben, oder Empfindungen aus der jeweiligen Interaktion zu zeigen, die rechtliche Schutzmechanismen wecken. Die vorherige Begriffsbestimmung versucht zu zeigen, wie sich die Einbeziehung eines Elements als Referenz des Zeichens „Person" auswirkt, indem es von der syntaktischen Ebene aus die Ebene möglicher Zusammenhänge ändert[32].

VII. Soziale Reaktion: Welchen Nutzen würde eine elektronische Person haben?

Die Schaffung von Begriffen für den Umgang mit der Welt ist eine menschliche Reaktion, die es Menschen ermöglicht, mit ihrer Umwelt umzugehen. Auch ein Element von einem anderen zu unterscheiden und sie räumlich und zeitlich einzuteilen. Diese Reaktion ermöglicht eine konnotative Symbolisierung, d. h. die Zuschreibung eines kulturellen Wertes: nützlich, schön, gefährlich, zart, schnell, interessant usw.

Wofür ist der Personenbegriff im Rechtsbereich? Was nützt es, dass künstliche Intelligenz zusammen mit anderen Realitäten als „Personen" konzeptualisiert wird? Die Beantwortung dieser Frage ist keine einfache Aufgabe, und es könnte sogar unmöglich sein, eine vollständige Antwort zu geben, da die vielfältigen sozialen Faktoren, die den sprachlichen, politischen und rechtlichen Konstruktionen zugrunde liegen, vielfältig und komplex sind. Um jedoch zumindest eine Überlegung über die Angelegenheit anbieten zu können, ist es erwähnenswert, dass nach Teubner[33], Systeme ihre eigenen Subjektmodelle entsprechend ihren Bedürfnissen schaffen. Über die Kategorie der elektronischen Personen nachzudenken, bezieht sich auf den Bedarf, sich vor diesen neuen Akteuren zu schützen.

Warum verleihen zu einem Element im Rechtsbereich Persönlichkeit, das nicht nur das Rechtssystem nicht verstehen oder in seinem Rahmen nicht handeln kann?[34] Diese Frage erfordert nun die Begriffsbestimmung von „Verstehen" und „Handeln", um darüber nachdenken zu können, wie diese Frage auf künstliche Intelligenz zutrifft. Wenn diese Wesenheiten analog zu Menschen intelligent sind (obwohl mit unterschiedlichen Prozessen, da das Neurokognitive mit Computerentwicklungen, das Natürliche mit dem Künstlichen, entgegenstellt wird) und wenn sie autonom Schaden

32 Saussure erklärt, dass sprachliche Zeichen dadurch gekennzeichnet sind, dass sie das sind, was andere nicht sind, und um dies zu beweisen, verwendet er verschiedene Dichotomien. Eine davon basiert auf der syntagmatischen Achse (was vorausgeht und was in einer Phrase, in einem Satz weitergeht und was den Inhalt aller verwandten Elemente verändert) und der Assoziationsachse, die Barthes später als „paradigmatisch" bezeichnen würde (die mögliche gleichzeitige Bedeutungen, die ein Zeichen haben könnte, wenn es isoliert gefunden wird). Vgl. Ferdinad de Saussure, *Curso de lingüística general* (Tr CU Lorda Mur. Losada 1945) und Roland Barthes, *Elementos de semiología* (Alberto Corazón Verlag 1971).

33 Vgl. Gunter Teubner, 'Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law' (2006) 33(4) *Journal of Law and Society* 497, 499-502

34 Grays Frage richtet sich nicht an künstliche Intelligenz, sondern wird im Rahmen einer historischen Studie über den Status lebloser Objekte im Rahmen des Rechts als Kasuistik gestellt, die Verwendungszwecke und Quellen des Rechtssystems veranschaulicht. Vgl. John Chipman Gray, *The Nature and Sources of the Law* (Creative Media Partners 2019) 27, 65, 80.

anrichten könnten, dann gibt es vielleicht einen Nutzen: ein Schadensreparatursystem zu erzeugen.

Eine weitere hervorzuhebende Frage ist die Willenlosigkeit dieser Wesenheiten, illegale Handlungen zu begehen. Es können jedoch Schäden auftreten, und wenn es eine Entwicklungskette der Entscheidungsfindung mit Autonomie von Herstellern und Programmierern gibt und wenn keine Möglichkeit besteht, diesen die Verantwortung zuzuweisen, sollten die Opfer alle Schäden tragen. Der Begriff der elektronischen Person im rechtlichen Rahmen würde versuchen, dieses Szenario zu vermeiden. Es gibt keine Wege, um diese Schäden zu verhindern, indem durch Drohungen gestützte Befehle erteilt werden, aber es ist doch möglich, die Probleme zu verringern, die auf sozialer Ebene aufgrund von KI-Handlungen auftreten können.

Der Status der Person hat für den Menschen mit ihrem eigenen Schutz und dem Bedarf zu tun, sich gegen andere Menschen zu verteidigen, die zwar eine Sphäre der Zusammenarbeit bilden, aber auch zu einer Drohung werden könnten. Im Falle von Tieren wäre es auf eine Quote von Empathie mit anderen Wesen zurückzuführen, die leiden können und daher verdienen, Rechtssubjekte zu sein. Verpflichtungen für diese aus Verteidigungsgründen zu erzeugen und sie mit Androhung von Sanktionen zu unterstützen, würde Unsinn scheinen, und daher unterliegen sie keinen Verpflichtungen. Sie sind nur Empfänger von Schutz. Juristische Personen sind Werkzeuge, die es ermöglichen, Kräfte bündeln, und ihr Status als Personen beruht auf der Tatsache, dass es sich um eine Fiktion handelt, die die Persönlichkeit vor und für das Recht der Personen, aus denen sie besteht, erweitert. Jeder konnte nicht einzeln handeln, sondern im Rahmen dieses globalen Ganzen.

Was die mögliche elektronische Person betrifft, unterscheiden sich die Beweggründe von den anderen. In diesem Fall liegt es an der Angst und dem Bedarf nach Schutz. Wenn künstliche Intelligenz Autonomie erlangt und in der Lage ist, selbst Entscheidungen zu treffen und zusätzlich mit ihrer Umgebung interagiert, kann sie Schäden anrichten. Letztere können den Herstellern nicht auf die gleiche Weise wie andere Arten von Schäden zugerechnet werden, sei es im Rahmen der zivilrechtlichen Haftung oder des Verbraucherrechts. KI kann Aktionen und Prozesse ausführen, die von den Herstellern selbst nicht vorgesehen sind, und dies macht die Ergebnisse ihrer Eingliederung in den Gemeinschaftsbereich sowohl für sie als auch für die betroffene Gesellschaft unvorhersehbar.

Dies birgt das Risiko des Unvorhergesehenen, die Möglichkeit einer Wesenheit, die Handlungen ausführt, Entscheidungen trifft, Daten sammelt und verarbeitet. Die Interaktion findet vor anderen Rechtssubjekten statt, die im Falle geschädigt zu werden, könnten einer Wesenheit gegenüberstehen, die trotz einer Entscheidung getroffen zu haben, nicht in der Lage ist, mit ihrem Vermögen darauf zu antworten.

Nach dem, was erwähnt wurde, könnte man sich die Schaffung der elektronischen Person als Gegenstück zu den Rechtssubjekten vorstellen, die, um ihr Sein als solches in der Interaktion zu betrachten, obligatorische Subjekte erfordern. Wer also ein Recht beeinträchtigen und damit den Umfang der Subjektivität eine andere Wesenheit stören kann, würde sofort zum Gegenstück zu dem: zum Subjekt von Pflichten.

Künstliche Intelligenz als mögliches neues Element des Rechtsbegriffs der Person würde zu den Kelsenschen Dualismen zwischen subjektiven Rechten und objektiven Rechten und Rechten und Pflichten zurückkehren. Der Unterschied bei dieser Gelegenheit besteht darin, dass es einen reinen Gegenstand von Verpflichtungen ohne Rechte geben könnte.

VIII. Abschließende Bemerkungen

Obwohl der Rechtsbegriff der Person einer derjenigen ist, der im Rahmen der Rechtspraxis und -theorie als grundlegend gilt, hat er keine klare und genau festgelegte Bedeutung.

Obwohl der Rechtsbegriff der Person einen technischen Sinn als normatives Zuschreibung-Zentrum hat, wird er in vielen Fällen auch mit einem gesunden Menschenverstand verwendet, der ihn mit dem Schutz des Menschen verbindet und Handlungsinstrumente generiert. Die Tatsache, dass es keine Klarheit gibt, führt jedoch dazu, dass sich sein Referenzfeld gemäß der Vision dieses Konzepts ausdehnt und zurückzieht: Sind Tiere Menschen? Ist eine juristische Person genau eine Person wie eine menschliche Person? Ist künstliche Intelligenz eine Person für das Gesetz, auch wenn sie nicht in der gemeinsamen Sprache ist?

In diesem Schriftstück wurde versucht zu zeigen, dass es je nach der Stellung, die man einnimmt, bezüglich der Bedeutung einer Person für das Gesetz, werden Probleme geben oder nicht, um die Einbeziehung elektronischer Personen unter den gemeinsamen Nenner anzunehmen. Eine positivistische Stellung wird keine Hindernisse haben: Solange das Rechtssystem Rechte oder Pflichten zuschreibt, werden wir in Gegenwart einer Art von Person sein. So können wir Personen mit allen Rechten und Pflichten (wie menschliche Personen), Personen mit manchen Rechten und Pflichten (wie juristische Personen) haben; Personen mit manchen Rechten (wie nichtmenschliche tierische Personen) und, wenn die Kategorie der elektronischen Menschen in Argentinien geschaffen wurde, Personen mit manchen Pflichten. Es gibt nicht viele Gemeinsamkeiten zwischen allen. Am auffälligsten ist es vielleicht, ausgerechnet Empfänger von Rechten und / oder Pflichten zu sein. Wir können auch eine Art Fähigkeit zur Interaktion mit dem Umfeld erwähnen.

Das, was oben erwähnt wurde, dass für eine formalistische Stellung keine größeren Probleme aufwirft, würde doch zu möglichen Unannehmlichkeiten für naturrechtliche Ansichten führen. Einerseits könnten vielleicht einige Ströme die Nützlichkeit der Einbeziehung elektronischer Personen erkennen. Sie könnten dieser Annahme jedoch aufgrund der Auswirkungen widersprechen, die sich auf den Rechtsbegriff der Person im Allgemeinen auswirken. Das heißt, wenn das fokale Analog der Mensch ist und daher das Rechtssystem dazu neigt, ihn zu schützen, schwächt sich seine konzeptuelle Kraft umso mehr ab, je weiter der Begriff der Person von dieser Idee entfernt ist. Das heißt, wenn nur die Fähigkeit zur Interaktion mit dem Umfeld von Bedeutung ist, wird das Konzept der Person, die mit dem menschlichen Wesen verbunden ist, auf ein Nervensystem oder auf die Fähigkeit zur Datenverarbeitung reduziert. Darüber könnte zugegeben werden, dass es Menschen mit Pflichten und ohne Rechte geben könnte.

Der Begriff der elektronischen Person kann einerseits theoretischen Schaden an der Semantik des Rechtsbegriffs der Person anrichten, da er gleichzeitig einen Teil seiner vorgeschriebenen Kraft verliert und die Begriffsbestimmung auf die aktuelle Kasuistik reduziert, die auf die aufkommende konditioniert ist. Auf der anderen Seite hat es einen praktischen Vorteil, nämlich ein Werkzeug bereitzustellen, mit dem die Haftung für Schäden einer Wesenheit zugeschrieben werden kann, und das eine Realität ist und mit den Gesellschaften interagiert. Wie bei menschlichen, juristischen und nichtmenschlichen Personen stellt sich die Frage, ob der Personenbegriff am nützlichsten und am zweckmäßigsten ist, um den gewünschten Effekt in Bezug auf künstliche Intelligenz zu erzielen.

Was im letzten Absatz dargelegt wird, bietet ein skeptisches Panorama hinsichtlich des Rechtsbegriffs der Person als Werkzeug zur Regulierung elektronischer Subjekte. Eine Lösung könnte jedoch in Betracht gezogen werden, indem die Person als Funktionsbegriff kennzeichnet wird, d. h. dass entsprechend dem Kontext interpretiert werden kann. In diesem Sinne könnten Rechtsbegriffe der Person im Plural unterschieden werden. Man könnte sich also ein technisches Konzept vorstellen, das im patrimonialen Bereich als Haftungssystem für verursachte Schäden übersetzt wird. Relevant ist da der Schutz der Personen, die geschädigt werden könnten, was als Gegenstück den Bedarf erfordert, die Fähigkeit und Verpflichtung zuzuschreiben, um auf die Agenten zu reagieren, die Schaden verursachen könnten. Dies führt uns dazu, über die praktischen Bereiche nachzudenken, in denen das Rechtskonzept der Person verwendet wird, und über die Vielzahl der Überlegungen, aus denen es besteht.

Peer-Review: Extern peer-reviewed.
Interessenkonflikt: Der Autor hat keinen Interessenkonflikt gemeldet.
Finanzielle Unterstützung: Der Autor erklärte, dass diese Studie keine finanzielle Unterstützung erhalten hat.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.

Literaturverzeichnis

Barthes R, *Elementos de semiología* (Alberto Corazón Verlag 1971).

Burri T, 'Künstliche Intelligenz und internationales Recht' (2018) 42 *Datenschutz Datensich* 603

Choprah S & White L, 'Artificial Agents - Personhood in Law and Philosophy' in *Proceedings of the 16th Eureopean Conference on Artificial Intelligence* (EICA 2004) 635.

Corominas J, 'Persona'. *Diccionario Crítico Etimológico Castellano e hispánico* (Gredos 1981).

Corvalán J G, 'La primera inteligencia artificial predictiva al servicio de la Justicia: Prometea' (2017) XXXI 186 *La Ley* 1.

Europäischen Parlaments, Entschließung vom 16 Februar 2017 mit Empfehlungen an die Kommission zu zivilrechtlichen Regelungen im Bereich Robotik [2017] 2015/2103

Erhardt J y Mona M, 'Rechtsperson Roboter – Philosophische Grundlagen für den rechtlichen Umgang mit künstlicher Intelligenz' in Gless S y Seelmann K (eds) *Intelligente Agenten und das Recht* (Nomos Verlagsgesellschaft mbH 2016) 61.

Ferrater Mora, J 'Persona' *Diccionario de Filosofía* (Ariel 2004).

Foucault M, *Die Ordnung der Dinge: eine Archäologie der Humanwissenschaften* (Suhrkamp 2003).

Gray J C, *The Nature and Sources of the Law* (Creative Media Partners 2019).

Herrera D, *La persona y el fundamento de los derechos humanos* (EdUCA 2012).

Hervada J, 'Problemas que una nota esencial de los derechos humanos plantea a la filosofía del derecho' (1982) 9. *Persona y Derecho*, 243.

Hoyos I M, *El concepto jurídico de persona* (Ediciones Universidad de Navarra 1989).

Kelsen H, *Reine Rechtslehre* (Mohr Siebeck, 1934).

Laukyte M, 'Artificial and Autonomous: A Person?' in Dodig-Crnkovich G; Rotolo A; Sartor G; Simon J; Smith C (eds.). *Social Computing, Social Cognition, Social Networks and Multiagent Systems. Social Turn* (Society for the Study of Artificial Intelligence and Simulation of Behaviour 2012) 66

Morales Zúñiga H, 'Estatus moral y el concepto de persona' *Problemas actuales de la filosofía jurídica* (Librotecnia 2015).

Muñiz C, '"Para nosotros, para nuestra posteridad, y para todos los robots que quieran habitar el suelo argentino" ¿Puede la inteligencia artificial ser sujeto de derecho?' (2018) 22 *RCCyC*.

Ribas Alba J M, *Persona: desde el derecho romano a la teología cristiana* (2nd edn Comares 2012).

Santos González M J, 'Regulación legal de la robótica y la inteligencia artificial: retos de futuro' (2017) 4 *Revista jurídica de la Universidad de León* 25.

Saussure F, *Curso de lingüística general* (Tr CU Lorda Mur Losada 1945).

Schlossmann S, *Persona und Prósopon im Recht und im christlichen Dogma* (Wissenschaftliche Buchgesellschaft 1968).

Searle J, *Minds, Brains and Science* (Harvard University Press 1984).

Sesink W, *Menschliche und künstliche Intelligenz: Der kleine Unterschied* (Kett-Cotta 2012).

Solum L B, 'Legal Personhood for Artificial Intelligences' (1992) 70(4) *North Carolina Law Review* 1231.

Stone C, *Earth and Other Ethics*: *The Case for Moral Pluralism* (Harper & Row 1987).

Teubner G, 'Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law' (2006) 33(4) *Journal of Law and Society* 497

Valente L A, 'La persona electrónica' (2019) 49 *Anales De La Facultad De Ciencias Juridicas Y Sociales De La Universidad Nacional De La Plata* 1

Viola F, 'El estatuto jurídico de la persona' (2015) 40 *Derecho y cambio social* 1

Wettig S & Zehender E, 'A legal analysis of human and electronic agents' (2004) 12 *Artificial Intelligence and Law* 111.

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 413–480

DOI: 10.26650/annales.2022.71.0009
http://annales.istanbul.edu.tr/

Annales de la Faculté de Droit d'Istanbul

Submitted: 26.08.2022
Revision Requested: 24.09.2022
Last Revision Received: 11.11.2022
Accepted: 19.12.2022
Published Online: 31.12.2022

RESEARCH ARTICLE

Aggravated Migrant Smuggling in a Transit Migration Context, Criminal Victimization under ECtHR Positive Obligations Case Law

Roxane de Massol de Rebetz*, Pınar Ölçer**

Abstract

The legal dichotomy established between migrant smuggling and human trafficking has often been criticized, including from the perspective of associated distinctions arising in human rights protection. This contribution focuses on the specific profile of transiting smuggled migrants in the Intra-Schengen mobility context. Building on empirical research conducted by the first author on the Belgian legal framework and its functioning in practice, it is argued that differentiated protection can be crafted for this profile within criminal justice related positive obligations ensuing from the ECHR in a manner similar to that which has been developed by the ECtHR for trafficking victims. As other (inter)national law sources do not drive towards protective duties in this sense for migrant smuggling, the ECtHR cannot feed from them in the manner it has done in the trafficking context. It is argued that the Court however can legitimately find an alternate basis in empirical evidence pointing to similar human rights needs, meaning that the ECtHR can craft protection through evidence-based decision-making, including through the deployment of (particular) vulnerability paradigms.

Keywords

ECHR, Criminal Justice Related Positive Obligations, Migrant Smuggling, Migrants in Transit, Human trafficking, Evidence-based Adjudication, Vulnerability

* Roxane de Massol de Rebetz (LLM, MSc, PhD candidate), Van Vollenhoven Institute for Law, Governance and Society, Leiden Law School, Leiden University, Leiden, Netherlands. E-mail: r.m.f.de.massol.de.rebetz@law.leidenuniv.nl ORCID: 0000-0002-3417-0345

** **Corresponding Author:** Pınar Ölçer (Assoc. Prof. Dr.), Leiden University, Institute of Criminal Law and Criminology, Criminal Law and Criminal Procedure, Leiden, Netherlands. E-mail: f.p.olcer@law.leidenuniv.nl ORCID: 0000-0003-4379-0981

To cite this article: de Massol de Rebetz R, Olcer P, "Aggravated Migrant Smuggling in a Transit Migration Context, Criminal Victimization under ECtHR Positive Obligations Case Law", (2022) 71 Annales de la Faculté de Droit d'Istanbul 413.
https://doi.org/10.26650/annales.2022.71.0009

I. Introduction

In recent years, particularly since 2015, migrant smuggling has solidified as a salient policy issue for Europe. At the European Union (EU) level, in accordance with the renewed EU Action Plan against Migrant Smuggling contributing to the implementation of the New Pact on Migration and Asylum, the current position is that the phenomenon requires a 'strong European response'.[1] Since the mid-1990s, that response has primarily been conceptualised as a need to combat cross-border (organised) crime.[2] The underlying rationale is that, on the one hand, migrant smuggling 'puts the migrant's lives at risk, showing disrespect for human life and dignity in the pursuit of profit,' and '(undermines (…) the fundamental rights of the people concerned'.[3] On the other, the offence, entailing the 'facilitation of irregular entry, transit and stay', disrupts 'the migration management objectives of the EU'.[4] Whereas the detrimental impact of smuggling on life, dignity and rights resonates in policy narratives and smuggling is clearly circumscribed as a crime, an oddity arises in the framing of the smuggled migrant. Arguably, the second rationale, centred on migration management, dominates the legal and policy responses, rendering them perpetrator-centric in nature.[5] Policy actions are primarily oriented on breaking the 'business model of the smugglers,' and, under the primary aim of the Facilitator's package, effectively criminalizing and sanctioning them.[6] The criminal profile of the perpetrator being unequivocal,[7] the conceptualisation of the smuggled migrant is however less clear.

This approach resonates with the legal frameworks adopted at the United Nations (UN) level, wherein the smuggled migrant also resides in somewhat of a limbo in terms of victimization, notably in a criminal justice sense. A focal point of consideration relates to the legal distinction between migrant smuggling and human trafficking embedded in the 2000 United Nations Convention against Transnational

1 Nina Perkowski and Vicki Squire, 'The Anti-Policy of European Anti-Smuggling as a Site of Contestation in the Mediterranean Migration 'Crisis'' (2019) 45(12) JEMS 2167; Commission (EC), 'A Renewed EU Action Plan Against Migrant Smuggling (2021-2025)' COM (2021), 1, 29 September 2021 < https://ec.europa.eu/home-affairs/renewed-eu-action-plan-against-migrant-smuggling-2021-2025-com-2021-591_fr>.

2 Ilse van Liempt, 'Human Smuggling: A Global Migration Industry', in Anna Triandafyllidou (ed), *Handbook of Migration and Globalisation,* (Edward Elgar Publishing 2018) 140. Gabriella Sanchez, Kheira Arrouche, Matteo Capasso, Angeliki Dimitriadi and Alia Fakhri. 'Beyond Networks, Militias and Tribes: Rethinking EU Counter Smuggling Policy and Response' (April 2021): <https://www.euromesco.net/publication/beyond-networks-militias-and-tribes-rethinking-eu-counter-smuggling-policy-and-response/> accessed 20 February 2022.

3 Renewed EU Action Plan (n 1).

4 Renewed EU Action Plan (n 1).

5 See Valsamis Mitsilegas, 'The normative foundations of the criminalization of human smuggling: exploring the fault lines between European and international law' (2019) 10(1) New Journal of European Criminal Law 68.

6 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17; Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1; Renewed EU Action Plan (n 1) 17.

7 For a critique and overview see Federico Alagna, 'Shifting Governance: Making Policies Against Migrant Smuggling Across the EU, Italy and Sicily' (PhD Thesis, Radboud University 2020).

Crime (UNTOC) and its two additional protocols.[8] Sometimes referred to as a 'strange legal fiction',[9] this distinction resolves into significant differences in the legal and practical treatment of trafficked versus smuggled persons. This is underscored by the nomenclature used in the two Protocols. The Trafficking Protocol refers structurally to 'victims' (also in a criminal justice sense), while the Smuggling Protocol refers to persons who have been the 'object' of criminal conduct.[10] At the European level, the disparity plays out even more strongly. Both the Council of Europe (CoE) and the EU have established own regulatory frameworks with respect to trafficking, securely recognizing criminal victimization of the trafficked person and prescribing significant duties of protection in that regard.[11] The same has not occurred for smuggled migrants however.[12]

Importantly, despite a visible ambivalence in the conceptualisation of smuggled migrants in all three legal frameworks, recent developments at the UN[13] and CoE[14] levels do demonstrate a growing awareness of the inherent risks faced by smuggled migrants to abuse and exploitation, underscoring, amongst other things the operational links between human trafficking and migrant smuggling, and acknowledging the need to take action.[15] With potential shifts in thinking on the horizon, it is a propitious time

8 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2241 UNTS 507; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319. On the history of these protocols and the legal dichotomy see Yvon Dandurand and Jessica Jahn, 'The Failing International Legal Framework on Migrant Smuggling and Human Trafficking' in John Winterdyk and Jackie Jones (eds.), *The Palgrave International Handbook of Human Trafficking* (Springer International Publishing 2020) 783; James Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49 Va. J. Int'l L. 1.

9 Anne Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground - A Response to James Hathaway' (2008) 49 Va. J. Int'l L 792; Dandurand and Jahn (n 8).

10 On the notion of victims, see the notes made by the Secretariat in UNTOC 'Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Transnational Organized Crime' (2006), < https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf>, 461, 483.

11 Council Directive 2002/90/EC (n 6).

12 See for instance Joanne Van der Leun and Anet van Schijndel, 'Emerging from the Shadows or Pushed into the Dark? The Relation Between the Combat against Trafficking in Human Beings and Migration Control' (2016) 44 International Journal of Law, Crime and Justice 26.

13 New York Declaration for Refugees and Migrants (adopted 19 September 2016) UNGA Res 71/1; Global Compact for Safe, Orderly and Regular Migration (adopted 19 December 2018) 5 February UN Doc A/Res/73/195.

14 European Committee on Crime Problems (CDPC). Council of Europe Roadmap on Fighting the Smuggling of Migrants (adopted 3 February 2020). The document mentions the possibility of creating a legally binding instrument on migrant smuggling considering the 'grave' legal discrepancies found in the legislations of its Member States. Despite its dominant perpetrator/crime-centric orientation, the document emphasises the necessity of the adoption of a multi-disciplinary approach which includes the safeguard of migrant's human rights, considering the life-threatening risks and exploitation to which they are exposed (point III).

15 Whereas the Global Compact (n 13) underlines the necessity of securing the human rights of smuggled migrants, the emphasis on the dichotomy between smuggling and human trafficking remains omnipresent (see objective 9). However, the New York Declaration (n 13) concretely highlights the interconnections between migrant smuggling and human trafficking (see objectives 5-6). Besides, the text operates a terminological turn from the Smuggling Protocol in referring to 'people in vulnerable situation' and more importantly 'to *victims* (emphasis added) of exploitation and abuse in the context of the smuggling of migrants' (objective 23). See also Jean-Pierre Gauci and Vladislava Stoyanova, 'The Human Rights of Smuggled Migrants and Trafficked Persons in the UN Global Compacts on Migrants and Refugees' (2018) 4(3) International Journal of Migration and Border Studies 222.

to contemplate how any momentum in this regard can be fortified through recourse to human rights law. This contribution argues that an important locale for the (re-) conceptualisation of the smuggled migrant is at the crossroads of criminal justice and human rights, with a focus not only on the perpetrator but the smuggled migrant as a *victim* therein.

Holding that a differentiated approach is critical to the development of protection within the European Convention of Human Rights (ECHR) framework, two important demarcations are maintained here. Firstly, the multiple issues and consequences surrounding the framing of the complex and multi-faceted smuggling phenomenon increasingly have captured the attention of scholarship.[16] The implications of insights in that regard for the human rights needs of smuggled migrants extend well beyond the domain of criminal justice.[17] An isolated approach, focusing only on protective duties in a criminal justice sense, would indeed itself be reductive, even detrimental, if that would mean a lack of regard for other types of needs.[18] While it is important to emphasize that a holistic understanding and strategy are required to address the full gamut and intersectionality thereof,[19] this contribution does focus solely on the criminal justice domain, examining if and how *certain smuggling experiences* of *migrants with a (particular) (vulnerability) profile*, can be positioned within the *criminal justice related positive obligations* framework developed in the case law of the European Court of Human Rights (ECtHR), under the European Convention on Human Rights (ECHR). The choice to seek recourse to this particular framework lies in the prolific nature of the Court's positive obligations case law, its unique interpretative arsenal and its responsiveness to social scientific information,[20] all making it uniquely positioned to disrupt protective disparities in the trafficking/ smuggling dichotomy.

16 Marika McAdam, 'What's in a Name? Victim Naming and Blaming in Rights-Based Distinctions between Human Trafficking and Migrant Smuggling' (2015) 4(1) International Human Rights Law Review 1. Anna Triandafyllidou, 'Migrant Smuggling: Novel Insights and Implications for Migration Control Policies' (2018) 676(1) The Annals of the American Academy of Political and Social Science 212; Gabriella Sanchez, 'Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research' (2017) 5(1) Journal on Migration and Human Security 9; Alagna, (n 7); Enrico Fassi, 'The EU, Migration and Global Justice. Policy Narratives of Human Smuggling and their normative implications' (2020) 1 Rivista Trimestrale di Scienza dell'Amministrazione 1.

17 See Marie-Bénédicte Dembour, 'The Migrant Case Law of the European Court of Human Rights. Critique and Way Forward' in Başak Çalı, Ledi Biancu, Iulia Motoc (eds) *Migration and the European Convention on Human Rights* (Oxford University Press 2021).

18 Also within the realm of positive obligations in relation to human trafficking, certain duties, such as those with respect to victim identification, exist autonomously from criminal proceedings. See in that respect (i) Vladislava Stoyanova, 'Separating Protection from the Exigencies of the Criminal Law, Achievements and Challenges under art. 4 ECHR' in Laurents Lavrysen and Natasa Mavronicola (eds.) *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Bloomsburg Publishing 2020). See also with respect to the distinct duty of victim identification, (ii) Vladislava Stoyanova, 'J. and Others v. Austria and the Strengthening of States' Obligation to Identify Victims of Human Trafficking' (Strasbourg Observers, 7 February 2017) <https://strasbourgobservers.com/2017/02/07/j-and-others-v-austria-and-the-strengthening-of-states-obligation-to-identify-victims-of-human-trafficking/> accessed 19 June 2022.

19 See also Stoyanova (n 18) (i), arguing for an approach extending beyond criminal justice needs.

20 All EU Member States being CoE members, ECtHR case law is moreover pertinent to all.

Feeding off the ECHR framework, notably as developed in relation to trafficking victimization, we argue that *categorically* approaching migrant smuggling as a victimless crime or downplaying the criminal victimization of the smuggled migrants - envisaging them as 'willing' participants, at worst as co-perpetrators[21] - would be iniquitous. That also holds because *it is* recognized that smuggling leads to human rights abuses, potentially *also* in the form of criminal victimization.[22] That should create a responsibility of clarity with respect to the type of victimization which can be at issue and to provide appropriate protection. While restricting discussion here to the interface between human rights and criminal justice related obligations, the argument may however also be made that crafting an evidence-based (vulnerability) profile under the framework of criminal justice related positive obligations resonating better with the experience of smuggled migrants, can function as an important pivot to improve the conceptualisation of smuggled (transiting) migrants in relation to other types of human right's needs.

Secondly, considering the need for differentiation and care in the construct of a legitimate, evidence-based needs profile, this contribution focuses particularly on cases where smuggled migrants take on the feature of being *migrants in transit*. Holding that this characteristic especially contributes to the (particular) vulnerability of smuggled migrants, the argument is made here that the Court, as it has been inclined to do so, *inter alia* in trafficking cases, can operationalize empirical evidence to enhance protection, with an emphasis on the transit element.[23] In light of the focus on the implications of a transit context, this contribution turns to the Belgian jurisdiction as a concrete illustration. Based on empirical research conducted by the first author, the practical functioning of the legal model developed in this jurisdiction to deal with aggravated forms of migrant smuggling is reviewed. Focusing on Belgium is of particular interest for two reasons. From a legal perspective, going beyond international obligations, Belgian legislation seems to respond well to operational links, or the grey area found at the nexus between migrant smuggling and human trafficking,[24] through the recognition of an unjust disparity in the treatment of trafficking and smuggling victims. Taking as a point of departure that the circumstances of such persons are similar where *aggravated forms of migrant smuggling* are at issue,

21 As distinct from the issue of criminalization of humanitarian aid, see Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan' (CEPS Policy Brief, December 2021) <https://www.ceps.eu/wp-content/uploads/2021/12/CEPS-PB2021-01_Between-politics-and-inconvenient-evidence.pdf> accessed 12 May 2022.

22 See also McAdam (n 16) on the issues around notions of exploitation and consent, the attempt to draw a strict distinction between smuggling and trafficking being described by the scholar as a heavily politicized exercise and a 'fraught process', generally and 3 and 30.

23 See, with respect to the Court's margin of appreciation in its 'free evaluation of all evidence', *Zoletic and Others v. Azerbaijan* 20116/12 (ECtHR, 7 October 2021) para 135.

24 Van der Leun and van Schijndel (n 12); Anette Brunovskis and Rebecca Surtees, 'Identifying Trafficked Migrants and Refugees along the Balkan Route. Exploring the Boundaries of Exploitation, Vulnerability and Risk' (2019) 72(1) Crime, Law and Social Change 73.

Belgium law accords smuggled individuals the protective status exclusively reserved for trafficking victims in other jurisdictions. From an empirical perspective, Belgium is of particular interest as it, as an EU and Schengen member, is a *transit* country and, as such, faces significant challenges arising from the presence of large numbers of irregular migrants *en route* to other destinations on its territory.

In order to build in different steps a realistic argument as to how the ECtHR can extend a protective umbrella through recognition of criminal victimisation requiring criminal justice action, the first section provides an overview of the Belgian legal and policy framework. Section 1 also outlines, based on empirical insights, how and why that framework is not fully effectuated in practice. Drawing on the problematic as demonstrated in the Belgian case study, Section 2 discusses how the ECtHR, as it has done in other contexts, can turn robust empirical information and scholarly insights into human rights currency. Specific attention is devoted in this regard to the concept of vulnerability, both from a theoretical and empirical perspective. To that end, the real-life profiles and experiences of smuggled migrants as they transit throughout European jurisdictions are discussed, with an eye on stressing the need to securely recognize victimization under the intersection of human rights and criminal law in light of the evidence presented. Subsequently, Section 3 concretely outlines the potential for the development of criminal justice related positive obligations protection for smuggled migrants, utilizing the Court's human trafficking case law as a model. This Section also focuses on *how* the ECtHR has also relied on empirical information in that context, advancing that, with an even commitment to this methodology, it can identify similar protective needs and requirements for certain categories of smuggled migrants. Section 5 concludes the contribution with some over-arching reflections.

A. The Belgian Case: Context, Legal Framework & Limitations

In examining the potential for the positioning of smuggled migrants with a particular (vulnerability) profile within the ECtHR's criminal justice related positive obligations framework, it is useful to explore a real-life scenario showcasing relevant legal and factual issues and illustrating needs and difficulties in this regard. Again, Belgium provides a particularly apt case study, not only because of its legal framework, but also because it is an important transit jurisdiction within the Schengen area. This allows for examination of the under-researched situation of migrants in transit and 'secondary' or 'unauthorized' migration movements.[25] To understand the Belgian

25 In contrast, more scholarly attention is already devoted to the situation of migrants at EU external borders. The authors are aware that the terminology 'secondary' or 'unauthorized' migration movements as used in EU policy documents can be problematic. See Sergio Carrera, Marco Stefan, Roberto Cortinovis and Ngo Chun Luk, 'When mobility is not a choice. Problematising asylum seekers' secondary movements and their criminalisation in the EU' (CEPS, December 2019): <http://aei.pitt.edu/102277/1/LSE2019-11-RESOMA-Policing-secondary-movements-in-the-EU.pdf> accessed 15 May 2022. While being mindful of these important terminological concerns, the authors will still refer to the term secondary migration movements when described as such either in policy/media documents and by the respondents.

context, this jurisdiction must first be envisaged as an EU Member State and as a Schengen member. Looking specifically at the distinct issues within the Schengen Area with regard to secondary migration movements and the potential links between migrant smuggling and human trafficking in a transit migration context, recent EU initiatives to tackle these phenomena and EU agency reports on the situation at the internal borders of the Schengen Area, should be highlighted as part of the contextual architecture.

1. Migrant Smuggling within the Schengen Area

Taking together the adoption of the renewed Action Plan against Migrant Smuggling (2021-2025) and the incorporation of the fight against migrant smuggling as priorities in both the new Pact on Migration and Asylum[26] and the European Agenda on Security,[27] the EU message is clear: anti-smuggling efforts should be intensified in order to 'prevent the exploitation of migrants by criminal networks and reduce incentives for irregular migration'.[28] The dual rationales underpinning the fight against migrant smuggling at the EU level outlined in the introduction are clearly maintained. However, an evolving sophistication can be identified in the understanding of smuggling *within* the Schengen Area. Looking at counter-smuggling policies and the ways in which the phenomenon is framed, it is interesting to examine the connections created between secondary migration/unauthorized movements, migrant smuggling and human trafficking. Following EU narratives, secondary migration movements are deemed to 'feed human smuggling and trafficking networks'.[29] Also connecting these phenomena and demonstrating awareness of the victimisation risks faced by smuggled migrants, the EU agency Europol signalled in 2011 an intersection between transit migration, migrant smuggling and human trafficking in that 'transiting migrants are frequently exploited in illicit labour'.[30] Distinct annual reports of the European Migrant Smuggling Centre (EMSC) recently established within Europol contain references to 'bottleneck' areas or 'migrant hubs', also within the Schengen Area, where a high concentration of migrants gather in order to circumvent obstacles (whether physical barriers or permanent/temporary border controls), to continue their

26 Renewed EU Action Plan (n 1); Commission (EC), 'New Pact on Migration and Asylum', COM (2020) 609 final, 23 September 2020 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0609&from=EN.

27 Commission (EC), 'EU Security Union Strategy', COM (2020) 605 final, 24 July 2020 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0605&from=EN>

28 Commission (EC) website <https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy_en> accessed 10 June 2022.

29 European Parliament, 'EU Parliament Briefing on EU Secondary Movements of Asylum Seekers in the EU Asylum System (October 2017), https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI(2017)608728_EN.pdf accessed 10 June 2022 ; see also New Pact on Migration and Asylum (n 25).

30 European Police Office (Europol), 'OCTA 2011 EU Organized Crime Threat Assessment', < https://www.europol.europa.eu/publications-events/main-reports/octa-2011-eu-organised-crime-threat-assessment> accessed 3 May 2022; Dunja Mijatovic, 'Time to Deliver on Commitments to Protect People on the move from Human Trafficking and Exploitation' (12 September 2019), <https ://www.coe.int/en/web/commissioner/-/time-to-deliver-on-commitments-to-protect-people-on-the-move-from-human-trafficking-and-exploitation> accessed 25 June 2022.

journeys onwards.[31] These areas, where the presence of organized crime groups is particularly visible, are 'increasingly targeted by law enforcement authorities' which in turn drives migrant smugglers to further displace their activities, such as around the English Channel, where facilitation activities increasingly take place inland (such as in Belgium and the Netherlands).[32]

Interestingly, while the phenomena of migrant smuggling and human trafficking are commonly described in official reports as clearly distinct in light of the absence of exploitation in the migrant smuggling context, the fourth annual EMSC report uses confusing phrasing in this regard, referring to the particular vulnerability to *exploitation* of 'potential irregular migrants in remote locations and so-called bottlenecks'.[33] In the same report, specific attention is paid to secondary migration movements, with respect to which an increase in migrant smuggling services has been observed.[34] As for the impact of Covid-19 measures on the phenomenon, notably vis-à-vis the stranding conditions faced by migrants, Europol signals a general shift in facilitation activities. The agency describes crossings as becoming riskier and dangerous, also for migrants already present in European territories. This shift is explained by restrictive border controls and travel restrictions, *inter alia* leading to an increase in the use of small rubber boats to cross the English Channel and a boost in the practice of hiding migrants in (refrigerated) concealed compartments of trucks.[35] Regarding sea crossings, this dangerous technique often involves migrant smugglers overcharging their fees and making migrants steer the boats, who in turn are sometimes arrested as co-perpetrators of smuggling.[36] Developing narratives outlining the difficulties faced by migrants in transit zones therewith show how vulnerability can be exacerbated *because of* restrictive border policies and actions, including by attracting organised crime groups.

Without discussing extensively relevant EU legal instruments for the governance of smuggled migrants, it is important to highlight that ambiguity with respect to the smuggled migrant extends thereto. Notable in that regard is the adoption of the EU Directive on Short-Term Residence Permits in 2004, which makes visible that the blurry area between smuggling and trafficking is formally acknowledged at the EU level.[37] Besides trafficking victims, the Directive leaves Member States the option of

31 European Migrant Smuggling Centre, 3rd Annual Activity Report 2018 (2019) 12; European Migrant Smuggling Centre, 4th Annual Activity Report 2019 (2020); European Migrant Smuggling Centre, 5th Annual Activity Report 2020 (2021).

32 Ibid.

33 European Migrant Smuggling Centre, 4th Annual Activity Report (n 31) 12.

34 Ibid.

35 European Migrant Smuggling Centre, 4th and 5th Annual Activity Reports (n 31).

36 Maël Galisson, 'Deadly Crossing and the Militarisation of Britain's Borders' (2020) < https://irr.org.uk/wp-content/uploads/2020/11/Deadly-Crossings-Final.pdf> accessed 3 May 2022.

37 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/10.

extending the scope of protection foreseen therein to smuggled individuals. Even if that protection is contingent upon a willingness to cooperate with authorities in the prosecution of perpetrators (and therewith retains a perpetrator-centric character), it represents a step in the direction of the reconceptualization of smuggled migrants in terms of victimization. Belgium is one of the nine Member States who have made use of the facultative option, going even further than required (see below 1.3).[38]

The ambiguous position of the EU and its agencies on the migrant smuggling phenomenon and its intersection with human trafficking, exploitation and abuse in any event becomes increasingly complex. While the position is maintained that it is necessary to distinguish between migrant smuggling and human trafficking, at the same time, crucially, it is also recognized both that there is fluidity between the phenomena and that smuggled (transiting) migrants face (increased) intersectional hazards of an own nature. This state of affairs at the EU level is important to emphasize in that it has implications throughout the EU jurisdiction as a whole, the absence of clarity not being conducive to consistent management by Member States. From the Belgian perspective, this has two implications. From a legal standpoint, the EU legal instruments related to migration, asylum, migrant smuggling, and human trafficking of course also govern the Belgian legal framework, even if there is room to manoeuvre in implementation.[39] Ambiguity at the EU level thus also travels to Belgium. Secondly, with different Member States all acting on the basis of their own understanding of the approach and actions to be taken, their mode of governance can lead to practical consequences for Belgium, such as surges of unauthorised movements (eventually) moving onward or backwards to Belgium.

2. Combatting 'Transmigration' and Migrant Smuggling in Belgium

Focusing further on the factual situation in Belgium, the historical role of this country as a jurisdiction of transit has been securely documented in scholarship.[40] As of 2015, and particularly since the dismantling of the infamous 'Jungle of Calais' by the French authorities in 2016, migratory pressure due to so-called 'transmigration' has increased substantially in the country.[41] As of 2016/2017, 800-1300 migrants

38 Conny Rijken, 'Inaugural Address: Victimisation through Migration' (2016) <https://research.tilburguniversity.edu/en/publications/victimisation-through-migration> accessed 5 January 2022.

39 We can *inter alia* refer to the Facilitator's Package (n 6), Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98 ; Directive 2004/81/EC (n 37); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

40 See Ilse Derluyn and Eric Broekaert, 'On the Way to a Better Future: Belgium as Transit Country for Trafficking and Smuggling of Unaccompanied Minors' (2005) 43(4) International Migration 31.

41 European Migration Network, 'Annual Report on Asylum and Migration Policy in Belgium 2016' (2017) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/02a_belgium_annual_policy_report_2016_en.pdf> accessed 17 May 2022; European Migration Network, 'Annual Report on Asylum and Migration Policy in Belgium 2019' (2020): <https://emnbelgium.be/publication/annual-report-migration-and-asylum-belgium-and-eu-2019-emn> accessed 17 May 2022.

regularly gather in the neighbourhood of the North railway station of Brussels and its Maximilian Park.[42] The zone has become transformed into a humanitarian hub where NGOs and citizens' organizations provide assistance and support for migrants.[43] Many of them do not aspire to remain and become regularized in Belgium but aim to reach the UK. The strategic position of Brussels incentivises the use of its land routes to the UK, to be reached by embarking in lorries in the parking areas along Belgian highways.[44]

In response to rising numbers, since 2015, at the initiative of the then Secretary of State and Asylum and Migration, a 'transmigration' task force has been put in place to combat illegal migration.[45] This was followed in 2018, the issue now seen as a federal priority, with the creation of a special Action Plan on Transmigration in 2018, the primary objective thereof being to prevent the creation of a 'minis-Calais' or other forms of migrant settlements on Belgian soil.[46] The plan included the evacuation of Maximilian Park, considered to represent a pull-factor for so-called 'transmigrants',[47] the intensification of police controls, the creation of an administrative detention centre for transmigrants (subsequently closed in December 2019) and the high securitization of parking areas along the highways. Due to the Covid 19 pandemic, Maximilian Park was evacuated by the authorities in 2020. Since then, migrants in transit are more dispersed, but many remain in the North Station neighbourhood. The humanitarian hub established in that region moved to another building and currently shelters hundreds of migrants in transit providing direct humanitarian assistance such as through the provision of food, clothes, and medical care.[48]

As highlighted in the former National Action Plan against Migrant Smuggling (2015-2019), and reiterated in the new one (2021-2015),[49] actions undertaken on Belgian territory to push back transmigration often focus exclusively on that objective, without necessarily considering the human rights position of the migrants from a

42 See Tom Guillaume, 'Immersion dans un Centre de la Croix-Rouge' *La Libre Belgique* (1 February 2021).

43 Elsa Mescoli and Antoine Roblain, 'The ambivalent relations behind civil society's engagement in the "grey zones" of migration and integration governance: Case studies from Belgium' (2021) 91 Political Geography 102477.

44 Robin Vandevoordt, 'Resisting Bare Life: Civil Solidarity and the Hunt for Illegalized Migrants' (2021) 59(3) International Migration 47; Myria, 'Myriadoc 10: Belgium, on the Road to the United Kingdom' (2020) <https://www.myria.be/en/publications/myriadoc-10-belgium-on-the-road-to-the-united-kingdom> accessed 24 January 2021.

45 European Migration Network, 'Belgian Annual Report on Asylum and Migration Policy in 2015' (2016) < https://emnbelgium.be/publication/annual-report-asylum-and-migration-policy-belgium-and-eu-2015-emn> accessed 24 January 2021.

46 Belgian House of Representative, 'Note de Politique Générale. Asile et Migration' (26 October 2018), (Doc 54 3296/021).

47 The neologism 'transmigrant/transitmigrant' which appeared in 2015 refers to a migrant which only passes through or reside temporarily in the territory and aims to reach the United Kingdom. This term which doesn't refer to any formal legal category creates a distinction between migrants who are applying for asylum in the country and those who are not. See Vandevoordt (n 44).

48 Mescoli and Roblain (n 43) ; Guillaume (n 42).

49 Service de Politique Criminelle, 'Plan d'Action Trafic des Êtres Humains 2015-2019' (2019) <https://www.dsb-spc.be/web/index.php?option=com_content&task=view&id=172&Itemid=225> accessed 23 May 2022 ; Service de Politique Criminelle, 'Plan d'Action Trafic des Êtres Humains 2021-2025' (2021) <https://www.dsb-spc.be/web/index.php?option=com_content&task=view&id=172&Itemid=225> accessed 23 January 2021.

(criminal) victimization perspective. Thus, in active policy and implementation, legally prescribed protection, which is available not only for potential victims of human trafficking, but also for 'victims' of aggravated forms of migrant smuggling, remains under administered.[50]

The problematic being recognized, there are calls in Belgium to rectify the situation. In 2020, the National Rapporteur on human trafficking and migrant smuggling (Myria), clearly underlined the links between migrant smuggling and transit migration, in a report specifically dedicated to the matter.[51] The National Action Plan (2015-2019) invites relevant actors (e.g. federal and local police) to approach migrant smuggling and human trafficking in their globality and emphasizes the need to check, during (migration) control operations, not only for potential signs of human trafficking, but also aggravated forms of migrant smuggling, so that protective mechanisms available by law can be operationalized. Calls are made for the continuation of training efforts for police officers in this regard.[52] Moreover, there is an observable growing awareness of various actors, including some regional Governments,[53] of the vulnerability of migrants in transit, in association with the potential for exploitation and human rights abuses.

In recent years, attention has also been devoted to the treatment of migrants in transit by the police. Findings indicate that the latter are not incentivized to regard them as potential victims, in a human rights or criminal justice sense. In 2018, the NGOs 'Médecins du Monde' and 'Humain' issued a report based on quantitative and qualitative research establishing the existence of physical and psychological police violence towards migrants stranded in Maximilian Park and its area.[54] The Permanent Oversight Committee of the Police Service (Comité P) also launched an investigation into police control and detention of migrants taking place during large-scale administrative arrest operations (often in parking areas along the highways).[55] Whereas the focus of these two reports is not completely aligned, another ad hoc report of the Myria on the topic underlines important commonalities, emphasizing that in briefings, police forces took little to no account of the guidelines on human

50 Ibid.

51 Myria 2020 (n 44).

52 National Action Plan (2021-2025) (n 49). See also Myria 2020 (n 44).

53 Ibid; See the Circular Letter on the Situation of Migrants in Transit in Wallonia (20 September 2020) < https://interieur.wallonie.be/sites/default/files/2020-10/20201001164241354.pdf> accessed 5 January 202; see also the collaborative report created by 5 NGOs on the topic of migrants in transit in Belgium by Caritas International, 'Migrant en Transit en Belgique' (February 2019) < https ://www.caritasinternational.be/wp-content/uploads/2019/02/Migrants-en-transit-en-belgique.pdf> accessed 5 January 2021.

54 Médecins du Monde, 'Violence Policières envers les Migrants et les Réfugiés en Transit en Belgique' (October 2018) <https://medecinsdumonde.be/actualites-publications/publications/violences-policieres-envers-les-migrants-et-les-refugies-en> accessed 5 January 2021; See also Mescoli and Roblain (n 43) on the securitization approach adopted at the Federal level to organise frequent police raids to disperse and at times arrest irregular migrants.

55 Comité P, 'Le Contrôle et la Détention de Transmigrants par la Police à l'Occasion d'Arrestations Administratives Massives' (2019) <https://comitep.be/document/onderzoeksrapporten/2019-02-06%20transmigrants.pdf> accessed 5 January 2021.

trafficking, migrant smuggling or the protective status reserved for victims of trafficking and aggravated forms of smuggling,[56] pointing to a discrepancy between the law and practice as far as (vulnerable) migrants in transit spaces using smuggling services are concerned.

3. Legal Framework: A Protective Approach Towards Victims of Aggravated Forms of Migrant Smuggling

That discrepancy arises from the legislative change brought about in 2005, through which the aggravating circumstances for trafficking and smuggling were harmonized. Recognizing the 'dramatic consequences' of both offences, with an eye on maintaining coherence and consistency,[57] article 77*quater* of the Foreigner's Act of 15 December 1980 was amended to provide that, if aggravated circumstances are found in migrant smuggling cases, the smuggled person should be able to access the protective status normally reserved for human trafficking victims.

On the basis of the insights gathered through interviews with Belgian experts,[58] the following aggravating circumstances[59] can often be found in smuggling situations: abuse of a situation of vulnerability of an individual (which includes his/her irregular or precarious administrative situation) in a way that the individual has no real and acceptable alternative to submit her/himself to the abuse; the endangerment of the victim's life either deliberately or through gross negligence; the (direct or indirect) use of fraud, violence, the use of threats or other forms of coercion (e.g., debt bondage), abduction, deception and abuse of power.

The design of the Belgian approach to both migrant smuggling and human trafficking is multi-disciplinary in nature,[60] all actors in accordance with their own expertise having a specific role within established procedures. Particularly important are the prosecutors specialised in human trafficking and migrant smuggling, the reception centres for victims present in each of the 3 Regions of the country, the

56 Ibid; Myria, 'Police et Migrants de Transit' (2019) <https://www.myria.be/files/Note_Police_et_migrants_de_transit.pdf> accessed 27 January 2021.

57 Belgian House of Representative, 'Explanatory Statement' (10 August 2005) 11. <https://www.lachambre.be/doc/flwb/pdf/51/1560/51k1560001.pdf> accessed 9 July 2021.

58 Semi-structured interviews were conducted with 17 experts' respondents specialized in the migrant smuggling and human trafficking field between 2018 and 2020 (e.g., specialised prosecutors, Federal Police Investigators, attachés from the Ministry of Justice, Foreigner's Office). See also following sub-sections.

59 For the complete list of aggravating circumstances see, article 77q*uater* of the Law on Foreigner of 15 December 1980. See Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers. See also further at 3.2.

60 Circular COL 5/2017 of 23 December 2016 Implementing a Multidisciplinary Cooperation with regard to Victims of Human Trafficking and/or Certain Aggravated Forms of Human Smuggling available on the website of the Public Prosecutor's Office < https://www.om-mp.be/fr/savoir-plus/circulaires> accessed 22 January 2021. For detailed information on the procedure, see also the two English reports of the Group of Experts on Action against Trafficking in Human Beings (GRETA) on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium issued respectively in 2013 and 2018 available on the website of the GRETA <https://www.coe.int/en/web/anti-human-trafficking/belgium> accessed 10 July 2021.

federal police, the local police, the Foreigner's Office and the Labour Inspectorate. The protective status comes with rights (e.g., a reflection period of 45 days, the allocation of temporary then potentially permanent residence permits), but also with conditions and obligations. Amongst other things, individuals who are referred to as potential victims are required to cooperate with authorities by making relevant declarations, be accompanied by one of the three reception centres for victims (NGOs) and cut ties with presumed perpetrators, while provisory status can only be granted if an investigation or judicial proceedings are still ongoing.

To an extent, this system has an impact on the situation of the smuggled migrant. Belgian case law provides at least two indications that national courts regard smuggled migrants as victims from a criminal law perspective. Firstly, they are referred to as such in verdicts against perpetrators. In a 2017 judgment, the Brussels Court of Appeal[61] found that the offence had been committed through abuse of the vulnerable situation of the migrant victims, leaving them with no other choice than to undergo the smuggling, adding that the fact that they had perhaps in part contributed to their own vulnerability, did not take away from that. The Court of Appeal explicitly held that the offences were serious and especially morally objectionable, not only because of the impact on public order and security, but also because of the effect on the individuals, being vulnerable persons from whom money had been obtained.[62] Secondly, Belgian Courts allow third parties, notably Myria, to join criminal proceedings against smugglers as civil parties on behalf of smuggled migrants, a procedural position reserved for criminal victims or those acting on their behalf.[63]

The recognition of victimization is weaker however where aggravating circumstances are not at issue. In 2015, the Correctional Court of Louvain[64] also dealt with the claim of an individual smuggled migrant who had joined the criminal proceedings, as a victim of both trafficking and aggravated smuggling. Not finding trafficking or the *aggravated form* of smuggling to have been proven in that case, the Court rejected the claim, because it had not been proven that the suspect had abused the particularly vulnerable position of the 'foreigners', or had directly or indirectly made use of trickery, violence, or any other form of coercion.

Nonetheless, Belgian Courts seem to have developed a sensitivity to the trafficking/smuggling nexus, particularly induced to do so via the special legislation creating a

61 Bruxelles (13e ch. corr.), 17 May 2017.

62 See also the judgment Corr. Anvers (8e ch.),8 December 2016 in which the Court shed light on the abuse of the precarious administrative, social, and financial situation of the smuggled victim. For an overview of the jurisprudence see the website of the National Rapporteur Myria gathering key court cases on migrant smuggling <https://www.myria.be/fr/jurisprudence/eyJyZXN1bHRfcGFnZSI6ImZyXC9qdXJpc3BydWRlbmNlIiwiY2F0ZWdvcnkiOiIzMzEiLCJyZXF1aXJlX2FsbCI6ImNhdGVnb3J5In0> accessed 12 January 2022.

63 Ibid.

64 Corr. Louvain (17e ch.), 12 May 2015.

bridge between the phenomena in the event of aggravated circumstances.[65] Where cases involving those do come to criminal courts, the special system does therewith seem to have important effect.

4. …Scarcely Used in Practice

The protective status for aggravated smuggling is scarcely used in practice however. Based on the national rapporteur's statistics, between 2017 and 2019, 48 victims used the protective procedure, while respectively, 476, 535 and 531 migrant smuggling cases were introduced by the Public Prosecution Office in the same years.[66] In 2019, only ten victims used the procedure, the lowest figure seen in the last ten years.[67] In line with national jurisprudence[68] and to underscore that migrants intercepted in lorries in parking areas qualify as victims of aggravated forms of migrant smuggling, expert respondents explained that they can establish the aggravated circumstances automatically in the case of irregular migrants being transported to England and that it would be inconceivable for them to not be considered as vulnerable. The fact that migrants often significantly overpay for their journeys was also considered by respondents as sufficient proof of abuse.[69] These views emphasize the discrepancy between the law and reality,[70] showing, as summarized by one specialised Prosecutor, that '*the system is not working*'.[71]

Semi-structured interviews with Belgian experts conducted by the first author[72] provide insights as to the distinct causes of the shortcomings. Firstly, many respondents explained that smuggled migrants have no interest in entering the protective status, as their goal is to stay 'off the grid'[73] and reach the UK at all costs. The threshold to enter the status was also considered 'too high',[74] particularly because of the condition of turning against one's smuggler.[75] A further impediment identified was the fear

65 Ibid. The Correctional Court of Louvain held that the line between human trafficking and human smuggling is thin, and that human smuggling can evolve into human trafficking when free will is brought under pressure.

66 Myria, 'Rapport Annuel Traite et Trafic des Êtres Humains 2018 : Mineurs en Danger Majeur' (2018) <https://www.myria.be/fr/publications/rapport-annuel-traite-et-trafic-des-etres-humains-2018-mineurs-en-danger-majeur> accessed 12 January 2021. Myria, 'Annual Evaluation Report 2019. Trafficking and Smuggling of Human Beings. Empowering Victims' (2019) < https://www.myria.be/en/publications/2019-annual-report-trafficking-and-smuggling-of-human-beings> accessed 12 January 2021; Myria, 'Annual Evaluation Report 2020. Trafficking and Smuggling of Human Beings. Behind Closed Doors'. (2020) <https://www.myria.be/en/publications/2020-annual-report-trafficking-and-smuggling-of-human-beings> accessed 12 January 2021.

67 Myria, 2020 (n 44).

68 Charles-Eric Clesse, *La Traite des Êtres Humains. Droit Belge Eclairé des Législations Française, Luxembourgeoise et Suisse* (Larcier 2013).

69 Interview, Federal Police Investigator in Migrant Smuggling.

70 Interview, Specialised Prosecutor 1.

71 Interview, Specialised Prosecutor 2.

72 See explanations in footnote 56.

73 Interview, Director NGO.

74 Interview, Respondent 3 Foreigner's Office.

75 Interview, Specialised Prosecutor 2 and 3.

of being sent back to another EU country via the Dublin III regulation.[76] Secondly, informational deficiencies with respect to the option of the special status became apparent,[77] the lack of authorities' awareness of legal procedures, due to insufficient training and/or sensibilization of first line officers, being acknowledged by several respondents.[78] Thirdly, time and operational capacity issues were pointed out in relation to the administrative and judicial formalities involved.[79] Shortages in this sense were identified by the majority of respondents at all levels, from police officers to the prosecutors, as important concerns. Fourthly, dealing with migrant smuggling is located at the crossroads of distinct fights, namely against illegal migration, against human trafficking and for the maintenance of safety and public order. This entails a problematic scattering of powers between different actors, whose respective agendas and priorities do necessarily align. Finally, the absence of unicity, structural and harmonized solutions, also at the European level, were recognized by most respondents as key challenges.

B. Turning Empirical Evidence into Human Rights Currency

1. Deference Practices in the Migration Field

Registering empirical realities in aid of legal reform is always useful but becomes critical where advocated change is likely to conflict with policy goals. The Belgian case clearly reveals an under-addressed problematic with respect to transiting smuggled migrants. The fact remains, however that, even if fortified in this jurisdiction, the weaker position of the smuggled migrant and the endurance of the legal trafficking/smuggling dichotomy follow from a conscious choice. Ultimately this can be related to the strong juncture between migrant smuggling and robustly guarded (national and regional) (im)migration and asylum policies. Challenges presented in that regard extend to any room the ECtHR may see to manoeuvre in bringing about paradigm shifts in the conceptualisation of the transiting smuggled migrant.

As highlighted by Baumgärtel, 'the politicized question of migration has been a persistent headache for the ECtHR', with criticism of the Court's handling of the theme generally coming from 'diametrically opposed perspectives,'[80] the ECtHR being charged simultaneously with judicial activism and under-intervention in this terrain.[81] Where trafficking is concerned, the Court has been able to enhance protection *inter*

76 Interview, Respondents 1, 2 and 3 Foreigner's Office.

77 Interview, Investigative Journalist; Interview, Volunteer Citizen's Platform.

78 Interview, Respondents 1 and 2 Ministry of Justice.

79 Also emphasised in the recent National Action Plan 2021-2025 (n 49) section 2.2.3.

80 Moritz Baumgärtel, 'Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights' (2021) 38(1) Netherlands Quarterly of Human Rights 12.

81 Ibid. 12-13.

alia by relying on the broad and strong legal recognition that criminal victimization associating with that phenomenon requires rigorous protection. While trafficking victims are not always irregular migrants (although, in ECtHR trafficking case law, they often are),[82] all smuggled migrants are always irregular. This potentially lands the plight of the smuggled migrant in the centre of a difficult deference problematic, within the forcefields of what Dembour has dubbed the 'Strasbourg reversal.' In this approach, notwithstanding important successes which have been achieved by the Court,[83] the ECtHR 'generally privileges state sovereignty over migrants' rights,' meaning that in the totality of case law, it 'rarely' finds for migrant applicants.[84]

Dembour's 'reversal' refers to a particular formula used by the Court, in which it declares Member States to be 'entitled, as a matter of international law and subject to (…) treaty obligations, to control the entry of aliens into its territory and their residence there [...]'.[85] This principle has more than abstract or symbolic impact. Rather, it is 'just one particularly striking pointer that indicates that the Strasbourg case law is not resolutely on the side of migrants' human rights.'[86] Concrete strategies give the principle actual effect. These include 'an interpretation of substantive rights that makes it difficult for violations to be declared and processual choices that tend to leave states off the hook.'[87] Over time, the principle has gained importance. While when it first 'appeared' in case law, '(i)t was simply presented as one important consideration to bear in mind amongst others,'[88] the Court subsequently opted to prelude its assessments with it as an opening consideration, '(reaffirming) at the outset the 'entitlement'.[89]

In the broader European context, the prerogative becomes stronger still through consideration of the joint interests of Member States in this respect. The Court namely not only holds that 'Contracting States have the right to control the entry, residence and removal of aliens' and to 'establish their own immigration policies' as a self-standing national entitlement, but also '*potentially in the context of bilateral cooperation or in accordance with their obligations stemming from membership of the*

82 See *Siliadin v. France* 73316/01 (ECtHR, 26 October 2005); *C.N. v. United Kingdom* 4239/08 (ECtHR, 13 February 2013); *Chowdury and Others v. Greece* 21884/15 (ECtHR, 30 March 2017); *Rantsev v. Cyprus and Russia*, 25965/04 (EctHR, 7 January 2010); *J. and Others v. Austria* 58216/12 (ECtHR, 17 January 2017); *S.M. v. Croatia* [GC] 60561/14 (ECtHR, 25 June 2020)*; V.C. L and A.N. v. United Kingdom* 77587/12 and 74603/12 (ECtHR, 5 July 2021); *Zoletic and Others v. Azerbaijan* (n 23). In *C.N. and V. v. France*, the applicants were French nationals who were born in Burundi. However, facing threats to be sent back to Burundi by their aunt, the victims believed that her residence in France was irregular. See *C.N. and V. v. France* 67724/09 (ECtHR January 2013).

83 Dembour (n 17) 19 and 22. With respect to the protection provided for asylum seekers, see also Juan Ruiz Ramos, 'The right to liberty of asylum-seekers and the European Court of Human Rights in the aftermath of the 2015 refugee crisis' (2019) 39 REEI 45.

84 Dembour (n 17) 19.

85 Ibid 29-30, citing *Üner v the Netherlands* [GC] 47410/ 99 (ECtHR, 18 October 2006), para 54,

86 Dembour (n 17) 32.

87 Ibid.

88 Ibid 30.

89 Ibid 29-30.

European Union' [emphasis added].[90] Underlining 'the importance of managing and protecting borders for distinct purposes such as preventing threat to internal security, public policy and public health',[91] the Court also has regard for the joint 'challenges facing *European States* [emphasis added] in terms of immigration control as a result of the economic crisis and recent social and political changes (…)'.[92] Deference to policy in this respect thus plays out in two manners, not only with respect to *national* immigration policies, but also with respect to the right of States to fulfil international obligations and, in that light, implement common policies and mindfulness of the disparate (burdens) which may rest on different States.

The 'reversal' takes effect, in some shape or form, even for (irregular) migrants who, under various international law sources as well as on the basis of standing ECtHR case law, qualify for greater protection because of a special status (e.g., asylum seekers).[93] Nevertheless, even if criticized for not intervening more because international law sources prescribe further protection for them, the Court is able to feed off those to significantly restrict discretion where such rights bearers are concerned.[94] For the smuggled migrant, the absence of such a springboard means that the prerogative enjoyed by Member States in the determination and effectuation of their (national and common European) asylum and migration policies may be conceived as presenting greater challenges for the Court in prescribing the same or similar positive criminal justice protective duties with respect to smuggled migrants as it does for trafficking victims.

2. (Non-)deference in the Context of Criminal Justice Related Positive Obligations

Nevertheless, impediments may exist in the general development of rights of 'particular benefit to migrants',[95] but there is 'nothing in international human rights law (which) would inherently prevent the ECtHR from adopting more progressive interpretations of the ECHR'.[96] Taking as a point of departure that deference in migration is a reality - and to an extent is legitimate - there are however ways to manage it. The Strasbourg reversal connects to the principle of subsidiarity and the margin of appreciation doctrine.[97] Recently fortified by the entry into force of the 15th Protocol to the Convention (through which *inter alia* a new recital has been added to

90 *N.D. and N.T. v. Spain* [GC] 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 167.

91 Ibid para 168.

92 Ibid para 169.

93 See Ruiz Ramos (n 83) in the context of administrative detention of asylum seekers under articles 5 and 3 ECHR.

94 Trafficking victims need not be migrants, the ECtHR also recognizing internal trafficking of nationals as a typology also requiring positive obligations protection (see Section 4).

95 Dembour (n 17) 21.

96 Ibid 19.

97 See discussing this relationship, Ruiz Ramos (n 83).

the Preamble, with an explicit reference to them),[98] these foundational interpretative principles are used to generally navigate the role of the ECtHR vis-à-vis national discretion.[99]

Importantly, they are not applied in a set manner. Firstly, ECtHR adjudicative technologies include an array of devices which intrinsically direct *towards* ECtHR engagement. The principle of autonomous interpretation, the maxims that the Convention is a living instrument, which must be interpreted 'evolutively and dynamically,' in accordance with the 'object and purpose' of the Convention and that protection cannot be 'theoretical and illusory' but must be 'practical and effective',[100] all present powerful tools which can reduce national discretion. Notably, these devices have played an important role in the development of criminal justice related positive obligations case law relating to trafficking.[101] Again, the interpretative principle that the ECHR must, as an instrument of international law itself, be read in harmony with other such sources,[102] does not currently push towards enhanced protection in the context of smuggling. The same holds with respect to the consensus method,[103] in as far as the Court cannot gauge common ground amongst Member States in that respect. Nevertheless, harmony and consensus considerations can also work in favour of the smuggled migrant. Even if they are only slight, any shifts in (softer) international law sources, or emerging standards at national levels,[104] can be picked up through early signalling and operationalized by the ECtHR.[105]

Secondly, deference determination also occurs through a complex algorithm in which different variables and interests are weighed against each other. The nature of a (policy) domain is certainly amongst those. There are clearly identifiable terrains with respect to which the Court by default adopts a position of more than standard deference, because it finds the subject matter to fall under a hard-core public law

98 Council of Europe, Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS, No.: 213 (31 October 2021). See also Ruiz Ramos (n 83).

99 See also in that light the 16th Protocol, which has a similar objective. Council of Europe, Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, 2 November 2013 (CETS, No. 214).

100 See amongst many other sources, *M.A. v. Denmark* 6697/1 (ECtHR, 9 July 2021) para 162.

101 See inter alia *Rantsev* (n 82) para 273-277 and the Grand Chamber confirming*, S.M.* (n 82) para 286-292.

102 See amongst other judgments, *Correia de Matos v. Portugal* 56402/12 (ECtHR, 4 April 2018) para 134. See also with respect to obligations deriving from international law, the Separate Opinion of Judge Pinto de Albuquerque in *Söderman v. Sweden* [GC] 5786/08 (ECtHR, 12 November 2013).

103 Jens Theilen, *European Consensus Between Strategy and Principle: The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication*. (Nomos Verlagsgesellschaft 2021).

104 See for an illustration, *M.H. and Others v. Croatia,* 15670/18 and 43115/18 (ECtHR, 18 November 2021), paras 200 and 236, the Court, in the context of complaints of unlawful deprivation of liberty and detention conditions, responding to 'increasing' calls of 'various international bodies' to 'expeditiously and completely cease or eradicate the immigration detention of children'.

105 See also Ruiz Ramos (n 83), on the importance of interpretation of asylum-seekers rights in light of broad international standards. See also with respect to the Court's reliance on various soruces, including hard and soft instruments and consensus, Ksenija Turković, 'Challenges to the Application of the Concept of Vulnerability and the Principle of Best Interests of the Child in the Case Law of the ECtHR Related to Detention of Migrant Children', in Başak Çalı, Ledi Biancu, Iulia Motoc (eds) *Migration and the European Convention on Human Rights* (Oxford University Press 2021).

prerogative. Thematically, the domain of (im)migration and asylum indeed squarely falls under those (although it is certainly not the only one).[106] However, in case law at large, but *also* in such 'deference by default' areas, whether or not the Court will opt to intervene is also determined on the basis of the facts and circumstances of the case, the (vulnerability) profile of the rights bearer and the nature and the aspect of the rights at stake, which are variably more or less susceptible to deference considerations.

As for the nature of rights at stake and the contexts in which they are invoked, Dembour analyses deference in relation to particular types of issues, attaching to different (aspects and types of) rights. These are issues relating to residence, family reunification, access to social services, deportation and removal in the context of rights guaranteed mainly under art. 8 and 6 (although sometimes also under art. 3 ECHR),[107] all inherently attaching closely to national policy prerogatives in migration management. National prerogative has (or should have) greater competition however where other issues and rights are concerned. Ruiz Ramos' examination of the ECtHR's management of margins in the context of administrative detention of asylum-seekers, under art. 5 par. 1 (f) and 3 ECHR[108] is of particular interest in this regard. Analyzing what the impact of the 2015 refugee crisis has been on the ECtHR's approach, he signals that, while deference was already strong, rather than the crisis leading to amplified protection, it has 'in some cases' become both 'clearer' and 'expanded'.[109] Associating that with 'political tensions,' he concludes 'that European State´s renewed preoccupation with strengthening their borders after 2015 has led the Court to widen the scope of the margin of appreciation,'[110] *inter alia* on the basis of its 'consideration (…) of States' difficulties in managing a migration crisis'.[111] Critical in his approach is that his review is oriented on specific rights, in the context of a specific theme (detention), meaning that his examination also extends to distinctions which can be made with respect to the detrimental impact the Strasbourg reversal can have on different rights. Finding that the reversal has also taken hold in the context of art. 5 ECHR (with the Court '(t)aking into account the context of the European refugee crisis as a way to justify a lower human rights protection'), he emphasizes that it is has 'more worryingly', also done so where art. 3 ECHR is concerned, in light of the fundamental nature of this provision.[112]

106 For an overview of such domains see separate opinion of Judge Pinto de Albuquerque in *Correia de Matos* (n 102).

107 Dembour (n 17). See more extensively in this respect and on the 'Strasbourg reversal', Marie-Bénédicte Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).

108 Ruiz Ramos (n 83).

109 Ibid 43.

110 Ibid.

111 Ibid 38.

112 Ibid, generally and 37-38.

The latter consideration would hold *a fortiori* in the context of the rights issues of concern here, being positive obligations in relation to (i) critical rights, invoked in (ii) a criminal justice context. Criminal justice related positive obligations case law with respect to trafficking confirms that logic. Not only is the 'Strasbourg reversal formula' not invoked therein by the ECtHR, but mention of the margin of appreciation doctrine (or related devices) is scarce. Deference is thus not part of the mainframe of principles and standards governing this typology of obligations. The Court does cap different types of positive obligations, but, endeavoring to not impose 'impossible or disproportionate burdens,' does so via testing against proportionality(-type) considerations.[113] In this context, testing does not focus on national prerogatives with respect to policy choices, but rather constitutes mindfulness of the limits of the ability of states to protect against crime through positive action.

In criminal justice related positive obligations case law, there is one (important) context where the Court leaves room for national (policy) choices. As discussed below, that is where (horizontal) rights abuses are not found to be sufficiently grave to necessarily require State intervention through *criminal justice means*. In such cases, other remedies, such as civil ones, may be sufficient.[114] However, where the Court itself determines with respect to more serious abuses that they can only be dealt with via criminal law enforcement, a threshold is crossed. All criminal justice related obligations then come into effect, with no room for national preferences for a different approach. If the Court were to determine, as it has done with respect to trafficking, that particular types of smuggling of migrants with a particular profile entails such a type and gravity of abuse, the fact that the victim is a migrant and that stringent protective standards would undermine European or national migration policies, should not be a concern.[115]

113 See *inter alia*, *Rantsev* (n 82) and para 287, *Zoletic* (n 23), para 188.

114 See further, Section 3.

115 See *M.S.S. v. Belgium and Greece* [GC] 30696/09 (ECtHR, 21 January 2011). In the context of the assessment of the complaint in the case of a violation of art. 3 ECHR because of detention conditions, *M.S.S. v. Greece and Belgium*, paras 223-224, the Court, demonstrated understanding for the 'difficulties', 'burden' and 'pressure' experienced by EU external border states 'in coping with the increasing influx of migrants and asylum-seekers', a situation 'exacerbated by the transfers of asylum-seekers by other member States in application of the Dublin Regulation', made 'all the greater in the (…) context of economic crisis', also in light of 'the capacities of some of those States'. Nevertheless, it also held that 'having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision' so that it did not 'accept the argument of the Greek Government that it should take these difficult circumstances into account when examining the applicant's complaints under Article 3'. See also *Ilias and Ahmed v. Hungary* [GC] 47287/15 (ECtHR, 21 November 2019), para 162. In the context of a violation of art. 3 ECHR due to the expulsion of the applicants in that case to Serbia, in light of the Hungarian government's argument that 'all parties to the Convention, including Serbia, North Macedonia and Greece, have the same obligations and that Hungary should not bear an additional burden to compensate for their deficient asylum systems', where the Court held that 'this is not a sufficient argument to justify a failure by Hungary, which opted for not examining the merits of the applicants' asylum claims, to discharge its own procedural obligation, stemming from the absolute nature of the prohibition of ill-treatment under Article 3 of the Convention.'

3. Evidence-based Adjudication and Recognition of (particular) Vulnerability

Taking the step to underscore deficiencies in the framing of the smuggled migrant as a victim in a criminal law sense would however still require a forceful stand on the part of the Court and a legitimizing basis to counter resistance which may arise, in light of the greater burden which would be created for Member States, with respect to a large group of rights bearers. It is held here that the ECtHR can justifiably expand protection for transiting smuggled migrants by doing so in a *differentiated and evidence-based manner*, bolstering enhanced protection through reliance on empirical evidence pointing to particular needs. Differentiation is key because the rights needs and profiles of the migrant - 'anybody outside their country of origin'[116] - are highly variable, meaning that the 'smuggled migrant' also does not constitute a homogenous category. Not all smuggled migrants or smuggling experiences should therewith qualify for this type of protection. As for evidence-based appraisal, while empirical information is used in a myriad of ways, in different types of decisions by the ECtHR, notably also in trafficking case law, discussion in this section will focus on its potential for deployment in the concept of (particular) vulnerability. In framing the needs of the transiting smuggled migrant, this notion holds great potential as an ordering device and can function as a channel to convert real-life issues into protection. Used as an exploratory device in scholarship, the vulnerability concept also has important practical application as a sorting mechanism in ECtHR case law.[117] Reviewing the Court's application of the concept, vulnerability theorists examine its capabilities with respect to the reduction of protective deficiencies, including through sounder theoretical grounding, enabling its ordered deployment in litigation, with an eye on better approximation of the lived realities of (distinct types of) rights bearers.[118]

Two main queries of vulnerability scholarship are of import here, namely how (particular) vulnerability can be identified and, once recognized, what legal effect that should have.[119] While the first question will be dealt with here, the second will be discussed in the next section, as it is more appropriately embedded in arguments

116 Dembour (n 17) 19. See also Baumgärtel (n 80) 22, holding that '(…) vulnerabilities take various degrees and expressions', so that 'in that sense, 'migrants' (and even 'asylum seekers' more narrowly speaking) truly are not a homogenous group'.

117 For an overview on the potential and pitfalls of the vulnerability concept for human rights see (i) Martha Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133; (ii) Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism, 10; Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) International Journal of Constitutional Law 1056; Alexandra Timmer, Moritz Baumgärtel, Louis Kotzé, and Lieneke Slingenberg, 'The Potential and Pitfalls of the Vulnerability Concept for Human Rights', (2021) 39(3) Netherlands Quarterly of Human Rights; So Yeon Kim, 'Les Vulnérables: Evaluating the Vulnerability Criterion in Article 14 Cases by the European Court of Human Rights' (2021) 41(4) Legal Studies 617; Baumgärtel (n 80); Ruiz Ramos (83). See also, with respect to the vulnerability of migrant children, Turković (n 105).

118 See for her proposed alternate ('autonomy') approach to protection of the vulnerable in the context of art. 14 ECHR (as well as a critical discussion of the Court's strategies with respect to art. 14 ECHR, including through its use of the vulnerability notion), Kim (n 117).

119 Baumgärtel (n 80) 13, 17-18, 23-27, including with respect to positive obligations (ibid 25), also in relation to human trafficking (ibid 24), referring in that last regard to (risks) of harm and in relation thereto, 'factors that change with the degree of migratory vulnerability' (ibid 25).

relating to the scope and locale of protection under the ECHR. Briefly discussing the vulnerability concept at a theoretical level (2.4), some remarks are made with respect to the Court's ability to register new forms of (particular) vulnerability (2.5). Building thereupon, utilizing insights to be extracted from recent scholarly and NGO research and enriching those with concrete empirical markers gathered through own research, a basis is laid for a particular (legal) vulnerability construct for the smuggled transiting migrant, based on own traits (2.6) as well as other external factors (2.7). Critical to signal is that (empirical and scholarly insights) increasingly point to strong conceptual similarities in smuggling and trafficking phenomena. While it may not be necessary to (fully) equate smuggling and trafficking experiences, on the basis of empirical evidence, the Court can break through protective disparities in the trafficking/smuggling dichotomy, or at least provide some form of similar protection for the smuggled migrant where necessary, engaging in that regard also with the feature of being in transit.

4. Theoretical Reflections on the Vulnerability Concept

In reviewing the manner in which the vulnerability notion is and should be enacted in human rights law, including in ECtHR litigation, a critical question is what the meaning of vulnerability is and who thus is to be seen as vulnerable.[120] For the purpose of developing 'a workable legal principle of *migratory vulnerability*', Baumgärtel, drawing 'primarily' on Fineman's 'seminal conception of vulnerability' - posited by her as 'a substantive critique of the limitations of legal and especially formal equality' - depicts her argument as holding that 'much of legal theory has been centred around an illusory 'universal human subject' defined by 'autonomy, self-sufficiency, and personal responsibility'.[121] Fineman elaborates that this subject, around whom '(…) dominant political and legal theories are built' is 'presumed' to be 'a competent social actor capable of playing multiple and concurrent societal roles' and has 'the capacity to manipulate and manage (…) independently acquired and overlapping resources'.[122] Where human rights are 'calculated' departing from this archetype, this corresponds to the use of 'group vulnerabilities', whereby certain groups of persons are designated such a status, through comparison with this competent actor, thus on the basis of 'identity categories,'

120 Peroni and Timmer (n 117). See also further sources in (n 117).

121 Baumgärtel (n 80) 14, referring to Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism, 10. See also Baumgärtel (n 80) 13, for his reference to his book, Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (CUP 2019) 5.

122 Fineman (n 117 (ii) 10. See also Peroni and Timmer (n 117) 1061-1062 and 1085 and Timmer et al. (n 117) 194-195. This resonates well with the particular ideal profile of a 'male, heterosexual, white, able-bodied Christian (…)' used in 'comparator approach' used in the Court's 'classic' testing model for art. 14 ECHR complaints (as an alternate to its later use of the notion of vulnerability, Kim (n 117) 620-621 and 623-624, referring with respect to that depiction to Rory O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies 228. From the viewpoint of the transiting smuggling victim, an added characteristic would be that the rights bearer is a person regularly and stably residing in Europe, living with a level of socio-economic welfare associated with that status. See also in this respect Stoyanova (n 18) (i) 207, where she holds that 'often migrant victims of crime do not have secure status in the country', for which reason 'they are in need of a specific form of protection'.

the shortcomings of this 'equality' approach travelling to the use of 'group vulnerability' by the ECtHR, for which reasons the Court's 'usage' thereof 'can (…) be questioned.[123]

Summarily stated, Fineman's argument is for recognition of 'universal' vulnerability, meaning that there is an 'ever-present possibility of harm, injury, and misfortune',[124] which is 'inherent in the human condition', but impacts persons differently.[125] Using (set) 'identity categories' *inter alia* creates a hazard that individual vulnerabilities not aligning therewith will be excluded, or, conversely, that categories will be drawn too broadly.[126] Discarding them allows for a more fine-tuned approach, with a focus on 'vulnerability as a 'socially embedded' process that will affect persons differently (…)'.[127] This brings with it recognition of vulnerability as 'a socially induced condition' and 'provides a means of interrogating the institutional practices that produce the identities and inequalities in the first place'.[128] Crucially, this 'promotes' the concept of the 'responsive state' as an important part of the apparatus creating vulnerability and resolves into state responsibility to redeem and build (back) resilience.[129]

Scholars point out that the hazard to such an individualized universal approach is that vulnerability becomes 'so broad as to obscure the needs of specific groups and individuals'.[130] In litigation, where the use of taxonomies is a practical necessity, the universal notion moreover does not provide a workable legal concept.[131] Peroni and Timmer point out however that the ECtHR's use of 'group vulnerability' is not irreconcilable with the universal notion.[132] Referring to an ECtHR judge's depiction that the Court sees 'all applicants (as) vulnerable', but some as 'more vulnerable than others',[133] these authors see a merger between the two approaches,[134] while further alignment is to be found in the fact that the Court's group vulnerability notion itself

123 Baumgärtel (n 80) 14 and 15.

124 Fineman (n 117) (ii) 9. See also Baumgärtel (n 80) 14. Thus, according to Fineman, '(v)ulnerability analysis questions the idea of a liberal subject, suggesting that the vulnerable subject is a more accurate and complete universal figure to place at the heart of social policy'. Ibid Fineman (n 117) 10.

125 Baumgärtel (n 80) 14.

126 Fineman (n 117) 4. See also in this regard, Baumgärtel (n 80) 15.

127 Baumgärtel (n 80) 15, respectively citing Judith Butler, 'Rethinking Vulnerability and Resistance' in Judith Butler, Zeynep Gambetti and Leticia Sabsay (eds), Vulnerability in Resistance (Duke University Press 2016) 12, 19 and 25 and Fineman (n 117) (ii) 16. For Fineman, '(b)ecause we are positioned differently within a web of economic and institutional relationships, our vulnerabilities range in magnitude and potential at the individual level. Undeniably universal, human vulnerability is also particular: it is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command', Fineman (n 117) (ii) 10.

128 Ibid.

129 Baumgärtel (n 80) 15.

130 Baumgärtel (n 80) 15, see his references at this place. See also Alyson Cole, 'All of Us Are Vulnerable, But Some Are More Vulnerable Than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique' (2016) 17 Critical Horizons 260. Kim (n 117) 625-626.

131 Baumgärtel (n 80) 15.

132 Peroni and Timmer (n 117) 1060 and 1073-1074.

133 Ibid 1060-1061.

134 Ibid 1061.

is 'relational', in that 'the Court links the individual applicant's vulnerability to the social or institutional environment, which originates or sustains the vulnerability of the group she is (made) part of'.[135] The context-based and situational construct of universal vulnerability theory therewith does not necessarily exclude the use of group vulnerability.[136] Thus, vulnerability can be 'existential'[137] but also accommodate broader group or individual recognition through a context-sensitive approach,[138] one in which the Court can recognize 'that people are differently vulnerable' and that 'vulnerability is partially constructed depending on economic, political and social processes of inclusion and exclusion'.[139] For Baumgärtel, vulnerability theory providing 'several potentially important insights for developing a notion of migratory vulnerability within the context of the ECHR', important in that regard is that '(t)he fact that both State and societal institutions are critical to enhancing resilience in the face of vulnerability comes as an important reminder when we look at the situation of vulnerable migrants', in that '(e)ven where migration control is the priority, it mostly falls upon those same institutions to respond to the most detrimental difficulties that policies may create,' 'Fineman's theory' in that regard '(particularly) (coming out) in favour of a strong and responsive State that equips individuals with the assets and capacities to compensate for this vulnerability, and thus address vulnerability so conceived'.[140]

135 Ibid 1064.

136 Ibid, 1074, the authors holding that 'it is not problematic that the Court pays increased attention to group vulnerability, provided that the Court ensures that (i) it is specific about why it considers that group particularly vulnerable and (ii) it demonstrates why that makes the particular applicant more prone to certain types of harm or why the applicant should be considered and treated as a vulnerable member of that group in the instant case. The test should therefore entail two interrelated levels of inquiry: collective and individual. Otherwise, the Court may end up essentializing vulnerable groups and stereotyping the individuals from these groups, thereby reinforcing their vulnerability rather than lessening it. Besides, our suggestion has the advantage that the Court does not lay itself open to the charge that it delivers judgments on the situation of particular groups in general, rather than on the facts of the case'.

137 Baumgärtel (n 80) 15.

138 Peroni and Timmer (n 117) 1081-1082. See also Baumgärtel (n 80) 13, '(i)n short, migratory vulnerability (as presented by him) describes a cluster of objective, socially induced, and temporary characteristics that affect persons to varying extents and forms. It therefore should be conceptualized neither as group membership nor as a purely individual characteristic, but rather determined on a case-by-case basis and in reference to identifiable social processes. Depending on its specific expression, it will give rise to distinct legal effects such as enlarged scopes of protection, shifts in the burden of proof, procedural and positive obligations and a narrower margin of appreciation, possibly even 'triggering' proceedings under Article 14 ECHR'.

139 Peroni and Timmer (n 117) 1061. See also Baumgärtel (n 80) 18, where he states that the 'obvious argument' that 'the difficulties experienced by many migrants are the result of political and social processes', has however, besides not being 'universally shared', also 'not yet informed the approach taken by the ECtHR'. See for his discussion of literature, to 'clarify and underline the extent to which migration control acts as a 'producer' of vulnerability', including how 'migration frequently elicits responses from receiving States that try to control the process, for example by closing and securitising borders', resulting in 'human costs' also 'in the form of border deaths', ibid 18-20.

140 Baumgärtel (n 80) 16. Practically (in outcome), the positions of Peroni and Timmer 'versus' that of Baumgärtel are not essentially divergent, in that they both call for a context-sensitive approach. Baumgärtel argues against group vulnerability in relation to 'migrants' - in that they are 'truly are not a homogenous group'. Also rejecting vulnerability as an 'purely individual characteristic' (see n 138), his proposal for the notion of 'migratory vulnerability' brings with it recognition that such vulnerabilities are 'linked to the fact that a person once crossed or tried to cross State borders', which is a 'characteristic, which all vulnerable migrants share to a varying extent temporarily' and is 'socially induced rather than innate but nonetheless real'. Amongst the advantages of this notion is that used as 'a transitory and situational adjective, it does not conclusively define a person, making it less likely to reproduce stigmatisation and prejudice', removes the necessity to identify groups and allows for better circumscription of the actual vulnerabilities themselves: '(i)n short, migratory vulnerability draws attention to social processes as much as to the individual person. It therefore is a principle whose application is complex as it cannot be reduced to a predefined set of factors. Furthermore, there may be intersections with other kinds of vulnerabilities (such as an applicant being a child), which also needs to be taken into account in the assessment'. See also Timmer et al. (n 117) 196.

5. The ECtHR's Ability to Deploy (New) Vulnerability Markers

As underscored in scholarship, theoretical and empirical grounding of vulnerability offers critical opportunities and could aid in the resolution of gaps and inconsistencies in the ECtHR's vulnerability catalogue.[141] Even with an open approach to vulnerability, its practical deployment can be difficult however and requires identifying markers. The ECtHR's assessments in this regard lead to differing appraisals. Baumgärtel, as well as Peroni and Timmer, commend the fact that the ECtHR in *M.S.S. v. Belgium and Greece*[142] worked from a 'more textured and complex formulations', basing itself on various reports issued by international organizations on the situation of asylum seekers in Greece to evaluate the applicant's vulnerability.[143] At the same time, the Court is not always as mindful as it could be. Examining its deference in the context of administrative detention of asylum-seekers, Ruiz Ramos points out that 'blurring the significance of the vulnerability of asylum-seekers under Article 3 may also be a form of granting more power to States as it weakens their responsibility to adapt detention conditions to their needs'.[144] It is therefore fundamental that the ECtHR is aided in vulnerability identification and appraisal, the availability of empirical information and a willingness on the part of the Court to use it being important factors in that regard. It is further important then that the Court provides (more) clarity as to when and how it gives (particular) vulnerability effect in its assessments of compliance with rights.[145]

6. The (Particular) Vulnerability of the Transiting Smuggling Victim

The position adopted in this contribution is that whether through designation under group vulnerability, or through its own 'merged' model, the ECtHR can and should circumscribe with sensitivity to context actual vulnerability profiles of (some) smuggled migrants. Under hard positive law, trafficking victims are as a group (rightly) clearly recognized as so (particularly, inherently) vulnerable that a certain type and degree of protection is required, while smuggled migrants are not (to the same extent). The (particular) vulnerability of trafficked persons also vividly plays

141 Ibid 13. See also Peroni and Timmer (n 117) 1070. See for these latter authors' discussion of the use of the notion of group vulnerability in ECtHR case law, also with respect to legal effects, ibid 1063-1082.

142 *M.S.S. v. Belgium and Greece* (n 115).

143 Peroni and Timmer (n 117) 1070. See Baumgärtel (n 80) 21 and 23.

144 Ruiz Ramos (n 83) 43.

145 See in this regard also Ilias and Ahmed (n 115) para 5 and 185 in which five Italian scholars submitted third-party comments, in a joint intervention discussing 'the concept of vulnerability with emphasis on international and human rights law', '(demonstrating) that variants of this concept had been used in different contexts without a definition of vulnerability' and (urging) the Court to develop relevant principles in this regard'. See also Baumgärtel (n 80) 13, 23, 27-28 on the importance of the use of empirical information by the Court, as well as academic research. See also Peroni and Timmer (n 117) 1084-1085, arguing, in relation to the 'open-endedness of the vulnerable-group concept', that the Court can also 'navigate' the issue of being overbroad, inter alia 'by taking the human rights corpus as its reference point for determining group vulnerability: when the activities of international organizations and human rights reports confirm that there is a structural failure to protect the human rights of a particular group, this should be the Court's cue', this also allowing 'the vulnerable-group concept to remain flexible', in that 'if the Court continues to base its judgments on recent international human rights reports and other authoritative materials, it can carefully follow developments on the ground'.

out as an important factor in criminal justice related positive obligations case law relating to this type of victimization. The question is then if a better calibration of the actual profile of the smuggled migrant can be achieved by looking more deeply at contextual, situational factors impacting his vulnerability, as well as the 'constructing' role played therein by the policies and actions of state authorities.

Again, given that 'smuggled migrants' constitute a too broad group (in that not all will qualify as (sufficiently) vulnerable), differentiation is necessary. To narrow scope here, smuggled migrants who already fall under another group already designated as particularly vulnerable (such as trafficking victims, asylum seekers and minors), for whom heightened protective duties arise on that basis, particularly if such features are present in aggregate form, are excluded from the following discussion. As for the remaining group of smuggled migrants, this section will explore a vulnerability profile arising out of the intersectional aggregation of the two features at the focus of this analysis, arguing that both qualify for at least presumptive identification under (particular) vulnerability and that this is particularly the case when they are both at issue. These are that the migrant is an *irregular migrant in transit* within Council of Europe territories and, inspired by the distinction incorporated in Belgian legislation, is also a migrant who has been smuggled (or stands to be smuggled further) *under aggravated circumstances.*

a. The Profile of the *Transiting Migrant*

Deconstructing both profiles, the ECtHR's stance with respect to *irregularity* seems to be that this feature does not give rise to particular vulnerability in and of itself. In *Khlaifia and Others. v. Italy,*[146] reversing the violation established by the chamber of art. 3 ECHR due to the detention conditions of the applicants, the Grand Chamber, while holding that the chamber had been right to point out their weakened state following a sea-crossing,[147] found however that they 'were not asylum-seekers, did not have the specific vulnerability inherent in that status, and did not claim to have endured traumatic experiences in their country of origin'.[148]

Such a categorical rejection points to a too broad strokes approach where transiting migrants, living in situations such as those depicted above with respect to Belgium are concerned. Diverse vulnerability markers flagged in scholarship and case law already provide useful anchoring points in this regard, such as power differentials and dependency on State support, institutional and social structures which 'originate, sustain and reinforce vulnerabilities' social disadvantages, and absence of resources.[149]

146 *Khlaifia and Others. v. Italy* [GC] 16483/12 (ECtHR, 15 December 2016) para 194.

147 Ibid.

148 Ibid para 194; see also Ruiz Ramos (n 83) 33.

149 See Kim (n 117) 626 and 621 and Peroni and Timmer (n 117) 1059 and 1065. See also for different typologies and meanings of vulnerability, in literature and as used by the ECtHR, Kim (n 117) 625-626. See also generally the resources at (n 117).

As mentioned above, Baumgärtel moreover specifically argues for the recognition of the notion of 'migratory vulnerability', in a manner accommodating differentiation.[150] Because migratory vulnerabilities affect migrants differently depending on distinct factors (such as age, socioeconomic status, gender, and race), Timmer et al. state that with a 'context-sensitive approach', a better alignment with lived realities is possible 'to analyse what specific disadvantages are being created, whether these are indeed conducive to immigration control (or merely based on an unproven assumption based on deterrence), and what the State and courts can and should do to offset them'.[151] Both systematic reviews of reports from NGOs and international organizations attesting to such vulnerabilities and growing (empirically grounded) sociolegal and migration scholarship could be utilized by the Court to investigate the relationship between vulnerability and migration.[152]

Departing from the perspective that migratory vulnerability is underrecognized, overreach in group vulnerability designation can be avoided through further (group) distinctions.[153] (Sub-)categories could be organised in the following manner: beyond asylum seekers and migrant trafficking victims, who are already specially protected, distinctions can be made between (1) migrants already present in a Council of Europe Jurisdiction, with at least a provisionally regular status; (2) irregular migrants who are factually (relatively) stably present in one European jurisdiction; (3) irregular migrants actively attempting (irregular) entry via external borders under (potentially) hazardous circumstances, further to be divided into (a) those who are self-smuggled and (b) those who have been smuggled by third parties, (i) with or (ii) without aggravating circumstances and (4) *transiting* irregular migrants who have entered and continue to irregularly move (under hazards) about European soil, again with a further distinction to be made between those who are (a) self-smuggled and (b) those who have been or stand to be smuggled, (i) with or (ii) without aggravating circumstances.

Such categorisations should not transpose into a set scale of exponentially increasing vulnerability, as the problematic and needs of each group will be divergent in different contexts. While a concrete rights bearer may fall under a taxonomy which may generally be considered as giving rise to lesser vulnerability as compared to another group, the distinct facts and circumstances of his particular situation and his

150 Baumgärtel (n 80). See also Stoyanova (n 18) (i) 205, where she holds that 'migrants are more vulnerable', also to 'some specific crimes' (such as 'human trafficking and severe forms of labour exploitation', while '(t)his vulnerability is linked to their migration status'.

151 Timmer et al. (n 117) 196.

152 See for instance Theodore Baird and Ilse Van Liempt, 'Scrutinising the Double Disadvantage: Knowledge Production in the Messy Field of Migrant Smuggling' (2016) 42(3) JEMS 400; Martina Tazzioli, 'Governing Migrant Mobility through Mobility: Containment and Dispersal at the Internal Frontiers of Europe' (2020) 38(1) Environment and Planning C: Politics and Space 3.

153 See in that regard Baumgärtel (n 117) 15, '(v)ulnerability as a situational experience bespeaks a world where the act of moving across national borders can, depending on the context, be an exercise in 'migration' or in 'mobility', result in an 'alien' or in an 'expat' life, and give rise to deportation or to protection'.

personal features, may make his vulnerability more acute. That consideration also applies in the comparison between smuggled migrants and groups of persons whose particular vulnerability is by default recognized. Thus, while generally considered particularly vulnerable, a concrete trafficking victim may be less vulnerable than a specific smuggled migrant, amongst other reasons, in that there are no life-threatening circumstances in the case of the former, while there may be for the latter.[154]

Working with sub-distinctions does have utility for the purpose of isolated consideration of distinct factors however, the focus here indeed being on the potential criminal justice needs of group (4)(b)(ii), as they may arise through the features of being in irregular transit and smuggled under aggravating circumstances.

While not corresponding to the scenario of group (4)(b)(ii) (in that it does not involve abusive treatment by third parties but state authorities), the ECtHR's recent judgment in *M.H. and Others. v. Croatia*[155] lends credence to the idea that transit migration requires own conceptualisation under the ECHR and for that reason merits some extensive discussion. As an ECtHR response to border pushbacks (in this case at the Croatian-Serbian border), the judgment is already hailed as important in light of different aspects thereof.[156] The public interest involved in the case emphasized in the Court's considerations,[157] its pertinence here arises from indications in the judgment that the Court is receptive to the notion of transitory vulnerability, notably also as that may arise from enhanced approaches to control of irregular migration. This aspect is strongly underscored in Judge Turković's attached concurring opinion.[158] Therein, she proclaims irregular migration to be 'one of the biggest challenges of today's society' and underlines that 'Croatia, together with several other countries, is at the front line' thereof, given its 'geographical position in the European Union'.[159] Referring to research indicating that 'Croatia is a transit State', this 'meaning that most migrants do not wish to stay there, but clandestinely cross through that country in order to reach western Europe', Judge Turković points out that '(t)his leads to a situation where numerous attempts are made to irregularly enter and cross Croatia, which understandably creates a range of difficulties for its authorities'.[160] Nevertheless, 'duly taking into account Croatia's difficult position', she holds that 'it is possible to meet these challenges while at the same time complying with the Convention requirements'.[161]

154 See McAdam (n 16) 23.

155 *M.H. and Others* (n 104).

156 See Hanaa Hakiki and Delphine Rodrik, 'M.H. v. Croatia: Shedding Light on the Pushback Blind Spot' (*VerfBlog,* 29 November 2021) <https://verfassungsblog.de/m-h-v-croatia-shedding-light-on-the-pushback-blind-spot> accessed 10 July 2022; Joyce de Coninck, 'MH and Others v. Croatia: Resolving the Jurisdictional and Evidentiary Black Hole for Expulsion cases?' (*Strasbourg Observer Blog*, 14 January 2022) < https://strasbourgobservers.com/2022/01/14/mh-and-others-v-croatia-resolving-the-jurisdictional-and-evidentiary-black-hole-for-expulsion-cases/> accessed 25 August 2022.

157 Ibid para 123.

158 See also Hakiki and Rodrik (n 156).

159 *M.H. and Others* (n 104), concurring Opinion of Judge Turković, para 1.

160 Ibid.

161 Ibid.

The complaints in *M.H. and Others. v. Croatia* regard two different 'episodes' of irregular entry. The first of those relates to a pushback of the applicants - an Afghan family of three adults and eleven children - to Serbia, in November 2017, following the irregular border crossing by some members of the family. In relation to this episode, the applicants first complained of violation of art. 2 ECHR, alleging that the actions of Croatian police officers, in sending the family members back to Serbia, ordering them to walk the final distance following train tracks, had caused the death of a six-year-old daughter of the family, who was fatally hit by a train, while this had not led to an effective criminal investigation. Secondly, they complained that this pushback was unlawful and violated the prohibition of collective expulsion under art. 4 Protocol 4 ECHR. The second set of complaints relate to a subsequent irregular crossing by the applicants in 2018, this time leading to their placement in an immigration detention centre. In relation to this episode, they complained of violation of art. 3 ECHR because of their detention conditions and of art. 5 ECHR due to the unlawfulness of their detention. Finally, the applicants complained of hindrance of their right to individual application at the ECtHR, *inter alia* because of restriction of their contacts with their chosen lawyer, in violation of art. 34 ECHR.[162]

The judgment is of interest here for two distinct reasons. Firstly, the blurriness surrounding the profile of the applicants, at least in the representation thereof by the government and the Court's management thereof, is of import. The government denying that they had entered Croatia before the accident or requested asylum during the first episode in 2017, following their request to that effect in the course of the second episode in 2018, the applicants themselves had stated that they considered Serbia to be a safe country, but, in the absence of job opportunities, did not wish to stay there, wanting 'to live in Europe so that the children could go to school and have a good life'.[163] The government claimed that they had also divulged that their 'final destination' was the United Kingdom.[164] While they had moreover stated to Croatian authorities that they had not sought asylum in other countries, it later became apparent that they had, both in Bulgaria and Serbia.[165] Following the denial of their asylum request (on the basis that Serbia was a safe third country),[166] even while the ECtHR had ordered interim measures blocking their removal, the applicants, '(h)aving tried to leave Croatia for Slovenia clandestinely on several occasions, (…) ultimately managed to do so', their whereabouts at the time of adjudication by the ECtHR being unknown.[167]

162 See the facts and circumstances of the case, paras. 5-76 and the complaints with respect to the various provisions invoked by the applicants, paras. 124 (art. 2 ECHR); 262 (art. 4 Protocol 4 ECHR); 167 (art. 3 ECHR); 214 (art. 5 ECHR) and 305 (art. 34 ECHR).

163 Ibid paras 266 and 49.

164 Ibid para 226.

165 Ibid para. 36.

166 Ibid para 50.

167 Ibid paras 67-76 and 47.

A central aspect of the Croatian government's arguments was that the applicants were in actual fact not to be considered asylum seekers in Croatia. Rather, they were to be regarded as being 'just like (…) 77% of the illegal migrants who entered Croatia, who claimed to intend to seek asylum there, but left the Country before actually lodging an application or without awaiting the outcome of proceedings',[168] statistics showing that (mainly economic) migrants 'used Croatia as a country of transit on their way to western and northern Europe'.[169] Interestingly therewith confirming the deliberately deterrent nature of national policies and actions, the government also submitted that 'as a European Union Member State with the prospect of joining the Schengen Area in the near future, Croatia had the right to control the entry of aliens to its territory and had the obligation to protect the State borders from illegal crossings,' explaining that '(s)ince mid-2017, the human and technical capacities of the border police had been increased and deterrents had been implemented more intensively than before because of increased migratory movements along the so-called Western Balkans migratory route', in that '(d)eterrence, which was regulated by the Schengen Borders Code, involved measures and action to prevent illegal entries at the external border'.[170] Submitting statistics with respect to successful applications for international protection in Croatia[171] and disputing that NGO and international reports provided a sufficient basis to 'trigger criminal investigations', the government moreover put forward that deterred migrants made false accusations of violence against Croatian police officers, hoping that this would 'help them to re-enter Croatia and continue their journey towards their countries of final destination'.[172]

As demonstrated in its assessment of the art. 5 ECHR complaint, the Court was not insensitive to such arguments. In that regard, the Court namely held that it, in light of the actions and statements of the applicants, had 'no cause to call into question' the authorities' conclusion that they presented a flight risk, so that detention could have been justified on that basis.[173] A violation was established of art. 5 ECHR, but on the basis of a lack of vigilance and expedition in decision-making and an absence of procedural safeguards.[174] Taking as a point of departure then that the Court was at least to an extent prepared to accept that the applicants were not truly seeking asylum in Croatia, but rather were transiting irregular migrants, it could have been envisaged that it, notably in its assessment of the applicants' complaint under art. 3 ECHR, could have found that that they were not to be regarded as particularly vulnerable, in line with the Grand Chamber's consideration in this respect in its *Khlaifia and Others v. Italy*.

168 Ibid para. 290.

169 Ibid para 47.

170 Ibid para. 291.

171 Ibid para 289.

172 Ibid para 292.

173 Ibid paras 252-253.

174 Ibid paras 245-259.

The Croatian government's arguments in this case touch upon conceptual difficulties which also exist in distinguishing between (the vulnerability of) 'true' asylum seekers and irregular 'economic' migrants. Creating even more complexity in this regard, a distinct category of persons can be identified as those who may have arguable claims as asylum seekers, but wish to stake that claim in a particular jurisdiction, transiting through others to reach that destination, sometimes claiming asylum in countries on the way, but not following through, with the intent of moving onwards. For such transiting persons, the question arises if a change occurs in their vulnerability profile for that reason. Do those with arguable claims to being asylum seekers lose a vulnerability status on that basis because they are not truly seeking asylum in jurisdictions through which they are transiting? If so, does that occur because the plausibility of their asylum claims becomes impacted by their preference for a particular jurisdiction?[175]

The manner in which the Court depicts the vulnerability of asylum seekers is important in this respect. Returning to its assessment of the applicants in *Khlaifia and Others v. Italy.* mentioned above, the Court there held that the applicant 'did not have *the specific vulnerability inherent in that status*, [emphasis added] and did not claim to have endured traumatic experiences in their country of origin'.[176] That would indicate that being an asylum seeker automatically equates to a particular vulnerability, while experiences in the jurisdiction of origin can separately give rise to vulnerability qualification. Having discounted in *Khlaifia and Others v. Italy* the hazardous sea journey as an experience creating vulnerability, the Court in other cases seems however also to accept that experiences *after* leaving the country of origin (and the circumstances giving rise to flight), can contribute to such a state.

In *M.S.S. v. Greece and Belgium*, rejecting the Greek government's 'suggestion' in that respect, the Court found that 'the applicant did not, on the face of it, have the profile of an "illegal immigrant"' and held that 'he was a potential asylum-seeker'.[177] In line with that qualification, in its appraisal of the applicant's complaint of violation of art. 3 ECHR because of the conditions of his detention, the Court established a violation because of the objective conditions, adding that 'the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum-seeker'.[178] The

175 See *Ilias* (n 115) paras 108-110. See in this respect the Hungarian government's arguments with respect to 'the importance of the distinction between the right to seek asylum, recognised in international law, and a purported right to be admitted to a preferred country for the purpose of seeking asylum', and the need 'to adopt a careful and realistic interpretation of any alleged risk of refoulement and of the threshold of severity triggering the application of Article 3' in order to 'avoid feeding the false perception that there was a right to asylum in the country offering the best protection'.

176 *M.H. and Others* (n 104) para 194; see also Ruiz Ramos (n 83) 33.

177 M.S.S (n 115) para 225. See also Baumgärtel (n 80) 20-23 discussing this case, demonstrating his argument against the use of *group* vulnerability, *inter alia* in that regard emphasizing that '(…)designating asylum seekers as a vulnerable group did not add to the reasoning in this judgment; the analysis of applicant's situation already provided sufficient reasons to consider him vulnerable', ibid 22.

178 Ibid para 233-234.

Court also established a separate violation of art. 3 ECHR in this case with respect to the applicant's complaint of inhuman and degrading treatment in Greece because of 'the state of extreme poverty in which he had lived since he arrived in Greece',[179] in that with no accommodation or 'means of subsistence', he 'like many other Afghan asylum-seekers, had lived in a park in the middle of Athens for many months', had been forced to look for food, occasionally receiving aid from locals and the Church, without 'access to any sanitary facilities' and '(a)t night (living) in permanent fear of being attacked and robbed', this according to the applicant resulting in a 'situation of vulnerability and material and psychological deprivation amounted to treatment contrary to Article 3', while 'his state of need, anxiety and uncertainty was such that he had no option but to leave Greece and seek refuge elsewhere'.[180] The Greek government in this context argued that the applicant's situation was a consequence of 'his own choices and omissions', in that he had 'chosen to invest his resources in fleeing the country rather than in accommodation',[181] while to find for the applicant 'would open the doors to countless similar applications from homeless persons and place an undue positive obligation on the States in terms of welfare policy'.[182] In this context also, the Court attached 'considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection', noting in this regard 'the existence of a broad consensus at the international and European level concerning this need for special protection',[183] establishing a violation in that respect because the Greek authorities did not have 'due regard to the applicant's vulnerability as an asylum-seeker'.[184]

Importantly, in the context of the applicant's complaint with respect to detention conditions, the Court however depicted the applicant's vulnerability more broadly, holding that it had to 'take into account that the applicant, being an asylum-seeker, was particularly vulnerable *because of everything he had been through during his migration* and the traumatic experiences he was likely to have endured previously'.[185]

As for the latter experiences, that would seem to refer to the circumstances causing him to flee Afghanistan, which he claimed to have done 'after escaping a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the international air force troops stationed in Kabul' (in which respect he provided documentation

179 Ibid para 235.

180 Ibid para 237-239.

181 Ibid para 240.

182 Ibid para 243.

183 Ibid para 251.

184 Ibid paras 263-264.

185 Ibid, para 232. See also with respect to the Court's approach to the applicant's vulnerability in this case, Baumgärtel (n 80) 33.

showing that he had been employed as such).[186] The reference to his experiences *during his migration* demonstrates however a sensitivity to difficulties in the course of his transiting journey. That could include anything starting from his departure from Kabul in 2008, continuing onwards through Iran and Turkey, followed by his arrival in Greece, where he was fingerprinted, but not having claimed asylum there, moved on via France to Belgium, where did claim asylum (stating there that he had selected Belgium on the basis of his experiences meeting some Belgian NATO soldiers whom he had found to be friendly). The applicant was sent back to Greece under the Dublin regulation however, where he, pending his asylum request (still unresolved at the time of the judgment), '(h)aving no means of subsistence (…) went to live in a park in central Athens where other Afghan asylum-seekers had assembled'.[187] The applicant not wishing to remain in Greece because of his circumstances there, made multiple further attempts to leave that jurisdiction, to Bulgaria and Italy, in that regard once also being arrested and convicted for trying to leave the country with false papers.[188] His experiences during his transit also include a smuggling trajectory, whereby he had used the aid of a smuggler to leave Afghanistan, paying 12,000 United States dollars, while the smuggler 'had taken his identity papers'.[189]

In *M.H. e.a. v. Croatia*, in adjudicating the applicants' complaint of violation of art. 3 ECHR because of their detention conditions, expressly examining vulnerability, the Court, (while establishing a violation of art. 3 ECHR as far as the minor applicants were concerned on the basis of the inherent particular vulnerability attaching to that feature),[190] declined to do so in relation to the adult applicants. However, this did not entail a categorical rejection of their vulnerability. Emphasizing that 'the adult applicants were not persons suspected or convicted of a criminal offence' and depicting them as 'migrants detained pending the verification of their identity and application for international protection,'[191] some of the Court's considerations rather point towards recognition of heightened vulnerability on the part of the adults also. Here again, the Court held that 'asylum-seekers may be considered vulnerable because of everything they might have been through *during their migration* [emphasis added] and the traumatic experiences they are likely to have endured previously,' observing 'in this connection', that the applicants had 'left Afghanistan in 2016'.[192]

Taking as a point of departure that the Court did to an extent follow the Croatian government's arguments with respect to blurriness surrounding the applicants'

186 Ibid para 31.

187 Ibid para 37.

188 Ibid para 45. See the full facts and circumstances of the case as summarised here, paras 9-53.

189 Ibid, para 15.

190 For the examination of the art. 3 ECHR complaints with respect to the minor applicants see, *M.H. and Others* (n 102) paras 191-204.

191 Ibid para 205.

192 Ibid para 207.

asylum-seeking profile, this observation may be read as follows. Notwithstanding their status as asylum seekers and the veracity of their claims in that regard (the judgment containing no information as to previous traumatic experiences they may have had in their country of origin), the applicants may, including in the course of a difficult and fragmented migration, have undergone experiences rendering them (particularly) vulnerable.[193] Indeed, at an individual level, the Court was notably 'mindful' of the fact that the applicants were mourning the death of their daughter MAD. H.,[194] but the consideration could also be understood as extending to other aspects of the undoubtedly difficult migratory path taken by the applicants, including their (according to them, multiple)[195] attempts to clandestinely enter Croatia, in light of the circumstances at the border. The Court also recognized that the applicants 'must have been affected by the uncertainty as to whether they were in detention and whether legal safeguards against arbitrary detention applied',[196] therewith underscoring the complexity and indeterminate nature of their legal status as a vulnerability indicator in that regard.

Building a vulnerability profile in this manner, the Court found no violation of art. 3 ECHR,[197] however not because the applicants were not found to be sufficiently vulnerable, but because of the way issues were offset. The negative effects of legal uncertainty must according to the Court have been allayed through the support of their legal aid lawyer and visits paid to them by the Croatian Ombudswoman and the Croatian Children's Ombudswoman.[198] With respect to the death of MAD. H., the Court found that they had been provided with appropriate psychological support.[199] Importantly however, in the absence of such ameliorating circumstances, the aggregated situational vulnerability of the applicants, importantly determined by the full gamut of their experiences preceding their detention as well the situational unclarity of their status, could have swayed the balance, even though their detention conditions were found not be to materially unsatisfactory.[200]

In establishing a violation of art. 34 ECHR, the Court likewise again explicitly deployed vulnerability as an assessment tool. In the context of the complaint under this provision that the applicants were hindered in their access to a lawyer they had previously chosen, the government had argued that they had been provided with a list of legal aid lawyers, including the name of that lawyer, but had not chosen her,

193 See also in that regard *M.S.S.* (139) para 232 and *Z.A. and Others v. Russia* [GC] 61411/15; 61420/15 and 61427/15 (ECtHR, 21 November 2019) para 193.

194 *M.H. and Others* (n 102) para 208.

195 Ibid para 263.

196 Ibid para 212.

197 Ibid para 213.

198 Ibid paras 211-212.

199 Ibid paras 208-209.

200 Ibid para 193.

showing 'that they did not have any real connection to her as they did not even recognize her name'.[201] The Court noted 'that the applicants are Afghan nationals, with no knowledge of the Croatian language', who had not met the lawyer in question 'in person' but 'had appointed her on a recommendation from the NGOs'.[202] Moreover, the Court found the applicants in this respect to be 'in a vulnerable situation, having lost their daughter and wanting that matter to be investigated,' not blaming them '(i)n those circumstances', for not recognizing the name of the lawyer.[203] Here again, vulnerability is not predicated on the applicants being asylum seekers, but is rather based on situational factors, in this context, the added circumstance of stress in relation to the death of MAD. H. and the investigation thereof.

In any event, even where persons belong to groups securely recognized as (particularly) vulnerable, the Court has regard for their particular circumstances in vulnerability assessments. In *Ilias and Ahmed v. Hungary*, the government in that case also arguing against the veracity of the applicants' status as asylum seekers,[204] in assessing 'the applicants' vulnerability argument' (again in the context of detention conditions under art. 3 ECHR), the Court, held that it had to 'examine the available evidence to establish whether, as alleged by them, they could be considered particularly vulnerable and, if so, whether the conditions in which they stayed at the Röszke transit zone in September and October 2015 were incompatible with any such vulnerability to the extent that these conditions constituted inhuman and degrading treatment with specific regard to the applicants'.[205] Here also using the formula that 'it is true that asylum-seekers may be considered vulnerable because of everything they might have been through during their migration and the traumatic experiences they were likely to have endured previously', in this case, the Court however found 'no indication that the applicants in the present case were more vulnerable than any other adult asylum-seeker confined to the Röszke transit zone in September 2015'.[206] Moreover, the Court did not attach any special vulnerability effect in light of 'their allegations about hardship and ill-treatment endured in Pakistan, Afghanistan, Iran, Dubai and Turkey', in that these regarded 'a period of time which ended in 2010 or 2011 for the first applicant and in 2013 for the second applicant'.[207] The Court also found that a psychiatric opinion rendered with respect to them was not decisive, given its 'context and content' and the relatively short period of time during which the applicants remained at the transit zone.[208] Likewise, while they also 'must have

201 Ibid para 316.

202 Ibid para 331.

203 Ibid.

204 *Ilias and Ahmed* (n 115) para 111.

205 Ibid para 191.

206 Ibid para 192.

207 Ibid.

208 Ibid.

been affected by the uncertainty as to whether they were in detention and whether legal safeguards against arbitrary detention applied', the shortness of the period and the fact that they 'were aware of the procedural developments in the asylum procedure, which unfolded without delays', meant that 'the negative effect of any such uncertainty on them must have been limited',[209] the Court establishing no violation of art. 3 ECHR in this case.[210]

Secondly, *M.H. and Others v. Croatia* is important to arguments here, in that the Court, greatly aiding the applicants by doing so, extensively deployed in diverse considerations empirical information (as it did in *M.S.S. v. Greece and Belgium*)[211] describing generally 'the situation of *migrants* arriving in Croatia'.[212] Provided in reports and letters of EU, CoE and UN public (monitoring) bodies, the Croatian (children's) Ombudsman, Amnesty International and third-party interveners, this information was oriented not only on the personal features or status of persons attempting to enter Croatia, but regardless of who they were, the experiences they were subjected to in the context of pushbacks.[213] While the Court did not consistently and explicitly operationalize that information through the vehicle of vulnerability, the content of the material clearly contains what may be regarded as vulnerability indicators, along the lines of vulnerability theory discussed above.

The material revealed that (excessively) violent, unlawful pushbacks had been systematically occurring at (and deep within) Croatian borders, national border control policies being 'characterised by a deterrent approach to the admission of migrants and refugees in the country' and tactics being aimed at 'physically exhausting' migrants and preventing further entry attempts. These actions exacerbated the situation of migrants, as they 'in reality did not deter people on the move from advancing towards the European Union territory, but instead led to a flourishing network of smugglers and organised criminal activities', leading to a grave situation, 'which required immediate attention and action by all countries in the region'. As for the State's response, this was characterized by inaction, law enforcement officers enjoying impunity, with the government being dismissive of 'reports published by NGOs or resulting from investigative journalism'.[214] Third-party interveners added that migrants were forced to 'swim through rivers and pass-through mountains' and were 'exposed to other dangerous situations,' including, as also happened in the *M.H. and*

209 Ibid para 193.

210 Ibid para 194. See also in this respect *RR. and Others v. Hungary* 36037/17 (ECtHR, 2 March 2021), where the Hungarian authorities were 'in principle allowed to decide to reduce or even withdraw material reception conditions from the first applicant as a *repeat asylum seeker*', [emphasis added], (para 54), yet the Court still established a violation of art. 3 ECHR, because the authorities 'without duly assessing his circumstances and giving a reasoned decision in that regard', 'failed to have due regard to the state of dependency' during his stay in a transit zone (para 57).

211 See note 143.

212 See *M.H. and Others* (n 102) under 'Relevant Legal Framework', heading V.

213 *M.H. and Others* (n 102) paras 103-116.

214 Ibid paras 103-115.

Others. v. Croatia case, by being ordered to return to Serbia following roads or train tracks to do so, 'as a result of which many of them had sustained accidents and died'. Fieldwork confirmed that 'Croatian officials were systematically putting migrants' lives in danger' and that 'despite the availability of 'numerous reports and evidence' the Croatian authorities displayed 'a systemic lack of an adequate response'.[215]

As for the concrete applications of this information, in relation to the first episode, in the context of the art. 2 ECHR complaint, the Court understood the government's submission that domestic remedies had not been exhausted as an argument that the applicants could have (also) pursued civil remedies, therewith relying on the rule that where deaths are unintentional, resolution through criminal prosecution can be necessary but only under 'exceptional circumstances'.[216] The government denying that the applicants had crossed into Croatia before the accident (which occurred on Serbian territory), without requiring the applicants to show that such circumstances were at issue in their case, the Court determined that there were, basing that finding on the material depicting the general situation at the border, pointing to systematic unlawfulness and the 'obvious risks' at issue.[217] Secondly, preluding its assessment by generally referring to the same information, in the context of the complaint of violation of the procedural positive obligation to conduct an effective criminal investigation, the Court found significant flaws in the investigation which had taken place, in that regard also connecting specifically to one concrete third party intervener's submission that '(w)hen it came to deaths and severe injuries, the investigating authorities should not predominantly rely on statements of officials implicated in the incidents, and testimonies of migrants should not be easily discredited on account of the linguistic challenges and their limited opportunities to gather and provide evidence'.[218] Applying this insight, the Court underscored that inconsistencies in the applicant's statements (potentially arising from language issues), were emphasized by national authorities, while discrepancies in those of police officers were not, investigative authorities also having neglected to verify that important material evidence (thermographic camera images, telephone and GPS signals) was, as claimed by police, not available.[219]

In the context of the complaint of collective expulsion in violation of art. 4 Protocol 4 ECHR, the Court greatly alleviated the applicants' evidentiary burden (to demonstrate *prima facie* evidence of the veracity of their version of events) by acknowledging the 'large number of reports by civil society organisations, national human rights structures and international organisations', confirming general summary

215 Ibid paras 144-147.

216 Ibid paras 132-152.

217 Ibid paras 132-141.

218 Ibid paras 144-147.

219 Ibid paras 152-148.

returns as described by the applicants.[220] In the examination of the merits of this complaint, the issues became (i) whether or not 'the lack of an individual expulsion decision could be attributed to the applicant's own conduct', and, in that light, (ii) 'whether the respondent State provided genuine and effective access to means of legal entry'.[221] Finding that the government 'did not supply, despite being expressly invited to do so, any specific information regarding the asylum procedures at the border with Serbia in 2017 or 2018', therewith not rebutting the narrative emerging from reports, the Court also established a violation of this provision.[222]

In relation to the complaint of violation of art. 5 par. 1 ECHR, not finding it necessary to rule on the lawfulness of the detention, the Court again established a violation, questioning the good faith of national authorities.[223] In this context, the Court again connected to specific information concerning errors frequently occurring in the recording of Afghan names in dismissing the government's claim that detention was necessary for identification purposes and that the exact names of the applicants were not contained Eurodac (the Court finding that they were, under alternate spellings).[224] Moreover, in finding a lack of procedural vigilance, the Court again referred to empirical information indicating a pattern with respect to an absence of procedural safeguards.[225]

Given that the information used in this manner, in essence, points to vulnerability markers by operationalizing them, even without explicitly transposing them into a vulnerability assessment, the Court can be said to have utilized them as such. That is in line with the vulnerability conceptualization discussed above, again, because the sourced information is not oriented on innate characteristics of the migrants attempting border crossing. Rather than advancing their membership of a particularly vulnerable group on such grounds, the sources reveal deliberately constructed, situational factors, impacting any migrant experiencing them. As such, the information, used in an open plan manner by the Court in diverse concrete findings, may also be regarded as potential precursors of set vulnerability indicators, which may evolve into a more general recognition of transiting vulnerability, given the evidence with respect to border circumstances more generally. The use of such markers, concretely or in a more generic form, in any event contributes to a richer perception of the real situation of rights bearers and therewith better appraisal of their needs.

220 Ibid paras 268-275.

221 Ibid paras 293-294.

222 Ibid paras 295-304.

223 Ibid paras 250-251.

224 Ibid para 116.

225 Ibid paras 248-259.

b. The Profile of the *Aggravated* Smuggling Victim

i. Object *versus* Victim of Migrant Smuggling?

Reviewing further what (add-on) effect being smuggled under aggravating circumstances could have in a vulnerability profile, it is important to first pinpoint an important aspect of the problematic relating to the discrepancy between the real-life situations of smuggled migrants and their legal circumscription. As underscored in the introduction, an important feature of the smuggled migrant is that, in international and national frameworks, his legal position is weaker than that of the trafficking victim, creating a sharp divide. At the same time, there is an ambiguity to his conceptualisation, both in law and policy. That ambivalence is attended by an inescapable - and growing - awareness of real-life harm and endangerment associated with smuggling.

The format of smuggling offences may be identified as a critical issue in this regard. Belgian law again provides an apt illustration. Human trafficking is regulated as an offence in the Belgian Criminal Code under Title VIII, regulating offences against persons. Migrant smuggling is however regulated, albeit in a section designated for 'criminal offences,' outside the Criminal Code, in the hybrid Foreigner's Act. Regulation in this manner is likely to reinforce perception of the smuggled migrant as an object, as opposed to a victim of crime. That follows from a common trait of special, hybrid laws, namely that criminal offences contained therein usually aim to protect collective, as opposed to individual, legal goods and interests. Thus, teleologically, communal offences (subsumed in criminal codes), will protect the life, (physical) integrity, dignity, property and so forth of individuals, therewith concretely circumscribing their victimization. Contrarily, the objective of offences in special laws will mainly be to protect collective interests, such as the public purse, public health, and economic and monetary stability. Seen from this perspective, the facilitation of illegal entry is criminalized because it is at odds with immigration and asylum rules and policies. Even if that is not intended to be the sole aim of smuggling offences, if the main orientation is on protection of that policy, this will direct away from perceiving smuggled migrants as victims of individualized engenderment or harm.

Belgian legislation clearly is not solely focused on policy interests. That is firstly apparent from the fact that the smuggling/trafficking dichotomy is to an extent disrupted under Belgian law, through recognition of the special situation of migrants smuggled under aggravated circumstances. Chapter IV of the Foreigner's Act, containing provisions with respect to the special status available for such migrants moreover contains multiple references to 'foreigners who are *victims*' (of aggravated forms of smuggling). As discussed above, in as far as cases lead to prosecution of

smugglers, Belgian courts also regard smuggled migrants as victims of the offences, if aggravated circumstances are at issue. As such, an important distinction may be said to exist under Belgian law between migrants who are and who are not smuggled under aggravated circumstances. Those who do not experience harm or endangerment arising from such circumstances remain 'objects' of smuggling, the focus of criminal law enforcement in such cases being on the protection of policy interests. Those who do suffer them however become victims in a criminal law sense, and the object of enforcement therewith also must be the protection of their interests.

Again, as discussed above, this system however does not seem to be taking effect as intended in practice. While diverse causes were identified above for that, arguably, the manner of regulation constitutes a fundamental weak spot, also driving other concrete issues signalled in that regard, or at least not being conducive to resolving them. Fieldwork indicates that both the legal format of the system, compounded by ambivalence in law and policy, has real impact on the implementation of the law in practice. In the course of an interview with a Belgian specialised prosecutor, a proposal to move the migrant smuggling offence to the Criminal Code was discussed. As the respondent explained, having been initiated around elections, that project was subsequently discontinued, when no government coalition could be formed, and the interim government lacked legitimacy to undertake substantial reform of the Criminal Code. Interestingly, the specialised prosecutor expressed a firm preference to maintain the *status quo*, arguing that human trafficking is 'an offence against the dignity of a person' whereas 'smuggling is an offence against public order and the State, as it's about migration law'.[226] Reiterating that it is necessary to retain a sharp distinction between the two offences, she also pointed out that the 'aims' of the offences are also different, being 'exploitation' for human trafficking and 'making money' for human smuggling. Nevertheless, this prosecutor also pointed out that the two phenomena can 'converge' and that even if migrant smuggling at first glance does not represent an infringement of human dignity, it can also take such a form, also acknowledging the difficult circumstances which migrants can face during their journeys.[227]

The scarce use of the special status may thus hinge on the fact that it is not *clear enough* to important stakeholders that when aggravated circumstances are at issue, the profile of the smuggled migrant 'changes' into that of a victim whose individual interests are to be protected via criminal justice[228]. As to be developed below, an inadequacy arising from the format of criminalization, which can follow from ambiguity thereof,[229] can lead to violation of positive obligations, namely the concrete obligation

226 Interview, Specialised Prosecutor 1

227 Ibid.

228 See also McAdams (n 16) 4 where she refers to 'conceptual challenges' which have been 'inherited' by 'practitioners', leaving then 'interpretative leeway'.

229 See further below, at Section 3.

to have an effective legal framework in place. For Belgium then, an issue may be that while the criminal law intends to properly embed the individual interests of victims of smuggling under aggravated circumstances, it still fails to do so, because the law is not sufficiently clear in this respect. Coupled with ambiguity in broader policy (with dual, competing interests engaged therein), that may be an important factor impeding successful implementation of the intended protection, public actors not being clearly and sufficiently galvanized to give it full effect. For other jurisdictions, where no distinction is made between different types of smuggling and the offence is designed only with an eye on the protection of collective interests, issues could be greater still, in that there is no recognition at all that certain types of smuggling (aggravated forms) create individual endangerment of and harm to the smuggled migrant.

Such deficiencies could be established if the ECtHR were to find that some forms of migrant smuggling entail horizontal abuse which can only be addressed through criminal justice means. In determining which types of migrant smuggling would qualify as such, the Court could elect to follow the distinction incorporated in Belgian law between smuggling with and without aggravating circumstances, in doing so prescribing that approach as a common standard for all Member States.

For the Court to set such a common standard however, it is important it be able to draw on broader (empirical) evidence. As argued directly below, such evidence does exist, supporting the proposition that there is *sui generis* vulnerability inherent to certain forms of migrant smuggling, notably where transit migration is concerned. This should convert to an obligation to appropriately address that vulnerability, notably also by appraising under which circumstances it can also transpose into a necessity to recognize individualized criminal victimization.

ii. Aggravated Smuggling Victims – A Profile Resembling Human Trafficking Victims?

An important baseline consideration in that regard is that empirically supported opinion increasingly points to resemblance between the profiles of smuggled migrants and victims of human trafficking, notably where transit conditions and fragmentation of the migration journey can bolster the migrant's vulnerability to abuse and/or exploitation,[230] the fieldwork depicted in Section 1 of the Belgian scenario confirming the similarities. The dichotomy between the two phenomena is considered particularly problematic because of the complex notions of consent,[231] debt bondage,[232] as well as the increased vulnerability to exploitation in a mixed

230 See, Brunovskis and Surtees (n 24); Dandurand and Jahn (n 8); McAdam (n 16) 12-13, in the context of the circumscription of the notion of exploitation.

231 See for example, Christian Kemp, 'In Search of Solace and Finding Servitude: Human Trafficking and the Human Trafficking Vulnerability of African Asylum Seekers in Malta' (2017) 18(2) Global Crime 140; see also McAdam (n 16).

232 Julia O'Connell Davidson, 'Troubling Freedom: Migration, Debt, and Modern Slavery' (2013) 1(2) Migration studies 176.

migration context.[233] Again, the framing used in EU policy documents on these issues also indicates the growing recognition of a nexus, such as where the New Pact on Migration and Asylum underscores that '(s)muggling involves the organised *exploitation* of migrants, showing scant respect for human life in the pursuit of profit'.[234]

The (empirical) findings of two recent reports, also focusing on transit zones within the EU and mapping the vulnerabilities of individuals on the move, verify the impact of both the problematic attaching to the trafficking/smuggling dichotomy, as well as the cumulation of different types of vulnerabilities.[235] The ECPAT report, gathering research conducted by NGOs and co-funded by the UK Home Office, focuses precisely on precarious transit journeys undertaken by Vietnamese nationals designated therein as human trafficking victims. Likewise, the France Terre d'Asile report reveals identification and protection issues of victims of human trafficking, particularly in a transit migration context. A crucial observation in both reports is that migrant smuggling and human trafficking can rarely be differentiated in a transit migration context, in that being 'on the move' enhances the vulnerability of migrants. Both reports indicate that migrants in transit are, also within the EU, in or outside transit camps, subjected to labour and/or sexual exploitation.[236] The France Terre d'Asile report underlines the superficiality of the legal dichotomy, pointing out that smuggling also entails advantage being taken of vulnerable individuals because of their desire to migrate, this creating a vulnerability to exploitation and/or abuse through diverse non-static factors. Amongst these are the precarious legal status of transiting migrants, *de facto* limiting their access to protection, strict border control policies which push to higher-risk border-crossing alternatives (also on their own when they lack financial resources and resort to acts of 'self-facilitation')[237] or towards more 'professionalized' smuggling networks demanding higher fees.[238]

233 See in particular the argument and the hazy scenarios depicted in Chapter 6 of Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2009); McAdam (n 16) discussing exploitation and consent as not providing adequate distinction between the two phenomena, respectively pp.4-14 and pp. 14-20; Brunovskis and Surtees, (n 24); Dandurand and Jahn, (n 8) for an overview of the criticism.

234 New Pact on Migration and Asylum (n 26) 15.

235 ECPAT, 'Precarious Journeys: Mapping Vulnerabilities of Victims of Trafficking From Vietnam to Europe' (March 2019): < https://www.ecpat.org.uk/precarious-journeys> accessed 12 May 2022; France Terre d'Asile, 'Identification et Protection des Victimes de la Traite dans un Contexte de Migration de Transit' (April 2017): <https://www.france-terre-asile.org/toutes-nos-publications/details/1/212-identification-et-protection-des-victimes-de-la-traite-dans-un-contexte-de-migration-de-transit> accessed 12 May 2022.

236 Also confirmed in Interview, Volunteer Citizen's Platform.

237 On the complexity of the migrant smuggling phenomenon and the deconstruction of taken for granted concepts see Sanchez, Arrouche, Capasso, Dimitriadi and Fakhri (n 2). On the operational definition of migrant smuggling as 'the smuggling spectrum' in line with the multifaceted nature of the phenomenon see Alagna (n 7). The recourse to self-facilitation or migrants 'copycatting' on their own professional smugglers when lacking alternatives was also observed in the Belgian context (Interview, Prosecutor 1; Interview, Federal Police Investigator).

238 Ibid. See also, Jørgen Carling, 'Batman in Vienna: Choosing How to Confront Migrant Smuggling' (*PrioBlog,* 12 September 2017): <https://blogs.prio.org/2017/09/batman-in-vienna-choosing-how-to-confront-migrant-smuggling/> accessed 16 January 2022. On the lack of information given to migrants in transit zones see, Giacomo Donadio, 'The Irregular Border: Theory and Praxis at the Border of Ventimiglia in the Schengen Age' In Livio Amigoni, Silvia Aru, Ivan Bonnin, Gabriele Proglio, Cecilia Vergnano (eds), *Debordering Europe: Migration and Control Across the Ventimiglia Region* (Springer Nature 2020).

Smuggling fees and debt bondage are cited in scholarship as key elements placing migrants in transit at risk of (future) exploitation.[239] Facing long and perilous migration journeys, migrants often face no alternative but to work in exploitative conditions to finance their journeys. Abuse and/or exploitation of migrants in transit susceptible to smuggling is *not* automatic, but the *risk* thereof is systemically present to such an extent as to warrant presumptive flagging as a particularly vulnerable group.[240]

Two important general vulnerability markers may further be adduced, namely the interrelated (i) fluidity of factual profiles and (ii) the complexity of legal position. The transit migrant has a kaleidoscopic and changeable profile, making, as illustrated in *M.H. and Others v. Croatia*, factual and legal sorting difficult, including through normative distinctions which may arise with movements between jurisdictions. The factual inability to do so becomes aggravated by a conscious policy to remove ambivalence. Taken together, access to and effectuation of rights is impeded by unclear legal standing. This issue becomes practically evident through the challenges identified in Belgium with respect to *victim identification and protection* as well as provision of *information* as depicted in section 1. In other jurisdictions, where legislation does not even prescribe such duties with respect to smuggled migrants, sensitivity to and identification of abuse can be even more difficult. The presence of migrants in different jurisdictions can vary between days, weeks and months, exacerbating difficulties in this respect, including in necessary follow-up, both by governmental and non-governmental entities.[241] The ambiguity of factual and legal profiles moreover fosters opportunities to look away, driven, as observed in Belgium, by a 'not our problem' mentality in transit countries, relegating responsibility to destination countries.[242] Thus, '*(m)ember states are happy when an illegal leaves the territory. How or what, when? Preferably as soon as possible and it's not our responsibility anymore, period*'.[243]

This idea has registered in ECtHR case law, in the specific context of distinct rights. As discussed above, in *M.H. and Others v. Croatia*, the applicants' uncertainty as to legal status was marked by the ECtHR as a vulnerability indicator. In *Khlaifia and Others v. Italy*, in the context of the applicants' complaint of violation of art. 5 ECHR because of the unlawfulness of their deprivation of liberty following a sea-crossing, as a third-party intervener, the Centre for Human Rights and Legal Pluralism of McGill University put forward that an inherent vulnerability should be recognized in the context of this provision for the applicants. Arguing that 'the law and legal theory were lacking when it came to the status and protection applicable to irregular migrants who did not apply for asylum' and that 'this legal void made

239 Carling (n 238); Triandafyllidou (n 16). See also France Terre d'Asile (n 235) 39 and ECPAT (n 235) 16.

240 See, France Terre d'Asile (n 235).

241 See, France Terre d'Asile (n 235).

242 ECPAT (n 235); Interview, Respondent 1, Federal Belgian Police.

243 Interview, Respondent 3 Foreigner's Office.

them particularly vulnerable',[244] this intervener argued for the transposition of that consideration into proportionality requirements. The Grand Chamber established a violation of art. 5 ECHR in that case,[245] holding that 'the provisions applying to the detention of irregular migrants were lacking in precision' and that there was thus a 'legislative ambiguity'. Although it did not explicitly incorporate the (legal) vulnerability aspect argued for by the intervener in its judgment, the idea that irregular migrants not applying for asylum are notably confronted with a precarious legal position, remains upright in the outcome.

What emerges then is that different types of harm or endangerment risks exist for the smuggled migrant. Following the empirical narratives discussed above with respect to operational links between smuggling, trafficking, and the circumstances of being in migratory transit, a first is that smuggled migrants are susceptible to becoming trafficking victims. Beyond that, further types of *sui generis* abuse can also attach to the experience of being smuggled (multiple times). While that abuse is not identical to that associated with trafficking, there are strong similarities, particularly in terms of exploitation and the assault on human dignity incurred therewith.[246] Exploitation can take many forms, the commodification of desperation and vulnerability as a business model may rightly be considered as an egregious variant thereof. The problem is exacerbated because the own typology of abuse attaching to smuggling is not adequately conceptualised, let alone legally defined *in abstracto*, while the fluidity and changeability of smuggled migrants' factual and legal profiles render it challenging to capture a full (vulnerability) conceptualisation *in concreto*.

7. Constructed Vulnerability

Going back to Fineman's vulnerability concept (see 2.1), the *constructed* nature of the circumstances experienced by transiting smuggled migrants points further to vulnerability, attracting even more strongly State responsibility, because it is in part caused by institutional or societal environments and the (in)action of public stakeholders therein. Thus, factual and legal vulnerability becomes aggravated because of the intentional stratagems underlying it.

Discussing migration governance in the EU, observing that the migrant can be 'trapped in legal ambiguity', Stel charts how migrants experience continuous dispersal and displacement between distinct national jurisdictions, underlining deficiencies in the provision of information in that process.[247] With other scholars, Stel links the

244 *Khlaifia and Others* (n 146) para 86.

245 Ibid paras 93-108.

246 See also generally McAdam (n 16), including her discussion on human dignity.

247 Nora Stel, 'Uncertainty, Exhaustion, and Abandonment Beyond South/North Divides: Governing Forced Migration Through Strategic Ambiguity' (2021) 88 Political Geography 102391.

'constructed' uncertainty to the policies managing migration.[248] The production of continuous uncertainty and ambiguity arising from the lack of regulatory precision is even described as a key governance strategy within the EU, its aim being to deter and generate disillusionment, a sense of abandonment and exhaustion.[249] Accounts of Davies et al. with respect to Calais also depict a strategic approach, concentrating on non-governance rather than governance, made visible by the 'violent inaction' of authorities as well as by the 'turning a blind eye' behaviours to the living conditions in the camps.[250]

With regards to the legal governance of the mobility of 'illegalized migrants' stranded in transit spaces within the Schengen Area, scholars also highlight other distinct governance strategies than inaction. Based on her ethnographic work conducted at the EU internal borders, Tazzioli, coining the term 'governing through mobility,' describe techniques going beyond detention, surveillance and forced immobility.[251] Examining administrative measures and local decrees, she observes techniques aimed at disrupting migrant's journeys by dividing, scattering, and forcing migrants to be continuously on the move. These techniques are depicted as instruments to evacuate sensitive border zones, as a strategy of deterrence, and as a 'frantic attempt rather than a planned strategy' to take back control over so-called 'unruly movements'.[252] Fontana's findings echo these arguments, with her research focusing on vulnerabilities and insecurities faced by migrants at the external *and* internal EU borders. Fontana outlines how bordering practices of EU Member States 'cast migrants into spaces of containment and vulnerability'.[253] Touching upon both smuggling practices and the constructed nature of vulnerability, Fontana provides an overview of the causes of death in secondary onward movements across the EU between 2014 and 2020. She concludes that when migrants find themselves contained into transit spaces without legal channels available to move onwards, they have no other possibilities but to resort to dangerous alternatives to cross borders which enhances significantly the risk of injuries and death.[254]

Importantly, the causes of these dynamics are located *inter alia* in the (mis) management of migrant and asylum seeker streams by Member States and the legal barriers erected by them, which cast migrants on the move into a 'bureaucratic

248 Ibid. See also, Leonie Ansems de Vries and Marta Welander, 'Politics of Exhaustion: Reflecting on an Emerging Concept in the Study of Human Mobility and Control. (*Border Criminologies*, 15 January 2021) :<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/01/politics> accessed 12 May 2022; Alessandra Sciurba, 'Categorizing Migrants by Undermining the Right to Asylum. The Implementation of the 'Hotspot Approach' in Sicily' (2017) 10(1) Etnografia e Ricerca Qualitativa 97; Thom Davies, Arshad Isakjee, and Surindar Dhesi, 'Violent Inaction: The Necropolitical Experience of Refugees in Europe' (2017) 49(5) Antipode 1263.

249 Sciurba (n 248).

250 Davies, Isakjee and Dhesi (n 248).

251 Tazzioli (n 152).

252 Ibid 11.

253 Iole Fontana,'The Human (In) security Trap: How European Border (ing) Practices Condemn Migrants to Vulnerability' (2022) 59(3) International Politics 480.

254 Ibid.

limbo'.[255] Similarly, Menghi, focusing on the Roya Camp (Italy), describes an 'economy of containment beyond detention'.[256] Ansems de Vries and Welander use the concept of the 'politics of exhaustion' to refer to a technology of governance used in places of transit which is aimed at 'pushing people to the edge, directly or indirectly'.[257] The authors depict a feeling of exhaustion experienced by migrants in settlements in Calais, Brussels and the nearby UK border regions, due to 'repeated evictions, detention, push-backs, deportations, sub-standard living conditions, fundamental uncertainty, the continuous threat and reality of violence, etc'.[258] These practices are regarded by these scholars as a deterrent strategy, the objective being to discourage migrants in attempts to access the UK or another EU country to lodge asylum requests. In his recent empirical research focusing on migrants in Brussels, Vandevoordt frames policing practices as games of 'cat and mouse' where migrants are 'hunted down', arrested and subsequently released.[259]Also using the concept of the politics of exhaustion, Vandevoordt signals that these police actions are aimed at deterring migrants who do not wish to apply for asylum from staying in Belgium.[260]

C. Legal Effects: Application of Criminal Justice Related Positive Obligations Framework

Empirical insights such as those discussed above can be used in different manners by the ECtHR. It is held here that its operationalization through specially calibrated (particular) vulnerability profiles would represent a fundamental step. Vulnerability recognition is not 'mere rhetorical flourish', but actually '*does* something' in ECtHR case law,[261] its strongest impact perhaps being where it transposes into a right to not fall into or be kept in a particular type of vulnerability, this engendering obligations on the part of the State to prevent that from occurring, cease its continuation and provides redress for it. This route arguably is also the one taken in the recognition of positive obligations in art. 4 ECHR with respect to forms of victimization not referred to in the text of the provision, namely human trafficking and other forms of exploitation not (clearly) qualifying as slavery, servitude or forced labour.[262]

255 Ibid.

256 Marta Menghi, 'The Moral Economy of a Transit Camp: Life and Control on the Italian-French Border', in Amigoni, Aru, Bonnin, Proglio and Vergnano (n 238) 94.

257 Ansems de Vries and Welander (n 248). See also, Leonie Ansem De Vries and Elspeth Guild, 'Seeking Refuge in Europe: Spaces of Transit and the Violence of Migration Management' (2018) 45(12) JEMS 2156; Anja Edmond-Pettitt, 'Territorial Policing and the 'Hostile Environment' in Calais: From Policy to Practice' (2018) 2(2) Justice, Power and Resistance 31.

258 Ansem de Vries and Welander (n 248).

259 Vandevoordt (n 44) 53. See also Mescoli and Robain (n 43) reporting the frequent police raids in transit spaces in Brussels.

260 Ibid.

261 Peroni and Timmer (n 117) 1057 and 1074.

262 Likewise, this provision makes no mention of positive obligations ensuing from it, while the Court holds that it is in this format that obligations particularly arise under art. 4 ECHR. See *S.M.* [GC] (n 82).

Via an overview of human trafficking case law in relation to criminal justice related positive obligations, this section first explores the feasibility of expansive interpretation of art. 4 ECHR, entailing the prohibition of slavery, servitude and forced or compulsory labour, to include aggravated smuggling in a transit context under its protective umbrella (3.1). Subsequently, the second sub-section develops a fluid and flexible approach including other protective bases other than art. 4 ECHR, which could also provide a basis for criminal justice related positive obligations protection vis-à-vis horizontal abuse experienced by transiting migrants smuggled under aggravating circumstances (3.2).[263] The final sub-section discusses how the Court has relied consistently on empirical information to develop its human trafficking case law (3.3) and how the same approach can be taken to circumscribe and operationalize the vulnerability of aggravated smuggling of transit migrants.

1. Applicability of the Convention to Transiting Migrants? Trafficking Case Law as a Model

Given the nexus between trafficking and smuggling vulnerability and victimization, art. 4 ECHR, the central locale of ECtHR positive obligations case law with respect to trafficking, arguably is an interesting option to explore as a basis for protection against transiting smuggling victimization. In its 13 judgments regarding criminal justice related positive obligations with respect to trafficking,[264] mainly (and through an explicit preference therefore),[265] positioning that protection in this provision, the Court has demonstrated a willingness to expansively interpret the 'restrictive wording'[266] of this provision, 'in such a way as to allow it to cover rights unthought of when it was conceived,'[267] modernizing it in line with contemporary protective needs in 'modern European democracies.'[268] Relying on own 'general principles' applying in this context,[269] the Court has responded to those in two important manners.

Not only taking a broad approach to its understanding of the forms of abuse explicitly prohibited in this provision (slavery, servitude and forced or compulsory labour), the Court has critically added to its scope by adding human trafficking as a further autonomous category of prohibited horizontal abuse.[270] The Court's open

263 See also McAdam (n 16) 21-30 exploring which human rights abuses may be at issue in the context of smuggling, notably examining possibilities under the prohibition of inhuman or degrading treatment, also in the sense of art. 3 ECHR.

264 The result of 13 judgments is obtained through search of HUDOC using art. 4 ECHR, English language and the exact term 'human trafficking' as filters. Adjudicated both at the chamber and Grand Chamber level, *S.M.* (n 80) counts twice.

265 *S.M.* [GC] (n 82) paras 242-243.

266 Kirsty Hughes, 'Human Trafficking, SM v Croatia and the Conceptual Evolution of Article 4 ECHR' (2022) 85(4) *The Modern Law Review* 1045 referring to Helen Fenwick, *Civil Liberties and Human Rights* (Routledge, 2007) 1045.

267 Ibid.

268 Ibid.

269 *J. and Others* (n 82) para 103.

270 The Court did so first in *Rantsev* (n 82).

approach to this provision - visible between its first (*Siliadin v. France* in 2005), up to the most recent (*Zoletic and Others v. Azerbaijan* in 2021) judgment in the catalogue of pertinent case law - is moreover facilitated by the fact that it does not see the need for exact classifications, holding not only that pertinent typologies of harm or endangerment can overlap within the categories in art. 4 ECHR,[271] but that they can also be covered by other Convention provisions, notably articles 2, 3, and 8 ECHR.[272] Protection in one instance has also been innovatively extended to art. 6 ECHR.[273] The Court has been lenient with unclearly formulated applications (either with respect to the Convention provision(s) on which complaints were based, or the format of alleged positive failings on the part of the State).[274] Where necessary, it has characterized complaints in the most suitable construct itself, demonstrating therewith awareness of difficulties involved in capturing the complex phenomena it in terms of human rights' deficiencies. As such, diverse (sub-)categories of abuse have been drawn under Convention protection (being trafficking (of minors) in association with domestic servitude, labour or sexual exploitation and forced prostitution).[275]

With one - perhaps two - exception(s),[276] in none of the pertinent judgments has the Court ever determined that the scenarios presented therein, legally or factually could not fall within the scope of Convention protection, even though all cases arguably presented hazy narratives.[277] Even where the Court does not (or cannot) engage with the substantive question as to whether or not treatment alleged by applicants amounted to behaviour prohibited under art. 4 ECHR, it can find procedural violations where *national authorities* did not do enough to determine (or exclude) that in domestic investigations and proceedings.[278] Generally, the Court has not been sparing in its assessments of compliance, at least one (type of) violation having been established in nearly all cases.[279]

271 See the discussion and clarification in this respect, also in relation to exploitation for the purpose of prostitution in *S.M* (n 80).

272 *S.M.* [GC] (n 82) paras 297; See also *M. and Others. v. Italy and Bulgaria* 40020/03 (ECtHR, 31 July 2012) paras 106-107.

273 That occurred in *V.C.L. and A.N.* (n 82) in which the minor applicants complained of their criminal prosecutions despite their (recognized) status as trafficking victims. The Court established a violation of art. 6 ECHR, *inter alia* because the national court had not 'consider(ed) their cases through the prism of the State's positive obligations under (art. 4 ECHR)' para. 208.

274 *S.M.* [GC] (n 82) paras 240 and 335. See with respect to *S.M* (n 82) in Hughes (n 266) 1049-1051; See also *Zoletic* (n 23) paras 121-133.

275 In *V.C.L and A.N.* (n 82) the second applicant put forward a further typology of trafficking abuse, holding that 'as a victim of trafficking exploited for the purposes of producing illegal drugs, he was treated differently from victims of trafficking exploited for other criminal purposes'. This complaint was found to inadmissible by the Court, but only did so because of non-exhaustion of domestic remedies. See paras 211-213.

276 See the case of the second applicant in *C.N. and V* (n 82) para 94. In the case of *M. and Others* (n 272), it is difficult to say whether or not the Court found that the first applicant could potentially have been trafficked. The case is an outlier in that the Court, establishing a violation of the procedural obligation under art. 3 ECHR to investigate the treatment to which the first applicant had been subjected, considered in that regard that she was potentially also a trafficking victim. In its examination of the art. 4 ECHR complaint relating specifically to trafficking in that case, the Court seems however to have backtracked this finding to a certain extent, in the context of other obligations than the procedural one. See in this judgment, with respect to the art. 3 ECHR complaint, para. 106 and, in contrast, in relation to the art. 4 complaint, paras 154-155.

277 The same holds for the 9 decisions, in which inadmissibility was established for other reasons.

278 *Zoletic* (n 23), paras 193-210; *S.M.* [GC] (n 80) paras 336-347.

279 *J. and Others* (n 82) and with respect to the second applicant in that case, *C.N. and V.* (n 82) paras 93-94 form the exceptions.

While the concrete criminal justice positive obligations in art. 4 ECHR in their base form follow the same format as those which apply in relation to other types of horizontal abuse,[280] in trafficking case law, the Court reads these in line with specific protective needs associating with this type of abuse, in some instances prescribing specific further obligations in that regard.[281] As such, the Court has established obligations to (*inter alia*) ensure: (i) *effective* criminalizations, interpretations and classifications[282] which adequately capture the full gamut of abuse; (ii) that the overall legal and practical apparatus is effectuated in practice, in this context emphasizing the importance of victim identification and the training of officials;[283] (iii) that impediments thereto do not arise through the existence of conflicting criminal justice and (immigration) policies, the latter undermining the former[284] and (iv) that shortcomings in investigations in association with the features of the crime phenomenon are addressed,[285] *inter alia* by emphasizing that the often cross-border aspect of trafficking gives rise to robust duties of international cooperation.[286] In so doing, the ECtHR has incorporated special features of trafficking victimization in its appraisals to the advantage of applicants. These include, the Court strongly relying in this regard on empirical evidence extracted from diverse sources, difficulties attaching to (over-reliance on) victims' statements, which may be problematic in light of (i) psychological pressure and burdens felt by them before and in the course of proceedings, (ii) prejudice and insensitivity to victim's problems on the part of officials taking testimony, (iii) the credibility of statements, in light of changes therein over time and (iv) fear and reluctance on the part of victims because of threats of reprisals or a lack of trust in 'the effectiveness of the criminal justice system'.[287] The Court has alleviated the burdens of victims by lowering thresholds in terms of (*prima facie*) evidence which they must show to trigger (the applicability of) positive obligations (to

280 From a criminal justice perspective, these are: (i) the (first) substantive obligation to have in place an adequate protective legal and administrative framework and the means to effectively operate it; (ii) the (second) substantive obligation to prevent or stop harm from occurring and (iii) the procedural obligation to provide effective (criminal law) redress, including via adequate investigation, adjudication, and sanctioning. See *inter alia*, *S.M.*[GC] (n 82) para 306; *Zoletic* (n 23) para 182.

281 In that 'the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking', the Court also prescribes non-criminal measures specifically important in the trafficking context, such as 'adequate measures regulating businesses often used as a cover for human trafficking', while 'a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking'. *Rantsev* (n 82) para 284.

282 See *Siliadin* (n 82), paras 147-148; *C.N. and V.* (n 82) paras 105-108; *C.N.* (n 82), para 80; *Chowdury* (n 82) para 123.

283 *J. and Others* (n 82) para 110-113 and, distinctly in terms of criminal victimization, para 115.

284 *Rantsev* (n 82) paras 291-293.

285 See *S.M.* [GC] (n 80), para 337, where the Court emphasized the importance of investigating contacts on social media, in that 'such contacts represent one of the recognised ways used by traffickers to recruit their victims'.

286 *Zoletic* (n 23) para 191; *Rantsev* (n 82) para 289; See also *J. and Others* (n 82) para 105.

287 *S.M.* (n 82), para 344, referring to empirical evidence cited in paras 138, 171, 206 and 260. See also in *Chowdury* (n 82) para 121, the reference to the recovery and reflection period in art. 13 of the Council of Europe Convention on Action against Trafficking in Human Beings, with the aim allowing a potential victim time to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities.

protect and provide criminal procedural remedies) at the national level.[288] Critical for the context of aggravated smuggling is that the Court also recognizes the complexities of the notion of consent, through sensitivity to the possibility that this can dissolve or be diluted.[289] Overarchingly, the ECtHR emphasizes the particular vulnerability arising from this type of victimization. Importantly, with most applicants falling under that category, the vulnerability of trafficking victims is often (in part) related to the fact that they are also *irregular migrants*.[290]

Registering the transiting migrant smuggled under aggravated circumstances under art. 4 ECHR would not only mean that the same obligations apply, inclusion of his profile in this provision would moreover have important symbolic and norm-transferring impact, emphasizing the conceptual proximity between trafficking and smuggling and underscoring that potentially serious forms of victimization can also take place under the latter. That is not to say that the Court can or should equate aggravated smuggling victimization (notably in a transit context) with trafficking. As discussed below, the current position of the ECtHR is that abuse can only qualify as trafficking if it meets the constituent aspects of that phenomenon as it is circumscribed in pertinent international law definitions.[291] While there may be strong similarities between smuggling and trafficking experiences, and there may be concrete instances in which the Court could interpret horizontal abuse as falling under those definitions, it is unlikely that the Court would create full identity between the two groups. That would not be necessary however, in that the Court, on the basis of evidence, recognizing *sui generis* harm and endangerment and vulnerability associating with certain types of smuggling, could understand those as falling under the scope of art. 4 ECHR, under an own category.[292]

2. A Consolidated and Fluid Approach Under Articles 2, 3, 4 and 8 ECHR

The fact remains however that the range of smuggling experiences and the profiles of smuggled migrants is highly varied, also in the sense that the similarity to trafficking may be more or less strong. It is further important in this regard that art. 4 ECHR is not the only locale in which the Court can establish protective duties. The question then becomes which provisions can be alternates, for which types of smuggling situations.

288 *Zoletic* (n 23) paras 139-142; paras 156-170 and paras 193-200. See also in this regard, John Trajer, 'Hidden in Plain Sight: Failure to Investigate Allegation of Abuse on Public Construction Projects in Zoletic and Others v. Azerbaijan' (Strasbourg Observers, 18 November 2021) <https://strasbourgobservers.com/2021/11/18/hidden-in-plain-sight-failure-to-investigate-allegations-of-abuse-on-public-construction-projects-in-zoletic-and-others-v-azerbaijan/> accessed 19 June 2022.

289 *Chowdury* (n 82) paras 96-97; *Zoletic* (n 23) para 167.

290 See footnote 82.

291 *S.M.* [GC] (n 82) para 303.

292 See in that regard, *S.M.* (n 82) para 307, where the Court considered that 'the relevant principles relating to trafficking' are also applicable to cases of forced prostitution, 'given the conceptual proximity of human trafficking and forced prostitution under Article 4 (…)', also referring in that regard to *C.N. v. the United Kingdom* (n 82), paras 65-69, with respect to domestic servitude.

Again taking Belgian law as an illustration, implementing the EU Facilitator's Package, article 77*bis* of the Foreigner's Act criminalizes the preparing, facilitating, or effectuating (attempted) of the irregular entry, residence, and transit by a non-EU subject, for direct or indirect financial gain. Again, a reading of the proposal leading up to this legislation makes it clear that the legal provision, which is purposefully placed in the Foreigner's Act as opposed to the Criminal Code, has the protection of the interests of the State as its main orientation. Indeed, when modifying former article 77*bis*, which previously did not differentiate between migrant smuggling from human trafficking (as they were conflated prior to a legal reform of 2005), the reason for positioning of the trafficking offence in the Criminal Code under the title 'Crimes and Offences against Persons' was precisely to 'make a stark distinction between migrant smuggling and human trafficking' in line with international instruments.[293] Regulated in this manner, difficulties may obtain in the qualification of the offence criminalized in article 77*bis* as a horizontal human rights abuse under any Convention provision. Moreover, articles 75 and 76 of the Foreigner's Act criminalize the illegal entry and residence and the non-compliance with removal orders by an alien himself, the provisions taken together rather framing this migrant as a consensual participant within the smuggling narrative.

The dynamics change however where aggravated circumstances meant in articles 77*quater* and 77*quinquies* are at issue. Some of those may (even without a smuggling context), attract the applicability of articles 2 and 3 ECHR. Thus, positive obligations under art. 2 ECHR could become engaged under aggravated circumstance (iv) of art. 77*quater*, where the life of the victim is endangered, intentionally or through gross negligence, or art. 77*quinquies* (i), if the crime causes the (unintentional) death of the victim.[294] Aggravated circumstance (v) under art. 77*quater*, where the crime causes a seemingly incurable disease, an inability to perform personal labour for more than four months, full loss of an organ or the use thereof or serious mutilation, could correspond with the requisite level of severity of ill-treatment in art. 3 ECHR.[295] The same may hold true, although less categorically, for the aggravated circumstances of art. 77*quater* under (iii), where smuggling is committed through direct or indirect use of cunning trickery, violence, threat or any form of coercion, or by kidnapping, abuse of power or deceit, particularly if violence is involved.[296] Where art. 3 ECHR would not apply (because the requisite level of severity is not attained), an alternate basis may be found in art. 8 ECHR which is broad enough to cover a great variety of horizontal abuse. That would also be an option for the aggravated circumstances meant under art. 77*quater*, where the crime is committed (i) in relation to a minor;

293 Belgian House of Representatives, Legislative Proposal (10 August 2005), 9-10.

294 Art. 2 ECHR would also apply in loss of life under such circumstances, regardless of Belgian law.

295 See also art. 6 par. 3 of Palermo Smuggling Protocol, 3 on the necessity to establish aggravating circumstances in life endangerment situations, inhuman or degrading treatment which include the exploitation of migrants.

296 Similarly, see McAdam (n 16) 23-30.

(ii) through abuse of the vulnerable situation of a person as a result of his irregular or precarious administrative situation, his age, pregnancy, illness or physical or mental deficiency, to such an extent that that person in fact has no other real and acceptable choice than to allow themselves to be abused or by offering or accepting payments or other advantages from a person holding authority over the victim.

Diverse issues arise however with these locales. Concrete horizontal abuses experienced by migrants smuggled under aggravating circumstances may be grave enough to trigger criminal justice positive obligations under articles 2 and 3 ECHR, but there is no guarantee of that. It would moreover be problematic if appraisal were to focus in isolation on the impact on life or physical or psychological integrity, thus only the aggravated circumstances itself, without consideration of the smuggling backdrop. In such a sealed-off approach, aspects of abuse associated with the aggravated *smuggling* - the own type of exploitation and assault on human dignity involved - would not (necessarily) come to the fore, meaning that any protection provided would be disengaged therefrom. While the same issues could arise with art. 8 ECHR, a further problematic attaching to this provision is that this is the location where the Court does administer a margin of appreciation, in that national authorities can be left a choice of means of redress for lesser abused, criminal remedies (and therewith criminalization) not necessarily being required.[297] The hazard is then that in the blurry environment of art. 8 ECHR, where 'lesser' aggravated circumstances are involved, that the Court will not recognize a deficiency in recognition of criminal victimization.

Such concerns again render the mechanics of art. 4 ECHR as it is applied to trafficking attractive, if not (in all cases) as a basis for protection, at least as an inspiration, to be applied in other provisions also. While the ECtHR has on numerous occasions made clear that prohibited forms of treatment under this provision, including trafficking, can overlap with abuse in the sense of articles 2, 3 and 8 ECHR, it is critical that it *prefers* to examine trafficking complaints under art. 4 ECHR. This is precisely in order to capture all aspects of the complex phenomenon. Underscoring that 'in its case-law it has tended to apply Article 4 to issues related to human trafficking',[298] the Court explains 'that this approach allows it to put the possible issues of ill-treatment (under Article 3) and abuse of the applicant's physical and psychological integrity (under Article 8) into their general context, namely that of trafficking in human beings (…),' holding further that 'allegations of ill-treatment

297 In the framework of art. 8 ECHR, the 'nature of the State's obligation' depends on 'the particular aspect of private life that is in issue,' the margin becoming 'correspondingly narrower' if 'a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life.' That will be the case where 'physical and psychological integrity' are involved. Particular vulnerability can also reduce margins, such as is the case for minors, notably where 'serious acts such as rape and sexual abuse' - which also engage 'fundamental values' - are concerned.' See *Söderman* (n 102) paras 78-82.

298 *S.M.* [GC] (n 82) para 241 referring to *Rantsev* (n 82) paras 252 and 336; *C.N. and V.* (n 82) para 55; *C.N.* (n 82) para 84; and *J. and Others* (n 82) para 123.

and abuse are inherently linked to trafficking and exploitation, whenever that is the alleged purpose for which the ill-treatment or abuse was inflicted'.[299]

(Aggravated) smuggling can be as complex a phenomenon as trafficking. It is paramount then that harms associated with it are in any event adequately identified and addressed, under whichever of the provisions mentioned above. It is also only in this manner that concrete obligations which may arise specifically in relation to this phenomenon can be developed, as they have been for trafficking. Understanding that not all smuggling experiences will be the same, a resolution would lie in envisaging articles 4, 2, 3 and 8 ECHR as points on a variegated scale of ill-treatment, the (greater) relevance of one or the other provision depending on the type and gravity of abuse. Taking all bases together, a broad matrix of potential protection would then be established, allowing for optimal approximation of the concrete situation of the smuggled migrant. Art. 4 ECHR could then be reserved for cases in which the abuse undergone by the smuggled migrant is found to have the closest conceptual proximity to the types of treatment prohibited in that provision, with the other provisions serving as fallback bases. Using them as alternates would not be problematic, as long as specific types of obligations associating with the type of abuse (corresponding to the needs and problematic arising from the crime phenomenon) are also read into those provisions.[300]

3. Sorting through Reliance on Empirical Information and Insights

In positioning the transiting migrant smuggled under aggravated circumstances within such a matrix, the Court can importantly rely on empirical evidence and the insights of expert bodies and scholars interpreting such information. Again, this is an approach also taken in trafficking case law, the Court having utilized empirical evidence in different manners therein. Importantly, as to be discussed below, the Court arguably also operationalized such evidence in its decision to recognize trafficking as a separate category of prohibited treatment under art. 4 ECHR,[301] of a kind necessitating recognition of criminal victimization and therewith requiring a criminal justice response. The Court has moreover used empirical information in assessing the applicability of art. 4 ECHR to concrete scenarios; to establish whether

299 *S.M.* [GC] (n 82) para 242.

300 See in this respect, *M. and Others* (n 272) paras 156 and 157 where the Court determined in its assessment of the art. 4 ECHR complaint that 'irrespective of whether or not there existed a credible suspicion that there was a real or immediate risk that the first applicant was being trafficked or exploited', the complaint of violation of the procedural obligation to effectively investigate established under art. 3 ECHR (see para 103), also covered any problematic which may have existed in that regard in the context of art. 4 ECHR.

301 In *Siladin* (n 82) in which the Court did not establish trafficking, but servitude and forced or compulsory labour, the Court relied in part on empirical information with respect to its findings that positive obligations are to be read into art. 4 ECHR and that the type of abuse at issue can only be addressed via criminal justice protection (paras 88 and 111). In *Rantsev* (n 80), as will be discussed further below, the Court relied in part on empirical information in finding that trafficking is to be considered an autonomous form of abuse within art. 4 ECHR.

or not a *prima facie* case of victimization was at issue;[302] in support of its findings with respect to the existence of specific types of obligations[303] and in the assessment of compliance in concrete cases.[304] A broad capital of information in the form of opinions, reports, studies, and statistical information emanating from public and private (monitoring) entities, often provided through third-party interventions, has provided a wealth of opportunities for the Court in this regard.[305]

This type of information has been used alongside support the Court has found for its positions in international law sources, but the Court has also availed itself of it where international sources provided no clear answers on certain issues (or where conflicts existed between sources). In *S.M. v. Croatia*, the Grand Chamber, finding that 'internal trafficking is currently the most common form of trafficking',[306] declined to exclude from its trafficking concept cases without a cross-border element, therewith, according to Hughes '(ensuring) the wider relevance of Article 4', and potentially '(assisting) centring analysis upon victims' experiences, as opposed to immigration control'.[307] Finding that a more restrictive approach would 'run counter to the object and purpose of the Convention as an instrument for the protection of individual human beings, which requires that its provisions be interpreted and applied so as to make its safeguards practical and effective,' the Grand Chamber also relied expressly on information provided by one of the third party interveners to that effect.[308] For Hughes, the Grand Chamber's holding in *S.M.* that 'human trafficking may take place outside the parameters of 'organised crime',[309] likewise gives rise to 'hope' that 'a conception of human trafficking that is not tied to border control and organised crime may assist in developing Article 4 beyond punishing 'perpetrators' of human trafficking (…) towards understanding the experiences of victims and addressing their substantive needs'.[310]

302 See with respect to the use of empirical evidence in aid of rights bearer's burden of presenting *prima facie* evidence of victimization, *Zoletic* (n 23), paras 156-170 and 193-200. See also in this regard, Trajer (n 288).

303 See with respect to the identification duty in *J. and Others* (n 82), paras 110-113 and 115, in light of Stoyanova's blog (n 18). See also *S.M.* (n 80) paras 295-296, where the Grand Chamber found that internal trafficking of nationals also falls under the concept of trafficking in art. 4 ECHR, *inter alia* relying on the information provided by one of the third-party interveners 'that internal trafficking is currently the most common form of trafficking'.

304 *Rantsev* (n 82). In *S.M.* (n 82), as underlined by Hughes (n 266) 1049: 'Both (judgements) found that Croatia had violated the procedural obligation to investigate by neglecting to pursue various lines of enquiry, all of which was contrary to expert guidance as to how to investigate human trafficking.'

305 In this regard, GRETA is identified as playing an important role as a contributor. See *inter alia* Vladislava Stoyanova, 'Sweet Taste with Bitter Roots: Forced Labour and Chowdury and Others v Greece' (2018) European Human Rights Law Review 67.

306 *S.M.* [GC] (n 82) para 295.

307 Hughes (n 266) 1051.

308 *S.M.* [GC] (n 82) paras 269-270, where the Research Centre *L'altro diritto onlus* (University of Florence) referred to the UNODC *Global reports on trafficking in persons*, which 'pointed out that victims who had been detected within their own borders represented the largest part of the victims detected worldwide'.

309 *S.M.* [GC] (n 82) paras 294-296 referring to sources mentioned in paras 11 and 120.

310 See Hughes (n 266) 1051.

The ECtHR can likewise source the real-life experiences and vulnerabilities of smuggled migrants as well as challenges in the effectuation of protection, using empirical insights to bolster its approach. Again, a fundamental first step which must be taken in that regard - which would trigger the whole chain of distinct positive obligations - is the recognition that there is a *sui generis* form of abuse associating with aggravated smuggling, notably in a transit context, which gives rise to an inherent vulnerability against which criminal justice protection must be available.

Returning then to the made by the Court of empirical information in the incorporation of trafficking as a distinct category in art. 4 ECHR, it is important to underscore that while lauded, the ECtHR's open approach to art. 4 ECHR has also been criticized.[311] Such criticism touches upon the lack of clarity with respect to abuse categories it (legally and factually)[312] sorts under the scope of the provision and the manner in which they relate to each other.[313] Commentary has been that the Court has created a 'definitional quagmire' within the provision[314] and has particularly been ambiguous in its description of trafficking, creating 'doubt about the broader parameters of the right'.[315] Perhaps influenced by the diverging views, including those within the Court itself,[316] in *S.M. v. Croatia* (the only Grand Chamber judgment with respect to trafficking), the ECtHR brought more clarity to the notion of trafficking under the Convention by binding itself to international law definition(s) of the phenomenon.[317] In keeping with the idea of deference, this may point to a strategy to check an overly progressive approach. Marking that the Grand Chamber did so in *S.M. v. Croatia*, Stoyanova argues that the chamber judgment in that case as well as confusion arising from the *Ranstev* judgment was importantly corrected, in that an implication lay therein that 'the definitional scope of Article 4 was enlarged to such an extent as to cover 'exploitation', whatever 'exploitation' might mean'.[318]

Nevertheless, at the same time, Hughes argues that, even after this Grand Chamber judgment, there are also indications that 'different future directions remain both possible and contested'.[319] Indeed, she argues that there is a basis to hold that in

311 Ibid 1046.

312 See Vladislava Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30(2) *Netherlands Quarterly of Human Rights*.

313 Hughes (n 266) 1046 See also Stoyanova (n 312).

314 Vladislava Stoyanova, 'The Grand Chamber Judgment in SM v. Croatia: Human Trafficking, Prostitution and the Definitional Scope of Article 4 ECHR' (*Strasbourg Observers,* 3 July 2020) <https://strasbourgobservers.com/2020/07/03/the-grand-chamber-judgment-in-s-m-v-croatia-human-trafficking-prostitution-and-the-definitional-scope-of-article-4-echr/> accessed 10 June 2022.

315 Hughes (n 266) 1046.

316 Hughes (n 266) 1055-1056.

317 Hughes (n 266).

318 See Stoyanova (n 312).

319 Hughes (n 266) 1046.

S.M. v. Croatia, the Court added, beyond trafficking, forced prostitution as a further category of distinct abuse covered by art. 4 ECHR.[320] Hughes offers an interesting analysis as to how the door may remain open for more. She identifies as a main cause for the definitional uncertainty with respect to the definition of trafficking under art. 4 ECHR the fact that the Court used two different approaches in framing the concept in *Rantsev v. Cyprus and Russia*.

Hughes coins these two approaches as follows: the 'ECtHR characteristics approach' and the 'international law definition'.[321] The latter attaches to Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, both of which unpack the three 'core elements' of trafficking, being the requisites of 'act, means and purpose'.[322] The 'characteristics approach' on the other hand 'describes the nature of human trafficking, the intentions of traffickers, and the impact of human trafficking upon the victim'.[323] The two approaches give rise to ambiguity because, while overlapping to an extent, they are also significantly different, particularly important being that the 'characteristics approach' does not require that the core elements in the international law elements are established, making it broader.[324] The Court exacerbated the lack of clarity according to Hughes, by, in case law following *Rantsev v.Cyprus and Russia*, 'vacillating' between the two approaches, alternately relying on one over the other.[325]

One of two explanations Hughes provides for the persistence of ambiguity in case law is of particular importance here. This lies in her suggestion that 'the Court did not pin down the concept earlier', because of 'difficulties (it) faced in explaining the relationship between human trafficking and Article 4, and thus in justifying reading the concept into the right', making it understandable that 'when implying a new concept into Art. 4 the Court would wish to explain how and why there was a role for it within Article 4 and would wish to resist being seen to be simply lifting concepts from other international frameworks'.[326]

As such, the 'characteristics account' can be considered as having functioned to legitimize the inclusion of trafficking under art. 4 ECHR, by supporting the position that there is a real need to do so. It remains relevant however, in that in *S.M. v. Croatia*, the Grand Chamber did not remove this account as a tool, but gave it an alternate function, namely as a means to determine '*how* [emphasis added] the phenomenon of human trafficking falls within the scope of Article 4'.[327] Thus, the characteristics account 'is

320 Hughes (n 266).

321 Hughes (n 266) 1048.

322 Ibid.

323 Ibid.

324 Ibid.

325 Ibid.

326 Ibid 1056.

327 Ibid 1057, citing to *S.M.* [GC] (n 82) para 291.

now presented as an attempt at explaining the nature of Article 4 and the rights that it encompasses by examining the ways in which an individual experiences a loss of those rights'.[328] In this manner, the characteristics approach retains importance, in that the Court may '(return) to this account',[329] notably also where ambiguity may again arise with respect to (new) types of treatment not (yet clearly) housed within the provision.[330]

Of great significance is that Hughes' 'characteristics approach' paraphrases a description of trafficking first laid down by the Court in *Ranstev v. Cyprus and Russia*, which reads fully as follows:

'(t)rafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (…). It implies close surveillance of the activities of victims, whose movements are often circumscribed (…). It involves the use of violence and threats against victims, who live and work under poor conditions (…). It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (…)). The Cypriot Ombudsman referred to sexual exploitation and trafficking taking place under a regime of modern slavery (…)'.[331]

Importantly, the elements of this definition are fully extracted from empirical information provided in reports third-party submissions in that case.[332] Reasoning why trafficking should be included within the scope of art. 4 ECHR, the Court moreover pointed in that judgment to the increase in trafficking as a 'global phenomenon', referring in that regard to the *Ex Officio* report of the Cypriot Ombudsman on the regime regarding entry and employment of alien women as artistes in entertainment places in Cyprus, two follow-up reports made by the Council of Europe Commissioner for Human Rights and the third party submission of The AIRE Centre.[333] The Court's conclusion that '(t)here can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention' is (as well as being mentioned in the preamble of the Anti-Trafficking Convention),[334] likewise supported in citations from the reports of the Cypriot Ombudsman.[335] As such, the 'characteristics account' may, in fact, be considered a summation of empirical

328 Ibid 1057.

329 Ibid.

330 See Hughes (n 266) ibid and 1056-1057 (with respect to forced prostitution).

331 *Rantsev* (n 82) para 281. See Hughes (n 266) citing from this paragraph 1048.

332 *Rantsev* (n 82) para 281.

333 Ibid paras 278.

334 Ibid para 162.

335 Ibid paras 282 and 89.

evidence, which, having been utilized first to recognize that trafficking represents a type of abuse falling under the scope of art. 4 ECHR, now functions to sort and analyse concrete narratives, to determine not only whether they constitute trafficking (within the parameters of the international law definition), but also to examine other forms of abuse which may also require positioning under the scope of this provision.

Strong empirical evidence likewise can be transposed into an own 'characteristics account' framing the real-life experiences and vulnerabilities of transiting smuggled migrants and can also be used by the Court to draw pertinent types of abuse under the scope of Convention protection. Again, in accordance with the specific type and gravity at issue, concrete cases can be positioned in the most appropriate manner, within the matrix of protection arising from the combined bases of articles 2, 3, 4, and 8 ECHR as envisaged above.

II. Conclusion

Even in Belgium, where the legal protection of the smuggled migrant may be said to be strong and well aligned with the empirically observed vulnerabilities of smuggled migrants, implementation and effectuation of intended protection are impeded. In jurisdictions where the strict dichotomy between trafficking and smuggling is even more forcefully in place, given the blurred boundaries between human trafficking and migrant smuggling and the own type of victimization and vulnerability associated with the latter, the persistence thereof is untenable. As also outlined by McAdam, departing from a broader international human rights law perspective, there must be a 'response (…) capable of adapting to the complicated realities of both phenomena in practice, which means rising to the challenge of the human rights violations and abuses that can occur as a cause or consequence of either'.[336] Differential treatment is particularly problematic given increasing empirical evidence of traces of abuse and exploitation in smuggling situations, *particularly* in a transit migration context.

Departing from a human rights perspective, we explored whether the ECtHR should and could break through existing protective disparities. We argued that diverse approaches can be reconciled if the Court takes the real-life experiences of smuggled migrants into consideration, viewing these from the lens of the context and *constructed nature* of their vulnerability and the role of institutional or societal environments in its deliberate creation. Unpacking growing theoretical and empirical insights, we built on the emerging awareness of the trafficking/smuggling nexus and the concept of 'migratory vulnerability', particularly in a transit context. We argued that *some* transiting smuggling migrants can and must be recognized as particularly vulnerable and as victims in the sense of the criminal law by the ECtHR. It is critical that the Court continues to use theoretical and empirical information and does so

336 McAdam (n 16) 31.

systematically and *structurally* to operate vulnerability paradigms (and transpose those to recognition of criminal victimization), in clear and effective manners. The Court's management of such information (which sources it uses, when and how it will do so) could benefit from ordering, while the operationalization of theoretical and empirical insights is contingent on the availability of information,[337] meaning that there is also a responsibility of stakeholders to ensure that the Court is provided with appropriate information.

Being conscious of the ambitious nature of the argument put forward, one important limitation should be underlined. Even if the steps suggested above were to be taken by the Court, further issues would likely appear at the level of testing of compliance with positive obligations, given the specific criteria and thresholds which apply for each type. The Court may recognize that protective duties exist in this sense for transit jurisdictions such as Belgium, also considering the obligations to manage and implement migration in a particular manner as Schengen-participants and EU Member States. Nevertheless, internal transit jurisdictions present an own problematic, notably in relation to the clarity of their own legal obligations with respect to both victims of migrant smuggling and human trafficking.[338] The fact that Belgium is a transit country and is therewith burdened with a greater problematic, in part on behalf of other states, may in that light also provide grounds for the Court to reject the idea that it can be held to stringent account. As observed by Golini, 'transit countries feel exploited as a springboard towards 'Eldorado' and do not regard themselves as able to deal with the growing numbers of irregular migrants'.[339] With regards to the Schengen Area and the vulnerability and unsustainability of EU migration policy, Scipioni highlights that the conditions for the migration 'crisis' of 2015 are to be found in weak monitoring, low solidarity between Member States, the absence of central institution and the lack of policy harmonization and situational contexts *created by and driven by (conscious) incomplete agreements within the EU* (emphasis added).[340] It is important to be mindful in this regard of the possibility that the Court may be reticent in establishing violations against transit jurisdictions, on the basis that it may be unfair to impose 'impossible or disproportionate burdens'[341] on them, placing with them greater responsibility for joint issues. A viable idea worth exploring in this regard is the notion of *shared* or *collective responsibility* of multiple

337 See, Baumgärtel, (n 80).

338 Benjamin Perrin, 'Just passing Through? International Legal Obligations and Policies of Transit Countries in Combating Trafficking in Persons' (2010) 7(1) European Journal of Criminology 11.

339 Antonio Golini, 'Facts and Problems of Migratory Policies' in Jospeh Chamie and Luca Dall'Oglio (eds) *International Migration and Development - Continuing the Dialogue: Legal and Policy Perspectives* (IOM, 2008) 96.

340 Marco Scipioni, 'Failing Forward in EU Migration Policy? EU Integration after the 2015 Asylum and Migration Crisis' (2018) 25(9) Journal of European Public Policy 1357.

341 *Rantsev* (n 82) para 219.

European jurisdictions already recognized in case law and scholarship.[342] Taking the protection of vulnerable individuals within the European legal space to heart, such an approach could diffuse the 'not our problem' mentality and bring an end to blaming games played out between European jurisdictions, which become salient in the event of dramatic incidents involving migrants' fatal journeys.[343] Judge Turković's concurring opinion attached to *M.H. and Others. v. Croatia* indeed underscores the need to examine shared responsibility. Opining that this judgment 'offers good guidance for the domestic authorities as to their future conduct', she marks out that the challenges involved in irregular transit migration 'concern the entire society', so that 'a common solution to the situation should be found within the European family'.[344] In this respect also, the Court can pioneer a progressive approach. In any event, with Dembour, we argue that the ECtHR should deploy 'courage to veer in a direction that is more protective of (...) migrant applicant(s)',[345] crafting appropriate protection with sensitivity to their particular circumstances, including with respect to vulnerabilities arising, as they transit through European legal space, through (aggravated) smuggling victimization.

Peer-review: Externally peer-reviewed.

Author Contributions: Conception/Design of study: R.M.R., P.Ö.; Data Acquisition: R.M.R., P.Ö.; Data Analysis/Interpretation: R.M.R., P.Ö.; Drafting Manuscript: R.M.R., P.Ö.; Critical Revision of Manuscript: R.M.R., P.Ö.; Final Approval and Accountability: R.M.R., P.Ö.

Conflict of Interest: The authors have no conflict of interest to declare.

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

Bibliography

Books, Book Chapters and Articles

Alagna F, *Shifting Governance: Making Policies Against Migrant Smuggling Across the EU, Italy and Sicily*. PhD Thesis, Radboud University 2020.

Ansem De Vries L and Guild E, 'Seeking Refuge in Europe: Spaces of Transit and the Violence of Migration Management' (2018) 45(12) JEMS 2156-2166.

Baird T and Van Liempt I, 'Scrutinising the Double Disadvantage: Knowledge Production in the Messy Field of Migrant Smuggling' (2016) 42(3) JEMS 400-417.

342 See in particular the insightful work of Maarten Den Heijer, 'Shared Responsibility Before The European Court of Human Rights' (2013) 60(3) Netherlands International Law Review 411; Maarten Den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4(2) Journal of International Dispute Settlement 361; Raquel Regueiro, 'Shared Responsibility and Human Rights Abuse: The 2022 World Cup in Qatar (2021) 25(1) Tilburg Law Review 27.

343 John Lichfield, 'The Channel Blame Game' *Politico* (27 November 2021): <https://www.politico.eu/article/migrants-english-channel-france-uk-refugees-drowned> accessed 12 May 2021.

344 *M.H. and Others* (n 102), Concurring Opinion Judge Turković, para 1.

345 See also Baumgärtel (n 80) 27, also with respect to the impact this may have at the domestic level (ibid 28). See also Peroni and Timmer (n 117) 1083-1084, in relation to concerns which may exist that the Court's use of the group vulnerability notion may present a 'threat' in light of the 'general tendency on the Court's part to read too many positive obligations into the text of the Convention-thereby putting too great of a burden on the Convention states', these authors arguing that the use of the concept 'might actually be a useful guiding principle', facilitating the 'prioritization of scarce resources', both on the part of states and the Court, meaning that '(v)ulnerability can thus be viewed as a limiting rather than a limitless principle'.

Baumgärtel M, 'Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights' (2021) 38(1) Netherlands Quarterly of Human Rights 12-29.

Belgian House of Representative. (2005, August 10). Projet de loi modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains. Doc. Parl., Chambre, Session 2004-2005, Doc 51 1560/001.

Belgian House of Representatives (2018, October 26). Note de politique générale. Asile et Migration, Doc. Parl. Chambre, session 2018-1019, Doc 54 3296/021.

Brunovskis A and Surtees R, 'Identifying Trafficked Migrants and Refugees along the Balkan Route. Exploring the Boundaries of Exploitation, Vulnerability and Risk' (2019) 72(1) Crime, Law and Social Change 73-86.

Clesse C-E, *La Traite des Êtres Humains. Droit Belge Eclairé des Législations Française, Luxembourgeoise et Suisse* (Larcier 2013).

Cole A, 'All of Us Are Vulnerable, But Some Are More Vulnerable Than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique' (2016) 17 Critical Horizons 260-277.

Dandurand Y and Jahn J, 'The Failing International Legal Framework on Migrant Smuggling and Human Trafficking' in John Winterdyk and Jackie Jones (eds.), *The Palgrave International Handbook of Human Trafficking* (Springer International Publishing 2020).

Dauvergne C, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2009).

Davies T, Isakjee A and Dhesi S, 'Violent Inaction: The Necropolitical Experience of Refugees in Europe' (2017) 49(5) Antipode 1263-1284.

Dembour M-B, 'The Migrant Case Law of the European Court of Human Rights. Critique and Way Forward' in Başak Çalı, Ledi Biancu, Iulia Motoc (eds) *Migration and the European Convention on Human Rights* (Oxford University Press 2021).

Dembour M-B, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).

Donadio G, 'The Irregular Border: Theory and Praxis at the Border of Ventimiglia in the Schengen Age' In Livio Amigoni, Silvia Aru, Ivan Bonnin, Gabriele Proglio, Cecilia Vergnano (eds), *Debordering Europe: Migration and Control Across the Ventimiglia Region* (Springer Nature 2020).

Edmond-Pettitt A, 'Territorial Policing and the 'Hostile Environment' in Calais: From Policy to Practice' (2018) 2(2) Justice, Power and Resistance 314-334.

Fassi E, 'The EU, Migration and Global Justice. Policy Narratives of Human Smuggling and their normative implications' (2020) 1 Rivista Trimestrale di Scienza dell'Amministrazione 1-30.

Fineman M, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1-23.

Fineman M, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133-149.

Fontana I, 'The Human (In) security Trap: How European Border (ing) Practices Condemn Migrants to Vulnerability' (2022) 59(3) International Politics 465-484.

Galisson M, 'Deadly Crossing and the Militarisation of Britain's Borders' (2020) < https://irr.org.uk/wp-content/uploads/2020/11/Deadly-Crossings-Final.pdf> accessed 3 May 2022.

Gallagher A, 'Human Rights and Human Trafficking: Quagmire or Firm Ground - A Response to James Hathaway' (2008) 49 Va. J. Int'l L 792-848.

Gauci J-P and Stoyanova V, 'The Human Rights of Smuggled Migrants and Trafficked Persons in the UN Global Compacts on Migrants and Refugees' (2018) 4(3) International Journal of Migration and Border Studies 222-235.

Hathaway J, 'The Human Rights Quagmire of Human Trafficking' (2008) 49 Va. J. Int'l L. 1-59.

Hughes K, 'Human Trafficking, SM v Croatia and the Conceptual Evolution of Article 4 ECHR' (2022) 85(4), The Modern Law Review 1044-1061.

McAdam M, 'What's in a Name? Victim Naming and Blaming in Rights-Based Distinctions between Human Trafficking and Migrant Smuggling' (2015) 4(1) International Human Rights Law Review 1-32.

Menghi M, 'The Moral Economy of a Transit Camp: Life and Control on the Italian-French Border', in Livio Amigoni, Silvia Aru, Ivan Bonnin, Gabriele Proglio, Cecilia Vergnano (eds), *Debordering Europe: Migration and Control Across the Ventimiglia Region* (Springer Nature 2020).

Mescoli E and Roblain A, 'The ambivalent relations behind civil society's engagement in the "grey zones" of migration and integration governance: Case studies from Belgium' (2021) 91 Political Geography &-11.

Mitsilegas V, 'The normative foundations of the criminalization of human smuggling: exploring the fault lines between European and international law' (2019) 10(1) New Journal of European Criminal Law 68-85.

O'Connell Davidson J, 'Troubling Freedom: Migration, Debt, and Modern Slavery' (2013) 1(2) Migration studies 176-195.

Perkowski N and Squire V, 'The Anti-Policy of European Anti-Smuggling as a Site of Contestation in the Mediterranean Migration 'Crisis'' (2019) 45(12) JEMS 2167-2184.

Peroni L and Timmer A. (2013), 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' International Journal of Constitutional Law, (2013) 11(4) 1056-1085.

Ruiz J-R, 'The right to liberty of asylum-seekers and the European Court of Human Rights in the aftermath of the 2015 refugee crisis' (2019) 39 1-46.

Sanchez G, 'Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research' (2017) 5(1) Journal on Migration and Human Security 9-27.

Tazzioli M, 'Governing Migrant Mobility through Mobility: Containment and Dispersal at the Internal Frontiers of Europe' (2020) 38(1) Environment and Planning C: Politics and Space 3-19.

Theilen J, *European Consensus Between Strategy and Principle: The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication*. (Nomos Verlagsgesellschaft 2021).

Timmer A, Baumgärtel M, Kotzé L and Slingenberg L, 'The Potential and Pitfalls of the Vulnerability Concept for Human Rights' (2021) 39(3) Netherlands Quarterly of Human Rights 190 – 197.

Triandafyllidou A, 'Migrant Smuggling: Novel Insights and Implications for Migration Control Policies' (2018) 676(1) The Annals of the American Academy of Political and Social Science 212-221.

Turković K, 'Challenges to the Application of the Concept of Vulnerability and the Principle of Best Interests of the Child in the Case Law of the ECtHR Related to Detention of Migrant Children', in Başak Çalı, Ledi Biancu, Iulia Motoc (eds) *Migration and the European Convention on Human Rights* (Oxford University Press 2021).

Stoyanova V, 'Separating Protection from the Exigencies of the Criminal Law, Achievements and Challenges under art. 4 ECHR' in Laurents Lavrysen and Natasa Mavronicola (eds.) *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Bloomsburg Publishing 2020).

Vandevoordt R, 'Resisting Bare Life: Civil Solidarity and the Hunt for Illegalized Migrants' (2021) 59(3) International Migration 47-62.

van der Leun J and Anet van Schijndel A, 'Emerging from the Shadows or Pushed into the Dark? The Relation Between the Combat against Trafficking in Human Beings and Migration Control' (2016) 44 International Journal of Law, Crime and Justice 26-42.

van Liempt I, 'Human Smuggling: A Global Migration Industry', in Anna Triandafyllidou (ed), *Handbook of Migration and Globalisation,* (Edward Elgar Publishing 2018).

Kim Y, 'Les Vulnérables: Evaluating the Vulnerability Criterion in Article 14 Cases by the European Court of Human Rights' (2021) 41(4) Legal Studies 617-632.

Electronic ressources

Ansems de Vries L and Welander M, 'Politics of Exhaustion: Reflecting on an Emerging Concept in the Study of Human Mobility and Control. (*Border Criminologies*, 15 January 2021) <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/01/politics> accessed 12 May 2022.

Arrouche K, Fallone A and Vosyliūtė L, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan' (CEPS Policy Brief, December 2021) <https://www.ceps.eu/wp-content/uploads/2021/12/CEPS-PB2021-01_Between-politics-and-inconvenient-evidence.pdf> accessed 12 May 2022.

Caritas International, 'Migrant en Transit en Belgique' (February 2019) < https ://www.caritasinternational.be/wp-content/uploads/2019/02/Migrants-en-transit-en-belgique.pdf> accessed 5 January 2021.

Carling J, 'Batman in Vienna: Choosing How to Confront Migrant Smuggling' (*PrioBlog,* 12 September 2017) <https://blogs.prio.org/2017/09/batman-in-vienna-choosing-how-to-confront-migrant-smuggling/> accessed 16 January 2022.

Circular Letter on the Situation of Migrants in Transit in Wallonia (20 September 2020) < https://interieur.wallonie.be/sites/default/files/2020-10/20201001164241354.pdf> accessed 5 January 2021.

Comité P, 'Le Contrôle et la Détention de Transmigrants par la Police à l'Occasion d'Arrestations Administratives Massives' (2019) <https://comitep.be/document/onderzoeksrapporten/2019-02-06%20transmigrants.pdf> accessed 5 January 2021.

ECPAT, 'Precarious Journeys: Mapping Vulnerabilities of Victims of Trafficking From Vietnam to Europe' (March 2019) < https://www.ecpat.org.uk/precarious-journeys> accessed 12 May 2022.

European Commission website, 'What we do' <https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy_en> accessed 10 June 2022.

European Migration Network, 'Belgian Annual Report on Asylum and Migration Policy in 2015' (2016) <https://emnbelgium.be/publication/annual-report-asylum-and-migration-policy-belgium-and-eu-2015-emn> accessed 24 January 2021.

European Migration Network, 'Annual Report on Asylum and Migration Policy in Belgium 2016' (2017) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/02a_belgium_annual_policy_report_2016_en.pdf> accessed 17 May 2022.

European Migration Network, 'Annual Report on Asylum and Migration Policy in Belgium 2019' (2020) <https://emnbelgium.be/publication/annual-report-migration-and-asylum-belgium-and-eu-2019-emn> accessed 17 May 2022

European Parliament, 'EU Parliament Briefing on EU Secondary Movements of Asylum Seekers in the EU Asylum System (October 2017) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI(2017)608728_EN.pdf> accessed 10 June 2022.

European Police Office (Europol), 'OCTA 2011 EU Organized Crime Threat Assessment' < https://www.europol.europa.eu/publications-events/main-reports/octa-2011-eu-organised-crime-threat-assessment> accessed 3 May 2022.

European Migrant Smuggling Centre, 3rd Annual Activity Report 2018 (2019) <https://www.europol.europa.eu/publications-events/publications/emsc-3rd-annual-activity-report-%E2%80%93-2018> accessed 10 June 2022.

European Migrant Smuggling Centre, 4th Annual Activity Report 2019 (2020) <https://www.europol.europa.eu/publications-events/publications/emsc-4th-annual-activity-report-%E2%80%93-2020> accessed 12 May 2022.

European Migrant Smuggling Centre, 5th Annual Activity Report 2020 (2021) <https://www.europol.europa.eu/publications-events/publications/european-migrant-smuggling-centre-5th-annual-report-%E2%80%93-2021> accessed 12 May 2022.

France Terre d'Asile, 'Identification et Protection des Victimes de la Traite dans un Contexte de Migration de Transit' (April 2017): <https://www.france-terre-asile.org/toutes-nos-publications/details/1/212-identification-et-protection-des-victimes-de-la-traite-dans-un-contexte-de-migration-de-transit> accessed 12 May 2022.

Den Heijer M, 'Shared Responsibility Before The European Court of Human Rights' (2013) 60(3) Netherlands International Law Review 411-440.

Den Heijer M, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4(2) Journal of International Dispute Settlement 361-383.

de Coninck J, 'MH and Others v. Croatia: Resolving the Jurisdictional and Evidentiary Black Hole for Expulsion cases?' (*Strasbourg Observer Blog*, 14 January 2022) < https://strasbourgobservers.com/2022/01/14/mh-and-others-v-croatia-resolving-the-jurisdictional-and-evidentiary-black-hole-for-expulsion-cases/> accessed 25 August 2022.

Golini A, 'Facts and Problems of Migratory Policies' in Jospeh Chamie and Luca Dall'Oglio (eds) *International Migration and Development - Continuing the Dialogue: Legal and Policy Perspectives* (IOM, 2008).

Group of Experts on Action against Trafficking in Human Being – GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium. First evaluation round (2013) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680630d0f> accessed 27 April 2021.

Group of Experts on Action against Trafficking in Human Being – GRETA. (2017a). Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium. Second evaluation round (2017) <https://rm.coe.int/greta-2017-26-frg-bel-en/1680782ae0> accessed 27 April 2021.

Guillaume T, 'Immersion dans un Centre de la Croix-Rouge' *La Libre Belgique* (1 February 2021) <https://www.lalibre.be/belgique/societe/2021/02/01/ici-cest-le-confort-mais-a-20-heures-je-retourne-a-la-rue-immersion-dans-un-centre-de-la-croix-rouge-V4S7S4VQ4BAW3FJBBC25JZXBOQ/> accessed 23 June 2021.

Hakiki H and Rodrik D, '*M.H. v. Croatia: Shedding Light on the Pushback Blind Spot' (VerfBlog,* 29 November 2021) <https://verfassungsblog.de/m-h-v-croatia-shedding-light-on-the-pushback-blind-spot> accessed 10 July 2022.

Lichfield J, 'The Channel Blame Game' *Politico* (27 November 2021) <https://www.politico.eu/article/migrants-english-channel-france-uk-refugees-drowned> accessed 12 May 2021.

Médecins du Monde, 'Violence Policières envers les Migrants et les Réfugiés en Transit en Belgique' (October 2018) < https://medecinsdumonde.be/actualites-publications/publications/violences-policieres-envers-les-migrants-et-les-refugies-en> accessed 5 January 2021.

Mijatovic D, 'Time to Deliver on Commitments to Protect People on the move from Human Trafficking and Exploitation' (12 September 2019), <https ://www.coe.int/en/web/commissioner/-/time-to-deliver-on-commitments-to-protect-people-on-the-move-from-human-trafficking-and-exploitation> accessed 25 June 2022.

Myria, 'Police et Migrants de Transit' (2019) <https://www.myria.be/files/Note_Police_et_migrants_de_transit.pdf> accessed 27 January 2021.

Myria, 'Myriadoc 10: Belgium, on the road to the United Kingdom' (2020) <https://www.myria.be/en/publications/myriadoc-10-belgium-on-the-road-to-the-united-kingdom> accessed 5 May 2021.

Myria, 'Rapport annuel traite et trafic des êtres humains 2018: Mineurs en danger majeur' (2018)<https://www.myria.be/fr/publications/rapport-annuel-traite-et-trafic-des-etres-humains-2018-mineurs-en-danger-majeur> accessed 27 January 2021.

Myria, 'Annual evaluation report 2019. Trafficking and smuggling of human beings. Empowering victims' <https://www.myria.be/en/publications/2019-annual-report-trafficking-and-smuggling-of-human-beings> accessed 5 May 2021.

Myria, 'Annual evaluation Report 2020. Trafficking and smuggling of human beings. Behind closed doors' (2020) <https://www.myria.be/en/publications/2020-annual-report-trafficking-and-smuggling-of-human-beings/> accessed 5 January 2021.

Perrin, 'Just passing Through? International Legal Obligations and Policies of Transit Countries in Combating Trafficking in Persons' (2010) 7(1) European Journal of Criminology 11-27.

Sergio Carrera S, Stefan M, Cortinovis R and Ngo Chun L, '*When mobility is not a choice. Problematising asylum seekers' secondary movements and their criminalisation in the EU' (CEPS, December 2019)* <http://aei.pitt.edu/102277/1/LSE2019-11-RESOMA-Policing-secondary-movements-in-the-EU.pdf> accessed 15 May 2022.

Regueiro R, 'Shared Responsibility and Human Rights Abuse: The 2022 World Cup in Qatar (2021) 25(1) Tilburg Law Review 27-39.

Rijken C, 'Inaugural Address: Victimisation through Migration' (2016) <https://research.tilburguniversity.edu/en/publications/victimisation-through-migration> accessed 5 January 2022.

Sanchez G, Arrouche K, Capasso M, Dimitriadi A and Fakhri A, 'Beyond Networks, Militias and Tribes: Rethinking EU Counter Smuggling Policy and Response' (April 2021) <https://www.euromesco.net/publication/beyond-networks-militias-and-tribes-rethinking-eu-counter-smuggling-policy-and-response/> accessed 20 February 2021.

Service de Politique Criminelle, 'Plan d'Action Trafic des Êtres Humains 2015-2019' (2019) <https://www.dsb-spc.be/web/index.php?option=com_content&task=view&id=172&Itemid=225> accessed 23 May 2022.

Service de Politique Criminelle, 'Plan d'Action Trafic des Êtres Humains 2021-2025' (2021) <https://www.dsb-spc.be/web/index.php?option=com_content&task=view&id=172&Itemid=225> accessed 23 January 2021.

Scipioni M, 'Failing Forward in EU Migration Policy? EU Integration after the 2015 Asylum and Migration Crisis' (2018) 25(9) Journal of European Public Policy 1357-1375.

Sciurba A, 'Categorizing Migrants by Undermining the Right to Asylum. The Implementation of the 'Hotspot Approach' in Sicily' (2017) 10(1) Etnografia e Ricerca Qualitativa 97-120.

Stoyanova V, 'J. and Others v. Austria and the Strengthening of States' Obligation to Identify Victims of Human Trafficking' (Strasbourg Observers, 7 February 2017) <https://strasbourgobservers.com/2017/02/07/j-and-others-v-austria-and-the-strengthening-of-states-obligation-to-identify-victims-of-human-trafficking/> accessed 19 June 2022.

Stoyanova V, 'The Grand Chamber Judgment in SM v. Croatia: Human Trafficking, Prostitution and the Definitional Scope of Article 4 ECHR' (*Strasbourg Observers,* 3 July 2020) <https://strasbourgobservers.com/2020/07/03/the-grand-chamber-judgment-in-s-m-v-croatia-human-trafficking-prostitution-and-the-definitional-scope-of-article-4-echr/> accessed 10 June 2022

Trajer J, 'Hidden in Plain Sight: Failure to Investigate Allegation of Abuse on Public Construction Projects in Zoletic and Others v. Azerbaijan' (Strasbourg Observers, 18 November 2021) <https://strasbourgobservers.com/2021/11/18/hidden-in-plain-sight-failure-to-investigate-allegations-of-abuse-on-public-construction-projects-in-zoletic-and-others-v-azerbaijan/> accessed 19 June 2022.

UNTOC 'Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Transnational Organized Crime' (2006) < https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf> accessed 13 June 2021.

Legislation, International Conventions/Declarations

Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, [2002] OJ L328/17 and the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, [2002] OJ L328/1 (2002/946/JHA). (*Facilitator's Package*).

Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/10. (*Residence Permit Directive*).

Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008). CETS No. 197. (*Warsaw Convention*).

Council of Europe. Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms (adopted 2 November 2013). CETS. No. 214.

Council of Europe. Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 31 October 2021). CETS No. 213.

Circular COL 5/2017 of 23 December 2016 implementing a multidisciplinary cooperation in respect of victims of human trafficking and/or certain aggravated forms of human smuggling. (Replaced COL 8/2008 - (Available at www.om-mp.com).

Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98. (*Return Directive*).

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

Global Compact for Safe, Orderly and Regular Migration (adopted 19 December 2018) 5 February UN Doc A/Res/73/195.

New York Declaration for Refugees and Migrants (adopted 19 September 2016) UNGA Res 71/1.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2241 UNTS 507.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319.

Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L180/31.

United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) DOC A/55/383.

Policy and Action Plans (CoE and EU)

European Committee on Crime Problems (CDPC). Council of Europe Roadmap on Fighting the Smuggling of Migrants (adopted 3 February 2020).

European Commission (2015). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Action Plan against migrant smuggling 2015 – 2020, COM (2015) 285 final, Brussels, 27.5.2015.

European Commission (2015). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration, COM (2015) 240 final, Brussels, 13.05.2015.

European Commission (2015). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -On the EU Security Union Strategy, COM (2015) 185 final, Strasbourg, 28.04.2015

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -On a New Pact on Migration and Asylum, COM (2020) 609 final, Brussels, 23.09.2015.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -The European Agenda on Security, COM (2020) 605 final, Brussels, 24.07.2020.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Renewed EU Action Plan Against Migrant Smuggling 2021-2025, COM (2021) 591 final, Brussels, 29.05.2021.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – On the EU Strategy to combat Organised Crime 2021-2025, COM (2021) 170 final, Brussels, 14.04.2021.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – On the EU Strategy on Combatting Trafficking in Human Beings 2021-2025, COM (2021) 171 final, Brussels, 14.04.2021.

ECtHR Case Law

Siliadin v. France 73316/01 (ECtHR, 26 October 2005).

Rantsev v. Cyprus and Russia 25965/04 (EctHR, 7 January 2010).

M.S.S. v. Belgium and Greece [GC] 30696/09 (ECtHR, 21 January 2011).

C.N. and V. v. France 67724/09 (ECtHR January 2013).

C.N. v. United Kingdom, 4239/08 (ECtHR, 13 February 2013).

Söderman v. Sweden [GC] 5786/08 (ECtHR, 12 November 2013).

Khlaifia and Others. v. Italy [GC] 16483/12 (ECtHR, 15 December 2016).

J. and Others v. Austria 58216/12 (ECtHR, 17 January 2017).

Chowdury and Others v. Greece 21884/15 (ECtHR, 30 March 2017).

Correia de Matos v. Portugal 56402/12 (ECtHR, 4 April 2018).

Hoti v. Croatia 63311/14 (ECtHR, 26 July 2018).

Z.A. and Others v. Russia [GC] 61411/15; 61420/15 and 61427/15 (ECtHR, 21 November 2019).

Ilias and Ahmed v. Hungary [GC] 47287/15 (ECtHR, 21 November 2019)

N.D. and N.T. v. Spain [GC] 8675/15 and 8697/15 (ECtHR, 13 February 2020).

S.M. v. Croatia [GC] 60561/14 (ECtHR, 25 June 2020).

V.C. L and A.N. v. United Kingdom 77587/12 and 74603/12 (ECtHR, 5 July 2021).

M.A. v. Denmark 6697/1 (ECtHR, 9 July 2021).

Zoletic and Others v. Azerbaijan, 20116/12 (ECtHR, 7 October 2021).

M.H. and Others v. Croatia 15670/18 and 43115/18 (ECtHR, 18 November 2021).

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 481–496

DOI: 10.26650/annales.2022.71.0007
http://annales.istanbul.edu.tr/

Annales de la Faculté de Droit d'Istanbul

Submitted: 05.09.2022
Revision Requested: 26.09.2022
Last Revision Received: 28.10.2022
Accepted: 05.11.2022

RESEARCH ARTICLE

Recent Developments on the Question of Religion Courses: An Analysis of a Turkish Constitutional Courts's Decision in 2022

Tolga Şirin*

Abstract

In this study, the decision of the Turkish Constitutional Court in 2022 regarding the compulsory religion classes, Hüseyin El and Nazlı Şirin El, was analyzed. The decision was criticized on the following eight points: (1) Although the correct decision was quite apparent, the Constitutional Court found a violation by only one vote. It created an unsafe situation. (2) The Constitutional Court established the violation too late. It weakened the objective effect of the decision. (3) The Constitutional Court referred to crucial international materials but did not consider their merits. (4) The Constitutional Court based its decision on the violation with reference to the decisions of the European Court of Human Rights but it missed the chance to make a much deeper analysis. (5) The Constitutional Court ignored the original and alternative theses in Turkish literature. (6) The Constitutional Court made controversial inferences regarding the principle of laicism, especially in the context of the doctrine of positive obligations. (7) The Ministry of Justice misrepresented the European Court of Human Rights judgments. (8) The application was not prepared professionally and powerfully enough.

Keywords

Turkish Constitutional Court, European Court of Human Rights, Compulsory Religion Course, Religious Culture and Moral Knowledge, Secularism

* **Corresponding Author:** Tolga Şirin (Assoc. Prof. Dr.), Marmara University, Faculty of Law, Department of Constitutional Law, Istanbul, Turkiye. E-mail: tolga.sirin@marmara.edu.tr ORCID: 0000-0002-7172-5426

To cite this article: Sirin T, "Recent Developments on the Question of Religion Courses: An Analysis of a Turkish Constitutional Courts's Decision in 2022", (2022) 71 Annales de la Faculté de Droit d'Istanbul 481. https://doi.org/10.26650/annales.2022.71.0007

Introduction

Compulsory religious lessons are one of Turkiye's chronic problems in human rights law. There were two judgments[1] delivered by the European Court of Human Rights (hereafter 'the ECtHR') and a considerable number of articles[2] published on the issue in English. In this respect, the problem was clearly identified at the international level, and some suggestions were put forward. Therefore, the government's responsibility was to take steps to solve the problem. However, the expected steps were not taken because it is a 'sensitive' issue for the conservative AK Party government, which has been in power for more than 20 years.[3] Nevertheless, the Turkish Constitutional Court (hereafter 'the TCC' or 'the Court') did what the AK Party government failed to do and contributed to the solution of the problem by delivering a violation decision in an individual application.[4]

This study examined the TCC's related decision published in the Official Gazette on July 28, 2022.[5]

I. The Background of the Case

The first applicant was the father of the second applicant, who was studying in the fourth grade of primary school in 2009. The first applicant requested that the school principal exempt his daughter (the second applicant) from the religious culture and ethics lesson (hereafter, 'the RCE'). However, the request was rejected with references to a document by the General Directorate of Primary Education of the Ministry of National Education and a decision of the High Council of Education and Training. According to the decision, among Turkish citizens, only students who belonged to the religions of Christianity or Judaism could be exempted from the said course if they could prove they belong to one of these religions. He subsequently applied to the civil registry office. He requested the removal of 'Islam' from his daughter's identity card and that the box be left blank or the phrase 'atheist' be written in the box.[6] The

1 *Hasan and Eylem Zengin v Turkey,* App no 1448/04 (ECtHR, 09 October 2007), *Mansur Yalçın v. Turkey,* App no 21163/11 (ECtHR, 16 September 2014)

2 Among many articles, see Olgun Akbulut and Zeynep Oya Usal, 'Parental Religious Rights vs. Compulsory Religious Education in Turkey' (2008) 15 Int. J. Minor. Group Rights 433; Özgür Heval Çınar, 'Compulsory Religious Education in Turkey' (2013) 8 Religion & Human Rights 223; Özgür Heval Çınar, 'An Unsolved Issue: Religious Education in International Human Rights Law and Case of Turkey' in Mine Yıldırım and Özgür Heval Çınar (eds), Freedom of Religion and Belief in Turkey (CSP 2014) 185; Ceren Özgül, 'Freedom of Religion, the ECtHR and Grassroots Mobilization on Religious Education in Turkey' (2019) 12(1) Politics and Religion 103

3 Olgun Akbulut, 'Turkey's Reaction to the Judgments of the European Court of Human Rights' (2015) 5 Int J Multidiscip 75, 80; Mine Yıldırım, 'Are Turkey's Restrictions on Freedom of Religion or Belief Permissible?' (2020) Religion & Human Rights 172, 187

4 *Hüseyin El ve Nazlı Şirin El,* App no 2014/15345 (AYM, 07 April 2022)

5 Official Gazette of 28 July 2022, Nr. 31906 <https://www.resmigazete.gov.tr/eskiler/2022/07/20220728-18.pdf> accessed 28 July 2022

6 The religion section in the identity card is another human rights violation issue in Turkey. For more information see Selin Esen and Levent Gönenç, 'Religious Information on Identity Cards: A Turkish Debate' (2008) 23(2) JLR 579; Berke Özenç, 'The Religion Box on Identity Cards as a Means to Understand the Turkish Type of Secularism' in in Mine Yıldırım and Özgür Heval Çınar (eds), Freedom of Religion and Belief in Turkey (CSP 2014) 89. For the ECtHR's approach, see *Sinan Işık v Turkey,* App no 21924/05 (ECtHR 02 February 2010)

civil registry office accepted the request and removed the phrase 'Islam' from his daughter's identity card.

The applicant filed an annulment action in the administrative jurisdiction against the rejection of his request for exemption from the RCE class by stating that there was no longer an Islam inscription on his daughter's identity card.

The first-instance court accepted the request for exemption in 2011, referring to a decision of the TCC in 1998[7] and *Hasan and Eylem Zengin* case of the ECtHR. For the first-instance court, this lesson's content included 'religious education,' although the course was called RCE. Consequently, the applicant's case was accepted since the Constitution (article 24) stipulated that religious education depends on the request of the minor's legal representative.

However, the Council of State (hereinafter 'the CoS') overturned the decision. First, according to the CoS, the RCE lesson was not a ''religious education' course; it did not indoctrinate a specific religion, and its content included teaching religions objectively. Secondly, the Presidency of the High Council of Education and Training granted an exemption only to students belonging to Christian or Jewish religions. Finally, the first-instance court extended the administration's decision and delivered a new decision on the nature of an administrative act and transaction.

The applicant then tried to request a revision of the decision from The CoS, and he applied to the TCC since the result did not change.

II. The Applicants' Arguments

The applicants claimed many violations. According to them, the fact that the second applicant was forced to attend a class on a religion to which she was not a member violated both 'freedom of religion and conscience' and 'the right of parents to ensure education and teaching in conformity with their own religious and convictions.' Moreover, they claimed that the following two situations violated their freedom of religion and conscience: (i) they had to reveal their religious and philosophical beliefs and convictions upon the response letter of the administration in response to their exemption requests, (ii) selection of the experts in the related case from 'the area responsible for matters related to the Religion of Islam' violated the freedoms of religion and conscience.[8]

For the applicants, the following two situations violated their right to a fair trial: (i) the examination was not conducted by an impartial and independent panel of experts,

7 Although the decision was not directly related to compulsory religious classes, it emphasized the importance of a laic education in Turkey. E. 1997/62, K. 1998/52 (AYM, 16 September 1998)

8 *Hüseyin El ve Nazlı Şirin El*, §194

and (ii) the first-instance court found that the applicants did not complain that the lesson violated their religious or philosophical beliefs, although they explicitly emphasized the point.[9]

III. Arguments of the Ministry of Justice

The individual application system in Turkey did not require an adversarial procedure. However, the Ministry of Justice was entitled to give opinions on the cases before the TCC. These opinions could be in favor of or against the applicant, or they could be neutral. In this case, the Ministry of Justice explicitly developed some theses against the application.

Six of the Ministry's arguments explained why the relevant ECtHR judgments could not be taken into account in the given case:[10]

Firstly, unlike Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution does not guarantee 'the right of parents to ensure education and teaching in conformity with their own religious and convictions.' Therefore, since the scope of the constitutional complaint was limited to 'one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights (hereafter 'the ECHR' or 'the Convention'), which the Constitution guaranteed under its article 148, the application could be found inadmissible *ratione materiae*.

Secondly, the related lesson was constitutionally compulsory; therefore, the TCC could handle the case differently than the ECtHR, which considered the Convention and not the Constitution.[11]

Thirdly, the provision that 'other religious education and instruction shall be subject to the individual's own desire, and to the request of their legal representatives in the case of minors,' which was written in Article 24(4) of the Constitution, proves that this course was objective.

Fourthly, *Valsamis v Greece*[12] and *Folgerø and others v Norway*[13] showed that the organization and planning of the curriculum were primarily under the authority of the state parties, and the Ministry enjoyed a wide margin of appreciation.

9 *Hüseyin El ve Nazlı Şirin El*, §194

10 *Hüseyin El ve Nazlı Şirin El*, §133

11 Art. 24/4 of the Constitution: 'Instruction in religious culture and ethics shall be one of the compulsory lessons in the curricula of primary and secondary schools.'

12 *Valsamis v Greece,* App no. 21787/93 (ECtHR, 18 December 1996)

13 *Folgerø et al. v Norway,* App no. 15472/02 (ECtHR, 29 June 2007)

Fifthly, the existence of terrorist organizations (such as FETÖ/PDY and ISIS) that abused religion in Turkiye made the relevant lesson much more important in a Turkish context.

Sixthly, as shown by *Osmanoğlu and Kocabaş v Switzerland*[14], the aim of preventing social exclusion must be considered in courses aimed at integrating citizens from different cultures and religions. According to the Ministry:

> 'In the decision above, the ECtHR evaluated that the compulsory swimming lesson aimed at integrating foreigners from different cultures and religions and that the measure in question was aimed at preventing the social exclusion of international students, and it was observed that the Court considered the special situation.'[15]

These six arguments of the Ministry focused on why the ECtHR case-law could not be applied technically in the given case.[16] Additionally, the defense of the Ministry regarding the said course was as follows:

> The new RCE course syllabus is currently being implemented, and this course aims to comply with the principles of pluralism and impartiality envisaged in Protocol no. 1, Article 2 of the ECtHR. Accordingly, different cultures and their religious values have been given in the new RCE course curricula introduced in the 2011-2012 academic year. In this direction, it aims to teach in order to recognize, understand and empathize with differences with a supra-denominational approach and a model that opens to religions. The unifying model of the supra-sectarian religious education approach lasted until the 2000s, and the RCE course curricula evolved into a pluralistic model after 2000.
>
> RCE course curricula include not only religious thoughts and movements in Turkey but also different religious beliefs and cultures such as Judaism, Christianity, Buddhism, Hinduism, Sikhism, Shintoism and Taoism. It also aims to approach its members with tolerance by recognizing the essential characteristics of other religions. In this context, the RCE lesson is compatible with having basic knowledge about the different religions and belief systems and their diversity in line with the Toledo principles. The lesson does not aim to impose any religious or denominational understanding and seeks to inform students objectively about RCE subjects.[17]

IV. Aspects Related to Admissibility

The TCC emphasized two points regarding the admissibility of the application. The first one was *ratione materiae*. However, the TCC readily overcame the problem by stating that the guarantees stipulated in Article 2 of Protocol no.1 were also safeguarded under the Constitution.[18]

14 *Osmanoğlu and Kocabaş v Switzerland,* App no. 29086/12 (ECtHR, 10 January 2017)

15 *Hüseyin El ve Nazlı Şirin El*, §133

16 For the Ministry, the given case is more similar to *Hasan and Eylem Zengin v Turkey* than to *Mansur Yalçın v Turkey*, as there is an exemption request.

17 *Hüseyin El ve Nazlı Şirin El*, §133

18 *Hüseyin El ve Nazlı Şirin El*, §140

The second controversial issue on admissibility was related to the rule to exhaust all other remedies. The first applicant filed a lawsuit in the name of the second applicant (his daughter), as the addressee of the refusal was his daughter on the rejection of his daughter's request to be exempted from the lesson. The majority of the TCC (despite the dissenting opinion of six members) concluded that the refusal of the first applicant's request for the exemption of his daughter from the lesson was directly related to the applicant's right to religious and philosophical beliefs respected in education and training as a parent, even though the first applicant was not technically a party to the proceedings before the lower courts.[19]

V. Merits of the Case

In this case, the TCC thoroughly explained the history of the developments in religious education in Turkiye by citing the relevant legislation and preparatory works and decisions. Moreover, in terms of international law, it cited the Universal Declaration of Human Rights (art. 26), International Covenant on Civil and Political Rights (art. 18), International Covenant on Economic, Social and Cultural Rights (art. 13), Convention on the Rights of the Child (art. 14), Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools, reports of the European Commission against Racism and Intolerance and the leading cases of the ECtHR.[20]

The TCC, which included these sources and claims of the parties in its decision, proceeded with its considerations on the merits. According to the TCC, the essence of the problem was simple: Article 24 of the Constitution stated that 'instruction in religious culture and ethics shall be one of the compulsory lessons in the curricula of primary and secondary schools. Other religious education and teaching shall be subject to the individual's own desire and the request of their legal representatives in the case of minors.' Therefore, the crucial point of the given case was whether the RCE that the applicant took could be qualified as optional religious education and training, exceeding the extents of religious culture and moral education, which is stipulated as compulsory according to the Constitution.

The TCC focused on the curriculum of the first applicant's daughter at the time, which was also the subject of the judgment of *Mansur Yalçın and others* against Turkiye. Therefore, the TCC has excluded the revised curriculum in the 2018-2019 academic year, as it did not apply to the applicants.

The TCC primarily noted historical and legal developments about the lesson in question including cases like *Hasan and Eylem Zengin*, *Mansur Yalçın and others* and various cases concluded by The CoS.

19 *Hüseyin El ve Nazlı Şirin El*, §150. AYM also reffered to the *Kapmaz v Turkey,* App no 13716/12, (ECtHR, 07 January 2020)

20 *Hüseyin El ve Nazlı Şirin El*, §98-130

The references to The CoS's case-law were quite remarkable:

> The Council of State foundit is unlawful that the request for exemption from RCE lessons, referring mainly to the ECtHR's findings in *Mansur Yalçın and others v Turkey* and *Hasan and Eylem Zengin v Turkey*, which concluded that 'the RCE is not taught objectively and rationally within the understanding of pluralism' in our country.

Expressing that it has examined the RCE curriculum (between 2005-2018) in detail and considering the decisions of the ECtHR and the previous decisions of The CoS, the TCC concluded as follows:

> In terms of the aforementioned (2005-2018) curriculum, there is no reason to depart from the conclusion of the ECtHR, stating that the curriculum primarily includes information about the religion of Islam and that the changes made in the course curriculum do not result in an actual revision in terms of the main components of this course, and the conclusion of the Council of State, stating that an RCE lesson is not given objectively within the understanding of pluralism in our country.

The CoS's decision to change its ongoing approach in 2017 and declaring that the course complies with the Constitution, the TCC noted that the reasons for this case-law change were not disclosed. After these evaluations, the TCC concluded as follows:

> (…) Until the 2018-2019 academic year, the RCE course curriculum is not within the scope of religious culture education, which is expected to be compulsory to provide objective and introductory information about religions. It has been evaluated within the scope of its original interpretation that goes beyond the education and training of the religion of Islam and the teaching of religious culture. Therefore, the failure to provide suitable alternatives to the applicant, who did not want his daughter to take the RCE course mentioned above, violated the right to demand respect for parents' religious and philosophical beliefs in education and training.

After concluding the result above, the TCC considered it necessary to clarify two points to avoid misunderstandings.

First, it emphasized that the judgment was not against the RCE lesson itself but its content until 2018 by referring to the former case-law. According to the referred case-law; 'measures and practices that offer options to people in the context of religious education and training and facilitate meeting the widespread and common needs of individuals who make up the society' and the fact that 'the lessons of 'The Holy Quran' and 'The Life of Our Prophet' are optional elective courses in secondary and high schools' were not unconstitutional.[21]

Secondly, religious education and training were among the state's positive obligations within the scope of freedom of religion and conscience.[22]

21 E. 2012/65, K. 2012/128 (AYM, 20 September 2012)

22 E. 2012/65, K. 2012/128 (AYM, 20 September 2012)

VI. Dissenting Opinions

There are six dissenting opinions on admissibility and seven dissenting opinions on merits.

According to the members of the minority, the application was problematic both because the father did not have a lawsuit filed on his behalf and the mother of the second applicant was not consulted. In the TCC's view, the father's application could be rejected on the ground that remedies had not been exhausted. On the other hand, whether the mother has permission to apply for this application or not should be examined since article 341 of the Turkish Civil Code provided that 'the right to determine the religious education of the child belongs to the parents.' The second applicant, a minor in the case before the administrative judiciary, came of age while the case before the TCC was being examined. Therefore, the application was not found admissible without asking whether it was authorized for this case.

For the minority, there was also a problem related to the scope of the examination. According to them, problematic and objectionable aspects of the RCE lesson that his daughter was forced to attend were not specified by the first applicant in the petition to the administration or at the administrative adjudication stage. Furthermore, their petitions did not discuss which beliefs or philosophical thoughts were included more and less or which concrete situations led the course to turn into religious education. As the applicants stated that they only wanted to be exempted from the course and did not submit any specific data in this regard, it was not deemed possible to examine the merits of the case.

On the other hand, another notable argument of the minority concerning the merits of the case was the necessity of an examination by an expert:

> (…) The principles set forth both in the case-laws of the Council of State and in the decisions of the ECtHR and the above-mentioned explanations shall be submitted to a committee that will consist of faculty members specialized in fields such as philosophy, sociology, psychology, religious education, and pedagogy in the relevant faculties of our universities such as theology, education, medicine, and law. A decision should be made by observing the principles determined in the report to be prepared consequent to the examination in order to determine the principles that are compatible with international objective standards regarding the content of the RCE lessons in our country.

Finally, it was observed that minority members agreed with the arguments of the Ministry of Justice in general and explained why the RCE lesson was essential for Turkiye. Some of these explanations will be further analyzed below.

VII. Eight Comments

First of all, it should be noted that the decision was crucial considering the authoritarian conditions of Turkiye and the power of the political Islam movement.

However, this significance did not hinder the criticism of the decision. On the contrary, the decision was criticized based on a minimum of eight aspects.

1. Swing Justices

The first remarkable point in the decision was that it was delivered by one vote. Seven of the fifteen members of the Court found that there was no violation in the present case. Undoubtedly, there may be a difference of opinion in some cases. Still, it was thought-provoking that the decision remained on the edge of an issue where the ECtHR has given a violation decision twice. However, it was not surprising considering the Court's inconsistent decisions in recent years. The probable reason for that is the ongoing grouping among its members.

The members are categorized by the President who appointed the member. Six members (Kadri Özkaya, Recai Akyel, Yıldız Seferinoğlu, Selahaddin Menteş, Basri Bağcı, İrfan Fidan) appointed by President Recep Tayyip Erdoğan tend to deviate from international human rights law standards in cases with a 'sensitive' nature for the government. The four members (Zühtü Arslan, Hasan Tahsin Gökcan, Engin Yıldırım, Emin Kuz) appointed by President Abdullah Gül insist on these standards. Two members break the pattern. Judge Yusuf Şevki Hakyemez, appointed by president Erdoğan, usually moves with the second group, while judge Muammer Topal, appointed by president Gül, often moves with the first group.

Those interested in the topic can review recent decisions where such trends are visible. For example, *Mehmet Osman Kavala* and *Cem Sarısülük and others* decisions regarding the Gezi Park protests; *Müyesser Uğur* and *Fikri Sağlar* decisions regarding dissident journalists; the *Umut Congar* decision related to the Kurdish issue; The *Yasin Agin and others* decision regarding anti-government protests and the decisions of *Gülistan Atasoy and others* and *Yağmur Erşan* regarding the State of Emergency Decrees are some of the examples that present the division mentioned above.[23]

Therefore, viewing through the lens of Presidential appointments, the first group, namely the group of members appointed by President Erdoğan, appears to be more powerful with a distribution of seven to five votes in the Court. That being so, there are also three other members elected by the Turkish Grand National Assembly. In most cases, these three members determine the fate of the decision. Since the preferences of these members are determinative, the TCC can deliver surprising decisions.

23 *Mehmet Osman Kavala (2),* App no. 2020/13893 (AYM, 29 December 2020), *Cem Sarısülük and Others,* App no. 2015/16451 (AYM, 15 December 2021), *Müyesser Uğur,* App no. 2020/18546 (AYM, 07 April 2022) *Durmuş Fikri Sağlar (2),* App no. 2017/29735 (AYM, 17 March 2021), *Umut Çongar,* App no. 2017/36905 (21 October 2021), *Yasin Agin and Others* App no. 2017/32534, (AYM, 21 January 2021) *Gülistan Atasoy and Others,* App no. 2017/15845, (AYM, 21 January 2021)

Transitions sometimes occur between groups. For example, the change in the approach of judge Basri Bağcı, appointed by President Erdoğan, seemed to have played a role in the delicate balance in the given case. Bearing that judge Basri Bağcı voted against the admissibility issue, it is quite possible that the opposite could be decided in a future case.

2. Delayed Justice

The second issue related to the decision was the time it took to reach a conclusion. The father-daughter complained about the lesson first and started their struggle in 2009.[24] The TCC delivered its decision thirteen years later, in 2022. Although the process before the administrative judiciary was not short, the main problem was at the TCC stage because eight out of these thirteen years passed before the TCC.

It was impossible to argue that the delay was due to a workload problem because (according to the statistics published by the TCC itself), the TCC ruled on almost 20 thousand applications made in 2014. According to the statistics published in 2018, the number of pending cases from 2014 is 148. This number decreased to 61 in 2019, 44 in 2020, and 38 in 2021 and remained the same until April, when the individual application was concluded.[25]

Based on this data, we understand that the finalization of the application was deliberately delayed and it was possible to conclude it earlier. However, how could the file be pending? We do not know this officially. However, we can point to the source of the problem. The problem arose from Article 13 of the Constitutional Court Law.[26] The provision in question granted the President of the Court the authority 'to set the agenda of the General Assembly and the sections whenever required'. Still, it leaves the criteria for exercising this authority unclear.

The arbitrariness, which cannot be controlled transparently, has led to at least three additional problems:

> First, the second applicant Nazlı Şirin El, a nine-year-old fourth-year primary school student in 2009 when the dispute arose, is currently a twenty-two-year-old university student.[27] The delay of the TCC forced her to take an unconstitutional lesson in her education until university.

Second, the ECtHR decided on this issue in 2007 and subsequently in 2014. TCC also based its decision on this case-law. However, the TCC did not act quick enough to implement these decisions. This was a great contradiction.

24 *Hüseyin El ve Nazlı Şirin El*, §11

25 For the statistics, see <https://www.anayasa.gov.tr/tr/yayinlar/istatistikler/bireysel-basvuru/> accessed 28 July 2022

26 For the full text, see <https://www.anayasa.gov.tr/en/legislation/law-on-constitutional-court/> accessed 28 July 2022

27 *Hüseyin El ve Nazlı Şirin El*, §10

Third, the delay of the Court has had a negative impact on millions of citizens because the TCC technically had to focus on the curriculum applied to the applicants. However, a curriculum change occurred in 2018 before the TCC decided.[28] Therefore, the decision of the TCC was meaningful only for the previous curriculum and had no direct impact on the current RCE lessons.

3. The Problem of Over-Length

Reading the decision of the Constitutional Court was not an easy task since the decision was 84 pages long. One of the reasons for this was that the resolution included the opinions of the dissenting members. I will not criticize this point. Nevertheless, other factors extended the length of the decision, which deserved to be criticized. For example, the resolution included many international documents and a long history of the Constitution. Incorporating the history of the Constitution may be understandable if it was used as part of a historicist interpretation. However, in the essence of the decision, such was not required.

Including many international documents could also be considered reasonable if references were made to these documents. There were no such references based in the decision. However, the issue was available to be handled from various aspects, particularly from the view of the Convention on the Rights of the Child.

Therefore, the reason for including these sources, which ultimately made the decision more difficult to read, remains unclear.

4. Delegative Timidity

The remarkable aspect of the decision was how both the majority and minority members avoided taking responsibility and referred the decision to other addresses.

However, in the given case, it was quite possible to make specific conclusions as to why the contents of the lesson had an indoctrination to guide the administration. Thus, it could be pointed out that the inoculation in question could be applicable not only for the RCE lesson but also for the history lesson in terms of hate speech and hostility, biology lesson in the context of the theory of creation, and even for a music lesson in terms of ignoring the Alevi culture.[29] Unfortunately, however, the TCC seemed to have avoided such considerations.

The hesitation was a clear manifestation of a willingness to say the least to the possible extent about a subject considered 'sensitive.' In my opinion, it was the result

28 *Hüseyin El ve Nazlı Şirin El*, §83

29 Tolga Şirin, 'Nüfus Cüzdanındaki Din Hanesi ve Eğitimdeki Din Dersi Zorlamalarına İlişkin Güncel Gelişmeler' (2016), Güncel Hukuk, 149

of the same point of view that the Court has chosen not to say anything about the current curriculum by limiting its review to the period before 2018.

Let us go even further. The inclusion of references to the importance of the lesson in an 'apologetic' form, right after the Court's finding of a violation, could also be interpreted as a pre-emptive measure for the government's possible reactions.

I think these points indirectly indicate the pressure put on the Constitutional Court.

5. Ignoring Alternative Theses

The TCC's avoidance of considerations on merits and its approach, which could be paraphrased as 'there is no need to depart from the case-law of the ECtHR and the Council of State,' has also prevented the Court from developing original initiatives.

For example, it was a perfect opportunity to address the contradiction of why non-Muslims could be exempted from the lesson, while it was claimed that this course was completely objective. If this lesson were entirely objective, then Christian or Jewish students would not be exempted.

On the other hand, according to an opinion in the literature, the fact that the course in question was compulsory means it was mandatory to include it in the curriculum.[30] This requirement did not exclude the possibility of exemption from the course if appropriate conditions exist. For example, sports lessons are compulsory in the curriculum. Every student was responsible for this lesson unless there was a special request. However, this obligation did not prevent a student with a broken leg from being exempted from this course. There was no reason the same logic could not be applied to the RCE course.

Likewise, the case in question provided an opportunity to evaluate the arguments that if the exemption of individuals from this course was accepted, there would be a possibility of violation, so the request should be documented, not the exemption, in such courses. Because, even under the conditions in which Turkiye takes steps to solve this problem, new issues related to the violation decisions made by the ECtHR regarding other countries (for example, which course to take during the exemption, questions to be subjected in university exams, how the exemption will be expressed in the report card, etc.) are still waiting for Turkiye.[31]

By addressing these and similar comments, the Court missed the chance to develop its case-law.

30 For instance, see Çınar (n2)

31 *Gorzelik and others v Poland,* App no. 44158/98 (ECtHR, 17 February 2004)

6. Inverted Laicism

Another controversial point in the decision was how the Court interpreted the principle of laicism. The Court made its controversial considerations in a previous decision.[32]

The first problem concerned the Court's determination of the extent to which religion could overflow. In the present case, the Court had once again gone beyond the tendency of the principle of laicism as a 'conscientious' issue in its previous 2010 case-law and re-normalized the spill over of religion into the 'social' and 'public' sphere.[33] Moreover, on this point, members of the minority mostly seemed to agree. For example, minority members, referring to a study by President Zühtü Arslan on this subject, described religion as 'an indispensable part of human and social life and culture,' considered that it 'has an important function in both the self-definition of individuals and in the shaping of *social and political life*.'[34] They also decided that 'almost all civilized societies accept the necessity of religious education.'[35] Both the relevance and appropriateness of these manifesto-like considerations to the given event were highly controversial.

Secondly, the Court's description of religious education and training as a 'positive obligation of the state' was also controversial from a similar point of view.[36] The reverse meaning of this description, which had no direct equivalence in human rights law, was that the freedom of religion and conscience would be violated if the state did not provide religious education. The interpretation of making religious education services an absolute obligation for the state by referring to it as a positive obligation was also problematic because it was a matter of 'margin of appreciation.' On the other hand, expressing it as a requirement of the principle of laicism multiplied the problem and even turned laicism upside down.

7. Misquotation of the ECtHR Case-law

Another issue that caught our attention in the case was related to the Ministry of Justice. The Ministry was legally authorized to express opinions on such applications. However, this power to express an opinion did not make it a party to the case. Despite this, the Ministry seemed to have taken a very proactive approach to the case. Undoubtedly, this could also be a political choice. Nevertheless, the problem was that it reflected this political choice incompletely or incorrectly in some ECtHR decisions.

32 *Hüseyin El ve Nazlı Şirin El*, §154

33 *Hüseyin El ve Nazlı Şirin El*, §157

34 There is no emphasis in the original text.

35 *Hüseyin El ve Nazlı Şirin El*, §57 in the dissenting opinion of Kadir Özkaya, Recai Akyel, Yıldız Seferinoğlu, Selahaddin Menteş and İrfan Fidan.

36 *Hüseyin El ve Nazlı Şirin El*, §185

The Ministry seemed to have referred to three different ECtHR decisions. The first two reinforced the argument that each state could prepare its curriculum as it wishes. However, the paragraphs quoted from these decisions seemed out of context.

For example, the *Folgerø et al. v. Norway* decision contained a result contrary to the Ministry's argument. In this case, it was concluded that the compulsory religion course in Norway constituted a violation.[37]

The focus of the *Valsamis v Greece* decision, which the Ministry referred to in the same context, was not on the compulsory religion course. Instead, in this case, it forced the children of a pacifist parent who was a Jehovah's Witness to attend national holiday celebrations (related to the war between Greece and Fascist Italy in 1940) was prominent.[38]

Another argument by the Ministry using the jurisprudence of the Strasbourg organs was that this course was a part of cultural integration. For this reason, it seemed to have applied to *Osmanoğlu and Kocabaş v Switzerland*.[39] The context of this decision, however, was quite different. The subject of the case in question was the coercion of a Muslim student to attend swimming lessons in a mixed pool for boys and girls. In the case of integration, there were other factors, such as the fact that the applicants were immigrants, the absence of a particular religious/philosophical compulsion in the lesson, and the permission to attend the class with a veiled swimsuit. Including factors unrelated to the RCE lesson was not reasonable.[40]

8. Quality Problem in a Strategic Litigation

Finally, it was necessary to criticize the applicants alongside the criticisms of the public authorities. This application did not seem to be well structured. In such applications, which concern millions of students, it was essential to structure strategic litigation and to provide a third party (amicus curiae) contribution when necessary. However, it was doubtful that the application had these qualities.

In particular, some administrative steps (for example, changing the registration of the religion on the identity card) were taken later, the indoctrination elements in the content of the course were not systematically revealed from the very beginning, and effective opinions and support were not received from the associations and experts working on this subject. This situation caused most of the Court to present an image of protecting the applicants 'despite their application.'

37 *Folgerø and others v Norway* (n13)

38 *Valsamis v Greece* (n12)

39 *Osmanoğlu and Kocabaş v Switzerland* (n14)

40 The Ministry's defence of the Turkey-specific importance of the course by referring to organizations such as FETÖ/PDY and ISIS, and its function against the abuse of religion in the political arena, should be a separate article for Turkey governed by the pro-Islamist AKP.

Conclusion

After all that has been written, I can summarize my criticisms as follows: This decision could have been taken in 2014, and it would be ideal to deliver this decision with easy-to-read wording, without the controversial considerations and descriptions regarding the principle of laicism, in a more creative manner and in unanimity beyond repeating what the Strasbourg organs had already said.

Nevertheless, seeking perfection did not require ignoring conditions. For this reason, let me repeat what I said at the beginning in order not to be unfair to the Court: In a context where religious conservatism was at its peak in Turkiye, this decision was like a puddle in the desert. Therefore, it was crucial to see it positively and embrace it despite all criticisms.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.

Bibliography

Akbulut O and Usal Z O. 'Parental Religious Rights vs. Compulsory Religious Education in Turkey' (2008) 15 Int. J. Minor. Group Rights 433-455.

Akbulut O. 'Turkey's Reaction to the Judgments of the European Court of Human Rights' (2015) 5 Int J Multidiscip 75-86.

Çınar Ö H. 'An Unsolved Issue: Religious Education in International Human Rights Law and Case of Turkey' in Mine Yıldırım and Özgür Heval Çınar (eds), Freedom of Religion and Belief in Turkey (CSP 2014) 57-79.

Çınar, Ö H. 'Compulsory Religious Education in Turkey' (2013) 8 Religion & Human Rights 223-241.

Esen S and Gönenç L. 'Religious Information on Identity Cards: A Turkish Debate' (2008) 23(2) JLR 579-603.

Özenç B. 'The Religion Box on Identity Cards as a Means to Understand the Turkish Type of Secularism' in in Mine Yıldırım and Özgür Heval Çınar (eds), Freedom of Religion and Belief in Turkey (CSP 2014) 89-112.

Özgül C. 'Freedom of Religion, the ECtHR and Grassroots Mobilization on Religious Education in Turkey' (2019) 12(1) Politics and Religion 101-133.

Şirin T. 'Nüfus Cüzdanındaki Din Hanesi ve Eğitimdeki Din Dersi Zorlamalarına İlişkin Güncel Gelişmeler' (2016) 149 Güncel Hukuk 21-26.

Yıldırım M. 'Are Turkey's Restrictions on Freedom of Religion or Belief Permissible?' (2020) Religion & Human Rights 172-191.

ECtHR's Decisions

Folgerø et al. v Norway App no. 15472/02 (ECtHR, 29 June 2007)

Hasan and Eylem Zengin v Turkey App no 1448/04 (ECtHR, 09 October 2007)

Kapmaz v Turkey App no 13716/12, (ECtHR, 07 January 2020)
Mansur Yalçın v. Turkey App no 21163/11 (ECtHR, 16 September 2014)
Osmanoğlu and Kocabaş v Switzerland App no. 29086/12 (ECtHR, 10 January 2017)
Sinan Işık v Turkey App no 21924/05 (ECtHR 02 February 2010)
Valsamis v Greece App no. 21787/93 (ECtHR, 18 December 1996)

TCC's Decisions

Cem Sarısülük and others App no. 2015/16451 (TCC, 15 December 2021)
Durmuş Fikri Sağlar (2) App no. 2017/29735 (TCC, 17 March 2021)
Gülistan Atasoy and others App no. 2017/15845, (TCC, 21 January 2021)
Hüseyin El ve Nazlı Şirin El App no 2014/15345 (TCC, 07 April 2022)
Mehmet Osman Kavala (2) App no. 2020/13893 (TCC, 29 December 2020)
Müyesser Uğur App no. 2020/18546 (TCC, 07 April 2022)
Umut Çongar App no. 2017/36905 (TCC, 21 October 2021)
Yasin Agin and others App no. 2017/32534, (TCC, 21 January 2021)
E. 1997/62, K. 1998/52, (TCC, 16 September 1998)
E. 2012/65, K. 2012/128 (TCC, 20 September 2012)
E. 2012/65, K. 2012/128 (TCC, 20 September 2012)

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 71: 497–538

DOI: 10.26650/annales.2022.71.0015
http://annales.istanbul.edu.tr/

Annales de la Faculté de Droit d'Istanbul

Submitted: 13.10.2021
Revision Requested: 01.11.2021
Last Revision Received: 20.10.2022
Accepted: 07.11.2022

RESEARCH ARTICLE

Pushback of Refugees Under International Law: A Conceptual Analysis

Ekin Deniz Uzun*

Abstract

Pushback describes measures and actions taken by state authorities to intercept refugees from seeking asylum as they enter or attempt to enter the state's territorial boundaries. There is no precise international law definition to help grasp pushback's scope and consequences. Scholars and refugee activists have evaluated the term pushback with links to collective expulsion, torture, and crimes against humanity. This Article charts relevant international legal regulations on the mentioned legal terms. The aim is to reveal whether a legal explanation can be brought to the term pushback through these concepts. From a legal perspective, this Article points out that pushback operations conflict with the non-refoulement principle and the prohibition on collective expulsion. The analysis further explains that certain elements must come together for the term pushback to be considered in a structure that will fall within the scope of international criminal law in its operational dimension. Keeping in mind the aspects described earlier, this Article will evaluate legal ways to make sense of a vague concept.

Keywords

Pushback, International Law, Collective Expulsion, Torture, Crimes Against Humanity

* **Corresponding Author:** Ekin Deniz Uzun (Asst. Prof. Dr.), Ankara Yıldırım Beyazıt University, Faculty of Law, Department of International Law, Ankara, Turkiye. E-mail: eduzun@ybu.edu.tr ORCID: 0000-0002-9757-0223

To cite this article: Uzun ED, "Pushback of Refugees Under International Law: A Conceptual Analysis", (2022) 71 Annales de la Faculté de Droit d'Istanbul 497. https://doi.org/10.26650/annales.2022.71.0015

I. Introduction

A. The Research Question

The Mediterranean refugee *crisis* erupted in 2015.[1] The mentioned crisis is a protection crisis that defines how refugees were left alone, ignored, and othered. About 1 million migrants and refugees arrived in the European Union (EU) that year.[2] Since then, refugees who have fled from persecution and armed conflict have dominated the human rights watchdogs' reports on the *non-entrance* practices of states[3] and violence directed against refugees who have intended to cross international borders.[4] Confusing misinterpretations have also emerged about the movement of refugees and their intentions/motivations. Refugees were questioned about why some have chosen to flee towards *democratic-wealthy states* in the first place.[5] As a result, the refugee has begun to be perceived under the influence of xenophobic rhetoric—for example, refugee as a term evoked images of people escaping from the Syrian war. Syrian refugees were depicted as illiterate and innumerate opportunists who were undeserving of protection.[6] But what was *not* seen was that they were only

1 Encamacion Gutierrez-Rodriguez, 'The Coloniality of Migration and the "Refugee Crisis" On the AsylumMigration Nexus, the Transatlantic White European Settler Colonialism- Migration and Racial Capitalism' (2018) 34 Refugee 1, 15-25.
"From a European perspective, the "Mediterranean migration crisis" was, in the first instance, a Greek crisis." Philippe Fargues, 'Four Decades of Cross-Mediterranean Undocumented Migration to Europe A Review of the Evidence' (International Organization for Migration, 2017), 11
<https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf> accessed 17 September 2021.

2 Al Jazeera, '2016: Refugee Arrivals Fall as Deaths Hit Record' (26 October 2016)
<https://www.aljazeera.com/news/2016/10/26/un-2016-mediterranean-refugee-deaths-hit-record-3800> accessed 6 September 2021.

3 Human Rights Watch, 'Human Rights Watch Submission to the Special Rapporteur's Report on Pushback Practices and Their Impact on the Human Rights of Migrants' (*Human Rights Watch*, 1 February 2021)
<https://www.hrw.org/news/2021/02/01/human-rights-watch-submission-special-rapporteurs-report-pushback- practices-and> accessed 9 August 2021.

4 The crisis narrative continues to this day. In the face of rising numbers of Afghan refugees, French President Emmanuel Macron made a statement about both the need to *"protect those who are in the greatest danger"* and *"protect [themselves] against large migratory flows"*. Charlotte McDonald-Gibson, 'Europe Sees a Migration Crisis in the Making in Afghanistan. Have the Lessons of the 2015 Surge Been Learned?' *Time* (18 August 2021) <https://time.com/6091084/afghanistan-taliban-europe-migration/> accessed 27 August 2021.
Further, *"Bulgaria announced on August 26 that it will bolster its border with Greece and Turkey with between 400 and 700 soldiers amid growing concern in Europe over an influx of migrants from Afghanistan."* Radio Free Europe, 'Bulgaria Sends Troops to Border as EU Braces for Afghan Migrant Flows' (27 August 2021) <https://www.rferl.org/a/bulgaria-border-migrants-afghanistan-
/31430530.html?mc_cid=14fd97bbdc&mc_eid=0cd57908d5> accessed 31 August 2021.
"EU countries vowed Tuesday to dole out an unspecified amount of funds to significantly beef up financial support for Afghanistan's neighbors to manage the refugee crisis at their borders." Hans Von Der Burchard, 'EU Plans Big Cash Offer for Afghanistan's Neighbors to Host Refugees' *Politico* (31 August 2021) <https://www.politico.eu/article/eu-plans-afghanistan-neighbors-host- refugees/?mc_cid=7346867e83&mc_eid=0cd57908d5> accessed 6 September 2021.

5 This Article mainly focuses on the European Union (EU) countries' asylum policies with links to pushback. Wealthy democratic state is used as a general heading to include the United States of America (USA), the United Kingdom (UK), Canada, Australia, and the EU countries. For further analysis on the wealthy democratic states' asylum policies please see Daniel Ghezelbash, 'Hyper-legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees' [2020] American Journal of Comparative Law 2.
An analysis on "why are rich countries democratic" can also be found here: Ricardo Hausmann, 'Why Are Rich Countries Democratic?' (*Harvard Kennedy School Mossavar-Rahmani Center for Business and Government*, 26 March 2014) <https://www.hks.harvard.edu/centers/mrcbg/programs/growthpolicy/why-are-rich-countries- democratic> accessed 14 September 2021.

6 Georgina Ramsay and Lucy Fiske, 'Election Factcheck: Are Many Refugees Illiterate and Innumerate?' *The Conversation* (18 May 2016) <https://theconversation.com/election-factcheck-are-many-refugees-illiterate-and- innumerate-59584> accessed 2 September 2021.

human beings, in the millions, fleeing persecution and armed conflict. Indeed, as the United Nations Refugee Agency's United Nations High Commissioner for Refugees (UNHCR) noted, by the end of 2014, Syria had become the World's top source of refugees, overtaking Afghanistan.[7]

In the face of growing numbers of refugees, however, the EU states, for example, have started to show resistance by narrating the current situation as a *crisis* brought by refugees. Since then, the wealthy democratic states have looked for ways to end the refugees' *flow towards their countries*. But offered solutions have had the potential to create more complicated problems. Thus, for example, the New EU Pact on Migration [8] deepens the continuing resistance of the EU countries against refugees, as it is designed *"to harden and formalize the 'Fortress Europe'"*. Therefore*, "migrants and refugees [are] to be kept out of Europe at all costs."*[9]

Since the beginning of the *wickedly conceptualized refugee crisis*, it seems that the international community has forgotten the root causes of why refugees have been moving across borders. Humanitarian calamities contribute to instability, which in turn, leads to a range of negative consequences. Human beings are left with no choice and are forced to flee for various reasons, including armed conflict or violence reaching the limits of persecution. But knowing the brutality of strict border control measures, refugees, in most cases, choose unconventional paths to overcome visible and invisible border walls of the destination states. Upon their arrival in the designated state, refugees mostly face ill-treatment and are detained in unsanitary, inhuman conditions.[10] This unfair/abusive treatment upon the arrival of refugees leads to double victimisation.

As is understood, the wealthy democratic states in specific EU countries have adopted new ways to *tackle emerging numbers of refugees* arriving in their territories. For example, refugees were left at state authorities' discretion and kept in inhuman conditions, especially in refugee camps, such as Moria in Greece[11] and Calais Jungle in

7 See UNHCR, 'World at War - Forced Displacement in 2014' (UNHCR Global Trends, 2015) <https://www.unhcr.org/statistics/country/556725e69/unhcr-global-trends-2014.html> accessed 6 September 2021. Please note that *"Thousands of people are scrambling to flee Afghanistan after the Taliban seized back control of the country, almost two decades after they were ousted by a US-led coalition"*. The Visual Journalism Team, 'Afghanistan: Where Will Refugees Go after Taliban Takeover?' *BBC News* (26 August 2021) <https://www.bbc.com/news/world-asia-58283177> accessed 26 August 2021.

8 European Commission, 'Migration and Asylum Package: New Pact on Migration and Asylum Documents Adopted on 23 September 2020' (23 September 2020) <https://ec.europa.eu/info/publications/migration-and- asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en>accessed 26 August 2021.

9 Dawn Chatty, 'Has the Tide Turned? Refuge and Sanctuary in the Euro-Mediterranean Space' (Borders, Migrations, Asylum and Refuge, 06 October 2020) <https://revistaidees.cat/en/has-the-tide-turned-refuge-and- sanctuary-in-the-euro-mediterranean-space/> accessed 25 January 2021.

10 Madeleine Joung, 'What Is Happening at Migrant Detention Centers? Here's What to Know' (12 July 2019) <https://time.com/5623148/migrant-detention-centers-conditions/> accessed 2 September 2021.

11 *"Four Afghan asylum-seekers have been sentenced to 10 years in prison for their part in a fire that destroyed the Moria migrant camp in Greece last year."* Al Jazeera, 'Greece: Four Afghan Migrants Jailed over Moria Camp Fire' *Al Jazeera* (13 June 2021) <https://www.aljazeera.com/news/2021/6/13/afghans-jailed-in-greece-over- moria-migrant-camp-blaze?mc_cid=12f8feb197&mc_eid=0cd57908d5> accessed 15 June 2021.

France. Moria was destroyed by fire, leaving 13,000 people without shelter in 2020.[12] The first closed refugee camp in Samos, Greece, which human rights organizations see as a *punishment policy*, opened almost one year later.[13] The punishment policy criticism results from a comparison of the refugee camp in Samos with a prison - considering that the base is *"surrounded by military-grade fencing, watched over by police and located in a remote valley"*.[14] As a result, it *"has been likened by critics to a jail or a dystopian nightmare"*.[15] The Calais Jungle, where up to 9,000 people lived, on the other hand, was dismantled. Refugees in this area are now thrown into disarray; most of them live on the outskirts of Calais.[16]

Contrary to the non-refoulement principle,[17] Hellenic Coast Guard pushed heavily loaded dinghies carrying men, women, and babies back onto the high seas.[18] In addition, we have read how refugees from Libya have drowned because of not receiving protection from any states in the middle of the Mediterranean Sea.[19] In its *Hirsi Jamaa v Italy* case, the European Court of Human Rights (ECtHR/ The Court/ Strasbourg Court) concluded that Italian authorities' interception - forcibly returning refugees to Libya - was contrary to the state's obligation of human rights protection. Because refugees were under the *"continuous and exclusive de jure and de facto control of the Italian authorities"*.[20] The ongoing tragedy resulted in the deaths of hundreds of people. They drowned in the Mediterranean Sea. This incident also

12 Barbara Wesel, 'Turkey Migration Deal a "Stain on EU Rights Record"' *DW Made for Minds* (17 March 2021) <https://www.dw.com/en/turkey-migration-deal-a-stain-on-eu-rights-record/a-56903392> accessed 16 June 2021.

13 Euronews, 'Yunanistan'da Cezaevine Benzetilen Mülteci Kampı Açılıyor, STK'lar Tepkili' (18 September 2021) <https://tr.euronews.com/2021/09/18/yunanistan-da-cezaevine-benzetilen-multeci-kamp-ac-l-yor-stk-lar- tepkili?utm_source=newsletter&utm_medium=$%7Btemplate_locale%7D&utm_content=yunanistan-da- cezaevine-benzetilen-multeci-kamp-ac-l-yor-stk-lar-tepkili&_ope=eyJndWlkIjoiODNjMGNjMzdiM2IzZjgyZDBlNDg3YmE2N2U5MDQxMjAifQ%3D%3D> accessed 18 September 2021.

14 Helena Smith, 'Why Greece's Expensive New Migrant Camps Are Outraging NGOs' *The Guardian* (19 September 2021) <https://www.theguardian.com/world/2021/sep/19/why-greeces-expensive-new-migrant-camps-are-outraging-ngos> accessed 20 September 2021.

15 ibid.

16 For further information please see Diana Taylor, 'French police clear migrant camp at launch point for Britain' *The Guardian* (29 September 2020) <https://www.theguardian.com/world/2020/sep/29/french-police-clear-calais- migrant-camp-launch-point-britain> accessed 25 January 2021.

17 The non-refoulement principle is regulated under the 1951 Refugee Convention Article 33 as follows:

> "1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention) art 33.

18 Patrick Kingsley and Karam Shoumali, 'Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea' *The New York Times* (27 April 2021) <https://www.nytimes.com/2020/08/14/world/europe/greece- migrants-abandoning-sea.html> accessed 3 May 2021.

19 UN News and Global perspective Human stories, 'Libya Shipwreck Claims 130 Lives despite SOS Calls, as UN Agencies Call for Urgent Action' (23 April 2021) <https://news.un.org/en/story/2021/04/1090462> accessed 21 June 2021.

20 *Hirsi Jamaa and Others v Italy* App no. 27765/09 (ECHR, 23 February 20I2) para 81.

highlighted the failings in European immigration policy and the resistance against the idea of *welcoming refugees*.[21]

As a side note, pushback incidents should not be considered as only Greece or Italy's asylum policy.[22] The idea of pushback lies in the notion that refugees would be prevented from arriving in the destination state or seeking asylum there. For example, Australia used its motto of *fighting against smugglers* to overshadow the brutality of its offshore processing of refugees. As it turns out, nine years later, this policy was described as nothing but *"cruel, costly and ineffective"*.[23] Australia has been transferring refugees to third states to have their claims processed. [24] Since 2014, Australia has pursued *"maritime pushbacks despite the availability of offshore processing."*[25] As is seen, states may prevent already 'trying to arrive refugees' from triggering the asylum application process immediately. They can also discourage future refugees by exposing the ones, e.g., in the offshore processing detention centres, to abuse and mistreatment.

The Australian model influenced the EU states. As a result, the EU countries have started to employ sea patrol operations. For example, boats have been intercepted and returned/pushed back on high seas (such as the Mediterranean Sea) under the watch of the European Border and Coast Guard Agency/Frontex.[26] Sadly enough, the United Kingdom (UK), for example, has shown interest in replicating a similar process in its asylum policy. For instance, the Nationality and Borders Bill, Bill 14 of 2021-22,[27] was introduced in the UK,[28] and Priti Patel serving as Home Secretary in the UK during that time prepared to push back small boats carrying refugees in the Channel.[29] Recently, Denmark also passed a law allowing for the offshore detention of refugees.[30] In addition, the Greek authorities are preparing a bill that

21 Al Jazeera, 'Deaths at Sea Highlight Failings in Europe Immigration Policy' (4 May 2021) <https://www.aljazeera.com/news/2021/5/4/deaths-at-sea-highlight-failings-in-europe-migration-policy> accessed 21 June 2021.

22 Amnesty International, 'Greece: Pushbacks and Violence against Refugees and Migrants Are de Facto Border Policy' (23 June 2021) <https://www.amnesty.org/en/latest/press-release/2021/06/greece-pushbacks-and- violence-against-refugees-and-migrants-are-de-facto-border-policy/> accessed 26 August 2021.

23 Madeline Gleeson and Natasha Yacoub, 'Policy Brief 11 Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia' (Kaldor Centre for International Refugee Law 2021) Policy Brief 11,2 <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Process ing.pdf> accessed 16 August 2021.

24 ibid.

25 ibid.

26 Frontex European Border and Coast Guard Agency < https://frontex.europa.eu> accessed 16 June 2021.

27 United Kingdom Government, 'Nationality and Borders Bill 2021' <https://publications.parliament.uk/pa/bills/cbill/58-02/0141/210141.pdf> accessed 31 August 2021.

28 Megan Specia, 'U.K. Proposes Moving Asylum Seekers Abroad While Their Cases Are Decided' *The New York Times* (6 July 2021) <https://www.nytimes.com/2021/07/06/world/europe/uk-migration-priti-patel.html> accessed 16 August 2021.

29 Rajeev Syal, 'Priti Patel to Send Boats Carrying Migrants to UK Back across Channel' *The Guardian* (9 September 2021) <https://www.theguardian.com/uk-news/2021/sep/09/priti-patel-to-send-boats-carrying- migrants-to-uk-back-across-channel?utm_term=16547debe68d2f1e930f736c93bc1661&utm_campaign=GuardianTodayUK&utm_source=es p&utm_medium=Email&CMP=GTUK_email&mc_cid=a4d0f45d8c&mc_eid=0cd57908d5> accessed 16 September 2021.

30 BBC News, 'Denmark Asylum: Law Passed to Allow Offshore Asylum Centres' (3 June 2021) <https://www.bbc.com/news/world-europe-57343572> accessed 16 August 2021.

imposes fines on non-governmental organisations (NGOs) that carry out efforts to rescue migrants at sea.[31]

As seen from the ongoing examples and discussions, this Article aims to build its debate on democratic wealthy countries' resistance against refugees not welcoming them to their lands.

The analysis carried out within the scope of the Article focuses on pushbacks employed by some of the said states. Pushback is not defined by international law, albeit states practice it. This referral -pushback- has been invented by refugee advocates due to high levels of malicious activities of some states, aiming to prevent refugees' arrivals to their territories or process their asylum applications. Pushbacks violate refugees' rights regulated under international law and infringe on their fundamental human rights. For example, the UN Special Rapporteur explained the legal aspect of rights violation with links to refugees' pushback as in the following:

> "In the absence of an individualized assessment for each migrant concerned and other procedural safeguards, pushbacks are a violation of the prohibition of collective expulsion and heighten the risk of further human rights violations, in particular refoulement."[32]

Furthermore, since no international legal regulation defines pushback, this Article charts existing legal avenues to describe this phenomenon.

In this light, this Article questions the following: Which international legal rules can be linked to explain the pushback phenomenon?

To address the issues detailed above and resolve the research question, this Article conducts a legal analysis of the phenomenon of pushback, employing comparative and socio-legal methods, and considers both law and practice as necessary. But a brief note should be included about the methodology of this Article. The following paragraphs explain the mentioned note on the research methods.

A legal mindset[33] would want to explain the relevance of pushback operations and the crime of torture through legal regulations. Based on established legal rules, it would ask whether pushbacks comply with the non-refoulement principle, whether

31 Euronews, 'Avrupa Konseyi' nden Yunanistan'a: Göçmenleri Sınır Dışı Etme Yasa Tasarısını Değiştir' (4 September 2021) <https://tr.euronews.com/2021/09/04/avrupa-konseyi-nden-yunanistan-a-gocmenleri-s-n-r-d-s-etme-yasa-tasar-s-n-degistir?utm_source=newsletter&utm_medium=$%7Btemplate_locale%7D&utm_content=avrupa-konseyi-nden-yunanistan-a-gocmenleri-s-n-r-d-s-etme-yasa-tasar-s-n-degistir&_ope=eyJndWlkIjoiODNjMGNjMzdiM2IzZjgyZDBlNDg3YmE2N2U5MDQxMjAifQ%3D%3D> accessed 6 September 2021.

32 United Nations Human Rights Office of the High Commissioner, 'Deadly Practice of Migrant "Pushbacks" Must Cease - UN Special Rapporteur' (23 June 2021) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27200&LangID=E> accessed 14 September 2021.

33 *Legal mindset* analysis is inspired by Mann's approach in the following article: Itamar Mann, 'Attack by Design: Australia's Offshore Detention System and the Literature of Atrocity' [2021] European Journal of International Law 429 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787661> accessed 14 April 2021.

state prevention methods are lawful, and whether it is actualised inhumanely. But the legal mindset may also overlook the *consequences/impacts* of the mighty and impenetrable profoundness of interception policies which are the products of politicians.[34] However, refugees endure hardship and put out all their energy to reach the designated state, only to be left without humanitarian assistance.[35]

For this reason, the approach to refugees' journey should require an exhaustive analysis of the *time spent* searching for an asylum state. This thorough analysis demands specific means to look at the issue from different angles, including political, social, and psychological aspects. The legal mindset thus, instead of asking whether the refugee loses their personality in seeking asylum, asks whether there is any evidence that would prove the actualised abuse. For this reason, to bring an in-depth dimension to the legal analysis, it is necessary to recourse to the victims' and witnesses' testimony. This method will eventually help us understand how *abuse* is seemingly justified through the pushback operations of states. Therefore, this Article's author has reviewed several reports, journals, newspaper articles and books to reveal the refugees'/victims' voices. Thus, although this Article sits at the junction with international refugee and international criminal law, by employing a perspective from a philosophical evaluation, the analysis also brings a critical dimension to the moral side of the issue.

The following section gives a preliminary idea about the necessity of bringing a legal and moral explanation to pushback along with the structure of this Article.

B. The Structure of the Article

This Article operates in five main parts. In the introductory part, the Article analysed the background of the research question exhaustively. The discussion established some western democratic states' reluctance to welcome refugees. As the given examples detailed, the opposition has turned to deterrence practices that include pushback. Pushback thus has become a contemporary phenomenon. Even though it exists in the context of states' border control measures, legally, there is no legal formulation that grasps the phenomenon of pushback thoroughly. This Article thus charts relevant international law regulations that allow us to capture the scope of pushback. To this end, this Article further proceeds as follows.

34 For example, there are examples discussed in this Article that destination states target refugees and systematically prevent them from arriving at their shores. A legal mindset in these incidents may not question whether the refugee would turn into the Agamben's Muselmann. As it happens to Muselmann, refugees too may lose "all consciousness and all personality" in cases that include fighting against artificial waves in dinghies on the high seas, for example. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, Stanford University Press 1998) 71.

35 Of course, this does not necessarily mean that refugees are *not* receiving any kind of assistance from states at all. In a recent incident for instance, *"Italian military vessels ... aided a decrepit fishing boat crammed with 539 migrants that was approaching the tiny southern Italian island of Lampedusa"*. Euronews, 'Fishing Boat Crammed with over 500 Migrants Arrives in Lampedusa' (28 August 2021) <https://www.euronews.com/2021/08/28/fishing-boat-crammed-with-over-500-migrants-arrives-in-lampedusa?mc_cid=14fd97bbdc&mc_eid=0cd57908d5> accessed 31 August 2021.

Part II explains why there should be a legally conceptualised analysis of the term pushback. Without defining the problem, we cannot protect the people who suffer the consequences of the issue. Hence, the necessity to bring a conceptual analysis to a vague concept lies in the foundation of protecting refugees.

Part III underlines that not every interception measure amounts to pushback by relating some states' deterrence practices. The analysis carried out within the scope of this part gives an idea about *what does not constitute pushback* in the states' deterrence practices. The following paragraph details this claim a little bit more to provide a background for Part III herein.

The non-entrée practices translate into resistance in the broader perspective and declare that *"the refugee shall not access our community"*.[36] Forms of non-entrée methods, apart from the pushback operations, may include the unwillingness of a state to grant asylum, thus, e.g., returning refugees to a third country.[37] Take, for instance, a rising common trend among states to build border walls. Its intended goal is to create a deterrence effect on refugees. But building border walls does not constitute pushback. The walls simply imply *resistance/reluctance* of states towards accepting refugees or *outlanders* to their lands in general. Therefore, it is necessary to distinguish the prevention of refugees' arrival to the country of asylum from the non-entrée method that results in actional interference against refugees' arrival in the state in question.

After clarifying the reason for the legal explanation of the term pushback and its place among the deterrence practices of states, this Article now begins to examine the term pushback through the eyes of international law.

Part IV considers available legal avenues in which pushback can find an explanation. Therefore, the first step asks whether collective expulsion and pushbacks have the same legal meaning. Next, this Article considers the European Convention of Human Rights (ECHR)[38] and the case law of the Strasbourg Court because the ECHR and the case law of the ECtHR bring specific explanations and analysis on the collective expulsion incidents.

Drawing upon ongoing analysis, in the second step, this Article continues its investigation to understand whether pushbacks reach the limits of the crime of torture because pushbacks that involved risking the lives of human beings were considered,

36 James C Hathaway, 'The Emerging Politics of Non-Entrée' (1992) 91 Refugees 40.

37 UNHCR, 'Legal Considerations Regarding Access to Protection and a Connection between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries' (UN High Commissioner for Refugees, 2018) <https://www.refworld.org/docid/5acb33ad4.html> accessed 30 September 2021.

38 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), amended by Protocols nos 11 and 14, 4 November 1950, ETS 5. The Protocol 4 Article 4 states the following: *"collective expulsion of aliens is prohibited"*. Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto 16 September 1963, ETS 46.

by some scholars, as crossing the boundaries of *"severe mental and physical suffering"* that constituted torture.[39] There is no legal regulation/indication guiding us to formulate pushbacks as a form of torture.

In the third step, this discussion examines whether pushbacks can be linked to crimes against humanity. In this context, assuming there is an accountability gap regarding pushbacks due to unresolved definitional issues, this Article figures whether international criminal law can or should fill it.[40] It has been claimed that the International Criminal Court (ICC) is an influential institution.[41] Thus, involving the ICC to eliminate pushbacks may help to reach constructive results -elimination of pushback practices. However, an international crime must have been committed for international criminal law to hold perpetrators accountable. Therefore, to deter states from pursuing pushback policies, this Article considers whether pushback reaches the threshold of crimes against humanity.

Finally, Part V is reserved for the conclusion. Here the Article conducts a brief review of its analysis of pushback. Therein it concludes that even though states as sovereigns are not *tamed*/ *dominated* by international legal rules and definitions *all the time*, explanations, descriptions, and clarifications on highly practised vague concepts may help eliminate further damage.

II. The Necessity to Address Pushback Phenomenon Legally

> *"Where there is law and principle, there is strength and the capacity to oppose. Where there are merely policies and guidelines, everything, including protection, is negotiable, and that includes refugees".*[42]

This Article is designed to answer the following question: How can we identify pushback within a legal context? Driven by this question, this Article looks at ways to describe pushback under the light of relevant international law regulations.

Given incidents throughout this Article show us that refugees are precluded from invoking their internationally recognised rights -precisely the right to seek asylum- because of pushbacks. The right to seek asylum is a combination of rights: the right to leave and apply for asylum in another country.

39 Itamar Mann and Niamh Keady-Tabbal, 'Torture by Rescue: Asylum-Seeker Pushbacks in the Aegean How Summary Expulsions From Greece Have Continued With Impunity' (Just Security, 26 October 2020) <https://www.justsecurity.org/72955/torture-by-rescue-asylum-seeker-pushbacks-in-the-aegean/> accessed 25 January 2021.

40 Itamar Mann, 'The Right to Perform Rescue at Sea: Jurisprudence and Drowning' [2020] German Law Journal 609.

41 *"The data suggest that the ICC drives sustained curiosity about human rights, which may signal a broader ability to contribute to long-term social and ideational change."* Geoffrey Thomas Dancy, 'The Hidden Impacts of the ICC: An Innovative Assessment Using Google Data' (2021) 34 Leiden Journal of International Law 729 <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/hidden-impacts-of-the-icc- an-innovative-assessment-using-google-data/ED6494135812ADADBE6DBD01FCACD932> accessed 26 August 2021.

42 Guy Goodwin-Gill, 'Refugee Identity and Protection's Fading Prospects' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999) 220.

International law recognises the right to leave in several documents, including the Universal Declaration of Human Rights (UDHR)[43] and the International Covenant on Civil and Political Rights (ICCPR).[44] However, considering that the right to leave *"is not matched by a state duty of admission"*, we can conclude that it is an *incomplete* right.[45]

Indeed, in this scene, minimum to zero care and intolerance frequently surface against refugees due to deterrence practices. Further, how they are treated tells a lot about what goes wrong during their journey. For example, torturous actions taken against refugees have caused damage for refugees, and *"[r]efugees themselves have lost confidence in the regime that is supposed to be protecting and finding solutions for them"*. [46]

How do we protect refugees, then? First, we must consider the legal mechanisms and international organisations protecting refugees in answering this question. In that way, we can reason with the claim that refugees have lost confidence in the refugee protection regime.

First, we may point to the UNHCR as a quick response for refugee protection. But the UNHCR is appearing as a less independent body -more and more in the modern era. The UNHCR also relies on states for its budget.[47] For this reason, the UNHCR is regarded as a non-binding lawmaker.[48] As a result, Crisp and Maple concluded that refugees *"who meet the criteria for refugee status simply prefer not to make contact*

43 Universal Declaration of Human Rights GA Res 217 A (III), UN GAOR, 3rd Sess., 183rd plen mtg, UN Doc A/810,10 December 1948 (UDHR).

44 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Article 12 of the ICCPR states the following:

> "Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

Article 13 of the ICCPR further states that

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

45 Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as A Personal Liberty' (2011) 12 Melbourne Journal of International Law 2.
Moreover, the incomplete right -right to leave- seems to remain as such, considering *"at a time when neoliberals, cosmopolitans [, and] humanitarians . . . fantasize a world without borders, . . . nation-states, rich and poor, exhibit a passion for wall building"*. Wendy Brown, *Walled States, Waning Sovereignty* (2010) 20.

46 Jeff Crisp and Nicholas Maple, 'Relevant or Redundant? The Future of the International Refugee Protection Regime' (*Refugee Law Initiative Blog on Refugee Law and Forced Migration*, 22 July 2021) <https://rli.blogs.sas.ac.uk/2021/07/22/relevant-or-redundant-the-future-of-the-international-refugee-protection- regime/> accessed 4 August 2021.

47 James C Hathaway, 'Is 'Ageing Gracefully?' An Ageist Critique?"' <https://rli.sas.ac.uk/resources/podcasts?utm_source=Refugee+Law+Initiative&utm_campaign=107851ca13-EMAIL_CAMPAIGN_2017_10_03_COPY_01&utm_medium=email&utm_term=0_304c0b75a9-107851ca13-581066909> accessed 5 August 2021.

48 ibid.

with UNHCR and its partners."[49] Moreover, considering the UNHCR has a weak role in combatting violence against refugees today, it is not surprising that Greece, for instance, does not take the agency's warnings seriously to *"refrain from such practices"* in its referrals to pushback operations.[50]

Secondly, we may refer to the 1951 Refugee Convention regarding refugees' protection. On the other hand, the Convention has also been criticised as an instrument *"showing its age"*[51] because it fails to address internally displaced persons, climate refugees, and different dynamics leading to the persecution of human beings. [52] Goodwin-Gill further states that

> "Although updated by one protocol in 1967, no other international instrument has emerged in the past 70 years, despite increasing numbers of refugees travelling farther and farther in search of refuge, the protracted and intractable nature of displacement, the lack of formal 'distribution' mechanisms, whether in relation to people or financial responsibility, the institutionalisation of protection rights at the individual level, and the complexity of causes and drivers."[53]

Of course, this does not necessarily mean that the 1951 Refugee Convention lacks regulations on refugee protection. One of the most critical rules established by the Convention regarding refugee protection is the non-refoulement principle. We can explain its importance with links to pushback incidents. Once refugees are pushed back, they are most likely sent to a place where they will face persecution or some other form of abuse. Thus, the non-refoulement principle, formulated under Article 33(1) of the 1951 Refugee Convention, applies in pushback cases because Article 33(1) explicitly uses the terms *"expel[ling] or return[ing]",* including the frontiers of territories.[54] This article details why the individual must be protected from expelling and returning. As stated by article 33, prohibition exists for a reason because otherwise, refugees' *"life or freedom would be threatened"*.[55] Refugees most probably would face a life-threatening circumstance -if they are pushed back- because they flee due to the reasons that make them a refugee: *"on account of race, religion, nationality, membership of a particular social group or political opinion."*[56]

49 Jeff Crisp and Nicholas Maple (n 46).

50 UNHCR, 'UNHCR Concerned by Pushback Reports, Calls for Protection of Refugees and Asylum-Seekers' (*UNHCR The UN Refugee Agency*, 21 August 2020) <https://www.unhcr.org/gr/en/16207-unhcr-concerned-by- pushback-reports-calls-for-protection-of-refugees-and-asylum-seekers.html> accessed 5 August 2021.

51 Stewart M Patrick, 'The U.N. Refugee Convention Is Under Pressure—and Showing Its Age' (*World Politics Review*, 9 August 2021) <https://www.worldpoliticsreview.com/articles/29869/the-un-refugees-regime-is-under- pressure-and-showing-its-age?mc_cid=b1f8cb11c9&mc_eid=0cd57908d5> accessed 16 August 2021.

52 ibid.

53 Guy Goodwin-Gill, 'The international refugee regime and the challenges today' (*Kaldor Center for International Refugee Law*, 27 August 2021) < https://www.kaldorcentre.unsw.edu.au/publication/international-refugee-regime-and-challenges-today> accessed 31 August 2021.

54 1951 Refugee Convention (n 17) art 33(1).

55 ibid.

56 ibid.

The non-refoulement principle thus should explain to us in what ways pushbacks contradict with a customary international law norm. [57]

We can debate how narrowly or broadly pushbacks should be viewed from different perspectives. But it is inevitable that pushbacks precisely demonstrate how the right to seek asylum is left dangling in the air. Refugees are pushed back and left in limbo without caring about their destinies. Although the frustration and uncertainty leave refugees and the international community at stake, refugees may be pushed back without subjecting them to any form of abuse that reaches the threshold of malicious activities in the sense of torture. Still, the pushback of refugees would contradict the non-refoulement principle and collective expulsion. But if refugees are pushed back utilising the methods that can be put to the limits of the crime of torture, then we must consider the incident through the lens of international criminal law.

In each incident, if states know that there are defined parameters surrounding pushback linked to torture and crimes against humanity, they will be more reluctant to pursue pushback. As a result, obligations to protect refugees would be implemented more effectively, especially considering the importance of respecting refugees' rights. For example, if pushbacks are recognised as an international crime, this would also encourage states not to tolerate pushbacks committed by their neighbouring state. Additionally, the ICC could take a stance in the future about matters that include violations of refugees' rights and their human rights in a general sense.

III. Deterrence Practices: What is *not* Pushback?

The 1951 Refugee Convention[58] and its 1967 Protocol[59] define the refugee. The UNHCR, through its Statute[60] and relevant regulations,[61] has tremendously enhanced the meaning of refugee and protection mechanisms attributed to this status.[62]

57 Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non- Refoulement' in UNHCR (eds) Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (Cambridge University Press 2003),149-163 <https://www.refworld.org/docid/470a33af0.html> accessed 16 September 2021.

58 The 1951 Refugee Convention sets a definition in determining refugee status under its article 1, as follows:
> "...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former." 1951 Refugee Convention (n 17).

59 Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (The 1967 Protocol).

60 Statute of the Office of the United Nations High Commissioner for Refugees 1950 (A/RES/428(V)).

61 Frances Nicholson and Judith Kumin, 'A Guide to International Refugee Protection and Building State Asylum Systems Handbook for Parliamentarians N° 27, 2017' (UNHCR, 2017), 15-32 <https://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html> accessed 26 August 2021.
Further see UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (UNHCR, 2019), 13-14 <https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures- criteria-determining-refugee-status-under-1951-convention.html> accessed 25 May 2021.

62 UNHCR ibid 42.

Specifically, the UNHCR defined the need for protection on a broader spectrum. Now we understand the meaning of the refugee and protection paradigm in legal terms: *"It is no longer the quality of 'refugee,' however defined, that entitles one to protection. It is the need for protection that entitles one to treatment as a refugee."*[63]

Despite the established protection mechanism mentioned above, refugees are seen as potential threats in modern times rather than people needing protection.[64] In contemporary times, the refugee person began to be regarded as the opposite of a *typical* refugee. The refugee, protected under the 1951 Refugee Convention after WWII, was *"white, male and anti-communist—which clashed sharply with individuals fleeing the Third World"*.[65] But later, the 9/11 terrorist attacks, the cold war era, and the armed conflicts that erupted in Iraq and Syria have shaped the collective memory of societies about refugees. For example, war refugees were considered weak-hearted ones who did not *stay* to fight for their countries.[66] Being mischaracterised as potential terrorists, greedy economic immigrants, queue-jumpers, or opportunists have categorised refugees as *invaders*. Refugees are thus hurt/victimised by certain misconceptions and thought practices around the concept of *potential national threat*.[67] People/institutions blame/discriminate against them for being aliens or for things they did/had to do while crossing the state borders.

States thus have built walls,[68] strengthened their policies, and brain-washed their citizens to protect their economies and *settled* social fabric. As a result, states -specifically democratic wealthy states- have employed tactics to keep refugees out due to seeing them from a pre-conditioned perspective. Apart from the pushback policies, tactics in the context of this section refer to deterrence practices, such as non-entrée, non-arrival, and front-door policies. [69] In specific, we can look at, for example, the European states' deterrence measures, which have been shaped over the years through the following means:[70]

63 See Jerzy Sztucki, 'Who Is a Refugee? The Convention Definition: Universal or Obsolete?' in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities* (Cambridge University Press 1999) 55.

64 Obiora Chinedu Okafor, *Refugee Law After 9/11 Sanctuary and Security in Canada and The United States* (UBC Press 2020) 3-10.

65 Bhupinder S Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 Journal of Refugee Studies 4, 351.

66 Patrick Strickland, 'Why Is the World Afraid of Young Refugee Men?' *Al Jazeera* (20 June 2016) <https://www.aljazeera.com/features/2016/6/20/why-is-the-world-afraid-of-young-refugee-men> accessed 6 October 2021.

67 United Nations Meetings Coverage and Press Releases, 'Refugees, Migrants Branded "Threats", Dehumanized in Campaigns Seeking Political Gain, High Commissioner Tells Third Committee, Appealing for Return to Dignity' (31 October 2018) <https://www.un.org/press/en/2017/gashc4247.doc.htm> accessed 27 August 2021.

68 Joanna Plucinska and Kacper Pempel, 'On the EU's Eastern Border, Poland Builds a Fence to Stop Migrants' *Reuters* (26 August 2021) <https://www.reuters.com/world/europe/eus-eastern-border-poland-builds-fence-stop- migrants-2021-08-26/?mc_cid=14fd97bbdc&mc_eid=0cd57908d5> accessed 31 August 2021.
Please also note that *"Greece has installed a 40km (25-mile) fence and surveillance system on its border with Turkey amid concern over a surge of migrants from Afghanistan"*. BBC News, 'Greece Erects Fence at Turkey Border amid Warnings of Afghan Migrant Surge' (21 August 2021) <https://www.bbc.com/news/world-europe- 58289893?mc_cid=d22ade97d4&mc_eid=0cd57908d5> accessed 31 August 2021.

69 Angel Sanchez Legido, 'The Walls of Fortress Europe: Externalization of Migration Control and the Rule of Law' (2019) 23 The Spanish Yearbook of International Law 345, 346.

70 ibid 346.

- European countries expect migrants and refugees to obtain a visa before their arrival.

- European countries aim to establish cooperation between the origin, transit, and neighbouring countries to contain migration flows.

- Some states have embraced a so-called mission of fighting against 'illegal immigration and human smugglers'. As a result, Malta and Italy detained rescue vessels, and activists with accusations of being involved in human trafficking.[71]

- European countries whose land borders were affected by crossings of migrants and refugees have constructed *migration fences*. Some have even gone to the extreme. For example, Greece created high-tech sound cannons to deter migrants from crossing into the EU from Turkey.[72]

- European states have embraced offshoring strategies such as expanding areas and territories, i.e., ports and airports.[73]

- State-led search and rescue (SAR)[74] operations shifted the burden of search and rescue operations onto large merchant ships. However, these ships are ill-fitted to conduct such operations. The EU allegedly creates this situation. Agencies and policymakers know that rescue operations performed by large merchant ships may result in loss of life in shipwrecks. For example, in 2015, over 800 people died *"when a migrants' vessel sank after a mis-manoeuvre led it to collide with a cargo ship that had approached to rescue its passengers"*.[75] This indirect expulsion tactic is - *"death by rescue"* - one of the outcomes of *"E.U.'s policy of non-assistance"*.[76]

- The EU and its member states have signed agreements with third countries, which have turned these states into the border guards of Europe. This process was referred to as border externalisation, which means that *people moving* towards Europe were stopped before they ever reached Europe's shores.[77] To this end, new detention facilities have been constructed in these third countries, and correctional officers have been employed.[78]

71 Laura Lynott, '"I'm Not a Hero but I'm Not a Criminal" - Trinity Graduate Sean (24) Returns Home after 100 Days in Greek Jail' *INDEPENDENT.IE* (16 December 2018) <https://www.independent.ie/irish-news/im-not-a- hero-but-im-not-a-criminal-trinity-graduate-sean-24-returns-home-after-100-days-in-greek-jail-37631116.html> accessed 31 August 2021.

72 Antonia Noori Farzan, 'As Greece Installs "Sound Cannons" on Border, Denmark Passes Law Allowing Asylum Seekers to Be Sent Overseas' [2021] The Washington Post
<https://www.washingtonpost.com/world/2021/06/05/greece-denmark-migrants/> accessed 16 June 2021.

73 Daria Davitti, 'Why Offshore Processing of Refugees Bound for Europe Is Such a Bad Idea' *The Conversation* (28 July 2017) <https://theconversation.com/why-offshore-processing-of-refugees-bound-for-europe-is-such-a- bad-idea-81695> accessed 27 August 2021.

74 Eugenio Cusumano and Matteo Villa, 'Over Troubled Waters: Maritime Rescue Operations in the Central Mediterranean Route' (IOM) <https://publications.iom.int/system/files/pdf/ch16-over-troubled-waters.pdf> accessed 26 August 2021.

75 Death by Rescue, 'Death by Rescue the Lethal Effects of The EU's Policies of Non-Assistance' <https://deathbyrescue.org> accessed 25 September 2021.

76 ibid.

77 Mark Akkerman, 'Outsourcing Oppression How Europe Externalises Migrant Detention Beyond Its Shores' (Niamh Ni Bhriain and Josephine Valeske eds, Transnational Institute and Stop Wapenhandel, 2021), 15 <https://www.tni.org/files/publication-downloads/outsourcingoppression-report-tni.pdf> accessed 7 October 2021.

78 Human Rights Watch, 'Pushed Back, Pushed Around Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' (2009) <https://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf> accessed 13 August 2021.

Departing from the last point made above, as is stated, third countries/non-EU states have become the guard of Europe's borders[79] through bilateral agreements concluded over the years. For example, Italy and Libya agreed in 2003 under the regime of Gaddafi. The agreement constituted *"Italy's provision of border security equipment"* and *"funding for detention centres and deportation flights"*.[80] After the fall of the Gaddafi regime in 2011, the newly formed Libyan Government sealed another deal with Italy in 2012. According to the latter agreement, detention centres would be upgraded. Indeed, not after some time passed did the Libyan Government begin constructing a new detention camp bordering Algeria in Ghat.[81] Since then, detention centres have been built, fluctuating between 17 to 35. People captured in Libya or *en route* to Europe from Libya are put in detention centres.[82] Reportedly, in Libyan detention centres, abuse amounting to torture and inhuman and degrading treatment have occurred due to several tactics employed by guards and officials. For example, Médecins Sans Frontières (Doctors Without Borders) stated in 2019 that detention centre guards sold detainees. The spokesperson of Médecins Sans Frontières described this as a form of exploitation.[83] Detainees were starved and beaten to death.[84] Global Detention Project[85] and the United Nations stated that women and girls were raped and sexually assaulted.[86] The given incidents have happened on the watch of the EU, which means that the EU countries have funded Libyan detention centres with the full knowledge that detainees will be held in inhumane conditions.[87] The EU justifies its ongoing support by claiming that detention staff is trained on human rights or suggests that so-called voluntary repatriation programs are an alternative protection regime.[88]

The given examples herein constitute deterrence practices, but they omit pushbacks. Any deterrence practice, in a general sense, will not equate to pushback.

79 Amnesty International, 'The Human Cost of Fortress Europe Human Rights Violations Against Migrants and Refugees at Europe's Borders' (2014) <https://reliefweb.int/sites/reliefweb.int/files/resources/EUR%20050012014_%20Fortress%20 Europe_complete _web.pdf> accessed 26 August 2021.

80 Akkerman (n 77) 25.

81 ibid.

82 Nadia Al-Dayel, Aaron Anfinson, and Graeme Anfinson, 'Captivity, Migration, and Power in Libya' [2021] Journal of Human Trafficking, 8 <https://www.tandfonline.com/doi/pdf/10.1080/23322705.2021.1908032?needAccess=true> accessed 18 May 2021.

83 Médecins Sans Frontières, 'Out of Sight, out of Mind: Refugees in Libya's Detention Centres' (12 July 2019) <https:// www. msf.org/out-sight-out-mind-refugees-libyas-detention-centres-libya> accessed 18 May 2021.

84 United Nations, 'Detained and Dehumanised: Report on Human Rights Abuses Against Migrants in Libya' (Office of the United Nations High Commissioner for Human Rights, 2016) <https://www.ohchr.org/Documents/Countries/LY/ DetainedAndDehumanised_en.pdf> accessed 18 May 2021. Kaamil Ahmed, 'Violence towards refugees at Libyan detention centers forces MSF to pull out' (*The Guardian*, 24 June 2021) <https://www.theguardian.com/global-development/2021/jun/24/violence-towards-refugees-at- libyan-detention-centres-forces-msf-to-pull-out?mc_cid=107ec98c57&mc_eid=0cd57908d5> accessed 5 August 2021.

85 The Global Detention Project (*The Global Detention Project*) <https://www.globaldetentionproject.org> accessed 27 August 2021.

86 The Global Detention Project, 'Country Report. Immigration Detention in Libya: "A Human Rights Crisis' (2018), 6 <https://www. globaldetentionproject.org/wp-content/uploads/2018/08/GDP-Immigration-Detention-Libya.pdf> accessed 18 May 2021.

87 Akkerman (n 77) 23.

88 ibid.

But of course, regarding differing pushbacks from the other non-entrée methods, we must understand the distinguished character traits embedded in pushbacks. The following analysis, conducted in the rest of this Article, precisely explains that.

IV. How Can Pushbacks Legally be Explained?

As stated in this Article's introduction, the Article aims to provide a legal explanation for the term pushback, which exists in real life but is not legally defined. In a legal context, the pushback phenomenon may be easily used for collective expulsion because collective expulsion incidents are also designed to keep refugees out of designated states or interrupt the process of triggering asylum applications. The following analysis looks at the legal understanding of collective expulsion to determine whether it can be used interchangeably with the pushback phenomenon. First, this Article posits that collective expulsion encompasses pushback, not the other way around. The reason for this claim is explained in the following section. Then, after completing the mentioned analysis, this Article evaluates pushback linked to torture and crimes against humanity.

A. Pushbacks and Collective Expulsion

As a deterrence practice, pushbacks aim to prevent refugees' asylum applications. Thus, pushbacks happen before or immediately after the arrival of refugees to the state's territory, or they are operated on the high seas.

Pushbacks often involve practices linked to the removal of non-nationals from the territory of a state, which leads to collective expulsion.[89] Collective expulsion violates several rules under international and EU Law. For example, the Charter of Fundamental Rights of the EU (CFREU)[90] and the International Covenant on Civil and Political Rights (ICCPR) [91] prohibit collective expulsion in explicit terms. Furthermore,

89 Special Rapporteur on the human rights of migrants, Felipe González Morales, describes pushbacks as

> "various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border."

Felipe González Morales, 'Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea' (UN Human Rights Council Forty-seventh session, 21 July 2021), 4 <https://documents-dds- ny.un.org/doc/UNDOC/GEN/G21/106/33/PDF/G2110633.pdf?OpenElement> accessed 18 September 2021.

90 Charter of Fundamental Rights of The European Union [2012] 326/02 395, art 19.

91 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Article 12 of the ICCPR states the following:

> "Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Covenant."

Article 13 of the ICCPR further states that

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

even under an emergency, states are prohibited from obtaining derogations that will amount to collective expulsion. [92] Again, based on the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[93] collective expulsion violates the right to equal treatment before the law on all levels.[94] Further, we see a more detailed and comprehensive approach/explanation in the Guide on Article 4 of Protocol No 4 to the European Convention of Human Rights (ECHR)[95] and the case law of the ECtHR. The Guide on Article 4 of Protocol No 4 to the ECHR explains the core purpose of this provision as

> "to prevent States from being able to remove a certain number of aliens without examining their circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority."[96]

Generally, collective expulsion cases sit on four pillars: the large number of refugees who face the same fate; a de facto policy employed by the designated state to expel refugees; deportation orders; and the difficulty in triggering the legal process and contacting a lawyer for refugees.[97] At first, for an expulsion to be considered collective, the Court does not set a specific requirement on the *number* of persons.[98] Ideally, every person among several aliens should be allowed to claim asylum. Therefore, there must be an objective examination of each person's request.[99] The ECtHR states that if the state conducts a reasonable and objective assessment of the case of each alien of the group, *"the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4."*[100]

Furthermore, in collective expulsion cases, states deprive refugees of effective remedies. In the process, refugees may also be detained in conditions that fall under

92 UN Human Rights Committee (HRC), 'CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency' 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 13(d) <https://www.refworld.org/docid/453883fd1f.html> accessed 9 September 2021.

93 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force on 4 January 1969) 660 UNTS 195 (CERD).

94 CERD Article 5(a) states the following: *"The right to equal treatment before the tribunals and all other organs administering justice"*.

95 ECtHR guideline defines collective expulsion as *"any measure compelling aliens, as a group, to leave a country, except where such a measure is taken based on a reasonable and objective examination of the particular case of each alien of the group"*. Council of Europe/European Court of Human Rights, 'Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights' (31 August 2022), 5 <https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf > accessed 19 October 2022.

96 European Court of Human Rights, 'Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of Collective Expulsions of Aliens' (Council of Europe, 30 April 2021) 5-8 <https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf> accessed 17 June 2021.

97 Jaya Ramji-Nogales, 'Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights' (*American Society of International Law*, 4 January 2016) <https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights> accessed 27 August 2021.

98 *N D & N T v Spanish* App nos 8675/15 and 8697/15 (ECHR, 13 February 2020) para 193-199.

99 Council of Europe/European Court of Human Rights (n 94) 5.

100 *Conka v Belgium* App no 51564/99 (ECHR, 5 February 2002) para 59.

the prohibition of illegal arrest or detention of a person regulated by Article 5(1)(f) of the ECHR. [101] In the *Khlaifia and Others v Italy* case -which concerned the unlawful detention of refugees, the Court concluded that *"no one should be arbitrarily dispossessed of such liberty"*.[102]

Prohibition on collective expulsion encapsulates extraterritorial application of human rights protection of aliens too. In its *Hirsi Jamaa and others v. Italy* case, for example, the Court stated that *"[t]he prohibition of refoulement is not limited to the territory of a State, but also applies to extraterritorial State action, including activities occurring on the high seas"*.[103] The Court, in this case, examined the applicability of Article 4 Protocol No 4 in the case of interception on the high seas. In its reasoning, the ECtHR stated the following:

> "the Italian border control operation of "pushback" on the high seas, coupled with the absence of an individual, fair and effective procedure to screen asylum-seekers, constitutes a serious breach of the prohibition of collective expulsion of aliens and consequently of the principle of non-refoulment."

Considering the above-mentioned *collective expulsion* usage by the Court, pushbacks occur as *a state practice* -which may happen on the high seas or on land. Therefore, considering the above-given reasoning of the Court, the formulation of collective expulsion is the combination of the operation of pushback and the absence of an individual and effective procedure. This process is explained by the UN Special Rapporteur on the human rights of migrants as follows: *"Pushbacks result in human rights violations such as forced returns without individual assessment and often collective expulsions with a high risk of refoulement, including chain refoulement."*[104]

As described above, pushback defines a procedural aspect that abruptly ends the effort of seeking asylum. For example, either the refugee is immediately put on a dinghy or a boat and cut adrift, or they are detained and sent back to where they came from without considering their well-being. Eventually, refugees are not allowed to seek asylum anymore. Refugees are pushed back through the measures taken by the state authorities. As mentioned earlier, the nature of the measures tells us under what kind of treatment refugees are pushed back. This article determines the legal nature of the term pushback around the measures taken.

In this regard, Keady-Tabbal and Mann conclude that *"[t]he probability of extreme ill-treatment does not have to be 100% for an asylum seeker to have been considered*

101 Article 5(1)(f) states the following: *"the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."* ECHR (n 38).

102 *Khlaifia and Others v Italy* App No 16483/12 (ECHR, 15 December 2016) para 64.

103 *Hirsi Jamaa and Others v Italy* (n 20) para 64.

104 González Morales (n 89) 1.

"pushed back".[105] To explain this claim, they give the example of the Southeastern European countries' treatment of refugees and the extreme, consistent indifference by these countries towards refugees. Since the pandemic, the authors posit Southeast Europe has displayed *"an indifference to whether an asylum seeker is "back" or is simply left to die"*.[106] Keady- Tabbal and Mann, drawing from the Southeastern European countries' abusive treatment, argue that the pushback phenomenon cannot explain or capture the means and consequences of such degrading treatment.

The Article claims that pushbacks carry an indifference towards refugees. State authorities do not care if refugees will reach a safe harbour or die on the high sea. Pushback operation encompasses all of that with one purpose: to break the will of refugees, ultimately, to seek asylum in their countries. To this end, it does not matter whether refugees return to the state in question to seek asylum repeatedly. Repetitively seeking asylum at different times in the same country does not relate to whether *they may still maintain some human integrity*. It only means that people are desperate to find a place other than *the hell* they are escaping from.

This Article agrees with Keady-Tabbal and Mann's approach of treating carefully, not referring to every border violence as pushback.[107] As this Article resolved previously, not every deterrence practice constitutes pushback. However, this Article also adds that state authorities conduct the action -as pushback- through brutal treatment in most cases. Of course, every pushback incident may not reach the level of torture - even though many pushback operations are carried out with a violence that reaches the level of the mentioned crime. Hence the example given by Mann and Keady-Tabbal regarding not explaining "*the egregiousness of unabated violations at the South-eastern border of Europe"*[108] within the realm of pushback should be treated carefully. European and international non-governmental groups have reported abuses against refugees in the southeastern edge of Europe. The violence has been conducted before and during some countries' pushbacks, including in Bulgaria, Croatia, Cyprus, Greece, Hungary, and Malta.[109] In these incidents, for example,

"Border officials used force and violence, pummelling people with fists and kicking them. They sometimes directed violence at women and children. In addition, border officials abandoned migrants in remote border areas, and in some cases forced them to cross freezing streams at the border with Bosnia and Herzegovina, which is outside the EU external frontier."[110]

105 Niamh Keady-Tabbal and Itamar Mann, '"Pushbacks" as Euphemism' <https://www.ejiltalk.org/pushbacks-as- euphemism/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 14 April 2021.

106 ibid.

107 Keady-Tabbal and Itamar Mann (n 105).

108 ibid.

109 Human Rights Watch, 'Frontex Failing to Protect People at EU Borders Stronger Safeguards Vital as Border Agency Expands' (2021) <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders> accessed 17 September 2021.

110 ibid.

The given incidents, of course, cannot be referred to as simply there have been *refugees pushed back*. The brutality and malice of employed actions may explain an international crime if the elements of crime come together. But this does not mean that the measures taken to prevent refugees' arrival cannot be considered within the realm of pushback. Refugees are prevented from reaching the designated states by utilising pushback. The critical aspect here is the methods that dominate the pushback operations. Methods tell us how refugees are pushed back, which also may direct us to the place of international criminal law. Therefore, discussing the practices/ measures that coexist with pushback is vital. The goal is to understand in what cases pushback may amount to torture and even crimes against humanity due to employed methods during the operation. The following sections further detail this argument.

B. The Relevance of Pushback to International Crimes

> *"How are we to make sense of systemic violence against unarmed migrants and refugees by numerous state actors in Western democratic countries?"* asks Kalir.[111]

This section of this Article argues a very similar question to that which Kalir poses. How can we describe systematic violence dressed as pushbacks against unarmed refugees by wealthy democratic states? Of course, violence and pushback often coexist to actualise the non-admittance of refugees. But the violence as a method to push refugees back may elevate the pushback to the international crime category. This Article looks for legal avenues to explain this process in the realm of torture and crimes against humanity.

To this end, the anatomy of torture crime is described considering relevant international law regulations. Then, the link between pushback and the crime of torture is established. Finally, it is also questioned whether pushback as the crime of torture reaches the limits of crimes against humanity.

1. Torture Crime and Crimes Against Humanity[112] with Links to Pushbacks

a. Background

The analysis so far has settled that pushback is the act of interference to prevent refugees' entrance. The methods employed by, e.g., border guards in pushback, define whether these methods reach torture limits. In some cases, the mentioned actions may even be considered within the meaning of crimes against humanity, regulated under the Rome Statute of the International Criminal Court (ICC). [113]

111 Barak Kalir, 'Departheid: The Draconian Governance of Illegalized Migrants in Western States' (2019) 5 Conflict and Society: Advances in Research 19.

112 Legal Centre Lesvos, 'Crimes Against Humanity in the Aegean' (2021) <http://legalcentrelesvos.org/wp- content/uploads/2021/02/Collective-Expulsions-in-the-Aegean-LCL-01.02.2021-1.pdf> accessed 17 May 2021.

113 Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.

Crime against humanity has been explained through Normative theories.[114] For instance, Bassiouni considers crimes against humanity grievous enough to *"shock the conscience of mankind"*.[115] Similarly, Luban evaluates crimes against humanity as targeting the identity of persons as political subjects.[116] The crimes that fall under the category of this international crime can threaten international peace and security. The acts committed in the context of crimes against humanity endanger *trust* in the first place-Trust for each other and faith in humankind to embrace the World as a safe place. While refugees are being pushed back, if state officials apply a torturous method, the consequences of this process may have the impact of shocking the conscience of societies. Its effect may be felt not only on its victim but also its future victims. In that way, international peace and security would be threatened irredeemably.

Against this backdrop, the following paragraphs will explain torture and crimes against humanity under international law. Relevant contemporary world examples will also be presented to show readers how pushbacks are conducted through torture. Then we will discuss whether such torturous acts employed in pushback operations also may reach the limits of crimes against humanity.

b. The Legal Reasoning

International ad hoc tribunals have been confronted with various crimes extending to torture and inhuman, cruel, and degrading treatment. For example, in the Statute of the ICTY, torture was enumerated as one of the crimes against humanity[117] and one of the war crime provisions of grave breaches.[118] Through the analysis of ad hoc tribunals and the case law of the ECtHR,[119] the definition of torture as an international crime and its distinctive features from the other forms of treatment have become more precise.[120]

---

114 Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 53.

115 M Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligation Erga Omnes' (1996) 59 Law and Contemporary Problems 4, 69.

116 David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 Yale Journal of International Law 85.

117 Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 2 February 2008, 32 ILM 1192. Article 5 of the Yugoslav Statute, entitled Crimes Against Humanity reads:

> "The International Tribunal shall have power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) *torture;* (g) rape; (h) persecutions on political, racial, and religious grounds; (i) other inhumane acts."

118 Article 2 of the Yugoslav Statute, entitled Grave Breaches of the Geneva Conventions of 1949 reads *inter alia*:

> "The International Tribunal shall have power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Convention: (a) wilful killing; (b) torture or inhumane treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health."

119 In their decisions, tribunals made references to the cases of Strasbourg Court. Olivier de Frouville, 'The Influence of the European Court of Human Rights' Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment' (2011) 9 Journal of International Criminal Justice 637, 639.

120 The judgment of ICTY also recognised rape *"as a form of torture and accepted the specific test identified by the ECtHR in the Ribitsch case for persons held in detention or any vulnerable situation"* ibid 637.

International law principles have established the duty not to inflict specific harms, including genocide, war crimes, crimes against humanity, ethnic cleansing, forced expulsion,[121] excessively sadistic torture and dehumanisation.[122] The duty to prevent and eliminate specific harms in this regard aims to protect humankind from unimaginable atrocities that shock the conscience of generations.[123]

These crimes are the mere definition of a *"violation of the highest order"*.[124] Under international law, torture stands as a *jus cogens norm,* enjoying a higher rank in the international law hierarchy than treaty law and even ordinary customary rules.[125] Torture *"is considered an international crime under the treaty and customary international law"*.[126] Therefore, torture cannot be justified whatever the case is, *"permitting torture means permitting torturers"*.[127]

Two primary international legal documents define the crime of torture. The first is the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Declaration against Torture).[128] The second is the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). [129]

Article 1 of the UN Declaration against Torture defines the crime of torture as follows:

> "1. For this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
>
> 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

121 Michael Doyle and Audrey Macklin, 'Responsibility Sharing and the Global Compact on Refugees', *Experts Meeting on the Global Compact on Refugees* (2017) 1-6.

122 Christopher W Tindale, 'The Logic of Torture a Critical Examination' (1996) 22 Social Theory and Practice 3, 349-374.

123 William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (New York, Oxford University Press, 2012) 1-25.

124 Hannah Perce, 'An Examination of the International Understanding of Political Rape and the Significance of Labelling it Torture' (2003) 14 International Journal of Refugee Law 4, 547.

125 *Prosecutor v Furundlija* IT-95-17/1-T (ICTY, 10 December 1998) 139.

126 Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 61.

127 Jessica Wolfendale, 'Training Torturers: A Critique of the "Ticking Bomb" Argument' (2006) 32 Social Theory and Practice 270.

128 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 3452 (XXX), Annex, 9 Dec 1975 (UN Declaration Against Torture).

129 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 39/46, Annex, 10 Dec 1984 (UNCAT).

The above-given definition sets the scope of the crime of torture based on three dimensions: the infliction of *severe* pain or suffering, the status of the perpetrator, and an explicit purpose. The UNCAT brings a more comprehensive definition of this crime. Its meaning reduces the restriction on the statutes of the perpetrator in article 1, as follows:

> 3. For this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
>
> It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 4. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

We can understand that constitutive elements of torture include the following: severe pain or suffering, intentionality, purposefulness, and powerlessness.[130] Considering the above-given definition, we should also consider how international criminal law regulates torture.

Suppose we base ourselves on the Rome Statute. In that case, article 7 of the Rome Statute states that *"crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:* [...] *torture.* Article 7(2)(e) of the Rome Statute further defines torture as follows:

> "'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[131]

Article 7(1)(f) of the Elements of Crimes of the Rome Statute formulates the elements of the crime of torture:

> 5. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
>
> 6. Such person or persons were in custody or under the control of the perpetrator.

130 Darius Rejali, *Torture and Democracy* (Princeton University Press, 2009) 446.

131 Rome Statute (n 113) art 7(2)(e).

> 7. Such pain or suffering did not arise only from and was not inherent in or incidental to lawful sanctions.
>
> 8. The conduct was committed as part of a widespread or systematic attack directed against civilians.
>
> 9. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."[132]

In the context of crimes against humanity with links to torture, we must ensure that the following can be proven -intent, knowledge, and attack.[133] We can formulate this characterisation through the Elements of Crime of the ICC as *"the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons"*.[134] The attack also must be systematic and widespread.[135] The employed method should have the capacity to carry such gravity uniquely considered for crimes against humanity. [136]

As can be understood from the definitions set by the UN Declaration against Torture, the Convention Against Torture, and the Rome Statute, the infliction of pain lies at the very core of torture crimes. But the Rome Statute, in conformation with the Elements of Crime, does not seek a specific purpose: *"[i]t is understood that no specific purpose needs to be proved for this crime"*.[137] In the meantime, the infliction of pain or suffering must be intentional: *"an important degree of pain and suffering has to be reached in order for a criminal act to amount to an act of torture"*.[138] Furthermore, the General Introduction of the Rome Statute asserts that *"the existence of intent and knowledge can be inferred from relevant facts and circumstances"*.[139]

We must carefully analyse the incident to identify torture and crimes against humanity in pushback operations. The analysis thus expands its argument through contemporary examples of pushbacks in the following section. As a side note, the

132 International Criminal Court (ICC), 'Elements of Crimes' (2011) <https://www.refworld.org/docid/4ff5dd7d2.html> accessed 26 August 2021.

133 *"Taken literally, no physical violence is necessary for an attack, but merely multiple instances of any conduct on the list, pursuant to a state policy."* Gerald L Neuman, 'What Counts as a Crime Against Humanity?' (*Harvard International Law Journal*) <https://harvardilj.org/2019/01/what-counts-as-a-crime-against-humanity/> accessed 2 September 2021.

134 ibid arts 7(1)(f) and 8(2)(a)(ii)-1, 7 - 14.

135 Article 7 of the Rome Statute states that *"crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...] (f) torture"*. Rome Statute (n 113).

136 Rome Statute Article 17, Issues of admissibility, states the following: *"(d) The case is not of sufficient gravity to justify further action by the Court."* (Emphasis added). Rome Statute (n 113). The scope and the content of gravity in international crimes is controversial, and beyond the topic of this Article. However, for further analysis, the following paper can be read: Margaret M deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32 Fordham International Law Journal 1400 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2162&context=ilj> accessed 19 August 2021.

137 Rome Statute (n 113).

138 M Cherif Bassiouni, *Crimes Against Humanity Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 418.

139 Rome Statute (n 113) General Introduction.

incidents outlined in the next section are focused on and around the Greek State's pushback operations. In that, the relevant procedures employed by Greek officials during pushbacks carry elements that can be evaluated with links to torture.

C. Pushbacks in Law and Practice

We can draw from several relevant incidents and circumstances that the abusive treatment refugees have faced in the process of pushback may have reached the limits of the crime of torture that can be considered in the context of crimes against humanity.

The crime of torture, in the simplest terms, can be defined as *"the intentional infliction of a suffusive panic"*.[140] As a result, victims of torture would probably feel and realise that they are entirely at the mercy of their tormentors.[141] This Article claims that if pushbacks are conducted with brutal prevention methods, state officials intentionally inflict a suffusive panic on refugees. As a result, refugees are put at the mercy of state officials. This analysis, for example, can be seen in an incident in 2006 in Greece. Greek coast guards tied a group of refugees up in *"plastic handcuffs and abandoned them, resulting in the drowning of six of their number."*[142] As is seen in this case, refugees could find themselves in chaotic helplessness, which is one of the results of torture. For example, Rejali demonstrates that torture occurs *"where policing is so intense that life approaches that of a prison."*[143]

In pushback operations, helplessness and suffusive panic may be in the air for a prolonged time. Even though pushback happens to detract refugees from the state's border, refugees may have already been exposed to inhuman conditions before they were pushed back. For example, South Asian migrants stuck in Bosnian camps spent nights in squashed barracks without enough food, water, and medical supplies. The fear increased with the uncertainty of possible incidents awaiting them when and if they attempted to cross the EU Border into Croatia. In 2020, one refugee from this camp reported the following: *"Croatian police split us into groups of five people after we crossed the border. They forced us to lie down and beat us mercilessly before forcing us back to Bosnia"*.[144] It has been alleged that refugees on the Balkan

140 Jacob Bronsther, 'Criminal Law Torture and Respect' (2019) 109 The Journal of Criminal Law & Criminology 3, 428.

141 David Sussman, 'What's Wrong with Torture?' (2005) 33 Philosophy and Public Affairs 1.
The crime of torture *"craves the abrogation of our capacity to imagine others' suffering, dehumanizing them so much that their pain is not our pain"* Ariel Dorfman, 'The Tyranny of Terror Torture Inevitable in Our Century and Beyond?' in Sanford Levinson (ed), *Torture A Collection* (Oxford University Press, 2004) 26.

142 FRA European Union Agency for Fundamental Rights, 'Fundamental Rights at Europe's Southern Sea Borders' (2013), 46 <https://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf> accessed 17 September 2021.

143 Rejali (n 130) 37.

144 Arafatul Islam, 'South Asian Migrants Accuse Croatian Police of Brutal Beatings at Border' *DW Made for Minds* (26 October 2020) <https://www.dw.com/en/south-asian-migrants-accuse-croatian-police-of-beatings/a- 55400222> accessed 13 August 2021.

route were *"whipped, robbed and, in one case, sexually abused by members of the Croatian police"*.[145] Pushback, in this instance, occurs as the end of the continuum - the continuum of ongoing abuse.

As a result of pushbacks that happen under the shadow of humiliating conduct, refugees endure physical and emotional pain. They face uncertainty and fear. This scenario creates terrorizing effects on the current and future refugees, as explained previously in this Article.[146] In the cases of pushbacks, the crime of torture encapsulates the psychological and physical damage of wicked acts conducted against refugees, which aims at scaring or teaching future refugees *a lesson*. We see a similar situation in hate crimes; for instance: the goal is creating fear that will travel far.[147] In these cases, refugees are pushed away without considering their well-being or the possible dangers they may face on the sea. For example, Greek officials insulted refugees when they stripped them for a naked search. As a result, refugees were beaten and sent back in their attempt to cross the land border.[148] This example also explains why Greece employs harsh tactics to frustrate/intimidate already present and future refugees: terrorise them through pushbacks and prevent future attempts to reach its shores.[149] But establishing a terrorising effect may hurt refugees and the international community. The lack of respect and humiliation towards refugees can potentially diminish the *"security, self-determination, dignity and identity, environmental orientation, emotional rapport, and communal trust"* between refugees and designated states' societies.[150]

We can look at another example with links to the ongoing discussion. *Pushback* was the word that a Palestinian woman, Aisha, used to describe what happened to a group of refugees who arrived in Greece from Turkey only to be sent back again. Aisha travelled with her children from Turkey to Samos with a group of refugees. Aisha hid in the mountains with her children, after reaching Samos. She found out later that *"others had been caught and deported back to Turkey"*. Aisha added, *"I made up my mind to stay on the island at any cost and even live on water for many*

145 Lorenzo Tondo, 'Croatian Police Accused of "Sickening" Assaults on Migrants on Balkans Trail' *The Guardian* (21 October 2020) <https://www.theguardian.com/global-development/2020/oct/21/croatian-police-accused-of- sickening-assaults-on-migrants-on-balkans-trail-bosnia> accessed 13 August 2021.

146 As is stated in the recent Report of the UN Special Rapporteur on Torture (24 February-20 March 2020) infliction of pain is recognised by the Committee Against Torture, the European Court of Human Rights, the Human Rights Committee, the Inter-American Court, and the other mechanisms. Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Human Rights Council Forty-third session, 24 February-20 March 2020 Agenda item 3, 12.

147 Karima Bennoune, 'Terror/Torture', Rutgers School of Law-Newark Research Papers Series Paper 032, 17.

148 Ayse Dicle Ergin, 'What Happened at the Greece-Turkey Border in Early 2020? A Legal Analysis' (*VerfBlog,* 30 September 2020) <https://verfassungsblog.de/what-happened-at-the-greece-turkey-border-in-early-2020/> accessed 7 September 2021.

149 Bennoune (n 147) 16.

150 United Nations (n 84) 12.

days."[151] Similar incidents happened in 2020. For example, upon their arrival in Greece, refugees were met by a team of Hellenic Coast Guard (HCG) officers. They were put on a bus. Refugees were informed by the guards that they would be taken to a camp. Instead, the bus drove to the north of the island for a couple of hours and stopped. People were taken off the bus; their phones were collected. They were beaten heavily and forced to get on *"a big coast guard boat with something like a cannon in the front side"* that took them out to sea. They were eventually pushed back to Turkey.[152] In the same year, Farhad, from Afghanistan, narrated his take on Greek pushbacks. Farhad described an inflatable boat carrying five masked men approaching from the Greek side to stop their dinghy. Farhad explained what those five men did to them in the blink of an eye: *"One was steering, two hit us with sticks, one destroyed our boat and our engine with a knife. The fifth just watched."*[153] In similar cases, refugees were squeezed in dinghies with no water and food, without considering any of their medical conditions. [154]

As is seen, leaving refugees in overcrowded dinghies in the middle of the sea or creating artificial waves to make the boats - carrying women and children - go away from the shores is more significant than only a persistent prevention act. For example, Greece has employed forcible/brutal pushbacks as an informal/de facto state policy against people who have entered Greece through its border at Turkey's Evros river, on the EU's watch.[155] In many incidents, even if refugees have managed to arrive on Greek soil, they have still been put in detention centres -where they faced inhuman and degrading conditions- to be sent back towards Turkish borders. Survivors' testimonies have made clear that there were incidents documented with reports showing *"physical violence, including beatings, use of weapons, batons, choking, and throwing people from the deck of the HCG boat onto life rafts."*[156] It does not end there. As a state party to the ECHR, Greece has denied the right to due process attributed to the refugees. Therefore, Greece infringed on the right to liberty and security under Article 5 of the ECHR.[157]

151 Katty Fallon, 'Greece Accused of Refugee "Pushback" after Family Avoid Being Forced off Island' (29 June 2021) <https://www.theguardian.com/global-development/2021/jun/29/greece-accused-of-refugee-pushback-after-family-avoid-being-forced-off-island> accessed 13 August 2021.

152 Kostas Kallergis, 'Pushbacks: Migrants Accuse Greece of Sending Them Back out to Sea' *BBC News* (12 December 2020) <https://www.bbc.com/news/world-europe-55231203> accessed 13 August 2021.

153 Birgitta Schulke-Gill and Julia Bayer, 'Greece: Refugees Attacked and Pushed Back in the Aegean' *DW Made for Minds* (29 June 2020) <https://www.dw.com/en/greece-refugees-attacked-and-pushed-back-in-the-aegean/a- 53977151> accessed 13 August 2021.

154 Malcolm Brabant and Daphne Tolis, 'Migrants Left Adrift at Sea after Boat Pushback from Greek Coast Guard' *PBS News Hour* (22 July 2021) <https://www.pbs.org/newshour/show/migrants-left-adrift-at-sea-after-boat- pushback-from-greek-coast-guard> accessed 13 August 2021.

155 Human Rights Watch, 'Greece: Violence Against Asylum Seekers at Border Detained, Assaulted, Stripped, Summarily Deported' (17 March 2020) <https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border> accessed 26 August 2021.

156 Legal Centre Lesvos (n 112).

157 ECHR (n 38) art 5.

Considering the given analysis herein, throughout the pushback operations, refugees remain under the control of state officials, who also happen to be the perpetrators. As a side note, contrary to the UN Declaration against Torture, the Rome Statute's definition does not specify that torturer would have to be a public official to conclude that torture has been committed. A torturer might be a state or a non-state actor. For instance, Rejali discussed *"the activity of some non-state actors as torture under specific circumstances"*.[158] But the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kunarac Trial Judgement* did not look for such specific circumstances regarding the actor of torture crime; "*the act committed rather than in the status of the person who committed it"*.[159]

On that note, indeed, the police and the border guards are law enforcers. They act on behalf of the state. If we consider pushbacks as a consequence of the state's asylum policy, the state, in this case, authorises violence. The police and the border guards are empowered to the extent that they usually brutally use deadly force and harassment during pushbacks because the state officials *"enjoy impunity concerning their actions"*.[160] The target of state officials, for example, in pushbacks is the refugees who happen to be foreigners. The police, thus, in another dimension, *"engage in state violence"* and *"state racism"* in the pushback operations.[161]

There is a shared responsibility falling on Greece and the EU concerning border violence[162] because of pushback, infringing the fundamental rights of human beings.[163] However, Greece and the EU did not hold individuals responsible for the crimes committed in pushback operations. Moreover, neither party have accepted any of the allegations. Similarly, it has been claimed that Greece has developed and embraced pushback as a state policy. But Greece has also denied the mentioned accusations on that matter.[164]

Greek authorities are unwilling to investigate any misconduct committed during pushback operations. On the international law level, if we associate pushback with

158 Rejali (n 130) 35

159 *Prosecutor v Kunarac, Kovac and Vukovic Kunarac*, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para 542 (Kunarac Trial Judgement).

160 Myisha Cherry, 'State Racism, State Violence, and Vulnerable Solidarity' in Naomi Zack (ed), *The Oxford Handbook of Philosophy and Race* (2017), 4 <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190236953.001.0001/oxfordhb-9780190236953-e-3> accessed 2 September 2021.

161 ibid 5.

162 Lorenzo Tondo, 'Revealed: 2,000 Refugee Deaths Linked to Illegal EU Pushbacks' *The Guardian* (5 May 2021) <https://amp.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks> accessed 26 August 2021.

163 See Christos Zois, 'Frontex' Involvement in Illegal Pushbacks and EU's Possible International Responsibility' (Jean Monnet Project EURIS, 17 March 2021) <https://www.jm-euris.eu/frontex-involvement-in-illegal-pushbacks/> accessed 19 October 2022.

164 Amnesty International, 'Greece: Violence, Lies, and Pushbacks Refugees and Migrants Still Denied Safety and Asylum at Europe's Borders' (2021) 12 <https://www.amnesty.gr/sites/default/files/new_edited_22_jun_greece- violence_lies_and_pushbacks2_eur25-4307-2021_002_002.pdf> accessed 6 September 2021.

the crime of torture, we may evaluate whether the ICC would be able to prosecute it in consideration of the Rome Statute's ruling. Considering Rome Statute's Article 15(3), *"[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected."*[165] But only having a reasonable basis to proceed with an investigation would not be enough to carry the case further. Under Article 17 of the Rome Statute, the complementarity test must also be satisfied to decide whether the case would be admissible before the ICC. The Prosecutor thus shall consider the following: the jurisdiction, admissibility utilizing complementarity and gravity, and "*the interests of justice"*.[166]

On the other hand, it is also not easy to be optimistic about whether the ICC (the Prosecutor) would investigate pushbacks. For example, an independent MP for Clark, Andrew Wilkie, reached out to the Office of the Prosecutor (OTP) of the ICC about worrying concerns over such treatment of Australian policymakers towards refugees and asylum seekers in detention centres. The claim was that the abuse against refugees in offshore detention centres amounted to crimes against humanity. In its response, although the OTP confirmed that Australian policy in these centres amounts to cruel, inhuman, or degrading treatment, the OTP declined to open a preliminary examination because the Prosecutor considered that the Australian Government's policies were not deliberate. Furthermore, the asylum seekers were not lawfully present in the area of deportation.[167]

We, thus, must be realistic. We do not have a precise legal regulation that would ignite the ICC to investigate a case that includes pushback. Refugees are pushed back as part of some states' asylum policies in the meantime.

However, something may become more powerful than any legal regulations - the power that lies within the anger of seeing the injustice of some states' asylum policies. The inequity has the potential to cause irritation that can have a butterfly effect across the World. The anger then may show itself in action as rage. That is why

165 Rome Statute (n 112) art 15(3).

166 Article 53 of the Rome Statute (n 112) states the following:
"The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.
The case is or would be admissible under article 17; and
Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.":

167 International Criminal Court the Office of the Prosecutor, (Ref OTP-CR-322/14/001, 12 February 2020) <https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court- Australian-Government-treatment-of-asylum-seekers_(1).pdf> accessed 21 May 2020.

activists and refugees rage against injustice.[168] But the purpose of wrath is neither to make people and the international community feel guilty nor to create violence and conflict. Instead, the rage enforces the value of refugees' rights, because, in this context, anger is not demonstrated as an act that is antithetical to love.[169]

Anger would be expressed because of having a yearning for a better world. Therefore, we must ensure that the international community knows about refugees' human rights violations. That way, there would be a sense of control over the current time.

As for the future, if legal loopholes are eradicated, and protection mechanisms are enhanced through well-defined terms and consequences, we can guard refugees against the brutal state systems that embrace pushbacks in their asylum policies.

V. Conclusion

This Article has looked for legal avenues under international law to describe the pushback phenomenon. As has been mentioned throughout this Article's text, there exists no international legal regulation that defines the term -pushback-. However, pushback operations have prevailed over the years. Even though the measures taken against refugees to prevent their arrival seem to belong to contemporary times, *"the turning away of ships full of hopeful immigrants has been occurring for decades, with catastrophic results"*. [170] For example, during the Holocaust, 907 German Jews fled persecution aboard the ocean liner St. Louis. First, they were stopped by Cuba, and in response, the Cuban Government did not recognise their entrance visas.[171]

Further, the USA dispatched a gunboat to prevent refugees from swimming ashore. Canada, too, claimed that *"the passengers of St. Louis were not a Canadian problem"*. [172] Jewish refugees were eventually denied entry and sent to Europe with the full knowledge that they would die in the gas chambers and crematoria of the Third Reich. [173]

In modern times, refugees are still pushed back in the full knowledge that they will die from exhaustion, starvation, dehydration, or some form of persecution awaiting them in their homelands.

168 David James, 'Listening to the Refugee: Valeria Luiselli's Sentimental Activism' (2021) 67 MFS - Modern Fiction Studies 390. <https://research.birmingham.ac.uk/portal/files/132120716/David_James_Luiselli_MFS_67.2_2021_AAM.pdf> accessed 7 September 2021.

169 Cherry (n 160).

170 Lily Rothman, 'The Long, Sad History of Migrant Ships Being Turned Away From Ports' *Time* (9 June 2015) <https://time.com/3914106/history-migrant-ships-st-louis/?utm_medium=email&utm_source=sfmc&utm_campaign=newsletter+history+default+ac&utm_content=+++20210917+++body&et_rid=87563062> accessed 21 September 2021.

171 James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 280.

172 ibid 280.

173 ibid 280.

The consistency of pushback has become our reality and has normalised how refugees' rights and human rights have been ignored. But no matter how states approach pushbacks or whether they employ pushbacks as state policy; it does not change the fact that pushbacks are illegal. The non-refoulement principle and the prohibition on collective expulsion explain the reasons for such illegality. Therefore, even though we can identify why and how pushbacks conflict with the mentioned norms and international legal regulations, the international community needs firm rules and formulations to combat this growing phenomenon. For that reason, this Article has mapped relevant international law regulations that either can explain pushback or pushback can be placed within the context of the term in question.

Initially, this Article introduced the research question based on contemporary world examples, including resistance of wealthy democratic states against welcoming refugees into their lands. As noted, a *democratic wealthy state* indicates industrialised and economically prosperous countries. This Article has discussed that the USA, Australia, the UK, and the EU countries -as democratic wealthy states- have embraced and developed asylum policies that would approve their ulterior motives. As was resolved, even though there are several tactics within the context of deterrence practices of states, pushbacks draw apart from them. In what ways pushbacks are unique from the other deterrence practices have been explained in three ways by this Article.

First, deterrence practices were outlined. The goal was to position pushbacks within the context of deterrence practices and underline that not every deterrence tactic constitutes pushback. What turns the non-entrée practice into pushback is the current action taken by the state in question. For example, the state employs an interception method to prevent refugees' arrival. The action taken by the state now constitutes pushback. For example, members of the German nongovernmental group Sea-Watch filmed Libya's coastguard chasing a crowded migrant boat and shooting in its direction to stop it from crossing the Mediterranean Sea to Europe.[174] This incident merely constitutes a classic example of pushback.

On the other hand, French authorities have intentionally frustrated people from seeking protection by not providing them with housing/shelter.[175] This state policy might constitute a form of deterrence practice. But French authorities' intentional and indirect harm to refugees does not include pushback.

174 Al Jazeera, 'Caught on Camera: Libyan Coastguard Shoots at Migrant Boat' *Al Jazeera* (1 July 2021) <https://www.aljazeera.com/news/2021/7/1/caught-on-camera-libyan-coast-guard-shoots-at-migrant-boat> accessed 3 August 2021.

175 Sophie Stuber, 'What's behind the Housing Crisis for Asylum Seekers in France?' (The New Humanitarian, 27 April 2021) <https://www.thenewhumanitarian.org/news-feature/behind-the-housing-crisis-for-asylum-seekers- in-france?utm_source=The+New+Humanitarian&utm_campaign=4422c95286-EMAIL_CAMPAIGN_2020_12_11_Weekly_COPY_01&utm_medium=email&utm_term=0_d842d98289-4422c95286-75551421&mc_cid=ba47bfa97d&mc_eid=0cd57908d5> accessed 17 May 2021.

Second, collective expulsion was set forth under international law to find a legal explanation for the pushback. As was detailed in part four of this Article, collective expulsion is actualised by utilising pushbacks.

Third, the analysis set forth pushbacks as being conducted through measures that change the colour of the employed operation by state authorities. In this regard, this Article discussed two significant aspects of the issue.

Initially, the analysis argued that pushback as a term must carefully be used and should not be abused to describe *any incident* that constitutes interceptions of refugees either on the high seas or on land. Pushbacks should not be considered a crime under international law without carefully examining the elements of the crime in question. It means that even though the action taken conflicts with the non-refoulement principle in the first place, this does not necessarily imply that pushback constitutes a crime of torture. However, the methods employed change the character of pushback operations. The brutality of state authorities' actions gives a new dimension to the pushback. In this scene, pushbacks may reach the limits of a crime of torture.

Since torture can be classified within the limits of crimes against humanity, the pushback was evaluated in alignment with this international crime. Certain elements must come together for a crime to be considered a crime against humanity. Pushbacks have the potential to be included in this context. But even if pushback is not officially defined under a legal text, still the ICC can pursue an investigation on that matter to see if there has been an international crime committed. However, since pushback is a politically motivated action executed by state authorities, a reluctance on both sides -states and the ICC- is foreseeable.

In the end, in the legal sense, pushback can be specified in the context of collective expulsion; it can be formalised within the meaning of a torture crime. Therefore, pushback can be understood as reaching the limits of crimes against humanity under certain conditions. However, considering there is currently no legal explanation for the pushback, this Article recommends the following. First, pushbacks must be engaged as a growing global concern; second, pushbacks should thus be confronted as severe border control measures infringing and disrespecting all the rights refugees have.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.

Bibliography

Agamben G, *Homo Sacer: Sovereign Power and Bare Life.* (Daniel Heller-Roazen tr, Stanford University Press 1998).

Ahmed K, 'Violence towards refugees at Libyan detention centers forces MSF to pull out' (*The Guardian*, 24 June 2021) <https://www.theguardian.com/global-development/2021/jun/24/violence-towards-refugees-at-libyan-detention-centres-forces-msf-to-pull-out?mc_cid=107ec98c57&mc_eid=0cd57908d5> accessed 5 August 2021.

Amnesty International, 'Greece: Violence, Lies, And Pushbacks Refugees and Migrants Still Denied Safety and Asylum at Europe's Borders' (2021) 12 <https://www.amnesty.gr/sites/default/files/new_edited_22_jun_greece-violence_lies_and_pushbacks2_eur25-4307-2021_002_002.pdf> accessed 6 September 2021.

Al-Dayel N, Anfinson A, and Anfinson G, 'Captivity, Migration, and Power in Libya' [2021] Journal of Human Trafficking <https://www.tandfonline.com/doi/pdf/10.1080/23322705.2021.1908032?needAccess=true> accessed 18 May 2021.

Al Jazeera, '2016: Refugee Arrivals Fall as Deaths Hit Record' (26 October 2016) <https://www.aljazeera.com/news/2016/10/26/un-2016-mediterranean-refugee-deaths-hit-record-3800> accessed 6 September 2021.

Al Jazeera, 'Caught on Camera: Libyan Coastguard Shoots at Migrant Boat' *Al Jazeera* (1 July 2021) <https://www.aljazeera.com/news/2021/7/1/caught-on-camera-libyan-coast-guard-shoots-at-migrant-boat> accessed 3 August 2021.

Al Jazeera, 'Deaths at Sea Highlight Failings in Europe Immigration Policy' (4 May 2021) <https://www.aljazeera.com/news/2021/5/4/deaths-at-sea-highlight-failings-in-europe- migration-policy> accessed 21 June 2021.

Al Jazeera, 'Greece: Four Afghan Migrants Jailed over Moria Camp Fire' Al Jazeera (13 June 2021) <https://www.aljazeera.com/news/2021/6/13/afghans-jailed-in-greece-over-moria-migrant-camp-blaze?mc_cid=12f8feb197&mc_eid=0cd57908d5> accessed 15 June 2021.

Akkerman M, 'Outsourcing Oppression How Europe Externalises Migrant Detention Beyond Its Shores' (Niamh Ni Bhriain and Josephine Valeske eds, Transnational Institute and Stop Wapenhandel, 2021) <https://www.tni.org/files/publication- downloads/outsourcingoppression-report-tni.pdf> accessed 7 October 2021.

Amnesty International, 'Greece: Pushbacks and Violence against Refugees and Migrants Are de Facto Border Policy' (23 June 2021) <https://www.amnesty.org/en/latest/press-release/2021/06/greece-pushbacks-and-violence-against-refugees-and-migrants-are-de-facto-border-policy/> accessed 26 August 2021.

Amnesty International, 'The Human Cost of Fortress Europe Human Rights Violations Against Migrants and Refugees at Europe's Borders' (2014) <https://reliefweb.int/sites/reliefweb.int/files/resources/EUR%20050012014_%20Fortress%20Europe_complete_web.pdf> accessed 26 August 2021.

Bassiouni C M, *Crimes Against Humanity Historical Evolution and Contemporary Application* (Cambridge University Press 2011).

Brown W, *Walled States, Waning Sovereignty* (2010).

Bennoune K, 'Terror/Torture', Rutgers School of Law-Newark Research Papers Series Paper 032.

BBC News, 'Denmark Asylum: Law Passed to Allow Offshore Asylum Centres' (3 June 2021) <https://www.bbc.com/news/world-europe-57343572> accessed 16 August 2021.

BBC News, 'Greece Erects Fence at Turkey Border amid Warnings of Afghan Migrant Surge' (21 August 2021) <https://www.bbc.com/news/world-europe-58289893?mc_cid=d22ade97d4&mc_eid=0cd57908d5> accessed 31 August 2021.

Burchard H, 'EU Plans Big Cash Offer for Afghanistan's Neighbors to Host Refugees' *Politico* (31 August 2021) <https://www.politico.eu/article/eu-plans-afghanistan-neighbors-host-refugees/?mc_cid=7346867e83&mc_eid=0cd57908d5> accessed 6 September 2021.

Brabant M and Tolis D, 'Migrants Left Adrift at Sea after Boat Pushback from Greek Coast Guard' *PBS News Hour* (22 July 2021) <https://www.pbs.org/newshour/show/migrants-left- adrift-at-sea-after-boat-pushback-from-greek-coast-guard> accessed 13 August 2021.

Bronsther J, 'Criminal Law Torture and Respect' (2019) 109 The Journal of Criminal Law & Criminology 3.

Bassiouni M C, 'International Crimes: Jus Cogens and Obligation Erga Omnes' (1996) 59 Law and Contemporary Problems 4.

Chatty D, 'Has the Tide Turned? Refuge and Sanctuary in the Euro-Mediterranean Space' (Borders, Migrations, Asylum and Refuge, 06 October 2020) <https://revistaidees.cat/en/has- the-tide-turned-refuge-and-sanctuary-in-the-euro-mediterranean-space/> accessed 25 January 2021.

Charter of Fundamental Rights of The European Union [2012] 326/02 395.

Cherry M, 'Anger Can Build a Better World' *The Atlantic* (25 August 2020) <https://www.theatlantic.com/ideas/archive/2020/08/how-anger-can-build-better-world/615625/> accessed 2 September 2021.

Cusumano E and Villa M, 'Over Troubled Waters: Maritime Rescue Operations in the Central Mediterranean Route' (IOM) <https://publications.iom.int/system/files/pdf/ch16-over- troubled-waters.pdf> accessed 26 August 2021.

Conka v Belgium App no 51564/99 (ECHR, 5 February 2002).

Chimni B S, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 Journal of Refugee Studies 4.

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention).

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), amended by Protocols nos 11 and 14, 4 November 1950, ETS 5.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 39/46, Annex, 10 Dec 1984 (UNCAT).

Crisp J and Maple N, 'Relevant or Redundant? The Future of the International Refugee Protection Regime' (*Refugee Law Initiative Blog on Refugee Law and Forced Migration*, 22 July 2021) <https://rli.blogs.sas.ac.uk/2021/07/22/relevant-or-redundant-the-future-of-the-international-refugee-protection-regime/> accessed 4 August 2021.

Cherry M, 'State Racism, State Violence, and Vulnerable Solidarity' in Naomi Zack (ed), *The Oxford Handbook of Philosophy and Race* (2017) <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190236953.001.0001/oxfor dhb-9780190236953-e-3> accessed 2 September 2021.

Dancy G T, 'The Hidden Impacts of the ICC: An Innovative Assessment Using Google Data' (2021) 34 Leiden Journal of International Law 729 <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/hidden-impacts-of-the-icc-an-innovative-assessment-using-google-data/ED6494135812ADADBE6DBD01FCACD932>accessed 26 August 2021.

Davitti D, 'Why Offshore Processing of Refugees Bound for Europe Is Such a Bad Idea' *The Conversation* (28 July 2017) <https://theconversation.com/why-offshore-processing-of-refugees-bound-for-europe-is-such-a-bad-idea-81695> accessed 27 August 2021.

Death by Rescue, 'Death by Rescue the Lethal Effects of The EU's Policies of NonAssistance' <https://deathbyrescue.org> accessed 25 September 2021.

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 3452 (XXX), Annex, 9 Dec 1975 (UN Declaration Against Torture).

Dorfman A, 'The Tyranny of Terror Torture Inevitable in Our Century and Beyond?' in Sanford Levinson (ed), *Torture A Collection* (Oxford University Press, 2004).

Doyle M and Macklin A, 'Responsibility Sharing and the Global Compact on Refugees', *Experts Meeting on the Global Compact on Refugees* (2017).

European Court of Human Rights, 'Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of Collective Expulsions of Aliens' (Council of Europe, 30 April 2021) <https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf> accessed 17 June 2021.

European Commission, 'Migration and Asylum Package: New Pact on Migration and Asylum Documents Adopted on 23 September 2020' (23 September 2020) <https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en>accessed 26 August 2021.

Euronews, 'Yunanistan'da Cezaevine Benzetilen Mülteci Kampı Açılıyor, STK'lar Tepkili' (18 September 2021) <https://tr.euronews.com/2021/09/18/yunanistan-da-cezaevine-benzetilen-multeci-kamp-ac-l-yor-stk-lar-tepkili?utm_source=newsletter&utm_medium=$%7Btemplate_locale%7D&utm_content=yun anistan-da-cezaevine-benzetilen-multeci-kamp-ac-l-yor-stk-lar-tepkili&_ope=eyJndWlkIjoiODNjMGNjMzdiM2IzZjgyZDBlNDg3YmE2N2U5MDQxMjAifQ%3D%3D> accessed 18 September 2021.

Euronews, 'Fishing Boat Crammed with over 500 Migrants Arrives in Lampedusa' (28 August 2021) <https://www.euronews.com/2021/08/28/fishing-boat-crammed-with-over-500-migrants-arrives-in-lampedusa?mc_cid=14fd97bbdc&mc_eid=0cd57908d5> accessed 31 August 2021.

Euronews, 'Avrupa Konseyi'nden Yunanistan'a: Göçmenleri Sınır Dışı Etme Yasa Tasarısını Değiştir' (4 September 2021) <https://tr.euronews.com/2021/09/04/avrupa-konseyinden-yunanistan-a-gocmenleri-s-n-r-d-s-etme-yasa-tasar-s-n-degistir?utm_source=newsletter&utm_medium=$%7Btemplate_locale%7D&utm_content=avrupa-konseyi-nden-yunanistan-a-gocmenleri-s-n-r-d-s-etme-yasa-tasar-s-n-degistir&_ope=eyJndWlkIjoiODNjMGNjMzdiM2IzZjgyZDBlNDg3YmE2N2U5MDQxMjAifQ%3D%3D> accessed 6 September 2021.

Ergin A D, 'What Happened at the Greece-Turkey Border in Early 2020? A Legal Analysis' (*VerfBlog*, 30 September 2020) <https://verfassungsblog.de/what-happened-at-the-greece-turkey-border-in-early-2020/> accessed 7 September 2021.

Fargues P, 'Four Decades of Cross-Mediterranean Undocumented Migration to Europe A Review of the Evidence' (International Organization for Migration, 2017), 11 <https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf> accessed 17 September 2021.

Farzan N A, 'As Greece Installs "Sound Cannons" on Border, Denmark Passes Law Allowing Asylum Seekers to Be Sent Overseas' [2021] The Washington Post <https://www.washingtonpost.com/world/2021/06/05/greece-denmark-migrants/> accessed 16 June 2021.

Fallon K, 'Greece Accused of Refugee "Pushback" after Family Avoid Being Forced off Island' (29 June 2021) <https://www.theguardian.com/global-development/2021/jun/29/greece-accused-of-refugee-pushback-after-family-avoid-being- forced-off-island> accessed 13 August 2021.

Frontex European Border and Coast Guard Agency <https://frontex.europa.eu> accessed 16 June 2021.

Frouville O, 'The Influence of the European Court of Human Rights' Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment' (2011) 9 Journal of International Criminal Justice.

FRA European Union Agency for Fundamental Rights, 'Fundamental Rights at Europe's Southern Sea Borders' (2013), 46 <https://fra.europa.eu/sites/default/files/fundamental-rights- europes-southern-sea-borders-jul-13_en.pdf> accessed 17 September 2021.

Ghezelbash D, 'Hyper-legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees' [2020] American Journal of Comparative Law 2.

Gleeson M and Yacoub N, 'Policy Brief 11 Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia' (Kaldor Centre for International Refugee Law 2021) Policy Brief 11 <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf> accessed 16 August 2021.

Gutierrez-Rodriguez E, 'The Coloniality of Migration and the "Refugee Crisis" On the Asylum-Migration Nexus, the Transatlantic White European Settler Colonialism- Migration and Racial Capitalism' (2018) 34 Refugee 1.

Guzman M M, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32 Fordham International Law Journal <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2162&context=ilj> accessed 19 August 2021.

Goodwin-Gill G, 'Refugee Identity and Protection's Fading Prospects' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999).

Guy Goodwin-Gill, 'The International Refugee Regime and the Challenges Today' (*Kaldor Center for International Refugee Law*, 27 August 2021) <https://www.kaldorcentre.unsw.edu.au/publication/international-refugee-regime-and-challenges-today> accessed 31 August 2021.

Hathaway J C, 'Is 'Ageing Gracefully?' an Ageist Critique?"' <https://rli.sas.ac.uk/resources/podcasts?utm_source=Refugee+Law+Initiative&utm_campaign=107851ca13-EMAIL_CAMPAIGN_2017_10_03_COPY_01&utm_medium=email&utm_term=0_304c0b75a9-107851ca13-581066909> accessed 5 August 2021.

Hathaway J C, 'The Emerging Politics of Non-Entrée' (1992) 91 Refugees 40.

Hathaway J C, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 280.

Hausmann R, 'Why Are Rich Countries Democratic?' (Harvard Kennedy School Mossavar-Rahmani Center for Business and Government, 26 March 2014) <https://www.hks.harvard.edu/centers/mrcbg/programs/growthpolicy/why-are-rich-countries- democratic> accessed 14 September 2021.

Hirsi Jamaa and Others v Italy App no. 27765/09 (ECHR, 23 February 20I2) para 81.

Human Rights Watch, 'Human Rights Watch Submission to the Special Rapporteur's Report on Pushback Practices and Their Impact on the Human Rights of Migrants' (*Human Rights Watch*, 1 February 2021) <https://www.hrw.org/news/2021/02/01/human-rights-watch- submission-special-rapporteurs-report-pushback-practices-and> accessed 9 August 2021.

Human Rights Watch, 'Greece: Violence Against Asylum Seekers at Border Detained, Assaulted, Stripped, Summarily Deported' (17 March 2020) <https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border> accessed 26 August 2021.

Human Rights Watch, 'Pushed Back, Pushed Around Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' (2009) <https://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf> accessed 13 August 2021.

Human Rights Watch, 'Frontex Failing to Protect People at EU Borders Stronger Safeguards Vital as Border Agency Expands' (2021) <https://www.hrw.org/news/2021/06/23/frontex- failing-protect-people-eu-borders> accessed 17 September 2021.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

International Criminal Court the Office of the Prosecutor, (Ref OTP-CR-322/14/001, 12 February 2020) <https://uploads. guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response- from-International-Criminal-Court-Australian-Government- treatment-of-asylum- seekers_(1).pdf> accessed 21 May 2020.

International Criminal Court (ICC), 'Elements of Crimes' (2011) <https://www.refworld.org/docid/4ff5dd7d2.html> accessed 26 August 2021.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force on 4 January 1969) 660 UNTS 195 (CERD).

Islam A, 'South Asian Migrants Accuse Croatian Police of Brutal Beatings at Border' *DW Made for Minds* (26 October 2020) <https://www.dw.com/en/south-asian-migrants-accuse- croatian-police-of-beatings/a-55400222> accessed 13 August 2021.

James D, 'Listening to the Refugee: Valeria Luiselli' s Sentimental Activism' (2021) 67 MFS - Modern Fiction Studies 390 <https://research.birmingham.ac.uk/portal/files/132120716/David_James_Luiselli_MFS_67.2 _2021_AAM.pdf> accessed 7 September 2021.

Joung M, 'What Is Happening at Migrant Detention Centers? Here's What to Know' (12 July 2019) <https://time.com/5623148/migrant-detention-centers-conditions/> accessed 2 September 2021.

Kalir B, 'Departheid: The Draconian Governance of Illegalized Migrants in Western States' (2019) 5 Conflict and Society: Advances in Research 19.

Kingsley P and Shoumali K, 'Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea' The New York Times (27 April 2021) <https://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html> accessed 3 May 2021.

Kallergis K, 'Pushbacks: Migrants Accuse Greece of Sending Them Back out to Sea' *BBC News* (12 December 2020) <https://www.bbc.com/news/world-europe-55231203> accessed 13 August 2021.

Keady-Tabbal N and Mann I, '"Pushbacks" as Euphemism' <https://www.ejiltalk.org/pushbacks-as-euphemism/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 14 April 2021.

Khlaifia and Others v Italy App No 16483/12 (ECHR, 15 December 2016).

Lynott L, '"I'm Not a Hero but I'm Not a Criminal" - Trinity Graduate Sean (24) Returns Home after 100 Days in Greek Jail' *INDEPENDENT.IE* (16 December 2018) <https://www.independent.ie/irish-news/im-not-a-hero-but-im-not-a-criminal-trinity- graduate-sean-24-returns-home-after-100-days-in-greek-jail-37631116.html> accessed 31 August 2021.

Legido A S, 'The Walls of Fortress Europe: Externalization of Migration Control and the Rule of Law' (2019) 23 The Spanish Yearbook of International Law 345.

Luban D, 'A Theory of Crimes Against Humanity' (2004) 29 Yale Journal of International Law.

Legal Centre Lesvos, 'Crimes Against Humanity in the Aegean' (2021) <http://legalcentrelesvos.org/wp-content/uploads/2021/02/Collective-Expulsions-in-the-Aegean-LCL-01.02.2021-1.pdf> accessed 17 May 2021.

Mann I and Keady-Tabbal N, 'Torture by Rescue: Asylum-Seeker Pushbacks in the Aegean How Summary Expulsions From Greece Have Continued With Impunity' (Just Security, 26 October 2020) <https://www.justsecurity.org/72955/torture-by-rescue-asylum-seeker- pushbacks-in-the-aegean/> accessed 25 January 2021.

Mann I, 'The Right to Perform Rescue at Sea: Jurisprudence and Drowning' [2020] German Law Journal 609.

Mann I, 'Attack by Design: Australia's Offshore Detention System and the Literature of Atrocity' [2021] European Journal of International Law 429 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787661> accessed 14 April 2021.

Médecins Sans Frontières, 'Out of Sight, out of Mind: Refugees in Libya's Detention Centres' (12 July 2019) <https://www. msf.org/out-sight-out-mind-refugees-libyas-detention- centres-libya> accessed 18 May 2021.

McAdam J, 'Australia and Asylum Seekers' (2013) 25 International Journal of Refugee Law 3.

McAdam J, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as A Personal Liberty' (2011) 12 Melbourne Journal of International Law 2.

McDonald-Gibson C, 'Europe Sees a Migration Crisis in the Making in Afghanistan. Have the Lessons of the 2015 Surge Been Learned?' *Time* (18 August 2021) <https://time.com/6091084/afghanistan-taliban-europe-migration/> accessed 27 August 2021.

Morales F G, 'Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea' (UN Human Rights Council Forty-seventh session, 21 July 2021), 4 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/106/33/PDF/G2110633.pdf? OpenElement> accessed 18 September 2021.

ND & NT v Spanish App nos 8675/15 and 8697/15 (ECHR, 13 February 2020).

Neuman G L, 'What Counts as a Crime Against Humanity?' (*Harvard International Law Journal*) <https://harvardilj.org/2019/01/what-counts-as-a-crime-against-humanity/> accessed 2 September 2021.

Nicholson F and Kumin J, 'A Guide to International Refugee Protection and Building State Asylum Systems Handbook for Parliamentarians N° 27, 2017' (UNHCR, 2017) <https://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international- refugee-law-handbook-parliamentarians.html> accessed 26 August 2021.

Okafor O C, *Refugee Law After 9/11 Sanctuary and Security in Canada and The United States* (UBC Press 2020) 3-10.

Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto 16 September 1963, ETS 46.

Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (The 1967 Protocol).

Patrick S M, 'The U.N. Refugee Convention Is Under Pressure—and Showing Its Age' (*World Politics Review*, 9 August 2021) <https://www.worldpoliticsreview.com/articles/29869/the-un-refugees-regime-is-under-pressure-and-showing-its-age?mc_cid=b1f8cb11c9&mc_eid=0cd57908d5> accessed 16 August 2021.

Plucinska J and Pempel K, 'On the EU's Eastern Border, Poland Builds a Fence to Stop Migrants' *Reuters* (26 August 2021) <https://www.reuters.com/world/europe/eus-eastern-border-poland-builds-fence-stop-migrants-2021-08-26/?mc_cid=14fd97bbdc&mc_eid=0cd57908d5> accessed 31 August 2021.

Prosecutor v Kunarac, Kovac and Vukovic Kunarac, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para 542 (Kunarac Trial Judgement).

Prosecutor v Furundlija IT-95-17/1-T (ICTY, 10 December 1998).

Perce H, 'An Examination of the International Understanding of Political Rape and the Significance of Labelling it Torture' (2003) 14 International Journal of Refugee Law 4.

Press Unit, 'Factsheet -Collective Expulsions of Aliens' (European Court of Human Rights, 2020) <https://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf> accessed 17 May 2021.

Radio Free Europe, 'Bulgaria Sends Troops to Border as EU Braces for Afghan Migrant Flows' (27 August 2021) <https://www.rferl.org/a/bulgaria-border-migrants-afghanistan- /31430530.html?mc_cid=14fd97bbdc&mc_eid=0cd57908d5> accessed 31 August 2021.

Ramsay G and Fiske L, 'Election Factcheck: Are Many Refugees Illiterate and Innumerate?' The Conversation (18 May 2016) <https://theconversation.com/election-factcheck-are-many-refugees-illiterate-and-innumerate-59584> accessed 2 September 2021.

Ramji-Nogales J, 'Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights' (*American Society of International Law*, 4 January 2016) <https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights> accessed 27 August 2021.

Relief web, 'UN Human Rights Council: Ending Collective Pushbacks of Migrants at Borders' (28 June 2021) <https://reliefweb.int/report/world/un-human-rights-council-ending- collective-pushbacks-migrants-borders> accessed 31 August 2021.

Rejali D, *Torture and Democracy* (Princeton University Press, 2009).

Rothman L, 'The Long, Sad History of Migrant Ships Being Turned Away from Ports' *Time* (9 June 2015) <https://time.com/3914106/history-migrant-ships-st-louis/?utm_medium=email&utm_source=sfmc&utm_campaign=newsletter+history+default+ac&utm_content=+++20210917+++body&et_rid=87563062> accessed 21 September 2021.

Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.

Sussman D, 'What's Wrong with Torture?' (2005) 33 Philosophy and Public Affairs 1.

Sir Lauterpacht E and Bethlehem D, 'The Scope and Content of the Principle of NonRefoulement' in UNHCR (eds) Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (Cambridge University Press 2003), 149-163 <https://www.refworld.org/docid/470a33af0.html> accessed 16 September 2021.

Syal R, 'Priti Patel to Send Boats Carrying Migrants to UK Back across Channel' *The Guardian* (9 September 2021) <https://www.theguardian.com/uk-news/2021/sep/09/priti-patel-to-send-boats-carrying-migrants-to-uk-back-across-channel?utm_term=16547debe68d2f1e930f736c93bc1661&utm_campaign=GuardianTodayUK&utm_source=esp&utm_medium=Email&CMP=GTUK_email&mc_cid=a4d0f45d8c&mc_ eid=0cd57908d5> accessed 16 September 2021.

Specia M, 'U.K. Proposes Moving Asylum Seekers Abroad While Their Cases Are Decided' The New York Times (6 July 2021) <https://www.nytimes.com/2021/07/06/world/europe/uk-migration-priti-patel.html> accessed 16 August 2021.

Smith H, 'Why Greece's Expensive New Migrant Camps Are Outraging NGOs' The Guardian (19 September 2021) <https://www.theguardian.com/world/2021/sep/19/why- greeces-expensive-new-migrant-camps-are-outraging-ngos> accessed 20 September 2021.

Stuber S, 'What's behind the Housing Crisis for Asylum Seekers in France?' (The New Humanitarian, 27 April 2021) <https://www.thenewhumanitarian.org/news-feature/behind-the-housing-crisis-for-asylum-seekers-in-france?utm_source=The+New+Humanitarian&utm_campaign=4422c95286-EMAIL_CAMPAIGN_2020_12_11_Weekly_COPY_01&utm_medium=email&utm_term=0_d842d98289-4422c95286-75551421&mc_cid=ba47bfa97d&mc_eid=0cd57908d5> accessed 17 May 2021.

Stahn C, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019).

Sztucki J, 'Who Is a Refugee? The Convention Definition: Universal or Obsolete?' in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities* (Cambridge University Press 1999).

Schulke-Gill B and Bayer J, 'Greece: Refugees Attacked and Pushed Back in the Aegean' *DW Made for Minds* (29 June 2020) <https://www.dw.com/en/greece-refugees-attacked-and-pushed-back-in-the-aegean/a-53977151> accessed 13 August 2021.

Schabas W, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (New York, Oxford University Press, 2012).

Strickland P, 'Why Is the World Afraid of Young Refugee Men?' *Al Jazeera* (20 June 2016) <https://www.aljazeera.com/features/2016/6/20/why-is-the-world-afraid-of-young-refugee-men> accessed 6 October 2021.

Stahn C, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019).

Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 2 February 2008, 32 I.L.M 1192.

Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Human Rights Council Forty-third session, 24 February-20 March 2020 Agenda item 3.

Taylor D, 'French Police Clear Migrant Camp at Launch Point for Britain' *The Guardian* (29 September 2020) <https://www.theguardian.com/world/2020/sep/29/french-police-clear-calais-migrant-camp-launch-point-britain> accessed 25 January 2021.

The Visual Journalism Team, 'Afghanistan: Where Will Refugees Go after Taliban

Takeover?' BBC News (26 August 2021) <https://www.bbc.com/news/world-asia-58283177> accessed 26 August 2021.

The Global Detention Project (*The Global Detention Project*) <https://www.globaldetentionproject.org> accessed 27 August 2021.

The Global Detention Project, 'Country Report. Immigration Detention in Libya: A Human Rights Crisis' (2018) <https://www. globaldetentionproject.org/wp-content/uploads/2018/08/GDP-Immigration-Detention-Libya.pdf> accessed 18 May 2021.

Tondo L, 'Revealed: 2,000 Refugee Deaths Linked to Illegal EU Pushbacks' *The Guardian* (5 May 2021) <https://amp.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks> accessed 26 August 2021.

Tondo L, 'Croatian Police Accused of "Sickening" Assaults on Migrants on Balkans Trail'

The Guardian (21 October 2020) <https://www.theguardian.com/global-development/2020/oct/21/croatian-police-accused-of-sickening-assaults-on-migrants-on- balkans-trail-bosnia> accessed 13 August 2021.

Tindale C W, 'The Logic of Torture a Critical Examination' (1996) 22 Social Theory and Practice 3.

UN News and Global Perspective Human Stories, 'Libya Shipwreck Claims 130 Lives Despite SOS Calls, as UN Agencies Call for Urgent Action' (23 April 2021) <https://news.un.org/en/story/2021/04/1090462> accessed 21 June 2021.

UNHCR, 'World at War - Forced Displacement in 2014' (UNHCR Global Trends, 2015) <https://www.unhcr.org/statistics/country/556725e69/unhcr-global-trends-2014.html> accessed 6 September 2021.

Universal Declaration of Human Rights GA Res 217 A (III), UN GAOR, 3rd Sess., 183rd plen mtg, UN Doc A/810,10 December 1948 (UDHR).

United Kingdom Government, 'Nationality and Borders Bill 2021' <https://publications.parliament.uk/pa/bills/cbill/58-02/0141/210141.pdf> accessed 31 August 2021.

United Nations Human Rights Office of the High Commissioner, 'Deadly Practice of Migrant "Pushbacks" Must Cease - UN Special Rapporteur' (23 June 2021) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27200&LangID=E> accessed 14 September 2021.

UNHCR, 'Legal Considerations Regarding Access to Protection and a Connection between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries' (UN High Commissioner for Refugees, 2018) <https://www.refworld.org/docid/5acb33ad4.html> accessed 30 September 2021.

UNHCR, 'UNHCR Concerned by Pushback Reports, Calls for Protection of Refugees and Asylum-Seekers' (*UNHCR The UN Refugee Agency*, 21 August 2020) <https://www.unhcr.org/gr/en/16207-unhcr-concerned-by-pushback-reports-calls-for-protection-of-refugees-and-asylum-seekers.html> accessed 5 August 2021.

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under The 1951 Convention and The 1967 Protocol Relating to the Status of Refugees' (UNHCR, 2019) <https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> accessed 25 May 2021.

United Nations Meetings Coverage and Press Releases, 'Refugees, Migrants Branded "Threats", Dehumanized in Campaigns Seeking Political Gain, High Commissioner Tells Third Committee, Appealing for Return to Dignity' (31 October 2018) <https://www.un.org/press/en/2017/gashc4247.doc.htm> accessed 27 August 2021.

United Nations, 'Detained and Dehumanised: Report on Human Rights Abuses Against Migrants in Libya' (Office of the United Nations High Commissioner for Human Rights, 2016) <https://www.ohchr.org/Documents/Countries/LY/ DetainedAndDehumanised_en.pdf> accessed 18 May 2021.

UN Human Rights Committee (HRC), 'CCPR General Comment No. 29: Article 4: Derogations During a State of Emergency' 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 13(d) <https://www.refworld.org/docid/453883fd1f.html> accessed 9 September 2021.

Zois C, 'Frontex' Involvement in Illegal Pushbacks and EU's Possible International Responsibility' (Jean Monnet Project EURIS, 17 March 2021) < https://www.jm-euris.eu/frontex-involvement-in-illegal-pushbacks/> accessed 19 October 2022.

Wesel B, 'Turkey Migration Deal a "Stain on EU Rights Record"' DW Made for Minds (17 March 2021) <https://www.dw.com/en/turkey-migration-deal-a-stain-on-eu-rights-record/a-56903392> accessed 16 June 2021.

Wolfendale J, 'Training Torturers: A Critique of the "Ticking Bomb" Argument' (2006) 32 Social Theory and Practice 270.

Annales de la Faculté de Droit d'Istanbul, 71: 539–565

DOI: 10.26650/annales.2022.71.0010
http://annales.istanbul.edu.tr/

Annales de la Faculté de Droit d'Istanbul

Submitted: 20.01.2022
Revision Requested: 02.02.2022
Last Revision Received: 28.10.2022
Accepted: 26.11.2022

RESEARCH ARTICLE

Can Rawls' Theory of Distributive Justice Become a Cure for Poverty?

Ülker Yükselbaba*

Abstract

Rawls, a leading thinker of our time, attempted to develop an understanding of justice that reconciles liberty and equality in his work A Theory of Justice (1971). Rawls constantly revised his theory of justice and took it to an international level with The Law of Peoples. A Theory of Justice was met with great interest, but it was also heavily criticized.

The aim of this paper is first to review Rawls' A Theory of Justice in broad terms and then to present the objections raised. Ultimately, the goal is to present my objections based on the impossibility of the Rawlsian theory of justice with some examples. Specifically, examples of the widening gap between the poor and the rich under Covid-19 conditions and the enormous increase in the incomes of the rich are addressed.

Keywords

John Rawls, A Theory of Justice, Distributive Justice, Justice as Fairness, Original Position, Veil of Ignorance, Capitalism, The Difference Principle, Equal Opportunity

* **Corresponding Author:** Ülker Yükselbaba (Assoc. Prof. Dr.), Istanbul University, Faculty of Law, Department of Philosophy and Sociology of Law, Istanbul, Turkiye. E-mail: ulkery@istanbul.edu.tr ORCID: 0000-0003-1677-2382

To cite this article: Yukselbaba U, "Can Rawls' Theory of Distributive Justice Become a Cure for Poverty?", (2022) 71 Annales de la Faculté de Droit d'Istanbul 539. https://doi.org/10.26650/annales.2022.71.0010

Can Rawls' Theory of Distributive Justice Become A Cure for Poverty?

I. Introduction: Distributive Justice

A study on justice should begin with a definition of justice. A definition of justice on which everyone can agree has not been formulated yet. Instead of defining justice, David Schmidtz attempts to explain what kind of a thing we are faced with.

> "The thing we call justice is, in a way, like a constellation of interrelated elements. I observe coherence and unity to a certain degree, but this coherence is more like the limited integrity of a neighborhood rather than the completeness of a single building. A good neighborhood is a functional place in which people live pleasantly. But good neighborhoods cannot be designed as thoroughly as good buildings."[1]

There are several theoretical frameworks for justice. Every theory serves as a directional map to explain what justice is. Although the outlines offered by the theories allow us to comprehend some aspects of justice, no single theory has yet attained a level of competency that can produce solutions to all issues related to justice. Every theory can lead to practices that lead to injustice when apprehended narrowly. This situation arises from the intricate nature of the topography that the concept of justice is intended for, rather than any problems within the theories themselves.[2]

The concept of distributive justice is concerned with the distribution of boons and burdens in human society since Aristotle. But what is distributed here is related to people being brought to political positions in line with their virtues. "Until quite recently, people have not even considered the basic structure of resource allocation as a matter of justice within their societies, let alone seeing justice as an essential thing for the allocation of resources to meet everyone's needs." The modern use of the concept of distributive justice, as defined in this sentence is slightly older than two centuries. The subject of distributive justice in its modern sense is the division of economic boons and burdens among citizens through means such as law, politics, institutions, etc. Questions like how distributive justice will be realized, which principles of justice will be relied on, what will be distributed, and who will distribute are questions of primary importance in this debate. Distribution depends on political processes, legal regulations, and institutional practices and it varies from society to society and from period to period. Principles of distributive justice put forward in a theory provide the main guidance on processes and structures concerning the distribution of boons and burdens.[3]

1 David Schmidtz, *Elements of Justice* (Cambridge University Press 2006) 3.

2 ibid 4.ibid 227.

3 Samuel Fleischacker, *A Short History of Distributive Justice* (Harvard University Press 2004) 4.

Today the gap between the rich and the poor has turned into a steep precipice. Inequalities have emerged in many areas throughout history and have been accepted as the source of social unrest by many philosophers. The political system in capitalist democratic societies is founded on citizens' demands for basic political equality, however, it can only maintain its existence through competition and inequality in the use of tangible resources. This is the result of the basic contradiction that lies at the base of capitalism. This is why it has been attempted to reconcile social welfare and economic competition in capitalist democracies.[4] Since urban violence, individual alienation will cause social instability to heighten in societies where there is intensive inequality, redistribution mechanisms must be functional in the name of social and political stability.[5] Today, the emerging thought that there is no justice in societies with such inequalities has also led several thinkers to reconsider the inequality in the distribution of income and wealth in the world and influenced them to conduct studies on distributive justice.

After reviewing Rawls' theory of justice below, we will consider whether the theory can be a remedy for poverty as a dimension of injustice within the framework of objections to this theory. To figure out what Rawls' distributive justice might look like under capitalism, I will draw on data from poverty and wealth studies of the pandemic period.

II. John Rawls' Theory of Distributive Justice

The most discussed work by Rawls is his theory of a just liberal society, called *Justice as Fairness*. Rawls first put forward his views on justice in his article "*Justice as Fairness*",[6] then systematized them in his book, *A Theory of Justice*. Rawls continued to revise Justice as Fairness throughout his life, reformulating the theory in *Political Liberalism* (1993), *The Law of Peoples* (1999), and *Justice as Fairness: Restatement* (2001).

In "Justice as Fairness: Political Not Metaphysical," Rawls began to develop the liberal view of justice as a political concept. As a political concept, justice is a political value and is not grounded in comprehensive moral, religious, or philosophical doctrines. This understanding formed the core idea of Political Liberalism (1993). Under the political and social conditions of free institutions, there are many different and even conflicting doctrines. Political liberalism sees this "reasonable pluralism reality" as the object of an overlapping consensus among various political conceptions. Through the conception of political liberalism, he reviewed his idea of justice as fairness. Political liberalism, which he built with an understanding of reasonable pluralism with an

4 Peter Hamilton, 'Editor's Foreword' in Bryan Turner, *Equality* (Ellis Horwood Limited) 9–11.

5 Bryan Turner, *Equality* (Ellis Horwood Limited 1986) 17.

6 John Rawls, 'Justice as Fairness' (1958) 67 The Philosophical Review, 164–194.

overlapping consensus, constitutes the content of justice as fairness. For this reason, he also reshapes his arguments about the two principles of justice.[7]

In his book *A Theory of Justice*, Rawls, a philosopher of politics and law who holds an important place in liberal American tradition,[8] proposes a more egalitarian liberal approach in face of the rising new right-wing ideology in the world by defending welfare state and distributive justice. Rawls' work created such a huge impact that Robert Nozick praised him as such;

> "We can bring our discussion of distributive justice into sharper focus by considering in some detail John Rawls' recent contribution to the subject. A Theory of Justice is a powerful, deep, subtle, wide-ranging, systematic work in political and moral philosophy that has not seen its like since the writings of John Stuart Mill, if then. It is a fountain of illuminating ideas, integrated together into a lovely whole. Political philosophers now must either work within Rawls' theory or explain why not. The considerations and distinctions we have developed are illuminated by, and help illuminate, Rawls' masterful presentation of an alternative conception. Even those who remain unconvinced after wrestling with Rawls' systematic vision will learn much from closely studying it. I do not speak only of the Millian sharpening of one's views in combating (what one takes to be) error. It is impossible to read Rawls' book without incorporating much, perhaps transmuted, into one's own deepened view. And it is impossible to finish his book without a new and inspiring vision of what a moral theory may attempt to do and unite; of how beautiful a whole theory can be. I permit myself to concentrate here on disagreements with Rawls only because I am confident that my readers will have discovered for themselves its many virtues."[9]

Below I will review Rawls' theory and try to make it clear why it is important.

A. General Framework of A Theory of Justice

In his work Justice as Fairness: Restatement, Rawls states that "the aim of justice as fairness is to provide an acceptable and moral basis for democratic institutions and thus to address the question of how the claims of liberty and equality are to be understood."[10] Therefore, while taking freedom and equality into consideration, he tries to reach the principles of justice that will guide all institutions of society for a just and stable liberal life. According to him, contemporary democratic and liberal societies have generally already accepted fundamental rights and freedoms. What needs to be done under these conditions is to create a just society by treating

7 Erin Kelly, 'Editor's Foreword' in John Rawls, *Justice as Fairness: A Restatement* (The Belknap Press of Harvard University Press 2001).

8 This work of Rawls has received so much attention that debates on justice are everywhere linked to Rawls' views. "A Theory of Justice … is arguably the most important book of American philosophy published in the second half of the last century.", Wayne P. Pomerleau, 'Western Theory of Justice' (Internet Encyclopedia of Philosophy) <https://iep.utm.edu/justwest/#H5> accessed 22 October 2021.

9 Robert Nozick, *Anarchy, State and Utopia* (Blackwell, Reprint 1999) 183.

10 John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed, MA: Harvard University Press 2001) 5.

individuals who are considered free and equal based on respect and by eliminating or equalizing certain inequalities.[11]

According to Rawls, the primary subject of justice is "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation." The principle of justice for major institutions will be the founding and fundamental principle for all institutions in the functioning of political, economic, and social order. The market economy, private property, family, and similar institutions are examples of institutions of the liberal order, and they must be regulated according to principles of justice. Thereby a society based on fair cooperation can be established.[12]

An important feature of Rawls' theory of justice is the attempt to stand against and set an alternative to utilitarian conceptions. Kantian ethics lie behind Rawls' criticisms of utilitarianism. Accordingly, one's "conscious goal" as a principle that determines a person's ethical autonomy has been developed to counter utilitarianism that oppresses the individual. "… principles of justice manifest in the basic structure of society; men's desire to treat one another not as a means only but as ends in themselves."[13] Rawls blames utilitarianists for sacrificing human beings and their inseparable rights to the principle of utility. Justice does not accept that a greater good shared by others justifies losses in the freedoms of some.[14]

B. Determining the Principles of Justice as Fairness

Rawls draws a procedural model to put forward the theory of justice. He first refers to the setup of a social contract. The social contract is an introduction to the answer to the question that if people were to set up a society, which principles of justice would they prefer.[15] Rawls first depicts the conditions of existence for a social contract and builds as a starting point where all people making up the society hold a meeting to make a social contract specifying the principles of justice to guide politics and law.

1. Social Contract

The social contract is formed by principles of justice reached as a result of Rawls' hypothetical meeting. This social contract is made up of two parts; the first

11 John Rawls, *A Theory of Justice* (Oxford University Press 1971) 13–15.

12 ibid 2. ibid 7. In *Justice as Fairness: A Restatement*, Rawls explains three levels of justice: 1. Local justice (principles applyin directly to institutions and associations), 2. Domestic justice (principles applying to the basic structure of society, 3. Global justice (principles applying to international law. Justice as fairness begins with domestic justice, which is the basic structure of justice. From there, it works outwards for international law and inwards for local justice. Rawls, *Justice as Fairness: A Restatement* (n 10) 11.

13 Rawls, *A Theory of Justice* (n 11) 179.

14 ibid 3.ibid 28.ibid 175–178. Rawls, *Justice as Fairness: A Restatement* (n 10) 10.;Larry Arnhart, *Political Questions: Political Philosophy from Platon to Pinker* (4th edn, Waveland Press Inc 2015) 507–542.; Barry Brian, *The Liberal Theory of Justice* (Oxford University Press 1973) 14.

15 Rawls, *A Theory of Justice* (n 11) 75.

part includes *the original position* which is like the state of nature before the social contract is made, and disclosure of the conditions for the selection of the principles of justice, the second part includes *the two principles of justice* people supposedly agreed on.[16]

In general, theories of social contract rely on assumptions, so they are fictional; they set the framework for mutual rights and duties between the state and people. Rawls' theory of contract, unlike other contract theories, is a medium for the realization of certain conditions to reach the principles of justice to be applied to the basic structure of society.

Rawls' theory of justice builds on the social contract tradition and offers an alternative to utilitarianism. His "political conception" of justice is based on fundamental values that he identifies as implicit in democratic societies. Rawls argues that they provide a basis for elaborating the principles of justice that can be accepted by members of such societies. Rawls' interpretation of the social contract allows him to address issues of justice directly rather than through social welfare, as is the case in utilitarianism, and indeed he elevates justice-not maximum welfare or efficiency-as "the first virtue of social institutions."[17]

2. The Original Position and Veil of Ignorance

Rawls uses the social contract referenced to explain the establishment of a political society to reach the principles of justice as fairness. His aim through this position ".... is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found ... in Locke, Rousseau, and Kant."[18] He starts the contract theory with a state-of-nature assumption as found in classic social contracts and calls this "the original position." Rawls described it as "a device of representation or, a thought experiment for the purpose of the public–and self-clarification."[19]

The original position takes place by people gathering to determine the principles of justice.[20] In Rawls' view of the liberal individual, participants in the assembly are equal, free, rational individuals and moral personalities. Individuals whose faces are covered with the veil of ignorance lack some information about themselves and their surroundings. Individuals cannot even know their welfare. This includes his social status, abilities, gender, desires, religions, beliefs, race, ethnic group, intelligence,

16 Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1998) 27.; Frank Lovett, *Rawls's A Theory of Justice: A Reader's Guide* (Continiuum I P G 2011) 7.

17 Rawls, *A Theory of Justice* (n 11) 3.

18 ibid 11.

19 Rawls, *Justice as Fairness: A Restatement* (n 10) 11.

20 ibid 17.

inclinations, or what makes him happy, and not even the economic situation of his society.[21] The original position must be independent of contingencies within the basic structure—the features and circumstances of persons. Thus, the conditions of a fair contract between free and equal persons are provided by getting rid of the bargaining advantages that inevitably arise with social and historical tendencies in any society.[22]

From the beginning, Rawls makes two assumptions about rational individuals who will agree. First, these individuals aren't jealous by nature and at the same time are not altruistic. What they are interested in is maximizing their good. Secondly, these individuals do not like to take risks. Thinking about the worst possible case behind a veil of ignorance, they strive to draw out the best possible case. Since individuals do not know their chances, they will choose the principles that maximize the situation of those who are the least well-off from among the alternatives presented to them in a situation of uncertainty. Here, Rawls proposes a "maximizing" strategy. That is, when we fall into the worst situation, it is a rational choice to increase what we can get to a maximum. According to Rawls, this situation resembles reasoning based on the assumption that your worst enemy will decide what place you will obtain in society. This setup was arranged so that the principles of justice preferred by Rawls would be chosen. The veil of ignorance is so thick that rational individuals cannot acquire information about facts that can affect their choices and thus will prefer the principles of justice as fairness.[23]

As required by *the veil of ignorance*, these individuals who have limited information choose based on their interests in the principles of justice which may also be the best for others.

This is, in fact, the concept of "justice as fairness": the idea that essential regulative principles (principles of justice) can be derived from the consideration of a situation in which certain opportunities to pursue self-interest by advocating one principle rather than another have been eliminated (conditions of fairness).[24]

In the initial situation, individuals finally agree on certain social rules and institutions and, under the veil of ignorance, choose the basic structure of society that they consider just.

21 Rawls, *A Theory of Justice* (n 11) 136–138.; Rawls, *Justice as Fairness: A Restatement* (n 10) 15.; Maimon Schwarzschild, 'Constitutional Law and Equality' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd ed., Blackwell Publishing) 169.; Norman P. Barry, *An Introduction to Modern Political Theory* (3rd ed., The Macmillan Press ltd 1995) 10.; Samuel Gorovitz, 'John Rawls: A Theory of Justice' in Anthony de Crespigny and Kenneth Minogue (eds), *Contemporary Political Philosophers* (Dodd, Mead Company 1975) 278.

22 Rawls, *Justice as Fairness: A Restatement* (n 10) 16.

23 Rawls, *A Theory of Justice* (n 11) 152–153.; Barry (n 21) 88–89.; Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edn, Oxford University Press 2012) 221–227.

24 Barry (n 21) 2.

3. Principles of Justice

Rawls states that the framework of justice as fairness is a democratic society. So, what are the principles of justice that fit into a democratic society as a fair system of social cooperation? The basic social and economic inequalities or differences in the life prospects of citizens are influenced by their social origins, their innate talents, their educational opportunities, and their good or bad fortune over a lifetime. According to Rawls, these inequalities are his primary concern.[25] The search for a principle to address these inequalities invokes the deepest convictions about equal fundamental rights and liberties, the just value of political liberties, and fair equality of opportunity. From the sphere of distributive justice in the narrower sense, one can see whether a suitable distributive principle emerges from these deeply held convictions, given their essential elements in the original position as a means of representation. Rawls uses "the idea our firmest considered convictions about the nature of a democratic society as a fair system of cooperation between free and equal citizens —as modeled in the original position to see whether the combined assertion of those convictions so expressed will help us to identify an appropriate distributive principle for the basic structure with its economic and social inequalities in citizens' life-prospects."[26]

Within societies, there may be deep inequalities. Therefore, such principles of justice should be applied in social institutions so that these inequalities are eliminated through the distribution of rights and freedoms, economic opportunities, and other good things, and a fair society is formed.[27] Individuals will be presented with several principles of justice. These are 1) the Conception of justice as fairness, 2) the Utilitarian conception of justice, 3) the Intuitionist conception of justice, 4) the Combined conception of justice made up of utilitarian and intuitionist conceptions, 5) Self interested conception of justice The individuals will try to reach a compromise on the principles of justice by debating them.[28]

To summarize: The parties in the original position are equal, which means that they all have the same rights in the process of picking principles; they can all offer proposals, provide reasons for their approval, and so on. Clearly, the purpose of these requirements is to represent equality amongst human beings as ethical individuals, as creatures with a sense of their own exact and successful experience of justice. Every man is assumed to have the ability to comprehend and act on whatever principles are chosen. These requirements, along with the veil of ignorance, define justice as the criteria that sensible men and women concerned with advancing their goals would

25 Rawls, *Justice as Fairness: A Restatement* (n 10) 39–41.

26 Rawls, *Justice as Fairness: A Restatement* (n 10) 42.

27 Lovett (n 16) 20.

28 Rawls, *A Theory of Justice* (n 11) 122–124.

agree to as equals were faced with a similar situation. In this way, the principles of justice are determined by equal, free, rational, and impartial people.[29]

> "(a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
>
> (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to the greatest benefit of the least-advantaged members of society (the difference principle)." [30]

Rawls says there is a certain ranking as *lexical order* between these two principles. *Lexical order* determines precedence, following, and weighting among the principles. According to this, the one mentioned initially has priority and more weight compared to those that follow. Of the two principles of justice, we will see below, the principle of liberty comes before the principle which arranges economic and social inequalities and was mentioned secondly. Even if the second principle creates a very very good situation socially and economically if this situation damages the first principle in any way, the first principle has priority, the first principle cannot be violated. The fair opportunity principle (2b) has priority over the difference principle (2a).[31]

a. The First Principle of Justice: Equal Liberty

The first principle in Rawls' system of justice as fairness is related to the equality and priority of basic liberties. "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."

We can list the basic liberties included in this principle as follows:

I. Political liberty: When applied to political procedures defined by equal liberty, it can be described as the right to equal participation. Political liberty requires equal participation and the right to choose for all citizens in the making of laws.

II. The second basic liberty is related to the concept of the state of law. Contents of the concept of the state of the law: a) the law means and requires the possible, b) equal treatment of those in equal situations, c) the principle of legality which requires trial according to laws in effect, d) the requirement that judges are fair and impartial and no one can be the judge of his trial just as the principle of the natural judge based on principles. Rawls' state of law concept carries a similar content to other state-of-law

29 ibid 19.

30 Rawls, *Justice as Fairness: A Restatement* (n 10) 42–43.

31 Rawls, *A Theory of Justice* (n 11) 302–303.; Rawls, *Justice as Fairness: A Restatement* (n 10) 43.Barry (n 22) 51–52.

conceptualizations. The state of law is "justice as orderliness," as Rawls says.[32] As a result, Rawls specified basic liberties by a list and called them "constitutional essentials"; "freedom of thought and liberty of conscience; political liberties (for example, the right to vote and to participate in politics) and freedom of association, as well as the rights and liberties specified by the liberty and integrity (physical and psychological) of the person; and finally, the rights and liberties covered by the rule of law."[33]

According to Rawls, basic liberty which is based on the first principle can only be restricted in the name of liberty itself. This restriction can be to ensure this one or another liberty and to better arrange the system of liberties. No matter how these liberties are arranged to establish a consistent system, the system must be equally guaranteed for all citizens.[34]

According to Rawls, the value of basic liberties will be under threat as long as there are inequalities among citizens in terms of power and welfare. Thus, social, and economic inequalities must be arranged to everyone's advantage in line with the principles of justice and the second principle of justice provides this. The second principle of justice is aimed at protecting the existence of the first.

b. The Second Principle of Justice Equality of Opportunity and the Difference Principle

> *The second principle*:
>
> (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to the greatest benefit of the least-advantaged members of society (the difference principle).

With this principle, Rawls wanted to find a solution to the problem of sharing that arose with the liberal claim that there are not enough resources for everyone in the world. This principle is about distributive justice, the distribution of income and wealth along with the distribution of personnel in organizations that have different responsibilities and powers, and it is a special principle in the sense that when applied together it has been put forward as an alternative to utilitarianism.

1) Equality of Opportunity

Equality of opportunity, according to Rawls, is an important tool in removing inequalities among people but is not sufficient. In the initial situation, there are

32 Barry (n 21) 35.

33 Rawls, *Justice as Fairness: A Restatement* (n 10) 44, 47.

34 John Rawls, 'Basic Liberties and Their Priority', *The Tanner Lectures on Human Values* (1981) 9 <https://tannerlectures.utah.edu/_resources/documents/a-to-z/r/rawls82.pdf 10/01/2022.> accessed 10 January 2022.

uncertainties which include the family one is born to or abilities one is born with. People cannot choose them, they are born with them, thus have deserved neither the wealth of their families nor their abilities. Therefore, a "fair" society must eliminate inequalities caused by such undeserved advantages. Providing everyone with the education that will provide them the opportunity to best utilize their capabilities and develop themselves is in that sense a requirement of justice.[35]

Rawls sees the "equality of opportunity" concept which does not take into consideration people's backgrounds as insufficient and unstable. Therefore, people who achieve success in life due to conditions and capabilities they were born into, should not gain all the rewards from their successes and should share their endowments with those less fortunate. Distribution should be made from the wealthy toward the least advantaged through taxation and some other ways.[36]

According to Rawls, fair equality of opportunity necessitates not only that social and public positions be accessible in a formal sense, but also that everyone should have an equal opportunity to obtain them.[37] So besides providing equality of opportunity, a just society should also provide an equal ground for the use of equality of opportunity. Some measures have to be taken for people to be treated fairly in a society based on just cooperation. To achieve this, inequalities that arise from natural and social differences should be compensated. A compensatory mechanism does not function by removing the differences people have, but by managing these differences in favor of the most disadvantaged.[38]

In Rawls' theory of justice, compensation for inequality does not mean everyone is absolutely equal. Some inequalities might be legitimate; however, this situation can be present if and only if the inequality gives a result in favor of *the least advantageous.* Thus, the acceptance of societal inequalities depends on the precondition of favoring the least advantageous.[39]

2) Difference Principle

Rawls points to inequalities stemming from natural talents. No one deserves to be born handicapped or have an IQ level of 140, any more than one deserves to be born into a certain gender or race. Just as it is not fair for people's destinies to be determined by their class, race, etc. characteristics, undeserved inequality emerging from situations like disability, intelligence, a handicap is also not fair. Therefore,

35 Lovett (n 16) 52.

36 Rawls, *A Theory of Justice* (n 11) 75.; Will Kymlicka, *Contemporary Political Philosophy* (2nd edn, Oxford University Press 2002) 59.

37 Rawls, *Justice as Fairness: A Restatement* (n 10) 43.

38 Kymlicka (n 36) 70–71.

39 Rawls, *A Theory of Justice* (n 11) chapter II, V.

distributing shares according to random conditions such as natural talents and social conditions means leaving ethical demands to chance, something Rawls objects to on grounds of undeserved inequality.[40]

The principle of liberal equality seeks a way to remove the inequality created by nature and thus, tries to transcend and correct formal equality of opportunity. The aim is to eradicate social and cultural inequalities in a sort of "fair meritocracy" with equal opportunities in education, certain redistribution policies, and other social reforms. The targeted ideal is for everyone to have an "equal beginning." This in turn will provide an opportunity for success to people who have similar abilities and capacities from birth and try to carry them into life, independent of their places in a social system and their classes. This way, equal culture, and success can be achieved for those with similar motivations and talents in every sphere of society. According to Rawls, the expectations of people who have similar abilities and wishes should not be affected because of the class they were born into. Rawls denies the thought of ethically deserving on two grounds: First, the talent someone has is not solely a work of that person's efforts. Secondly, what a society value emerges arbitrarily. That is why arbitrarily rewarding a talent based on that society's demand and supply conditions is not accepted by Rawls.[41]

People whose natural talents bring them success in life, should not take all the rewards of those successes and should share the boons they receive from them with those who are less fortunate than themselves.[42]

For instance, a doctor receiving a very high salary can be accepted as legitimate only if it brings the worst-off member of society to a better position than would be under an absolute equality situation. Because every participant will seek to further his interests rationally, he or she will prefer a situation in which everyone is equal but gets less of the social share to a situation where inequalities work in everyone's favor. The phrase "inequalities in income and wealth are to be arranged for the greatest benefit of the least advantaged" simply means that we should compare schemes of cooperation to determine which one makes the least advantaged the most well-off.[43] From there, we should choose the scheme that makes the least advantaged better off than any scheme. For example, let's assume that everyone receives 10 units of

40 Rawls, *A Theory of Justice* (n 11) 102-104.

41 Michael J Sandel, *Justice: What's the Right Thing To Do?* (Cambridge University Press 1998) 140–166.; David Rubinstein, 'Capitalism, Social Mobility, and Distributive Justice' (1993) 19 Social Theory and Practice 183, 184–185.

42 Rawls, *A Theory of Justice* (n 11) 277–278.. There are quite a lot of questions about the applicability of the redistribution Rawls proposes in real life. In a society, the poor are far too many, especially in certain communities. For example, a big majority of blacks in the US whom Rawls was considering when he devised his theory live in poverty and it can be said that whites are not all that willing for transfers to the blacks through taxes or that immigrants do not receive strong support from the peoples of countries they migrate to. Hence, it seems quite difficult that the rich to make transfers to the poor for the second principle of justice to apply. Serge-Christophe Kolm, *Modern Theories of Justice* (MIT Press 2002) 207.

43 Rawls, *Justice as Fairness: A Restatement* (n 10) 59.

income in an absolute equality situation. When inequalities are permitted, if some people earn more than 10 units through some methods and as a result some others get less than 10 units, this is unfair. However, in the second distribution, if some earn 40 units of income and others 20 units and no one falls into a worse situation because of this distribution than in absolute equality, participants will prefer the second distribution in the beginning state. This distribution is, at the same time, legitimate and fair. Because once the veil of ignorance is lifted, participants will know that there is a situation in their favor relative to the absolute equality situation, even when they got less share.[44] There is no reason for any rational person to choose the first way of distribution and this is confirmatory of the difference principle.

When we look at who "the least advantaged" are, we realize that Rawls uses the concept of the least advantaged to refer to the least advantaged class, not singular individuals. Secondly, this class is determined according to wealth and income situation. In Rawls' theory, "only and only the typical representatives of the lowest income group is meant" by the class he refers to as "the least advantaged." This class will be considered when the distribution is made. Here it is not possible to avoid a certain arbitrariness according to Rawls. One way is to pick out a specific social position, such as an unskilled laborer, and then count as least advantaged all those who have the average earnings and wealth of that team or less. The expectation of the lowest consultant is defined as the average of this entire class. Another alternative is a definition based totally on relative income and wealth, except reference to social status. Thus, all humans with much less than half of the median profits and wealth can be considered the least advantaged segment. This definition refers only to the bottom half of the distribution and has the benefit of drawing attention to the social hole between those who have the least, and the common citizen. This gap is certainly a critical feature of the scenario of the less advantaged members of society. I think that one of these definitions, or a mixture of them, will suffice.[45]

Rawls has been heavily criticized on this point. With the method he uses, individuals' and groups' physical disadvantages are not taken into consideration, so people in true need are overlooked.[46]

4. Application of the Principles of Justice

Applying the two justice principles in a society is one of the crucial points of Rawls' theory of justice. In any society, there are always disagreements about the laws, and everyone will think at least some of the laws are bad or unjust. What is to make the

44 Rawls, *A Theory of Justice* (n 11) 311.

45 ibid 98.

46 Barry (n 21) 173–183.

coercive enforcement of these, and other laws legitimate in the eyes of citizens? In political theory, legitimacy is often construed as the popular acceptance of political power and laws. But for Rawls not just any popularly accepted law or exercise of political power can be legitimate (laws denying basic liberties to minorities are not, for example). [47]

> "For Rawls, a condition of laws' legitimacy is that they stem from a just, or at least nearly just, democratic constitution. But legitimacy is not the same as justice. For laws can be just and still not be legitimate. Just laws for Rawls accord with principles and a constitution that would be agreed to by hypothetical parties in the original position and the ensuing four-stage sequence."[48]

Idealized procedures are one of the basic elements of the theory of justice. These procedures are made up of four sequential stages. In the initial stage, principles of justice are selected while the following steps are about the application of the principles of justice to the constitution, legislation, and individual cases. Hence, a clearer notion emerges on how to implement laws and policies within the framework of general facts in society.

After the initial stage, which is the designation of the principles of justice, whether these principles will succeed under non-ideal conditions, in other words, a real situation, must be studied.

The second stage which follows the designation of the principles of justice is to make a constitution. In this phase, related parties meet to establish a constitutional system that will regulate the authorities of ruling powers and the basic rights of citizens. Now that the principles of justice have been specified, the veil of ignorance lifts partially. Those attending this meeting are not yet aware of their social status, natural talents, or their good understanding. But they possess knowledge about their society. They know the natural conditions and resources of their society, its economic situation, political culture, and similar things. Under these conditions, they will establish a constitution that will meet the principles of justice.

The fourth stage is that of the judiciary. This stage is carried out by judges and administrators and the people, in general, abide by these rules. Besides, the veil of ignorance is now fully lifted, and everyone can access all the information.

Thus, the principles of justice become applicable in the institutions of society. [49]

47 Rawls, *A Theory of Justice* (n 11) 195–201.

48 Morgan Freeman, 'Introduction: John Rawls – An Overview', *The Cambridge Companion to Rawls* (Cambridge University Press 2003) 38.

49 Rawls, *A Theory of Justice* (n 11) 195–201; See also Rawls, *Justice as Fairness: A Restatement* (n 10) 48;

C. Can Rawls' Model of Distributive Justice Become a Cure for Poverty? Criticisms of the Theory

The model of justice proposed by Rawls, which we can call distributive, includes many procedures such as the original position and the veil of ignorance. For Rawls, the application of the principles of justice as a result of following these procedures together with a just process means the realization of justice. However, even though the model proposed by Rawls seems to work in design, it has been criticized from both theoretical and practical perspectives. The criticisms of the principles of equality of opportunity and difference, which constitute the second principle of justice that realizes distributive justice, are discussed below.[50]

Rawls explains the difference principle as follows:

> "The difference principle gives some weight to considerations singled out by the principle of redress. This is the principle that undeserved inequalities call for redress; some inequalities of birth and natural endowment are about undeserved inequalities; and since some inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for. Thus the principle holds that to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and those born into the less favorable social positions. The idea is to redress the bias of contingencies in the direction of equality."[51]

Now the difference principle does not require society to try to compensate for disadvantages as if every man were expected to compete on an honest basis in the same contest. But the requirement of distinction would allocate resources for education in such a way as to enhance the long-term opportunities of the least advantaged. If this purpose is achieved by giving a greater interest to the better off, it is permissible; otherwise, it is not. And in making this decision, the cost of education must not be judged solely in terms of monetary effectiveness and social welfare. Equally important, if not more so, is the role of education in enabling people to participate in the way of life of their society and to take part in its affairs, thus giving each person an infallible sense of his or her worth.[52]

Brian Barry criticizes Rawls' principles aimed at economic inequalities from various aspects. He asserts that fair equality of opportunity is by itself a hollow principle. Because in liberal societies, there is no obstacle in applying for a position anyway. What should be the subject of discussion is related to the background; a good education, providing the learning of a foreign language, etc. qualifications are conditions that are prepared by families. That is why citing fair equality of opportunity among the principles of justice is not important by itself concerning the distribution of

50 Wacks (n 23) 221–227. In his book, Wacks summarizes his criticisms toward Rawls under seven titles. Just as Wacks specifies, each title of critique requires a detailed elaboration.

51 Rawls, *A Theory of Justice* (n 11) 100–101.

52 ibid 101.

goods. The background is mainly about tangible income. Poverty remains prevalent even when a society is industrialized. The main reasons for poverty are considered to be having children, being sick, being unemployed for long periods, being old or handicapped. Rawls' point of view considers the individual representing the worst-off situation is not in a position to bring a solution to these problems. Because the government should make a special effort in such cases even if there is a growth in welfare.[53] Some problems cannot be overcome through increases in individual welfare, they must be addressed and resolved at a social level and the organized power of government is needed to tackle such problems.

Kymlicka criticizes the difference principle for its insensitivity to choose. Take, for example, two people who live in the same social circumstances and have similar talents. One of them wants to play tennis and lives on a farm big enough to buy a tennis court and live the life he wants. The other person buys a garden about the size of a tennis court and, after working hard, achieves a good harvest in a short period. Although both start under equal conditions, the gardener increases his income within a short time. The tennis player, on the other hand, may earn an income just sufficient to continue playing tennis. According to the difference principle, this inequality is only permissible if the worst-off person benefits. The tennis player should benefit from the income, so the government should transfer some of it to the tennis player to equalize their incomes.[54] Resorting to taxes to equalize these two people seems intuitively wrong. For although the initial conditions were identical, they made different choices and did what they wanted to do. The gardener tried to work hard to earn more, while the tennis player preferred to work less and play tennis. Assuming that the choices were made under free circumstances, we would penalize the gardener's lifestyle and income in favor of the tennis player.

> "Rather than removing a disadvantage, the difference principle simply makes the gardener subsidize the tennis player's expensive desire for leisure. The gardener has to pay for the costs of her choices-- i.e she forgoes leisure to get more income. But the tennis player does not have to pay for the costs of his choice-- i.e. he does not forgo income to get more leisure. The tennis player expects that the gardener pays for the costs of her own (in a sense the tennis player's) choices and also subsidize his choice. Rawls' theory also requires this. That does not promote equality, it undermines it. He (tennis player) gets his preferred lifestyle (leisureful tennis) plus some income from the gardener's taxes. While the gardener gets her preferred lifestyle (income-producing gardening) minus some income that is taxed from her. The gardener must give up part of what makes her life valuable so that the tennis player can have more of what he finds valuable. They are treated unequally in this sense, for no legitimate reason."[55]

53 Barry (n 21) 50–51.

54 Kymlicka (n 36) 72–75.

55 ibid 73.

If income differences are the result of choices rather than circumstances, the application of the difference principle creates inequality. Treating people with equal concern requires that they pay for the costs of their own choices. Dworkin's distributional scheme of an "endowment-insensitive" but "choice-sensitive" approach provides a fairer solution to the above example.[56]

Rawls himself also emphasizes that we are responsible for our own choices. This is the reason why his assessment of justice uses the distribution of primary goods as its basis. Rawls says that one cannot conclude that people with expensive tastes should be supported by those with moderate tastes "because we have the capacity to assume responsibility for our own goals." Moreover, people with expensive tastes change their tastes over time based on their income and now believe that their current income cannot be lowered by subsidizing others with expensive tastes. Under Rawls' theory of justice, it is not necessary to subsidize inequalities that result from the outcomes of choices made by an individual within his or her sphere of responsibility. But inequalities that affect a person's life chances should be corrected.[57] But for all that, the difference principle does not distinguish between inequalities that result from choices and unchosen inequalities. Therefore, the difference principle not only excludes natural and social disadvantages, but also intervenes in inequalities that result from personal choices and efforts.[58]

Michael J. Sandel has also criticized the difference principle from another aspect. For him, the difference principle resembles utilitarianism. In the original position, an individual who lacks some information concerning himself under a veil of ignorance is the "unencumbered self." The unencumbered self cannot assert that he deserves advantages arising from his physical structure and nice behaviors because they are arbitrary factors and are not the basic elements of a person's identity. The unencumbered self does not deserve these characteristics. Still, there is an assumption in Rawls' theory that the advantages an individual has are arbitrary and belong to that individual. This assumption is a continuation of the previous assertion that the fruits of these arbitrary advantages should be shared by society and that the community can demand them. Sandel does not think of this as "natural." Advantages that a person has got through a contingent way are limited in favor of society and detrimental to the individual. Sandel reaches the same conclusion as Barry: The difference principle is actually "a principle of sharing, like utilitarianism."[59]

> "If nothing of moral significance could flow from what was arbitrary, then no particular person's existence could be of moral significance since which of the many sperm cells

56 ibid 72–75.

57 Rawls, *A Theory of Justice* (n 11) 96. ibid 7.

58 Kymlicka (n 36) 72–75.

59 Michael J Sandel, 'The Procedural Republic and the Unencumbered Self' (1984) 12 Political Theory 81.

> succeeds in fertilizing the egg cell is (so far as we know) arbitrary from a moral point of view. This suggests another, more vague, remark directed to the spirit of Rawls'position rather than to its letter. Each existing person is the product of a process wherein the one sperm cell which succeeds had been "fairer" as judged by Rawls' standards, that all "inequities" in it had been rectified? We should be apprehensive about any principle that would condemn morally the very sort of process that brought us to be, a principle that therefore would undercut the legitimacy of our very existence." [60]

G. A. Cohen adopts different readings of the difference principle and argues what would happen if the principle were accepted strictly as it is, and what the results would be if it were accepted loosely. According to Cohen, the principle is an argument that justifies inequalities when pecuniary incentives are the primary means. Thus, talented people will produce more and earn high incomes and transfer some of their income to the worst-off. From this perspective, inequalities are a requirement to rectify the circumstances of the worst off. Cohen raises the legitimate question of whether the equality that results when all inequalities are eliminated by the common will of men leads us to the result that everyone is worse off. Continuing this critique, Cohen says that justice requires an ethos and that rules and regulations alone are not enough to achieve it.[61] Because in Rawls' system, the continuity of gains of those who earn more is supported. Cohen emphasizes that it will be quite difficult to convince the worst-off about inequality, that is the difference principle, while there is equality. Trying to give incentives to the talented and fuel inequality instead of working to eliminate inequalities does not seem very acceptable from the viewpoint of the worst-off. It can be pondered that if the worst-off want equality and refuse the difference principle, whatever egalitarians defending the difference principle assert will be meaningless.[62] In short, under the economic system Rawls tries to defend with his difference principle, the "more talented" will earn more income and the worst-off will approve support for inequalities instead of equality. At the same time, since there is no measure as to how much it will be to the advantage of the worst off, inequality will be accepted as legitimate even when the slightest difference is created. The first topic to be underlined is how this theory legitimizes inequalities.[63] Rawls responds to these objections by saying that in practice such results cannot emerge because his principles have a natural tendency towards equality.

> "He argues that … a rise in the expectations of the best-off will have the effect of raising everybody else's expectations throughout the system. This has provoked great hostility from collectivists who say that it is a rationalization of the traditional liberal-capitalist argument that, somehow, people can only gain from an economic process if the better off are allowed freedom to accumulate. Collectivists would argue that the better off are

60 Nozick (n 9) 226.

61 GA Cohen, *If You're an Egalitarian, How Come You're So Rich?* (4th edn, Harvard University Press 2002) 124–133.

62 GA Cohen, 'Incentives, Inequality, and Community', *The Tanner Lectures on Human Values, Stanford University* (1991) 265.; ibid 269.; ibid 326.

63 Barry (n 21) 181; ibid 185.

> only able to be successful because of past privileges and class advantages which even a rigorous application of Rawls' fair equality of opportunity can do little to alleviate. ... It is certainly impossible to eliminate all the advantages that some have over others, … but it may be the case that the preservation of the more serious inequalities is a product of the granting of privileges by *political* authorities, rather than an endogenous feature of the market system itself."[64]

Cohen confronts this view with another objection:

> "the theory constructed in A Theory of Justice is proposed for a context of the mutual provision in which, although people's productive powers are different in kind and extent, the activity of each enhances the reward available to all … the question answered by principles of justice is not: who should (unilaterally) help whom and to what extent? But: how should the fruits of co-operation, a process in which everyone benefits everyone, be divided?"[65]

N.P. Barry directs the same objection brought by Cohen: "On what grounds is it reasonable for the better endowed to have their talents, in a sense, used for the well-being of the least advantaged?" Rawls is prepared for such objections. According to him, social life is a collaborative activity in which the most talented can realize their opportunities only in cooperation with the less talented. This point puts Rawls into the school of social justice because this approach emphasizes the collective dimension of justice, beyond the treatment of individuals within the rules of fair play.[66] As can be understood from the expressions below, Rawls deals with social justice, which is based on solidarity among the members of the society, with an emphasis on voluntary cooperation.

> "To begin with, it is clear that the well-being of each depends on a scheme of social cooperation without which no one could have a satisfactory life. Secondly, we can ask for the willing cooperation of everyone only if the terms of the scheme are reasonable. The difference principle, then, seems to be a fair basis on which those better endowed, or more fortunate in their social circumstances, could expect others to collaborate with them when some workable arrangement is a necessary condition of the good of all."[67]

Criticism from a similar point of view is expressed by Schwarzschild. According to him, certain groups, such as the intellectuals and the pious, are persistent in following their good. The rest of the majority, however, want economic success and a better life for their families. Rawls' difference principle, however, restricts limits people in the economic sense. At this point, the talented, fortunate, and ambitious will object to these limitations.[68]

64 ibid 105.

65 GA Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge University Press 1995) 224.

66 Barry (n 21) 183.; Rawls, *A Theory of Justice* (n 11) 103.

67 Rawls, *A Theory of Justice* (n 11) 103.

68 Schwarzschild (n 21) 169–170.

D. Structural Reflexes of the Capitalist System During the Pandemic Period

A Marxist critique offers more holistic ways of criticizing Rawls' theory and a separate title. Rawls has no problem with capitalism, classes, and exploitation. His basic problem is to provide and secure a stable, democratic, and liberal society. To put it more clearly, Rawls' theory is based on supporting capitalism and making it work better. Fictional and procedural concepts such as the social contract, the initial state, and the veil of ignorance, which are the fundamental elements of a theory of justice, do not involve the construction of a new order as in the age of Hobbes or Locke, so they only serve to legitimize existing inequalities. A holistic critique of a theory of justice is therefore only possible by criticizing the capitalism on which it is built. As other authors have pointed out, if we look outside the box of Rawlsian theory, which encompasses many procedures and is constantly being revised with a reflexive balance, the first thing we find is convincing the capitalist class to give up their profits and to integrate into this system. This is actually a proposed practice that goes against the nature of the capitalist system. Capitalism constantly has to enable profits for its very existence and cannot adapt itself to such a distribution relationship.[69] At this point, we can say beforehand to those who will remind the welfare state and/or social state practices that economically and intrinsically capitalism has the capacity to make room for such practices to protect the system itself. But these are only acceptable and applicable as long as they do not push the limits that the system imposes.

The well-ordered society argument will not be enough to persuade capitalists of Rawls' understanding of distribution according to Rawls, a well-ordered society refers to a society built by the public reason of reasonable, equal, and free people, and in which a democratic, overlapping consensus prevails. The economic system envisaged in such a society has a capitalist nature and, at the same time, the principles of distributive justice are expected to be applied.

The construction and continuity of such an order require a high level of economic prosperity in the country. This, in turn, involves extracting surplus value from other countries, in other words, exploiting them. Rawls, in his work "The Law of Peoples", tries to realize justice as fairness in the international sphere. He mentions five types of domestic societies: 1. reasonable liberal peoples, 2. decent peoples, 3. lawless states, 4. societies burdened by unfavorable conditions, 5. benevolent absolutisms. With the exception of reasonable liberal peoples and decent peoples, according to Rawls, these peoples do not participate in the creation of justice [70]

69 Falling profit rates and slowing/stopping of capital accumulation are structural features of capitalism. The "Capitalist Crisis" drives small capitalists into bankruptcy and recruits them into the army of the unemployed/workers. Large capitalists and capital groups usually grow larger after the crisis. In addition, some of the workers become unemployed in times of crisis; workers who still have not lost their jobs have to endure lower wages and worse working conditions. But the "Capitalist Crisis" never brings the end of capitalism, that is, it does not destroy capitalism. For a more detailed discussion, the law of falling profit rates can be examined. Karl Marx, *Kapital Cilt: III*, (Yordam Kitap 2015).

70 John Rawls, *The Law of Peoples: The Idea of Public Reason Revisited* (Harvard University Press 1999) 4.

It is about laying the groundwork for intervention against liberal and reasonable peoples, peoples who are not considered liberal and reasonable by The Law of Peoples. It is based on the idea that there is a valid reason for intervention against these peoples for a legitimate foundation. According to Rawls, the aggressiveness of unlawful states and their efforts to solve their problems by force are sufficient grounds for intervention with them. From the thinker's point of view, lawless states are aggressive and dangerous; even if they do not have such characteristics, they could only get to that level by force and pressure. The conclusion is that lawless states should not be negotiated with because they have aggressive and violent tendencies and that they should be intervened with, even by way of war. However, it is criticized for reflecting only the perspective of decent and liberal peoples. Rawls' point in The Law of Peoples is that interfering with others can be justified. The limits of this interference are very uncertain, leaving the door open for the powerful countries to politically and economically exploit others that are not reasonable, liberal, and decent to secure prosperity at home. Under these conditions, argues Rawls, a well-ordered society can maintain the just order by confiscating surplus value (I would also point out that this does not mean that exploitation within the country has ended). This interpretation, which sounds like a fictional story, is indeed telling of globalized neoliberalism. However, as Wallerstein said, from the beginning the world capitalist economic system has taken the form of "central capitalist countries" and "peripheral capitalist countries" from the moment it first emerged, and the transfer of wealth and power from the periphery to the center has occurred and continues to occur through various mechanisms. While this transfer enriches the center, it impoverishes the periphery. The powerful capitalist states of the center play a crucial role in the regular functioning of this flow. Therefore, the central capitalist countries are in the position of the exploiters and the peripheral capitalist countries are in the position of the exploited.[71]

There are other objections related to the framework I mentioned above. It is clear that capitalism not only does not allow the sharing of profit, but also considers extraordinary circumstances such as war, natural disasters or epidemics as opportunities to make even more profit. The giant monopolies have made enormous profits in the last two years, thanks to the practices carried out under the so-called pandemic measures and the trillions of dollars were distributed under one name or another. However, those who earn a living from their work around the world have gone through, and are still going through, a great process of impoverishment during this time. The experience of vaccines during the pandemic is proof that capitalism never cared about humanity. A cure for the disease was found, but it was not properly applied. The failure of the

71 ibid. See also, Immanuel Wallerstein, *The Capitalist World-Economy* (Cambridge University Press 1980) 1–25. Also the center-periphery relationship produces the development-underdevelopment relationship along with it. As the center develops, underdevelopment develops in the periphery. Therefore, the development-underdevelopment relationship is a product of the capitalist system.

Covid 19 vaccine distribution is another example of the Rawlsian theory of justice being unworkable due to capitalist profiteering. These vaccines are distributed very unevenly around the world. While less than 1% of people in low-income countries have received their first vaccination, in many wealthier countries more than half of the population has already been fully vaccinated. Therefore, despite the availability of 17 vaccines and the administration of more than three billion doses, millions of the most vulnerable people, such as frontline health and social care professionals and other individuals with underlying health conditions, remain unprotected.[72] Despite this, giant pharmaceutical companies are still not sharing the necessary information about the vaccine, creating an obstacle for anyone who wants to get the vaccine.

The development of AstraZeneca's vaccine most strikingly recapitulates the situation. The technology for this vaccine was developed by a publicly funded laboratory at the University of Oxford, with an analysis of more than 100 studies published between 2002 and 2020. It was also considered and announced at the outset as an open-license vaccine that could be used free of charge by any manufacturer. However, eventually, it has become a vaccine to which AstraZeneca owns the rights. The Gates Foundation, which donated $750 million to Oxford for vaccine development, forced the university to sign a special vaccine agreement with AstraZeneca, and through the influence of this "philanthropic" capitalist, the vaccine, which was to be distributed to the world at very low prices, became the property of the giant drug monopoly AstraZeneca. [73]

The pandemic conditions in which humanity finds itself in a very difficult situation have created the most likely opportunity to observe Rawls' theory of justice as fairness, even if it is not in its ideal state. It is clear that those who are already poor, those who are unemployed in the process, and those who for various reasons have difficulty meeting their basic needs are the most disadvantaged segment of society. Again, according to Rawls' theory of justice, justice as fairness is realized through a transfer from the advantaged to the disadvantaged. As I mentioned above, Rawls did not answer the question of how to persuade the rich to do this. For my part, I suppose it is reasonable to expect the rich to participate in a pandemic like Covid by ceding some of their profits. However, the reports, articles, and statistics published by Oxfam show otherwise.

72 Also see 'Monitoring Metrics Related to the Global Covid-19 Vaccination Strategy in a Changing World: July 2022' (2022) Meeting Report <https://www.who.int/publications/m/item/monitoring-metrics-related-to-the-global-covid-19-vaccination-strategy-in-a-changing-world--july-2022-update>.

73 Jayati Ghosh, 'The Political Economy of Covid-19 Vaccines' *The India Forum* (3 March 2021) <https://www.theindiaforum.in/article/political-economy-covid-19-vaccines> accessed 15 October 2022., see also 'They Pledged to Donate Rights to Their COVID Vaccine, Then Sold Them to Pharma' <https://khn.org/news/rather-than-give-away-its-covid-vaccine-oxford-makes-a-deal-with-drugmaker/> accessed 17 October 2022.. "The answer to one of the most important public health questions of our time — who gets access to vaccines? — was mostly determined neither by political representatives nor scientists, but by corporate executives." Zain Rizvi, 'Reclaiming Global Public Health' <https://blog.petrieflom.law.harvard.edu/2022/09/20/reclaiming-global-public-health/#more-31291> accessed 18 October 2022.

Lockdowns, restrictions on freedom, discussions about the possibility of denying medical care, and numerous other changes in people's everyday behavior have been triggered by the COVID -19 pandemic. The pandemic shines a spotlight on a host of important justice issues that will require our attention for some time to come.

The COVID -19 pandemic has brought to light a sickening underbelly of the neoliberal economic model and brought into striking contrast the increasing inequality that characterizes our societies.

One of the striking results is that inequalities are much deeper during the Covid period;

> "The rise in private wealth has also been unequal within countries and at the world level. Global multimillionaires have captured a disproportionate share of global wealth growth over the past several decades: the top 1% took 38% of all additional wealth accumulated since the mid-1990s, whereas the bottom 50% captured just 2% of it.
>
> This inequality stems from serious inequality in growth rates between the top and the bottom segments of the wealth distribution. The wealth of richest individuals on earth has grown at 6 to 9% per year since 1995, whereas average wealth has grown at 3.2% per year. Since 1995, the share of global wealth possessed by billionaires has risen from 1% to over 3%. This increase was exacerbated during the COVID pandemic. In fact, 2020 marked the steepest increase in global billionaires' share of wealth on record."[74]

In the other study published by Oxfam, titled "Power, Profits and the Pandemic", it is predicted that the 32 most profitable companies in the world will make 109 billion more profit in 2020 than in previous years, while 400 million people have lost their jobs.

I would like to support my theses with a long quote from the Oxfam article:

> "Oxfam analysis demonstrates the extent to which some companies are making excessive profits during the pandemic. Studying the financial statements of the most profitable firms across the USA, Europe, Japan, South Korea, Australia, Brazil, India, Nigeria, and South Africa, Oxfam found 32 companies are expected to make considerably more in 2020 than in previous, very profitable years. In fact, 32 of the world's most profitable companies are together expected to rake $109bn more during the pandemic than the average of the four previous years, which were already quite profitable. As many of the world's billionaires are also some of the largest shareholders in these companies, the 25 wealthiest billionaires increased their wealth by a staggering $255bn between mid-March and late-May alone.
>
> Some would argue that corporates have made up for this with their tax payments and the generosity of their philanthropy, but the evidence does not support this. To the contrary, the US government is estimated to have lost around $135bn in revenue due to corporate tax avoidance in 2017. In contrast, corporate philanthropy has amounted to less than

74 'World Inequality Report 2022' <https://wir2022.wid.world/executive-summary/> accessed 15 October 2022.

> $20bn a year. Similarly, in India, companies' $6bn corporate social responsibility contributions pale in comparison to the estimated loss of $47bn in government revenue due to corporate tax avoidance annually.
>
> At a global level, Oxfam analysis has found that the world's largest companies' donations during COVID-19 on average amounted to 0.32% of operating income for 2019 and thus do not constitute an adequate contribution considering the financial costs of this crisis and the extent of corporate profits."[75]

According to the "World Inequality Report 2022", wealth disparities around the world are more pronounced than income disparities. With only 2% of the world's wealth in their possession, the poorest half of the population has virtually no money. In contrast, 76% of the world's wealth is owned by the richest 10% of people. The lower 50% of people own an average of $4,100, while the richest 10% own $771,300.[76]

One of the main conclusions of this report is that inequality is not inevitable, but a political choice. According to the report, income and wealth inequality has increased almost everywhere since the 1980s as a result of a series of deregulation and liberalization initiatives that have taken different forms in different countries.[77]

In conclusion, I can briefly summarize the situation as follows: Capitalism will never give up its profits. It only carries out social democratic or welfare state practices such as ensuring its own continuity and preventing crises of capitalism. That's why Rawls' theory of justice is a theory that has no reality under capitalism, and so I think it creates an ideology of the benevolence of capitalism while at the same time legitimizing inequalities.

III. Conclusion

Criticism of Rawls' model of justice is not limited to the above. The fact that Rawls' views on justice are still intensely debated is due to the dire state that inequalities have reached in our world today.

Rawls seeks an answer to the question of how people can live in peace and tranquilly within a liberal order in a pluralistic society. Therefore, the theory of justice aims to create a "pluralistic and tolerant" society in which different good and cultures can coexist.

It has long been known that liberalism alone cannot achieve equality among classes. The legitimacy of liberalism is even more questioned in today's conditions where the gap between rich and poor has become a chasm. In this context, Rawls

75 Uwe Gneiting, Nicholas Lusiani and Irit Tamir, 'Power, Profits and the Pandemic' (Oxfam GB for International 2020) <https://www.oxfam.org/en/research/power-profits-and-pandemic>.

76 'World Inequality Report 2022' (n 70).

77 ibid.

presents the question of how wealth should be distributed in a liberal society as a problem of justice.

In his theory of "justice as fairness," which seeks to reconcile liberty and equality, Rawls tries to overcome conflict over limited resources by viewing social collaboration as justice. Limited resources and different plans that each individual wants to realize for a good life are necessary to achieve social collaboration. The concept of justice is not limited to income distribution. According to him, the basic structure of society is the primary object of justice. Social institutions are essential for people to have a fair starting position.

According to the difference principle, which is crucial in Rawls' theory of justice, "social and economic inequalities should be for the greatest benefit of the least advantaged members of society." In some ways, this looks like a principle that protects the most disadvantaged, but it is a guarantor of the capitalist system. In other words, this conception of justice does not eliminate inequalities but minimizes conflicts for the continuation of the system. It tries to create "justice as fairness" without tearing down the limits of liberalism but also taking into account the ever-deepening gap between classes.

Since the COVID-19 pandemic, which disrupted and changed the daily lives of people all over the world, debates on justice came to the forefront on issues such as lockdowns, restriction of freedoms, the right to refuse medical treatment, and compulsory vaccination. With people's health and well-being under threat, it was necessary to ask whether Rawls' theory of justice could be a solution to these problems. Poverty is not only low monetary income but also not being able to access basic human requirements, medical treatment, education and employment

To quote a report published on January 17 by Oxfam: "The wealth of the world's 10 richest men has doubled since the pandemic began. The incomes of 99% of humanity are worse off because of COVID-19. Widening economic, gender, and racial inequalities—as well as the inequality that exists between countries—are tearing our world apart. This is not by chance, but choice: "economic violence" is perpetrated when structural policy choices are made for the richest and most powerful people. This causes direct harm to us all, and to the poorest people, women, and girls, and racialized groups most. Inequality contributes to the death of at least one person every four seconds."[78]

In the coronavirus pandemic, all kinds of inequality, especially income inequality, became an important indicator of who will get to live and who will die. If millions of people had access to the vaccine, they would not have died. In this period, it was

78 'Inequality Kills' <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621341/bp-inequality-kills-170122-en.pdf;jsessionid=287BCECEE53DE85B319E0C548F97C087?sequence=9> accessed 19 January 2022.

observed yet again that capitalism never misses an opportunity to turn disasters into profit. Rawls' distributive justice theory is not practically applicable under capitalism. However, even though this theory does not have a way to achieve justice but has its importance by keeping the pursuit of justice alive.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.

Bibliography

Arnhart L, *Political Questions: Political Philosophy from Platon to Pinker* (4th edn, Waveland Press Inc 2015)

Barry NP, *An Introduction to Modern Political Theory* (3rd edn, The Macmillan Press ltd 1995)

Brian B, *The Liberal Theory of Justice* (Oxford University Press 1973)

Cohen GA, 'Incentives, Inequality, and Community', *The Tanner Lectures on Human Values, Stanford University* (1991)

——, *Self-Ownership, Freedom, and Equality* (Cambridge University Press 1995)

——, *If You're an Egalitarian, How Come You're So Rich?* (4th edn, Harvard University Press 2002)

Fleischacker S, *A Short History of Distributive Justice* (Harvard University Press 2004)

Freeman M, 'Introduction: John Rawls – An Overview', *The Cambridge Companion to Rawls* (Cambridge University Press 2003)

Ghosh J, 'The Political Economy of Covid-19 Vaccines' *The India Forum* (3 March 2021) <https://www.theindiaforum.in/article/political-economy-covid-19-vaccines> accessed 15 October 2022

Gneiting U, Lusiani N and Tamir I, 'Power, Profits and the Pandemic' (Oxfam GB for International 2020) <https://www.oxfam.org/en/research/power-profits-and-pandemic>

Hamilton P, 'Editor's Foreword' in Bryan Turner, *Equality* (Ellis Horwood Limited)

'Inequality Kills' <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621341/bp-inequality-kills-170122-en.pdf;jsessionid=287BCECEE53DE85B319E0C548F97C087?sequence=9> accessed 19 January 2022

Kelly E, 'Editor's Foreword' in John Rawls, *Justice as Fairness: A Restatement* (The Belknap Press of Harvard University Press 2001)

Kolm S-C, *Modern Theories of Justice* (MIT Press 2002)

Kymlicka W, *Contemporary Political Philosophy* (2nd edn, Oxford University Press 2002)

Lovett F, *Rawls's A Theory of Justice: A Reader's Guide* (Continiuum I P G 2011)

'Monitoring Metrics Related to the Global Covid-19 Vaccination Strategy in a Changing World: July 2022' (2022) Meeting Report <https://www.who.int/publications/m/item/monitoring-metrics-related-to-the-global-covid-19-vaccination-strategy-in-a-changing-world--july-2022-update>

Nozick R, *Anarchy, State and Utopia* (Blackwell, Reprint 1999)

P. Pomerleau W, 'Western Theory of Justice' (Internet Encyclopedia of Philosophy) <https://iep.utm.edu/justwest/#H5> accessed 22 October 2021

Rawls J, 'Justice as Fairness' (1958) 67 The Philosophical Review 164

——, *A Theory of Justice* (Oxford University Press 1971)

——, 'Basic Liberties and Their Priority', *The Tanner Lectures on Human Values* (1981) <https://tannerlectures.utah.edu/_resources/documents/a-to-z/r/rawls82.pdf 10/01/2022.> accessed 10 January 2022

——, *Justice as Fairness: A Restatement* (Erin Kelly ed, MA: Harvard University Press 2001)

——, *The Law of Peoples: The Idea of Public Reason Revisited* (Harvard University Press 1999)

Rizvi Z, 'Reclaiming Global Public Health' <https://blog.petrieflom.law.harvard.edu/2022/09/20/reclaiming-global-public-health/#more-31291> accessed 18 October 2022

Rubinstein D, 'Capitalism, Social Mobility, and Distributive Justice' (1993) 19 Social Theory and Practice 183

Samuel G, 'John Rawls: A Theory of Justice' in Anthony de Crespigny and Kenneth Minogue (eds), *Contemporary Political Philosophers* (Dodd, Mead Company 1975)

Sandel MJ, 'The Procedural Republic and the Unencumbered Self' (1984) 12 Political Theory 81

——, *Justice: What's the Right Thing To Do?* (Cambridge University Press 1998)

——, *Liberalism and the Limits of Justice* (Cambridge University Press 1998)

Schmidtz D, *Elements of Justice* (Cambridge University Press 2006)

Schwarzschild M, 'Constitutional Law and Equality' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell Publishing)

'They Pledged to Donate Rights to Their COVID Vaccine, Then Sold Them to Pharma' <https://khn.org/news/rather-than-give-away-its-covid-vaccine-oxford-makes-a-deal-with-drugmaker/> accessed 17 October 2022

Turner B, *Equality* (Ellis Horwood Limited 1986)

Wacks R, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edn, Oxford University Press 2012)

Wallerstein I, *The Capitalist World-Economy* (Cambridge University Press 1980)

'World Inequality Report 2022' <https://wir2022.wid.world/executive-summary/> accessed 15 October 2022

DESCRIPTION

Annales de la Faculté de Droit d'Istanbul has been an open access, peer-reviewed, scholarly journal published by İstanbul University, Faculty of Law since 1951.

AIM and SCOPE

Annales de la Faculté de Droit d'Istanbul aims to publish high quality articles and thus contribute to the accumulation and dissemination of knowledge in the field.

Annales de la Faculte de Droit d'Istanbul is a well-known and long-standing peer-reviewed academic journal that reviews the latest evolutions and developments in the legal field since 1951. The approach of the Journal is a comparative one and accordingly will focus on not only Turkish domestic law but also German, Swiss, French, European Union and Anglo-American laws as well as all fields of international law. It embraces work that is theoretical, empirical, socio-legal, doctrinal or comparative that relates to any legal systems. Each edition of the Annales contains significant theoretical contributions while also being a dossier of information on the cross-cultural application of a specific area of law. Annales also translated texts of Turkish relevant legislation. It is worth noting that Turkiye becomes very important actor in the process of enlargement of EU and the regional leader in the Middle East and Asia Minor. Annales is the leading forum for research and discussion of the law and legal systems of these regions. Thus, the Annales with its Editorial Board including both national and international leading experts is the magnet for all legal scholars working in this region.

Priority will be given to authors who will present original perspective on legal issues as described above. However, it is open for all scholars around the world to contribute to the Annales. The editorial board will be pleased to receive submissions from foreign scholars all over the world.

EDITORIAL POLICIES AND PEER REVIEW PROCESS

Publication Policy

The subjects covered in the manuscripts submitted to the Journal for publication must be in accordance with the aim and scope of the Journal. The Journal gives priority to original research papers submitted for publication.

General Principles

Only those manuscripts approved by its every individual author and that were not published before in or sent to another journal, are accepted for evaluation.

Submitted manuscripts that pass preliminary control are scanned for plagiarism using iThenticate software. After plagiarism check, the eligible ones are evaluated by editor-in-chief for their originality, methodology, the importance of the subject covered and compliance with the journal scope.

Short presentations that took place in scientific meetings can be referred if indicated in the article. The editor hands over the papers matching the formal rules to at least two national/international referees for evaluation and gives green light for publication upon modification by the authors in accordance with the referees' claims. Changing the name of an author (omission, addition or order) in papers submitted to the Journal requires written permission of all declared authors. Refused manuscripts and graphics are not returned to the author. The copyright of the published articles and pictures belong to the Journal.

Author Responsibilities

It is authors' responsibility to ensure that the article is in accordance with scientific and ethical standards and rules. And authors must ensure that submitted work is original. They must certify that the manuscript has not previously been published elsewhere or is not currently being considered for publication elsewhere, in any language. Applicable copyright laws and conventions must be followed. Copyright material (e.g. tables, figures or extensive quotations) must be reproduced only with appropriate permission and acknowledgement. Any work or words of other authors, contributors, or sources must be appropriately credited and referenced.

All the authors of a submitted manuscript must have direct scientific and academic contribution to the manuscript. The author(s) of the original research articles is defined as a person who is significantly involved in "conceptualization and design of the study", "collecting the data", "analyzing the data", "writing the manuscript", "reviewing the manuscript with a critical perspective" and "planning/ conducting the study of the manuscript and/or revising it". Fund raising, data collection or supervision of the research group are not sufficient roles to be accepted as an author. The author(s) must meet all these criteria described above. The order of names in the author list of an article must be a co-decision and it must be indicated in the Copyright Agreement Form. The individuals who do not meet the authorship criteria but contributed to the study must take place in the acknowledgement section. Individuals providing technical support, assisting writing, providing a general support, providing material or financial support are examples to be indicated in acknowledgement section.

All authors must disclose all issues concerning financial relationship, conflict of interest, and competing interest that may potentially influence the results of the research or scientific judgment. When an author discovers a significant error or inaccuracy in his/her own published paper, it is the author's obligation to promptly cooperate with the Editor-in-Chief to provide retractions or corrections of mistakes.

Peer Review Process

Only those manuscripts approved by its every individual author and that were not published before in or sent to another journal, are accepted for evaluation.

Submitted manuscripts that pass preliminary control are scanned for plagiarism using iThenticate software. After plagiarism check, the eligible ones are evaluated by editor-in-chief for their originality, methodology, the importance of the subject covered and compliance with the journal scope. Editor-in-chief evaluates manuscripts for their scientific content without regard to ethnic origin, gender, sexual orientation, citizenship, religious belief or political philosophy of the authors and ensures a fair double-blind peer review of the selected manuscripts.

The selected manuscripts are sent to at least two national/international referees for evaluation and publication decision is given by editor-in-chief upon modification by the authors in accordance with the referees' claims.

Editor in chief does not allow any conflicts of interest between the authors, editors and reviewers and is responsible for final decision for publication of the manuscripts in the Journal. Reviewers' judgments must be objective. Reviewers' comments on the following aspects are expected while conducting the review.

- Does the manuscript contain new and significant information?
- Does the abstract clearly and accurately describe the content of the manuscript?
- Is the problem significant and concisely stated?
- Are the methods described comprehensively?

- Are the interpretations and consclusions justified by the results?
- Is adequate references made to other Works in the field?
- Is the language acceptable?

Reviewers must ensure that all the information related to submitted manuscripts is kept as confidential and must report to the editor if they are aware of copyright infringement and plagiarism on the author's side.

A reviewer who feels unqualified to review the topic of a manuscript or knows that its prompt review will be impossible should notify the editor and excuse himself from the review process. The editor informs the reviewers that the manuscripts are confidential information and that this is a privileged interaction. The reviewers and editorial board cannot discuss the manuscripts with other persons. The anonymity of the referees is important.

PUBLICATION ETHICS AND PUBLICATION MALPRACTICE STATEMENT

Annales de la Faculté de Droit d'Istanbul is committed to upholding the highest standards of publication ethics and pays regard to Principles of Transparency and Best Practice in Scholarly Publishing published by the Committee on Publication Ethics (COPE), the Directory of Open Access Journals (DOAJ), the Open Access Scholarly Publishers Association (OASPA), and the World Association of Medical Editors (WAME) on https://publicationethics.org/resources/guidelines-new/principlestransparency-and-best-practice-scholarly-publishing

All parties involved in the publishing process (Editors, Reviewers, Authors and Publishers) are expected to agree on the following ethical principles.

All submissions must be original, unpublished (including as full text in conference proceedings), and not under the review of any other publication synchronously. Each manuscript is reviewed by one of the editors and at least two referees under double-blind peer review process. Plagiarism, duplication, fraud authorship/denied authorship, research/data fabrication, salami slicing/salami publication, breaching of copyrights, prevailing conflict of interest are unnethical behaviors.

All manuscripts not in accordance with the accepted ethical standards will be removed from the publication. This also contains any possible malpractice discovered after the publication. In accordance with the code of conduct we will report any cases of suspected plagiarism or duplicate publishing.

Research Ethics

The journal adheres to the highest standards in research ethics and follows the principles of international research ethics as defined below. The authors are responsible for the compliance of the manuscripts with the ethical rules.

- Principles of integrity, quality and transparency should be sustained in designing the research, reviewing the design and conducting the research.
- The research team and participants should be fully informed about the aim, methods, possible uses and requirements of the research and risks of participation in research.
- The confidentiality of the information provided by the research participants and the confidentiality of the respondents should be ensured. The research should be designed to protect the autonomy and dignity of the participants.
- Research participants should participate in the research voluntarily, not under any coercion.

- Any possible harm to participants must be avoided. The research should be planned in such a way that the participants are not at risk.
- The independence of research must be clear; and any conflict of interest or must be disclosed.
- In experimental studies with human subjects, written informed consent of the participants who decide to participate in the research must be obtained. In the case of children and those under wardship or with confirmed insanity, legal custodian's assent must be obtained.
- If the study is to be carried out in any institution or organization, approval must be obtained from this institution or organization.
- In studies with human subject, it must be noted in the method's section of the manuscript that the informed consent of the participants and ethics committee approval from the institution where the study has been conducted have been obtained.

Open Access Statement

The journal is an open access journal and all content is freely available without charge to the user or his/her institution. Except for commercial purposes, users are allowed to read, download, copy, print, search, or link to the full texts of the articles in this journal without asking prior permission from the publisher or the author. This is in accordance with the BOAI definition of open access. The open access articles in the journal are licensed under the terms of the Creative Commons Attribution-NonCommercial 4.0 International (CC BY-NC 4.0) license.

Article Processing Charge

All expenses of the journal are covered by the Istanbul University. Processing and publication are free of charge with the journal. There is no article processing charges or submission fees for any submitted or accepted articles.

Copyright Notice

Authors publishing with the journal retain the copyright to their work licensed under the Creative Commons Attribution-NonCommercial 4.0 International license (CC BY-NC 4.0) (https://creativecommons.org/licenses/by-nc/4.0/) and grant the Publisher non-exclusive commercial right to publish the work. CC BY-NC 4.0 license permits unrestricted, non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Responsibility for the Editor and Reviewers

Editor-in-Chief evaluates manuscripts for their scientific content without regard to ethnic origin, gender, sexual orientation, citizenship, religious belief or political philosophy of the authors. He/She provides a fair double-blind peer review of the submitted articles for publication and ensures that all the information related to submitted manuscripts is kept as confidential before publishing.

Editor-in-Chief is responsible for the contents and overall quality of the publication. He/She must publish errata pages or make corrections when needed.

Editor-in-Chief does not allow any conflicts of interest between the authors, editors and reviewers.

Only he has the full authority to assign a reviewer and is responsible for final decision for publication of the manuscripts in the Journal.

Reviewers must have no conflict of interest with respect to the research, the authors and/or the research funders. Their judgments must be objective.

Reviewers must ensure that all the information related to submitted manuscripts is kept as confidential and must report to the editor if they are aware of copyright infringement and plagiarism on the author's side.

A reviewer who feels unqualified to review the topic of a manuscript or knows that its prompt review will be impossible should notify the editor and excuse himself from the review process.

The editor informs the reviewers that the manuscripts are confidential information and that this is a privileged interaction. The reviewers and editorial board cannot discuss the manuscripts with other persons. The anonymity of the referees must be ensured. In particular situations, the editor may share the review of one reviewer with other reviewers to clarify a particular point.

MANUSCRIPT ORGANIZATION

Language

The language of the journal is French, English and German.

Manuscript Organization and Submission

All correspondence will be sent to the first-named author unless otherwise specified. Manuscpript is to be submitted online via http://dergipark.gov.tr/login that can be accessed at https://dergipark.org.tr/tr/pub/iuafdi and it must be accompanied by a Title Page specifying the article category (i.e. research article, review etc.) and including information about the manuscript (see the Submission Checklist). Manuscripts should be prepared in Microsoft Word 2003 and upper versions. In addition, Copyright Agreement Form that has to be signed by all authors must be submitted.

1. The manuscripts should be in A4 paper standards: having 2.5 cm margins from right, left, bottom and top, Times New Roman font style in 12 font size and line spacing of 1.5. Due to double blind peer review, manuscript file must not include any information about the author.
2. Title Page including author information must be submitted together with the manuscript. The title page is to include fully descriptive title of the manuscript and, affiliation, title, e-mail address, postal address, ORCIDs, phone and fax number of the author(s) (see The Submission Checklist).
3. The manuscripts should contain mainly these components: title, abstract and keywords, sections, references and, tables and figures.
4. Before the introduction part, there should be abstract between 150-200 words both in the language of the article and in English summarizing the scope, the purpose, the results of the study and the methodology used. Underneath the abstracts, 3-5 keywords that inform the reader about the content of the study should be specified. For the manuscripts in French and German, an extended abstract of 600-800 words is required as well.
5. Apart from research articles and reviews, reviews of judgements, legislation assessments and meeting notes are included within the journal.
6. Annales de la Faculté de Droit d'Istanbul offers two options of referencing style. Authors should use OSCOLA. Accuracy of citation is the author's responsibility. All references should be cited in text.
7. If the manuscript includes a table or graphic, raw data must be submitted as a separate Excel file together with the manuscript Word file. Tables, graphs and figures should be given with a defining title and with a number if it is necessary to follow the idea of the article.

8. It is accepted that the submitted manuscripts are in line with the journal's rules. In case that violation of scientific research and ethical rules and too many writing errors are detected the manuscript would be rejected by the Editor and Editorial Board.
9. Authors are responsible for all statements made in their work submitted to the Journal for publication.
10. The manuscripts submitted to the journal will not be returned whether they are published or not.

REFERENCES

Reference Style and Format

Annales de la Faculté de Droit d'Istanbul offers two options of referencing style. Authors should use OSCOLA. OSCOLA (Oxford Standard for the Citation of Legal Authorities) is published by the University of Oxford and detail and examples about the style can be found at https://www.law.ox.ac.uk/research-subject-groups/publications/oscola

OSCOLA Reference Examples

Primary Sources

Do not use full stops in abbreviations. Separate citations with a semi-colon.

Cases

Give the party names, followed by the neutral citation, followed by the *Law Reports* citation (eg AC, Ch, QB). If there is no neutral citation, give the *Law Reports* citation followed by the court in brackets. If the case is not reported in the *Law Reports*, cite the All ER or the WLR, or failing that a specialist report.

Corr v IBC Vehicles Ltd [2008] UKHL 13, [2008] 1 AC 884.

R (Roberts) v Parole Board [2004] EWCA Civ 1031, [2005] QB 410.

Page v Smith [1996] AC 155 (HL).

When pinpointing, give paragraph numbers in square brackets at the end of the citation. If the judgment has no paragraph numbers, provide the page number pinpoint after the court.

Callery v Gray [2001] EWCA Civ 1117, [2001] 1 WLR 2112 [42], [45].

Bunt v Tilley [2006] EWHC 407 (QB), [2006] 3 All ER 336 [1]–[37].

R v Leeds County Court, ex p Morris [1990] QB 523 (QB) 530–31.

If citing a particular judge:

Arscott v The Coal Authority [2004] EWCA Civ 892, [2005] Env LR 6 [27] (Laws LJ).

Statutes and statutory instruments

Act of Supremacy 1558.

Human Rights Act 1998, s 15(1)(b).

Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166.

EU legislation and cases

Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1, art 5.

Case C–176/03 *Commission v Council* [2005] ECR I–7879, paras 47–48.

European Court of Human Rights

Omojudi v UK (2009) 51 EHRR 10.

Osman v UK ECHR 1998–VIII 3124.

Balogh v Hungary App no 47940/99 (ECHR, 20 July 2004).

Simpson v UK (1989) 64 DR 188.

Secondary Sources

Books

Give the author's name in the same form as in the publication, except in bibliographies, where you should give only the surname followed by the initial(s). Give relevant information about editions, translators and so forth before the publisher, and give page numbers at the end of the citation, after the brackets.

Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) 268.

Gareth Jones, *Goff and Jones: The Law of Restitution* (1st supp, 7th edn, Sweet & Maxwell 2009).

K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998).

Contributions to edited books

Francis Rose, 'The Evolution of the Species' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks (OUP 2006).*

Encyclopedias

Halsbury's Laws (5th edn, 2010) vol 57, para 53.

Journal articles

Paul Craig, 'Theory, "Pure Theory" and Values in Public Law' [2005] PL 440.

When pinpointing, put a comma between the first page of the article and the page pinpoint.

JAG Griffith, 'The Common Law and the Political Constitution'(2001) 117 LQR 42, 64.

Online journals

Graham Greenleaf, 'The Global Development of Free Access to Legal Information' (2010) 1(1) EJLT < http://ejlt.org//article/view/17 > accessed 27 July 2010.

Command papers and Law Commission reports

Department for International Development, *Eliminating World Poverty: Building our Common Future* (White Paper, Cm 7656, 2009) ch 5.

Law Commission, *Reforming Bribery* (Law Com No 313, 2008) paras 3.12–3.17.

Websites and blogs

Sarah Cole, 'Virtual Friend Fires Employee' (*Naked Law*, 1 May 2009)

<www.nakedlaw.com/2009/05/index.html> accessed 19 November 2009.

Newspaper articles

Jane Croft, 'Supreme Court Warns on Quality' *Financial Times* (London, 1 July 2010) 3.

SUBMISSION CHECKLIST

Ensure that the following items are present:

- ✓ Confirm that the category of the manuscript is specifed.
- ✓ Confirm that "the paper is not under consideration for publication in another journal".
- ✓ Confirm that disclosure of any commercial or financial involvement is provided.
- ✓ Confirm that last control for fluent English was done.
- ✓ Confirm that journal policies detailed in Information for Authors have been reviewed.
- ✓ Confirm that the references cited in the text and listed in the references section are in line with OSCOLA

- Copyright Agreement Form
- Permission of previous published material if used in the present manuscript
- Title Page
  - ✓ The category of the manuscript
  - ✓ The title of the manuscript both in the language of article and in English
  - ✓ All authors' names and affiliations (institution, faculty/department, city, country), e-mail addresses
  - ✓ Corresponding author's email address, full postal address, telephone and fax number
  - ✓ ORCIDs of all authors..
  - ✓ Grant support (if exists)
  - ✓ Conflict of interest (if exists)
  - ✓ Acknowledgement (if exists)
- Main manuscript document
  - ✓ Important: Please avoid mentioning the author (s) names in the manuscript
  - ✓ The title of the manuscript both in the language of article and in English
  - ✓ Abstracts (150-200 words) both in the language of article and in English
  - ✓ Key words: 3-5 words both in the language of article and in English
  - ✓ Extended abstract in English if the manuscript is in French or German (600-800 words)
  - ✓ References
  - ✓ All tables, illustrations (figures) (including title, explanation, captions)

COPYRIGHT AGREEMENT FORM / TELİF HAKKI ANLAŞMASI FORMU

İstanbul University
İstanbul Üniversitesi

Journal name: Annales de la Faculté de Droit d'Istanbul
Dergi Adı: Annales de la Faculté de Droit d'Istanbul

Copyright Agreement Form
Telif Hakkı Anlaşması Formu

Responsible/Corresponding Author *Sorumlu Yazar*	
Title of Manuscript *Makalenin Başlığı*	
Acceptance date *Kabul Tarihi*	
List of authors *Yazarların Listesi*	

Sıra No	**Name - Surname** *Adı-Soyadı*	**E-mail** *E-Posta*	**Signature** *İmza*	**Date** *Tarih*
1				
2				
3				
4				
5				

Manuscript Type (Research Article, Review, etc.) *Makalenin türü (Araştırma makalesi, Derleme, v.b.)*	

Responsible/Corresponding Author:
Sorumlu Yazar:

University/company/institution	*Çalıştığı kurum*	
Address	*Posta adresi*	
E-mail	*E-posta*	
Phone; mobile phone	*Telefon no; GSM no*	

The author(s) agrees that:
The manuscript submitted is his/her/their own original work and has not been plagiarized from any prior work,
all authors participated in the work in a substantive way and are prepared to take public responsibility for the work,
all authors have seen and approved the manuscript as submitted,
the manuscript has not been published and is not being submitted or considered for publication elsewhere,
the text, illustrations, and any other materials included in the manuscript do not infringe upon any existing copyright or other rights of anyone.
ISTANBUL UNIVERSITY will publish the content under Creative Commons Attribution-NonCommercial 4.0 International (CC BY-NC 4.0) license that gives permission to copy and redistribute the material in any medium or format other than commercial purposes as well as remix, transform and build upon the material by providing appropriate credit to the original work.
The Contributor(s) or, if applicable the Contributor's Employer, retain(s) all proprietary rights in addition to copyright, patent rights.
I/We indemnify ISTANBUL UNIVERSITY and the Editors of the Journals, and hold them harmless from any loss, expense or damage occasioned by a claim or suit by a third party for copyright infringement, or any suit arising out of any breach of the foregoing warranties as a result of publication of my/our article.
I/We also warrant that the article contains no libelous or unlawful statements and does not contain material or instructions that might cause harm or injury.
This Copyright Agreement Form must be signed/ratified by all authors. Separate copies of the form (completed in full) may be submitted by authors located at different institutions; however, all signatures must be original and authenticated.

Yazar(lar) aşağıdaki hususları kabul eder
Sunulan makalenin yazar(lar)ın orijinal çalışması olduğunu ve intihal yapmadıklarını,
Tüm yazarların bu çalışmaya asli olarak katılmış olduklarını ve bu çalışma için her türlü sorumluluğu aldıklarını,
Tüm yazarların sunulan makalenin son halini gördüklerini ve onayladıklarını,
Makalenin başka bir yerde basılmadığını veya basılmak için sunulmadığını,
Makalede bulunan metnin, şekillerin ve dokümanların diğer şahıslara ait olan Telif Haklarını ihlal etmediğini kabul ve taahhüt ederler.
İSTANBUL ÜNİVERSİTESİ'nin bu fikri eseri, Creative Commons Atıf-GayrıTicari 4.0 Uluslararası (CC BY-NC 4.0) lisansı ile yayınlamasına izin verirler. Creative Commons Atıf-GayrıTicari 4.0 Uluslararası (CC BY-NC 4.0) lisansı, eserin ticari kullanım dışında her boyut ve formatta paylaşılmasına, kopyalanmasına, çoğaltılmasına ve orijinal esere uygun şekilde atıfta bulunmak kaydıyla yeniden düzenleme, dönüştürme ve eserin üzerine inşa etme dâhil adapte edilmesine izin verir.
Yazar(lar)ın veya varsa yazar(lar)ın işvereninin telif dâhil patent hakları, fikri mülkiyet hakları saklıdır.
Ben/Biz, telif hakkı ihlali nedeniyle üçüncü şahıslarca vuku bulacak hak talebi veya açılacak davalarda İSTANBUL ÜNİVERSİTESİ ve Dergi Editörlerinin hiçbir sorumluluğunun olmadığını, tüm sorumluluğun yazarlara ait olduğunu taahhüt ederim/ederiz.
Ayrıca Ben/Biz makalede hiçbir suç unsuru veya kanuna aykırı ifade bulunmadığını, araştırma yapılırken kanuna aykırı herhangi bir malzeme ve yöntem kullanılmadığını taahhüt ederim/ederiz.
Bu Telif Hakkı Anlaşması Formu tüm yazarlar tarafından imzalanmalıdır/onaylanmalıdır. Form farklı kurumlarda bulunan yazarlar tarafından ayrı kopyalar halinde doldurularak sunulabilir. Ancak, tüm imzaların orijinal veya kanıtlanabilir şekilde onaylı olması gerekir.

Responsible/Corresponding Author; *Sorumlu Yazar;*	**Signature** / *İmza*	**Date** / *Tarih*
		……../……../……