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RESEARCH ARTICLE

Critically Queer Yet Politically Affirmative Engagements with Human Rights

Remzi Orkun Güner*

Abstract

Considering recent queer engagements with international human rights, this article argues that emerging attempts at queering rights have often resulted in framing queer critique into the normativity of human rights. This article critiques this tendency, suggesting that queer engagement with rights can be critical yet (potentially) affirmative. It shows that queer critique, understood as non-essentialist politics, can contribute to contemporary critical human rights studies and their analyses of identity-producing functions of rights. In this way, the paper engages not only with the subject paradox of the rights discourse but also with queer responses to identity-based rights claims. I argue that queer critiques, shifting the focus from ontology to politics, encourage an affirmative engagement with framings of rights by considering identities as political claims, understanding rights not in ontological terms but as instruments for shifting temporary strategies in practice. The arena of rights, a site where debates about the definitions of human are contested, is a crucial space for deploying non-essentialist politics. In this context, the article refers to queer as a critical method in deploying rights to reduce the disciplinary effects of identities, helping us to free ourselves, our engagements with others, and politics from the eyes of the Normative.

Keywords

Human rights, identity politics, critical theory, queer theory, Michel Foucault

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Rights produce the subject they pretend only to presume.[1]
Wendy Brown

...it is not just gender and sexuality that are in some sense performative, but their political articulation and the claims made on their behalf are performative, as well.[2]
Judith Butler

This article examines the current engagements of queer theory with the politics of human rights and debates the potential of queer to serve as a critical method in contemporary advocacy for rights. Over the past decade, legal scholars have increasingly turned their attention to queer theory and politics. Recent analyses suggest that this curiosity often identifies queer politics with the increasing formalization of LGBTI+ rights as human rights. Attempts at *queering* international human rights have led to a normalization process of queer within the human rights discourse, moving queer away from its critical *ethos*. In other words, 'queer has gone normative' within the framework of human rights. Rather than equating queer politics with LGBTI+ rights or regarding them as mutually exclusive, this paper advocates an alternative positive engagement between these two forms of politics. Drawing inspiration from Michel Foucault, Wendy Brown, and Judith Butler, this study proposes a *critically queer yet politically affirmative engagement*.

Within this engagement, the critique of queer theories on mainstream rights advocacy shifts the focus *from ontology to politics*. They encourage us to consider homogenizing identities not as ontological claims but as political constructs, as impossible yet politically necessary categories. Accordingly, with their simultaneous effects of emancipation and discipline, human rights are understood not in ontological terms but in terms of strategy, as instruments for shifting temporary strategies and tactics in various political contexts. Moreover, drawing from critical human rights studies, since the arena of human rights is a normative/normalizing site where debates about the political definitions of what constitutes the subject are contested, it is also a very convenient space for non-essentialist and antinormative politics of queer. In addition, within the presence of regulatory and identity-producing effects of human rights, to know how to govern identities and rights, rather than fully totalized by them, and to form a distance between ourselves and our political-legal tools as much as possible, critical capacities of queer can contribute a *self-critical perspective* to the ongoing struggles. Eventually, queer critique forces us not to see ourselves and our relationships from the eyes of the Normative.

1 Wendy Brown, 'Revaluing Critique: A Response to Kenneth Baynes' (2000) 28 Political Theory 469 (2000) 472.

2 Judith Butler, *Notes Toward a Performative Theory of Assembly* (Harvard University Press 2015) 57.

I. Introduction: Queer's Current Engagements with Human Rights: A Framing?

As we examine how queer is currently situated within the international human rights law framework, the attempts of *queering rights* come into question. It is crucial to underscore the critical capacities of queer theory in challenging the human rights discourse in this context. Thus, one of the central focuses of the article is the inevitable tension between the normativity of human (LGBTI+) rights and the anti-normative, non-identity politics of queer:

To delineate the distance between queer politics and the advocacy of LGBTI+ rights, I first clarify the concept of queer and how I refer to *queer politics* in this article. The term queer refers to various meanings and usages in our contemporary world. Occasionally, it serves as an umbrella term encompassing all individuals within the LGBTI+ community. It can also be adopted by anyone troubled by prevailing gender and sexuality norms. Furthermore, queer embodies theoretical and political viewpoints that contest the conceptual dichotomies of sex and gender and critiques the normalization processes entrenched within societal norms of gender and sexuality and granted stabilities in everyday life. However, at its core, queer emerges as an opposition to identitarian and assimilationist politics within the anti-ontological framework, focusing on the normative devices that shape subjectivity.[3]

Historically, queer has emerged as a political movement countering hegemonic normativity and the normalization processes of sexuality and gender. It evolved from various political debates surrounding gender, gender identity, and sexual orientation. Yet, queer destabilizes the notion of singular and unitary categories of identity, such as gay or woman. It posits that these identities are not natural but socially constructed and inseparable from existing power dynamics. Thus, while queer occasionally refers to LGBTI+s, rather than an identity, it embodies a critical stance towards identities, a resistance to *naming* and *essentializing*.[4] Even employed as a 'false unifying umbrella'[5] or a collective identity that works as a shelter or an instrument to make political claims with others, queer signifies an anti-essentialist position on identity. It is understood as a political stance that resists assimilation into normalization processes[6] through rigid or totalising legal framings, 'at odds with the normal, the legitimate, the dominant'[7].

3 Annamarie Jagose, *Queer Theory: An Introduction* (New York University Press 1996) 31, 58–71; Cathy J Cohen, 'Punks, Bulldaggers, and Welfare Queen: The Radical Potential of Queer Politics' (1997) 3 GLQ 437, 439–440; Nikki Sullivan, *A Critical Introduction to Queer Theory* (New York University Press 2003) 81; Lorenzo Bernini, *Queer Theories. An Introduction* (Michela Baldo and Elena Basil trs, Routledge 2021) 33.

4 Leo Bersani, *Thoughts and Things* (The University of Chicago Press 2015) 18.

5 Sullivan (n 3) 44.

6 Michael Warner, 'Introduction' in Michael Warner (ed), *Fear of a Queer Planet: Queer Politics and Social Theory* (University of Minnesota Press 1993).

7 David Halperin, *Saint Foucault. Towards a Gay Hagiography* (Oxford University Press 1995) 62.

Therefore, the emergence of queer critique has often been welcomed with a discussion regarding whether queer signals the end of existing forms of politics, particularly identity-based rights claiming. As queer fundamentally represents a non-identity, more precisely, an anti-normative endeavor challenging the hegemonic norms of sexuality and gender, the argument against queer has been that queer critique leaves no *ground* for collective action, contending that without recourse to an identity category, one cannot make political claims for the group.[8] Queer approaches, in this context, have been accused of personalizing political identities. Its theoretical concerns have been dismissed as detached from 'the blood, bricks, and mortar of everyday life'[9].

A similar tension arises in the relationship between the queer and the advocacy for identity-based rights, as well. Queer politics maintains an ambiguous stance toward rights: to assert rights claims, one must begin with unitary identities as a *foundation*. Legitimacy and the pursuit of equal rights necessitate clearly defined group identities, as political claims must be definitively framed to gain legal recognition. Yet, queer perspectives prioritize exposing the inherent oppression within these political-legal identities, which is crucial for political gain. By asserting that gender and sexuality are socially constructed and fluid, queer perspectives challenge the identity politics model that underpins the LGBTI+ rights activism.[10] Some accounts have even been concerned about the potential 'disastrous consequences'[11] of queer theory for LGBTI+ rights. Indeed, framing struggles into the human rights rhetoric, for instance, declaring that "I am gay" and "gay rights are human rights" have been very effective in an era where rights serve as a moral high ground, in the 'age of rights'[12]. However, queer interventions interrogate the stabilization and normalization of sexuality in the name of rights, the Western-centric global governance of gay rights struggles, and the depoliticizing effects of the rights discourse on sexualized subjects. The queer critique thus engages *uneasily* with legal normativity, questioning how law eventually plays a role in how we perceive, declare, and/or reject ourselves regarding our sexuality via rights.

However, over the past decade, there has been a notable shift in queer curiosity. It has been shaped differently among legal scholars, particularly within Western jurisprudence and international human rights law. Despite the efforts to distinguish between the LGBTI+ and queer, recent publications often conflate the two, queer being equated with the acronym LGBTI+, and queer politics recognized as the

8 Max H. Kirsch, *Queer Theory and Social Change* (Routledge 2000) 2–6.

9 K. Browne and C. J. Nash, 'Queer Methods and Methodologies An Introduction' in K. Browne and C. J. Nash (eds), *Queer Methods and Methodologies: Intersecting Queer Theories and Social Science Research* (Routledge 2010) 6.

10 Julie Mertus, 'The Rejection of Human Rights Framings. the Case of LGBT Advocacy in the US' (2007) 29 Human Rights Quarterly 1036, 1063.

11 Richard D Mohr, 'The Perils of Postmodernity for Gay Rights' (1995) 8 Canadian Journal of Law and Society 5, 5.

12 Costas Douzinas, *The End of Human Rights. Critical Legal Thought at the Turn of the Century.* (Hart Publishing 2000) 1.

LGBTI+ rights advocacy.[13] In some cases, the term *queer rights* has been proposed as a more inclusive alternative to LGBTI+ rights terminology. Indeed, in global politics, human rights standards and terminology serve as the primary normative order, regulating our engagement with politics and defining our roles as political agents. While developments in international human rights law, women's rights advocacy, and political mobilization around HIV have ultimately elevated human rights as a central focus of LGBTI+ activism, queer politics is often depicted as synonymous with demands for LGBTI+ rights: LGBTI+ rights, it is noted, have become 'a central claim of queer politics'[14]. This mainstream narrative, through an evolutionist perspective of history and the rights triumphalism, tends to homogenize diverse local and global struggles under the umbrella of the struggle for rights, potentially erasing their distinctiveness. When queer politics is viewed as the transformation of political demands into legal terminology through the rhetoric of rights, eventually into the human rights regime of the liberal international order as such, Ratna Kapur argues, the critical examination of queer has been located into the normativity of rights. Queer politics, which initially aimed to challenge the naturalization and normalization of gender and sexuality categories, has become normalized through its engagement with human rights.[15]

Hence, re-radicalizing queer and embracing its critical capacities within jurisprudence emerge as essential endeavors. Nonetheless, Kapur suggests that 'the potential for queer radicality remains on the outskirts of human rights, rather than within its embrace'[16]. In contrast, this paper explores the possibility of re-radicalizing queer within the politics of rights without conflating queer politics with struggles for rights. Instead of asserting 'the incompatibility of law and queer theory'[17], it seeks to explore critical yet affirmative engagements between these distinct politics. Non-essentialist political positions do not necessarily suggest rejecting struggles for rights based on identity. Queer can serve as a critical *impulse* within political action, emphasizing that rights and identities should be viewed in terms of strategy and tactics, contingent upon the dynamics of politics. Hence, the primary purpose of this article is to realign the current engagements to queer with its critical *ethos*, suggesting queer as a critical tool that would allow agents to deploy rights and identities cautiously and to instrumentalize them for alternative political paths.

13 Ratna Kapur, 'The (Im)Possibility of Queering Human Rights Law' in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complications, Risks* (Routledge 2018) 132–133; Anthony J Langlois, 'Queer Rights?' (2017) 71 Australian Journal of International Affairs 241, 244; Brenda Cossman, 'Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)' (2019) 6 Critical Analysis of Law 25 <https://cal.library.utoronto.ca/index.php/cal/article/view/32562> accessed 8 February 2024.

14 Dennis Altman and Jonathan Symons, *Queer Wars. The New Global Polarization over Gay Rights* (Polity Press 2016) 17.

15 Kapur (n 13) 132–134.

16 Ibid 132.

17 Cossman (n 13) 28.

Structured into three sections, the first and second sections focus on the critical dimension of queer engagements with human rights, mainly of the discourse surrounding gay identity and gays' human rights. Drawing from critical human rights studies and their main discussion topics, the first section contends that the concept of human rights is primarily challenged through its *identity-producing effects* and *subjectification processes*. The paradoxes within the discourse of human rights essentially result from the problem of defining the subject of rights. Therefore, this section portrays struggles for rights based on difference and identity as struggles for redefining and destabilizing what it means to be human.

Since the subjectivity of the liberal-legal essentialist humanist tradition is a main critical focus of queer critiques, the second section indicates the contributions of queer critique to critical human rights studies, highlighting the subject paradox inherent in the rights discourse. In the context of queer perspectives, there has been a pressing concern about the normative and exclusionary effects of (gay) rights. While the discursive effects of rights are still undeniably powerful in challenging oppression and the rhetoric of rights is on the main agenda of global gay activism, the deployment of the framework of human rights is highly paradoxical in many local contexts. As the subject of rights is based on Western sexual epistemology, several questions have been raised about whether the framework of gay rights dictates Western concepts of and perspectives on gender and sexuality. Apart from that, alliances between the agenda of mainstream gay rights advocacy and the prevailing nationalist, neoliberalist, colonialist, or racist discourses have also been investigated.

Following these critical approaches that enable us to compile the current political debates over gay rights, the third section analyzes the socio-political practice of identity-based rights claiming. Based on conceptual tools provided by Foucault, Brown, and Butler, this section critiques the identities at stake; however, it is more interested in exploring the affirmative dimension of queer engagements with the politics of rights. Foucault's insights on identity and the politics of rights are particularly relevant, as he offers a perspective on rights that refers to the concept within the arena of political action in terms of strategy and tactics. Foucault affirms identities not as ontological claims but as political constructs, and the politics of rights are deemed impactful for their contingent and performative effects on challenging the existing relations of power. The concepts of contingency and performativity are central to this discussion, highlighting the ambiguity, fluidity, and necessity of a self-reflexive approach within rights activism.

Consequently, following a critical yet affirmative perspective on rights, the article emphasizes rights' contingent nature and performativity inherent in political action. It questions whether queer critique can be deployed to challenge the framing effects

of rights discourse. This study explores how queer can serve as a method in ongoing struggles to reduce the disciplinary and regulatory effects of rights and identities as much as possible. It concludes by probing the queer potentials to disrupt and transform conventional understandings of rights and identities.

II. Who is the Subject of Human Rights?

Human rights, a fundamental concept of modernity, remain prominent in our moral and political imagination. However, despite the promises of the human rights discourse, there have been considerable critiques from various theorists, lawyers, and/or activists in recent years regarding the disparity between the discourse and practice.[18] Since the early 2000s, there has been a growing interest in critically examining human rights, leading to the expanding literature of critical human rights studies. Critiques of rights stem from various perspectives on different grounds, challenging rights-claiming based on fixed identity categories or questioning the authority of rights as neutral, self-evident truths and above politics. While these critiques vary in their focus and methodology, they converge on a shared concern regarding the normative effects of the subject of human rights.

It is generally argued that the Human-subject serves as the norm that enforces specific subjectivities, characterized by traits such as whiteness, Western heritage, able-bodiedness, heterosexuality, cis-maleness, and citizenship.[19] The top-down regime of human rights regulates non-conforming bodies in accordance with the Human-subject category, in alignment with these normative standards. In essence, while human rights have emancipatory potentials, to many critical perspectives, they are at stake with their subjectification effects and identity-producing functions.[20] Even if we accept that rights are political in origin, are established and reshaped through/by political struggles, their invocation directs attention to the legal sphere and the normativity of legal systems. As law cannot function without framing political demands, categorizing and naming subjects, and privileging specific aspects of human experience, any invocation of rights requires a determinate idea of the subject. This subject-norm serves as a shared language by establishing *objectivity* and *naturality* irrespective of any particular doctrine.[21] Consequently, the deployment of rights always risks reinforcing the subject as the norm while reproducing a range of others as marginalized subjects. Therefore, at what cost do the dehumanized socio-

18 Douzinas (n 12).

19 Wendy Brown, *Politics out of History* (Princeton University Press 2001) 9–12.

20 Anne Grear, '"Framing the Project" of International Human Rights Law: Reflections on the Dysfunctional "Family" of the Universal Declaration', in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012) 18–20; Jim Ife, *Human Rights from Below: Achieving Rights through Community Development* (Cambridge University Press 2012) 70.

21 François Ewald, 'Norms, Discipline, and the Law' in Robert Post (ed), *Law and the Order of Culture* (University of California Press 1991) 156.

political others (such as gays) or natural others (such as non-human beings) of the Human-norm haunt the rhetoric of human rights that categorically expel them? At what cost do they use rights while simultaneously being regulated by them? These questions underscore the complex dynamics within the interplay among rights, identity, and power.

Following these questions, contemporary critical human rights approaches, with various perspectives and methodologies, often highlight the paradox inherent in the subject of the human rights discourse through interconnected discussion points. We can categorize these critical themes as follows:

- *Legalistic effects of human rights*: Within this theme, critical approaches question how political questions are translated into framed legal issues through rights. The critique focuses on the expansion of law at the expense of politics via human rights, advocating the possibility of political projects not entirely constrained by legalistic frameworks. This perspective aims to uncover the political origins of rights, which are often obscured by legal discourses and philosophical questions over the ontological basis of human rights.[22]

- *The authority of legal/ontological perspectives on human rights*: Another critical path questions the authority of legal and philosophical interpretations of rights, of 'juridico-philosophical discourse'[23] on rights, which often reduces political questions into legal technical problems or portrays rights as neutral entities, separating them from their political context. As politics are reframed into legality through rights, the orthodox human rights discourse presents rights as almost identical to justice, aiming to persuade us that social justice is only achievable through rights, measurable by judicial neutrality.

- *The history of human rights and agency*: Many argue that the orthodox historical narrative suggests that human rights represent the pinnacle of political emancipation[24], as something 'the most we can hope for'[25]. Critical studies have revealed the ideological aspects of the teleological and progressive historiography of human rights on rewriting political agency, framing it into legal struggles, and obscuring the diversity of struggles from different historical conjunctures. The new human rights historiography emerging since the 2010s challenges the triumphalist narratives and explores the political-historical conditions that have shaped the idea of human rights as a universal

22 Wendy Brown and Janet Halley, 'Introduction' in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 20.

23 Michel Foucault, *'Society Must Be Defended'. Lectures at the Collège de France, 1975-76* (David Macey tr, Allen Lane 2003) 52.

24 Samuel Moyn, *The Last Utopia: Human Rights in History* (The Belknap Press of Harvard University Press 2010).

25 Wendy Brown, '"The Most We Can Hope For...": Human Rights and the Politics of Fatalism' (2004) 103 South Atlantic Quarterly 451, 451.

normative order, focusing on the last quarter of the twentieth century.[26] On the other hand, the social theory of human rights priorities acknowledging historical connections between political agency and rights.[27]

- *The state-centrism of human rights*: It mainly focuses on the false dichotomy between the Human and the Citizen. Inspired by Hannah Arendt's analysis[28], this path stresses the constitutive relation between the discourse of rights and the nation-state model, challenging the postulate that rights derive from a universal moral nature common to all, instead emphasizing their link to citizen identities. The critique remains relevant, particularly in the refugee crisis in Europe, where the state-centric approach to rights has profound implications.[29]

- *Gender of human rights*: The gendered dimension of human rights discourse is a critical point of discussion, revealing the gendered subject concealed behind the mask of impartiality. Historically, it is the first objection to human rights discourse, which dates back to the objections of French feminist movements in the late eighteenth century towards the Declaration of the Rights of the Man and of the Citizen. Since then, it has highlighted the centrality of the male experience, the gendered language, and the framework of the international law regime from different feminist standpoints.[30]

- *The cultural identity of human rights*: Another paradox lies in the cultural identity of universality: critical perspectives aim to reveal the Eurocentric and colonialist underpinnings of the universal discourse. The rhetoric of the victim-savior illustrates this, depicting human rights as championed by the white Western man who bestows dignity and rights upon the *victim*, often associated with non-Westerns.[31] This equation has often justified humanitarian interventions and militaristic endeavors in the name of (Western) democracy and human rights.[32]

26 Devin O Pendas, 'Toward a New Politics? On the Recent Historiography of Human Rights' (2012) 21 Contemporary European History 95, 98; Joseph R Slaughter, 'Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World' (2018) 40 Human Rights Quarterly 735, 736.

27 Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009) 2.

28 Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, Brace 1951).

29 Étienne Balibar, '"Rights of Man" and "Rights of the Citizen": The Modern Dialectic of Equality and Freedom', in James Swenson (tr), Étienne Balibar, *Masses, Classes, Ideas. Studies on Politics and Philosophy Before and After Marx* (Routledge 1994); Giorgio Agamben, 'Beyond Human Rights' in Vincenzo Binetti and Cesare Casarino (trs), *Means Without End: Notes on Politics* (University of Minnesota Press 2000).

30 Joan Wallach Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Harvard University Press 1996); Dianne Otto, 'Lost in Translation: Re-Scripting the Sexed Subjects of International HUman Rights Law' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press 2009); V Spike Peterson and Laura Parisi, 'Are Women Human? It's Not an Academic Question' in Tony Evans (ed), *Human Rights Fifty Years On. A Reappraisal* (Manchester University Press 1998) 132–134; Tony Evans, *Human Rights in the Global Political Perspective* (Lynne Rienner Publisher 2011) 32–36.

31 Makau Mutua, *Human Rights: A Political & Cultural Critique* (University of Pennsylvania Press 2002) 22–40.

32 Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish 2007) 51; Tony Evans, *The Politics of Human Rights. A Global Perspective* (2nd edn, Pluto Press 2005) 37.

- *The victimization effects of human rights*: Consequently, the victimization effects of human rights discourse are subject to critique, highlighting the normativization of suffering and the construction of victimhood.[33] Furthermore, questions arise regarding rights' capacity to normativize the suffering, determine which suffering is worth protection, and reproduce their victim subjects.

- *Neoliberal functions of human rights*: Critical examinations of the relations between the discourse of rights and the capital reveal the commodification of suffering within human rights markets. This critique can be taken back to Karl Marx's objection[34] to the Declaration, questioning the historically contingent subject figure behind the *abstract* man endowed with natural rights. This paradox is currently intertwined with the legalistic model of rights within neoliberalism.[35]

- *Anthropocentrism of human rights*: Critical approaches illuminate the political and physical violence of liberal-legal essentialist humanism inherent in the discourse. This path prompts questioning whether rights are adequate tools to combat the exploitation of nature and non-human beings, as the discourse inherently assigns dignity solely to the human species and often makes account of the environment due to the interests of human beings.[36]

On the basis of this overall categorization, contemporary critical human rights studies provide insights into the multifaceted nature of human rights, shedding light on its legalistic, historical, and ontological dimensions. These perspectives challenge dominant narratives and offer starting points for understanding the political implications of the liberal human rights discourse. Importantly, these discussions intersect and converge on common ground: as discussing rights and the paradoxes they embody, the focus invariably shifts to the subject, particularly the hegemonic Human subject of human rights, and simultaneously to the others of the hegemonic Human-norm. Critical literature delves into the perspectives of the stateless, refugees, socio-political others such as women, as well as non-human entities like animals and the environment. Unlike the orthodox juridico-philosophical discourse, they examine the historical figures and agents of several political struggles overlooked by the *lawful* Human-norm. The subject's identity – encompassing gender, gender identity, sexual orientation, culture, economic and political status, nationality, citizenship, ethnicity, etc. – is always at the forefront. Defining who the subject is and what they are not becomes a central concern. Yet, orthodox wisdom dictates

33 Upendra Baxi, *The Future of Human Rights* (3rd edn, Oxford University Press 2012).

34 Karl Marx, 'On the Jewish Question' in Robert C Tucker (ed), Thomas B Bottomore (tr), *The Marx-Engels Reader* (2nd edn, W W Norton & Company 1978).

35 Evans (n 30); Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019).

36 Baxi (n 33); Luc Ferry, *The New Ecological Order* (Carol Volk tr, University of Chicago Press 1995).

that any discussion of human rights theory necessitates a foundational understanding of the human. Indeed, engaging in discourse on human rights requires having some determinate idea of the human. This foundationalism often leads to a metaphysical presumption wherein rights are considered inherent entitlements based solely on human existence.[37] However, critical analyses challenge this presumption, highlighting the complexities inherent in defining subjects entitled to human rights.

As stated, critical studies emphasize that the human rights discourse cannot effectively address rights without initially defining who the subject is and conversely, who is not – that is, who falls outside the norm. The question 'Who is the subject of human rights?'[38] therefore, is consistently revisited and answered in various ways across different historical contexts. In this context, the Human of human rights might refer to the Western, white, wealthy, able-bodied, heterosexual, cisgender man citizen as the norm. Critical approaches frequently pose this *wrong* question of who the subject of human rights is to challenge the norms embedded within the human rights regime. The aim is to uncover the subject's biases, expose the arbitrary characters of normative criteria, and call for rewriting what it means to be human.[39]

Since the normative Human is always defined in relation to a constitutive other within the framework of the dualist reasoning, it implicitly incorporates the humanity of these others as well. However, these very others are simultaneously masked within the Human-norm and reproduced within it. Thus, while rights can have emancipatory functions, they also serve as a power technique that defines humanity, invent divisions, and subjectify individuals. The discourse of rights works as a normalizing regime. As such, the political arena of rights becomes a crucial battleground for disrupting the divisions of political power and redefining identities. The others of the Human-norm, by 'their quivering humanity,' reside already within this framework, making it a strategic site for resistance and transformation:

So, reckoning the human involves addressing the norms by which intelligibility as human is conferred: an intelligibility without which the human must remain out of place, on the far side of being and becoming. At the same time, the univocal category of the human is perpetually troubled and haunted by the quivering humanity of those living, differing, sexing, mattering, touched and touching otherwise, elsewhere.[40]

This haunting finds its embodiment, particularly in identity-based rights claiming. It has been suggested that the discursive power of human rights has been started to weaken since the 1990s in the West, simultaneously with the rise in rights-based

37 Ben Golder, 'What Is an Anti-Humanist Human Right?' (2010) 16 Social Identities 651, 660.

38 Jacques Rancière, 'Who Is the Subject of the Rights of Man' (2004) 103 South Atlantic Quarterly 297, 297.

39 Judith Butler, *Undoing Gender* (Routledge 2004) 33.

40 Judith Butler and Athena Athanasiou, *Dispossession: The Performative in the Political* (Polity Press 2013) 32–33.

struggles centered on identity and difference.[41] Those advocating for emancipation, equality, and recognition through rights have illuminated that the human of rights is imbued with its own contents, including heterosexuality, patriarchy, capital, or whiteness. When several oppressed groups seek to speak the language of the universal, the inherent paradox of the subject becomes apparent. Consequently, these groups have embraced their differences and invented new rights claims based on a group identity. They assert that gay rights are human rights, for instance, thereby participating in the rights regime under this group identity. However, this discursive practice comes with a price: identity becomes totalized. While identities have been instrumental in creating spaces of liberation and ensuring participation in the institutional game of human rights, they have also contributed to the formation of regulatory norms and the production of their own others, akin to the Human subject of rights. In fact, a close reading of the current practices of rights sheds light on social movements' challenge to these totalizing subjectivities. Subjected to the oppression of humanist normativity, various movements have begun to question the standards, methods, and efficacy of rights. By making rights claims for legal recognition, these movements not only engage in a struggle for rights at the legal level but also resist being homogenized by legal framings[42] in a critical engagement with rights claiming.

In this regard, many critical approaches do not solely aim to expose the regulatory effects of rights. Criticism also serves as a positive activity.[43] Under our political circumstances, a critical approach to the practice of international human rights regime still would seem a serious strategic political loss if the *critical* has been understood as the renouncement of the benefits that rights provide. While there exists a theoretical trend[44] that rejects human rights as politics, there is also a powerful inclination, referred to 'critical affirmation,'[45] which seeks to explore the potential of rights politics by referring to critique as a method. These approaches, highlighting the paradoxes, seek a re-articulation: an endeavor to offer theoretical game openings to the politics of rights in diverse ways, seeking alternative paths to affirm rights not ontologically but politically, fostering a political dialogue that acknowledges those engaged in struggles for their rights, alongside the legal/philosophical authorities of rights.

Thus, critique does not necessitate forsaking the opportunities provided by rights. A theoretical critique also refrains from undermining ongoing struggles for rights and

41 Wendy Brown, *States of Injury. Power and Freedom in Late Modernity* (Princeton University Press 1995) 18–19; Baxi (n 33) 6.

42 Butler and Athanasiou (n 40) 85–86.

43 Michel Foucault, 'What Is Critique?' in Sylvere Lotringer and Lysa Hocroth (eds), *The Politics of Truth* (Semiotext(e) 1997); Michel Foucault, *The Government of Self and Others: Lectures at the Collège de France, 1982-83* (Graham Burchell tr, Palgrave Macmillan 2010); Wendy Brown, 'Revaluing Critique: A Response to Kenneth Baynes' (2000) 28 Political Theory 469.

44 Agamben (n 29); Alain Badiou, *Ethics. An Essay on the Understanding Of Evil* (Verso 2001).

45 Ben Golder, 'Foucault's Critical (yet Ambivalent) Affirmation: Three Figures of Rights' (2011) 20 Social & Legal Studies 283, 286.

those who claim them. These movements are often aware of their language limitations, institutional practices and governance routines: they do not need the words of the theorist to be introduced to the *dark side* of human rights[46], or to the disciplinary dimensions of law. However, they weigh and seize their options within the given set of discourses and practices, grappling with the limits, contradictions, and disenchantment, simultaneously trying open spaces of maneuver and resistance. To a certain extent, a critical engagement with rights contributes to this political effort. It encourages reflection on the potential consequences of specific rights policies, scrutinizes the power dynamics produced by rights and identities, and provides conceptual tools and discussion points to the struggles if they choose to engage with them. As a critique in the sense understood by Foucault, it leaves experimenting with these conceptions to political movements, as Lorenzo Bernini noted, a queer quality as well, not necessarily offering alternatives but leaving to the movements the practice of the critique.[47]

Given that queer embraces anti-normative and non-essentialist politics that distance itself from identification, it can serve as a potent instrument in revealing and redefining the notion of the subject of human rights: from a queer perspective, any attempt to define the boundaries of the human and establish what it means to be human inevitably leads to exclusion and the suppression of difference. Furthermore, queer critique does not aim to legitimate experiences based on an abstract notion of humanity. Instead, it posits that humanity is an evolving construct, devoid of a definitive endpoint, continually undergoing reconstruction and redefinition.

III. How Do Rights Subject Us?

The preceding section highlights how critical human rights studies engage in discussions about the subjectification and identity-producing functions of rights, employing various concerns. This section presents a queer image of gay rights by referring to salient debates over the contemporary politics of rights. Discussions on normative effects of the discourse of rights within the context of LGBTI+ rights revolve mainly around two key points: first, the challenge of appealing to rights without reinforcing the normalization processes of identities and the gendered, heteronormative, and Western framework of international human rights discourse[48]; and second, the need to re-articulate LGBTI+ rights without imposing Western sexual epistemology to the 'third world queers'[49].

46 David W Kennedy, 'The International Human Rights Regime:Still Part of the Problem?' in Rob Dickinson and others (eds), *Examining Critical Perspectives on Human Rights* (Cambridge University Press 2012) 22.

47 Bernini (n 3) 48.

48 Dianne Otto, 'Introduction: Embracing Queer Quriosity' in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge 2018) 6.

49 Rahul Rao, *Third World Protest. Between Home and the World* (Oxford University Press 2010).

Since the 1970s, the Western gay liberation movement has primarily relied on a strategy based on identity politics. It has been suggested that, particularly at the beginning of the 1990s, the movement shifted its focus to incorporate the human rights lexicon into its activism at large. The primary goal was to challenge societal norms by demanding the acceptance of sexuality. This strategy prioritized political participation and legal recognition based on *sexual orientation*, with other aspects such as gender, race, or social status being secondary considerations.[50] Gays' human rights have been grounded on the universal fixed identity of gay, fostering community ties and a feeling of belonging to a minority group, and this strategy has contributed to their political-legal representation. The quest for gay rights has rested upon two fundamental assumptions: 1) Without appealing to the category gay, as the essential foundation of action, one cannot make political claims for the group, since politics is understood as a representational discourse that presumes a subject that is ontologically grounded.[51] 2) Legal battles are the pathway to liberation for the gay community.[52]

Based on these assumptions, it is regarded that homosexual experience corresponds to a subject and under the identity groups can be politically visible and demand legal recognition and equal rights. However, the strategy has also contributed to the marginalization among them; the identity category has become the basis for oppression and assimilation, as well. Similar to the dynamics observed with the Human-norm of rights, the gay has created its own others, who do not fit the Norm. The subject of gay rights has faced challenges from social constructionist viewpoints on identity and subsequent queer interventions. Notably, the arguments of Foucault and Brown shed light on this issue:

Foucault, a prominent critic of identity and a pioneer of queer theory, famously contends that sexuality is historically experienced, constructed, and perceived in specific contexts. He argues that power regulates individuals through their identities because power does not merely exercise authority over subjects but governs their conduct by categorizing and making divisions among them.[53] Identification is one of the strategies of power, and sexual classification is one of its key strategies, with homosexuality emerging in the late nineteenth century in the West as a means to regulate sexual experiences. The invention of the homosexual shifted the focus from sexual acts to the sexualized subject, framing it medically and legally. In

50 Jagose (n 3) 71.

51 John D'Emilio, 'Cycles of Change, Questions of Strategy: The Gay and Lesbian Movement after Fifty Years' in Craig A Rimmerman, Kenneth D Wald and Clyde Wilcox (eds), *The Politics of Gay Rights* (University of Chicago Press 2000); Janet Halley, *Split Decisions. How and Why to Take a Break from Feminism* (Princeton University Press 2006); Tucker Culbertson and Jack E Jackson, 'Proper Objects, Different Subjects and Juridical Horizons in Radical Legal Critique' in Martha Albertson Fineman, Jack E Jackson and Adam P Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Unfomfortable Conversations* (Routledge 2010).

52 Brown, *States of Injury. Power and Freedom in Late Modernity* (n 41).

53 Michel Foucault, *The Will to Knowledge. Vol 1. of the History of Sexuality* (Robert Hurley tr, Penguin 1979).

fact, the identity was based on the strict heterosexual-homosexual binary, which is already a heteronormative product normalizing heterosexuality while pathologizing homosexuality, later gaining collective political significance in the 1960s.[54] Foucault has suggested carefully analyzing the gay discourse, emphasizing that individuals both deploy and subject themselves to it. As participants, we contribute to its power to shape our perceptions and naturalize homosexuality as an autonomous, stable, coherent, and knowable description of sexual desire. The formula of power is simple: 'tell me your desires, I'll tell you who you are'[55].

Despite its empowering role in his time, Foucault has questioned this identity as restrictive and exclusionary, challenging its naturality, and highlighting its political construction. There exists no genuine gay identity, no inner nature, no gay essence, no gay desire, and no particular gay lifestyle.[56] Apart from 'the myth of eternal homosexual'[57], we are, as gays, not everywhere, not in every society nor at every time, yet the products of historical power configurations.

Additionally, within the representation of gay, sexuality is emphasized at the expense of other facets of human experience. Brown suggests that the rigid classification of gay fails to acknowledge the intersections of identity, including factors like ethnicity, race, class, religion, or gender. While it unites individuals who share a common historical injury, it can also lead to an identification with the injury itself. Critical perspectives have highlighted that these 'wounded attachments' might be limited investments with exclusionary effects.[58] Moreover, when an ideal of identity is inscribed in law, it becomes an opportunity for disciplinary power. Since law inherently frames lives, rights potentially bring power strategies that have already been used in the first place. In discussing women's human rights, for instance, Brown argues that neither the abstract equality of human rights nor the specificity of women's rights adequately addresses the subordination of women.[59] Instead, they may inadvertently perpetuate the power dynamic by obscuring the mechanisms through which women are constructed and regulated as rights-bearing subjects. While it may seem empowering to have rights reflect complex identities, it risks reducing women's experience 'into the ontological basis of the rights claim' and 'seek recognition by the state of already constituted identities'[60].

54 Ibid. 36–49; Halperin (n 7) 33.

55 Michel Foucault, 'An Ethics of Pleasure' in Sylvere Lotringer (ed), Lysa Hocroth and John Johnston (trs), *Foucault Live: Collected Interviews, 1961-1984* (Semiotext(e) 1996) 377.

56 Halperin (n 7).

57 John D'Emilio, 'Capitalism and Gay Identity' in Henry Abelove, Michele Aina Barale and David Halperin (eds), *The Lesbian and Gay Studies Reader* (Routledge 1993) 468.

58 Brown, *States of Injury. Power and Freedom in Late Modernity* (n 41).

59 Ibid.; Wendy Brown, 'Suffering Rights as Paradoxes' (2000) 7 Constellations 229, 200.

60 Karen Zivi, 'Feminism and the Politics of Rights: A Qualified Defense of Identity-Based Rights Claiming' (2005) 1 Politics & Gender 377, 381.

Within this critical framework, for contemporary queer perspectives examining global gay rights advocacy, the key contention lies in recognizing that categories of rights and identities are not mere empty signifiers. Making rights claims based on a dominant gay identity, for instance, presupposes a universal sexual orientation, standardizes experiences, regulates non-conforming experiences, and promotes generalized biological narratives on homosexuality. Moreover, the universal identity is shaped within the framework of Western sexual epistemology, or as a Western 'gay conduct'[61]. The mainstream imposition of specific Western categories on gender and sexuality within gay rights tends to assimilate local and political traditions. As noted by Rahul Rao, individuals in non-Western contexts are usually caught between their homophobic nationalist governments and misguided interventions of the gay international.[62]

From a Western perspective, thus, I suggest that the strategy of gay rights rests on three postulates: 1) Everyone has a particular fixed sexual orientation; 2) desires to come out with a specific language and a specific self-narrative; 3) and perceives sexuality through the lens of identity. Yet these assumptions are grounded in a unitary model of the Gay-subject – a Western, professional, middle or upper-class, able-bodied, white, cisgender, coupled, often with double male earning power, deemed highly marketable. Consequently, mainstream rights advocacy, as an assimilationist project, tends to bind subjects according to this Gay ideal.

In this context, queer critiques have raised several interrelated discussion points in relation to critical perspectives on human rights. Queer critique has resisted the uncritical embracement of rights as an end themselves, from an anti-assimilationist perspective, suggesting that such policies potentially tend to conform and *domesticate* rather than transform, simultaneously, excluding alternative forms of collective engagements.[63] Central to these discussions is the critique of the state-centric nature of gay rights advocacy. Scholars argue that promoting rights may inadvertently bolster nationalist agendas, as the discourse often perceives the nation-state as the primary source of rights and freedoms. Consequently, activism aimed at having and securing rights may inadvertently align with state interests, potentially reinforcing power structures governing gender and sexuality. To explore these complexities, scholars have introduced conceptual tools, such as the terms homonationalism, homocolonialism, or homoglobalism[64], that offer insights into the global dimensions

61 Lauri Siisiäinen, 'Foucault and Gay Counter-Conduct' (2016) 30 Global Society 301, 301.

62 Rao (n 49) 191.

63 Carl F Stychin, *Law's Desire. Sexuality and the Limits of Justice* (Routledge 1995); Cohen (n 3).

64 Jasbir K Puar, *Terrorist Assemblages. Homonationalism in Queer Times* (Duke University Press 2007); Jasbir K Puar, 'Rethinking Homonationalism' (2013) 45 International Journal of Middle East Studies 336; Anthony J Langlois, 'International Political Theory and LGBTQ Rights' in Chris Brown and Robyn Eckersley (eds), Anthony J Langlois, *The Oxford Handbook of International Political Theory* (Oxford University Press 2018) <https://academic.oup.com/edited-volume/28084/chapter/212153414> accessed 7 February 2024; Aeyal Gross, 'Homoglobalism: The Emergence of Gay Governance' in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complications, Risks* (Routledge 2018).

of rights advocacy and their assimilative impacts. These concepts prompt critical inquiries into how Western societies are symbolically embodied through gay rights and how these rights become entwined with a specific set of white, secular, progressive, and colonial normativity. Moreover, based on these concepts, scholars question how the idealized Western figure associated with rights advocacy can be weaponized to justify racist positions, doubting the implications of attributing homophobia to chosen cultures from a homonationalist perspective. In essence, critiques within this framework underline the importance of considering the benefits and costs of rights advocacy within a broader sociopolitical context.

One of the themes focuses on the legalism of gay rights, leading to discussions on its heteronormative and homonormative effects. As the feminist legal theory has already informed us, when legal systems engage with the sociopolitical others of the Human, they typically respond in one of two ways.[65] The dominant response, assimilation, assumes that differences can be erased; therefore, the other can be assimilated and tamed. Critics of gay rights argue that such assimilation promotes uniformity in a heteronormative manner. The other response is naturalizing differences, acknowledging them as inherent and unavoidable; eventually, perpetuating sexual essentialism and stereotypes, and contributing to homonormativity.[66] Based on the agenda of global mainstream advocacy, it has been proposed that gay rights advocacy has compelled groups to frame their sexual experiences in conformity with traditional heterosexual norms, emphasizing values such as heterosexual coupledom and family structures, ultimately aiming to include individuals into the heterosexual privilege and transforming the queer imagery. According to critical approaches, the deployment of identities within the gay right movement has inadvertently reinforced the dominant structures of sexuality, potentially resulting in homonormativity.[67] In the face of changes in Western public cultures of homosexuality, Lisa Duggan introduced a new form of homonormativity, which perpetuates existing heteronormative assumptions while offering the illusion of a 'demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption.'[68]

One aspect under discussion pertains to the production of the gay subject, often depicted as wealthy, in control of popular culture, and seen as useful in terms of promoting capitalist consumption, particularly evident in most Western societies.[69] Critical perspectives in this realm question the nexus between capitalism and gay identity, exploring the connections between capitalist expansion and the emergence

65 Otto (n 30); Mertus (n 10) 1038–1039.

66 Mertus (n 10) 1038.

67 Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Russ Castronovo and Dana D Nelson (eds), *Materializing Democracy: Towards a Revitalized Cultural Politics* (Duke University Press 2002).

68 Ibid 179.

69 D'Emilio (n 57).

of a *gay* lifestyle since the beginning of the 1970s and how these connections shape the agenda of mainstream gay advocacy.[70] Through conceptual tools, such as homocapitalism[71], the real effects of the commitments of powerful financial institutions to gay rights are discussed. In brief, the role of capitalism in creating the material conditions for the ideal gay-subject (of gay rights) is brought into the discussion.[72]

Furthermore, queer critique asserts the prevailing conception of gay rights, and its hegemonic identity is constructed through Western conceptions of sexuality, marginalizing local concepts and various experiences, perpetuating a cycle of Western hegemony within the human rights project. Postcolonial queer perspectives, in this regard, shed light on the complexities surrounding the strategy of gay rights, which, while linking experiences across the West and the East, also creates deep divisions.[73] Yet grassroots human rights activists in non-Western contexts have frequently faced conflicts between local demands or terminology and the agendas of global institutions, usually through NGOs funded by the West.[74]

Joseph Massad famously answers the question of 'who is the subject of gay rights' as the 'Gay International,' which posits a specific Western understanding of sexual orientation and assumes a subject who perceives sexuality in the heterosexual-homosexual dichotomy. As Massad suggests, the Gay International produces valid gays and lesbians, where they do not exist, by repressing practices that refuse to assimilate into this sexual epistemology.[75] Additionally, it works on a narrative of victimhood and saviour dynamics, with the West assuming the role of the *civilized* savior offering protection to the Middle East.[76] On that note, queer critique, from various paths, highlights the cultural imperialism inherent in the universalization of gay rights and emphasizes the importance of considering local genealogies and practices; questioning whether resistance to global gay rights politics refers to another facet of Western exceptionalism, perpetuating homocolonialism and reinforcing anti-homosexual legislation in response to Western intervention.[77] Ultimately, the Gay International of rights is portrayed as a power technique that overlooks those who do not necessarily consider themselves gay, or those who cannot reach this terminology.

70 Libby Adler, *Gay Priori. A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018).

71 Rahul Rao, 'Global Homocapitalism' (2015) 194 Radical Philosophy 38, 38.

72 D'Emilio (n 57) 474.

73 Katerina Dalacoura, 'Homosexuality as Cultural Battleground in the Middle East: Culture and Postcolonial International Theory' (2014) 35 Third World Quarterly 1290.

74 Langlois (n 13) 244; Momin Rahman, 'Queer Rights and the Triangulation of Western Exceptionalism' (2014) 13 Journal of Human Rights 274, 282.

75 Joseph A Massad, *Desiring Arabs* (The University of Chicago Press 2007) 188-89.

76 Mutua (n 31).

77 Dalacoura (n 73).

Essentialist conceptions of sexual orientation and sexual identity, essential for claiming rights, also belong to this assimilative epistemology. Critics within the queer framework assert that the necessary term sexual orientation is often interpreted as a distinct and permanent aspect of self-identity and personhood.[78] However, this assumption has prompted questions from individuals who do not perceive sexuality as natural or stable or who do not interpret their sexuality through an identity frame. The rigidity of categorical thinking challenges and constraints, prompting contemporary queer discussions to focus on how these terms can be queered, reinterpreted, and reconceptualized to infuse them with new meanings.

Concurrently, gay rights often presuppose an individual with a stable sexual orientation who desires to come out; however, the assumption that coming out is universally desired and beneficial as a political strategy frequently overlooks practical complexities. The struggle for gay rights implies an imperative for individuals to explicitly declare their sexuality to claim their rights, conforming to prescribed concepts and self-narratives. Therefore, these trends in human rights need to be questioned based on how responsive they are to diverse experiences in local contexts. Indeed, historically, within the gay liberation movement of the late 1960s and 1970s in the United States, coming out was considered a strategic move to end oppression and link identity to the language of rights.[79] While significant in its historical context, the imperative to come out is presented as emancipatory yet regulative, shaping individuals' perceptions of self and their relationship with others. In this context, instead of 'I am out, therefore I am'[80], Sami Zeidan writes, '"I" is not always the "I" we assume wants to come out'[81]. Furthermore, in some local contexts, individuals might choose not to pursue legal strategies or engage in struggles for rights because of concerns about personal safety. Since the pressure to come out fails to acknowledge the diverse range of experiences and the potential risks associated with visibility, invisibility and silence may serve as a form of self-protection in certain situations.[82]

Depending upon contemporary critical analyses, therefore, from a queer perspective, questions arise regarding whether gay identity is a personal or legal one[83], how the

78 Jagose (n 3); Aeyal Gross, 'Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?' (2007) 101 Proceedings of the ASIL Annual Meeting 129; Ryan Richard Thoreson, 'Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name' (2009) 8 Journal of Human Rights 323; Carlos A Ball, 'Essentialism and Universalism in Gay Rights Philosophy: Liberalism Meets Queer Theory' (2001) 26 Law & Social Inquiry 271; Stevi Jackson, 'Sexual Politics: Feminist Politics, Gay Politics and the Problem of Heterosexuality' in Terrell Carver and Veronique Mottier (eds), *Politics of Sexuality: Identity, Gender, Citizenship* (Routledge 1998) 76.

79 D'Emilio (n 57); D'Emilio (n 51).

80 Eve K Sedgwick, *Epistemology of the Closet*, p 4.

81 Sami Zeidan, ''The Remote Control of the "I" We Assume Wants to Come out: Sexuality and Governance in the Arab World.' in Oishik Sirca and Dipika Jain (eds), *New Intimacies, Old Desires: Law, Culture and Queer Politics in Neoliberal Times* (Zubaan 2017) 271.

82 Tony E Adams, 'Paradoxes of Sexuality, Gay Identity, and the Closet' (2011) 33 Symbolic Interaction 234.

83 Mariano Croce, 'Desiring What the Law Desires: A Semiotic View on the Normalization of Homosexual Sexuality' (2018) 14 Law, Culture and the Humanities 402.

law operates discursively and attaches us to a model of identity[84], and how legal frameworks shape our perceptions, expressions and/or rejections of ourselves. While advocating for gays within the framework of human rights is essential, it is crucial to recognize the costs associated with such rights. Queer critiques underscore the role of rights in identity-production, power dynamics, and marginalization, shaping individuals' perceptions of the self and their engagement in politics.

IV. Critical Yet Affirmative Engagements with Rights

In examining (gay) rights and the broader normativity of human rights, nevertheless, a critical approach does not inherently lead to the dismissal of potentials inherent in the politics of rights. This final section explores the possibility of adopting a critically queer yet 'politically productive'[85] perspective on rights and identities. This perspective becomes plausible when:

- Identities are understood not as ontological claims but as political facts.
- Rights are considered diverse tactics within the contingency of politics, and rights claiming is examined through a performative lens.
- The politics of rights is regarded as a site where debates about the definition of what constitutes human contested and destabilized.

By steering clear of the horrors of rights fetishism[86], which elevate rights to the status of eternal and metajuridical values, rights claiming grounded in identities linked to historical injustices is part of the resistance against heteropatriarchy. Our globalized conceptions of identities and rights are not static within the contingency of politics; instead, they intertwine with localized tactics and strategies. And queer serves as an analytical tool in facilitating this shift from ontology to politics, which accompanies the practice of rights.

Recognizing that rights and identities are mobilized within and through struggles where globalized terms intersect with local political notions is important. As Aeyal Gross has stressed, 'notions of sexuality change on axes of time and place, and the ideological constructions of sexuality are constitutive of the way we interpret and give meaning to our lives and actions, then we cannot, from a queer perspective, just say that the concept of sexual orientation is a Western one'[87]. Thus, from a queer perspective, it is inadequate to label the concept of sexual orientation, for instance, as exclusively Western or to suggest the impossibility of the *gay* identity. Instead, queer

84 Lise Gottell, 'Queering Law: Not by Vriend' (2002) 17 Canadian Journal of Law and Society 89, 97.

85 Evans (n 32) 40.

86 Valerie Kerruish, *Jurisprudence as Ideology* (Routledge 1992) 139.

87 Gross (n 78) 131.

critique reminds us that identities and rights are contingent products of history and therefore, subject to political transformation. In other words, this dynamic critique not only aims to refute and ridicule prevailing stabilities but also to invent new realities out of them. Law necessarily frames political claims and the individuals who assert them. Legal categories, indeed, have the power to produce binding effects when used to redescribe social realities by framing them. However, it is essential to recognize that rights, prior to their formalization into legal categories, emerge from the realm of politics and are established through our language and actions in socio-political life, within the processes of redefinition. The process of redescribing and redefining legal categories is achieved through specific deployments of performative acts. To further explain these arguments, Foucault provides some insightful conceptual tools.

As an opponent of the tradition that takes the Human as the departure point for politics, Foucault is central to thinking critically about human rights and the liberal assumption of subjectivity. His analysis of subjectivity and power brings a series of critiques to the ontological ground of rights. However, Foucault's critique does not lead to rejecting rights or undermining ongoing struggles. Since the mid-1970s, Foucault has engaged with the discourse of rights within the context of identity politics and difference, recognizing the rhetoric of rights as a prominent tool of his activism, albeit one that required critical examination in terms of tactics and strategy, since rights are considered simultaneously forms of regulation and resistance.[88] He acknowledges that rights possess disciplinary effects and are central modalities of governing that aim to categorize individuals and impose normative standards to govern them.

Briefly, Foucault's affirmative stance on rights is grounded in the notion of *counter-conduct*, which involves challenging the techniques of governmentality by deploying its own strategies and discourses; a concept 'to designate the type of revolts, or rather the sort of specific web of resistance to forms of power that do not exercise sovereignty and do not exploit, but conduct'[89]. Since conduct and counter-conduct are derived from the same factors of power, the term counter-conduct refers to challenging the techniques of governmentality by using its own repertoire. It is the deployment of all available political discourses already furnished within the power. Thus, a critical approach to rights entails freeing them for diverse applications, revealing their contingent foundations, and being self-critical of their potential counter-effects. Then, critique emerges as an essential component of the politics of rights, allowing for the deployment of rights without succumbing to their totalizing effects. It involves understanding how to *govern* rights while simultaneously remaining cautious about their identity-producing and regulatory effects.

88 Ben Golder, *Foucault and the Politics of Rights* (Stanford University Press 2015) 5–8; Paul Patton, 'Foucault, Critique, and Rights' (2005) 6 Critical Horizons 267, 269.

89 Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78* (Graham Burchell tr, Palgrave Macmillan 2007) 200.

This attitude can most clearly be seen in his advocacy for the gay rights movement, where he speaks on his behalf as a gay man, and in his intellectual inspiration for the early AIDS activism in the 1980s.[90] Foucault regards the unitary gay identity as limiting by examining the historical conditions that made the discursive formation of homosexuality possible. Since identity politics and claiming rights based on identity have effectively mobilized groups for political equality, in terms of strategy and tactics are necessary. Foucault questions their tendency to essentialize and naturalize identity as an inner truth of oneself. The problem, in terms of Foucauldian politics of rights, is framing identity as an existential question rather than a political fact.[91] His stance towards identity politics, as evidenced in *The Advocate* interview of 1982, underscores his broader perspective on identity:

Well, if identity is only a game, if it is only a procedure to have relations, social and sexual-pleasure relationships that create new friendships, it is useful. But if identity becomes the problem of sexual existence, and if people think that they have to 'uncover' their 'own' identity, and that their own identity has to become law, the principle, the code of their existence; […] *they will turn back to a kind of ethics very close to the old heterosexual virility. If we are asked to relate to the question of identity, it must be an identity to our unique selves. But the relationships we have to have with ourselves are not ones of identity, rather, they must be relationships of differentiation, of creation, of innovation.* […] *we must not think of this identity as an ethical universal rule.*[92]

In this passage, Foucault highlights the limits of purely political and juridical strategies of identity-based protection. Moreover, there is a warning against the universalization of identity, emphasizing its tactical nature over a fixed norm. On several occasions, Foucault stresses that gay does not refer to a sexual existence: the question of identity is not related to the question of affirming one's sexual identity. Its assertion is contingent on the prevailing political conditions. Due to the circumstances, in Foucault's account, identity is something we make instead of something we already are. It is a collective construction that we declare with others within the political arena rather than an inherent trait. When an individual is called and attacked as gay, the only way of defending himself is to become gay. Therefore, in the political landscape of the 1980s, the statement of 'I am gay', besides being a truth-producing discourse, is an act of defiance amidst challenging times for the gay liberation movement. It is a strategy that locates oneself in opposition to the prevailing norm. In a 1984 interview,

90 Halperin (n 7) 16.

91 Michel Foucault, 'Sexual Choice, Sexual Act' in Paul Rabinow (ed), Robert Hurley (tr), *Essential Works of Foucault, 1954-1984, vol. 1: Ethics: Subjectivity and Truth* (Allen Lane/Penguin 1997) 141–143; Michel Foucault, 'The Social Triumph of the Sexual Will' in Paul Rabinow (ed), Robert Hurley (tr), *Essential Works of Foucault, 1954-1984, vol. 1: Ethics: Subjectivity and Truth* (Allen Lane/Penguin 1997) 160; Michel Foucault, 'Interview with Jean François and John de Wit' in James D: Faubion and Bernard E Harcourt (eds), Stephen W Sawyer (tr), *Wrong-Doing, Truth-Telling. The Function of Avowal in Justice* (The University of Chicago Press 2014) 261.

92 Michel Foucault, 'Sex, Power, and the Politics of Identity' in Paul Rabinow (ed), Robert Hurley (tr), *Essential Works of Foucault, 1954-1984, vol. 1: Ethics: Subjectivity and Truth* (Allen Lane/Penguin 1997) 166.

Foucault notably refrains from categorizing homosexuality as biological or socially constructed explicitly: 'no comment'.[93] Gays' human rights are the crucial component of the liberation movement because they are 'still not respected in many places'[94]. In this regard, the quest for legal recognition and equal rights embraces a resistance that can never be finalized. The gay subject refers to a political fact rooted in a historical injury, in a sense of shame and marginalization. 'I was produced by insult,' Didier Eribon[95] writes, 'I am the son of shame'. Followingly:

'*We are brought into a world in which a sentence has already been pronounced, and we come, at one point or another in our lives, to occupy the place of those who have been exposed to public condemnation, those who live with an accusatory finger pointed at them, who have no choice but to try to protect themselves from this condemnation* […] *This curse, this sentence that one has to live with, produces feelings of insecurity and vulnerability in the deepest regions of the self, and the source of diffuse kind of anxiety that characterizes gay subjectivity.*'[96]

There comes a moment when, being spat on you turn the verbal attacks into a garland of flowers; a moment where shame turns into pride. This pride is political through and through because it defies the deepest workings of normality and of normativity. You don't start from when you set out to reformulate what you are. It is a slow and painstaking process through which you shape an identity, starting from the one imposed upon you by the social order.[97]

Since the 1970s in the West, the gay liberation movement has aimed to replace shame with the anger and pride, making identity a pivotal tool for empowerment. However, this strategy is not an inherent nor an ontological orientation; rather, it serves as a response to societal othering and the historical wound. It refers to a political fact that constitutes but does not *fully* determine what an individual is.[98] In the political sphere, even if we might be compelled to declare *what we are*, Foucault suggests on the other hand, *becoming-gay*, offers a dynamic process of inventing new relations and new understandings of *what we might be* in the future.[99] This perspective, concurrently, implies that our aspirations for the future are intricately linked to our present and past identities: the gay identity is marked by the shame and wound, yet not limited by them.

93 Foucault, 'Sexual Choice, Sexual Act' (n 91) 152.

94 Foucault, 'Sex, Power, and the Politics of Identity' (n 92) 164.

95 Didier Eribon, *Returning to Reims* (Michael Lucey tr, Penguin 2019) 194.

96 Ibid 212.

97 Ibid 216.

98 Butler, *Undoing Gender* (n 39) 3–4.

99 Foucault, 'Sex, Power, and the Politics of Identity' (n 92) 163–164; Michel Foucault, 'Friendship as a Way of Life' in Paul Rabinow (ed), Robert Hurley (tr), *Essential Works of Foucault, 1954-1984, vol. 1: Ethics: Subjectivity and Truth* (Allen Lane/Penguin 1997) 136.

In Butler's words,

One of the central tasks of lesbian and gay international rights is to assert in clear and public terms the reality of homosexuality, not as an inner truth, not as a sexual practice, but as one of the definite features of the social world in its very intelligibility […] *Indeed the task of international lesbian and gay politics is no less than a remaking of reality, a reconstituting of the human, and a brokering of the question, what is and is not livable?*[100]

In this regard, as stated, Foucault observed that the emergence of gay coincided with late 19th-century power dynamics, which necessitated a medicalized/criminalized subjectivity. The constant pathologization and criminalization of homosexuality have led to the essentialization of gay identity, prompting ongoing struggles to assert and affirm it publicly. However, identity-formation is also a means to forge new social and political alliances.[101] Since claiming rights based on identity remains an urgent tactic for accessing the institutional/juridical game of power relations and re-articulating them, and since the universalistic effects of rights are potentially re-shaped by their deployment through various tactics and strategies, rights-claiming is something that 'we cannot not want'[102]. Both Foucault and Butler suggest that within the realm of rights advocacy, within an inherited set of discourses, diverse groups rally under seemingly contradictory or partial identities and strategically and *temporarily* engage with rights to advance their political agendas. Indeed, we necessarily rely on the language of legal recognition and rights. Though, it is essential to acknowledge our capacity to transform and rewrite the meanings of the language as well:

It is not because there are laws, and not because I have rights, that I am entitled to defend myself; it is because I defend myself that my rights exist and the law respects me. It is thus first of all the dynamic of defense which is able to give law and rights the value which is indispensable for us. A right is nothing unless it comes to life in the defense which occasions its invocation.[103]

Focusing on the transforming processes, the passage highlights that rights are not inherent entitlements but emerge through defending them. They exist through the political investment of those who claim and assert them. The transformation of a right claim into a legal conception, then, depends on the persistence, power, and fortune of those claiming them, suggesting that the practice of rights-claiming itself establishes the foundation of rights. Rights-claiming is a performative act[104], as articulated by

100 Butler, *Undoing Gender* (n 39) 29–30.

101 Foucault, 'Sex, Power, and the Politics of Identity' (n 92) 166.

102 Gayatri Chakravorty Spivak, *Outside in the Teaching Machine* (Routledge 2009) 45–46.

103 Philippe Chevallier, 'Michel Foucault and the Question of Rights' in Ben Golder (ed), Colin Gordon (tr), *Re-Reading Foucault: On Law, Power and Rights* (Routledge 2013) 177.

104 Golder, *Foucault and the Politics of Rights* (n 88) 83.

Karen Zivi's performative account of rights[105], instead of an essentialist form. This account refers to rights claiming as a linguistic activity continually re-articulated through particular exercises. Despite the universalism of rights and identities, in practice, they are constantly subject to political and cultural translation. This means that the political articulation and claims made on behalf of rights and identities are performative and shape individuals and collectivities that struggle for them. Even though rights shape those who struggle for them, they are reshaped through particular contexts. The notion of *rights culture*, in this context, refers to the outcomes of the discursive circulations of rights rhetoric among people, societies, and institutions.[106] This circulation fosters a particular cultural context in which rights are discussed and claimed, potentially differentiated from the offered discourse, highlighting the influence of political actions on universalist concepts.

Therefore, for instance, even though we refer to a universalist category of gay, and even though this subject is not an empty signifier and contains norms, and even though these norms refer to a historical Western figure, in local contexts, the subject is re-written by particular language and actions. There is often a gap between universalist discourse and its political implementations on these rights' ambiguous grounds. Each rights claim has the potential to create politically a new claim, as conducts and counter-conducts share the same instruments: 'no universal is freed from its contamination by the particular contexts from which it emerges and in which it travels'[107]. This underscores the reversibility inherent in performative acts within the realm of rights claiming. Rather than debating whether rights are merely 'techniques or technologies'[108], a critical yet affirmative perspective[109] seeks to explore particular ways within the inherited set of discourses. Past and ongoing political struggles shape these discourses, and within this framework, we inevitably rely on the discourse of recognition. However, while we necessarily engage with the concepts of the human, the subject, and the international, we seek pathways not beyond this framework but within it.

The affirmative aspect of contemporary politics of rights prompts a reconsideration of the act of claiming rights, recognizing its ambiguous, contingent, and performative nature. The non-conformity and inconsistency inherent in this politics offer opportunities to leverage the law against itself, fostering a dynamic struggle across various fronts.[110] A queer perspective might be interested in finding alternative avenues within this contested arena in which the notion of the human is defined, aiming to

105 Karen Zivi, *Making Rights Claims: A Practice of Democratic Citizenship* (Oxford University Press 2012).

106 ibid 8–20.

107 Judith Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' in Judith Butler, Ernesto Laclau and Slavoj Žižek, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (Verso 2000) 40.

108 Michel Foucault and Jonathan Simon, 'Danger, Crime and Rights: A Conversation between Michel Foucault and Jonathan Simon' (2016) 0 Theory, Culture & Society 1.

109 Golder, *Foucault and the Politics of Rights* (n 88).

110 Ibid. 24; Butler and Athanasiou (n 40) 85.

redefine and rearticulate the usage of all these terms. Since our legal categories always contain historical articulations about the human-subject and its rights, then there is a crucial political space for queer's non-essentialist politics, focusing on the necessity of grappling with further questions about the *de-stabilization* of the human and the international. *Queering*, eventually, 'persists as a defining moment of performativity'.[111]

V. Conclusion

We might find ourselves reliant on rights and identities. Rights hold a privileged position among various discourses for emancipation, especially evident in the mobilizing effects of its rhetoric. As one of the most visible instruments of gay activism, in our reality, they are something we cannot not want. Identities, on the other hand, serve normative and regulatory functions, deemed necessary within our political context: we might be compelled to embrace 'the necessary error of identity'[112]. Besides, identity is something necessary yet impossible: it is impossible to live as a universalist concept within our reality, and we are constantly reminded by the presence of others who might even deem us inadequate, failing to fit into the norm. Yet, due to political circumstances and the wounds inflicted by power through our certain experiences, we embrace this *impossibility*, the *trouble*, or the *error* to defend ourselves. Gay rights are undeniably human rights.

This article acknowledges that queer critique does not necessarily reject this assertion. Rather, it highlights the constructed nature of the identities and rights we adopt, emphasizing their tactical orientations. While we advocate for them, simultaneously, we may need to resist being completely subsumed by them. Queer critique cautions against the dangers inherent in these identities and rights; serving as a critical tool to prevent their naturalization, encouraging a self-reflexive questioning regarding the normativity inherent in them, and urges us not to see ourselves and our relationships through the lens of the Normative.[113] Maintaining a critical distance from our political claims becomes imperative, enabling us to be cautious, but at the same time, to know how to *govern* them. This represents one facet of queer engagements with identity-based struggles for rights: *a constant self-critical practice*.

As mentioned at the beginning of the article, recent queer engagements with human rights law have often resulted in framing and articulating a normative vision of politics that assimilates the critique. Contrarily, this engagement can be a critical one, since the engagement includes contestation as well, reminding us of how identities and

111 Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge 1993) 224.

112 ibid 229; Judith Butler, 'Imitation and Gender Subordination' in Henry Abelove, Michele Aina Barale and David Halperin (eds), *Lesbian and Gay Studies Reader* (Routledge 1993) 308.

113 Judith Butler, *Frames of War* (Verso 2009) 137.

rights subject us 'even as we assert them in our defense'[114], despite their liberation potentials. This contestation finds its meaning on the ground that contests 'not only the exclusion of queers, but also the authority of liberal internationalist agents to set the terms of their political and economic existence and inclusion'[115]. Rather than focusing on who is the subject of rights, queer questioning prompts us to consider *how rights subject us*. This questioning can complement rights advocacy, offering to utilize political claims in alternative ways.

Furthermore, a queer engagement might offer us an alternative perspective on the politics of rights: a platform to rearticulate our political names and strategies. Within the arena of rights and identities, we do not just strategically *deploy* these legal strategies; we are constantly *conducted* by and through them. However, being conducted is not equivalent to being entirely *determined* by them[116]; we desire to transform their meanings and applications. This requires courage, indeed, and understanding rights and identities not ontologically but politically. Therefore, queer critique does not affirm rights and identities only because they are something we cannot not want. Instead, it embraces the rights for their ambiguity and potential to be reinterpreted. Our political claims of rights are performative; universal identity categories are subject to translation within the contingency of politics, allowing for diverse deployments. Indeed, law plays a pivotal role in framing and distinguishing between individual experiences. The human rights framework normative questions on who/what human is, shaping the political discourse around terms like human, citizen, gay, etc. Therefore, the politics of rights initiate a political-legal process of subjecting human to redefinition and destabilization, offering the opportunity and creativity to rearticulate it.[117] Within this very fabric of rights, queer engagements remind us not to defend ourselves solely as identities but to affirm ourselves as creative forces capable of constructing new subjectivities and relationships.[118] Thus, I suggest that it would be inaccurate to claim that identity is nothing more than the effects of power relations for queer approaches. Fundamentally, queer interest in rights stems from their potential to reinterpret framings for anti-essentialist politics. The non-normative stance of queer theory makes it a powerful tool for this political creativity, as it does not carry any inherent meaning.[119]

Deploying queer as a critical method enriches contemporary critical approaches to human rights regarding their subject-production effects. Besides, it fosters a critical

114 Brown, *States of Injury. Power and Freedom in Late Modernity* (n 41) 121.

115 Langlois (n 13) 245.

116 Culbertson and Jackson (n 51) 140; Karen Zivi, 'Rights and the Politics of Performativity' in Terrell Carver and Samuel A Chambers (eds), *Judith Butler's Precarious Politics: Critical Encounters* (Routledge 2008) 163.

117 Butler, *Undoing Gender* (n 39) 33.

118 Foucault, 'Friendship as a Way of Life' (n 99) 136.

119 Bernini (n 3) 100.

practice within political movements regarding the effects of strategies and tactics they deploy. Our categories of rights are to be seized and employed as counter-conducts. However, within the dynamism of power relations, they inevitably produce their counter-effects, various unintended consequences. The effects of rights and other legal forms are unpredictable and beyond control. Therefore, in this very fragile domain of rights, rights are to be seized as *critical* counter-conducts. Given the unpredictable political nature of rights, maintaining a constant critical attitude might be necessary to be both participatory yet disclaimed within the interplay of legal institutions to its regulatory operations. Deploying queer critique, not prescriptively but methodologically, can assist in navigating this terrain. While the contingency and ambiguity of the politics of rights might be the reason for political vigilance, they also harbor emancipatory potentials. It may be an opportune moment to critically evaluate the political claims at our disposal, recognizing both their possibilities and effects on the self and on politics.

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RESEARCH ARTICLE

Individual Application to the Constitutional Court of Poland

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Abstract

The Constitutional Court was established in Poland in 1985, a country that adopted the European model constitutional justice system. Individual application to the Constitutional Court (Constitutional complaint), which is an important mechanism in the protection of individual rights and freedoms and also ensures the development of the Constitutional Court jurisprudence, was made possible for the first time in Poland with the Constitution that came into force in 1997. The Constitutional Tribunal Act, which was adopted in the same year with the 1997 Polish Constitution, contains regulations regarding individual application. Because of the judicial reforms carried out in 2016, the Constitutional Tribunal Act Law was changed. The Act of Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, which is the most recent act put into force on January 3, 2017, includes up-to-date regulations regarding individual applications. The review authority of the Polish Constitutional Court regarding individual applications differs from that in Turkey. In the Republic of Poland, when an application is made to the Constitutional Court on the grounds that fundamental rights and freedoms guaranteed in the constitution have been violated, the legal regulation itself is subject to unconstitutionality review. The reasons for choosing Poland in this study include the fact that the Constitutional Court was established in Poland before the collapse of the Eastern Bloc; that it sets an example for other Eastern European countries; and that legal regulations can also be subject to individual application.

Keywords

Polish Constitutional Court, Individual Application, Constitutional Review, Constitutional Complaint, Fundamental Rights and Freedoms

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Introduction

For constitutions to function to limit power, it is not enough for them to contain regulations regarding the basic organs of the state; besides, individual rights and freedoms must be recognised and guaranteed. Abstract norm reviews and concrete norm reviews, which are types of constitutionality reviews, are not sufficient to secure individual rights and freedoms. In addition to these review mechanisms, the opportunity for individual application to the Constitutional Court should be provided.

This study discusses the system of individual application to the Constitutional Court in Poland, which has a special place in the democratisation waves after the end of Soviet rule in Eastern Europe. Poland was selected because the country established the Constitutional Court while still under Soviet rule and pioneered other post-communist countries regarding the establishment of the Constitutional Courts.

In this study, the focus is on the history and structure of the Polish Constitutional Court. Following this, the types of norm reviews carried out by the Polish Constitutional Court will be briefly discussed. Next, the study will explain how individual application works. Regarding the functioning of individual applications, the study will deal with who initiates individual applications in what circumstances and in what way. Finally, the review procedure of the Polish Constitutional Court, the decisions that can be made, and the effects of the decisions will be discussed.

I. Establishment and Historical Development of the Polish Constitutional Court

Judicial review is important for protecting the fundamental rights and freedoms included in the constitutions. In this regard, there is a need to examine the establishment of the Polish Constitutional Court and its judicial review mechanism.

Poland's[1] position[2] has always been different from that of other Eastern European countries. It not only has the oldest Constitutional Court in Eastern Europe but also has become a pioneering country in this regard[3] because the opposition in Poland emerged early and grew stronger rapidly. There are two reasons for this: The first is that there was a great struggle against Soviet domination in Poland, and they were

1 With its Constitution dated May 3, 1791, Poland had the world's second and Europe's first Constitution, after the 1787 US Constitution. However, the Constitution never came into force, and four years after its adoption, Poland lost its independence and was disintegrated by Austria, Prussia, and Russia. Herman Schwartz, *The Struggle for Constitutional Justice in Post- Communist Europe* (The University of Chicago Press, 2000) 49; Rett R. Ludwikowski, 'Two Firsts: A Comparative Study of the American and the Polish Constitutions' (1987) 8 Michigan Journal of International Law 117.

2 Poland, which came under Soviet rule, later took part in the Eastern Bloc as a member of the Warsaw Pact. However, the republic's experience and liberal policies in its history caused Poland to be in a different position from Hungary. Bülent Yücel, 'Yarı-Başkanlık Sisteminin Hükümet Modeli Üzerine Karşılaştırmalı Bir Çalışma: Fransa Modeli Ve Komünizm Sonrası Polonya', (2003) 52 Ankara Üniversitesi Hukuk Fakültesi Dergisi, vol. 52, pp. 352, 2003.

3 Piotr Czarny and Bogumił Nalezin´ski, 'Law-making Activity of the Polish Constitutional Tribunal' in Monica Florczak-Wator (ed), *Judicial Law-Making in European Constitutional Courts* (Routledge 2020) 165.

always in a struggle with their neighbours for independence. In addition, they were a homogeneous nation state. The second reason is that the communist regime in Poland has always been authoritarian, not totalitarian[4].

Looking at the historical background of the Polish Constitutional Court, we see that there was no judicial review mechanism in the Polish Constitutions before World War II and that a judicial review mechanism could not be developed during Soviet rule. Neither the 1921 nor the 1935 Constitutions included a Constitutional Court, and although the necessity of constitutional jurisdiction was put forward by the doctrine in the early 1970s, there was no tradition of constitutional jurisdiction that could be referred to when the transformation process[5] began in Poland in the 1980s. After the formation of the 1st Solidarity Movement in 1981, the idea of urgently establishing a constitutional court emerged[6].

In the Autumn of 1981, lawyers began working on the establishment of the Constitutional Court. The constitutional amendment of 26 March 1982 introduced the Polish Constitutional Court[7] and the Impeachment Court into the Polish legal system. Although the law for the Impeachment Court, which ensures the functioning of the institution, was accepted on the same day, the Constitutional Tribunal Act was accepted on April 29, 1985, after three years of conflicts regarding the regulation. It has been stated by groups opposed to the idea of establishing the Constitutional Court that it is difficult to support it politically, considering the independence of the institution[8].

During this period, the assertiveness of the Supreme Administrative Court on constitutional issues caused the regime to be uneasy about the Constitutional Court and to want to limit it. In these circumstances, because of a hard-won compromise that included several limitations on the court's position and powers, the Constitutional Tribunal Act was adopted on April 29, 1985[9]. The most important limitation regarding

4 Levent Gönenç, *Prospects for Constitutionalism in Post-Communist Countries* (Kluwer Law International, 2002), 123, 124.

5 Poland has been the leading country in democratisation movements in Eastern Europe. The "Polish Solidarity Movement", dating back to the 1980s, sparked subsequent revolutionary events in Eastern Europe. Gönenç (n 4) 123; The Solidarity movement in Poland and its leader Lech Walesa gained legitimacy in 1989 and later. Stephen Gardbaum, 'Revolutionary Constitutionalism' (2017) 15 International Journal of Constitutional Law 190.

6 Leszek Lech Garlicki, 'The Experience of the Polish Constitutional Court' in Wojciech Sadurski (ed), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective* (Kluwer Law International 2002) 265. Although Constitutional Courts were established in many Western European countries after World War II, the constitutional judiciary was rejected as a manipulative tool of the bourgeois class in Central and Eastern Europe and in Poland, which was under the influence of Communist rule. Mark F. Brzezinski and Leszek Garlicki, 'Judicial Review in Post-Communist Poland: The 'Emergence of a Rechtsstaat' (1995) 31 (1) Stanford Journal of International Law 15.

7 The Polish Constitutional Court was established at an early stage of the transition to democracy. Although additional powers were introduced with the constitutional amendments in 1989 after its establishment, the court's powers are more limited than those of the constitutional courts of similar countries in Europe. Ergun Özbudun, Demokrasiye *Geçiş Sürecinde Anayasa Yapımı* (Bilgi Yayınevi,1993) 164.

8 Garlicki (no 6) 265.

9 Schwartz (n 1) 51, 52.

the proceedings of the Constitutional Court was that the decision of the court could be overturned by a decision taken by a two-thirds majority of the Sejm (Polish Parliament) on unconstitutional laws[10].

The first judges of the Constitutional Court panel were appointed in November 1985, and the first trial of the newly established Constitutional Court was held in May 1986[11]. Thus, the Constitutional Court was established before the collapse of the communist system. It differed from Western European models because the court's duties and authority were realised as a result of a compromise[12]. According to the establishment and historical information of the Constitutional Court, Poland preferred the European Model Constitutional Court, where a central judicial body conducts review[13].

Fundamental changes became possible after the systemic transformation that began in 1989[14]. The 1985 law was amended to remove some limitations on the Constitutional Court's duties and powers. Through incompatible legislative amendments, until 1997, the Sejm retained the power to override decisions of the Constitutional Court on the unconstitutionality of laws[15]. The fundamental change in the political situation led to a great increase in the importance of the Constitutional Court. Political pluralism allowed opponents to emerge from among the public. During this period, there was no new constitution in Poland. Despite the lack of a new constitution in Poland until 1997, the constitutional amendments adopted did not solve important problems[16].

Considering the structure of the Polish Constitutional Court, according to Article 194[17] of the Polish Constitution, the Constitutional Court consists of fifteen judges who are elected by the Sejm[18] for a term of nine years from among persons distinguished by their legal knowledge. According to Article 6 of the Act of November 30, 2016 on

10 Garlicki (n 6) 265.

11 Ibid.. 265; Daniel H. Cole, 'Poland's 1997 Constitution in Its Historical Context' (1998) 1 Saint Louis-Warsaw Transatlantic Law Journal 1.

12 Garlicki (n 6) 265.

13 For the Constitutional Court crisis in Poland and subsequent thoughts on the review conducted by ordinary courts (American Model), see Piotr Radziewicz, 'Judicial Change to the Law in-Action of Constitutional Review of Statutes in Poland' (2022) 18 (1) Utrecht Law Review 38; Marcin Szwed, 'The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights' ECtHR 7 May 2021, No. 4907/18, Xero Flor w Polsce sp. z o.o. v Poland (2022) 18 (1) European Constitutional Law Review 132-154.

14 Despite the significant changes in 1989, the decisions of the Constitutional Court were not binding until the New Polish Constitution came into force on October 17, 1997. Sven Höbel, 'Polish and German Constitutional Jurisprudence on Matters of European Community Law: A Comparison of Constitutional Courts' Approaches' (2007) 3 Croatian Yearbook of European Law and Policy, 516.

15 Garlicki (n 6) 266.

16 Ibid. 266.

17 For the English text of the Constitution, see <The Constitution of the Republic of Poland (sejm.gov.pl)> accessed 25th December 2023.

18 The fact that all members of the Constitutional Court were elected by the Sejm created fears that they might be influenced by politicians, but efforts were made to reduce this possibility. In addition, not all members are elected at the same time, which reduces the possibility of judges being influenced by political will. Hüseyin Bilgin, 'Polonya Yargı Sistemi Üzerine Düşünceler' (2013) 107 Türkiye Barolar Birliği Dergisi 390.

the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, "The General Assembly shall comprise the incumbent judges of the Tribunal who have taken the oath of office before the President of the Republic of Poland"[19].

The President appoints the President and Vice-President of the Constitutional Court from among the candidates recommended by the General Assembly of the Constitutional Court. The issues on which the Constitutional Court has the authority to decide are listed in Article 188 of the Polish Constitution. These are;

- the conformity of statutes and international agreements to the Constitution;

- the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;

- the conformity of legal provisions issued by central State organs to the Constitution and ratified international agreements and statutes;

conformity to the Constitution of the purposes or activities of political parties;

- complaints concerning constitutional infringements, as specified in Article 79, paragraph 1.

In addition, Article 189 of the Constitution stipulates that the Constitutional Court will resolve jurisdictional disputes between the central constitutional organs of the State.

In relation to the decisions made by the Polish Constitutional Court, the majority required for decisions to be made varies in accordance with the type of case and the composition of the Constitutional Court hearing the case. For instance, decisions made by the General Assembly of the Constitutional Court require the presence of at least two-thirds of the Justices, including the President or the Vice President of the Tribunal, and they are adopted by a simple majority unless the law requires otherwise[20]. This is typically reserved for the most important or complex cases, ensuring a broad consensus among the Justices.

As for the decisions made by the Court proceeding constitutional control of the acts, the number of Justices deciding on a case is based on the nature of that case

19 The Act of November 30, 2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, [Published in the Journal of Laws of the Republic of Poland on 19 December 2016, item 2072] https://trybunal.gov.pl/fileadmin/content/dokumenty/Akty_normatywne/Am._in_force_6II2019_The_Act_on_the_Organisation_of_the_Constitutional_Tribunal_and_the_Mode_of_Proceedings_Before_the_Constitutional_Tribunal_en.pdf accessed 2nd January 2023

20 Piotr Tuleja, 'The Polish Constitutional Tribunal' in Armin von Bogdandy, Peter Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford University Press 2020) 625.

under review. For example, five Justices are required for the constitutional review of legislative acts and international treaties to determine their compatibility with the Constitution or with ratified international treaties. On the other hand, for the constitutional review of subordinate norms, constitutional complaints, and complaints against the rejection of a petition to review a norm, three Justices are sufficient[21]. It is also stated in Article 190 of the Constitution that the decisions of the Constitutional Court are binding and final [22].

II. Polish Constitutional Judiciary

Poland's Constitutional Court has adopted both preventive and suppressive constitutionality reviews[23]. The establishment of a Constitutional Court during communist rule, before the dissolution of the Eastern Bloc, set an example for other Eastern European countries[24]. In addition to the Polish Constitutional Court, the Ombudsman institution, which was established in 1987, is also a pioneer for the Eastern Bloc countries. This institution has made a significant contribution to human rights proceedings in many human rights issues before they are brought before the Constitutional Court[25].

The Polish Constitutional Court, which sets an example for other Eastern European countries, faced two important limitations in the end of the 1990s. One of these limitations was the Sejm's overcoming of the Constitutional Court's unconstitutionality decisions and the obstruction of the use of its judicial powers, and the other was the lack of a human rights catalogue in Poland[26]. The Court has overcome these limitations in various ways; for example, it uses the "rule of law principle" when granting rights that are not expressly regulated in the constitution. Prochazka criticised this attitude of the court[27]. However, there is nothing more natural than removing some sub-principles, rights, and freedoms from basic principles such as the rule of law, democratic state, and the state that respects human rights in the constitution. It is possible to agree with Prochazka's criticism that restricting these rights to principles not included in the constitution rather than creating rights that are not included in the constitution based only on basic principles will cause drawbacks.

21 Tuleja (n 20) 626.

22 The decision of the Constitutional Court enters into force from the day of its publication; However, the Constitutional Court may set another date for the termination of the binding force of a normative law. This period cannot exceed 18 months according to one law or 12 months according to any other normative law. If the decision has financial consequences that are not foreseen in the budget, the Constitutional Court, after taking the opinion of the Council of Ministers, determines the date on which the relevant normative act will cease to be binding. Article 190 of the Constitution.

23 Erdal Onar, *Kanunların Anayasaya Uygunluğunun Siyasal ve Yargısal Denetimi ve Yargısal Denetim Alannda Ülkemizde Öncüler* (2003) 122, 125.

24 Onar (n 23) 134.

25 Schwartz (n 1) 49.

26 Radoslav Prochazka, 'Polonya, Çek Cumhuriyeti ve Slovak Cumhuriyetinde Anayasa Yargısı' in Ozan Ergül (ed), *Democracy and Judiciary* (Türkiye Barolar Birliği 2005) 314.

27 Prochazka (n 26) 314.

It is quite remarkable that the decisions made by the Constitutional Court regarding unconstitutionality were invalidated by the legislative body, the Sejm. However, this practise was ended in 1999 after the adoption of the 1997 Constitution[28].

Considering the constitution of the Republic of Poland, the Constitutional Court not only managed to contribute to the democratic state of law by acting in line with the limits of its jurisdiction but also eliminated deficiencies during the Soviet domination period, producing concepts that would contribute to constitutional democracy[29].

A. Preventive Review

In cases where constitutionality review is carried out by a central judicial body, the review that occurs before the law comes into force is called preventive (a priori) review[30]. Because preventive review is carried out before the law comes into force, it has the function of preventing unconstitutional laws from entering the legal system. The best example of this type of review is the one conducted by the French Constitutional Council[31]. The preventive review method was implemented in Spain between 1980 and 1985 and is still in practise in Portugal and Romania[32].

Article 122 of the Constitution describes the phase of an accepted bill after it is submitted to the President. According to paragraph 3 of Article 122 of the Constitution, the President may apply to the Constitutional Court for adjudication on the constitutionality of a law sent to him/her for signature after it has been accepted by the assembly. After the Constitutional Court judges on constitutionality, the President must sign and publish the bill[33].

According to paragraph 4 of the same Article of the Constitution, the President rejects signing the bill that the Constitutional Court has ruled unconstitutional. If the decision on unconstitutionality is partial and if these parts are not inextricably linked to the entire bill, the President, after obtaining the opinion of the Marshal of the Sejm, signs the provisions not found to be unconstitutional or returns the bill to the Sejm for the elimination of the unconstitutionality.

28 Onar (n 23) 135.

29 Mustafa Erdoğan, 'Anayasa Mahkemeleri Önemli midir?" Orta Avrupa'da Anayasa Yargs ve Demokrasinin Pekişmesi' (2005) 54 Ankara Üniversitesi Hukuk Fakültesi Dergisi 19; the Hungarian and Slovak constitutional courts tried to influence the policies of the parliaments for different reasons and by using different methods compared with the Polish and Czech constitutional courts. However, the courts of Poland and the Czech Republic, while adhering to the ideologies established by their post-revolutionary leaders, were more active than the constitutional courts of Hungary and Slovakia in communicating with local courts. Prochazka (n 26) 313.

30 Onar (n 23) 122.

31 Şeref İba and Abbas Kılıç, *Anayasa Yargısı Dersleri* (Turhan Kitabevi 2022) 65.

32 Wojciech Sadurski, *Rights Before Courts-A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005) 74.

33 Onar (n 23) 135

In paragraph 5 of Article 122, it is mentioned that the President shall send the bill, together with its justifications, to the Sejm for reconsideration, without applying to the Constitutional Court. If the returned bill is re-approved by the Sejm with a three-fifths majority in a session where at least half of the total number of members are present, the President has to sign the bill within seven days and publish it in the Journal of Laws of the Republic of Poland (Dziennik Ustaw). It is not possible for the President to take the bill passed again by the Sejm to the Constitutional Court in accordance with paragraph 3. In other words, the President can never send the bill repassed by the Sejm to the Constitutional Court for preventive review. On the other hand, the President has the option of referring that repassed bill to the Constitutional Court only for suppressive review.

According to Article 133 of the Constitution, in addition to the laws, the President, before ratifying an international agreement, may also apply to the Constitutional Court with a request to adjudicate upon its conformity to the Constitution.

B. Suppressive Review

Suppressive review (a posteriori) occurs at any stage after laws are put into force, either when persons authorised in the constitution may file an application with the Constitutional Court without waiting for the law to be implemented in a case pending in a court or when bringing the norm applied in a pending case to the Constitutional Court with the claim that it is unconstitutional. In the Polish constitutional justice system, in addition to the preventive review mentioned above, there is also suppressive (corrective) review[34]. Suppressive review consists of abstract norm review, concrete norm review, and individual application (constitutional complaint) [35]. The method of individual application is discussed under a separate heading below.

1. Abstract Norm Review

Abstract norm review is a review method that is accepted in all post-communist countries[36]. Abstract review offers a useful instrument for facilitating legislative compromise[37]. According to Article 188 of the Constitution, the Constitutional Tribunal shall decide on the following issues: the conformity of statutes and international agreements to the Constitution; the conformity of a statute to ratified international agreements whose ratification requires prior consent granted by statute; the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements, and statutes; the conformity to the Constitution of

34 Onar (n 23) 122,136.

35 Garlicki (n 6) 273.

36 Sadurski (n 32) 65.

37 Georg Vanberg, 'Abstract Juicial Review, Legislative Bargaining, And Policy Compromise' (1998) 10 (3), 1998, 314.

the purposes or activities of political parties; and complaints concerning constitutional infringements, as specified in Article 79, paragraph 1.

According to sub-paragraph 1 of paragraph 1 of Article 191, the President, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 deputies, 30 senators, the First President of the Court of Appeal, the President of the Council of State, the Chief Public Prosecutor, the President of the Supreme Supervisory Board, and the Commissioner of Citizens' Rights may apply to the Constitutional Court regarding the matters listed in Article 188. However, the application authority of the organs listed in the continuation of Article 191 is limited. The National Council of the Judiciary may apply to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges. The constitutive organs of units of local government, the national organs of trade unions, as well as the national authorities of employers' organisations and occupational organisations, churches and religious organisations may make such applications if the normative act relates to matters relevant to the scope of their activity[38]. According to Article 190 of the Constitution, the decisions of the Constitutional Court are binding and final.

2. Concrete Norm Review

The concrete norm review method refers to the fact that the decision on the merits of a case in a court depends on whether the norm to be applied in that case is constitutional or not[39]. In concrete norm review, the court hearing the case makes it a pending issue to decide whether the norm to be applied complies with the constitution. Concrete norm review is implemented in most Central and Eastern European countries[40]. When ordinary courts refer constitutional questions to them under the concrete review limb, constitutional courts can and should respond to them by carefully considering their arguments. Rather than being viewed as a paternalistic exposition of the constitution by the constitutional tribunal, these constitutional referrals by ordinary courts should be viewed as a forum for conversation on constitutional matters between the constitutional tribunal and ordinary courts[41]. Although in practise, the courts are cautious about applying for concrete norm review, there is an increase in the number of applications[42].

38 Garlicki (n 6) 274.

39 Kemal Gözler and *Türk Anayasa Hukuku* (Ekin Yayınevi 2019) 1141; Erdoğan Teziç and *Anayasa Hukuku* (Beta Yayınevi 2019) 244.

40 Garlicki (n 6) 274; Sadurski (n 32) 65.

41 David Kosař and Sarah Ouředníčková, 'Responsive Judicial Review "Light" in Central and Eastern Europe–A New Sheriff in Town?' (2023) 48 Review of Central and East European Law 452.

42 Garlicki (n 6) 274.

Application to the Constitutional Court can be done through concrete norm review regarding whether a law to be used to resolve a legal issue regarding a case pending at any court conforms to the constitution, approved international agreements, or laws. Article 193 of the Polish Constitution regulates application to the Constitutional Court through concrete norm review.

3. Individual Application

Individual application refers to a legal mechanism that offers individuals the opportunity to object to laws, decisions, or actions of the state that they view as a violation of their constitutional rights by presenting their case directly to a constitutional court. This legal mechanism is also in effect in Poland according to Article 79 of the Constitution of the Republic of Poland. Since the focus of this article is on individual application to the Constitutional Court in Poland, in the following sections, the conceptual framework of this legal mechanism will be given, which is followed by detailed information about how it works in the country.

III. Individual Application in the Polish Constitutional Jurisdiction

The system of individual application[43] (constitutional complaint) shaped on the basis of the Austrian model entered the Polish constitutional justice system with the constitution adopted in 1997[44]. In the Turkish legal system, individual application, which is a newer experience than the Polish constitutional system, is a concept that was included in the Turkish constitutional justice system with the Constitutional Amendment of September 12, 2010. The system of individual application[45], whose acceptance has been discussed in the Turkish legal system since the 1960s, was created on the basis of examples such as Germany and Spain[46]. In the case of Poland, the Austrian model of the individual[47] application system was used[48].

43 Schwartz stated that the individual application system in the Polish Constitutional Court will bring citizens and the Constitutional Court closer together and make a significant contribution to the court in human rights proceedings. Schwartz (n 1) 73.

44 Adam Bodnar, 'Anayasa Mahkemesi'ne Bireysel Başvuru (Doğu Avrupa Deneyimi)' in B. Yücel and İ. G. Şen (eds), *Anayasa Mahkemesi'ne Bireysel Başvuru Hakkı Sempozyumu* Anadolu University (2011) 116.

45 Bahadır Kılınç, 'Karşılaştırmalı Anayasa Yargısında Bireysel Başvuru (Anayasa Şikâyeti) Kurumu ve Türkiye Açısından Uygulanabilirliği', (2008) 24 Anayasa Yargısı 20.

46 Selin Esen Arnwine, 'İspanya'da Amparo Başvurusu ve Türkiye' in B. Yücel and İ. G. Şen (eds), *Anayasa Mahkemesi'ne Bireysel Başvuru Hakkı Sempozyumu* Anadolu University (2011) 100.

47 In the Austrian model, according to Article 140 of the Constitution, people who claim to have been directly harmed by any law due to its unconstitutionality can file an application against the relevant law in the Constitutional Court. However, for this to occur, the law in question must have direct legal consequences without the need for any court decision or administrative action. Gerhart Holzinger, 'Avusturya Anayasa Hukukunda Anayasa Şikâyeti ve Bireysel Başvuru' (2009) 26 Anayasa Yargs, 69; in Austria, people who claim that their rights guaranteed in the constitution have been violated by an administrative action can also apply to the Constitutional Complaint, which is regulated in a separate article of the Constitution (Article 144 of the Constitution), and to the Constitutional Court. The term "administrative procedure" refers to individual proceedings based on public power, such as building permits, tax transactions, and traffic fines. Holzinger (n 37) 62.

48 Bodnar (n 44) 116.

In the Turkish legal system, individual application[49] is defined as a way of seeking justice applied by people whose rights have been violated due to actions taken by the executive and judicial authorities[50]. The Polish individual application system[51], which differs from the German constitutional complaint model[52], combines elements of the Polish constitutional judiciary. In this respect, individual application constitutes a third type of suppressive review besides abstract norm review and concrete norm review[53].

Individual application, which is stated in Article 79 of the Polish Constitution, is available in case the fundamental rights and freedoms included in the constitution are violated as a result of a final judgement or decision given by the courts or public institutions. In the face of such a violation, everyone whose constitutional rights and freedoms have been violated has the right to apply to the Constitutional Court regarding the constitutionality of the law or norm law[54] related to the rights and freedoms specified in the constitution on which the final decision is based. It can be seen here that the issue of unconstitutionality is not about a specific practise but about the content of the relevant legal regulation[55].

Regulations regarding the right to individual application to the Polish Constitutional Court are included in the Polish Constitution and the Constitutional Tribunal Act. The Constitutional Tribunal Act, adopted after the 1997 Constitution, was repealed, and the Constitutional Tribunal Act has been changed several times. The law currently in force is the Act of Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, which entered into force on January 3, 2017.

A. Those with the Individual Application Right

The right to individual application to the Polish Constitutional Court is stated in Article 79[56] of the Polish Constitution. According to Article 79, within the framework of the principles specified in the law, everyone whose constitutional rights and freedoms are violated has the right to individual application to the Constitutional

49 Göztepe lists the basic functions of individual application as "ensuring and protecting the direct use of rights and freedoms, expanding the scope of the principle of constitutional interpretation, ensuring unity in the judiciary, and contributing to the development of citizens' democratic consciousness". Ece Göztepe, 'Türkiye'de Anayasa Mahkemesi'ne Bireysel Başvuru Hakkının (Anayasa Şikâyeti) 6216 Sayılı Kanun Kapsamında Değerlendirilmesi' (2011) 95 Türkiye Barolar Birliği Dergisi 21.

50 Kılınç (n 45) 23.

51 When the individual application method was accepted by the Polish Constitutional Court, it was described as a revolution in the Polish legal system. Ryszard Cholewinski, 'The Protection of Human Rights in the New Polish Constitution' (1998) 22 Fordham International Law Journal, 288.

52 Esen Arnwine (n 46) 99.

53 Bodnar (n 44) 117.

54 "Regardless of any general and abstract form of norm, a norm is a law within the meaning of Article 79."

55 Bodnar (n 44) 117.

56 Constitution of the Republic of Poland. <The Constitution of the Republic of Poland (sejm.gov.pl)> accessed 25th December 2023.

Court for the constitutionality of a law or norm law on which a court or public institution bases its final decision regarding the freedoms and rights specified in the Constitution.

According to Article 79 of the Constitution, it is seen that the expression of "everyone whose constitutional rights and freedoms are violated" is used. The interpretation of certain rights and freedoms in the constitution determines the scope of the individual application system. The right to individual application is undoubtedly a right granted to every Polish citizen. However, since the term "everyone" is used, foreigners and real persons who are not Polish citizens can also benefit, subject to exceptions[57]. Both real and legal persons have the right to apply individually. However, public and state-owned legal entities do not have the right to individual application.[58] Legal scholars and judges accept that the individual application process can also be exercised by legal entities and associations without legal personality, if these organisations can exercise their constitutional rights and freedoms[59].

The Polish Constitutional Court finds individual applications made by municipalities inadmissible. The most important justification of the Court in this regard is that the addressee of the rights arising from individual constitutional rights and freedoms is not the organisation performing public duties[60]. Political parties, religious organisations or labour unions can make individual applications filed by legal entities on the grounds that their constitutional rights have been violated.

Turkish practise and Polish practise are similar in terms of individuals who have the right to individual application because, in both countries, there is no right of individual application for public legal entities. In Turkey, private law legal entities are granted the right to individual application only regarding the violation of rights belonging to the legal entity, whereas in Poland, an application method limited to private law legal entities is accepted for entities such as religious organisations and labour unions.

B. Application Conditions

1. Violation of Constitutional Rights and Freedoms

Individual application is possible when constitutional freedom (right) is violated. If the complainant directly cites a specific provision that regulates a particular

57 Marta Klopocka-Jasinka and Adam Krzywoń, 'On The Right Of Public Law Entities To Lodge A Constitutional Complaint In The Light Of The Jurisprudence Of The Polish Constitutional Tribunal' (2016) 6 Wroclaw Review of Law, Administration & Economics 47.

58 Bodnar (n 44), 117.

59 Klopocka and Krzywoń (no 57) 47.

60 Lech Jamróz, 'The Right to Constitutional Complaint In Poland' in Anna Budnik (ed), *Locus Standi Across Legal Cultures* (Temida 2015) 148.

freedom (right) found in the second part of the Constitution, this does not create much difficulty. However, cases in which the complainant refers to legal principles (Part I provision), such as the democratic rule of law, are problematic. Although the Court accepts that this is not absolutely excluded, it is the duty of the complainant to show that a violation of such a provision results in the violation of his or her rights and freedoms as set out in the Constitution[61]. If a fundamental right is inherent in another right that is included in the constitution and which can be subject to individual application, individual application should also be made in terms of that right[62].

An exception is foreseen in paragraph 2 of Article 79 of the Constitution, and the rights in Article 56 of the Constitution, which relate to granting asylum to foreigners in Poland, are not related to paragraph 1 of Article 79, that is, individual application.

In Polish Constitutional Jurisdiction, an individual application can only be based on a statutory provision in its own right, rather than on the interpretation of the judicial or administrative authority[63]. For individual application to be implemented, domestic legal remedies must be exhausted, but it is not mandatory to apply to the Supreme Court at the legal remedy stage[64].

2. Exhaustion of Domestic Legal Remedies

To operate the individual application system in the Polish Constitutional Court, domestic legal remedies must be exhausted. For individual applications, legal benefits are required. If the violation can be resolved through general courts, there is no legal benefit in making an individual application to the Constitutional Court. Because of the secondary nature of the individual application method, this method can only be used if it is not possible to achieve the purpose of the application in any other way[65].

In the context of exhausting domestic remedies to make an individual application to the Constitutional Court of Poland, an application to the Supreme Court is not mandatory as a domestic remedy. This is because appeal means the interpretation of the law[66].

61 Jamróz (n 60) 153. Tuleja (n 20) 637.

62 Yavuz Sabuncu and Selin Esen Arnwine, 'Türkiye İçin Anayasa Şikâyeti Modeli Türkiye'de Bireysel Başvuru Yolu' (2004) 21 Anayasa Yargs 229,233.

63 Garlicki (n 6) 276.

64 Bodnar (n 44) 117.

65 Sabuncu and Arnwine (n 62) 229.

66 Bodnar (n 44) 117.

C. Application Procedure

1. Matters to be Included in the Application Petition

According to Article 53 of the Act of November 30, 2016, an individual application shall specify a challenged provision of a statute or another normative act upon which a court or a public administration authority has made a final decision on the complainant's freedoms, rights, or obligations specified in the Constitution, and with regard to which the complainant requests the Tribunal to determine non-conformity to the Constitution. It shall also indicate which constitutional freedom or right of the complainant and in what way, according to the complainant, has been infringed. In addition, individual application shall provide justification for an allegation about the non-conformity of the challenged provision of a statute or another normative act to the indicated constitutional freedom or right, including arguments or evidence in support of the allegation. It shall also state relevant facts and substantiate the date of service of the judgement, the decision, or another determination, as referred to in paragraph 1 of Article 77. Finally, individual applications shall provide information on whether an extraordinary means of appeal was filed against the judgement, the decision, or the determination, which are referred to in paragraph 1 of Article 77.

2. Obligation of Representation by a Lawyer or Legal Advisor

According to Article 44 of the Act of November 30, 2016, within the scope of the preparation and submission of a constitutional complaint and an appeal against a decision on refusal to proceed with the complaint as well as with regard to the legal representation of the complainant in proceedings before the Tribunal, there is a requirement that the complainant shall be represented before the Tribunal by an advocate or a legal adviser unless the complainant is a judge, a public prosecutor, an advocate, a legal adviser, a notary public, a professor of law, or a scholar with a post-PhD degree in Law. According to the same Article, where the complainant cannot cover the costs of legal representation, the complainant may file a request with the district court of his/her place of residence for an advocate or a legal adviser to be appointed by the court.

Contrary to Turkish law, the obligation to be represented by a lawyer during individual applications has various drawbacks for Poland. Although a person may request the appointment of a lawyer because of his/her economic weakness, such an obligation will make it difficult to exercise the right to individual application. On the other hand, there may be positive consequences of having individual application requests handled by a professional lawyer.

3. Application Period

There is a time limit for individual applications to the Polish Constitutional Court. This period is determined in Article 77 of the Act of November 30, 2016. Accordingly, the individual application must be made within three months after all domestic remedies have been exhausted, i.e., after the final judgement is given or the legally valid decision reaches the applicant. Three months is a disqualifying period.[67]

4. Court Costs

According to Article 54 of the Act of November 30, 2016, the State Treasury shall cover the costs of proceedings before the Tribunal. The Tribunal shall issue, along with a judgement granting a constitutional complaint, a decision on the reimbursement of the costs of proceedings before the Tribunal to the complainant by a public authority that has issued a normative act that is the subject of the constitutional complaint. Where justified, the Tribunal may decide that the costs of proceedings before the Tribunal are to be reimbursed when a constitutional complaint is dismissed. The Tribunal may determine the costs of legal representation incurred by a complainant lodging a constitutional complaint, payable to an advocate or a legal adviser, depending on the nature of the case and the extent to which the said attorney's involvement contributed to the examination and determination of the case.

D. Types of Decisions

Individual applications do not prove that the applicant's personal rights have been infringed. Instead, the violation of the applicant's individual rights is a prerequisite for considering the application to review the underlying norm. Consequently, the Polish individual application cannot be classified as an actio popularis. When an individual application is deemed admissible, the Constitutional Tribunal solely evaluates the objective constitutionality of the contested norm. At no point in the proceedings does the Tribunal investigate whether the applicant's individual rights have been violated[68].

Determining whether a norm is unconstitutional because of the norm itself or its implementation can often be a complex task. This distinction becomes particularly challenging when one must decide whether the norm itself or its interpretation infringes upon fundamental rights. The Constitutional Tribunal asserts that when provisions are consistently interpreted, their content aligns with their interpretation. In such instances, any violation originates from the norm itself and not its application. Consequently, the complaint is considered valid. However, this approach does not

67 Ibid. 117.

68 Tuleja (n 20) 637.

address the broader issue of how one can independently determine the content of a norm separate from its enforcement[69].

The Polish Constitutional Court may grant upon individual application as follows[70]:

- It can decide that the legal regulation alleged to be unconstitutional, or more accurately, to be contrary to the fundamental rights and freedoms guaranteed in the constitution, is constitutional.

- It can decide that the legal regulation claimed to be unconstitutional cannot be examined according to the justification claimed by the individual applicant, that is, the constitutional provision.

- It can decide that the allegedly unconstitutional legal regulation is unconstitutional.

- It can make interpretive decisions. In other words, if the law is interpreted in a certain way, it can decide whether Article A of the law is contrary to Article B of the constitution or is compatible with it.

- It can also make decisions limited to practise, that is, decisions stating that Article A of the law is unconstitutional as applied in certain cases.

E. Effects of Decisions

In the Polish Constitutional Court, the individual effects of the decisions were expressed in the form of a retrial. In civil and criminal cases, the decision of the Polish Constitutional Court that the provision-underlying the case is unconstitutional does not directly overturn the relevant court decision. In addition, individuals can also demand compensation by filing a separate application[71]. If we express general effects other than these individual effects, the unconstitutionality decision given by the Polish Constitutional Court because of the individual application results in the cancellation of the norm in question. The Polish Constitutional Court may postpone the entry into force of its annulment decision for 18 months. In this respect, it is important for the legislature to make the necessary legal regulations[72]. According to the Constitution of The Republic of Poland Article 190 paragraph 3, a judgement of the Constitutional Tribunal shall take effect from the day of its publication; however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such a time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act.

69 Ibid. 637.

70 Bodnar (n 44) 118.

71 Ibid. 119.

72 Ibid. 119.

IV. Criticisms and Individual Application Decisions

In the Polish Constitutional system, the fact that individual application relates only to legal regulations is criticised as to whether it provides sufficient protection for individuals, and a revision of the individual application system according to the German Constitutional Complaint model is recommended. The legal nature of the decisions of the Polish Constitutional Court, which seemed like a warning about changing the legal regulations, the late decision of individual application requests due to workload, the fact that violations of individual rights in the context of individual applications arise from gaps in the law, and the difficulty in processing the individual application in these cases are all among other problems in relation to individual application made to the Constitutional Court [73].

In one of the individual applications made to the Polish Constitutional Court, the application concerned the pre-trial detention order of trainee judges. The reason for the application was stated as the fact that the trainee judges did not hold the title of judge during the internship period, and in this respect, they did not have the guarantee of independence and were affiliated with the Ministry of Justice. Regarding this application, the Constitutional Court ruled that trainee judges did not have the authority to make decisions. However, the Polish Constitutional Court postponed the entry into force of this decision for 18 months, and during this period, a judicial reform regarding the appointment of judges was carried out[74].

Another individual application was made regarding overcrowding in prisons. In the individual application in question, it was claimed that a provision in the Penal Execution Law was unconstitutional. The relevant provision of the law stipulated that at least 3 m2 of space should be provided for each convict, but in exceptional cases, the prison director could narrow this area. The Polish Constitutional Court also ruled that reducing the area for each prisoner to less than three square metres was against the provision in the constitution stating that inhuman and degrading behaviour cannot be committed. With this decision, the problem of overcrowding in Polish prisons has been resolved[75].

Conclusion

In this study, individual applications to the Polish Constitutional Court, which has an important position in the transition to democracy after the collapse of the Eastern Bloc, are discussed. Among the reasons why Poland was preferred was that this country has the second constitution in the world and the first in Europe, even though it has not come into force, and that Poland has pioneered other Eastern Bloc

73 Ibid. 119.

74 Ibid. 120.

75 Ibid. 120.

countries in the establishment of constitutional judiciary and constitutional courts. In this respect, this study primarily covers the history of the establishment of the Polish Constitutional Court and the types of constitutionality reviews. In this study, the current regulations in the Act of November 30, 2016 which came into force on January 3, 2017, are included.

Individual application, which was included in the constitutional system with the 1997 Constitution, deals with the unconstitutionality of the content of a legal regulation, unlike the German Constitutional complaint, which is of great importance worldwide. Regarding the operation of the individual application remedy, the study mentioned who can operate the individual application remedy, in what circumstances and in what way, the review procedure of the Polish Constitutional Court, the decisions that can be made, and the effects of the decisions.

Within the framework of the principles specified in the Act in relation to individual application to the Polish Constitutional Court, everyone whose constitutional freedoms and rights have been violated has the right to apply to the Constitutional Court for the constitutionality of a law or norm on which a court or public institution bases its final decision regarding the freedoms and rights specified in the Constitution.

To carry out the individual application process quickly and accurately, it is important to require the assistance of a lawyer in making an individual application to the Constitutional Court of Poland. Moreover, it is also quite appropriate to offer free legal assistance to those who are economically weak.

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RESEARCH ARTICLE

Das Erscheinen der vom Arbeitgeber zu leistenden Zahlung im türkischen und schweizerischen Recht im Rahmen der im Obligationenrecht für die Hinterbliebenen des verstorbenen Arbeitnehmers vorgesehenen Grundsätze

Turkish and Swiss Law on the Payment to be made by the Employer to the Survivors of the Deceased Employee within the Framework of the Code of Obligations

Ender Gülver*

Zusammenfassung

Während der rechtliche Bestand des Arbeitsvertrags zwischen dem Arbeitnehmer und dem Arbeitgeber fortgesetzt, ist die Rechtsfolge des Todes von dem Arbeitnehmer im türkischen Obligationenrecht geregelt, angelehnt an die allgemeine Regel im schweizerischen Obligationenrecht, und es gibt keine allgemeine Regel in dieser Richtung im Arbeitsrecht. Danach endet der Arbeitsvertrag mit dem Tod des Arbeitnehmers und der Vertrag mit den gesetzlichen Erben des verstorbenen Arbeitnehmers wird nicht fortgesetzt. Das Eintreten dieses Todesfalls ist mit der Verpflichtung des Arbeitnehmers vereinbar, die im Rahmen des Arbeitsvertrags übernehmende Arbeitsleistung persönlich zu erbringen. Mit einer späteren Änderung in der Schweiz wurde diese Regelung bezüglich der Auswirkung des Todes des Arbeitnehmers auf den Arbeitsvertrag um eine Zahlungsverpflichtung des Arbeitgebers an die Hinterbliebenen des verstorbenen Arbeitnehmers ergänzt, auch wenn der Tod eingetreten und der Arbeitsvertrag beendet ist. Danach hat der Arbeitgeber abhängig von der Betriebszugehörigkeit zum Zeitpunkt des Todes einen monatlichen oder zweimonatigen Lohn an die beschränkten Angehörigen des Arbeitnehmers zu zahlen. Dieses Recht, das nach der Änderung des schweizerischen Obligationenrechts vorgesehen war, wurde bis auf wenige Punkte ziemlich genau in das türkische Obligationenrecht übergenommen. Damit ist im türkischen Recht ein neues Recht an seine Stelle getreten, das beim Tod des Arbeitnehmers vom Arbeitgeber eingefordert werden kann, sofern bestimmte Voraussetzungen erfüllt sind. In dieser Studie werden nach der Erläuterung der Auswirkungen des Todes des Arbeitnehmers auf den Arbeitsvertrag die gesetzlichen Bestimmungen über die vom Arbeitgeber zu leistende Zahlung aufgrund des Todes von dem Arbeitnehmer in Obligationenrechts und Art 440 des türkischen Obligationenrechts, (das auf der Grundlage des Art. 338 Abs. 2 des Schweizerischen Obligationenrecht geschaffen wurde), der Begriff, mit dem diese Zahlung ausgedrückt werden soll, rechtliche Beschaffenheit der Zahlung, die Bedingungen des Zahlungsanspruchs, die berechtigten Personen (Begünstigten), die Höhe der Zahlung, die Berechnung des Zahlungsbetrags, die Verteilung des berechneten Betrags auf die Begünstigten, die Fälligkeit der Forderung, die anzuwendenden Zinsen, das Beginndatum der Zinsen, die Verjährungsfrist, die relative zwingende Charakter der Vorschrift, die Frage, ob die Arbeitnehmer, die türkischem Arbeitsgesetz unterliegen, und die Seeleute, die türkischem Seearbeitsgesetz unterliegen, einen Anspruch auf diese Zahlung haben und ob diese Zahlung zusammen mit der Abfindungsanspruch verlangt werden kann, wurde unter Berücksichtigung der Unterschiede zwischen der türkischen und der schweizerischen Rechtspraxis erörtert.

Schlüsselwörter

Arbeitsvertrag, Beendigung des Arbeitsvertrags, Tod des Arbeitnehmers, Lohnnachgenuss, Hinterbliebene

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Abstract
The legal consequences of the death of the employee during the legal existence of the employment contract between the employee and the employer are regulated in the Code of Obligations, inspired by the general rule in the Swiss Code of Obligations, and there is no general regulation in this direction in the labour legislation. According to this rule, the employment contract is terminated upon the death of the employee, and the contract does not continue with the legal heirs of the deceased employee. The emergence of this result upon death agrees with the obligation of the employee to personally perform the work undertaken by the employee under the employment contract. In Switzerland, with a subsequent amendment, the obligation of the employer to make a payment to the survivors of the deceased employee has been added to this rule regarding the effect of the death of the employee on the employment contract, even if the death has occurred and the employment contract has been terminated. Accordingly, the employer is obliged to make a payment of one or two months' wages, depending on the length of seniority at the date of death, to the relatives of the deceased employee. This right, which was expected following the amendment to the Swiss Code of Obligations, has been transferred almost verbatim to the Turkish Code of Obligations, except for a few points. Thus, a new right that can be claimed from the employer upon the death of the employee, provided that certain conditions are fulfilled, has taken its place in Turkish Law. In this study, after explaining the effect of the death of the employee on the labour contract, Article 338 of the SCO and Article 440 of the TCO, which is based on this regulation, will be discussed. The legal regulations regarding the payment to be made by the employer to the survivors of the employee due to the death of the employee, the term to be used to express the payment, the nature of the payment, the conditions of entitlement to payment, who the beneficiaries are, the amount of payment, the calculation of the amount of payment, the allocation of the calculated amount among the beneficiaries, the moment the receivable becomes due, the interest to be applied, The starting date of the interest, the statute of limitations, the relative mandatory character of the provision, the question of whether the workers subject to the Labour Law and the seafarers subject to the Maritime Labour Law have the right to demand this payment, and whether the payment in question can be demanded together with the severance pay, are discussed by taking into consideration the differences between the Turkish and Swiss Law practise.

Keywords
Labour contract, termination of labour contract, death of worker, subsequent salary payment, survivors

Extended Summary

During the continuation of the employment contract, regardless of the reason for the death of the employee, the employment contract between the parties loses its legal existence. The effect of the death of the employee on the employment contract is clearly stated in Article 338/1 of the SCO and Article 440 of the TCO, which is regulated on the basis of this provision. The employment contract terminates automatically upon the death of the employee, and for this result to arise, it is not necessary for the legal heirs left behind by the employee or the employer to give a notice of termination after the death of the employee. The acceptance of the termination of the employment contract upon the death of the employee in the legal regulations is a natural consequence of the fact that the employee is obliged to personally perform the work undertaken during his/her lifetime.

Neither Labour Law No. 4857 nor Maritime Labour Law No. 854 stipulates that the employer shall make a payment to the survivors of the deceased employee following the automatic termination of the employment contract upon the death of the employee. However, Article 18 of the Press Labour Law, titled death indemnity, stipulates that "In the event of termination of the employment contract due to the death of the journalist, his/her spouse and children, and in their absence, the members

of his/her family whose livelihood depends on him/her, shall receive death indemnity in the amount of seniority rights, not less than three times the monthly wage of the deceased". While this is the case in terms of Turkish Law, the regulation in Article 338/2 of the Swiss Code of Obligations has been translated and transferred to Article 440 of the Turkish Code of Obligations, and a regulation similar to the death indemnity in the Press Labour Law has been introduced. According to Article 338/2 of the Swiss Code of Obligations, "However, the employer is obliged to pay wages to the deceased employee's spouse, registered union, minor children and, in the absence of these heirs, to other dependent survivors for an additional month calculated as of the day of death, or for an additional two months in the case of five years of seniority". According to the second sentence of Article 440/1 of the Turkish Code of Obligations, "The employer is obliged to pay one month's wage to the surviving spouse and minor children of the deceased employee, or in the absence of such heirs, to the dependents of the deceased employee, starting from the day of death, or two months' wage if the service relationship has continued for more than five years."

The right to demand payment from the employer is not a right arising from the estate of the deceased employee and passing to the heirs according to the principles of inheritance. This right arises directly for the surviving beneficiaries mentioned separately in each article. Therefore, even if the inheritance is rejected, the right to claim payment does not disappear, as the right is originally recognised to the persons concerned.

To be entitled to payment, it is necessary to be a beneficiary who are foreseen to claim payment at the time of death. The surviving spouse and minor children of the deceased worker, or if these are not available, the persons who were dependent on the worker in his/her lifetime, shall be entitled to the payment. According to Article 338/2 of the SCO, with the surviving spouse, the registered union of the deceased worker is also listed as the beneficiary. For the beneficiaries to be entitled to the payment, the employment contract concluded between the employee and the employer must be a valid contract and the employee must have started to work in accordance with the contract. To be entitled to the payment, the seniority period of the worker before the date of death is not of any importance. In the payment to be made by the employer to the surviving beneficiaries due to the death of the worker, the seniority period is taken into consideration in determining the amount entitled, not in entitlement to payment. In this framework, if the seniority period at the date of the death of the worker is five years or less, the amount of payment that can be requested is the amount of one month's wage of the worker. On the other hand, if the seniority period at the date of the worker's death exceeds five years, the amount of payment to be paid is two months' salary.

There is no clarity as to how the payment amount will be divided among more than one beneficiary at the same time. The predominant view adopted in Turkish and Swiss law is that the payment amount should be divided equally. The minority

opinion, on the other hand, accepts that the distribution should be made according to the inheritance shares. In the decision of Antalya RCA 9th Civil Chamber dated 03/05/2020 and numbered 2019/2696 E. and 2020/657 K., which is the first decision regarding the application of the regulation on death compensation under Article 440 of the TCO, it was concluded that death compensation should be divided among the persons entitled to death compensation in proportion to their inheritance shares specified in the certificate of inheritance.

Since there is no separate interest rate determined for the payment to be made by the employer to the surviving beneficiaries due to the death of the employee, legal interest should be applied. The automatic termination of the employment contract upon the death of the employee causes the receivable regarding the payment to be made by the employer to the right holders left behind due to the death to become due, but the default of the employer does not arise simultaneously and automatically with the receivable becoming due. There is no clarity in both Art. 338/2 of the SCO and Art. 440 of the TCO that the payment must be made to the persons determined as beneficiaries on the date of death. For this reason, although the decision of the 9th Civil Chamber of Antalya RCA is correct in determining that legal interest should be applied in death compensation, it is not correct to run the interest from the date of death without requiring the employer to be in default.

Within the framework of the current legal regulations, the statute of limitations for death compensation should be accepted as 10 years from the date of death of the worker.

The provisions regarding the payment to be made by the employer to the beneficiaries left behind due to the death of the employee are of a relative mandatory nature. For this reason, it is possible to make arrangements that make the right better than the legal regulation, for example, extending the duration of the payment or expanding the scope of the persons who will benefit from the payment.

In the doctrine of labour law, the debate focuses on whether the provision on death indemnity stipulated in Article 440 of the TCO can be applied to workers subject to the Labour Law and seafarers subject to the Maritime Labour Law, other than to workers subject to the Turkish Code of Obligations. Although there are different opinions on the subject, it is more appropriate to accept that the provision is applicable only to workers subject to the provisions of the Turkish Code of Obligations. In the decision of the 9th Civil Chamber of Antalya RCA dated 03/05/2020 and numbered 2019/2696 E. and 2020/657 K., it was concluded that workers subject to the Labour Law and seafarers subject to the Maritime Labour Law may also claim death indemnity stipulated in Article 440 of the TCO, and that there is no obstacle to request death indemnity together with severance pay.

I. Einleitung

Es gibt viele Formen der Beendigung des zwischen dem Arbeitnehmer und dem Arbeitgeber geschlossenen Arbeitsvertrags. Einige Gründe für die Beendigung des Arbeitsverhältnisses stehen im Zusammenhang mit der Beendigung des Arbeitsverhältnisses durch Kündigung. Eine Willenserklärung einer der Parteien des Arbeitsvertrags, des Arbeitnehmers oder des Arbeitgebers, gegenüber der anderen Vertragspartei, die den Arbeitsvertrag einseitig und ohne Zustimmung der anderen Partei beenden kann, nennt man Kündigungserklärung. Nach dem türkische Arbeitsgesetz kann bei einem unbefristeten Arbeitsvertrag eine Partei der anderen Partei gegenüber unter Fristsetzung (Nachfrist) kündigen als auch bei einem unbefristeten oder befristeten Arbeitsvertrag kann eine Partei der anderen Partei auch ohne Einhaltung einer Frist kündigen, wenn ein wichtiger Grund vorliegt. Im ersten Fall ist von einer ordentlichen (mit Hinweis, mit Nachtfrist, gewöhnlich) Kündigung die Rede, im zweiten Fall von einer außerordentlichen (ohne Hinweis, fristlosen, außergewöhnlichen) Kündigung. Bei einer Kündigung mit Kündigungsfrist wird der Arbeitsvertrag nach Ablauf der Kündigungsfrist beendet, die der anderen Vertragspartei mitgeteilt werden muss. Bei einer außerordentlichen Kündigung liegt ein sachlich gerechtfertigter Kündigungsgrund vor, der die Fortsetzung eines unbefristeten oder befristeten Arbeitsverhältnisses unzumutbar macht, und bei einer Kündigung aus diesem Grund wird das Arbeitsverhältnis sofort beendet, ohne auf das Ende einer bestimmten Kündigungsfrist gewartet wird.

Einige der Gründe für die Beendigung des Arbeitsvertrags hängen mit anderen Gründen als der Kündigung zusammen. Eine von diesen Fällen, die den in diesem Teil enthaltenen Arbeitsvertrag beenden, ist die Vereinbarung der Parteien. Der Arbeitsvertrag kann jederzeit durch Vereinbarung der Parteien beendet werden. Der Arbeitsvertrag kann durch Vereinbarung des Willens der Parteien nicht nur begründet als auch durch Vereinbarung des Willens der Parteien beendet werden. Diese Vereinbarung zur Auflösung des Arbeitsvertrags wird Aufhebungsvertrag genannt. Der Ablauf der Dauer eines befristeten Arbeitsvertrags, der gemäß den gesetzlichen Bedingungen festgelegt wurde, ist ein weiterer Fall, der den Arbeitsvertrag außer der Kündigung beendet. In einem solchen Fall endet der Arbeitsvertrag automatisch, ohne dass weitere Maßnahmen erforderlich sind. Bei Arbeitsverträgen, die unter Berücksichtigung der Persönlichkeit des Arbeitgebers abgeschlossen wurden, endet der Arbeitsvertrag durch den Tod des Arbeitgebers. Beispielsweise endet ein Arbeitsvertrag mit einer Pflegekraft zur Pflege einer älteren Person automatisch mit dem Tod dieser Person. In einem solchen Fall hängt der Bestand des Arbeitsvertrags vom Überleben der Pflegeperson ab. Im Falle des Todes dieser Person wird der Arbeitsvertrag nicht fortgesetzt, er endet automatisch. Einer der in diesen Fällen aufgeführten Kündigungsgründe ist der Tod des Arbeitnehmers. Der Tod des

Arbeitnehmers während der Laufzeit des Arbeitsvertrags führt automatisch zur Beendigung des Arbeitsvertrags, ohne dass weitere Maßnahmen erforderlich sind.

Das Arbeitsgesetz Nr. 4857, das Seearbeitsgesetz Nr. 854 und das Pressearbeitsgesetz Nr. 5953 enthalten keine allgemeine Bestimmung, welche die Auswirkungen des Todes des Arbeitnehmers auf den Arbeitsvertrag direkt regelt. Obwohl es in diesen Gesetzen keine allgemeine Regel über die Auswirkungen des Todes auf den Arbeitsvertrag gibt, werden einige Rechtsfolgen, die mit dem Tod eintreten geregelt, und in diese einigen Vorschriften wird indirekt angegeben, dass der Tod des Arbeitnehmers den Arbeitsvertrag beendet. Zum Beispiel werden in Artikel 74 des Arbeitsgesetzes im Falle des Todes der Mutter bei der Geburt oder nach der Geburt dem Vater die nicht genutzten Urlaubszeiten nach der Geburt gewährt. Neben dieser, in dem zusätzlichen Artikel 2 des Arbeitsgesetzes ist im Falle des Todes des Ehepartners, der Geschwister oder des Kindes seiner Mutter oder seines Vaters dem Arbeitnehmer ein dreitägiger Lohn zu zahlen, sofern eine Entschuldigung zulässig ist. Ebenso wird im Falle der Beendigung des Arbeitsvertrags durch den Tod des Arbeitnehmers eine Abfindung vom Arbeitgeber an die hinterlassenen gesetzlichen Erben gezahlt. (Gesetz Nr. 1475, Artikel 14; Seearbeitsgesetz, Artikel 20). Für den Fall, dass der Arbeitsvertrag aufgrund des Todes des dem Pressearbeitsgesetz unterliegenden Journalisten beendet wird, konnte vom Arbeitgeber keine Abfindung verlangt werden, sondern im Rahmen Artikel 18 des Pressearbeitsgesetzes war es vorgesehen, eine Zahlung unter dem Namen Sterbegeld innerhalb zu leisten. Alle diese Regelungen deuten darauf hin, dass der Arbeitsvertrag durch den Tod des Arbeitnehmers endet, wenn auch indirekt.

In Art. 347 des alten, heute nicht mehr gültigen Obligationenrechts Nr. 818, wurde akzeptiert, dass der Arbeitsvertrag erst mit dem Tod des Arbeitnehmers endet, parallel zur Regelung im damals geltenden schweizerischen Obligationenrecht, und es wurde keine Regel bezüglich der Verpflichtung des Arbeitgebers zur Zahlung der Hinterbliebenen des verstorbenen Arbeitnehmers erlassen. Im türkischen Obligationenrecht Nr. 6098, gültig ab 01/07/2012, wurde die Regelung bezüglich der Folgen des Todes des Arbeitnehmers unter Berücksichtigung der nachträglichen Änderung im schweizerischen Obligationenrecht aktualisiert. In der neuen Bestimmung wird erneut festgestellt, dass der Tod des Arbeitnehmers den Arbeitsvertrag beendet, diesmal wird jedoch akzeptiert, dass der Arbeitgeber bestimmten Personen unter bestimmten Bedingungen verpflichtet ist, Zahlungen zu leisten. Gemäß Artikel 440 des türkischen Obligationenrechts Nr. 6098 endet der Vertrag automatisch mit dem Tod des Arbeitnehmers. Der Arbeitgeber, der hinterbliebene Ehegatte und minderjährige Kinder des Arbeitnehmers oder deren Angehörige, falls diese nicht anwesend sind, einen Monat nach dem Todestag; dauert das Dienstverhältnis länger als fünf Jahre, ist er zur Zahlung eines zweimonatigen Entgelts verpflichtet. Gemäss Artikel 338

des schweizerischen Obligationenrechts, der diesem Artikel entspricht, endet das Arbeitsverhältnis mit dem Tod des Arbeitnehmers. Allerdings hat der Arbeitgeber einen weiteren Monat, gerechnet ab dem Todestag, und zwei weitere Monate bei fünfjähriger Betriebszugehörigkeit für den Ehegatten, die eingetragene Partnerschaft und die nicht volljährigen Kinder des Arbeitnehmers; In Ermangelung dieser Erben hat er diese Gebühr an die verbleibenden Unterhaltsberechtigten zu zahlen.

In dieser Studie werden nach der Erläuterung der Auswirkungen des Todes des Arbeitnehmers auf den Arbeitsvertrag die gesetzlichen Bestimmungen über die vom Arbeitgeber zu leistende Zahlung aufgrund des Todes des Arbeitnehmers in Obligationenrechts und Art 440 des türkischen Obligationenrechts skizziert, (das auf der Grundlage des Art. 338 Abs. 2 des Schweizerischen Obligationenrecht geschaffen wurde), der Begriff, mit dem diese Zahlung ausgedrückt werden soll, rechtliche Beschaffenheit der Zahlung, die Bedingungen des Zahlungsanspruchs, die berechtigten Personen (Begünstigten), die Höhe der Zahlung, die Berechnung des Zahlungsbetrags, die Verteilung des berechneten Betrags auf die Begünstigten, die Fälligkeit der Forderung, die anzuwendenden Zinsen, das Startdatum der Zinsen, die Verjährungsfrist, der relativ zwingende Charakter der Vorschrift, die Frage, ob die Arbeitnehmer, die türkischem Arbeitsgesetz unterliegen, und die Seeleute, die türkischem Seearbeitsgesetz unterliegen, einen Anspruch auf diese Zahlung haben und ob diese Zahlung zusammen mit der Abfindungsanspruch verlangt werden kann, wurde unter Berücksichtigung die Unterschiede zwischen der türkischen und der schweizerischen Rechtspraxis erörtert.

II. Auswirkungen des Todes des Arbeitnehmers auf den Arbeitsvertrag

Stirbt der Arbeitnehmer während des laufenden Arbeitsvertrags, endet der Arbeitsvertrag automatisch, ohne dass weitere Maßnahmen erforderlich sind. Dieser Punkt ist in Artikel 440 des türkischen Obligationenrechts geregelt, in Übereinstimmung mit der Regelung, dass das Arbeitsverhältnis in Artikel 338/1 des schweizerischen Obligationenrechts mit dem Tod des Arbeitnehmers endet. Gemäß dieser Regelung endet der Vertrag automatisch mit dem Tod des Arbeitnehmers. (Art. 440 Abs. 1 Satz. 1 des türkischen Obligationenrechts)

Weil der Arbeitsvertrag unter Berücksichtigung der Persönlichkeit des Arbeitnehmers geschlossen wird, ist dieses Ergebnis unumstritten[1]. Dann muss der Arbeitnehmer

1 Sarper Süzek, *İş Hukuku* (23. Bası, Beta Yayınları 2023) 537; Nuri Çelik/Nurşen Caniklioğlu/Talat Canbolat/Ercüment Özkaraca, *İş Hukuku Dersleri* (36. Bası, Beta Yayınları, 2023) 466; Hamdi Mollamahmutoğlu/Muhittin Astarlı/Ulaş Baysal, *İş Hukuku Ders Kitabı, Cilt 1: Bireysel İş Hukuku* (Lykeion Yayınları, 2022) 239; Öner Eyrenci/Savaş Taşkent/Devrim Ulucan/Esra Baskan, *İş Hukuku* (10. Bası, Beta Yayınları, 2020) 177; Tankut Centel, *İş Hukuku, Cilt: I, Bireysel İş Hukuku* (Beta Yayınları, 1994) 169; Ünal Narmanlıoğlu, *Türk Hukukunda Kanundan Doğan Kıdem Tazminatı* (Fakülteler Matbaası, 1973) 334; Polat Soyer, 'Hizmet Sözleşmesinin Sona Ermesine İlişkin "Yeni" Türk Borçlar Kanunu Hükümleri ve Türk İş Hukuku Bakımından Önemi' (2011) 22 Sicil 12, 18; Gülsevil Alpagut, 'Türk Borçlar Kanununun Hizmet Sözleşmesinin Devri, Sona Ermesi, Rekabet Yasağı, Cezai Şart ve İbranameye İlişkin Hükümleri', *Çalışma Hayatı Açısından Yeni Borçlar Kanunu ve Ticaret Kanunu Semineri* (TİSK, Ankara 2012) 124, 150; Kübra Doğan Yenisey, 'Hizmet

seine arbeitsvertragliche Arbeitspflicht persönlich erfüllen (Art. 395 des türkischen Obligationenrechts; Art. 321 Schweizerischen des Obligationenrechts). Da es dem Arbeitnehmer mit dem Tod nicht mehr möglich ist, die Arbeit selbst zu verrichten, akzeptiert das Gesetz, dass der Arbeitsvertrag automatisch endet, ohne dass weitere Maßnahmen erforderlich sind. Wenn es akzeptiert würde, dass die Geschäftstätigkeit auf die gesetzlichen Erben des verstorbenen Arbeitnehmers übergeht, nach der der Arbeitnehmer stirbt, während das Arbeitsverhältnis fortgesetzt, dieses Ergebnis sei mit der Verpflichtung des Arbeitnehmers, die Arbeit selbst auszuführen, unvereinbar. Deswegen erklärt sich die rechtliche Beendigung des Arbeitsverhältnisses mit dem Tod des Arbeitnehmers damit, dass der Arbeitnehmer grundsätzlich zur Selbstfüllung der von ihm übergenommenen Arbeitsleistung verpflichtet ist[2]. Damit der Arbeitsvertrag durch den Tod des Arbeitnehmers beendet werden kann, ist keine Kündigung durch die Erben des Arbeitnehmers oder den Arbeitgeber nach dem Tod erforderlich[3].

Im schweizerischen Recht heißt es, dass die Tatsache, dass der verstorbene Arbeitnehmer die Arbeitshandlung zusammen mit anderen Arbeitnehmern und nicht allein ausführt (Arbeitsteilung, Teamverträge), das Ergebnis der im Gesetz für den verstorbenen Arbeitnehmer festgelegten Beendigung des Arbeitsverhältnisses nicht ändert. Es wird empfohlen, zuerst gemäß dem Arbeitsvertrag zwischen den Parteien zu entscheiden, wie mit anderen Arbeitnehmern umgegangen werden soll, und dann, ob die verbleibenden Arbeitnehmer oder Hilfspersonen den verstorbenen Arbeitnehmer ersetzen können[4].

Zu beachten ist, dass mit der Beendigung des Arbeitsverhältnisses durch den Tod des Arbeitnehmers nicht sämtliche Pflichten aus dem Arbeitsverhältnis für den Arbeitnehmer erlöschen, wie bei anderen Formen der Beendigung des

Sözleşmesi' *Türk Borçlar Kanunu Sempozyumu: Makaleler – Tebliğler* (2012) 324; Nurşen Caniklioğlu, 'Türk Borçlar Kanunu – İş Kanunu İlişkisi ve Türk Borçlar Kanununun Bazı Hükümlerinin İş Kanunu Açısından Değerlendirilmesi' *10. Yılında İş Kanunu Semineri* (TİSK, 2014) 109; Ercan Akyiğit, 'Ölüm ve İş İlişkisindeki Yeni Sonuçları' (2011) 22 Sicil 32, 34; Sabahattin Yürekli, *Türk Borçlar Kanununa Göre Hizmet Sözleşmesinin Sona Ermesi* (3. Bası, Seçkin Yayınevi, 2016) 155; Yeliz Bozkurt Gümrükçüoğlu, *Belirli Süreli İş Sözleşmesi* (Vedat Kitapçılık, 2012) 282, 283; Ercüment Özkaraca, 'Ölüm Tazminatı (Karar İncelemesi)' (2022) 454 Tekstil İşveren 2, 4; Ş. Esra Baskan, '6098 Sayılı Türk Borçlar Kanunu Hükümleri Çerçevesinde Ölümün Hizmet Sözleşmesine Etkisi ve Yeni Bir Tazminat: Ölüm Tazminatı' (2013) 104 Türkiye Barolar Birliği Dergisi 55, 57; İpek Kocagil, 'İşçinin Ölümünün İş İlişkisi Bakımından Sonuçları' (2014) 20/1 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Prof. Dr. Ali Rıza Okur'a Armağan 429, 430, 431.

2 Jürg Brühwiler, *Kommentar zum Einzelarbeitsvertrag, Art. 319 – 343 OR* (3. Aufl., 2014) 338 N 1; Frank Emmel, *Handkommentar zum Schweizer Privatrecht, Vertragsverhältnisse Teil 2: Arbeitsvertrag, Werkvertrag, Auftrag, GoA, Bürgschaft, Art. 319 – 529 OR* (3. Aufl., Zürich 2016) 338 N 1; Ullin Streiff /Adrian von Kaenel/Roger Rudolph, *Arbeitsvertrag, Praxiskommentar zu Art. 319 – 362 OR* (7. Aufl., Zürich/Basel/Genf 2012) 338 N 2; Boris Etter/Marcel Stucky, *Stämpflis Handkommentar, Arbeitsvertrag* (Staempfli Verlag, 2021) N 1; Wolfgang Portmann/Isabelle Wildhaber, *Schweizerisches Arbeitsrecht* (4th edition, Dike Verlag, 2020) N 804; Anina Kuoni *Arbeitsrecht* (Schulthess Juristische Medien, 2020) 53.

3 Streiff/von Kaenel/Rudolph (n 2) 338 N 2; Çelik/Caniklioğlu/Canbolat/Özkaraca (n 1) 466; Özkaraca (n 1) 4.

4 Brühwiler (n 2) 338 N 1; Angela Hensch, 'Tod des Arbeitnehmers' (2016) AJP, 163; Streiff/von Kaenel/Rudolph (n 2) 338 N 2; Etter/Stucky (n 2) N 2; siehe auch, Manfred Rehbinder/Jean-Fritz Stöckli, *Berner Kommentar, Der Arbeitsvertrag, Art. 331 – 355 und Art. 361 – 362 OR, Schweizerisches Zivilgesetzbuch, Das Obligationenrecht,* (Stämpfli Verlag, 2014) 338 N 2; Adrian Staehelin, *Zürcher Kommentar zum Schweizerischen Zivilgesetzbuch, Der Arbeitsvertrag: Art. 330b – 355 OR, Art. 361 – 362 OR, Kommentar zum schweizerischen Zivilrecht, Obligationenrecht, Kommentar zur 1. und 2. Abteilung (Art. 1 – 529 OR)*, (Schulthess Juristische Medien, 2014) 338 N 1.

Arbeitsverhältnisses beispielsweise bestimmte Pflichten wie die Herausgabe- (Art. 443 des türkischen OR, Art. 339a des schweizerischen OR) und die Geheimhaltungspflicht (Art. 396 Abs. 4 des Art. türkischen OR, Art. 321a Abs. 4 des schweizerischen OR)[5] bestimmte Pflichten gehen mit dem Tod des Arbeitnehmers auf die gesetzlichen Erben über[6]. Ferner ergeben sich mit dem Tod neue, je nach Todesfall vorgesehene Rechtsfolgen. Beispielsweise sieht gemäß Artikel 120 des Arbeitsgesetzes Nr. 4857 Artikel 14 des Arbeitsgesetzes Nr. 1475, der noch in Kraft ist, dass im Todesfall eines Arbeitnehmers mit mindestens einem Jahr Betriebszugehörigkeit eine Abfindung erfolgt, dieses Gehalt wird an die gesetzlichen Erben gezahlt (Gesetz Nr. 1475, Artikel 14/1, 14). Dieselbe Regelung wurde in Artikel 20 des türkischem Seearbeitsgesetzes für Seeleute wiederholt, die den Bestimmungen des Seearbeitsgesetzes unterliegen. (Seearbeitsgesetzbuch 20/1, 15). Gemäss Art. 339b Abs. 1 des schweizerischen OR wird anerkannt, dass der Arbeitgeber zur Zahlung einer Abgangsentschädigung verpflichtet ist, wenn das Arbeitsverhältnis eines mindestens fünfzigjährigen Arbeitnehmers nach zwanzig oder mehr Dienstjahren endet.

Todesart und Todesursache spielen bei der Beendigung des Arbeitsverhältnisses keine Rolle. Egal wie der Arbeitnehmer sein Leben verliert, der Arbeitsvertrag läuft aus. Stirbt der Arbeitnehmer eines natürlichen Todes, durch Dritte oder durch eigenes Fehlverhalten oder durch Suizid des Arbeitnehmers, verliert der Arbeitsvertrag mit dem Todeszeitpunkt seine rechtliche Existenz[7].

Todesart und -ursache sollen weder für die Beendigung des Arbeitsverhältnisses noch für die Geltendmachung einer Abfindung wirksam sein. Voraussetzung für eine Abfindung ist das Geschehen des Todes. Eine Unterscheidung nach Todesart und Todesursache ist in den gesetzlichen Regelungen des Abfertigungsanspruchs nicht enthalten[8]. Andererseits akzeptiert der Kassationsgerichtshof in einigen seiner Entscheidungen, dass, wenn der Arbeitnehmer, der seinen eigenen Tod durch sein fehlerhaftes Verhalten verursacht hat, und auch dem Arbeitgeber erlaubt, den Arbeitsvertrag aus diesem Grund außerordentliche kündigen, eine Abfindung nicht erfordert werden kann. Das Kassationsgericht kam zu dem Schluss[9], dass *«wenn das*

5 Hensch (n 4) 165; Rehbinder/Stöckli (n 4) 338 N 1; Stefan Reider (n 4) 'Sind Ferienentschädigungen vererbbar?' 2012 AJP, 1579; Staehelin (n 4) 338 N 2.

6 Streiff/von Kaenel/Rudolph (n 2) 338 N 2.

7 Eyrenci/Taşkent/Ulucan/Baskan (n 1) 258; Ömer Ekmekçi/Esra Yiğit, *Bireysel İş Hukuku* (5. Bası, On İki Levha Yayıncılık, 2023) 838, 839; Yürekli (n 1) 159.

8 Süzek (n 1) 767, 768; Çelik/Caniklioğlu/Canbolat/Özkaraca (n 1) 720; Münir Ekonomi, *İş Hukuku, Cilt 1, Ferdi İş Hukuku* (3. Bası, İstanbul Teknik Üniversitesi Vakfı, 1987) 236, 237; Narmanlıoğlu (n 1) 583; Eyrenci/Taşkent/Ulucan/Baskan (n 1) 258, 259; Centel (n 1) 210; Mollamahmutoğlu/Astarlı/Baysal (n 1) 346, 347; Kenan Tunçomağ/Tankut Centel, *İş Hukukunun Esasları* (10. Bası, Beta Yayınları, 2022) 195; Ercan Akyiğit, *Kıdem Tazminatı* (Seçkin Yayıncılık, 2010) 108, 109; Yürekli (n 1) 156; Eda Karaçöp/Efe Yamakoğlu, '6098 sayılı Türk Borçlar Kanunu'nun Hizmet Sözleşmesine İlişkin Hükümleri ve İş Kanunları ile İlişkisi' (2013) 38 Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi 83 129; Kocagil (n 1) 439, 440.

9 Y9HD., 21/03/1978, 1977/1676 E., 1978/4008 K., Münir Ekonomi, İHU, İşK.17, No. 16; In die gleiche Richtung, siehe, YHGK, 21/12/1979, 1978/9 – 1041 E., 1979/1634 K.; Y9HD., 07/02/1985, 1984/11082 E., 1985/1201 K., Ali Güzel, İHU, İşK. 14, No. 49.

Ereignis, das den Tod verursacht hat, aufgrund der Vernachlässigung der Arbeit durch den Arbeitnehmer auch eine Gefahr am Arbeitsplatz geschaffen oder den Arbeitgeber dazu veranlasst hat, den Arbeitsvertrag aus einem berechtigen Grund zu kündigen, dann sollten die Erben nicht in der Lage sein Abfindung zu erhalten.»

III. Zahlung vom Arbeitgeber an die Hinterbliebenen des Verstorbenen Arbeitnehmers

A. Gesetzliche Bestimmungen

Im türkischem Arbeitsgesetz Nr. 4857 und im türkischem Seearbeitsgesetz Nr. 854 gibt es keine Regelung bezüglich der Zahlung des Arbeitgebers an die Hinterbliebenen nach dem Tod des Arbeitnehmers.

Im türkischem Pressearbeitsgesetz Nr. 5953 gibt es keine Bestimmung zur Zahlung einer Abfindung im Falle des Todes eines Journalisten in Artikel 6 bezüglich der Voraussetzungen für den Anspruch auf Abfindung und der Grundsätze, die in Bezug auf die Abfindung anzuwenden sind. In Artikel 18 des Pressearbeitsgesetzes mit dem Titel Todesfallentschädigung heißt es jedoch: «Falls der Arbeitsvertrag aufgrund des Todes des Journalisten beendet wird, hat der Ehegatte und die Kinder des Journalisten das Recht auf eine Abfindung abhängig vom Dienstalter, das nicht weniger als das Dreifache des Monatsgehalts des Verstorbenen beträgt, und wenn diese Angehörigen nicht anwesend sind, diese Bezahlung wird zu den Familienangehörigen, die bei ihn den Lebensunterhalt bestreiten.»

Während dies der Fall ist, die Regelung im Art. 338 Abs. 2 des schweizerischen Obligationenrechts übersetzt wird und bis auf wenige Punkte fast exakt in Art. 440 des türkischen Obligationenrechts übergenommen haben und eine Bestimmung, die die ähnlich mit Todesfallentschädigung im Pressearbeitsgesetz erlassen wurde.

Gemäß Art. 338 Abs. 2 des schweizerischen OR, *«Der Arbeitgeber hat jedoch den Lohn für einen weiteren Monat und nach fünfjähriger Dienstdauer für zwei weitere Monate, gerechnet vom Todestag an, zu entrichten, sofern der Arbeitnehmer den Ehegatten, die eingetragene Partnerin, den eingetragenen Partner oder minderjährige Kinder oder bei Fehlen dieser Erben andere Personen hinterlässt, denen gegenüber er eine Unterstützungspflicht erfüllt hat.*" Gemäß der Bestimmung in Artikel 440 Absatz 1 Satz 2 des türkischen Obligationenrechts «*Der Arbeitgeber ist nach dem hinterbliebenen Ehegatten und die minderjährigen Kinder des Arbeitnehmers oder wenn nicht, ihre Angehörigen für einen Monat ab dem Todestag; dauert das Dienstverhältnis länger als fünf Jahre, er zur Zahlung eines zweimonatigen Entgelts verpflichtet.»*

B. Begriff

In Artikel 18 des türkischem Pressearbeitsgesetzes wird die Zahlung, die der Arbeitgeber beim Tod des Journalisten an die Hinterbliebenen zu leisten hat, vom Gesetz direkt als „Todesentschädigung" bezeichnet. In der Regelung in Artikel 440 des türkischen OR wurde jedoch kein Begriff für diese Zahlung verwendet. Aus diesem Grund gibt es diejenigen, die für die im Text des Artikels vorgesehene Leistung den Begriff „Todesfallgeld" verwenden[10], sowie diejenigen, die den Begriff „Todesentschädigung" verwenden[11].

Die Zahlung im Art. 338 Abs. 2 des Schweizerischen OR angesetzt ist, ist die Verpflichtung des Arbeitgebers zur Lohnzahlung aus dem Arbeitsverhältnis nach Beendigung des Arbeitsverhältnisses aufgrund des Todes des Arbeitnehmers, und im schweizerischen Recht, diese Zahlung diesmal nicht zur Arbeitnehmer, jedoch zur die im Text des Artikels genannten Begünstigten und für einen Zeitraum von einem Monat oder zwei Monaten als Fortsetzung bezahlt wird. Im schweizerischen Recht beruht die Verpflichtung des Arbeitgebers, Zahlungen an die Hinterbliebenen wegen des Todes des Arbeitnehmers zu leisten, auf der Wirkung der sich aus dem Arbeitsvertrag ergebenden Schutz- und Fürsorgepflicht des Arbeitgebers nach Beendigung des Vertrags. Die Zahlung, die nach Beendigung des Arbeitsverhältnisses mit dem Tod des Arbeitnehmers geleistet wird, wird als Lohn verstanden. Aus diesem Grund wird diese Zahlung als «Lohnnachgenuss» bezeichnet. Im schweizerischen Recht wird die Existenz eines Soziallohns erwähnt, der nach Vertragsende zu zahlen ist, nicht der tatsächliche Lohn, der als Gegenleistung für die Arbeit erwähnt wurde. Wenn der Arbeitnehmer nicht gestorben ist und weitergearbeitet hätte, wird der Lohn, der vom Arbeitgeber gemäß der gesetzlichen Regelung direkt an den Arbeitnehmer gezahlt werden sollte, für eine Weile nach Tod an den Hinterbliebenen des Arbeitnehmers gezahlt, im Rahmen der Fürsorgepflicht[12].

In Anbetracht der Ausgestaltung der Bestimmung in Art. 440 des türkischen OR wird angemerkt, dass die Bestimmung in Art. 440 des türkischen OR von der Regelung in Art. 338 Abs. 2 des schweizerischen OR abweicht. In Art. 440 des türkischen OR wird im Gegensatz zu Art. 338 Abs. 2 des schweizerischen OR nicht von der Zahlung des Lohns des Arbeiters gesprochen, sondern von einer *„Zahlung in der Höhe von einem oder zwei Monatslöhnen"*. Die Verwendung dieses Ausdrucks kann dahingehend interpretiert werden, dass der Gesetzgeber die besagte Zahlung nicht als Lohn, sondern als Entschädigung betrachtet. Daher wäre es angemessener, den Begriff Todesfallentschädigung im Sinne des türkischen Rechts zu verwenden.

10 Doğan Yenisey (n 1) 324; Akyiğit (n 1) 34; Mustafa Alper Gümüş, *Borçlar Hukuku Özel Hükümler Cilt – 1* (3. Bası, Vedat Kitapçılık, 2013) 538 – 540.

11 Süzek (n 1) 537, 768; Çelik/Caniklioğlu/Canbolat/Özkaraca (n 1) 467; Mollamahmutoğlu/Astarlı/Baysal (n 1) 347; Ekmekçi/Yiğit (n 7) 608; Caniklioğlu (n 1) 109; Nurşen Caniklioğlu, 'İş Kanununun 10. Yılında Belirli Süreli İş Sözleşmesi ile Kısmi Süreli İş Sözleşmesi ve Uygulamada Yaşanan Sorunlar', *10. Yılında 4857 Sayılı İş Kanunu Sempozyumu 26 – 27 Nisan 2013* (Ankara Yıldırım Beyazıt Üniversitesi Hukuk Fakültesi Yayını, 2016) 173; Özkaraca (n 1) 4.

12 Staehelin (n 4) 338 N 3; Rehbinder/Stöckli (n 4) 338 N 3.

C. Beschaffenheit der Zahlung

Für den Fall, dass das Arbeitsverhältnis durch den Tod des Arbeitnehmers beendet wird, sieht sowohl das schweizerische OR Art. 338 Abs. 2 als auch das türkische OR Art. 440 vor, dass der Arbeitgeber an bestimmte Personen für einen bestimmten Zeitraum eine Zahlung leistet. Der Anspruch auf Zahlung entsteht direkt gegenüber den als Begünstigten vorgesehenen Personen und wird von den als Begünstigten vorgesehenen Personen direkt an den Arbeitgeber gerichtet[13]. Dieses Recht unterscheidet sich seiner Art nach von den Rechten des verstorbenen Arbeitnehmers, die zum Zeitpunkt des Todes bereits bestanden, aber noch nicht erfüllt wurden. Die genannten Rechte gehen auf die Erben des verstorbenen Arbeitnehmers über, sofern es sich nicht um Persönlichkeitsrechte handelt[14]. Als Beispiel für diese Rechte können Lohnforderungen angeführt werden, die vor dem Tod entstanden sind, aber erst zum Zeitpunkt des Todes ausgezahlt werden[15]. Die Ausstellung einer Arbeitsbescheinigung für den Arbeitnehmer ist ein Recht, das von der Person des Arbeitnehmers abhängt und nicht auf die Erben übergeht, da es von der Person des Arbeitnehmers abhängt[16].

Weil es in der gesetzlichen Regelung vorgesehene Forderungsrecht von Todesfallentschädigung den ursprünglich Berechtigten eingeräumt und das Erbrecht ausgesondert wird, hat die Verweigerung der Erbschaft durch eine als Berechtigte bestimmte Person keine Auswirkung auf das Forderungsrecht der Zahlung[17]. Da das Forderungsrecht nichts mit der Erbschaft zu tun habe, sei es irreführend, in den Regelungstext von Art. 338 Abs. 2 des schweizerische OR die Wendung *«bei Fehlen dieser Erben»* bezeichnet wird[18]. Der Ausdruck *«bei Fehlen dieser Erben»* in Artikel 338 Abs. 2 des Schweizerischen OR wurde bei der Übernahme der entsprechenden Bestimmung in das türkische OR korrekt aus dem Text des Artikels entfernt und nur der Ausdruck *«wenn nicht»* inbegriffen. Erbschaft besteht nur in Bezug auf früher bestehende Rechte, die noch nicht erfüllt sind. Insofern hat die Art der Erbschaft keine Bedeutung im Hinblick auf das Recht, das sowohl im türkischen OR Art. 440 als auch im schweizerischen OR Art. 338 Abs. 2 vorgesehen ist.

Außerdem, weil die Identität der für die Aufrechnung erforderlichen Parteien nicht existiert, kann der Arbeitgeber die Forderungen gegenüber dem Arbeitnehmer nicht gegen die Zahlung austauschen, die an die Personen zu leisten ist, die aufgrund des Todes des Arbeitnehmers als Begünstigte vorgesehen sind[19].

13 Rehbinder/Stöckli (n 4) 338 N 6; Streiff/von Kaenel/Rudolph (n 2) 338 N 8; siehe auch, OGer ZH, JAR 2015 597, 598 ff.

14 Hensch (n 4) 163; Rehbinder/Stöckli (n 4) 338 N 6.

15 Hensch (n 4) 163 f.; Reider (n 4) 1579 ff.

16 Hensch (n 4) 164; Etter/Stucky (n 2) N 4.

17 Brühwiler (n 2) 338 N 3; Hensch (n 4) 165; Streiff/von Kaenel/Rudolph (n 2) 338 N 8; Emmel (n 2) 338 N 1.

18 Hensch (n 4) 165; Staehelin (n 4) 338 N 5; Etter/Stucky (n 2) N 5.

19 Hensch (n 4) 170; Rehbinder/Stöckli (n 4) 338 N 6; Streiff/von Kaenel/Rudolph (n 2) 338 N 2.

D. Bedingungen des Zahlungsanspruchs

Um Anspruch auf die Zahlung zu haben, die den Begünstigten zu gewähren ist, die der Arbeitgeber aufgrund des Todes des Arbeitnehmers zurückgelassen hat, ist es erstens erforderlich, zu den Begünstigten zu gehören, die voraussichtlich zu diesem Zeitpunkt in der Lage sind, die Zahlung zu verlangen des Todes[20].

Zweitens ist es wesentlich, dass zum Zeitpunkt des Todes ein gültiger Arbeitsvertrag besteht und dass mit der Ausführung der Arbeit aus diesem Vertrag begonnen wurde, das heißt, dass der Arbeitnehmer tatsächlich mit der Arbeit begonnen hat. Dementsprechend kann nur dann kein Anspruch geltend gemacht werden, wenn der Arbeitsvertrag von den Parteien unterzeichnet ist und der Arbeitnehmer stirbt, ohne tatsächlich mit der Arbeit begonnen zu haben[21].

Dabei spielt es keine Rolle, ob die Probezeit andauert oder nicht[22]. Diese Zahlung kann auch beantragt werden, wenn der Arbeitnehmer während der Probezeit verstirbt. Wird der Arbeitsvertrag unter Einhaltung der Kündigungsfristen beendet, endet der Vertrag mit Ablauf der Kündigungsfrist.

Für die Anspruchsberechtigung ist es unerheblich, ob der Todesfall innerhalb der Kündigungsfrist eintritt oder ob das Arbeitsverhältnis befristet, unbefristet oder in Voll- oder Teilzeit erfolgt[23], solange der Arbeitsvertrag zum Todeszeitpunkt noch besteht.

Während der Suspendierungszeit werden nur die Grundschulden aus dem Arbeitsvertrag, die Pflicht zur Arbeit für den Arbeitnehmer und die Schuld zur Zahlung des Lohns für den Arbeitgeber nicht erfüllt, aber der Arbeitsvertrag setzt seinen rechtlichen Bestand zwischen den Parteien zusammen mit seinen anderen Schulden. Wenn der Arbeitnehmer innerhalb der Suspendierungszeit verstirbt, kann Zahlung noch verlangt werden, da der Vertrag zwischen den Parteien rechtswirksam ist[24].

Dabei spielt es keine Rolle, ob der Arbeitnehmer an seinem Tod verschuldet ist oder nicht[25]. Diese Zahlung ist aufgrund des Todes des Arbeitnehmers kein Recht, das dem Arbeitnehmer selbst gewährt wird, mit anderen Worten, dem Arbeitnehmer selbst, sondern ein Recht, das Personen gewährt wird, die als berechtigt gelten, also ob die Arbeitnehmer an seinem Tod schuld ist, wird nicht berücksichtigt[26].

20 Etter/Stucky (n 2) N 7; Hensch (n 4) 165.

21 Hensch (n 4) 165; Rehbinder/Stöckli (n 4) 338 N 3; Streiff/von Kaenel/Rudolph (n 2) 338 N 2; Staehelin (n 4) 338 N 3; Etter/Stucky (n 2) N 7; Mollamahmutoğlu/Astarlı/Baysal (n 1) 347; Özkaraca (n 1) 6; Baskan (n 1) 62.

22 Emmel (n 2) 338 N 1; Hensch (n 4) 165.

23 Etter/Stucky (n 2) N 7; Süzek (n 1) 537; Çelik/Caniklioğlu/Canbolat/Özkaraca (n 1) 468; Mollamahmutoğlu/Astarlı/Baysal (n 1) 347; Ekmekçi/Yiğit (n 7) 607; Erdem Özdemir, 'Yeni Borçlar Kanunu'nun İş Sözleşmesinin Sona Ermesine İlişkin Hükümlerinin 4857 sayılı Kanun Kapsamındaki İş İlişkilerine Etkisi' (2012) 27 Sicil 25, 34; Yürekli (n 1) 159; Akyiğit (n 1) 35; Bozkurt Gümrükçüoğlu (n 1) 283, 284; Baskan (n 1) 62.

24 Özkaraca (n 1) 6.

25 Özkaraca (n 1) 6.

26 Streiff/von Kaenel/Rudolph (n 2) 338 N 2; Staehelin (n 4) 338 N 3; Emmel (n 2) 338 N 1; Etter/Stucky (n 2) N 16.

Für den Fall, dass gegen den Arbeitnehmer ein Abwesenheitsbescheid ergeht oder der Arbeitnehmer aufgrund der Todesvermutung als verstorben gilt, treten Todesrechtsfolgen ein[27].

Damit der Arbeitnehmer Anspruch auf Zahlung hat, spielt die Betriebszugehörigkeit vor dem Todestag keine Rolle. Bei den vom Arbeitgeber an die Anspruchsberechtigten aufgrund des Todes des Arbeitnehmers zu leistenden Zahlungen wird die Betriebszugehörigkeit nicht bei der Anspruchsberechtigung, sondern bei der Bestimmung der Anspruchshöhe berücksichtigt[28]. Wenn das Dienstalter zum Zeitpunkt des Todes genau fünf Jahre oder weniger unterschreitet, beträgt die zu verlangende Auszahlung einen Monatslohn. Übersteigt das Dienstalter zum Zeitpunkt des Todes des Arbeitnehmers hingegen fünf Jahre, beträgt die zu zahlende Zahlung dieses Mal zwei Monatslöhne.

E. Berechtigten Personen (Begünstigten)

1. Hierarchie zwischen erster und zweiter Kategorie

In der gesetzlichen Regelung werden die Anspruchsberechtigten durch eine Einteilung in zwei Kategorien bestimmt. Zwischen beiden Kategorien besteht eine Hierarchie. Erstens haben der überlebende Ehegatte und die minderjährigen Kinder des verstorbenen Arbeitnehmers Anspruch auf Sterbegeld (erste Kategorie). Zweitens, wenn es niemanden in der ersten Kategorie gibt, haben andere Angehörige des Arbeitnehmers das Recht, Zahlung zu verlangen (zweite Kategorie). In diese Kategorie werden Eltern, Großeltern, Geschwister, Enkel, geschiedene Ehegatten und – nach der Lehrmeinung – erwachsene Kinder des verstorbenen Arbeitnehmers aufgenommen[29].

In Art. 338 Abs. 2 des schweizerischen Obligationenrechts werden die zur ersten Kategorie gehörenden berechtigten Personen aufgeführt und auch die eingetragene Partnerschaft des verstorbenen Arbeitnehmers, ohne den überlebenden Ehegatten und die minderjährigen Kinder, erwähnt. Denn gleichgeschlechtlichen Paaren ist es in der Schweiz erlaubt, ihre Partnerschaft mit Ausnahme der Ehe im Rahmen bestimmter Bedingungen des Bundesgesetzes vom 01/01/2007 unter Angabe der

27 Akyiğit (n 1) 34; Ekmekçi/Yiğit (n 7) 838, 839; Yürekli (n 1) 158; Baskan (n 1) 61; Kocagil (n 1) 432.

28 siehe, Süzek (n 1) 537; Çelik/Caniklioğlu/Canbolat/Özkaraca (n 1) 468; Mollamahmutoğlu/Astarlı/Baysal (n 1) 347; Narmanlıoğlu (n 1) 335; Polat Soyer, '6098 sayılı Türk Borçlar Kanunu'nda Yer Alan "Genel Hizmet Sözleşmesi"ne İlişkin "Bazı" Hükümlerin İş Hukuku Açısından Önemi' *Kadir Has Üniversitesi Hukuk Fakültesi, İş Hukukunda Güncel Sorunlar (2)* (Kadir Has Üniversitesi Hukuk Fakültesi Yayınları, 2012) 45; Alpagut (n 1) 150; Akyiğit (n 1) 35; Nurşen Caniklioğlu, 'Türk Borçlar Kanununun Hizmet Sözleşmesinin Kurulmasına, Tarafların Hak ve Borçlarına, Hizmet Sözleşmesinin Devrine ve Sona Ermesine İlişkin Hükümleri' *Çalışma Yaşamının Güncel Sorunları ve Mevzuatımızdaki Yeni Gelişmeler*, (2014) 81; Yürekli (n 1) 160; Özkaraca (n 1) 5, 6; Başak Güneş/Faruk Barış Mutlay, 'Yeni Borçlar Kanununun "Genel Hizmet Sözleşmesi"ne İlişkin Hükümlerinin İş Kanunu ve 818 sayılı Kanunla Karşılaştırılarak Değerlendirilmesi' (2011) 30 Çalışma ve Toplum Dergisi 231, 272; Baskan (n 1) 61, 62.

29 Hensch (n 4) 166; Staehelin (n 4) 338 N 4; Etter/Stucky (n 2) N 8.

Begünstigten im Artikeltext eintragen zu lassen (Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlichen Paare – Partnerschaftsgesetz), ist auch die eingetragene Partnerschaft enthalten, mit Ausnahme des überlebenden Ehegatten[30]. Denn im türkischen Recht wird es kein anderes Rechtsinstitut als die Ehe zwischen den Ehegatten anerkannt, wird die Bestimmung im schweizerischen OR Art. 338 Abs. 2 übergenommen, während die eingetragenen Partnerschaften im türkischen OR Art. 440 vom Anwendungsbereich ausgenommen sind der Begünstigten.

Eine andere in der Arbeitsrechtslehre vertretene Auffassung ist, dass es statt der eingeschränkten Zählung der Begünstigten in der Regelung in Art. 440 des türkischen OR auch um das Recht geht, eine Abfindung wegen Todes des Arbeitnehmers zu verlangen, sowie die gesetzlichen Rechte der Begünstigten, die aufgrund des Todes des Arbeitnehmers eine Zahlung vom Arbeitgeber verlangen können, wäre es genauer, sie als Erben zu identifizieren[31]. Personen, denen nach Art. 338 Abs. 2 des schweizerischen Obligationenrechts das Recht zusteht, vom Arbeitgeber eine Todesentschädigung wegen Todes des Arbeitnehmers zu verlangen, und Personen, die wegen des Todes des Arbeitnehmers als berechtigt gelten, eine Abgangsentschädigung zu verlangen in Art. 339b Abs. 2 des schweizerischen OR überschneiden sich genau. Bei der Bestimmung der Anspruchsberechtigten bei Tod des Arbeitnehmers nach Art. 338 Abs. 2 schweizerischen OR, der Anspruchsberechtigten auf Abgangsentschädigung nach Art. 339b Abs. 2 schweizerischen OR werden zugrunde gelegt. Gemäß Artikel 120 des Arbeitsgesetzes Nr. 4857 bestimmt Artikel 14 des Arbeitsgesetzes Nr. 1475, der noch in Kraft ist, dass die Abfindung an die gesetzlichen Erben gezahlt wird, falls der Arbeitnehmer Anspruch auf der Abfindung wegen seines Todes (1475 sK.m14/14) hat. Seit die Regelung in Art. 338 Abs. 2 des schweizerischen Obligationenrechts exakt übersetzt und ins türkische Obligationenrecht übergenommen wurde, hat sich im türkischen Recht ein Unterschied herauskristallisiert, wer eine Abgangsentschädigung wegen Todes des Arbeitnehmers beanspruchen kann, und wer kann wegen des Todes des Arbeitnehmers eine Zahlung vom Arbeitgeber verlangen. Meines Erachtens wäre es angemessener, diejenigen, die aufgrund des Todes des Arbeitnehmers eine Zahlung gemäß Art. 440 des türkischem OR verlangen können, mit den gesetzlichen Erben zusammenzubringen, die eine Abfindung verlangen können.

2. Probleme im Zusammenhang mit der ersten Kategorie

Ob eine Hierarchie zwischen Ehegatten bzw. eingetragenen Partnerschaften einerseits und minderjährigen Kindern andererseits besteht, ist innerhalb der ersten Kategorie der schweizerischen Rechtslehre umstritten[32]; und bis heute nicht durch

30 Rehbinder/Stöckli (n 4) 338 N 4; Staehelin (n 4) 338 N 4; Streiff/von Kaenel/Rudolph (n 2) 338 N 6; siehe auch, Yürekli (n 1) 160, 161.

31 Özdemir (n 23) 32.

32 befürwortend: Milani, OFK 338 N 4; Rehbinder/Stöckli (n 4) 338 N 5; Portmann/Rudolph, BSK OR 338 N 2; ablehnend:

Rechtsprechung geklärt. Der Ansatz, der die Existenz einer Hierarchie in der ersten Kategorie ablehnt, argumentiert, dass der Text des Artikels nicht klar genug ist, um zu akzeptieren, dass es eine Hierarchie gibt[33]. Unklar ist nach dieser Auffassung auch die Begründung für die Begünstigung aus der Abfindung von minderjährigen Kinder nach Ehegatten oder eingetragenen Partnerschaften. Wenn angenommen wird, dass eine solche Hierarchie in der ersten Kategorie besteht, kann beispielsweise ein Kind, das nicht mit dem überlebenden Ehegatten im selben Haushalt lebt und/ oder keine rechtlichen Bindungen zu dem überlebenden Ehegatten hat, niemals anspruchsberechtigt seine Zahlung, diese Situation kann zu unfairen Konsequenzen führt[34].

Ebenso herrscht in der schweizerischen Rechtslehre Meinungsverschiedenheit darüber, ob volljährige Kinder zu den Begünstigten der ersten Kategorie gezählt werden können, solange sie Unterhalt nach Art. 277 Abs. 2 des Schweizerischen Zivilgesetzbuches beziehen[35]. Nach Ansicht derjenigen, die diese Ansicht vertreten, gibt es keinen Grund, die Zahlung von volljährigen Kindern, die Anspruch auf Unterhalt nach Artikel 338 des schweizerischen Obligationenrechts haben, nicht zu akzeptieren[36]. Diejenigen, die das Gegenteil vertreten, zeigen zunächst den klaren Ausdruck der Vorschrift[37].

3. Probleme im Zusammenhang mit der zweiten Kategorie

Im schweizerischen Recht geht aus dem Wortlaut der Bestimmung in Art. 338 Abs. 2 des schweizerischen OR hervor, dass die tatsächliche Erfüllung einer Fürsorgepflicht nur für die zweite Kategorie erforderlich ist[38]. Diese Anforderung für Personen der ersten Kategorie durchsuchen, würde zu unfairen Ergebnissen führen. Für den Fall, dass der verstorbene Arbeitnehmer zu Lebzeiten seiner Fürsorgepflicht nicht nachgekommen ist und angenommen wurde, dass der Arbeitgeber aufgrund der bloßen Nichterfüllung der Fürsorgepflicht nicht zahlen müsste, würden die Personen der ersten Kategorie dies tun wurden erneut bestraft[39]. In der Minderheitenansicht könnte auch argumentiert werden, dass das gleiche Argument für Personen der zweiten Kategorie gilt, wenn der verstorbene Arbeitnehmer eine gesetzliche oder vertragliche Unterhaltspflicht hat. Das Erfordernis der tatsächlichen Erfüllung der Fürsorgepflicht des verstorbenen Arbeitnehmers in seiner Lebzeit kommt nur dann in Betracht,

Hensch (n 4) S. 166; Streiff/von Kaenel/Rudolph (n 2) 338 N 6.

33 Hensch (n 4) 166; Streiff/von Kaenel/Rudolph (n 2) 338 N 6.

34 Hensch (n 4) 166.

35 befürwortend: Rehbinder/Stöckli (n 4) 338 N 4; Staehelin (n 4) 338 N 4; Portmann/Wildhaber (n 2) N 805.

36 Rehbinder/Stöckli (n 4) 338 N 4.

37 Hensch (n 4) 166; Streiff/von Kaenel/Rudolph (n 2) 338 N 6; Kuoni (n 2) 54.

38 Streiff/von Kaenel/Rudolph (n 2) 338 N 6; Kuoni (n 2) 54.

39 Streiff/von Kaenel/Rudolph (n 2) 338 N 6.

wenn es um eine moralische Fürsorgepflicht geht[40]. Die Fürsorgepflicht gegenüber Personen der zweiten Kategorie kann sich aus dem Gesetz oder Vertrag sowie aus der moralischen Struktur ergeben. Hier ist kein Gerichtsbeschluss erforderlich und die Pflegeleistungen, die der verstorbene Arbeitnehmer freiwillig in seiner Lebzeit erbringt, müssen nicht erfasst werden[41].

Nach türkischem Recht wird akzeptiert, dass unter keinen Umständen Zahlungen an volljährige Kinder geleistet werden. Bei Fehlen des Ehepartners und der Kinder des Arbeitnehmers ist vorgesehen, dass die Zahlung an die Angehörigen erfolgt. Es ist nicht leicht zu erkennen, wer in diesem Bereich enthalten ist. Angesichts der Erwähnung von Angehörigen im Text des Artikels ist es jedoch für den Anspruch auf Entschädigung unerheblich, ob sich der Arbeitnehmer wirklich um diese Menschen in seiner Lebenszeit gekümmert hat[42].

4. Teilung des Zahlungsauftrags zwischen mehreren Personen innerhalb derselben Kategorie

In der gesetzlichen Regelung zur Auszahlung nach Art. 338 Abs. 2 des schweizerischen OR ist die Aufteilung des Auszahlungsbetrags bei mehreren Personen der ersten oder zweiten Kategorie nicht klar. Die im schweizerischen Recht vertretene gewichtete Auffassung empfiehlt, dass die Aufteilung zu gleichen Teilen unter den Rechteinhabern erfolgt[43]. Die Minderheitenmeinung hingegen argumentiert, dass die Verteilung erstens nach der Notwendigkeit der Unterstützung und zweitens nach den Erbanteilen erfolgen soll[44]. Die in der Doktrin vertretene Minderheitenansicht wird kritisiert, weil sie in einem Aspekt nicht sehr praktisch ist. Der Richter wird sich höchstwahrscheinlich ernsthaft bemühen, die Notwendigkeit der Unterstützung zu klären. Andererseits widerspricht die Tatsache, dass die Aufteilung nach den Erbanteilen erfolgt und die vom Arbeitgeber zu leistende Zahlung nicht vererbt wird, der Vorschrift, dass sie als materielles Recht derjenigen anerkannt wird, die dies tun gemäss Art. 338 Abs. 2 des schweizerischen OR als berechtigt bezeichnet werden[45].

Im türkischen Recht wird die im schweizerischen Recht vertretene vorherrschende Ansicht verteidigt. Das Recht auf Sterbegeld wird direkt dem überlebenden Ehegatten, den minderjährigen Kindern oder, falls diese nicht vorhanden sind, den Hinterbliebenen des verstorbenen Arbeitnehmers gewährt. Todesfallentschädigung, die mit dem Tod gesetzlich geltend gemacht werden kann, ist kein Gegenstand der

40 in gleicher Richtung, Staehelin (n 4) 338 N 5.

41 Brühwiler (n 2) 338 N 3; Hensch (n 4) 166; Rehbinder/Stöckli (n 4) 338 N 3; Streiff/von Kaenel/Rudolph (n 2) 338 N 6.

42 Süzek (n 1) 538; siehe noch, Akyiğit (n 1) 36, 37.

43 Brühwiler (n 2) 338 N 4; Hensch (n 4) 167; Rehbinder/Stöckli (n 4) 338 N 5; Streiff/von Kaenel/Rudolph (n 2) 338 N 6; Kuoni (n 2) 54.

44 Staehelin (n 4) 338 N 4.

45 Streiff/von Kaenel/Rudolph (n 2) 338 N 2; Etter/Stucky (n 2) N 13.

Erbmasse des Erblassers. In Fällen, in denen es mehrere Personen gibt, die in der Lage sind, von der Zahlung zu profitieren, sollte dieser Betrag daher zu gleichen Teilen unter denjenigen aufgeteilt werden, die eine Todesfallentschädigung verdienen, und nicht im Verhältnis zu ihren Erbschaftsanteilen[46]. In der Entscheidung des 9. Regionales Berufungsgericht Antalya vom 05/03/2020, nummeriert 2019/2696 E. und 2020/657 K., die die erste Entscheidung zur Umsetzung der Regelung über die Entschädigung im Todesfall in Artikel 440 des türkischen OR ist, wurde der Schluss gezogen, dass die Todesfallentschädigung unter den Begünstigten im Verhältnis zu den im Erbschein genannten Erbanteile aufgeteilt werden sollte. Meines Erachtens ist die im Entscheid vertretene Auffassung im Rahmen der sowohl im schweizerischen als auch im türkischen Recht vorgebrachten Gründe nichtzutreffend[47].

F. Höhe der Zahlung

Bei Vorliegen der Anspruchsvoraussetzungen hat der Arbeitgeber den Anspruchsberechtigten einen Monatslohn zu zahlen, wenn der Arbeitnehmer zum Zeitpunkt des Todes ein Dienstalter von fünf Jahren oder weniger hat, und zwei Monate, wenn der Arbeitnehmer eine Betriebszugehörigkeit von mehr als fünf Jahren hat. Nach dem Ausdruck in dem Gesetzestext hat die Auszahlung eine Höhe von maximal zwei Monatslöhnen[48].

Auch wenn im Text des Artikels keine Klarheit über die Beendigung des Arbeitsvertrags besteht, weil der Arbeitsvertrag befristet ist und die Vertragslaufzeit kurz nach dem Tod ausläuft, hat dies keine Auswirkungen auf die Auszahlungshöhe[49]. Das Gleiche gilt für den Tod des Arbeitnehmers während des Zeitraums, in dem die Kündigungsfristen weiterlaufen[50].

In Artikel 18 des Arbeitsgesetzes Nr. 4857 ist festgelegt, dass die Zeiten, die am selben oder an verschiedenen Arbeitsplätzen desselben Arbeitgebers verbracht werden, berechnet werden, indem sie im Hinblick auf die sechsmonatige Betriebszugehörigkeit, die erforderlich ist, um den Beschäftigungssicherheit den Bestimmungen zu unterliegen. In ähnlicher Weise wird gemäß Artikel 54/1 des Arbeitsgesetzes Nr. 4857 die Zeit, die der Arbeitnehmer an einem oder mehreren

46 Süzek (n 1) 538; Çelik/Caniklioğlu/Canbolat/Özkaraca (n 1) 468; Akyiğit (n 1) 37; Caniklioğlu (n 1) 112; Baskan (n 1) 64; in der Richtung, dass die Verteilung zwischen mehreren Rechtsinhabern entsprechend ihren Erbanteilen erfolgen sollte, siehe, Yürekli (n 1) 166; Gümüş (n 10) 540.

47 siehe, Özkaraca (n 1) 7, 8.

48 Hensch (n 4) 167; Streiff/von Kaenel/Rudolph (n 2) 338 N 2.

49 Brühwiler (n 2) 338 N 2; Hensch (n 4) 165; Staehelin (n 4) 338 N 3 und 6; Etter/Stucky (n 2) N 15; für andere Meinung siehe, Rehbinder/Stöckli (n 4) 338 N 3; in diesem Fall verliert der Arbeitgeber die finanzielle Planbarkeit, die normalerweise durch die Schaffung eines befristeten Arbeitsverhältnisses erreicht wird; Portmann/Rudolph, BSK OR 338 N 1; AGer BE, JAR 1994, S. 157; bei Tod des Arbeitnehmers gegen Ende der Laufzeit eines befristeten Arbeitsverhältnisses endet die Lohnzahlungspflicht des Arbeitgebers spätestens mit Ablauf der vereinbarten Vertragslaufzeit, Portmann/Wildhaber (n 2), N 804.

50 Brühwiler (n 2) 338 N 2; Hensch (n 4) 165; Rehbinder/Stöckli (n 4) 338 N 3; Staehelin (n 4) 338 N 3.

Arbeitsplätzen desselben Arbeitgebers gearbeitet hat, bei der Berechnung des Zeitraums berücksichtigt, der für den Anspruch auf bezahlten Jahresurlaub erforderlich ist verlassen. Auch hier wird gemäß Artikel 14 Abs. 2 des Arbeitsgesetzes Nr. 1475 das Dienstalter des Arbeitnehmers unter Berücksichtigung der Zeitdauer berechnet, die er an einem oder mehreren Arbeitsplätzen desselben Arbeitgebers gearbeitet hat, unabhängig davon, ob der Dienstvertrag fortgeführt oder neu abgeschlossen wurde. Für den Fall, dass der Arbeitnehmer ununterbrochen bei demselben Arbeitgeber arbeitet, gibt es keine Sonderregelung wie im Arbeitsgesetz Artikel 18/4, 54/1 und 1475 nummeriertes Gesetz Artikel 14/2 in Bezug auf die Vereinheitlichung des Dienstalters ins Todesfallentschädigung unterliegt.

Ausgehend von dieser Begründung ist es meines Erachtens angemessen, dass die Höhe der Todesfallentschädigung unter Berücksichtigung der letzten Dienstzeit eines Arbeitnehmers bestimmt wird, der zuvor für denselben Arbeitgeber gearbeitet hat[51]. Im schweizerischen Recht hingegen kommt man zum Schluss, dass die Gesamtzeit zu berücksichtigen ist, sofern die Arbeitszeiten kurz sind[52]. Gemäß Artikel 6/2 des Arbeitsgesetzes Nr. 4857 und Artikel 428/2 des türkischen Obligationenrechts über den Übergang des Betriebs und Artikel 429/2 *des* türkischen Obligationenrechts über den Übergang des Arbeitsvertrags richtet sich die Dauer der Betriebszugehörigkeit für die Berechnung des Betrags der Todesfallentschädigung jedoch nach dem Datum, an dem der Arbeitnehmer seine Tätigkeit für den abgebenden Arbeitgeber aufgenommen hat[53]. Da es sich bei der Forderung im Todesfall um eine Forderung handelt, die nach der Übertragung des Betriebs entsteht, ist sie nur für die Forderungen vorgesehen, die vor der Übertragung entstanden sind und am Tag der Übertragung zu zahlen sind, und die gemeinsame Haftung des übertragenden und des übernehmenden Arbeitgebers kommt nicht in Bezug auf die Entschädigung im Todesfall. Für diese Forderung haftet vollumfänglich der übernehmende Arbeitgeber[54].

Für den Anspruch auf Todesfallentschädigung ist es unerheblich, ob der Arbeitnehmer an seinem Tod verschuldet ist oder nicht. Gleichzeitig ist es nicht möglich, die Höhe der unverfallbaren Todesfallleistung, um den Satz des Verschuldens des Arbeitnehmers zu kürzen.

G. Berechnung des Zahlungsbetrags

Weil Ähnlichkeiten mit dem in Art. 324a schweizerischen Obligationenrecht geregelten Fall der Lohnfortzahlung bestehen, wird der zu entrichtende Betrag

51 Özkaraca (n 1) 6, 7; gegensätzliche Ansicht, Güneş/Mutlay (n 28) 272.

52 Rehbinder/Stöckli (n 4) 338 N 3; Streiff/von Kaenel/Rudolph (n 2) 338 N 3; siehe auch, Özkaraca (n 1) 7.

53 Özkaraca (n 1) 7; Güneş/Mutlay (n 28) 272.

54 Özkaraca (n 1) 7; Güneş/Mutlay (n 28) 272, 273.

nach Art. 338 Abs. 2 schweizerischen OR nach denselben Regeln berechnet[55]. Bei der Zahlung, die der Arbeitgeber an die Hinterbliebenen aufgrund des Todes des Arbeitnehmers zu leisten hat, wird der Lohnbetrag berücksichtigt, der ihm als Gegenleistung für seine Arbeit gezahlt würde, wenn der Arbeitnehmer nicht stirbt, sondern weiterarbeitet berücksichtigen. Da die vom Arbeitgeber zu leistende Zahlung an die Hinterbliebenen aufgrund des Todes des Arbeitnehmers im schweizerischen Recht als Lohn gilt, werden auch Lohnzuschläge wie vertragliche oder gesetzliche Zahlungen bei der Berechnung der Auszahlungshöhe berücksichtigt[56].

Bei dieser Zahlung wird der Bruttolohn in die Berechnung mit einbezogen, denn hier gibt es keine konkrete Arbeit und deswegen werden keine Sozialversicherungsbeitäge abgezogen[57].

Sofern das Gesetz nicht ausdrücklich vorschreibt, dass der komplexe Lohn (mit Nebenrechten) bei der Berechnung einer Zahlung zu berücksichtigen ist, muss der zu zahlender Betrag unter Berücksichtigung des einfachen Lohns des Arbeitnehmers berechnet werden. Beispielsweise wird in Artikel 17 letzte Abs. des Arbeitsgesetzes in Bezug auf die Kündigungsabfindung in Artikel 14 Abs. 11 des Gesetzes Nr. 1475, in Bezug auf die Abfindung festgelegt, dass die Berechnung zusätzlich zum Lohn des Arbeitnehmers unter Berücksichtigung erfolgt das dem Arbeitnehmer zur Verfügung gestellte Geld und die sich aus dem Vertrag und dem Gesetz ergebenden Vorteile, die in Geld gemessen werden können, der komplexe Lohn, berücksichtigt werden. Weil gemäß Artikel 440 des türkischen OR keine eindeutige Regelung bezüglich der Berechnung des vom Arbeitgeber an die verbleibenden Begünstigten des verstorbenen Arbeitnehmers zu leistenden Auszahlungsbetrags besteht, sollte der endgültige Bruttobetrag des einfachen Lohnes zugrunde gelegt werden[58].

Denn die Regelung hat der Auszahlung relativ zwingender Charakter, ist es möglich, zugunsten der Begünstigten der Auszahlung Änderungen vorzunehmen und den Betrag durch Verträge zu erhöhen[59].

H. Anzuwendende Zinsen

Sofern nicht durch den Arbeitsvertrag oder eine eindeutige gesetzliche Bestimmung ein besonderes Interesse bestimmt wird, werden die gesetzlichen Zinsen für jede Forderung aus dem Arbeitsvertrag oder der Beendigung des Arbeitsvertrags berechnet.

55 Brühwiler (n 2) 338 N 2; Rehbinder/Stöckli (n 4) 338 N 3; Streiff/von Kaenel/Rudolph (n 2) 338 N 2.

56 Rehbinder/Stöckli (n 4) 338 N 3; Streiff/von Kaenel/Rudolph (n 2) 338 N 2; Etter/Stucky (n 2) N 16; Kuoni (n 2) 54.

57 Brühwiler (n 2) 338 N 5; Rehbinder/Stöckli (n 4) 338 N 6; Streiff/von Kaenel/Rudolph (n 2) 338 N 10; Etter/Stucky (n 2) N 17; Staehelin (n 4) 338 N 6; Emmel (n 2) 338 N 1; Kuoni (n 2) 54; Özkaraca (n 1) 6.

58 Süzek (n 1) 537, 538; Çelik/Caniklioğlu/Canbolat/Özkaraca (n 1) 468; Mollamahmutoğlu/Astarlı/Baysal (n 1) 347; Akyiğit (n 1) 35; Yürekli (n 1) 167; Özkaraca (n 1) 6; Baskan (n 1) 65.

59 Süzek (n 1) 538; Çelik/Caniklioğlu/Canbolat/Özkaraca (n 1) 468; Mollamahmutoğlu/Astarlı/Baysal (n 1) 347; Akyiğit (n 1) 35; Caniklioğlu (n 1) 111; Yürekli (n 1) 166, 167.

Beispielsweise, wird für nicht fristgerecht gezahlte Lohnforderungen gemäß Artikel 34 des Arbeitsgesetzes der höchste für Einlagen geltende Zinssatz angewendet. Der höchste auf die Einlage angewandte Zinssatz ist auch im 11. Absatz des 14. Artikels des Arbeitsgesetzes Nr. 1475 in Bezug auf die aufgrund der Beendigung des Arbeitsvertrags zu zahlende Abfindung festgelegt. Da im Obligationenrecht für die vom Arbeitgeber beim Tod des Arbeitnehmers zu leistenden Leistungen an die Hinterlassenen keine gesonderte Verzinsung vorgesehen ist, muss die gesetzliche Verzinsung geltend gemacht werden.

I. Fälligkeit der Forderung

Mit Ablauf des Vertrages werden alle Forderungen aus dem Vertrag fällig (schweizer. OR Art. 339; türk. OR Art. 442). Die im Obligationenrecht vorgesehene Todesentschädigung des Arbeitgebers an die durch den Tod des Arbeitnehmers Hinterbliebenen ergibt sich daraus, dass die arbeitsvertragliche Schutz- und Obhutspflicht des Arbeitgebers auch wirksam nach Vertragsende ist. Insofern hat die genannte Zahlung den Charakter einer Forderung aus dem Arbeitsvertrag. Als natürliche Folge des Grundprinzips, das in der Regelung in Artikel 339 des schweizerischen Obligationenrechts und Artikel 442 des türkischen Obligationenrechts übergenommen wurde, gilt die gleiche Situation für die Forderungen im Zusammenhang mit der Zahlung, die der Arbeitgeber an die zurückgelassenen Begünstigten zu leisten hat aufgrund des Todes des Arbeitnehmers und ab dem Todestag die Forderung gleich ist, ebenfalls als fällig anzusehen[60]. Die automatische Beendigung des Arbeitsverhältnisses durch den Tod des Arbeitnehmers bewirkt zwar, dass die Forderung auf die vom Arbeitgeber an die hinterbliebenen Anspruchsberechtigten zu leistende Zahlung durch den Tod fällig wird, führt aber nicht gleichzeitig und automatisch zum Verzug des Arbeitgebers[61]. Sowohl Art. 338 Abs. 2 des schweizerischen OR als auch Art. 440 des türkischen OR enthalten keine Klarheit darüber, dass die Zahlung an die am Todestag als Begünstigte bezeichneten Personen zu leisten ist. In Art. 338 Abs. 2 des schweizerischen OR soll der Ausdruck *«berechnet ab dem Todestag»* die Höhe der monatlich oder zweimonatlich zu zahlende Zahlung bestimmen, soll keine Regelung geschaffen werden, wie hoch die Zahlung sein muss vom Arbeitgeber am Todestag vorgenommen. Der Ausdruck *«berechnet ab dem Todestag»* in Art. 338 Abs. 2 des Schweizerischen OR wurde nicht auf Art. 440 des türkischen OR als Ganzes übertragen, nur der Ausdruck *«ab dem Todestag»* ist im Gesetzestext enthalten. Dass der Ausdruck *«berechnet»* in Art. 338 Abs. 2 des schweizerischen OR nicht in die Bestimmung des Art. 440 des türkischen OR aufgenommen wird, ändert am Ergebnis nichts. Die Bestimmung ist als solche nicht geeignet, um zu dem Schluss zu kommen, dass die Zahlung der Forderung zum

60 Hensch (n 4) 169; Rehbinder/Stöckli (n 4) 338 N 3; Streiff/von Kaenel/Rudolph (n 2) 338 N 2; Etter/Stucky (n 2) N 18; Faruk Barış Mutlay/Bülent Ferat İşçi, 'İşçilik Alacaklarının Muaccel Olduğu Anlar ve Zamanaşımı Süreleri ile Zamanaşımı Bakımından Özellik Arz Eden Bazı Durumların Değerlendirilmesi' (2019) 64 Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi 1491, 1546; Özkaraca (n 1) 7.

61 siehe, Streiff/von Kaenel/Rudolph (n 2) 338 N 2; Etter/Stucky (n 2) N 19.

Todestag zu leisten ist[62]. Dabei gibt es im Sinne der Regelung in Art. 440 des türkischen Obligationenrechts, wie sie im schweizerischen Recht übergenommen wird, keine gesetzliche Regelung zur bestimmten Fälligkeit die besagt, dass die Forderung mit dem Todestag fällig wird, sondern die die Auszahlung erfolgt am Todestag, daher ist die gesetzliche Verzinsung der Forderung nicht festgesetzt, sollte es hingenommen werden, dass auch der Arbeitgeber für den Beginn der Frist in Verzug geraten muss[63]. Folglich beginnen die Zinsen ab dem Datum der Mahnung zu laufen, wenn der Arbeitgeber zuvor in Verzug war, oder ab dem Datum der Klage, wenn der Arbeitgeber zuvor nicht in Verzug war. In der Entscheidung des 9. Regionales Berufungsgericht Antalya vom 05/03/2020, nummeriert 2019/2696 E. und 2020/657 K., die die erste Entscheidung zur Umsetzung der Regelung über die Todesentschädigung in Artikel 440 des türkischen Obligationenrechts, dass obwohl korrekt festgestellt wurde, dass gesetzliche Zinsen auf die Todesfallentschädigung anzuwenden sind, meines Erachtens, ist es nicht richtig, die Zinsen ab dem Todestag zu berechnen, ohne den Arbeitgeber erneut in Verzug zu setzen[64].

J. Verjährungsfrist

Gemäss Artikel 128 des schweizerischen Obligationenrechts gilt für die Forderungen aus dem Arbeitsverhältnis die Verjährungsfrist von fünf Jahren. Weil die in Art. 338 Abs. 2 des schweizerischen Obligationenrechts vorgesehene Bezahlung als Gebühr gilt, ist nach herrschender Meinung in der schweizerischen Rechtslehre das Recht, eine in Art. 338 Abs. 2 des schweizerischen Obligationenrechts vorgesehene Bezahlung zu verlangen, gemäß Artikel 128 Abs. 3 des schweizerischen Obligationenrechts, gilt ab dem Todestag, erlischt innerhalb von fünf Jahren ab[65]. Diese Auffassung wurde insbesondere deshalb kritisiert, weil sie keine Reallohnforderung beinhaltet[66]. Diese Zahlung wird im Allgemeinen als lohnähnlich bezeichnet, weil es sich nicht um eine Vergütung für die vom Arbeitnehmer geleistete Arbeit handelt. Es wird betont, dass der Lohn auch eine soziale Bedeutung für die Begünstigten hat[67].

Im Gegensatz zum schweizerischen Recht gilt nach türkischem Recht die Zahlung, die der Arbeitgeber aufgrund des Todes des Arbeitnehmers an die Hinterbliebenen gemäß Artikel 440 des türkischen OR zu leisten hat, nicht als Lohn behandelt. Aus diesem Grund kann nicht davon ausgegangen werden, dass die Regelungen, die die Anwendung der fünfjährigen Verjährungsfrist für Lohnforderungen in den Bestimmungen des Art. 147 des türkischen OR und des Art.32 des Arbeitsgesetzes Nr.

62 siehe, Özkaraca (n 1) 7.

63 in umgekehrter Richtung Mutlay/İşçi (n 60) 1546.

64 siehe, Özkaraca (n 1) 7.

65 Hensch (n 4) 169; Streiff/von Kaenel/Rudolph (n 2) 338 N 8.

66 Etter/Stucky (n 2) N 17.

67 Staehelin (n 4) 338 N 3.

4857 vorsehen, nicht zugrunde gelegt werden können. Darüber hinaus wird die in Artikel 440 des türkischen Obligationenrechts festgelegte Todesfallentschädigung nicht zu den Forderungen gezählt, die in dem mit dem 15. Artikel des Gesetzes zum Arbeitsgesetz hinzugefügten Zusatzartikel 3 einer fünfjährigen Verjährungsfrist unterliegen Nr. 7036. In diesem Artikel wird akzeptiert, dass die fünfjährige Verjährungsfrist für Forderungen aus Urlaubsentgelt, Abfindung, Kündigungsentschädigung, Schadensersatz wegen Treu und Glaubens und Diskriminierungsentschädigung gilt, unabhängig vom Gesetz, sofern sie sich aus dem Beschäftigungsverhältnis ergeben Vertrag. Weil keine spezielle Verjährungsfrist für die Todesfallentschädigung festgelegt wurde, sollte akzeptiert werden, dass dieser Anspruch gemäß Art. 146 des türkischen OR einer zehnjährigen Verjährungsfrist ab dem Todestag unterliegt.

IV. Beziehung mit Anderen Regeln

A. Relativer zwingende Charakter

Art. 338 Abs. 2 des schweizerischen OR gehört zur Kategorie der relativ zwingenden Vorschriften gemäß Art. 362 OR, wonach Art. 338 Abs. 2 schweizerischen OR nur zugunsten des Arbeitnehmers geändert werden kann. Es ist möglich, die Dauer der Auszahlung gemäss Art. 338 Abs. 2 des schweizerischen Obligationenrechts zu verlängern oder den Kreis der begünstigten Personen zu erweitern[68].

Obwohl es im türkischen Recht keine spezielle Bestimmung gibt, die die relativen zwingenden Bestimmungen auflistet, die zugunsten des Arbeitnehmers geändert werden können, wie in Artikel 362 des schweizerischen Obligationenrechts, unter Berücksichtigung des Inhalts der Bestimmung in Artikel 440 des türkischen Gesetzbuchs der Pflichten, wird akzeptiert, dass diese Regelung relativ zwingender in Natur ist. In dieser Hinsicht ist es möglich, Änderungen zugunsten des Arbeitnehmers bezüglich der in Artikel 440 des türkischen OR festgelegten Zahlung vorzunehmen.

B. Frage, ob Arbeitnehmer, die dem Arbeitsgesetz Unterliegen, und Seeleute, die dem Seearbeitsgesetz Unterliegen, Anspruch auf Todesfallentschädigung Haben Können

1. Begründung des Problems

Zweifellos findet im Todesfall von Arbeitnehmern, die unter das türkische OR fallen, die Regelung zur Todesfallentschädigung in Art. 440 des türkischen OR unmittelbar Anwendung[69]. Diesbezüglich besteht kein Zweifel.

68 Hensch (n 4) 167; Staehelin (n 4) 338 N 9.

69 Süzek (n 1) 769; Çelik/Caniklioğlu/Canbolat/Özkaraca (n 1) 468; Özkaraca (n 1) 4.

Journalisten, die dem Pressearbeitsgesetz unterliegen, können Todesfallentschädigung gemäß Artikel 18 des Pressearbeitsgesetzes fordern, der eine für sie festgelegte Sonderregelung ist, nicht gemäß Artikel 440 des türkischen Obligationenrechts.

Gemäß Art. 1 Abs. 2 des Arbeitsgesetzes Nr. 4857 gilt es für alle Arbeitsstätten, Arbeitgeber, Arbeitgebervertreter und Arbeitnehmer dieser Arbeitsstätten, unabhängig von ihrem Tätigkeitsbereich, mit Ausnahme der Ausnahmen in Artikel 4 des Arbeitsgesetzes. Der Seeverkehr ist vom Anwendungsbereich gemäß Artikel 4 des Arbeitsgesetzes ausgenommen. Andererseits unterliegen Arbeitnehmer, die beim Be- und Entladen von Land zu Schiff und von Schiff zu Land an Küsten, Häfen und Piers beschäftigt sind, den Bestimmungen des Arbeitsgesetzes Nr. 4857. Der Hauptgrund für den Ausschluss von Seetransportarbeiten aus dem Anwendungsbereich ist die Existenz eines separaten Arbeitsgesetzes, das diese Frage regelt. Das Seearbeitsgesetz Nr. 854 gilt für Arbeitsbeziehungen zwischen Arbeitgebern und Seeleuten, die im Seeverkehr tätig sind. Allerdings ist auch der Anwendungsbereich des Seearbeitsgesetzes eingeschränkt, und auch nicht alle Seeleute wurden in den Anwendungsbereich des Seearbeitsgesetzes einbezogen[70]. Gemäß der Regelung in Art. 1 Abs. 1 des Seearbeitsgesetzes gilt das Seearbeitsgesetz für Seeleute und ihre Arbeitgeber, die die türkische Flagge auf Meeren, Seen und Flüssen führen und auf Schiffen mit einer Bruttoraumzahl von einen 100 ft. oder mehr arbeiten. Beträgt die Gesamtbruttoraumzahl der Schiffe desselben Arbeitgebers einhundert oder mehr oder beträgt die Zahl der beim Arbeitgeber beschäftigten Seeleute fünf oder mehr, finden die Vorschriften des Seearbeitsgesetzes Anwendung (Seearbeitsgesetz Art. 1 Abs. 2). Darüber hinaus ist der Präsident der Republik ermächtigt, die Bestimmungen des Seearbeitsgesetzes für Schiffe und Seeleute und ihre Arbeitgeber, die im Hinblick auf wirtschaftliche und soziale Anforderungen außerhalb des Geltungsbereichs liegen, teilweise oder vollständig zu erfassen (Seearbeitsgesetz Art. 1 Abs. 4). Im Rahmen dieser Regelungen zum Anwendungsbereich des Seearbeitsgesetzes; Die Anzahl der Seeleute, die auf einem Schiff unter ausländischer Flagge arbeiten, die Anzahl der Seeleute, die auf einem Schiff unter der türkischen Flagge mit einer Bruttoraumzahl von weniger als 100 ft. arbeiten, die Anzahl der Seeleute, die auf Schiffen mit einer Bruttoraumzahl von weniger als 100 ft. arbeiten und unabhängig davon operieren die Bruttoraumzahl desselben Arbeitgebers Seeleute, die auf Schiffen oder Schiffen mit weniger als fünf beschäftigt sind, unterliegen nicht dem Seearbeitsgesetz. Für die auf Schiffen beschäftigten Seeleute gelten außerhalb des Geltungsbereichs des Seearbeitsgesetzes die Bestimmungen des türkischen Obligationenrechts, nicht die Bestimmungen des Seearbeitsgesetzes. In diesem Fall muss der Arbeitgeber aufgrund des Todes der Seeleute, auf die die Bestimmungen des türkischen Obligationenrechts

70 siehe, Bektaş Kar, *Deniz İş Hukuku* (Yetkin Yayınları, 2021) 187 – 194; Mehmet Nusret Bedük, *Deniz İş Sözleşmesi* (Ekin Yayınevi, 2012) 32 – 35.

Anwendung finden, da sie nicht in den Anwendungsbereich der Bestimmungen des Seearbeitsgesetzes fallen, wird eine Todesfallentschädigung an die Hinterbliebene des verstorbenen Seemanns im Rahmen der in Art. 440 des türkischen OR festgelegten Grundsätze bezahlt.

Zum anderen stellt sich die Frage, ob diese Bestimmung auf Arbeitsverhältnisse nach dem Arbeitsgesetz und dem Seearbeitsgesetz Anwendung finden wird, da es im Arbeitsgesetz und im Seearbeitsgesetz keine besondere Regelung zum Todesfallentschädigungsanspruch gibt. Nach mit dem Inkrafttreten der Bestimmung 440 des türkischen Obligationenrechts diese Situation in Arbeitsrechtlehre diskutiert wurde.

2. Ansichten, die in der Doktrin zum Problem diskutiert

Laut einer in der Doktrin vertretenen Meinung sollten Arbeitnehmer im Geltungsbereich der Arbeitsgesetze von dieser Zahlung nicht profitieren können. Für Arbeitnehmer, die dem Arbeitsgesetz unterliegen, sind die Rechtsfolgen des Todes im Arbeitsgesetz Nr. 1475 und im Seearbeitsgesetz geregelt, und es ist vorgesehen, dass in diesem Fall nur eine Abfindung verlangt werden kann. Weil die Rechtsfolgen des Todes geregelt sind, kann diese aufgrund der Regelungslücke nicht zusätzlich zur Abfindung der im Art. 440 des türkischen Obligationenrechts vorgesehenen Todesfallentschädigung geltend gemacht werden[71].

Nach einer anderen Ansicht muss festgestellt werden, ob der Benutzung des Arbeitnehmers aus dieser Zahlung im Rahmen des Arbeitsgesetzes Nr. 4857 danach differenziert wird, ob die Erben des Arbeitnehmers Anspruch auf eine Abfindung haben. Wenn die gesetzlichen Erben des Arbeitnehmers Anspruch auf eine Abfindung haben, können sie dementsprechend nicht von dieser im türkischen Obligationenrecht enthaltenen Zahlung profitieren. Haben sie dagegen keinen Anspruch auf eine Abfindung, sollen sie von dieser Abfindung profitieren[72].

Nach einer anderen Auffassung zu diesem Thema sollten Arbeitnehmer, die in den Anwendungsbereich des Arbeitsgesetzes und des Seearbeitsgesetzes fallen, von der Todesfallentschädigung profitieren, aber weil es eine ähnliche Regelung im Pressearbeitsgesetz gibt, kann für Journalisten im Anwendungsbereich dieses Gesetzes keine Todesfallentschädigung nach Art. 440 des türkischen OR verlangt werden. Nach dieser Ansicht wird zwar im Arbeitsgesetz Nr. 4857 und im Seearbeitsgesetz eine Abfindung an die gesetzlichen Erben der verstorbenen Arbeitnehmer gezahlt, diese in Artikel 440 des türkischen Obligationenrechts geregelte Zahlung ist jedoch nicht

71 Tunçomağ/Centel (n 8) 195; Ekmekçi/Yiğit (n 7) 608; Gülsevil Alpagut, 'Türk Borçlar Kanununun Hizmet Sözleşmesinin Devri, Sona Ermesi, Rekabet Yasağı, Cezai Şart ve İbranameye İlişkin Hükümleri' (2011) 31 Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi 913, 941, 942; Özdemir (23) 41; Güneş/Mutlay (n 28) 273.

72 Mollamahmutoğlu/Astarlı/Baysal (n 1) 347, 348.

das Äquivalent die Todesentschädigung zahlen im türkischen Obligationenrecht. Diese Zahlung wird nicht zur Belohnung des Dienstalters gewährt. Im Gegenteil, es wird gewährt, um den Ehepartner, minderjährige Kinder und Angehörige des verstorbenen Arbeitnehmers zu unterstützen. Die Rechtsnatur beider Entschädigungen unterscheidet sich voneinander. Angesichts dieser Situation die in Artikel 440 des türkischen Obligationenrechts festgelegte Todesfallentschädigung; Beim Tod von nicht abfertigungsberechtigten Arbeitnehmern, die den Vorschriften des Obligationenrechts unterliegen, beim Tod von Arbeitnehmern, die dem Arbeitsgesetz und dem Seearbeitsgesetz unterliegen, aber die eine Jahresarbeitszeit auf eine Abfindung und beim Tod von Arbeitnehmern, die dem Arbeitsgesetz und dem Seearbeitsgesetz unterliegen, Anspruch auf eine Abfindung zu erheben. Diese sollte zusammen mit der Abfindung beim Tod von Arbeitnehmern angewendet werden, die dazu berechtigt sind zahlen[73].

Im schweizerischen Recht gibt es keine Diskussion zu diesem Thema. Gemäss Art. 338 Abs. 2 des schweizerischen Obligationenrechts wird akzeptiert, dass neben der in Art. 339b Obligationenrechts geregelten Todesentschädigung auch die vom Arbeitgeber an die Hinterlassenen des verstorbenen Arbeitnehmers zu leistende Abfindung umfasst ist Diesbezüglich ist es möglich, beide Forderungen gemeinsam geltend zu machen, sofern die Anspruchsvoraussetzungen erfüllt sind[74].

3. Gerichtliche Stellungnahme zu dem Problem

Bislang gibt es keine Entscheidung von Kassationsgerichtshof zu diesem Thema. Jedoch, In der Entscheidung des 9. Regionales Berufungsgericht Antalya vom 05/03/2020, nummeriert 2019/2696 E. und 2020/657 K., die die erste Entscheidung zur Umsetzung der Regelung über die Entschädigung im Todesfall in Artikel 440 des türkischen Obligationenrechts, wurde festgestellt, dass Arbeitnehmer, die dem Arbeitsgesetz unterliegen, und Seeleute, die dem Seearbeitsgesetz unterliegen, unabhängig davon, ob die Voraussetzungen für den Anspruch auf eine Abfertigung vorliegen, im Todesfall auch Todesfallentschädigungen verlangen können. Laut dieser Entscheidung wurde es zum Schluss bekommen[75], *«(…) Wie oben erwähnt, gibt es im Arbeitsgesetz Nr. 1475 eine Regelung, dass den gesetzlichen Erben des Arbeitnehmers eine Abfindung gezahlt wird, falls der Arbeitsvertrag mit dem*

73 Süzek (n 1) 538, 769; Çelik/Caniklioğlu/Canbolat/Özkaraca (n 1) 467, 468; Narmanlıoğlu (n 1) 335; Eyrenci/Taşkent/Ulucan/Baskan (n 1) 259; Soyer (n 1) 18; Soyer (n 28) 46; Akyiğit (n 1) 37, 38; Caniklioğlu (28) 81; Doğan Yenisey (n 1) 325; Mustafa Alp, 'Yeni Borçlar Kanununun İş Hukuku'na Etkileri' *İzmir Barosu İş Hukuku Günleri – II, Uluslararası Sözleşmelerin İş ve Sosyal Güvenlik Hukukumuzda Uygulama Sorunları Sempozyumu* (2013) 134, 140; Yürekli (n 1) 159, 160; Bozkurt Gümrükçüoğlu (n 1) 285, 286; Özkaraca (n 1) 5; Karaçöp/Yamakoğlu (n 8) 130; Arzu Arslan Ertürk, 'Türk Borçlar Kanunu'nun Hizmet Sözleşmesine İlişkin Hükümlerinin İş Kanunu Üzerindeki Etkisi', *İş Hukukunda Genç Yaklaşımlar* (İstanbul, 2014) 49, 108; Baskan (n 1) 61, 66; Mutlay/İşçi (n 60) 1545, Fn. 100; Didem Yardımcıoğlu, *Türk İş ve Sosyal Güvenlik Hukukunda Mevsimlik İş Sözleşmesi*, (On İki Levha Yayıncılık, 2020) 399; Ebru Erener, *Türk İş Hukukunda Asgari Süreli İş Sözleşmesi* (On İki Levha Yayıncılık, 2017) 117, 118; Kar (70) 325.

74 Brühwiler (n 2) 338 N 4; Streiff/von Kaenel/Rudolph (n 2) 338 N 9; Etter/Stucky (n 2) N 22.

75 Den Wortlaut des Urteils siehe, Özkaraca (n 1) 2 – 4.

Tod des Arbeitnehmers endet, und es gibt keine Regelung bezüglich der Zahlung Todesfallentschädigung, wenn der Arbeitsvertrag mit dem Tod des Arbeitnehmers im Rahmen des Arbeitsverhältnisses im Geltungsbereich dieses Gesetzes endet. Aus diesem Grund ist in der Arbeitsrechtlehre umstritten, ob die unter das Arbeitsgesetz (und das Seearbeitsgesetz) fallenden Arbeitnehmer eine Todesfallentschädigung nach Artikel 440 des türkischen Obligationenrechts beanspruchen können. Auf der Grundlage dieser Diskussion stellt sich die Frage, ob es diesbezüglich eine Lücke im türkischen Arbeitsrecht gibt oder ob es sich um eine bewusste Entscheidung handelt oder nicht. Es ist unbestreitbar, dass das Arbeitsgesetz Nr. 4857 das ein besondere Gesetz ist, das Türkische Obligationengesetz Nr. 6098 das allgemeine Gesetz ist und die Bestimmungen des allgemeinen Gesetzes in Fällen angewendet werden können, in denen besondere Gesetz eine Lücke aufweist. Für Arbeitsverträge, die nicht in den Anwendungsbereich anderer Arbeitsgesetze fallen, gelten grundsätzlich die Vorschriften des türkischen Obligationenrechts über Arbeitsverträge. Abgesehen davon wird akzeptiert, dass auch die Regelungen für Sachverhalte, die nicht in anderen Arbeitsgesetzen geregelt sind, einen Anwendungsbereich finden werden, da es sich um allgemeine Gesetze handelt. Insofern kann der Umstand, dass das Obligationenrecht eine von der Abgangsentschädigung unabhängige Leistung darstellt, direkt als allgemeine gesetzliche Bestimmung herangezogen werden, insbesondere wenn man bedenkt, dass der Anspruch auf Sterbegeld nicht an eine bestimmte Dienstaltersbedingung geknüpft ist und die zu zahlende Person (Rechteinhaber) ist eine andere (...)». In diesem Fall kann die Todesfallentschädigung auch dann beansprucht werden, wenn die Hinterbliebenen des verstorbenen Arbeitnehmers einen Anspruch auf Abfindung haben. Das Berufungsgericht kommt in seiner Entscheidung zu dem Schluss, dass Arbeitnehmer, die Anspruch auf Abfindung haben, sowohl Abfindung als auch Sterbegeld zusammen beanspruchen können[76].

Obwohl es zu dieser Frage keine Entscheidung des Kassationsgerichtshof gibt, zeigt die Tatsache, dass der Kassationsgerichtshof in seinen Entscheidungen zu anderen Fragen akzeptiert, dass es eine Rechtslücke im Arbeitsgesetz in Bezug auf die Todesfallentschädigung gibt, dass der Kassationsgerichtshof diese Meinung teilen wird in der Entscheidung des Regionales Berufungsgericht im Fall eines möglichen Rechtsstreits erreicht. In einer Entscheidung in dieser Richtung hat der Kassationsgerichtshof festgestellt wurde[77], *«(...) Andererseits ist unbestreitbar, dass Gesetz Nr. 854 ein besonderes Gesetz und Gesetz Nr. 6098 ein allgemeines Gesetz ist. Es besteht kein Zweifel, dass die Vorschriften des allgemeinen Rechts in den Fällen angewendet werden können, in denen eine Lücke im besonderen Gesetz besteht. Das Seearbeitsgesetz enthält jedoch keine Lücke bezüglich der Berechnungsmethode für*

76 für die in dem Urteil gezogene Schlussfolgerung, siehe., Özkaraca (n 1) 8.

77 Y9HD., 31/05/2022, 2022/6018 E., 2022/6890 K, (2022/3) 74 Çalışma ve Toplum Dergisi 3049.

Überstundenlöhne, und es wird eindeutig verfügt, dass die Berechnung mit einem um 25 % erhöhten Lohn vorgenommen wird. Für Arbeitsverträge, die außerhalb des Anwendungsbereichs anderer Arbeitsgesetze liegen, gelten grundsätzlich die Vorschriften des türkischen Obligationenrechts über Arbeitsverträge. Abgesehen davon wird akzeptiert, dass die Regeln für Situationen, die nicht in anderen Arbeitsgesetzen geregelt sind, auch Anwendung finden, da es sich um allgemeine Gesetze handelt. Beispielsweise ist der Schutz der Persönlichkeit des Arbeitnehmers nicht in den Arbeitsgesetzen geregelt, in diesem Fall kann Artikel 417 des Gesetzes Nr. 6098 als allgemeine Bestimmung des allgemeinen Gesetzes gelten. Auch hier kann die in Artikel 440 desselben Gesetzes vorgesehene Todesfallleistung direkt als allgemeine gesetzliche Bestimmung angewendet werden, da sie in anderen Gesetzen getrennt von der Abfindung geregelt ist und die Rechtsinhaberschaft getrennt vom Erbschein festgestellt wird.»

4. Bewertung des Themas

Die in Artikel 440 des türkischen Obligationenrechts geregelte Todesfallentschädigung gilt nicht als Abfindung. Mit beiden Zahlungen sollen unterschiedliche Zwecke verfolgt werden. Bei Arbeitsverhältnissen, die dem Arbeitsrecht unterliegen, ist nur im Pressearbeitsgesetz die Todesfallentschädigung geregelt. Wenn der Gesetzgeber gewollt hätte, hätte er eine entsprechende Regelung in das Arbeitsgesetz und das Seearbeitsgesetz aufnehmen können. Weil es keine Regelung in diese Richtung gibt, versteht es sich, dass der Gesetzgeber diese Zahlung nur für Journalisten wünscht, die dem Pressearbeitsgesetz im Sinne des Arbeitsgesetzes und des Seearbeitsgesetzes unterliegen.

Das Pressearbeitsgesetz enthält eine Bestimmung zur Abfindung, aber im Todesfall eines Journalisten können gesetzliche Erben keine Abfindung geltend machen. Im Todesfall eines dem Pressearbeitsgesetz unterliegenden Journalisten ist die in Art.18 Pressearbeitsgesetz geregelte Todesentschädigung rechtlich keine Abfindung[78]. Tatsächlich wurde die Regelung zur Todesfallentschädigung im Pressearbeitsgesetz in einem anderen Artikel als dem Artikel, in dem die Abfindung geregelt war, getroffen. Darüber hinaus setzt die Abfindung jeweils die Erfüllung einer bestimmten Dienstaltersvoraussetzung voraus. Es besteht jedoch keine Notwendigkeit, eine bestimmte Dienstaltersbedingung in Bezug auf die Todesfallentschädigung zu erfüllen. Aus den vorgenannten Punkten geht eindeutig hervor, dass die Todesfallentschädigung nach Art. 18 Pressearbeitsgesetz nicht als Abfindung zu qualifizieren ist[79].

78 A. Can Tuncay, *Hukuki Yönden Basında İşçi – İşveren İlişkileri* (Evrim, 1989) 75, 76; Soyer (n 28) 47; Akyiğit (n 1) 38; gegensätzliche Meinung, Narmanlıoğlu (n 1) 255; Müjdat Şakar, *Basın İş Hukuku* (Beta Yayınları, 2002) 107; siehe auch, Doğan Yenisey (n 1) 325, Fn. 58.

79 siehe, Soyer (n 28) 47.

Gleiches gilt für Mitarbeiter, die dem türkischen Obligationenrecht unterliegen. Arbeitnehmer, die dem türkischen Obligationenrecht unterliegen, können ebenfalls keine Abfindung beanspruchen. Betrachtet man diese Tabelle zu den bei Todesfall zu leistenden Leistungen in den geltenden gesetzlichen Regelungen, so ist festzuhalten, dass der Gesetzgeber die Todesfallentschädigung in den Fällen regelt, in denen keine Abfertigung geltend gemacht werden kann.

In diesem Fall sollte es Journalisten, die nur dem Pressearbeitsgesetz unterliegen, möglich sein, Todesfallentschädigung auf der Grundlage von Art. 18 des Pressearbeitsgesetzes zu verlangen, und für Arbeitnehmer, die dem türkischen Obligationenrecht unterliegen, auf der Grundlage von Art. 440 des türkischen OR von Verpflichtungen.

Von einer Regelungslücke kann nach derzeitigem Stand der gesetzlichen Regelungen nicht gesprochen werden. Darüber hinaus besteht kein schutzwürdiges berechtigtes Interesse an der Anwendung der im türkischen Obligationenrecht 440 festgelegten Todesfallentschädigung auf Arbeitnehmer, die in den Anwendungsbereich des Arbeitsgesetzes und des Seearbeitsgesetzes fallen. Aus diesem Grund sollte es nicht möglich sein, den Artikel 440 des türkischen Obligationenrechts zur Todesfallentschädigung zusätzlich zur Abfindung im Todesfall von Arbeitnehmern anzuwenden, die dem Arbeitsgesetz und dem Seearbeitsgesetz unterliegen. Um einen Anspruch auf Abfindung geltend machen zu können, sollten Arbeitnehmer und Seeleute, die das Erfordernis des Dienstalters nicht erfüllt haben, kein Sterbegeld gemäß Artikel 440 des türkischen Obligationenrechts verlangen können.

Meines Erachtens ist die Schlussforderung in der Entscheidung von 9. Regionales Berufungsgericht Antalya vom 05/03/2020, nummeriert 2019/2696 E. und 2020/657 K, deren Text aus den genannten Gründen aufgenommen wird, nichtzutreffend.

V. Schluss

Im türkischen Recht weisen die bestehenden gesetzlichen Regelungen zu den Grundsätzen des zwischen dem Arbeitnehmer und dem Arbeitgeber begründeten Arbeitsverhältnisses, dem Inhalt der anzuwendenden Arbeitsbedingungen, der Beendigung des Arbeitsverhältnisses und den aus der Beendigung entstehenden Rechtsfolgen strukturlos. Neben dem Arbeitsgesetz Nr. 4857 gibt es abweichende Regelungen im Pressearbeitsgesetz Nr. 5953 für Journalisten und im Seearbeitsgesetz Nr. 854 für Seeleute. Im türkischen Obligationenrecht, das ein allgemeines Gesetz ist, werden auch einige Regeln zum Dienstvertrag akzeptiert. Aufgrund dieser verstreuten Struktur ergeben sich erhebliche Bedenken bei der Bestimmung der Anwendungsbereiche der Bestimmungen in verschiedenen Gesetzen. Ohne Berücksichtigung dieser in der Arbeitsgesetzgebung beobachteten

Streustruktur führt die Aufnahme einer nur für die Anwendung des Rechts eines anderen Landes bedeutsamen Vorschrift durch Übersetzung und Aufnahme in die innerstaatliche Rechtspraxis zu anderen Problemen zusätzlich zu den bestehenden Implementierungsproblemen. Einige Ungereimtheiten sind auch dadurch entstanden, dass die Bestimmung in Art. 338 Abs. 2 des schweizerischen Obligationenrechts bezüglich der vom Arbeitgeber zu leistende Zahlung aufgrund des Todes des Arbeitnehmers, die im türkischen Recht als Todesfallentschädigung bezeichnet wird, übersetzt wird das türkische Obligationenrecht, bis auf wenige Punkte.

Nach schweizerischem Recht ist unbestritten, dass die Abfindung nach Art. 338 Abs. 2 des schweizerischem OR zusammen mit der Abgangsentschädigung nach Art. 339b Abs. 1 schweizerischem OR geltend gemacht werden kann. Im schweizerischen Obligationenrecht sind die Anspruchsvoraussetzungen für eine Abgangsentschädigung äusserst schwer. Gemäss Art. 339b Abs. 1 des schweizerischen Obligationenrechts ist der Arbeitgeber zur Zahlung einer Abgangsentschädigung verpflichtet, wenn ein mindestens 50-jähriger Arbeitnehmer eine Betriebszugehörigkeit von 20 Jahren oder mehr hat. Auf der anderen Seite Personen, denen nach Art. 338 Abs. 2 des schweizerischen Obligationenrechts ein Anspruch auf Zahlung des Arbeitgebers aufgrund des Todes des Arbeitnehmers zugesprochen wird, sowie Personen, die Anspruch auf eine fällige Abgangsentschädigung haben der Tod des Arbeitnehmers in Art. 339b Abs. 2 des schweizerischen Obligationenrechts genau überschneidet. In einem System, in dem die Voraussetzungen für den Anspruch auf Abfindung so streng festgelegt sind, ist es selbstverständlich vorzusehen, dass dieselben Personen im Todesfall des Arbeitnehmers unter einfacheren Bedingungen bezahlt werden. Die Tatsache, dass dieselbe Bestimmung ohne Berücksichtigung der Voraussetzungen für den Anspruch auf Abfindung getroffen wird, die in das türkische Recht übergenommen wurde, führt jedoch zu Widersprüchen.

Als letzter Punkt wurde im Rahmen der in der Rechtspraxis akzeptierten Meinung erreicht, dass die Todesfallentschädigung in Artikel 440 des türkischen Obligationenrechts trotz allem nicht nur auf die Arbeitnehmer angewendet wird, die den Bestimmungen des türkischen Obligationenrechts unterliegen den in der Arbeitsrechtslehre vertretenen Auffassungen entgegensteht, findet das Arbeitsrecht und das Seearbeitsgesetz einen Anwendungsbereich für Arbeitnehmer, die seinen Bestimmungen unterliegen. Angesichts dieser Situation können die Hinterbliebenen im Falle des Todes eines Arbeitnehmers, der mindestens ein Jahr Betriebszugehörigkeit zurückgelegt hat, sowohl die Abfindung als auch das Todesfallgeld gemeinsam vom Arbeitgeber verlangen. Allerdings ist es nicht so einfach, beide Zahlungen zusammen im Quellenrecht geltend zu machen. Darüber hinaus können die Personen, die beide Zahlungen fordern werden, eine Abfindung im Sinne des türkischen Rechts verlangen, die von der Todesfallentschädigung abweicht, obwohl dies im schweizerischen

Obligationenrecht identisch ist, gesetzliche Erben. Auch die Tatsache, dass die Bestimmung von Art. 338 Abs. 2 des schweizerischen Obligationenrechts ohne Berücksichtigung der Unterschiede zwischen den Rechtsinstituten übersetzt wurde, hat zu einer Widersprüchlichkeit im Kreis der Anspruchsberechtigten geführt.

In Anbetracht der Anordnung und des Zwecks der Bestimmungen zu beiden Zahlungen im schweizerischen Obligationenrecht wäre die idealste Lösung, zu akzeptieren, dass der Antrag auf Todesfallentschädigung in Artikel 440 des türkischen Obligationenrechts nur auf Arbeitnehmer beschränkt ist, die den Bestimmungen von unterliegen das türkische OR. Zu demselben Schluss kommt man, wenn man die Regelungen zur Todesfallentschädigung und zur Abfindung im türkischen Recht vergleicht. Vergleicht man die gesetzlichen Regelungen, so gibt es im Arbeitsgesetz und im Seearbeitsgesetz zwar eine Abfindung aufgrund des Todes des Arbeitnehmers, aber kein Todesentschädigung. Ebenso gibt es im Pressearbeitsgesetz wegen des Todes des Journalisten Sterbegeld, aber keine Abfindung. Angesichts dieses Bildes lässt sich schlussfolgern, dass der Gesetzgeber akzeptiert, dass Todesfallentschädigungen in den Regelungen, die die Möglichkeit der Geltendmachung einer Todesfallabfindung vorsehen, nicht gesondert geltend gemacht werden können. Der Grund, warum Todesfallentschädigung in Artikel 440 des türkischen Obligationenrechts festgelegt ist, liegt darin, dass Arbeitnehmer, die dem türkischen Obligationenrecht unterliegen, nicht berechtigt sind, eine Abfindung zu verlangen. In Anbetracht der Tatsache, dass der Gesetzgeber für beide Zahlungen eine unterschiedliche Wahl zwischen den Gesetzen getroffen hat, kann der Schluss gezogen werden, dass die Bestimmung von Artikel 440 des türkischen Obligationenrechts nur auf Arbeitnehmer angewendet werden kann, die den Bestimmungen des türkischen Gesetzbuchs unterliegen von Verpflichtungen.

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RESEARCH ARTICLE

An Atypical Joint Stock Company under Turkish Law: Basic (Atypical) Principles in the Establishment and Share Issuance of Investment Companies with Variable Capital

Numan Sabit Sönmez*

Abstract

Thanks to the instruments offered to investors in capital markets, even owners of small savings have the opportunity to buy and sell these instruments and generate income. However, not all investors will have the same level of knowledge and experience in capital markets. Moreover, in such a diversified environment, investment by experts, i.e. professionals, is desirable for everyone in order to maximise profits. Yet it is inconceivable that small investors would hire professionals to make their investments. Collective investment schemes are institutions that offer capital market instruments to investors in return for which they create a portfolio of investment instruments in various markets and allow professionals to manage the portfolio, thus providing access to basic investment principles, such as professional management and risk allocation, for small investors. Collective investment schemes can be established as a company or fund. The established companies may prefer fixed or variable capital systems. The variable capital system allows investment companies to conduct their activities under the status of joint stock companies. On the other hand, there are many aspects that constitute derogation from the fundamental principles of joint stock companies. As the name suggests, this type of company does not have fixed capital in its articles of association. In these companies, capital is equal to the net asset value of the company and changes as the value of the assets changes. In addition, because of capital volatility, shares do not have a nominal value. Thus, basic principles such as the protection of capital, prohibition of return of capital, and nominal value, intended to be protected in the TCC regulations for joint stock companies, are completely eliminated in companies with variable capital. Although there is no protection of capital in such companies, different mechanisms are expected for protecting investors in portfolio management. In addition, in companies with variable capital, shares are divided into founder and investor shares. Founder shares are issued to the persons who founded the company or, with the permission of the Board in the subsequent issuance of founder shares, to the persons who have subscribed to such shares and grant all shareholding rights to the holders. Investor shares are issued through public offering or other special methods and do not grant any rights to their holders other than profit and liquidation dividends. Thus, a type of share that is completely deprived of various rights that do not exist in the TCC has been established. Moreover, the investor shares can be sold to the company at any time, and the company is obliged to return the net asset value per share to the investor. Thus, the basic principle of the TCC regarding the company's acquisition of its shares is eliminated in such partnerships. In this study, issues regarding the establishment, capital structure, and shares of variable capital partnerships, which differ from the basic principles of joint stock companies, are discussed.

Keywords: Collective investment schemes, investment companies, variable capital, founder's share, investor's share

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I. Introduction

In short, the capital market is a sub-branch of financial markets where the supply of funds and demand for funds come together. According to classical understanding, it refers to markets where medium- and long-term fund flows are provided[1]. Investors, who supply funds, invest their savings by buying and selling capital market instruments, whereas those who supply instruments and those who demand funds meet their resource needs. In other words, the capital market is essentially a market in which fund owners invest to earn profits, while those who offer instruments meet their funding needs. Instruments can be very diverse. Investors can operate by directly buying and selling these instruments, or they can pool their funds and entrust them to specialised managers in order to make the best investment and minimise the risk of loss. Collective investment schemes are capital market institutions that respond to the needs of the second group of investors. To put it more clearly; collective investment schemes are institutions that bring together the funds collected from investors and form a portfolio of different instruments within the framework of the principle of risk allocation, manage the portfolio formed through professional persons, store it with depositories, and thus aim to maximise gains and minimise loss[2]. Investment trusts can be defined as entities that perform these activities within a partnership organisation.

The fact that collective investment schemes act on the principle of risk allocation is directly related to the purpose of their existence. This is because, due to the limited funds available to small investors, it is not possible for the investor to divide the fund and make various investments, and even if he or she incurs a loss on one investment, it is unlikely that they will be able to offset it with another. The "collective" aspect of collective investment schemes refers to the ability to make more independent investment decisions due to the size of the funds offered, the ability to divide the funds among investment instruments, i.e. to distribute the risk, consequently minimising the risk of loss, and the ability of small investors to obtain the same benefits as large investors[3]. On the other hand, it can be criticised that the principle of risk allocation would also minimise the profits of small investors and therefore does not attract them.

1 Ali Paslı, 'Türk Hukukunda Menkul Kıymet Kavramı' in Ömer Teoman and others (eds), *Prof. Dr. Hüseyin Ülgen'e Armağan,* vol 2 (Vedat 2007) 1515.

2 Ünal Tekinalp, *Sermaye Piyasası Hukukunun Esasları* (Ekonomik ve Sosyal Yayınlar 1982) 78-79. For the purpose and basic principles of collective investment schemes, see N. Füsun Nomer Ertan, '6362 Sayılı Sermaye Piyasası Kanunu'nda Kolektif Yatırım Kuruluşları ve Özellikle Değişken Sermayeli Yatırım Ortaklığı' (2013) 71(2) İstanbul Hukuk Mecmuası 131, 131-132.

3 N. Füsun Nomer, *Yatırım Ortaklıkları* (2nd edn, Beta 2003) 5-6. These elements have been presented since the first definition of investment partnerships. The first was the definition given in the establishment of the "Foreign and Colonial Trust" in 1868. In the definition, the purpose of investment partnerships is to reduce the risk of investing in foreign government securities and to provide small investors with the same advantages as large investors. For the definition see Murat Uğur Aksoy, 'Yatırım Ortaklıklarının Temel Kavramları Üzerine' (1974) 20(11) İktisat ve Maliye Dergisi 412, 413. It was also stated that the principle of risk allocation in economic activity first emerged in Rome. In Rome, instead of one capital owner lending to one sailor, multiple capital owners lending to the same sailor and sharing the risk that will occur are also considered within this framework, see Kemal Tahir Gürsoy, *Yatırım Fonları* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 1977) 2.

However, due to risk allocation, it is possible to make more appropriate investments and maximise profits by managing the investment institution by professionals. The balance between risk allocation and profit is tipped in favour of profit because of professional management[4].

The capital market instruments provided to investors in return for the funds they bring in may vary. For example, partnership shares in public joint stock companies are an example of such instruments. By purchasing shares of a publicly traded joint stock company, an investor can both exercise his/her shareholding rights arising from these shares, for example, benefit from end-of-period profits, and gain income in proportion to the increase in value by selling his/her shares later. In investment companies with variable capital, which are the subject of our analysis, the "investor shares" offered to investors have characteristics that are quite different from those of classical joint stock companies. Although these shares are also the shares of the investment company, as will be explained in detail below, they provide the owner with a profit based on the change in the net value of the share and, moreover, impose an obligation on the company to purchase the share. In this study, the establishment and shares issued by investment companies with variable capital, which are exceptions to many basic principles of joint stock companies, will be analysed.

II. Investment Companies in General

Article 3 of the CML defines collective investment schemes as companies and investment funds.

Investment funds are defined in Article 52 under the heading of collective investment schemes in the fourth section of the CML as follows:

> *An investment fund is a property without legal identity, which is established by portfolio management companies within fund rules in conformity with fiduciary ownership principles on the account of savers, with money or other assets collected from savers pursuant to the provisions of this Law in return for fund units to operate the portfolio or portfolios consisting of instruments and rights determined by the Board.*

However, investment companies are regulated under the heading of collective investment schemes under Articles 48 et seq. of the CML. Article 48 defines investment trusts as

> *Investment companies are joint stock corporations with fixed or variable capital established to issue their shares and to manage portfolios comprised of capital market instruments, real estate, venture capital investments, and other assets and rights to be determined by the Board.*

4 For criticisms and evaluations, see Hamdi Yasaman, 'Fransız Yatırım Ortaklıkları ve Yatırım Fonları-Birinci Bölüm' (1973) 20(4) İktisat ve Maliye Dergisi 146, 150.

The scope of operations of investment companies is thus defined by law. These companies are established to operate the portfolio created within the framework permitted by law[5].

As can be seen, investment funds operate by collecting funds in exchange for participation shares and investing these funds in various assets, whereas investment companies operate by issuing company shares and using the funds obtained in this way by creating a portfolio for investment purposes. The most important aspect of the company model *vis-à-vis* the fund model is the legal personality.

From a legal perspective, a legal personality can also pose a risk to investors. This is because the company will be the owner of the assets, including the portfolio; therefore, the company will be legally entitled to dispose of the portfolio as it sees fit[6]. To overcome such drawbacks, measures such as allowing companies to operate only for specific purposes and separately protecting the company's portfolio from its assets have been included[7].

Investment companies with variable capital constitute a sub-group of investment companies that fall under collective investment schemes. The decisive element it has is the capital system of the company. In other words, as stated in the definition, when an investment company is established as a joint stock company, it adopts either a fixed capital system or variable capital system. Investment companies with variable capital are those whose capital remains at any time equal to their net asset value (Article 50/1 of the CML).

To briefly mention here the meaning of capital variability: Within the TCC system, the company's assets are a dynamic concept, whereas capital is inherently a fixed value [8]. Upon start of operations, the company uses its assets in line with its economic purpose, and these assets may decrease or increase because of its activities. The amount calculated by subtracting the company's liabilities from its assets is called the net asset value of the company (Article 50/1 of the CML). In investment companies with variable capital, no fixed capital figure is shown in the association's articles, and the net asset value also represents the capital of the company. Therefore, not only assets but also capital becomes dynamic.

5 It is argued that this is what distinguishes investment companies from other partnerships, see Nomer (n 3) 17. In addition, regarding the different legal structures under which collective investment schemes are formed see Nomer Ertan (n 2) 134-135. For other purposes of investment companies also see Tekin Memiş and Gökçen Turan, *Sermaye Piyasası Hukuku* (5th edn, Seçkin 2020) 168-169.

6 Ünal Tekinalp, 'Yatırım Ortaklıklarının Düzenlenmesinde Temel Alınabilecek İki Model ve Türk Sistemi' (1970) 27(9) İktisat ve Maliye Dergisi 386, 388.

7 Tekinalp, *Esaslar* (n 2) s. 82.

8 With the incorporation of a company, the property rights of the founders on the cash or in-kind capital items brought by them are terminated and these values are included in the assets of the company. Therefore, at the time of incorporation, the company's capital, at least its paid-in capital, and assets are considered equal. These assets may increase or decrease as the company begins operations. While share capital is a fixed figure written in the articles of association, assets represent a variable value. On this issue only see Halil Arslanlı, *Anonim Şirketler – I. Umumi Hükümler* (Fakülteler Matbaası 1960) 92 et seq.

The CML stipulates that investment companies may have fixed or variable capital (Article 48 of the CML) and that investment companies with variable capital are regulated without any distinction between company types (real estate, venture capital, securities)[9]. Article 49/1 of the CML, while listing the conditions for the establishment and operation of investment companies, states that they shall be established in the registered capital system without any distinction, and the provisions regarding variable capital are reserved. Thus, at first glance, it appears that all investment trusts may have variable capital. However, Article 6/2 of the Communiqué on Principles Regarding Real Estate Investment Companies[10] (III-48.1) and Article 5/2 of the Communiqué on Principles Regarding Venture Capital Investment Companies[11] (III-48.3) refer to the fixed capital system by requiring such partnerships to adopt the registered capital system. In this case, it should be noted that the variable capital system is applicable only to securities investment companies.

Because of this determination, explanations will be provided in the following sections within the framework of the relevant legislation. However, before proceeding with these explanations, note that variable capital investment trusts are particularly preferred in the Anglo-Saxon system. Since the law of joint stock companies in the continental European system is not suitable for a variable capital system, investment funds have come to the forefront of this system. However, when operating as a company, variable capital is a necessity rather than an option. In countries where the public is not accustomed to trading on the stock exchange, it is essential for the company to be able to issue shares and offer them to investors at any time to appeal to a wide range of investors and to be able to buy back the shares by paying the price when the investors want to sell them back[12]. As the basic principles of the fixed capital system do not meet these needs, the variable capital system is an important alternative for investment companies.

To briefly touch upon the legislation on variable capital investment companies: Articles 50 and 51 of the CML generally regulate this type of partnership. According to Article 50/6 of the CML, the principles and procedures regarding the activity and management principles of investment companies with variable capital, valuation of assets and rights in their portfolios, safekeeping of their assets, portfolio restrictions, prospectus and publication of prospectus, the issue, sale and redemption of their shares, cessation of redemption, their liquidation and termination shall be determined by the Board.

9 The name of the Company depends mainly on the predominant investment instruments in the portfolio, see Nomer (n 3) 19.

10 Official Journal No. 28660, 28.05.2013.

11 Official Journal No. 28790, 09.10.2013.

12 İbrahim Öngüt, 'Yatırım Şirketleri ve Yatırım Fonları' (1967) 14(2) İktisat ve Maliye Dergisi 55, 63.

On the basis of the aforementioned provision, a communiqué directly regulating investment companies with variable capital has not been issued. The Communiqué Relating to the Principles for Securities Investment Trusts[13] (III-48.5), on the other hand, directly regulates investment companies with variable capital under Article 41 et seq. of Section III. The following examination will be carried out within the framework of the relevant legislation.

III. Investment Companies with Variable Capital

A. Establishment and Capital of the Company

When the regulations on investment companies with variable capital are examined in general, it is seen that there is a company structure that is incompatible with the principles of joint stock company law, which is different in many aspects and even contrary to the principles to be protected by the TCC and does not yet have an example in Turkish law[14]. However, the fact that this is the case does not mean that the variable capital system will not be applied in the future. While investment companies in Türkiye currently operate under a fixed capital system, it is always possible that this system will be abandoned and a variable capital system will be implemented. This is because the variable capital system may serve the objectives of investment trusts much more effectively. On the other hand, it seems unlikely that the variable capital system can be offered as a choice in the law of joint stock companies for companies other than investment. In particular, it should be reconsidered whether the variable capital system is really disadvantageous in terms of the principle of capital preservation.

As stated above, investment companies can be established with fixed or variable capital. Fixed capital refers to whether the company adopts share capital or the authorised capital system. In these systems, capital represents a fixed number on paper, and the number of shares is limited by the capital. Therefore, it is not possible for third parties and shareholders to freely enter and exit the company as shareholders, except for the transfer of shares, without changing the capital. The issuance of new shares or the cancellation of existing shares requires a change in the capital, i.e. the company must increase or decrease its capital. This feature has led to the gradual abandonment of fixed capital in foreign legal systems[15].

13 Official Journal No. 29368, 27.05.2015.

14 Regarding the aspects of investment companies with variable capital that constitute an exception to the basic principles of the TCC and why it is not possible to establish such a company under the TCC, see Nomer Ertan (n 2) 136; Burak Adıgüzel, *Sermaye Piyasası Hukuku* (5th edn, Adalet 2023) 284-285.

15 Hamdi Yasaman, *İsviçre ve Fransız Hukukunda Yatırım Fonları* (1980) 12. Investment companies with variable capital have been relatively controversial in the United States, but have nevertheless attracted attention. For example, an empirical study conducted in the 1950s compared the income of government debt instruments and investment companies with variable capital and compared which one was the better investment instrument; on this issue see George Wilber Moffitt, 'Management Achievement of Open-Ended Investment Companies' (1952) 25(2) The Journal of Busieness of the

In the variable capital system, a company may increase its capital by issuing and selling new shares or decrease its capital by purchasing and redeeming its shares without being bound by the principles of corporate law in terms of capital increase or decrease. Capital may be changed not only through the issuance or redemption of shares but also through an increase or decrease in the value of the company's assets. Therefore, in this type of company, the assets of the company and the value of the shares determined accordingly are of importance, not capital.

Article 41 of the Communiqué stipulates that investment companies with variable capital should be established as joint stock companies to manage portfolios of certain assets and instruments. That is, the subject of the business is portfolio management. The assets and instruments to be included in the company's portfolio are also explained in the same provision[16]. Although it is beyond the scope of this study to explain these assets one by one, it should be noted that the items in question include a wide variety of assets and instruments.

Article 45 of the Communiqué details the conditions for the establishment of investment companies with variable capital. First, the company must be incorporated as a joint stock company (45/1-a). Although it does not have fixed capital as in the TCC system, founders of the variable capital company must have committed to the Board that the company would increase its net asset value to a minimum of TRY 4 million through issue of investor shares within the term and under the principles set forth in the Communiqué (45/1-b). Article 3/1-a of the Communiqué defines this as the minimum net asset value. In addition, Article 45/1-c of the Communiqué states that the initial capital cannot be less than TRY 2 million. According to Article 3/1-ç of the Communiqué, the initial capital is the minimum amount of capital to be paid by the founding shareholders.

The minimum net asset value must be reached within six months of registration. Article 49/10 of the Communiqué refers to Article 529/1-b of the TCC and stipulates that if this condition is not fulfilled, the company will be automatically dissolved. In Art. 529/1-b of the TCC, the legislator has regulated the realisation or impossibility of realisation of the subject of operation regulated in the articles of association of the joint stock company as the reason for termination[17]. It is unclear why the Communiqué refers to this provision. This is because, in a separate provision in the CML, failure to meet the minimum net asset value may result in dissolution without

University of Chicago 71, 72 onw.

16 The provision lists shares of issuers, debt instruments, deposit and participation accounts, precious metals, lease and real estate certificates, foreign investment instruments, etc. among the assets that may be included in the portfolio. On the other hand, by stating "other investment instruments deemed appropriate by the Board", it is also stated that the enumeration is not restrictive - provided that it is subject to the Board's authorization.

17 Regarding Art. 529/1-b of the TCC and the same provision under the former TCC see Halil Arslanlı, *Anonim Şirketler IV. Anonim Şirketin Hesapları V. Anonim Şirketin İnfisahı ve Tasfiyesi* (Fakülteler Matbaası 1961) 169 et seq.; Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku* (4th edn, Vedat 2015) N. 10-91.

the need for reference. Failure to bring or raise capital is not the same as the realisation or impossibility of realisation of the subject of operation. In this context, it is also possible to consider the commitment and payment of the minimum amount by the founders by applying provision 346/2 of the TCC on public offering at incorporation as another solution instead of the dissolution of the company. There is no prohibition against founders from acquiring investor shares.

On the other hand, Article 50/4 of the CML stipulates that the Board must be notified in the event that the value of the founder shares of an investment company with variable capital falls below the minimum amount or the financial situation of the company deteriorates. According to this provision, the board of directors must convene the General Assembly within 30 days to make a decision on how to address the situation. If the required decision cannot be reached, the Board is authorised to take any measure, including the dissolution of the company.

In this case, the following result is achieved: If the minimum net asset value is not reached within six months after incorporation, which is understood to be TRY 4 million pursuant to Article 45/1-b of the Communiqué, the company will automatically be dissolved pursuant to Article 49/10 of the Communiqué. If this condition is met, but the value of the founder shares falls below the minimum amount in another period, the CML Article 50/4 will be applied and the general assembly will convene; if no measures can be taken, the Board will take a decision on the company.

Article 45/3 of the Communiqué states that the maximum amount of capital may also be included if desired. However, even if the maximum capital amount is stipulated in a company that does not have fixed capital and that changes at any time, it may not be possible to determine whether the maximum capital has been exceeded in all cases.

Another important provision regarding incorporation is that founders will be required to meet the qualifications set forth in Article 46 of the Communiqué. Therefore, unlike the TCC system, persons who will establish a company with variable capital must also possess abstract qualities such as financial strength, honesty, and reputation. The Board will assess whether these abstract qualities are present.

Upon fulfilment of the conditions, an application will be made to the Board under Article 47 of the Communiqué, and upon the Board's approval, the company will be registered in the trade registry. Under Article 47/3 of the Communiqué, it is also obligatory that the initial capital (TRY 2 million pursuant to Article 45/1-c of the Communiqué) is paid before the application.

B. Issuance, Characteristics, Transfer, and Redemption of Shares

1. General Structure-Nominal Value-Net Asset Value per Share

The shares of investment companies with variable capital consist of investor shares and founder shares that must be in the name of the holder (Article 50/2 of the CML). These shares have no nominal value (Article 50/2 of the CML, Article 52/1 of the Communiqué). In other words, in the variable capital system, shares differ from the TCC system (Art. 339/1-c, 347) primarily in terms of nominal value.

In TCC regulations, nominal values represent part of capital. Each share has a nominal value, and the sum of the values of all shares gives the share capital. By envisaging the issuance of each share in this way, it is ensured that the status of the share against the capital is determined[18]. The share system and nominal value primarily create a fixed shareholding position, i.e., they prevent the shareholding position from changing regardless of the name of the shareholder[19]. In addition, as in Article 434 of the TCC, the nominal value may determine the participation rate for certain shareholding rights.

In companies with variable capital, there is no such system. This is because the shares do not have a nominal value and the company's capital is determined on the basis of assets, not on a fixed figure in the articles of association and an amount corresponding to the sum of the nominal values of the shares. The absence of a nominal share value is an imperative rather than a choice[20]. Because, in this system, capital also changes in line with changes in assets. Therefore, it is not possible to set fixed nominal values for shares despite constantly changing capital.

For this reason, in companies having variable capital, net asset value is referred to instead of the nominal value of the shares. According to Article 52/2 of the Communiqué; net asset value per share of a variable capital company shall be calculated by adding liquid assets, receivables, and other assets to the company's portfolio value, subtracting total debts therefrom, and dividing the resulting amount by the total number of investors' and founders' shares. This value is taken as the basis for the trading of shares, and it is determined and announced every day (Article 52/3-4 of the Communiqué). As a result, the real value of the shares is determined, and investors can receive this value[21].

18 One of the most fundamental features of a joint stock company is the division of the company's capital into shares and, as a result, the numerical expression of the relationship between the capital and the share with a nominal value. This is because joint stock companies aim to divide capital into shares and enable the free transfer of these shares; they exist for this purpose, and this is where they derive their "joint stock" character. Therefore, nominal value shares become one of the most important elements of a joint stock company. On this issue, see only Feyzan Hayal Şehirali Çelik (İsmail Kırca and Çağlar Manavgat), *Anonim Şirketler Hukuku Cilt 1* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 2013) 97-98. However, the notional value system has also been criticised recently, see ibid 99.

19 ibid 100.

20 Nomer Ertan (n 2) 140; Adıgüzel (n 11) 285.

21 Nomer (n 3) 152.

2. Shareholder Rights

Because shares do not have a nominal value, a question arises as to how certain shareholder rights can be exercised. It would be appropriate to make a distinction between founder's and investor shares: Pursuant to Article 53/2 of the Communiqué; founder shares provide their owners with the rights of dividends, taking share from liquidation, attending general assembly meetings, voting in general assembly meetings, obtaining and inspecting information, requesting a special audit, filing a lawsuit for cancellation of general assembly decisions, and holding minority interests. Each founder's share grants one right to vote in the general assembly meeting.

Another aspect of variable capital partnership shares that differs from the TCC system is illustrated here. Under Article 434/1 of the TCC, voting rights are determined on the basis of the nominal value of the shares, whereas in companies with variable capital, voting rights are determined as one share-one vote. In fact, this is a natural consequence of the unique features of the variable capital structure. Since the net asset value per share (=net asset value of the company/total number of shares) of each share will be equal, shares of equal value confer equal voting rights.

Article 53/2 of the Communiqué states that minority rights may also be exercised with founding shares. Presumably, the number of shares will also be taken as a basis for minority rights. Given the variability in capital and absence of a nominal value, the only determinant of rights to be exercised is the number of shares.

Regarding the investor shares, Article 50/2 of the CML states that the investor shares shall not be granted administrative rights. In fact, Article 53/3 of the Communiqué explicitly stipulates that an investor shares shall entitle the holder to only receive profit and liquidation dividends. Therefore, investors' shares benefit their holders through dividends and increased share value[22] and do not allow interference in the running of the company. In the TCC system, although it is possible for certain rights to be frozen or unavailable under certain conditions in joint stock companies, no share is deprived of all rights other than profit and liquidation dividends. This is where the investor shares differ from the TCC system.

In fact, this regulation agrees with the purpose of the investment company. This is because the investor shares are not a partnership but an investment instrument. The acquirers of these shares, as shareholders, may have no interest in the internal workings of the company; they simply follow the increase or decrease in the value of their shares and aim to gain profit by returning their shares to the company at the right moment. The people who hold founder shares are the risk-takers and founders of the company. While they bring in the initial capital, it is not as easy for them to

22 Regarding the rights granted by the shares of investment companies in general and the factors affecting such rights, see Öngüt (n 10) 57.

redeem their shares and exit as it is for holders of the investor shares. Therefore, it is appropriate to leave shareholding rights other than financial rights to the founders.

According to Article 53/4 of the Communiqué, founder shares and investor shares do not have any rights of option for newly issued shares. The right to acquire new shares can be exercised in two situations in joint stock company law: Pre-emptive rights in capital increases from external sources and rights to receive free shares in capital increases from internal sources. Because neither of these conditions applies to partnerships with variable capital, it is natural that the right to acquire new shares does not exist. On the other hand, pursuant to Article 54/3 of the Communiqué, after establishment, the founder shares may be issued for allocation to existing founding shareholders or third parties by a decision of the general assembly of shareholders and with prior consent from the Board.

3. Issuance, Transfer, and Redemption of Founder Shares

Founders' shares, which must be issued in name in companies with variable capital (Art. 50/2 of the CML; Art. 53/1 of the Communiqué), shall be allocated to the founders of the investment company (Art. 54/1 of the Communiqué), and new founders' shares may be issued after establishment with the permission of the Board (Art. 48, 54/3 of the Communiqué). In other words, the founders' shares initially belong to the founders of the company and then to those who subscribe to the newly issued founders' shares with the permission of the Board.

There are various restrictions on the transfer of founder shares. First, if founders' shares are to be transferred before the issuance of investor shares, this transfer will be subject to the Board's authorisation, and the transferees will be subject to the same conditions as the founders, except for having financial power (Communiqué Art. 54/2). Note that the financial power requirement for founders is not required for transferees of founder shares. On the other hand, after the issuance of investor shares, the transfer of founder shares in a ratio that will transfer management control is also subject to the Board's authorisation (Communiqué Art. 54/4). Transferees need not possess financial power. The transfer of founder shares that do not change control is not subject to authorisation but to notification (Communiqué Art. 54/4).

Article 50/2 of the CML and Article 54/7 of the Communiqué stipulate that transfers of founder shares made without authorisation shall not be recorded in the share ledger, and if a record is made, such records shall be null and void. Thus, by departing from the freedom of transfer of shares and the principle that this freedom may be restricted exceptionally under Art. 490 et seq. of the TCC, the transfer of founders' shares in companies with variable capital is fully subject to the Board's authorisation or notification.

The redemption of founder shares is subject to the approval of the other founding shareholders, and the value of founder shares remaining after redemption should not fall below the initial capital (Communiqué Art. 55). In the event that the value of the founder shares falls below the determined amount, certain sanctions are envisaged, ranging from notification to the Board to liquidation of the company (CML Art. 50/4).

4. Issuance, Transfer, and Redemption of Investor Shares

In investment companies with variable capital, the shares constituting the subject matter of the "investment" and essentially determine the differentiated characteristics of the company are the investor shares.

According to Article 49 of the Communiqué, investor shares may be issued through a public offering. In the event of any other issuance, the new shares must be allocated to a specific investor group on a professional or sectoral basis or sold to qualified investors. For the issuance of investor shares, the required documents must be issued, and approval must be obtained by applying to the Board. After approval is obtained, investor shares are offered to investors through predetermined distribution channels, and the money and assets obtained from the issuance of these shares are invested in the assets and transactions specified in the documents (Communiqué Art. 49/7-8).

As previously mentioned, the initial capital of a company with variable capital shall not be less than TRY 2 million, and the net asset value of the company shall be increased to at least TRY 4 million through the issuance of investor shares (Communiqué Art. 45/1-b, c). Article 49/10 of the Communiqué contains a provision for this purpose. According to this provision, the minimum net asset value condition must be met within six months of registration of the articles of association with the trade registry. Otherwise, the company will be deemed dissolved. The issuance of investor shares is essentially an obligation rather than an opportunity for the company to reach its net asset value. Once the minimum net asset value is reached, the issuance of new investor shares becomes an option for the company.

The main peculiarity of investor shares manifests itself in the trading of these shares, particularly in the obligation of the corporation to purchase its shares.

Article 50/3 of the CML is one of the most important provisions for variable capital companies. According to this provision, upon the request of the shareholder, the partnership must purchase and redeem the shares and repay the price. These shares are investor shares (Art. 56/1 of the Communiqué). The price to be paid is the net asset value per share, which will be calculated according to the net asset value (Art. 56/2 of the Communiqué).

According to Article 2/3 of the Communiqué on Buy-Back Shares (II-22.1), investment companies with variable capital are excluded from the scope of the regulation. On the other hand, Article 51 of the CML explicitly states that the provisions of the TCC regarding the acquisition or pledge of its shares shall not apply to companies with variable capital. Thus, in companies with variable capital, one of the fundamental principles of joint stock companies, namely, the prohibition of the company's acquisition of its shares (Art. 379 TCC), is rendered inoperative.

In joint stock companies, the acquisition of its own shares is a highly debated issue[23] that is regulated differently in various legal systems as part of the principle of protecting capital and assets[24]. In fact, Article 382/1-e of the TCC provides an exception for securities companies with respect to restrictions on the acquisition of shares by joint stock companies. There is no definition of what a securities company is. The concept was drafted as "securities investment company" in the Sub-Committee of the Justice Commission based on Second Council Directive 77/91/EEC dated 13.12.1976, but the term "securities company" was included in the draft bill when the negotiations on the draft bill were postponed to the next legislative period and enacted as such[25]. Therefore, within the framework of the view we share, the purpose of the provision is to remove the limitations on these types of partnerships, since it is usual and necessary for investment companies to acquire their own shares[26]. On the other hand, although the exception set forth in Article 382/1-e of the TCC refers to investment companies with fixed capital[27], in our opinion, both fixed and variable capital investment companies fall within the scope of the provision. As a matter of fact, even if a contrary interpretation is made, within the framework of Article 61 of the CML, the provision on the prohibition of acquisition of own shares by joint stock companies shall not apply to companies with variable capital.

23 In general, joint stock companies may acquire their own shares to utilise cash surpluses, convey to the market that there is confidence in the shares of the company and that there is a possibility of profit, increase the price of the shares, to realise dividend distribution without taxation, and remove the minority from the company for a fair price. On this issue see Alihan Aydın, *Anonim Ortaklığın Kendi Paylarını Edinmesi* (Arıkan 2008) 66 et seq.; Andreas Cahn and David C. Donald, *Comperative Company Law* (CUP 2010) 242; Çağlar Manavgat, 'Anonim Ortaklığın Kendi Paylarını Edinmesinde "Menkul Kıymetler Şirketi"nin Anlamı ve İstisnaların Değerlendirilmesi' in Merih Öden and others (eds), *Prof. Dr. Erdal Onar'a Armağan,* vol II (Ankara Üniversitesi 2013) 1141-1143; also see Ahmet Türk, *Anonim Ortaklığın Kendi Paylarını Edinmesi* (Adalet 2016) 79 et seq. In addition, such transactions entail dangers such as the reduction of a company's assets, the ability of managers to remove shareholders who are uncomfortable with them or who pose a threat to their position by purchasing their shares, and the over-inflation of a company's share value. See Cahn and Donald (n 20) 243.

24 Under UK law, companies may issue redeemable shares even if the company is not publicly traded, provided that there is a provision in the articles of association (Companies Act Art. 684). In essence, the company issues a group of shares called "redeemable shares" and can redeem these shares upon request of the shareholders or the company. Regarding this subject, see Alan Dignam and John Lowry, *Company Law* (OUP 2012) 134-136. In the American Law, on the other hand, it is allowed to redeem shares provided that the share capital is not harmed. For example, see Delaware General Corporation Law 160; Cahn and Donald (n 20) 250. For similar structures in other legal systems, see Mads Andenas and Frank Wooldridge, *European Comperative Company Law* (CUP 2009) 233 onw.

25 Grand National Assembly of Turkey Justice Commission Report, no. 1/324, decision no. 10, date 11.01.2008, order no. 96, page 491; Manavgat (n 20) 1139.

26 Manavgat (n 20) 1143 et seq.; Türk (n 20) 259. However, this exception provision has been subject to serious criticism in the doctrine. First, since there is no such company type as a "securities" company in our law, it is unclear whether the provision will apply to investment companies or to all companies whose field of activity is the purchase and sale of securities. For this and similar criticisms, see Aydın (n 20) 326.

27 Aziz Bora Durmaz, *Anonim Ortaklığın Kendi Paylarını İktisabı* (Beta 2024) 195.

The ability to redeem shares through a partnership is important for investors. This is because, while the investor's expectation is a lower risk and a higher probability of gain, the ability to redeem his/her investment at any time and as easily as possible, e.g., without having to trade on the stock exchange, is also an incentive for investing[28]. In countries where the stock market is newly developed and small investors are not accustomed to trading, enabling investors to sell their shares to the company is an important function.

The freedom for investment companies to acquire their own shares is also the result of their practical need. First, investment companies need such opportunities to compete with other investment funds. In the absence of such an opportunity, while in investment funds, the investor can redeem his/her participation share and obtain the return, in a company structure, the shares can be traded at a discounted price on the stock exchange, which will result in both costly and lower-price transactions for investors, leading to the non-preference of the company structure[29]. The ability of a company to buy its share also reduces the difference between the discounted value in the stock market and the actual value of the shares[30]. Thus, the company structure is attractive to investors.

In investment companies with variable capital, investor shares are redeemed upon the request of the shareholder. Shares may be purchased through delivery of shares of investors and full payment in cash of the net asset value per share, and shares may be sold through liquidation of shares of investors upon delivery to the variable capital company in accordance with the principles stipulated in the information documents (Communiqué Art. 56/2). In other words, the net asset value per share will be paid to the shareholder, and the acquired shares will be disposed of. The net asset value per share of a variable capital company shall be calculated by adding liquid assets, receivables, and other assets to the company's portfolio value, subtraction of total debts therefrom, and division of the resulting amount by the total number of investor's and founder shares (Communiqué Art. 52/2).

Therefore, how can shares be paid? This is where the challenge for investment companies arises. The company will either hold cash at all times or meet its cash needs by monetising the assets in the portfolio[31]. In our opinion, holding cash at all times may lead to insufficient investments, whereas liquidating a portion of the portfolio may lead to a failure to realise the expected benefit. For this reason, it would be more appropriate to regulate the conditions of the return and how it will be realised in more detail, in a way to protect both the company and investors.

28 Nomer (n 3) 149-150.

29 Manavgat (n 20) s. 1144; also see Nusret Çetin, Hatice Ebru Töremiş and Zeynep Cantimur, *6362 sayılı Sermaye Piyasası Kanunu'nun Sistematik Analizi* (Yetkin 2014) 106.

30 Manavgat (n 20) 1145-1146; also see Çetin, Töremiş and Cantimur (n 26) 106. For other advantages of the ability to redeem shares see Memiş and Turan (n 5) 168.

31 Nomer (n 3) 154.

C. Provisions Not Applicable

Pursuant to Article 51 of the CML and Article 91/2 of the Communiqué; provisions of the TCC with respect to joint stock corporations regarding the principles of equity capital, minimum amount of capital, minimum content of articles of association, commitments of capital in-kind, nominal value, acceptance of own shares by the corporation as acquisition or in pledge, the procedure of capital raising and reduction, share commitment and its payment, restrictions of share transfer, profit and loss account and profit distribution, reserves and liquidation shall not be applicable for investment companies with variable capital. Meanwhile, it should be noted that, in accordance with our view, it would have been more appropriate to regulate the institution of variable capital companies, which constitutes an exception to these provisions of the TCC that refer to the basic principles of joint stock companies, at the level of a law rather than a Communiqué[32].

IV. Conclusion

Investment companies with variable capital are collective investment schemes established in the form of joint stock companies as regulated by the CML. According to the legislation, only securities investment companies can be established with variable capital.

The characteristic of the variable capital system is that capital increases and decreases depending on the assets of the company, thus abandoning the classical joint stock companies' system of written and fixed capital. Shareholders will be able to enter and exit the company as they wish, and even if there is no change in the shareholders, the capital will increase and decrease with the increase and decrease in the value of the company's assets. The net asset value corresponds to the company's capital. The figure calculated by subtracting liabilities from company assets, i.e., net asset value, is also the company's capital.

For companies with variable capital, exceptions are made to the basic provisions of the TCC regarding the establishment of joint stock companies with the qualifications required for founders, the distinction between initial capital and net asset value, the payment of shares in cash and in advance, and especially the dissolution of the company if the minimum net asset value is not reached within six months after the establishment. Although some of these differences are mandatory due to the nature of the company, in our opinion, it would be beneficial to re-evaluate the regulation introduced, especially in terms of the dissolution of the company.

There are two types of shares in variable capital partnerships: founder and investor shares. Founder shares are granted to the founders of the company, and their subsequent

32 Nomer Ertan (n 2) 142.

issuance, transfer, and redemption are subject to certain conditions, in addition to the Board's approval. Founder shares provide the holder with all shareholding rights.

Investor shares do not have such strict requirements. This is because investor shares can be returned to the company in return for payment of the net asset value per share. Therefore, the type of shares that investors are most interested in are investor shares. These shares entitle the holder only to profits and liquidation dividends.

Although the company has no fixed capital, it cannot be said that it has no capital. Moreover, the legislator has tried to limit the variability of capital by including rules such as minimum initial capital and minimum net asset value. Naturally, some duties and responsibilities fall on a company if it falls below these limits.

Finally, there is a long list of provisions of the TCC that are not applicable to investment trusts with variable capital. The aforementioned points demonstrate how a company with variable capital differs from a classical joint stock company, at least in terms of establishment, capital, and shares. It would be more appropriate to regulate an institution that makes such exceptions to the basic principles of the TCC regarding joint stock companies by law rather than a communiqué.

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RESEARCH ARTICLE

Le rôle des tribunaux *ad hoc* dans la mise en œuvre des principes du droit cosmopolitique: une étude empirique via la pensée kantienne*

The role of *ad hoc* tribunals in the implementation of cosmopolitan law: an empirical study via Kantian ethics

Başak Naz Şimşek** , **Yeliz Kulalı Martin*****

Résumé

Les souffrances infligées aux personnes vulnérables attirent l'intérêt de plein de penseurs depuis l'Antiquité. Des philosophes stoïciens aux théoriciens contemporains de paix, de nombreuses personnes ont songé sur les manières d'empêcher ces souffrances et d'arriver à une paix perpétuelle. Ce phénomène se trouve au cœur des sphères juridiques et politiques, étant donné que le fait d'assurer une paix durable dispose des fondements légaux et sociaux à la fois. L'une des théories se concentrant au côté juridique de l'idée de la paix perpétuelle est le droit cosmopolitique. Les idées kantiennes en constituent les fondements. Selon cette théorie, un cadre juridique universel devrait être établi pour juger les actes illicites infligés aux personnes vulnérables. L'idée derrière cela est que ces violences nuisent à la conscience de toute l'humanité. Si bien qu'elles ne peuvent et ne devraient pas être limitées à une seule région. Les grandes violences commises pendant les guerres mondiales du 20ème siècle ont incité la communauté internationale à réunir autour des valeurs juridiques communes. Cette initiative consistait à condamner les responsables de ces actes illicites et d'empêcher la commission de nouvelles infractions. C'est à la suite de la Seconde Guerre mondiale que cette idée a été mise en pratique. Le monde a été bouleversé par les actes très graves commis pendant ce conflit, et plus tard, dans les années 90. A la suite des conflits interétatiques et intraétatiques à grande échelle, quatre tribunaux pénaux *ad hoc* ont été créés en Allemagne, au Japon, en ex-Yougoslavie et au Rwanda. Ce développement s'est réalisé conformément à l'idée kantienne selon laquelle certains crimes blessent la conscience de l'humanité et leurs responsables devraient être jugés devant les yeux de la communauté internationale, à travers les principes juridiques universels.

Mots-clés

Tribunaux *ad hoc*, droit cosmopolitique, Nuremberg, Tokyo, Yougoslavie, Rwanda, responsabilité pénale individuelle

Abstract

The suffering inflicted on vulnerable people has attracted the interest of many thinkers since Antiquity. From Stoics to contemporary peace theorists, many scholars have proposed ways to prevent such suffering and achieve perpetual peace. This phenomenon lies at the heart of legal and political spheres because it has both legal and social foundations. A theory that focuses on the juridical side of the idea of perpetual peace is cosmopolitan law. It is based on Kantian ethics. Accordingly, a universal legal framework should be established to judge unlawful acts committed against vulnerable people. Cosmopolitan law is based on the idea that these unlawful acts cannot be confined to a single region as they wound the conscience of all humanity. The great violence committed during the world wars of the 20th century prompted the international community to unite around common legal values. The aim of this initiative was to condemn

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those responsible for these unlawful acts and to prevent the commission of new violence. It was following the Second World War that this idea was put into practice. The world was shaken by the very serious acts committed during this conflict, and later, in the 1990s. In the wake of large-scale inter-state and intra-state conflicts, four *ad hoc* criminal tribunals were set up in Germany, Japan, the former Yugoslavia, and Rwanda. This development agreed with the Kantian idea that certain crimes harm the conscience of all humanity and that perpetrators should be judged before the eyes of the international community through universal legal principles.

Keywords: *Ad hoc* tribunals, cosmopolitan law, Nuremberg, Tokyo, Yugoslavia, Rwanda, individual criminal responsibility

Extended Summary

During human history, there have been many conflicts during which civilians from various regions of the world have suffered from violent acts. There have been attempts to codify a group of unlawful acts as international crimes beyond the nation-state level. During this process, certain unlawful acts were deemed to be in keeping with the spirit of war, while the most violent ones were considered infractions that affected the conscience of all humanity. These efforts began at the end of the 19th century, with international conventions on the limitations of warfare methods and the impact of war on civilians. The 20th century witnessed two world wars and an important number of intrastate conflicts. The striking dimension of these conflicts has pushed the international community to take a step beyond international conventions to punish criminals and prevent the recurrence of new violence against civilians.

To take a step further in terms of the application of international conventions, after the outbreak of the First and Second World Wars, the need to establish judicial institutions with international competence has been discussed. With the establishment of these tribunals, definitions of crimes would have been added to their constituent texts, a step would have been taken towards codifying unlawful acts, and the universalisation of criminal justice would have begun. Major developments in this field began with the Second World War. The first examples of *ad hoc* criminal tribunals were founded in Germany and Japan to prosecute military and political figures responsible for the suffering of civilians. Thanks to these two tribunals, serious breaches of the fundamental rights of individuals have been codified as international crimes, and international criminal law has begun to universalise. Although limited, individuals gained legal personality before international law and became subjects of it. Hence, the legal sphere of Kantian cosmopolitanism has begun to find its place in the international order.

The International Military Tribunals of Nuremberg and the Far East have contributed significantly to international criminal law. They form the first proof of the will of the international community to do something beyond international conventions regarding the suffering of civilians during conflicts and thus establish a more binding legal framework. They constitute a via-media between state-centric

treaties and a permanent cosmopolitan legal institution. Despite many criticisms, these *ad hoc* tribunals have been one of the foundations of progress in international criminal law. The two legal institutions that were established with the breakdown of the bipolar world order during the Cold War took these efforts further by adding new elements to their statutes that aimed to prosecute war criminals and prevent the commission of further unlawful acts. The International Criminal Tribunals for the former Yugoslavia and for Rwanda participated in attempts to improve the scope of the codification of international crimes and thus arrived at an interpretation that was more up-to-date and appropriate to the context of the era.

Is it possible to establish a direct link between Kantian cosmopolitan law and these historical developments? Does this evolution prove the rooting of the principles of a universal human society within the discipline of international law? Kantian cosmopolitanism discusses the possibility of gradually creating a political, legal, and social framework that begins at the state level and extends to world citizenship. According to Kant, such cosmopolitanism is a way to ensure perpetual peace. The legal aspect of this thought led to the ideal of the creation of a cosmopolitan law for issues that concern humanity as a whole. Cosmopolitan law aims to find solutions to global problems such as the violation of fundamental rights of individuals and environmental issues, as this juridical sphere recommends the construction of universal legal norms that complement national and international law. It underlines the universalisation of humanitarian legal society.

This research aims to determine the link between certain historical developments of the 20th century and Kant's concept of cosmopolitan law. It intends to demonstrate that the motivation behind the establishment of *ad hoc* tribunals is strongly linked to this approach. Within this perspective, the first part is dedicated to a theoretical examination of Kantian cosmopolitan law and two models by Olivier de Frouville that interpret this universalisation within the scope of international law. In this research, the step towards the cosmopolitanising of international law is observed from a fundamental right perspective. The historical period to be examined is the second half of the 20th century. In the second part, which includes an empirical study, four *ad hoc* criminal tribunals created during this period will be analysed to obtain concrete elements that demonstrate a connection with cosmopolitan law. Hence, this article demonstrates that four *ad hoc* tribunals contributed to the codification of international crimes and thus supported the implementation of the principles of cosmopolitan law. This research will contribute to international relations and international law.

Le rôle des tribunaux *ad hoc* dans la mise en œuvre des principes du droit cosmopolitique: une étude empirique via la pensée kantienne

I. Introduction

L'histoire de l'humanité a témoigné de nombreux conflits, de nature interétatique et intraétatique. Le fait que la violence soit un phénomène qui persiste depuis des siècles a conduit de nombreux penseurs à développer des théories sur ce qui peut être fait pour prévenir et empêcher l'éclatement des guerres ainsi que les actes illicites commis lors des guerres. Les efforts des penseurs ont donné naissance à de nombreuses études se concentrant à la prévention de la guerre et avançant des méthodes pour parvenir à une paix durable et voire permanente. Plein de penseurs ont étudié, d'une manière multidisciplinaire, la question de savoir comment parvenir à une paix perpétuelle entre les peuples et Etats-nations. Ils ont traité le sujet dans un contexte philosophique, politique et juridique. L'un des penseurs éminents qui s'est concentré sur ce domaine est Emmanuel Kant ; dans ses œuvres s'appelant « Idée d'une histoire universelle d'un point de vue cosmopolitique[1] » (1784) et « Projet de paix perpétuelle[2] » (1795), il a étudié sur la manière de parvenir à une paix durable entre les Etats.

Les constatations de Kant concernant la création d'un modèle politique et juridique pour mettre fin aux souffrances des individus et assurer la paix ont refait surface au 20ème siècle, parallèlement aux événements internationaux. Le fait que ce siècle ait été la scène des conflits violents et multiformes a remis au premier plan les études des Lumières sur la paix. En effet, ledit siècle a témoigné de deux guerres à grande échelle et de nombreux conflits régionaux. Des millions de personnes ont perdu leur vie au cours de la Première et de la Seconde Guerre mondiale. Une partie considérable des civiles ont été victimes de persécutions et de violences. Pour cette raison, la question de savoir comment jeter les bases d'une paix durable et solide ainsi qu'empêcher les guerres est montée en scène et a fait l'objet de nombreuses recherches contemporaines. Les atrocités commises contre les civils durant les grandes guerres du 20ème siècle ont remis à l'agenda publique la nécessité de prendre des dispositions juridiques pour prévenir et empêcher les violations graves du droit international humanitaire (ci-après « DIH ») et poursuivre les responsables de celles qui ont déjà été commises.[3] De cette manière, conformément aux dynamiques de la mondialisation et parallèlement à d'autres disciplines, une tendance de transformation s'est également fait sentir dans le domaine juridique, au sujet de jugement de certains actes odieux.

1 Emmanuel Kant, *Idée d'une histoire universelle d'un point de vue cosmopolitique* (Heidi Barré-Mérand; Christine Cadot, 1st edn, Folio 2009)

2 Emmanuel Kant, *Ebedi Barış Üzerine Felsefi Bir Tasarı* (Celal Yeşilçayır, 1st edn, FOL Kitap 2021)

3 Selon la Comité International de la Croix Rouge (CICR), le droit international humanitaire est « un ensemble de règles qui, pour des raisons humanitaires, cherchent à limiter les effets des conflits armés. Il protège les personnes qui ne participent pas ou plus aux combats et restreint les moyens et méthodes de guerre ». Pour plus de détails, voir Comité International de la Croix Rouge, 'Qu'est-ce que le droit international humanitaire ?', (2022) < https://www.icrc.org/fr/document/quest-ce-que-le-droit-international-humanitaire >, accessed 1 May 2023

Ainsi, le point de vue selon lequel les Etats-nations sont les seuls acteurs de la sphère internationale s'est mis à se transformer. Le monde a témoigné des efforts internationaux concernant la définition et codification d'infractions sévères du DIH ainsi que la poursuite de leurs responsables. On s'est mis à mettre davantage d'accent sur le besoin de créer des modèles juridiques universelles pour remédier aux problèmes concernant toute l'humanité. La communauté internationale a rediscuté la conception d'un cadre juridique au-delà du niveau régional concernant les violations des droits fondamentaux des individus. Donc, au cours du 20ème siècle, pleins d'efforts internationaux ont été faits pour cela. Grâce à l'initiative de la communauté internationale, plein de conventions internationales ont été créées afin de mettre en avant les actes qui seront considérés comme inacceptables et feront l'objet de poursuites judiciaires. Un autre événement primordial qui est venu à l'ordre du jour vers la deuxième moitié du 20ème siècle a été l'établissement des tribunaux *ad hoc*[4] pour la poursuite des responsables de violations très graves du DIH.

Parallèlement à ces développements, le point de vue selon lequel les Etats sont les seuls acteurs de l'arène international a commencé à être défié.[5] Les crimes graves de deux guerres mondiales ont accéléré les discussions sur la responsabilité pénale individuelle[6] et les juridictions internationales. Quatre tribunaux *ad hoc* ont été établis pour juger les responsables de pires infractions du DIH. Ainsi, de hauts responsables militaires et politiques ont pu être poursuivis pour les crimes d'atrocité qu'ils ont commis.

A la lumière de ce bref rappel théorique et historique, la question de départ de cette étude est « Quels sont les liens entre le droit cosmopolitique et les tribunaux *ad hoc* ? ». Plus spécifiquement, le but de cet article est de répondre à la question suivante : « Comment ont contribué les tribunaux *ad hoc* à la mise en application du droit cosmopolitique à travers la pensée kantienne? ». Le problématique consiste donc à mettre en avant la façon dont ces institutions juridiques ont contribué déploiement des idées du droit cosmopolitique. Pour répondre à ces questions, le cadre théorique du droit cosmopolitique kantien et les approches d'un juriste contemporain qui se

4 CICR, 'Tribunaux ad hoc' (*Site officiel du Comité international de la Croix-Rouge*, 29 Oct 2010) <https://www.icrc.org/fr/document/tribunaux-ad-hoc> accessed 1 May 2023

5 Isabel Gacho Carmona, 'Cosmopolitan ideas in the current international society' (2019) Instituto Español de Estudios Estratégicos (IEEE Opinion Paper) 1, 7-8

6 La responsabilité pénale individuelle constitue une règle du droit pénal international, selon laquelle tous les commetteurs des actes causant une infraction internationale sont responsables de leurs comportements et qu'ils seront sanctionnés par des peines prononcées soit par un tribunal national soit par une juridiction pénale internationale. La naissance du principe de la responsabilité pénale internationale s'est réalisée avec la piraterie. Dans le cas de la piraterie, il a été décidé que ce principe soit appliqué aux personnes physiques sans faire distinction s'ils sont des responsables de l'État ou non. Cette décision représente une pierre angulaire vu que la responsabilité pénale est induite à un niveau individuel. Le Tribunal Militaire International de Nuremberg forme l'élément fondamental de l'application de ce principe, vu qu'il constitue le premier cas ou l'applicabilité directe de ce principe aux individus a été accepté par un tribunal pénal international ad hoc. Pour plus de détails, voir Anne-Marie La Rosa (1998): *Dictionnaire de droit international pénal. Termes choisis*. With assistance of Antonio Cassese. Paris: Presses universitaires de France (Publications de l'Institut universitaire de hautes études internationales, Genève). https://directory.doabooks.org/handle/20.500.12854/45062 93-95

base sur deux modèles seront étudiés. Ainsi, le droit cosmopolitique sera réinterprété à travers ces deux modèles à la fois antithétiques mais complémentaires : « le modèle de la société des États souverains » et « le modèle de la société humaine universelle ».[7] Ces derniers sont utilisés en raison de leur capacité d'aborder et d'unir les approches qui donnent la priorité aux enjeux humanitaires et le respect à la souveraineté étatique. A travers ces modèles sera discuté l'émergence d'un cadre juridique universel pour la poursuite des crimes d'atrocité. Quatre tribunaux *ad hoc* créés au 20ème siècle seront examinés à travers cette perspective. Ainsi, cette recherche établira un lien causal entre l'établissement et les activités des tribunaux *ad hoc* et la mise en application du droit cosmopolitique. Quant à la méthodologie, les statuts des quatre tribunaux *ad hoc* seront analysés pour comprendre la manière par laquelle ils ont servi à la codification des violations du DIH en tant que crimes d'atrocité.

II. Vers un idéal universel : le droit cosmopolitique

Le droit cosmopolitique a été conçu en tant que réponse aux conflits très sanglants ayant causé la souffrance des civils. Son objectif principal est de trouver une solution mondiale aux problèmes humanitaires communs tels que les violations des droits fondamentaux des individus. Le droit cosmopolitique et le cosmopolitisme sur lequel cette idée se repose ambitionnent à parvenir à une paix universelle à la fin de certains étapes politiques et juridiques. L'accent y est mis sur l'universalisation de l'ordre mondiale dans lequel les individus occupent une place primordiale en tant que citoyens du monde et ont plus de droits et responsabilités. Donc, la mentalité qui repose derrière cette pensée est la nécessité d'être plus sensibles et responsables aux problèmes humanitaires internationaux pour assurer un environnement plus paisible.

A. Le cosmopolitisme kantien face aux problèmes mondiaux

Les origines du cosmopolitisme sont très anciennes. Les philosophes stoïciens[8], qui ont développé des idées à l'époque hellénistique et qui peuvent donc être considérés comme ses précurseurs, ont soutenu l'idée qu'il est nécessaire d'agir et de vivre conformément à la nature pour assurer la paix entre les individus qui sont égaux en tout terme.[9] Par le passage au Moyen Âge[10], y compris *« l'époque de la foi*[11] *»* le rôle

7 Olivier de Frouville, *Droit International Pénal Sources, Incriminations, Responsabilité* (2nd edn, Pedone 2012) 2-5

8 Ecole philosophie hellénistique fondée vers la fin du 4ème siècle av. J.-C. à Athènes. Il peut être considéré la doctrine philosophique majeure de l'Antiquité. Parallèlement à Kant, les philosophes stoïciens ont fait des constatations sur le cosmopolitisme. Selon eux, la loi est l'esprit suprême qui détermine les actions à faire et à ne pas faire. La raison forme la loi universelle. Pour plus de détails, voir Stanford encyclopedia of philosophy, 'Stoicism' (*Stanford Encyclopedia of Philosophy's website*, 20 January 2023) <https://plato.stanford.edu/entries/stoicism/> accessed 1 May 2023

9 Blanchard Makanga, 'Questions morales et rapports de l'homme à la nature à partir de la morale stoïcienne : réflexion philosophique sur l'environnement ' (Thesis, 2008) 53-54

10 L'ère marquant l'histoire de l'Europe qui correspond entre le 5ème et la fin du 15ème siècle. Source : Institut national de recherches archéologiques préventives (INRAP), 'Le Moyen Âge' (*Site internet de l'Institut national de recherches archéologiques préventives*, 14 January 2016) <https://www.inrap.fr/le-moyen-age-10252> accessed 1 May 2023

11 Voir Jean-Claude Schmitt, 'La croyance au Moyen Age' (1995) (113) Raison présente 5, 5-22

de la religion a augmenté considérablement. Donc, les penseurs étudiant sur la paix l'ont généralement associé à la religion. Ils ont ainsi construit leur idéal de la paix perpétuelle sur un fondement divin.[12] Avec la Renaissance, l'impact de la religion s'est diminué et la raison a pris sa place.[13] L'approche d'Emmanuel Kant à la paix n'a pas de racines divines mais humanitaires.[14] Il est l'un des premiers philosophes à penser sur la paix qui serait atteinte universellement.[15] La paix perpétuelle kantienne a fourni une base théorique aux recherches sur la paix internationale qui se sont surtout accélérées à la suite de deux guerres mondiales du 20ème siècle. Grâce à Kant s'est propagé l'idée que l'humanité constitue un tout indissociable et que la paix est un concept universel qui s'y applique.

Le projet de paix perpétuelle de Kant comprend un processus graduel qui part du niveau des États et s'étend jusqu'à la citoyenneté du monde.[16] Le cosmopolitisme kantien dispose donc de fondements philosophiques, politiques et juridiques à la fois.[17] Il s'y agit de la construction juridique d'un ordre du monde qui définisse la paix comme son objectif politique finale.[18] Ce projet a trois fondements principaux qui contiennent des éléments politiques et juridiques à la fois. Premièrement, afin d'assurer une paix durable entre les Etats, il est nécessaire que ces derniers aient un régime républicain et que leur droit civique se repose sur une constitution républicaine.[19] C'est de cette façon que la volonté commune du peuple serait recherchée dans les prises de décisions importantes telle que la déclaration de guerre. En second lieu, les Etats susmentionnés devraient se réunir et établir une fédération. Il ne s'y agit pas de la création d'une république mondiale, mais celle d'un ordre qui permettra aux Etats républicains de s'unir librement.[20] Ce que l'on entend par l'idée d'établir une fédération, c'est le rassemblement des sociétés sous un même toit. Selon nous, ce désir de Kant peut s'identifier de nos jours aux Nations Unies[21], l'une des plus grandes organisations internationales créée en 1945 pour maintenir la paix et la sécurité internationales. Le troisième fondement consiste le droit cosmopolitique, qui constitue un point d'intersection entre la sphère politique et la sphère juridique. Dans

12 Gilles Campagnolo, 'Petite histoire sociologique du concept de paix' (2006) 26(2) Cités 151, 145-161

13 Bernard Chedozeau, 'Humanisme et religion' (2010) Synthèses des Conférences données à l'Académie des Sciences et Lettres de Montpellier <https://www.ac-sciences-lettres-montpellier.fr/academie_edition/fichiers_conf/CHEDOZEAU2-2010.pdf> accessed 2 May 2023, 4

14 Kant (n 2) 20

15 Kant (n 1) 67-68

16 *ibid*. 40-54

17 *ibid*. 40-54

18 *ibid.* & Monique Castillo, 'Significations du cosmopolitisme kantien' (2017) 1(201) Raison présente 19, 19-30

19 Juliette Grange, Chapitre 2 Kant : la république contre la démocratie. in *L'Idée de République* (Hachette 2008) 61-69

20 *ibid.*

21 L'Organisation des Nations Unies est une organisation internationale regroupant actuellement 193 États membres. Ses objectifs primordiaux constituent le maintien de la paix et la sécurité internationale. Pour plus de détails, consultez Nations Unies, 'L'histoire des Nations Unies' (*Site officiel des Nations Unies*) <https://www.un.org/fr/about-us/history-of-the-un> accessed 2 May 2023

cette dernière étape de son projet de paix perpétuelle, Kant développe une structure qui s'éteint au niveau global et englobe tous les êtres humains en tant que citoyens du monde. Vu que le droit cosmopolitique constitue le but ultime, son accomplissement se fonde sur la mise en pratique de la constitutionalisation dans un niveau étatique et atteint ensuite une échelle internationale.[22] Quant à la dimension philosophique de son approche, la pensée morale est associée à la raison : la liberté n'a de sens que dans la mesure où elle peut être restreinte par des lois.[23]

Si nous exprimons le droit cosmopolitique par les propres mots de Kant: *« Les relations plus ou moins suivies qui se sont établies entre les peuples, étant devenues si étroites, qu'une violation de droits commise en un lieu est ressentie partout, l'idée d'un droit cosmopolitique ne peut plus passer pour une exagération fantaisiste du droit ; elle apparait comme le couronnement nécessaire de ce code non encore écrit, qui embrassant le droit civil et le droit des gens, doit s'élever jusqu'au droit public des hommes en général, et par là jusqu'à la paix perpétuelle dont on peut se flatter de se rapprocher sans cesse, mais seulement sous les conditions qui viennent d'être indiquées.*[24]*... ».* Ici, Kant explique, d'une manière claire, les raisons pour lesquelles il juge nécessaire la création d'un cadre juridique universelle. Il accentue le fait que certaines atrocités dépassent les limites d'une seule région par leurs caractéristiques. Pour la punition de leurs responsables et la garantie de la paix perpétuelle, il est d'après lui nécessaire de créer une structure juridique complémentant le droit étatique et le droit international. Donc, il conçoit le droit cosmopolitique en tant que le troisième cycle de son projet juridique.[25]

Dans son ouvrage qui se concentre sur les manières de fonder et de conserver la paix perpétuelle, Kant accentue que atrocités commises dans une partie limitée du monde s'évoluent vers une dimension globale en raison de leur caractère humanitaire.[26] Si nous analysons ses constatations à la lumière des événements plus actuels, nous pouvons supporter la création d'un modèle juridique universel pour des questions humanitaires qui blessent la conscience de toute la communauté internationale, telles que les violations graves du DIH et des droits de l'homme.[27] En effet, bien que Kant ait formulé son approche au 18ème siècle, même sans avoir observé les actes illicites qui se sont déroulés durant les deux guerres mondiales, il a pointé les problèmes auxquels la communauté internationale confronterait au 20ème

22 Emmanuel Kant, *Essai philosophique sur la paix perpétuelle* (Bibliothèque nationale de France 1880) 17-25

23 *ibid.* 13-14

24 *ibid.* 27

25 Elisabeth Zoller, Le droit cosmopolitique, droit de la 'fédération des états libres' du monde : une mise en perspective fédérale. in Olivier de Frouville (ed), *Le cosmopolitisme juridique* (A. Pedone 2015) 297-299

26 Kant (n 23) 28-30

27 Les droits de l'homme constituent des normes ayant pour l'objectif de reconnaitre et de protéger la dignité des êtres humains. Ces droits sont à la fois universels et inaliénables. Voir la Déclaration universelle des droits de l'homme (le 10 décembre 1948, Paris).

siècle. De cette façon, il a presque prédit que l'interprétation traditionnelle du droit international se heurterait aux obstacles dans la recherche de solutions aux problèmes contemporains. Ses idées ont pris davantage de sens avec la conjoncture émergée à la suite de deux guerres mondiales ainsi que le changement d'ordre mondial après la Guerre froide. Du fait, dès la fin du 19ème siècle, la communauté internationale s'est mise à chercher des solutions plus universelles à certains problèmes affreux qui nuisent à la conscience de tous les individus du monde, comme les violations graves du DIH. Donc, les principes que Kant a énoncés dans son œuvre ont créé un fondement solide aux recherches contemporaines visant à mettre fin aux souffrances des individus et garantir la paix.

B. La montée en scène de la société humaine universelle

1. Les défis de l'ordre Westphalien

Il y a souvent une référence au 15ème siècle où le droit international est devenu une institution de la société interétatique.[28] En fait, avant le 15ème siècle, il existait une structure extrêmement hiérarchisée et rigide dans l'ordre impérial en Europe. Après ledit siècle la religion a reculé de la scène politique et avec la naissance d'État-nation, les intérêts politiques ont gagné de l'importance. Les Etats ont créé un ordre au niveau international en décidant de se réunir autour de normes et valeurs communes. Le droit international dont les fondements ont été établis avec les Traités de Westphalie de 1648 constitue une étape primordiale dans ce processus. En effet, dans une époque où l'Europe était secouée par les guerres de religion, ces traités qui ont mis fin à la dernière grande guerre de religion (la Guerre de Trente Ans) ont jeté les bases des relations internationales modernes.[29]

Dans ce contexte, avec la participation active de nombreuses puissances dans le processus de préparation des traités, l'idée d'une société internationale composée d'États égaux et souverains a été mise en écriture pour la première fois. Donc, les traités de Westphalie marquent une étape importante de l'histoire européenne et vu qu'ils ont donné naissance à un nouvel ordre international qui s'est propagé dans toute l'Europe, ils dépassent le cadre d'un seul pays.[30] Ils constituent la pierre angulaire de la construction de l'Europe politique moderne, par un nombre considérable

28 Pour plus d'information, consultez les œuvres des théoriciens de l'Ecole Anglaise (English School theory) des relations internationales comme Barry Buzan, Hedley Bull, Martin Wight.

29 La Guerre de Trente Ans (1618-1648), qui a opposé un grand nombre de puissances, comprend l'affrontement entre protestantisme et catholicisme sur le plan religieux et l'antagonisme entre féodalité et absolutisme sur le plan politique. La guerre dispose d'une perspective importante vu qu'elle a été marquée par la transformation d'une guerre de religion vers une guerre internationale, autrement dit, la montée en puissance des intérêts politiques face aux intérêts religieux. Pour plus de détails, voir Claire Gantet, 'Guerre de Trente ans et paix de Westphalie : un bilan historiographique' (2017) 4(277) XVIIe siècle 645, 645-666

30 Lucien Bély, XII La paix, dynamique de l'Europe moderne : l'exemple de Westphalie. in Bély and others (eds), *L'art de la paix en Europe: Naissance de la diplomatie moderne* XVIe-XVIIIe siècle (Presses Universitaires de France 2007) 239, 239-258

d'États intéressés.[31] Après la mise en pratique des principes indiqués dans les traités de Westphalie et l'ascension d'un nouvel ordre formé d'États-nations, le droit international a reconnu une grande évolution vers la création et l'adoption de certains principes fondamentaux. En concluant des traités internationaux, les Etats-nations se sont mis à s'organiser autour de valeurs et normes communes par leur propre volonté. Le 20ème siècle a été marqué par les efforts de codification sous l'auspice de deux organisations internationales : la Société des Nations[32] (SdN) et les Nations Unies.[33]

L'interprétation moderne du droit international a émergé au 20ème siècle. Le système juridique qu'il a mis en avant se repose largement sur le principe de la souveraineté des Etats-nations, tel qu'il peut être observé dans le cadre de l'affaire du Lotus[34] qui porte sur les compétences d'Etat en droit international.[35] Donc, au début du 20ème siècle persistait toujours la tendance à accentuer le rôle primordial des Etats dans la sphère internationale, et recourir aux modèles locaux dans la résolution des problèmes mondiaux, et l'affaire Lotus en constitue un exemple important. Le défi contre cette approche correspond tout d'abord à la fin de la Seconde Guerre mondiale et ensuite, les conflits sanglants des années 90. Conformément aux dynamiques contemporains, les questions humanitaires ont gagné plus d'importance. Les violations sévères du DIH commises à ces époques-là ont évoqué la nécessité de mettre fin aux crimes d'atrocité infligées aux civils. La communauté internationale a décidé de dépasser les solutions juridiques locales et opté pour les modèles internationaux pour en punir les responsables. Dans la partie suivante, deux modèles juridiques constatés et promus par un juriste contemporain français seront utilisés pour mieux expliquer cette transformation.

2. Le rapport entre deux modèles juridiques

Cette partie de l'étude consiste à établir un lien entre deux modèles juridiques d'Olivier de Frouville[36] et le droit cosmopolitique pour analyser en détail le processus historique par lequel les individus ont obtenu une personnalité légale juridique et sont devenus le sujet du droit international. Selon Frouville, le droit international

31 Denis-Armand Canal, Klaus Malettke, Imaginer l'Europe (1st edn, De Boeck et Larcier 1999) 121-133

32 Société des Nations (SdN) a été créée après la Première Guerre mondiale, en tant qu'organisation internationale regroupant un nombre considérable de pays. Le Traité de Versailles lui a donné naissance en 1919. Ses premiers objectifs étaient de promouvoir la coopération internationale et de garantir la paix et la sécurité. Elle a été dissoute en 1946. Pour plus d'informations, voir Nations Unies, 'La Société des Nations et les précurseurs de l'ONU' (*Site officiel des Nations Unies*) <https://www.un.org/fr/about-us/history-of-the-un/predecessor> accessed 6 May 2023

33 Hüseyin Pazarcı, *Uluslararası Hukuk* (19th edn, Turhan Kitabevi 2020) 200-203

34 L'affaire du Lotus est une affaire interétatique qui s'est déroulé entre 1926-1927, à laquelle CPJI a rendu son arrêt. Il s'agit d'un désaccord entre les gouvernements français et turc sur un abordage. Pour plus de détails, voir *Affaire du Lotus* (France v Turquie) (1927) 10 CPJI A

35 Zerrin Savaşan, 'Değişen/Dönüşen Uluslararası Hukuk' (2019) 50 The Turkish Yearbook of International Relations 18, 17-35

36 M. Olivier de Frouville est professeur en droit public à l'Université Panthéon-Assas. Pour accéder à ses ouvrages et à son CV, consultez : <https://www.assas-universite.fr/fr/universite/enseignants-chercheurs/m-olivier-de-frouville>

contemporain peut être observé autour de la dialectique entre « le modèle de la société des États souverains » et « le modèle de la société humaine universelle ».[37] Le premier modèle (qui est encore plus dominant que le deuxième) met les Etats-nations au centre du droit international en les considérant totalement libres et égaux en matière de souveraineté.[38] Donc, ce modèle se repose sur les fondements westphaliens. Il considère le droit international, voire interétatique, comme une institution qui est directement liée au consentement des Etats à se réunir autour de certaines normes et valeurs communes. Donc, seuls les Etats font sujets du droit international et ce dernier est purement consensuel.[39] Ce modèle correspond au droit des gens dans l'idée kantienne, autrement dit, à la jurisprudence entre les Etats-nations. Les préoccupations morales y restent en arrière-plan. Par rapport au second modèle, il contribue au développement du modèle de la société des Etats souverains. Ici, ce ne sont pas les Etats-nations mais les individus qui se trouvent au centre du droit international.[40] Les références à l'humanisme et aux règles fondamentaux de l'humanité viennent en avant. La nécessité d'établir un cadre juridique plus universel pour les problèmes dépassant les frontières des Etats-nations y est accentué. Cette approche correspond à la troisième couche du projet kantien, y compris le droit cosmopolitique kantien.

Parallèlement à la complémentarité parmi le droit civil, le droit des gens et le droit cosmopolitique du projet kantien peut être observé une interdépendance entre les deux modèles de Frouville. Ces modèles ont de différents moyens d'interpréter les problèmes contemporains de la société et d'en trouver des solutions juridiques. En face d'enjeux modernes mondiaux, ils pointent efficacement au rôle diversifiant des individus et Etats en tant que sujets de la communauté internationale. Par exemple, certaines questions telles que la piraterie, le faux-monnayage, la prostitution ou la vente d'enfants relèvent du premier modèle car elles sont sujettes d'extradition.[41] Ici, un Etat livre à un deuxième Etat une personne trouvé coupable par le droit interne de ce dernier pour que cet individu puisse y être poursuivi.[42] Bien que les personnes soient jugées par le droit international, l'accent est toujours mis sur la compétence des Etats et la soutenabilité des solutions locales. Cependant, la société humaine universelle fait une référence directe à la responsabilité pénale individuelle des personnes dans la commission des crimes d'atrocité ainsi que le besoin d'établir des institutions juridiques internationales pour les poursuivre à travers des règles

37 Frouville (n 7) 1

38 Olivier de Frouville, 'Une conception démocratique du droit international' (2001) 39(101) Revue européenne des sciences sociales 106, 101-144

39 Frouville (n 7), 4

40 *ibid*. 4-5

41 *ibid*. 1

42 Pour plus d'informations sur la définition et le sens de l'extradition, voir : Anne-Marie La Rosa, Extradition. in Graduate institute publications (ed), *Dictionnaire de droit international pénal : Termes choisis* (PUF 1998) 38-45

universelles. Ces actes illicites comprennent les crimes de guerre, les crimes contre l'humanité, le génocide et le crime d'agression et ouvrent la voie à la création des juridictions internationales pour complémenter les tribunaux nationaux. Donc, le premier modèle se contente de solutions locales en accordant la compétence juridictionnelle aux Etats, tandis que le deuxième souligne la nécessité de créer des institutions internationales et un approche juridique universel concernant les crimes blessant la conscience de toute l'humanité. Dans le modèle de la société humaine universelle, il est possible de trouver les traces des idées kantiennes.

III. Les réactions internationales aux violations graves du droit international humanitaire

Le 20ème siècle a été marqué par les réactions de la communauté internationale contre les violations flagrantes du DIH commises dans de diverses parties du monde. Cette réaction peut être liée à la caractéristique globale des crimes susmentionnés ayant nuit à la conscience de tout le monde. Surtout l'élaboration et la conclusion des conventions internationales ainsi que l'établissement des tribunaux *ad hoc* occupent une place vitale dans ce processus historique. Les tribunaux internationaux existent depuis des décennies[43] pour régler les litiges entre les Etats. Néanmoins, la création des tribunaux pénaux *ad hoc* représente un point de départ pour la poursuite des responsables des violations flagrantes du DIH. C'est avec leur établissement que des individus responsables de certains actes illicites ont pu être poursuivis pour la première fois devant les yeux de la communauté internationale.

A. La fondation des tribunaux *ad hoc* pour la poursuite des criminels de guerre

1. Nuremberg et Tokyo : les premiers pas vers le droit cosmopolitique

La Seconde Guerre mondiale a marqué l'histoire humaine en raison de son ampleur et sa caractéristique ravageuse.[44] C'est un événement important pour l'implication de la responsabilité pénale individuelle aux violations graves du DIH.[45] Les efforts de garantir le respect des lois et coutumes de la guerre ont créé un exemple pour des accords similaires à venir.[46] Le Tribunal Militaire International de Nuremberg (TMI) est la première institution juridique *ad hoc* établi pour la poursuite des responsables

43 P.ex. : Le Tribunal Militaire International de Nuremberg ; le Tribunal Militaire International d'Extrême-Orient ; le Tribunal pénal international pour l'ex-Yougoslavie, etc.

44 Selon Statista, les estimations du nombre total de morts de la Seconde Guerre mondiale sont entre 70 et 85 millions de personnes. Statista, 'Estimated number of military and civilian fatalities due to the Second World War per country or region between 1939 and 1945' (*Statista Historical Data*, 18 August 2022) <https://www.statista.com/statistics/1293510/second-world-war-fatalities-per-country/> accessed 7 May 2023"

45 Mehmet Şahin, 'Nürnberg Mahkemeleri Üzerine Bir İnceleme' (2010) 2(1) Aksaray İİBF Dergisi 49, 49-61

46 *ibid.*

de pires crimes.[47] Le procès de Nuremberg et le Statut du Tribunal occupent une place vitale dans la codification des principes généraux de la punition des violations sévères du DIH.

L'idée de respecter les droits fondamentaux des individus et condamner les responsables de pires crimes internationaux a des origines anciennes. La motivation religieuse se trouvant derrière les poursuites a laissé sa place à l'humanisme au fur et à mesure.[48] De plus, les initiatives internationales concernant ce domaine ont accéléré vers la fin du 19ème siècle. Avant cette date-là, les efforts étaient plutôt délimités par le principe de souveraineté étatique. Les conventions internationales telles que La Haye et les Conventions de Genève ont joué un rôle marquant dans ce processus. Les conférences internationales de La Haye datant de 1899 et de 1907 se sont déroulées pour « *rechercher des moyens les plus efficaces d'assurer à tous les peuples les bienfaits d'une paix réelle et durable*[49] ». Ensuite, les Conventions de Genève et leurs Protocoles additionnels possédant les règles premières et essentielles du DIH ont été mis en vigueur.[50] Les textes juridiques datant du 1899, 1907, et 1864 ont alimenté l'idée de créer des tribunaux *ad hoc*. Il y a eu un essor concernant ce sujet après la Première Guerre mondiale. L'idée de créer un tribunal pénal international pour juger les criminels de guerre est venu à l'ordre du jour dans le traité de Versailles. Ceci visait l'empereur Guillaume II pour ses actes *« pour offense suprême contre la morale internationale et l'autorité sacrée des traités*[51] *»* et soutenait la fondation d'un Tribunal international par l'initiative des vainqueurs de la guerre.[52] Bien qu'un nombre de jugements ait été réalisé en Allemagne au Tribunal du Reich de Leipzig, un Tribunal international n'a pas été établi à cette époque-là en raison de désaccords entre les parties.[53] La Deuxième Guerre mondiale et le procès de Nuremberg sont devenus le pierre angulaire de ce domaine. La création d'une institution juridique internationale pour juger les criminels de guerre nazis a marqué un tournant dans l'histoire du droit international.

47 Le noyau dur des crimes internationaux regroupe certaines infractions du DIH qui endommagent considérablement la sécurité humaine et internationale. Parmi eux peuvent être comptés les crimes contre l'humanité, les crimes contre la paix, les crimes de guerre et le génocide. Le fait qu'ils sont codifiés dans les statuts des tribunaux pénaux internationaux les rend différent d'autres crimes internationaux. Voir Yeliz Kulalı, 'Le noyau dur des crimes internationaux (core international crimes) commis envers les individus, particulièrement contre les membres des minorités : l'une des variables de l'essor du nouveau système international' (DPhil thesis, University of Strasbourg 2015)

48 Mark Antaki, 'Esquisse d'une généalogie des crimes contre l'humanité' (2007) Revue québécoise de droit international, hors-série avril 2007, Hommage à Katia Boustany 67-68, 63-80

49 Aktaran : Stanislas Jeannesson, 'Les conférences internationales de La Haye, 1899 et 1907' (2020) Encyclopédie d'histoire numérique de l'Europe <https://ehne.fr/fr/node/12230> accessed 7 May 2023

50 CICR, 'Les Conventions de Genève de 1949 et leur Protocoles additionnels' (*Site officiel du Comité international de la Croix-Rouge*, 1 January 2014) <https://www.icrc.org/fr/document/conventions-geneve-1949-protocoles-additionnels> accessed 8 May 2023

51 Traité de Versailles 1919, Partie VII, Article No. 227

52 Robert Badinter, 'De Nuremberg à la Haye' (2004) 75(3-4) Revue internationale de droit pénal 700, 699-707

53 Sylvie Bukhari-de Pontual, 'Naissance difficile d'une Cour pénale internationale' Revue Projet (2008) 303(2) 4, 4-12

Le procès de Nuremberg est important surtout pour deux raisons. Tout d'abord, les crimes d'atrocité ont été codifiés pour la première fois dans le Statut d'un tribunal *ad hoc*.[54] Cet élément constitue un pas primordial pour l'internationalisation de ces infractions, qui étaient auparavant poursuivies en vertu du droit national.[55] En second lieu, le procès constitue un tournant pour la codification des crimes contre l'humanité.[56] Pendant le procès de Nuremberg qui s'est tenu du 20 novembre 1945 au 1er octobre 1946, les principaux responsables du Troisième Reich ont été accusés de quatre chefs d'accusation[57] dont le complot, les crimes contre la paix, les crimes de guerre et les crimes contre l'humanité, et condamnés de diverses peines.[58] Le TMI constitue une pierre angulaire dans le droit international pénal car c'est le premier tribunal *ad hoc* dont la définition et codification de ces crimes se trouvent dans le document fondateur, bien qu'il n'existe pas d'accent particulier aux violences sexuelles infligées aux civils.[59] Le Tribunal est considéré comme un exemple pivot concernant la mise en application des principes du droit cosmopolitique et l'universalisation de ces actes illicites. Néanmoins, il existe de diverses critiques contre le TMI. Ces critiques se concentrent surtout à son établissement par l'initiative des Alliés. En effet, cette caractéristique du Tribunal ouvre la voie aux commentaires selon lesquelles le TMI a été imposé par un nombre restreint des Etats ayant vaincu la Seconde Guerre mondiale, à deux pays de l'Alliance de l'Axe, l'Allemagne et le Japon. Ces critiques sont importants et raisonnables car il est vrai qu'un nombre très limité d'Etats ont fait partie du document fondateur du TMI lorsque le Tribunal a été institué. Pourtant, ces allégations peuvent être contesté autour de certains éléments qui prouvent que le TMI a considérablement servi à l'universalisation des crimes d'atrocité.

Le TMI, qui a été créé par l'entrée en vigueur du Statut de Londres, a rendu son verdict le 1e Octobre 1946.[60] Durant la réunion de l'Assemblée générale tenue vers la fin du mois d'octobre, les pays membres des Nations Unies ont reconnu l'importance du TMI dans la protection des droits fondamentaux des individus ainsi que la codification des crimes d'atrocité.[61] Cette reconnaissance a gagné un

54 Badinter (n 52) 700

55 *ibid.*

56 Eugène Aroneanu, 'Les crimes contre l'humanité depuis Nuremberg' (1957) 77(10) Le Monde Juif 29, 29-32

57 Le terme y est utilisé tel qu'il l'a été dans le Statut du TMI. Il signifie les crimes spécifiques que l'accusé est suspecté d'avoir commis. Les chefs d'accusation se trouvent dans l'acte d'accusation et ce dernier comprend la totalité des crimes dont un individu est accusé (*ibid*. accessed 9 May 2023).

58 CIJ, 'Les archives du procès de Nuremberg' (2018) 2 11, 11-13

59 Claire Fourçans, 'La répression par les juridictions pénales internationales des violences sexuelles commises pendant les conflits armés' (2012) 1(34) Archives de politique criminelle 155, 155-165

60 Voir The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General A/CN.4/5 Part 1 Article 5 <https://legal.un.org/ilc/documentation/english/a_cn4_5.pdf> accessed 16 June 2024

61 General Assembly Resolution 95 (I) of 11 December 1946, Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal < https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf> accessed 16 June 2024

fondement très solide le 10 décembre 1946 avec la recommandation de la 6e Comité à l'Assemblée générale qui consistait l'adoption d'une Résolution concernant le sujet. En conséquence, dans la 1e session du 55e réunion plénière tenue le 11 décembre 1946, l'Assemblée générale des Nations Unies a unanimement adopté la Résolution No. 95(1).[62] Ladite Résolution affirmait la reconnaissance et l'adoption des principes du droit international par le Statut du TMI. Dans le texte écrit de la Résolution existe une référence nette au premier paragraphe de l'Article No.13 du Statut du TMI qui indique que le Tribunal a l'objectif de travailler et faire des recommandations pour contribuer au développement progressif du droit international et aux efforts de codification des crimes d'atrocité.[63] Donc, les principes de Nuremberg ont accédé un niveau universel avec l'adoption à l'unanimité de la Résolution No. 95(1) dans l'Assemblée générale des Nations Unies, car leur reconnaissance limitée qui suscitait des critiques a ainsi été dépassée. Un autre incident très important est la création avec la Résolution No. 95(1) de la Commission chargée de la codification du droit international pour diriger les projets futurs concernant la définition et la codification des crimes d'atrocité.[64] Etant intrinsèquement liés l'un à l'autre, la confirmation des principes de Nuremberg et l'établissement de la Commission du droit international se sont réalisés dans la même séance plénière. Ces principes, qui ont été définis comme ceux du droit international par les Nations Unies, ont jeté les bases de futurs efforts concernant la codification des crimes d'atrocité et la garantie de la paix. En 1950, dans sa 2e session, la Commission a adopté les principes du droit international consacrés par le Statut du TMI et dans le jugement de ce Tribunal et reporté à l'Assemblée générale les travaux et ses commentaires sur les principes. [65] Dans l'Article No.14 du texte est accentué la responsabilité pénale individuelle de tous les individus incluant les chefs d'Etat et de gouvernement (Principe No.III).[66] En outre, le Principe No.VI du le texte comprend la définition des crimes contre la paix, de crimes de guerre et de crimes contre l'humanité, et maintient que la complicité de ces crimes constitue un crime de droit international.[67] En conséquence, les codifications faites dans le Statut du TMI ont gagné un fondement plus solide après tous ces développements.

Grâce au procès de Nuremberg, pour la première fois dans l'histoire, les infractions graves des droits fondamentaux des individus comme la réduction en esclavage, l'extermination, l'assassinat et la déportation forcée ont été définis comme les crimes contre l'humanité et leurs responsables ne sont pas restés impunis.[68]

62 Voir UNGA Res. 95(1) (11 December 1946) UN Doc S/RES/95(1)

63 *ibid.*

64 *ibid.*

65 Principes du droit international consacrés par le statut du tribunal de Nuremberg et dans le jugement de ce tribunal 1950, Article 14

66 *ibid.* Principe No.III

67 *ibid.* Principe No.VI

68 United Kingdom of Great Britain and Northern Ireland, United States of America, France and Union of Soviet Socialist Republics, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of

Quant à la conception de génocide, qui a commencé à être discutée après la guerre en raison de l'ampleur brutale des violations du DIH, il a été reconnu en 1948.[69] En d'autres termes, personne n'a été poursuivi pour ce délit avant cette date-là.[70] En somme, le TMI a largement contribué à la création d'un cadre juridique qui correspond aux principes du droit cosmopolitique et ceux du modèle de la société humaine universelle. Avec l'application de la responsabilité pénale aux personnes responsables d'infractions sévères du DIH, les individus ont défié la place immuable des États pour la première fois dans l'ordre juridique international.[71] Il est possible de retrouver au sein de la Cour pénale internationale[72] (CPI) les mêmes idées qui se trouvait derrière la création du TMI. Par exemple, dans le Préambule du Statut de Rome de la Cour Pénale internationale est indiqué que les crimes d'atrocité touchent toute l'humanité et nécessitent la coopération dans un niveau international. Il est également précisé que tous les Etats ont une responsabilité de traduire à la justice les responsables de ces crimes internationaux, et que la CPI est établie afin de garantir le respect et la mise en application de la justice internationale. Dans l'Article No.1, il est affirmé que la Cour exercera sa compétence envers les individus pour la persécution des crimes les plus graves.[73]

De point de vue régional, le Japon est également important dans le jugement des responsables de violations graves du DIH commises pendant la Seconde Guerre mondiale. La Déclaration de Potsdam qui date du 26 juillet 1945 a mis en avant le désir des Alliés de rendre en justice les Japonais ayant commis des crimes de guerre.[74] Ainsi, le Tribunal militaire international pour l'Extrême-Orient (TMIEO) a été fondé le 19 janvier 1946. Parallèlement au TMI, ce tribunal a été créé autour du motif de juger les individus ayant commis des infractions incluant les crimes contre la paix et son siège permanent a été établi à Tokyo[75]. Le TMIEO dispose de nombreux points communs avec le TMI. Tous les deux reflètent le désir des Alliés de poursuivre les

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the major war criminals of the European Axis ("London Agreement") Article No. 6(c) United Nations, 8 August 1945, <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf> accessed 16 June 2024

69 Le génocide a été reconnu dans le droit international pour la première fois par la ratification à l'unanimité de la Convention pour la prévention et la répression du crime de génocide (CPRCG). Le CPRCG est un traité de droit international approuvé à l'unanimité le 9 décembre 1948 par l'Assemblée générale des Nations Unies. Il est entré en vigueur le 12 janvier 1951. Voir Nations Unies, 'La Convention pour la prévention et la répression du crime de génocide (1948)' (*Bureau de la prévention du génocide et de la responsabilité de protéger*, January 2019) <https://www.un.org/en/genocideprevention/documents/Genocide%20Convention-FactSheet-FR.pdf> accessed 10 May 2023

70 *ibid.*

71 Anne-Laure Chaumette, Les personnes pénalement responsables. in Ascensio and others (eds), *Droit international pénal* (Pedone 2012) 477-487

72 La Cour Pénale internationale (CPI) est une cour pénale de caractère universel et permanent basé à La Haye. Elle a été fondée en 2002. La CPI est compétente de poursuivre quatre crimes graves: le génocide, les crimes contre l'humanité, les crimes d'agression et les crimes de guerre (y compris, le noyau dur des crimes internationaux). Voir CPI, *Aider à bâtir un monde plus juste : mieux comprendre la Cour pénale internationale* (1st edn, CPI 2020)

73 Rome Statute of the International Criminal Court (2002) 2187 CPI 3

74 International Military Tribunal for the Far East Treaties and Other International Acts Series 1589

75 *ibid.* Article No.1

criminels de guerre et possèdent une caractéristique militaire et *ad hoc*. Les mêmes catégories de crimes sont encadrées dans leurs Statuts : les crimes contre la paix, les crimes de guerre et les crimes contre l'humanité. Les deux institutions ont fait leurs poursuites à travers la responsabilité pénale individuelle de hauts commandants militaires et figures politiques.

Les procès de Nuremberg et de Tokyo ont constitué les pionniers en matière de poursuites juridiques autour d'une idéale universelle. Ils ont créé des exemples pour les futurs tribunaux *ad hoc* qui ont été fondés dans les années 90. Ils ont tous les deux servi aux efforts mondiaux concernant la définition et codification des violations du DIH en tant que de pires crimes internationaux. Les idéales qui ont donné naissance à ces tribunaux ont initié le processus d'universalisation du noyau dur des crimes internationaux. En tant qu'institutions juridiques internationales, le TMI et le TMIEO ont alimenté la mise en œuvre des principes du droit cosmopolitique et le passage à la société humaine universelle.

2. L' héritage de l'après-guerre froide : les Tribunaux pénaux internationaux pour l'ex-Yougoslavie et le Rwanda

Parallèlement au nouvel ordre mondial qui a émergé à la fin de la Guerre froide, la nature des conflits s'est définitivement transformée et a obtenu un caractère intraétatique.[76] En conséquence, la part des guerres civiles dans le nombre total a augmenté et beaucoup de civiles ont perdu leurs vies dans ces conflits interétatiques.[77] Les conflits ethniques et religieux longtemps réprimés par les États-Unis et l'URSS après la Seconde Guerre mondiale se sont remontés en scène dans les années 90 et ont causé des guerres civiles. Les deux exemples principaux de ce phénomène sont les conflits sanglants en ex-Yougoslavie et au Rwanda.

Concernant le cas de l'ex-Yougoslavie, les Balkans constituent depuis longtemps une région pluriculturelle.[78] La montée du nationalisme vers la fin du 20ème siècle est la raison principale ayant bousculé la région balkanique par les conflits ethniques.[79] Les années 1990 ont été marquées par les conflits violents dans la région balkanique, aboutissant jusqu'à l'éclatement de l'ex-Yougoslavie.[80] Ce processus a été marqué par les discours nationalistes des dirigeants politiques visant à blesser l'identité

76 Raùl Magni Berton and Sophie Panel, Chapitre 1 - Conflits intra-étatiques depuis 1945. In *Le choix des armes* (Sciences Po 2020) 27, 27-51

77 Arnaud Blin, 'Groupes armés et conflits intra-étatiques : à l'aube d'une nouvelle ère ?' (2011) 93(2) Revue internationale de la Croix-Rouge : sélection française 31, 25-50

78 Larousse, 'Péninsule des Balkans' (*Encyclopédie Larousse*) <https://www.larousse.fr/encyclopedie/autre-region/p%C3%A9ninsule_des_Balkans/107278> accessed 15 May 2023

79 Jean-Simon Legascon, 'L'Europe face au défi nationaliste dans les Balkans' (2005) 1(217) Guerres mondiales et conflits contemporains 61, 61-62

80 Julie Fournier, 'La crise yougoslave : la genèse du conflit et ses perspectives de paix dans l'après-Dayton' (1997) 28(3) Études internationales 462, 461-491

commune yougoslave et à cultiver les sentiments de peur et de méfiance au sein de différents groupes ethniques.[81] Durant les guerres yougoslaves, les civiles et surtout les Bosniaques ont été infligés a de grandes souffrances telles que la détention dans des camps de concentration, la migration forcée, la torture, la violence systématique, les massacres et le viol.[82] Les actes illicites commis pendant les guerres en Bosnie (1992-95) et au Kosovo (1998-99) ont été issus de juridictions internationales.

Face à la montée des atrocités contre les civils yougoslaves, les Nations Unies a ressenti le besoin de fonder une instance judiciaire pour juger les criminels de guerre. En mai 1993 a été adopté le Statut du Tribunal pénal international pour l'ex-Yougoslavie (TPIY), un tribunal *ad hoc* dont la création a servi à la poursuite des individus ayant commis des infractions graves du DIH sur les territoires de l'ex-Yougoslavie.[83] Le TPIY a été créé par la Résolution 808 du Conseil de Sécurité des Nations Unies et son statut a été accepté par la Résolution 827.[84] Son établissement s'est réalisé conformément aux principes indiqués dans le Chapitre VII de la Charte des Nations Unies. Il y a une référence claire aux principes du droit cosmopolitique dans ces Résolutions. En fait, la nécessité pour toutes les parties de respecter les obligations découlant du droit international, et en particulier des conventions de Genève du 12 août 1949, a été rappelée, et la responsabilité pénale individuelle des fonctionnaires de l'Etat et du gouvernement en cas de violation de ces lois a été soulignée. En outre, il est indiqué que les violations généralisées et flagrantes du DIH constituent une menace sérieuse pour la paix et la sécurité internationales. Lesdites résolutions reflètent la décision prise au sein des Nations Unies selon laquelle la création d'un tribunal *ad hoc* pour la poursuite des personnes responsables des violations permettrait de mettre fin aux atrocités et contribuerait au rétablissement de la paix au niveau international.

En somme, le TPIY est le premier tribunal *ad hoc* établi environ 50 ans après Nuremberg par l'initiative des Nations Unies pour poursuivre les criminels de guerre yougoslaves. Le fait que son institution s'est réalisée avec les résolutions des Nations Unies lui a donné un caractère plus légitime que les tribunaux militaires *ad hoc*. En effet, le TPIY n'a pas été créé par la motivation d'un nombre restreint d'Etats vainqueurs de la guerre, mais par celle de la communauté internationale. Quant au Statut du Tribunal, celui-ci contient les catégories de crimes suivantes : les crimes de guerre constitués par les infractions graves aux Conventions de Genève de 1949 (Article No.2) et les violations des lois ou coutumes de la guerre (Article No.3) ; le génocide (Article No.4) ; et les crimes contre l'humanité (Article No. 5). Donc, le

81 Nations Unies, 'Tribunal pénal international pour l'ex-Yougoslavie : les conflits' (*Site officiel des Nations Unies*) <https://www.icty.org/fr/le-tribunal-en-bref/quest-ce-que-lex-yougoslavie/les-conflits> accessed 15 May 2023

82 Amnesty International, Bosnie-Herzégovine : Viols et sévices sexuels pratiqués par les forces armées, EUR63/01/93, Londres, Janvier 1993 4-5

83 Magali Bessone, 'Le Tribunal Pénal International pour l'ex-Yougoslavie : la justice en vue de la paix ?' (2005) 1(24) Le Philosophoire 51, 51-74

84 Voir UNSC Res. 808 (22 February 1993) UN Doc S/RES/808 et UNSC Res. 827 (25 May 1993) UN Doc S/RES/827

crime de génocide a été inclus pour la première fois dans le document fondateur d'un tribunal *ad hoc*.

Le TPIY est un exemple pivot aussi dans la persécution des responsables de violences sexuelles pour avoir violé des lois et coutumes de la guerre et avoir commis des crimes contre l'humanité.[85] Selon les archives historiques, le Tribunal a mené des enquêtes au sujet d'allégations concernant le viol de femmes, d'hommes et d'enfants.[86] Le résultat a été frappant : à peu près la moitié des personnes condamnées par le TPIY ont été déclarées coupables pour des violences sexuelles.[87] Le Tribunal a appliqué les normes juridiques universelles à la poursuite des responsables des violences sexuelles. C'est grâce au TPIY que lesdits actes illicites ont fait objet de juridictions internationales et progressé d'un pas vers l'universalité. Le Tribunal a prouvé la capacité de la communauté internationale à établir une juridiction internationale en vertu du Chapitre VII de la Charte des Nations Unies lorsqu'il s'agit de conflits incessants nuisant aux civils. Le TPIY a contribué à l'élargissement de la portée des crimes contre l'humanité et la reconnaissance du génocide en tant que chef d'accusation, et a accordé une importance considérable à la condamnation des violations sexuelles.

En plus de l'ex-Yougoslavie, le Rwanda a été bousculé par les conflits intraétatiques dans les années 90. Les violences à grande échelle ont causé 800.000 morts et marqué l'histoire en tant que « génocide des Tutsis au Rwanda ».[88] Les politiques discriminatoires menés par les Hutus contre les Tutsis ont débuté vers la fin des années 50, et elles se sont vite transformées en violence. Les premiers massacres de Tutsis ont été réalisé dans les années 60.[89] La répression et l'exclusion des Tutsis de la sphère social et politique a continué jusqu'aux 1990. Vers le milieu des années 90, les Hutus détenant la puissance politique à l'époque se sont rassemblés autour d'appareils de média, ont élargi leurs zones d'influence et les attentats contre les Tutsis se sont multipliés.[90] Le génocide des Tutsis au Rwanda a débuté le 6 avril 1994, la date où l'avion de Juvénal Habyarimana[91] a été abattu par un missile. Sa mort est considérée comme le déclencheur du génocide rwandais.[92]

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85 Pour plus d'informations, voir Le Procureur c. Dusko Tadić IT-94-1-T para 194 ; Le Procureur c. Z. Delalic, Z. Mucic, H. Zelic et E. Landzo IT-96-21-T para 808 ; Le Procureur c. A.Furundzija IT 95-17/1-T para 185

86 Nations Unies, 'Crimes sexuels' (*Site officiel des Nations Unies*) <https://www.icty.org/fr/sp%C3%A9cial/crimes-sexuels> accessed 25 May 2023

87 *ibid*.

88 Yves Ternon, 'Génocide des Tutsis au Rwanda : émergence d'un négationnisme' (2004) 2(181) Revue d'Histoire de la Shoah 363, 363-375

89 La république du Rwanda est divisée en trois sous-groupes : les Twas, les Hutus et les Tutsis, qui constituaient à l'époque 1 %, 84 %, et 15 % de la population rwandaise. Voir Yves Ternon 'Rwanda 1994. Analyse d'un processus génocidaire' Revue d'Histoire de la Shoah (2009) 190 (1) 18, 15-57

90 Ici, particulièrement le radio des Mille Collines fondé en 1993 et dirigé par les extrémistes Hutu a occupé une place primordiale. Voir Cyril Bensimon, 'Génocide rwandais : une journaliste de Radio mille collines témoigne' Le Monde (Paris, 26 February 2014) 2

91 Mort en Avril 1994, Habyarimana a gouverné le Rwanda pendant plus de 20 ans après avoir obtenu le pouvoir en 1973 par un coup d'Etat militaire. Il est connu par son autoritarisme ainsi que ses politiques discriminatoires contre les Tutsis. Pour plus de détails voir Britannica, 'Habyarimana Juvénal' <https://www.britannica.com/biography/Juvenal-Habyarimana> accessed 29 May 2023

92 Matthieu Vendrely, 'Attentat de 1994 contre Juvénal Habyarimana au Rwanda : la justice française confirme le non-lieu' Le

Le génocide des Tutsis au Rwanda a fait 800.000 victimes en 100 jours et est toujours considéré comme l'un des génocides les plus marquants de l'histoire.[93] Les gens de différentes couches sociales ont joué un rôle actif dans ces crimes ayant bouleversé la communauté internationale.[94] Le génocide a ciblé les Tutsis ainsi que les Hutus modérés. Les maisons des Tutsis ainsi que les bâtiments locaux comme les églises, écoles et hôpitaux ont été attaqués un par un. Les « machettes[95] » ont été utilisées en tant qu'arme principale du génocide. Une très grande partie de la population locale a été blessée de façon meurtrière et soumis à des violences sexuelles. Le Front patriotique Rwandais (FPR) a obtenu le contrôle du pays le 17 juillet 1994 et a mis une fin aux massacres. Cet événement inoubliable a laissé derrière lui une histoire très sombre et des souvenirs douloureux. Après le génocide, à la lumière des rapports sur les violations graves du DIH commises au Rwanda, par le Statut annexé à la résolution 955 (1994) du Conseil de sécurité, les Nations Unies a déclaré sa motivation à *« mettre fin à de tels crimes et de prendre des mesures efficaces pour que les personnes qui en sont responsables soient traduites en justice*[96] *»*. De cette manière, le Tribunal pénal international pour le Rwanda (TPIR) a été créé le 8 novembre 1994 par la Résolution 955 en vertu du Chapitre VII de la Charte des Nations Unies et son siège a été établi à Arusha, en Tanzanie, par la Résolution 977.[97] En raison de son établissement par les résolutions des Nations Unies, le TPIR jouit d'un niveau de légitimité parallèle de celui du TPIY. Selon les documents susmentionnés, le TPIR était compètent à poursuivre les responsables d'actes de génocide ou d'autres infractions graves du DIH employé dans les territoires rwandais ainsi que celles des pays voisins entre le 1er janvier 1994 et 31 décembre 1994.[98] Il s'y agit donc d'une compétence juridictionnelle limitée de temps et d'espace comme celle du TPIY, TMIEO et TMI.

Dans le Statut du TPIR a été inclus trois crimes d'atrocité : le génocide (Article No.2), les crimes contre l'humanité (Article No.3), et les violations de l'Article No.3

Monde (Paris, 3 July 2020)" <https://information.tv5monde.com/afrique/attentat-de-1994-contre-juvenal-habyarimana-au-rwanda-la-justice-francaise-confirme-le-non> accessed 29 May 2023

93 Mémorial de la Shoah, 'Le génocide des Tutsi au Rwanda' (*Musée, centre de documentation*) <https://www.memorialdelashoah.org/archives-et-documentation/genocides-xx-siecle/genocide-tutsi-rwanda.html> accessed 29 May 2023

94 Jeremy Maron, 'Qu'est-ce qui a mené au génocide des Tutsis au Rwanda ?' (*Musée canadien pour les droits de la personne*, 26 June 2019) <https://droitsdelapersonne.ca/histoire/quest-ce-qui-mene-au-genocide-des-tutsis-au-rwanda> accessed 29 May 2023

95 Un grand couteau utilisé en général dans les régions tropicales pour couper les plantes et les fruits. Les machettes sont devenues le symbole du génocide des Tutsis au Rwanda en raison de leur utilisation en tant qu'arme principale durant ces événements très sanglants. (Source : Claudine Vidal, 1. Un « génocide à la machette ». in Marc Le pape (ed), *Crises extrêmes* (Paris: La Découverte 2006) 21, 21-35 ; Voir aussi The Conversation, ‹Y a-t-il eu importation de machettes en vue de préparer le génocide des Tutsis au Rwanda ?› (Official Website of The Conversation, 30 August 2020) <https://theconversation.com/y-a-t-il-eu-importation-de-machettes-en-vue-de-preparer-le-genocide-des-tutsis-au-rwanda-145216> accessed 29 May 2023

96 UNSC Res. 955 (8 November 1994) UN Doc S/RES/955

97 UNSC Res. 977 (22 February 1995) UN Doc S/RES/977

98 UNSC Res. 955 (n 90) 3

communs aux Conventions de Genève et du Protocole additionnel II (Article No.4).[99] Le Tribunal a associé les actes constitutifs de génocide à la tentative de détruire totalement ou partiellement un groupe national, ethnique, racial ou religieux.[100] La complicité dans le génocide a été considérée en tant que motif à être puni. Par rapport aux crimes contre l'humanité, contrairement au Statut du TPIY, il n'existe pas de référence à un conflit armé. En supplément, c'est à la fois le premier tribunal *ad hoc* à reconnaître le viol comme un méthode d'exécuter le génocide.[101] Le rôle des médias en tant qu'incitateur au génocide et la poursuite des membres des médias est un autre facteur majeur qui distingue le cas rwandais et le TPIR des autres.[102]

Parallèlement à ses prédécesseurs, dans le Statut du TPIR, la responsabilité pénale individuelle des hommes politiques et militaires ayant planifié, incité, commis, ou bien aidé et encouragé la commission d'infractions graves du DIH est nettement indiquée.[103] Tout comme les tribunaux *ad hoc* qui le précèdent, dans l'Article No.6 de son Statut, le TPIR fait ouvertement référence au fait que le fonction politique ou militaire d'une personne ne peut pas le « sauver » de comparaître devant le Tribunal ou bien être considéré comme un motif de diminution de peine. La responsabilité pénale des supérieurs est traitée de la même manière dont elle a été examinée dans l'Article No.7 du Statut du TPIY. Ces personnages-là sont tenus responsables de leurs actes en raison de leur capacité à en prévoir les conséquences. D'après les chiffres officiels, quatre-vingt-treize personnes ont été mises en accusation pour génocide et violations graves du DIH, dont soixante-et-un ont été condamnées.[104]

Autour de tous ces points, chacun de quatre tribunaux *ad hoc* analysés dans cette étude ont contribué à l'attribution aux personnes une responsabilité pénale individuelle. L'établissement de ces tribunaux est important dans la mise en pratique des principes du droit cosmopolitique et ceux du modèle de la société humaine universelle. Il est possible d'interpréter que jusqu'à la fin du 20ème siècle, la communauté internationale a plusieurs fois pris l'initiative de poursuivre les responsables de pires crimes internationaux via les tribunaux *ad hoc* et que ces moments représentent des points tournants dans la cosmopolitisation du droit international.

99 *ibid.* 3-5

100 *ibid*. 3

101 Pour plus d'informations, voir The Prosecutor v. Jean-Paul Akayesu ICTR-96-4-T para 732

102 La radio des Mille Collines dirigé par les extrémistes Hutu a été accusée d'avoir émis, avant et durant toutes les violences, des programmes incitant le public à la haine et à la commission des actes de génocide. Voir Linda Melvern '7. La radio de la haine', *Complicités de génocide. Comment le monde a trahi le Rwanda* (2010) 125, 125-131

103 UNSC Res. 955 (n 90), Article No. 6

104 Nations Unies, 'Chiffres-Clés des Affaires du TPIR' (*Site officiel des Nations Unies*, March 2021) <https://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-fr.pdf> accessed 30 May 2023

IV. Conclusion

Le but principal de cette étude était de discuter les apports des tribunaux *ad hoc* établis au 20ème siècle à l'évolution du droit international par la mise en œuvre des principes fondamentaux du droit cosmopolitique. A travers cet objectif a été observé le procès historique menant à la création de ces institutions juridiques internationales ainsi que la manière par laquelle ces dernières ont contribué aux efforts de codification d'actes illicites en tant que crimes internationaux. La partie théorique de l'article a fourni un cadre holistique pour la seconde partie consacrée à l'étude empirique. En débutant par le cosmopolitisme kantien et avançant par les deux modèles juridiques de Frouville, l'idée du droit cosmopolitique a été associée aux études contemporaines sur le droit international. Plus précisément, plusieurs références ont été faites au passage à la société humaine universelle avec l'adoption de la perspective selon laquelle les individus forment les sujets (et pas objets) du droit international, parallèlement à ce que suggère le droit cosmopolitique kantien.

Dans la partie empirique, les événements historiques sanglants qui ont mené à la fondation de quatre tribunaux *ad hoc* au 20eme siècle ainsi que les documents fondateurs de ces derniers ont été analysés autour de cet approche théorique. Les points primordiaux du TMI, TMIEO, TPIY et TPIR ont été étudiés chronologiquement pour comprendre pas-à-pas la manière par laquelle les pires actes illicites ont été définis en tant que crimes internationaux dans leurs statuts. Cette analyse sert à mettre en avant et supporter l'idée que les tribunaux *ad hoc* ont déclenché les efforts d'universalisation des infractions sévères du DIH en tant que noyau dur des crimes internationaux, qui ont été progressés par la CPI. En outre, l'étude comparative de quatre tribunaux *ad hoc* a fourni la possibilité d'analyser les différentes façons dont ils ont contribué à la mise en œuvre du droit cosmopolitique. L'observation du panorama historique qui s'étend de la Seconde Guerre mondiale aux années 2000 à travers ces institutions juridiques a permis d'étudier en détail les événements qui ont incité la communauté internationale à prendre de grandes initiatives en matière de codification de pires actes illicites comme crimes internationaux.

L'ordre international plutôt réservé aux Etats-nations s'est mis à se transformer après la Seconde Guerre mondiale avec le changement du rôle des individus et des acteurs transnationaux. Le caractère choquant d'actes illicites commis pendant les guerres et conflits du 20eme siècle a poussé le monde à créer un cadre juridique au-delà des nations afin de poursuivre les responsables de ces atrocités devant les yeux de la communauté internationale. La création des tribunaux *ad hoc* et le cadre juridique auquel ils ont donné naissance représente un grand pas concernant l'application des valeurs du droit cosmopolitique kantien et celles du modèle de la société humaine universelle. À notre avis, au sein de la mentalité ayant abouti à l'établissement de ces quatre tribunaux ainsi que les procès qui se passent à ces institutions judiciaires

se trouve l'influence kantienne car cet essor prouve qu'une violation commise en un lieu peut être ressentie par toute la communauté internationale. Il y existe également une référence nette au modèle de la société humaine universelle. Quant à la codification des violations flagrantes du DIH en tant que crimes internationaux, il existe de diverses contributions que ces quatre tribunaux *ad hoc* ont faites à la littérature juridique.

Nous pouvons également comparer la manière par laquelle les quatre tribunaux *ad hoc* ont exercé la responsabilité pénale individuelle. À notre avis, ce sujet est vital vu que l'application de ce principe aux responsables de crimes internationaux signifie un grand pas vers le droit cosmopolitique. Grâce au cadre juridique créé par ces institutions, tous les criminels de guerre ont pu être tenus responsables de leurs actes sans distinction de qualité officielle. Les individus sont devenus sujets du droit international et la compétence des juridictions internationales à les poursuivre a été approuvé par la communauté internationale. C'est dans ce contexte qu'est né un système juridique règlementant les rapports interindividuels dans un niveau international, parallèlement aux idées de Kant et Frouville. Cette transformation de mentalité peut être expliqué à travers le point de vue du Secrétaire général des Nations Unies Antonio Guterres sur le TPIY, qui selon lui *« créé l'architecture contemporaine de la justice internationale*[105] *»*.

Donc, la définition et codification des violations graves du DIH ainsi que la poursuite de leurs responsables jouent un rôle pivot dans cette transformation. Outre les conventions internationales, nous pouvons compter les tribunaux *ad hoc* fondés à partir des années 40 parmi les développements les plus importants en la matière. En effet, durant la période qui a débuté par la fondation du Tribunal Militaire International de Nuremberg et terminé par la prononciation des peines contre les criminels de guerre yougoslaves et rwandais, la communauté internationale a ressenti plusieurs fois que certains crimes disposent d'une nature qui préoccupe tous les individus du monde. Un grand nombre d'actes odieux ont été définis et codifiés au sein des statuts des tribunaux *ad hoc* en tant que crimes internationaux. Les hauts fonctionnaires responsables de ces atrocités ont été jugés par lesdites institutions, conformément aux règles juridiques qui sont graduellement devenues universelles.

Les activités de quatre tribunaux *ad hoc* ont donc constitué un part important dans ce processus d'universalisation ; avec la codification d'infractions sévères du DIH dans leurs statuts, quatre actes ont été définis comme des crimes internationaux. En effet, les tribunaux *ad hoc* du 20ème siècle ont occupé une place vitale dans la reconnaissance mondiale des règles du DIH et la considération de ses violations en tant que pires crimes internationaux. Avec la création de ces institutions, un cadre

105 Stéphanie Maupas, 'Le tribunal pour l'ex-Yougoslavie entre dans l'histoire' Le Monde (La Haye, 21 December 2017)

juridique universel - comme le définit les théoriciens du droit cosmopolitique, et surtout Emmanuel Kant - a été mis en œuvre. La mentalité favorisant l'évaluation des infractions sévères du DIH dans le cadre du modèle de la société humaine universelle s'est installée parallèlement aux besoins du monde contemporain. Les individus sont devenus des sujets actifs du droit international et ont été tenus pénalement responsables de leurs actes nuisant à la conscience de la communauté internationale.

En somme, les tribunaux *ad hoc* ont joué un rôle prépondérant dans la mise en œuvre des principes du droit cosmopolitique kantien. Etant en faveur de l'établissement de ces institutions juridiques, la communauté internationale a approuvé que certaines infractions dépassent les frontières des États-nations et qu'elles doivent obtenir un caractère universel. Ainsi, le monde a pu observer la mise en application des normes de la société humaine universelle aux crimes d'atrocité, d'où la caractéristique mondiale de ces crimes. Cette approche a connu une évolution frappante dans les années 2000, avec le consentement des dirigeants politiques concernant leur responsabilité de protéger les populations contre les crimes de guerre, le génocide, les crimes contre l'humanité et le nettoyage ethnique lors du Sommet mondial de 2005.[106] Le document final de ce Sommet a été adoptée par l'Assemblée générale des Nations Unies, et ainsi, ces crimes ont gagné une caractéristique cosmopolitique.

De nos jours, le jugement des criminels de guerre se réalise sous le toit d'une institution judiciaire de caractère permanente, la CPI, qui mène ses opérations en coopération avec les tribunaux nationaux. L'expression qui se trouve dans son préambule montre que les points principaux du droit cosmopolitique persistent de nos jours : « *les crimes les plus graves qui touchent l'ensemble de la communauté internationale ne sauraient rester impunis*[107]. ». Cette phrase montre que les efforts en ce domaine poursuivent depuis des dizaines d'années. Le fait que la CPI en tant que successeur des tribunaux *ad hoc* continue ses activités d'une façon permanente peut être interprété comme la victoire de Kant au sujet du droit cosmopolitique. Néanmoins, le fait que les Etats-nations possèdent toujours le pouvoir de décider en faveur ou contre la compétence de la CPI constitue de nous jours le point de discussion principal. De plus, la caractéristique complémentaire de la CPI par rapport aux tribunaux nationaux est le deuxième aspect majeur par lequel la nature cosmopolitique de la Cour est défiée.[108]

Etant donné que cet article ne se concentre qu'aux tribunaux *ad hoc*, les points indiqués en haut forment le sujet d'une autre étude. Afin de ne pas dépasser le cadre de cette recherche, nous nous contenterons d'exprimer que la compétence de

106 Document final du Sommet mondial de 2005, Nations Unies Assemblée générale, Soixantième session, le 20 septembre 2005, A/60/L.1, Articles No. 138, 139

107 Rome Statute of the International Criminal Court (n 65) Préambule

108 CPI, *Aider à bâtir un monde plus juste : mieux comprendre la Cour pénale internationale* (1st edn, CPI 2020)

la CPI ne devrait pas être sous-estimée car le non-respect de ses décisions par un Etat-nation causerait le manque prestige de ce dernier. Il est vrai que les juridictions internationales heurtent de temps en temps à la souveraineté étatique. Néanmoins, la volonté menant à leurs établissements et le respect envers leurs décisions prouvent d'un certain degré que l'idéal cosmopolitique de Kant et de ses contemporains fait partie de notre société. Cette étude est pour l'idée que les poursuites à venir de la CPI ainsi que la solidarité de la communauté internationale au sujet de l'universalité de ces crimes continueraient à contribuer à l'implémentation des principes du droit cosmopolitique.

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RESEARCH ARTICLE

La responsabilité délictuelle du fait d'un enfant mineur: des régimes spéciaux vers un régime général ? - une comparaison franco-mauricienne

Tort Liability for the Act of a Minor Child: from the Special Regimes towards a General One?–A Comparison between French and Mauritian Laws

Goran Georgijevic*

Résumé

Tant le Code civil français que le Code civil mauricien, inspiré pour des raisons d'ordre historique par celui-là, contiennent les cas spécifiques de responsabilité du fait d'un enfant mineur. Il en va ainsi de la responsabilité des parents, du personnel éducatif ou encore des écoles publiques. Néanmoins, l'interrogation sur ce type de responsabilité et sur sa spécificité peut aller encore plus loin, comme un enfant mineur peut être confié à un tiers en vertu d'un jugement ou d'une décision administrative. Peut-on alors ébaucher un régime général de la responsabilité délictuelle du fait d'un enfant mineur ? Le but que se fixe la présente analyse consiste à répondre à cette question, en analysant, d'une part, les conditions essentielles d'un tel régime général, et en ébauchant, d'autre part, les contours de la nature d'un tel régime. La méthode utilisée dans la préparation de la présente analyse est la méthode analytique, s'appuyant sur les sources législatives, jurisprudentielles et doctrinales disponibles.

Mots clés: Responsabilité, délictuelle, enfant, mineur, France, Maurice

Abstract

Both the French and the Mauritian Civil Codes, the latter being, for historical reasons, strongly influenced by the former, contain special rules on tort liability for the acts of minors. These rules concern the tort liability of parents, educational staff, and public schools. However, the reflection on this type of tort liability and its specificity can go beyond the existing legal framework, as a minor child can be handed to another person on the grounds of a state court's judgement or an administrative decision. Can we imagine a general regime of tort liability for acts committed by a minor child? This study aims to answer the above question. On the one hand, we will analyse the essential conditions of such a regime and, on the other hand, we propose the nature of tort liability for the acts of a minor child under such a general regime. We will use a traditional analytical method in which legal analysis draws upon available legislation, case law, and scholarly writings.

Keywords: Liability tort, child, minor, France

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Extended Summary

Mauritius has, for historical reasons, a mixed legal system, where one part is influenced by the Common Law and the other is inspired by French law. The organisation of the courts of justice in Mauritius is based on the UK model, and the powers of the Supreme Court of Mauritius are the same as those of the High Court of Justice in England. Many branches of the Mauritian Law, maritime law, and judicial review, for example, have been influenced by the Common Law, but some parts of it, the Civil Code, for instance, are of French origin. This is because the Act of capitulation signed between France and the United Kingdom in 1810 has authorised the inhabitants of the island to keep their laws. In these circumstances, a comparison between French and Mauritian civil law is well justified.

Both France and Mauritius have special rules on tort liability for acts committed by minors. These rules concern public schools, teaching staff, and parents. However, Mauritian Law differentiates from French Law regarding the existence of a general principle of tort liability for the acts of others (children). In France, such a general principle was established in the case of Blieck brought before the French Court of Cassation. In Mauritius, such a general principle does not exist, meaning that the victim of harm must rely on the general rules on subjective tort liability and prove the fault of the defendant.

A comparison between France and Mauritius leads us to the conclusion that a general regime of tort liability may exist for the acts of minor children in Mauritius. Two conditions need to be fulfilled for the application of the aforesaid general regime: (1) the existence of legal power exercised over a child and (2) the existence of the personal liability of a child. This liability may be subjective, based on the civil fault of a child, or objective, without any civil fault of the child.

It is certain that tort liability for the acts of a minor child derogates from the general rule in Mauritius that the victim of harm must prove the civil fault of the defendant. Thus, a general regime of tort liability for the acts of a minor child may be based either on the presumption of a civil fault of the person exercising the legal power over a child or objectively without any fault. On the one hand, objective liability, which is harsh on the liable person, needs to be applied only if the benefit realised by the liable person and the situation of the liable person justify such a legal solution. On the other hand, in all other situations, the liability for the acts of a minor child must be based on the presumption of civil negligence. This gives the liable person the opportunity to escape from his or her liability by proving that no civil fault has been committed. It is not necessary to prove the existence of a force majeure.

Introduction

Tout rapprochement entre le droit civil français, d'une part, et le droit civil mauricien, d'autre part, a de quoi étonner, eu égard à la distance géographique d'environ 9 500 kilomètres qui sépare les deux pays, la France et la République de Maurice. Néanmoins, au moment même de la rédaction de ce papier, le droit civil français, les jugements de la Cour de cassation en France d'abord, mais aussi la doctrine française, occupent la place d'une *persuasive authority* à Maurice. Cela s'explique par l'histoire de l'Ile Maurice.

Après le départ des néerlandais, la possession de l'Ile Maurice a été prise par les français qui y ont amené leurs lois, y compris le Code civil français. Après la défaite militaire de la France face à la Grande-Bretagne, et la prise de la possession de l'Ile Maurice par celle-ci, un Acte de capitulation a été signé en 1810. L'article 8 de l'Acte de capitulation prévoyait que la population de l'île conserverait sa religion, *ses lois* et ses coutumes[1]. De là résulte une fascinante dualité (hybridité) du droit mauricien. Le *Common Law* britannique a influencé le droit public mauricien et ses branches telles que le droit constitutionnel[2], le droit administratif[3], le droit de l'environnement[4]. D'autres braches de droit, telles que le droit maritime[5], la procédure civile[6], la procédure pénale[7], etc. sont aussi imprégnées du droit anglo-saxon[8]. Les cours sont réglementées à Maurice par des lois spéciales rédigées en anglais, la *Courts Act* de 1945[9] étant celle qui traite minutieusement de la Cour suprême[10]. La section 17 de la Loi prévoit clairement que pour ce qui est de la procédure en matière de droit civil, la Cour suprême de Maurice sera mise sur un pied d'égalité avec la Haute Cour de Justice (*High Court of Justice*) en Angleterre. Cela signifie que les jugements de la Cour suprême de Maurice sont formellement obligatoires (*binding authority*) pour les juridictions de rang inférieur, alors que les jugements antérieurement rendus par

1 Law Reform Commission, *Background Paper, Reform of Codes*, octobre 2010, https://lrc.govmu.org/lrc/?p=2479 (consulté le 1 juin 2023) ; Agostini E., « Heurs et malheurs du mariage religieux à l'Ile Maurice », in *Etudes offertes à Pierre Jobert*, Gérard Aubin (éd.) (Presses universitaires de Bordeaux, 1992), p. 21-22 ; Venchard L. – E., « L'application du droit mixte à l'Ile Maurice », (1982) *Mauritius Law Review*, n° 4, p. 31. ; Agostini E, « Odgovornost za štetu od opasne stvari-primena francuskog prava na Mauricijusu », (2004) *Anali Pravnog Fakulteta u Beogradu*, 52 (1-2), p. 116-117.

2 La Constitution mauricienne de 1968 (GN 54/1968) est faite d'après le modèle anglo-saxon. *Vide*, Georgijevic S., *République de Maurice*, https://www.legiscompare.fr/web/IMG/pdf/170904_la_chouette_fp_maurice_fr.pdf (consulté le 6 novembre 2023), p. 3.

3 Ainsi, la procédure de révision des décisions administratives (*Judicial Review*) est fortement influencée à Maurice par le droit anglo-saxon (Law Reform Commission of Mauritius, *Discussion Paper on Judicial Review*, November 2009, https://lrc.govmu.org/lrc/?p=2468 (consulté le 6 novembre 2023), p. 12-14, n° 28-30).

4 *Environment Protection Act* de 2002 (Act 19/2002).

5 *Merchant Shipping Act* de 2007 (Act 26/2007).

6 *Supreme Court Rules* de 2000, prises en vertu de l'Annex (*Schedule*) 4 de la loi *Act* 5/1945 et de l'Annex 3 de la loi *Act* 15/2000.

7 *Criminal Procedure Act* de 1853, Cap 169.

8 Knetsch J., "Le métissage juridique dans deux 'petits états' de l'océan indien : Maurice et les Seychelles", (2019) *Small States: A Collection of Essays*, Hors Série, 23, p. 198-199.

9 Act 5/1945.

10 *Vide* notamment Angelo A. - H., "Mauritius: The Basis of the Legal System" (1970) *The Comparative and International Journal of Southern Africa*, 3 (2), p. 233-237.

la Cour ne l'obligent pas formellement dans une autre affaire de même nature dans le futur, mais sont pris en compte (*persuasive authority*)[11]. En revanche, le droit civil mauricien est régi principalement par le Code civil mauricien de 1805[12], mais aussi par des lois spéciales, rédigées en anglais et d'inspiration anglo-saxonne[13]. Le Code civil mauricien est rédigé en français, et de nombreux articles du Code civil mauricien sont, peu ou prou, identiques aux articles correspondants du Code civil français. Dans ses jugements, le juge mauricien a la possibilité de consulter et citer des décisions rendues par la Cour de cassation française, afin de rendre son raisonnement le plus convaincant possible[14]. Cependant, rien dans le système juridique mauricien ne l'oblige à procéder ainsi[15]. Les décisions de la Cour de cassation française ne seront citées dans les décisions mauriciennes que si le juge mauricien les considère adaptées au contexte. Les décisions de la Cour de cassation française représentent à Maurice une *persuasive* et non une *binding authority*[16].

Le Code civil français et le Code français de l'éducation, de même que le Code civil mauricien, contiennent des règles établissant des régimes spéciaux de la responsabilité du fait d'un enfant. Ainsi, les lois des deux pays contiennent des règles spéciales sur la responsabilité délictuelle des instituteurs et des écoles publiques[17] pour le préjudice causé par un enfant alors qu'il se trouvait dans l'enceinte d'un établissement éducatif ou encore sur la responsabilité délictuelle des parents pour le préjudice causé par leur enfant mineur[18]. En revanche, les deux pays divergent pour ce qui est de la spécialité d'autres situations impliquant des adultes ou des établissements en charge de surveiller les mineurs[19], diriger leur activité et d'organiser leur mode de vie.

11 Angelo A.- H., p. 238.

12 Act 105/1805.

13 On peut citer, à titre d'illustration, l'*Acquisitive Prescription Act* de 2018 (*Act* 13/2018), la *Transcription and Mortgage Act* de 1863 (*Act* 28/1863) ou encore la *Civil Status Act* de 1981 (*Act* 23/1981).

14 Dans son jugement *Lingel-Roy M. J. E. M. and ORS v. The State of Mauritius and Anor* 2017 SCJ 411 la Cour suprême de Maurce annonce : *"It is appropriate to recall the practice that when it comes to the interpretation of a law borrowed from French law we stand guided for its interpretation by French doctrine and case law. One can quote in that respect the following passage from L'Etendry v The Queen [1953 MR 15]: "the normal rule of construction laid down time and again by this court (...) is to the effect that when our law is borrowed from French law we should resort for guidance as to its interpretation to French doctrine and case law."*

15 *Lingel-Roy M. J. E. M. and ORS v. The State of Mauritius and Anor* 2017 SCJ 411: *"But, it has to be pointed out that the practice of relying on French authorities has always been for guidance and not in application of the stare decisis principle."*.

16 *Vide* par exemple : *Mangroo vs Dahal* 1937 MR, 43 – Agostini E., « Responsabilité du fait des choses, l'Ile Maurice est encore l'Isle de France », in *Mélanges Christian Mouly* (Litec, 1998), p. 6. – *Vide* aussi les jugements de la Cour suprême de Maurice *Jugessur Mrs Shati & ORS v. Bestel Joseph Christian Yann & Anor* 2007 SCJ 106 et *Naikoo v. Société Héritiers Bhogun* 1972 MR 66 1972 comparés aux arrêts français Cass. ch. mixte, 27 fév. 1970 n° de pourvoi: 68–10276 et Cass. crim. 17 March 1970 n° de pourvoi: 69–91040.

17 Art. 1242 al. 6 C. civ. fr. et L. 911-4 C. fr. éduc. – Art. 1384 alinéa 3 et 4 C. civ. maur., ensemble avec la *State Proceedings Act* de 1953 (Act 5/1953) et la *Public Officers' Protection Act* de 1957 (Act 45/1957).

18 Art. 1242 al. 4 C. civ fr et 1384 al. 2 C. civ. fr.

19 En France et à Maurice le mineur est une personne âgée de moins de 18 ans. - Art 388 C. civ. fr et C. civ. maur.

En France, dans le célèbre arrêt *Blieck* de 1991[20], un principe général de la responsabilité du fait d'autrui, y compris l'enfant, a été énoncé par la Cour de cassation française. Ainsi, les personnes, autres que les parents, les instituteurs et les établissements éducatifs, peuvent être responsables pour autrui, par dérogation au droit commun posé aux articles 1240 et 1241 du Code civil français[21], qui fait peser sur la victime prétendue d'un préjudice la charge de la preuve (*actori incumbit probatio*). Toutefois, le tableau résultant de cette extension jurisprudentielle de la responsabilité du fait d'autrui en France est bien bariolé. Tantôt la responsabilité délictuelle du fait d'autrui est objective, détachée de toute idée de faute, prouvée ou exonératoire, tantôt elle est subjective, fondée sur une présomption de faute, où le responsable peut échapper à sa responsabilité en prouvant l'absence de sa faute.

A Maurice, à la différence de la France, il n'y a pas, pour l'instant, de principe général de la responsabilité délictuelle du fait d'autrui, qui serait l'œuvre de la Cour suprême de Maurice. Cela se comprend aisément, eu égard au fait que la Cour suprême de Maurice évite, autant que faire se peut, à endosser le rôle du législateur. Cette tendance a été clairement établie dans les années 1930 dans le célèbre jugement de la Cour suprême de Maurice *Mangroo v. Dahal*[22] rendu à propos de la responsabilité objective du gardien d'une chose. Dans l'affaire *Mangroo*, quelques années après le fameux jugement *Jand'heur* de la chambre réunie de la Cour de cassation française du 13 février 1930, la Cour suprême de Maurice a eu l'opportunité de s'aligner sur la position de son homologue français et d'introduire au droit mauricien la responsabilité objective du gardien d'une chose. Cependant, cela n'est pas arrivé, car à la différence de la position prise par la Haute juridiction française le 13 février 1930, la Cour suprême de Maurice a refusé d'attribuer à l'article 1384 alinéa 1 du Code civil mauricien le sens et la portée que le législateur de 1805 n'avait pas à l'esprit et de créer ainsi un nouveau type de responsabilité délictuelle[23], celle du gardien qui serait objective et détachée de toute idée de faute. Ainsi, en dehors de la responsabilité de l'instituteur, des établissements d'éducation publics et des parents, c'est le droit commun de la responsabilité délictuelle incarné par les articles 1382[24] et 1383[25] du Code civil mauricien qui s'applique à toute autre personne qui pourrait être en charge de la surveillance, du contrôle de l'activité ou du mode de vie d'un mineur. Ainsi, les grands-parents, les établissements auxquels l'enfant est confié en vertu

20 Flour J., Aubert J. – L., Savaux E., Andreu L., *Droit civil. Les obligations. Le fait juridique – Quasi-contrats Responsabilité extracontractuelle* (15ème éd. Dalloz, 2024), p. 461.

21 Avant la réforme de 2016, c'était les articles 1382 et 1383.

22 1937 MR 43.

23 La Cour suprême de Maurice a exprimé cette idée en termes suivants : *« The interpretation given to article 1384-1 in Jand'heur by the Court of Cassation was contrary to the text and to the spirit and intention of the legislator and […] by so doing the French Judges had usurped the role of the legislator ».*

24 « Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer ».

25 « Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence ».

d'une décision de justice ou en vertu d'une décision administrative ne peut être tenu responsable que si la prétendue victime prouve une faute des personnes mentionnées ci-dessus.

La présentation des solutions fluctuantes sur la responsabilité délictuelle du fait d'un enfant mineur dans les deux pays analysés nous amène à nous interroger sur la viabilité d'un régime général de la responsabilité délictuelle du fait d'un enfant mineur, applicable à tous les potentiels responsables du fait de l'enfant. La question est théoriquement intéressante, car elle fait ressortir la problématique du fondement de la responsabilité du fait d'un enfant mineur (le risque v. une faute présumée du responsable). En outre, la question est aussi pratiquement importante, car en fonction du type de responsabilité appliqué, il sera plus ou moins difficile d'échapper à la responsabilité du fait d'un enfant mineur (la preuve d'une force majeure v. la simple preuve de l'absence de faute).

Ainsi, en s'appuyant sur une méthode analytique, courante dans les écrits de droit civil, nous analyserons, dans un premier temps les conditions d'application d'un régime général de la responsabilité délictuelle du fait de l'enfant (I), avant d'étudier, dans un second temps la nature de la responsabilité applicable dans un régime général de la responsabilité délictuelle du fait de l'enfant (II).

I. Les conditions d'application d'un régime général de la responsabilité délictuelle du fait de l'enfant

La réunion des deux conditions essentielles nous semble nécessaire pour qu'on puisse, dans toute hypothèse, appliquer la responsabilité du fait d'un enfant mineur. D'une part, l'enfant doit être personnellement responsable pour le préjudice causé (A) et, d'autre part, il doit faire l'objet de l'exercice d'un pouvoir légitime (B).

A. La nécessité d'une responsabilité préalable de l'enfant

Quel que soit le cas de responsabilité délictuelle du fait d'un enfant mineur - celle des parents, ou de l'instituteur, ou de l'école publique, ou d'un grand parent, ou d'un établissement auquel l'enfant a été confié en vertu d'un jugement ou d'un contrat – la logique exige que cette responsabilité du fait d'autrui soit déclenchée uniquement si la personne dont on est responsable, l'enfant en l'occurrence, est personnellement responsable. En d'autres mots, l'enfant doit avoir commis une faute délictuelle ou doit avoir été gardien d'une chose, avant que la victime puisse demander la mise en œuvre de la responsabilité d'une autre personne pour ce préjudice causé par l'enfant. Il serait extrêmement difficile de comprendre sur quel fondement serait basé la responsabilité d'une personne du fait d'un enfant, dont ce dernier n'est pas personnellement responsable. Cette condition ne semble pas être remise en cause

à Maurice. En revanche, en France, depuis le célèbre jugement de la deuxième chambre civile de Cour de cassation *Levert* du 10 mai 2001[26] il n'est pas nécessaire que l'enfant commette une faute. Malgré l'absence de toute faute d'un enfant mineur, ses parents peuvent être déclarés civilement responsables. En l'occurrence, un enfant a été gravement blessé au cours d'une partie de rugby improvisée, et les parents de la jeune victime se sont retournés contre les parents de l'enfant qui a été impliqué dans la réalisation du préjudice. Toutefois, aucune faute de ce dernier n'a pu être constatée, comme aucun acte délibéré, contraire à l'esprit du jeu n'a été commis par l'enfant impliqué dans la réalisation du préjudice[27]. La Cour de cassation a clairement sortie du cadre de la responsabilité délictuelle et a fait peser sur les épaules des parents de l'enfant-auteur du préjudice une obligation d'indemnisation fondée sur un sentiment d'équité. Si juste que cette solution puisse paraître, nous la déconseillons pour le droit mauricien, comme elle entraînerait une importante imprévisibilité et insécurité pour d'éventuels responsables. La responsabilité du fait d'un enfant mineur doit être précédée d'une responsabilité personnelle de l'enfant, soit pour faute soit en tant que gardien.

Pour ce qui est de la responsabilité pour faute de l'enfant[28], la tendance générale consiste à objectiver la faute, en s'éloignant de la capacité de discernement. Cette capacité désigne l'aptitude d'une personne, d'un enfant en l'occurrence, de comprendre les conséquences de ses gestes et de distinguer le bien du mal. Elle est généralement acquise entre l'âge de 4 et 15 ans. A partir de l'âge de 4 ans les enfants commencent à comprendre certaines conséquences de leurs actes, et en grandissant et murissant, cette capacité se renforce dans les domaines un peu plus subtiles et techniques, tels que les dangers liés aux circuits électriques ou aux installations de gaz, par exemple. Même si la situation varie d'un enfant à l'autre, la pleine capacité de discernement est généralement acquise vers l'âge de 15 ans[29]. La capacité de discernement a longtemps été une partie constitutive de la faute délictuelle en France. Derrière cette exigence se trouvait une dimension morale : peuvent commettre une faute délictuelle ceux qui peuvent comprendre les conséquences de leurs actes et qui peuvent les regretter[30]. Les enfants en bas âge, privés de cette capacité, ne pouvaient donc pas commettre de faute délictuelle. La jurisprudence est changée le 9 mai 1984 avec les jugements

26 Cass. 2ème, 10 mai 2001, n° of pourvoi 99-11.287.

27 En France, comme à Maurice, si le préjudice corporel a été causé au cours d'une partie de sport, les fautes de simple négligence ou imprudence n'entrainent pas la responsabilité délictuelle du participant, car il est considéré que chaque participant assume le risque de blessure, tant que l'on reste dans l'esprit de la compétition. En revanche, il y a faute entraînant la responsabilité délictuelle en cas d'une violation délibérée des règles du jeu et de leur esprit. Ceci arrive, par exemple, en cas d'une bagarre générale survenue au cours d'un match de sport. – Voir : Flour J., Aubert J. – L., Savaux E., Andreu L., p. 222, n° 141.

28 Il est à noter que dans les faits, il est rare que la victime poursuive en justice le mineur pour sa faute, comme celui-ci dispose rarement des moyens financiers pour dédommager la victime.

29 Comp. avec : Terré F., Simler Ph., Lequette Y., Chénédé F., *Droit civil. Les obligations* (13ème éd. Dalloz, 2022), p. 1083, n° 960.

30 Flour J., Aubert J. – L., Savaux E., Andreu L., p. 194, n° 119 ; Terré F., Simler Ph., Lequette Y., Chénédé F., p. 1082, n° 959.

de l'Assemblée plénière de la Cour de cassation française connus sous le nom de *Derguini*[31] et *Lemaire*[32]. Même privés de leur capacité de discernement, les enfants mineurs peuvent commettre une faute civile, si leur comportement ne correspond pas à ce qui est attendu d'une personne prudente et raisonnable. Le revirement de jurisprudence été suivi par la Cour suprême de Maurice dans son jugement *Medine Sugar Estates Co. Ltd v. Anthony* de1990[33].

Comme pour tous les autres responsables, la faute délictuelle d'un enfant mineur est appréciée tant en France[34] qu'à Maurice *in abstracto*. Le comportement de l'enfant sera comparé avec ce qu'une personne moyenne, prudente et raisonnable aurait fait dans les mêmes circonstances. Si l'enfant a fait, dans les circonstances données, ce qu'une personne prudente et raisonnable aurait fait, il n'y a pas de faute délictuelle, et dans le cas contraire, une faute délictuelle peut être constatée. De toute façon, cette appréciation factuelle de l'existence d'une faute délictuelle relève du pouvoir de l'appréciation souverain du juge. A Maurice, l'appréciation *in abstracto* de la faute délictuelle a été retenue dans les jugements de la Cour suprême de Maurice *Neron Publications Co Ltd v. La Sentinelle Ltd & Ors* de 2020[35], *Belloguet L.F. & Anor v. Mungur I. (DR) & Ors* de 2019[36], *Cundasamy v. The Government of Mauritius* de 2001[37] et *Mir v. IBL* de 2023[38].

Tant en France[39] qu'à Maurice[40] le gardien d'une chose est objectivement responsable de tout le préjudice résultant du fait d'une chose. Cela signifie que, d'une part, la prétendue victime n'a pas à prouver une faute du gardien et, d'autre part, le gardien ne pourrait échapper à sa responsabilité en prouvant qu'il n'a pas commis de faute. Seule une force majeure ou la faute de la victime revêtant les caractères d'une force majeure pourrait exonérer le gardien. Ce dernier peut être défini comme la personne ayant le pouvoir indépendant,[41] conforme à la loi ou non[42], d'user de la chose de la diriger et de la contrôler. Et un enfant mineur, privé de la capacité de discernement peut être considéré comme gardien et être responsable sur le plan délictuel en tant que tel.

31 N° de pourvoi : 80-93.481.

32 N° de pourvoi : 80-93.031.

33 1990 SCJ 334.

34 Terré F., Simler Ph., Lequette Y., Chénédé F., p. 1081, n° 957.

35 2020 SCJ 63.

36 2019 SCJ 218.

37 2001 SCJ 60.

38 2023 SCJ 195.

39 Article 1242 alinéa 1 C. civ.fr.

40 Art. 1384 al. 5 et 6 C. civ. maur.

41 Le préposé est donc exclu de la définition du gardien, comme il ne dispose pas d'un pouvoir autonome sur la chose. Il ne fait qu'obéir aux ordres de son commettant.

42 Ainsi, depuis l'arrêt *Franck* des Chambres réunies de la Cour de cassation du 2 décembre 1941 (Bulletin des arrêts de la Cour de cassation Chambre civile p. 523, n° 292), même un voleur peut être gardien au sens de l'article 1242 alinéa 1 du Code civil français.

B. La nécessité d'un pouvoir légitime exercé sur l'enfant

Tant en France, qu'à l'Ile Maurice, outre la responsabilité personnelle de l'enfant mineur, la responsabilité du fait d'un enfant mineur exige aussi un pouvoir légitime conféré à la personne responsable du fait de cet enfant.

En cas de responsabilité des parents, il s'agit de la garde[43], la notion empruntée au droit de la famille, désignant un faisceau de droits et obligations que les parents assument vis-à-vis de leurs enfants mineurs[44]. Tant en France[45], qu'à Maurice[46] le parent exerçant la garde est responsable, selon les règles dérogeant au droit commun de la responsabilité délictuelle qui exige que la prétendue victime prouve une faute du défendeur au procès[47]. Ainsi, les parents mariés ou les parents non mariés vivant sous le même toit, exercent ensemble la garde[48], et sont solidairement responsables[49] du préjudice causé par leur enfant mineur. En revanche, il arrive qu'un seul parent exerce la garde, notamment lorsque l'autre parent est décédé ou que les parents ont divorcé et la garde a été confiée par une décision de justice à l'un d'entre eux, alors que l'autre doit se contenter d'un droit de visite et d'hébergement.[50] Dans un tel cas, seul le parent investi du pouvoir de garde sur l'enfant sera responsable selon les règles spéciales, dérogeant au droit commun de la responsabilité délictuelle. La responsabilité de l'autre parent, n'exerçant pas la garde, peut être recherchée selon les règles du droit commun de la responsabilité délictuelle en France[51] et à Maurice[52] : une faute du défendeur au procès doit être prouvée par la prétendue victime.

Il convient de remarquer que cette exigence d'un pouvoir légitime exercé sur l'enfant mineur justifie l'absence de la responsabilité d'autrui pour le fait d'un enfant mineur émancipé. L'émancipation est une procédure qui vise à conférer une capacité d'exercice quasi-complète à un mineur qui pourra désormais accomplir les actes que normalement un mineur ne peut accomplir. Ainsi, le mineur pourra notamment faire

43 En France, la garde est appelée « autorité parentale ».

44 Il s'agit des droits et obligations liées à la personne de l'enfant (le choix de l'école, le choix des pratiques religieuses de l'enfant, de ses activités de loisirs, etc.), ainsi que de ceux que les parents exercent sur les biens de l'enfant (les actes d'administration et de disposition).

45 Art. 1242 al. 4 C. civ. fr.

46 Art. 1384 al. 2 C. civ. maur.

47 Notons dès à présent qu'en France cette responsabilité est objective, détachée de toute éventuelle faute d'éducation et surveillance des parents, alors qu'à Maurice, on applique une présomption de faute d'éducation et de surveillance de l'enfant pouvant être renversée par le défendeur au procès.

48 Buffelan-Lanore Y., Larribau-Terneyre V., *Droit civil. Les obligations* (18ème éd. Sirey, 2022), p. 944 ; Porchy-Simon S., *Droit des obligations 2024* (16ème éd. Dalloz, 2023), p. 422. – Art. 372 et 374 C. civ. maur.

49 La solidarité est une mesure de garantie offerte par les droits français et mauricien à la victime d'un préjudice. Celle-ci peut choisir l'un des co-responsables et lui demander de réparer l'intégralité de son préjudice. Le co-responsable auquel l'on a demandé un tel paiement ne pourra pas se défendre en demandant à la victime de diviser la poursuite entre lui et l'autre co-responsable. Il est facile de comprendre que la victime agira en justice contre le co-responsable qu'elle estime le plus solvable. – *Vide* Porchy-Simon S., p. 422.

50 Buffelan-Lanore Y., Larribau-Terneyre V., p. 944-945 ; Porchy-Simon S., p. 422-423. – Art. 373-2 C. civ. maur.

51 Art. 1240 et 1241 C. civ. fr.

52 Art. 1382 et 1383 C. civ. maur.

seul et sans assistance les actes de disposition, vendre et acheter des biens immobiliers, par exemple, ou constituer seul les sûretés réelles immobilières. Pour ce qui est de la responsabilité délictuelle, un mineur émancipé est le seul responsable pour le préjudice qu'il a causé, ses parents ne le sont plus, comme ils n'exercent plus aucun pouvoir juridique sur leur enfant mineur. L'émancipation oppose désormais le droit français et le droit mauricien. En France, l'émancipation est possible par mariage d'un mineur, mais aussi par une décision de justice[53]. A Maurice, jusqu'à 2020, et l'entrée en vigueur de la section 12 du *Childrens' Act*, l'émancipation par mariage était possible. Toutefois, la section 12 a interdit le mariage des mineurs à Maurice, et l'a érigé en infraction pénale. Cela a implicitement abrogé les articles 476 à 478 du Code civil mauricien qui autorisaient l'émancipation par mariage. Désormais, les parents mauriciens exercent toujours la garde de leurs enfants mineurs, et peuvent être responsables sur le plan délictuel en vertu de la faute présumée de l'article 1384 alinéa 2 du Code civil mauricien. La différence entre les solutions des droits français et mauricien s'explique par un contexte social et culturel différent dans les deux pays.

Pour ce qui est de la responsabilité des instituteurs et des écoles publiques du fait de leurs élèves mineurs, le pouvoir conféré par la loi d'organiser le service public de l'enseignement[54] justifie l'existence d'un régime spécial de la responsabilité délictuelle dérogeant au droit commun. Il est intéressant de noter que depuis la fin du XIX^{ème} siècle le droit français[55] confère une immunité civile à l'instituteur ou autre membre du personnel enseignant du secteur public ayant commis une faute délictuelle de surveillance. La solution a été prise à la suite de l'affaire *LeBlanc* jugée par la Cour de cassation qui avait provoqué un émoi au travers du pays. Un enseignant du secteur public a été condamné pour faute à réparer le préjudice causé par un élève qui se trouvait sous sa surveillance, ce qui a entraîné un bouleversement profond dans la vie de cet enseignant[56]. Le droit mauricien, pour l'instant, n'a pas conféré de telle immunité aux enseignants du secteur public. Néanmoins, la protection des instituteurs et autre personnel éducatif se fait d'une autre manière : seule une faute lourde, c'est-à-dire une faute d'une exceptionnelle gravité est susceptible d'engager la responsabilité délictuelle d'un membre du service éducatif public[57]. La protection

53 Art. 413-2 C. civ. fr.

54 Voir le Code français de l'éducation et la Education Act mauricienne de 1957 (Act 39/1957).

55 La loi du 20 juillet 1899.

56 Selon certaines sources, il aurait commis le suicide après sa condamnation civile (Buffelan-Lanore Y., Larribau-Terneyre V., p. 955), alors que d'autres auteurs affirment qu'il avait simplement perdu la raison (Terré F., Simler Ph., Lequette Y., Chénédé F., p. 1154.).

57 La règle est solidement ancrée dans la jurisprudence mauricienne, ce dont témoignent de nombreux jugements de la Cour suprême de Maurice. *Vide Daureeawo M. R. v The State of Mauritius* 2024 SCJ 91; *Jhugdamby B. v Private Secondary Education Authority* 2022 SCJ 56; *Ramjee E. v Dayal N. & Anor* 2020 SCJ 203; *Dooboree K. v The State of Mauritius and Anor* 2020 SCJ 207; *Senarain M. v The Commissioner of Police & Anor* 2019 SCJ 72; *Kowlessur R. v The State of Mauritius* 2018 SCJ 216; *Neewoor A. v Burrenchobay A.* 2017 SCJ 22; *Transpacific Export Services Ltd v State & Anor* 2016 SCJ 407; *Ah Sue Mario Alain Chung Ching v The State of Mauritius* 2015 SCJ 110; *Naidoo G. (Dr) v The State of Mauritius & Anor* 2014 SCJ 289; *Metex Trading Co. Ltd. v The State of Mauritius & Ors* 2014 SCJ 219; *Consolidated Steel Ltd v The State of Mauritius* 2014 SCJ 301; *Agathe B. & Anor v The State of Mauritius* 2004 SCJ 207; *The State of*

s'explique, d'une part, par la nécessité de protéger les enseignants du secteur public d'une trop lourde charge financière, et, d'autre part, par le besoin de leur assurer une certaine tranquillité d'esprit dans l'exécution de leurs missions.

Le droit français de la responsabilité délictuelle ne s'arrête pas là, car depuis 1991 et le fameux arrêt *Blieck* de la Cour de cassation[58] un régime spécial de la responsabilité du fait d'autrui existe aussi dans les cas autres que ceux spécifiquement mentionnés dans le Code civil français (parents, instituteurs, commettants, artisans et maîtres du stage). Le point commun à tous les cas concernant les enfants mineurs et rentrant dans ce principe général de la responsabilité du fait d'autrui est que c'est un pouvoir juridique exercé sur l'enfant qui justifie une dérogation au droit commun de la responsabilité délictuelle. Dans certains cas, l'enfant a été confié à une institution éducative ou de protection de la santé en vertu d'un jugement. Il en va ainsi notamment des enfants en difficulté sociale ou malades.

II. La nature de la responsabilité applicable dans un régime général de la responsabilité délictuelle du fait de l'enfant

Nous sommes d'avis que, la plupart du temps, la responsabilité du fait d'un enfant mineur devrait être pour faute présumée (B), mais dans certains cas exceptionnels elle peut être objective (A), malgré sa sévérité pour le responsable.

A. Une responsabilité objective sévère pour le responsable

Nous pouvons observer que dans un certain nombre de cas, le droit français et le droit mauricien appliquent la responsabilité objective du fait d'un enfant mineur. La solution est bien plus sévère pour le responsable qu'une responsabilité pour faute présumée. Dans le système de responsabilité objective, la faute du responsable pour le fait de l'enfant n'a plus aucune importance. D'une part, la prétendue victime n'a pas à prouver la faute de ce responsable, et, d'autre part, le responsable ne saurait échapper à sa responsabilité en prouvant l'absence de sa faute. Seule la preuve d'une force majeure est susceptible d'exonérer le responsable du fait d'un enfant mineur. En revanche, dans le système de faute présumée, le responsable peut échapper à sa responsabilité s'il prouve l'absence de sa faute.

Depuis le célèbre arrêt *Bertand* de la 2ème chambre civile de la Cour de cassation du 19 mai 1997, la responsabilité des parents est objective, détachée de toute idée de faute. En l'occurrence, un enfant mineur roulant à vélo avait causé un préjudice corporel à un piéton. Ce dernier a agi en responsabilité délictuelle contre les parents de cet enfant, qui ont essayé d'échapper à leur responsabilité délictuelle en prouvant

Mauritius v Sookna 2001 SCJ 51; *Favory H. & Anor v Government of Mauritius* 1999 SCJ 28.

58 Cass. Ass. plén. 29 mars 1991, n° de pourvoi : 89-15.231.

l'absence de toute faute d'éducation et de surveillance de leur part. La défense a été rejetée par la Cour de cassation, qui a déclaré les parents objectivement responsables pour le préjudice causé par leur enfant mineur. Les parents ne peuvent échapper à leur responsabilité délictuelle en prouvant l'absence de leur faute, seule la preuve d'une force majeure peut les exonérer. La solution met une charge financière sur les épaules des parents, dont la responsabilité délictuelle peut concerner les montants assez élevés. Tant qu'il n'existe pas à Maurice d'assurance obligatoire des parents contre des préjudices susceptibles d'être causés par leurs enfants mineurs, nous déconseillons la transposition de la jurisprudence *Bertand* dans le droit mauricien de la responsabilité délictuelle. La responsabilité des parents, basée sur une faute présumée de ceux-ci, nous semble être bien plus adaptée au sérieux de la charge financière que la responsabilité délictuelle du fait de leur enfant mineur pourrait faire peser sur les épaules des parents. Tant qu'il n'y a pas d'assurance obligatoire des parents et ceux-ci doivent assumer la charge définitive de leur responsabilité délictuelle du fait de leur enfant mineur, il semble juste et approprié de leur permettre d'échapper à cette responsabilité en prouvant qu'ils ont bien éduqué et surveillé leur enfant mineur. Fort heureusement, c'est la solution appliquée dans la jurisprudence mauricienne, comme en témoigne le jugement de la Cour suprême *Rabaille v Boodhun* de 1978[59]. En l'occurrence, un garçon âgé de 17 ans avait blessé un client de la boulangerie où le garçon travaillait à l'époque. La victime a demandé au parent de cet enfant mineur la réparation de son préjudice corporel. Les parents ont pu échapper à leur responsabilité du fait de leur enfant mineur en renversant la présomption de leur faute posée à l'article 1384 alinéa 2 du Code civil mauricien. Ils sont parvenus à prouver qu'il n'y avait aucune faute d'éducation ni de surveillance de leur part.

Il est à noter que la condition de cohabitation, posée à l'article 1384 alinéa 2 du Code civil mauricien, comme spécifique à la responsabilité des parents, s'accorde bien avec la responsabilité de ceux-ci basée sur une présomption de faute. La cohabitation peut être définie comme le fait que l'enfant vive sous le même toit avec ses parents au moment où le préjudice a été causé. Cette vie commune donne aux parents la possibilité de bien éduquer et surveiller leur enfant et, en conséquence, d'échapper à leur responsabilité en prouvant qu'ils n'ont pas commis de faute d'éducation ni de surveillance[60].

Pour ce qui est de la responsabilité de l'Etat, en tant que commettant, pour la faute de surveillance commise par le personnel enseignant, elle est objective tant en

59 1978 MR 34.

60 En revanche, la cohabitation cesse lorsque l'enfant réside au moment du préjudice chez la personne n'exerçant pas d'autorité parentale sur lui, par exemple, chez le parent divorcé qui n'a que le droit de visite et d'hébergement sur l'enfant. - Porchy-Simon S., p. 423 ; Terré F., Simler Ph., Lequette Y., Chénédé F., p. 1163.

France[61] qu'à Maurice[62]. La solution, même si elle est assez sévère pour le responsable, qui ne peut échapper à sa responsabilité en prouvant l'absence de sa faute, nous semble pleinement justifiée. L'Etat, en tant que commettant, retire des bénéfices de l'activité de son personnel éducatif, ce dernier permettant le déroulement d'un service public essentiel, à savoir l'éducation. Il nous semble que ce bénéfice justifie une responsabilité plus sévère que celle pour faute présumée. L'Etat ne peut échapper à sa responsabilité délictuelle pour la faute de son personnel éducatif, le seul moyen pour s'en exonérer est une force majeure[63].

B. La responsabilité subjective pour faute présumée, une solution favorable au responsable

Quant à la responsabilité personnelle du personnel éducatif travaillant dans le secteur privé, pour le préjudice causé par un élève qui se trouvait sous leur surveillance, une faute doit être prouvée[64], en France, alors qu'à Maurice la responsabilité est subjective, pour faute présumée[65]. La solution du droit mauricien nous semble pleinement satisfaisante. Nous sommes d'avis qu'il ne serait pas souhaitable d'accorder à un membre du corps enseignant du secteur privé[66] à Maurice, ayant commis une faute, une immunité civile, car cela serait contraire à la fonction normative de la responsabilité délictuelle. Chaque membre du personnel éducatif à Maurice doit prendre au sérieux l'obligation de surveiller ses élèves et être conscient qu'il expose à une certaine charge financière en cas de défaut de surveillance satisfaisante. En revanche, et même s'il n'est pas nécessaire que la victime prouve la faute de l'enseignant, ce dernier doit pouvoir s'exonérer de sa responsabilité délictuelle en prouvant l'absence de sa faute. Nous ne recommandons pas une responsabilité objective, qui serait basée sur l'idée du risque contrôlé, car le personnel éducatif occupe la place du préposé, obéissant aux ordres de leur employeur (école privée). C'est ce dernier qui a le pouvoir autonome d'organiser l'exécution de la mission de l'enseignement, ce qui justifie que son exonération de la responsabilité civile soit subordonnée à la preuve d'une force majeure. L'employé-enseignant, qui exécute les ordres de son employeur-école privée, ne peut être responsable que s'il a commis une faute de surveillance. Et pour faciliter autant que possible l'indemnisation de la victime cette faute doit être présumée.

61 Buffelan-Lanore Y., Larribau-Terneyre V., p. 959.

62 *Jhugdamby B. v Private Secondary Education Authority* 2022 SCJ 56.

63 Buffelan-Lanore Y., Larribau-Terneyre V., p. 972 ; Tranchant L., Egea V., *Droit des obligations 2024,* (27ème éd. Levebvre Dalloz, 2023), 141.

64 La loi du 5 avril 1937.

65 Art. 1384 al. 4 C. civ. maur.

66 Nous préconisons, d'ailleurs, la même solution pour les enseignants du secteur public.

Pour ce qui est des cas qui ne sont pas spécifiquement prévus dans le Code civil français ni mauricien, les deux systèmes juridiques contiennent, pour l'instant des solutions fort opposées.

En France, lorsque l'enfant a été confié par une décision de justice ou une décision administrative à un organisme[67], pour que ce dernier organise et contrôle son mode de vie, la responsabilité de cet organisme, pour le préjudice que l'enfant mineur pourrait causer est objective, et seule la preuve d'une force majeure peut exonérer cet organisme. La preuve de l'absence de faute ne servira à rien. La solution s'applique que le pouvoir conféré à l'organisme est permanent ou temporaire. La dérogation au droit commun est fondée sur ce pouvoir juridique d'organiser et contrôler le mode de vie du mineur[68].

A Maurice, une extension de la responsabilité du fait d'un enfant mineur n'a toujours pas eu lieu. Ce qui signifie que dans les cas mentionnés dans le paragraphe précédent, la faute de la personne ou de l'entité à laquelle l'enfant mineur a été confié doit être prouvée, conformément aux articles 1382 et 1383 du Code civil mauricien. La charge de la preuve pèse donc sur la prétendue victime du préjudice.

Nous sommes favorables à une généralisation à Maurice de la responsabilité du fait d'un enfant mineur, en dehors des cas spécifiquement régis par le Code civil mauricien, comme une telle extension serait conforme aux évolutions sociales[69]. Toutefois, la responsabilité objective, sans faute, nous semble être une solution trop sévère, eu égard à un équilibre nécessaire entre les intérêts de la victime et du responsable. Nous y préférons une responsabilité subjective, pour faute présumée. Cette solution permettra au responsable du fait d'un enfant mineur d'échapper à la responsabilité et à une importante charge financière en prouvant l'absence de toute faute de sa part. Néanmoins, nous admettons la possibilité que la responsabilité objective soit introduite au droit mauricien, mais uniquement si le législateur introduit une assurance obligatoire du responsable contre ce type de risque ou si, *de facto*, une telle assurance commence à être largement pratiquée à Maurice.

Conclusion

Dans ce papier nous avons comparé les cas spécifiques de responsabilité du fait d'un enfant mineur, tel qu'ils sont actuellement réglementés dans les droits français et mauricien, et constaté une différence du traitement d'un régime général de la responsabilité du fait d'un enfant mineur, la France y étant favorable, alors que pour l'instant, le droit mauricien reste silencieux sur ce point. A partir de cet examen

67 Flour J., Aubert J. – L., Savaux E., Andreu L., p. 465-466.

68 En même sens : Flour J., Aubert J. – L., Savaux E., Andreu L., p. 465.

69 Comp. avec : Flour J., Aubert J. – L., Savaux E., Andreu L., p. 461-462.

préalable, une tentative a été faite d'ébaucher un régime général de la responsabilité du fait d'un enfant mineur. Deux conditions nous ont semblé essentielles pour qu'un tel régime puisse exister, la responsabilité personnelle de l'enfant, d'une part, et l'exercice d'une autorité sur l'enfant d'autre part. Quant à la nature de la responsabilité généralisée du fait d'un enfant mineur une responsabilité subjective pour faute présumée nous semble être la solution la plus équitable, comme elle prend suffisamment en compte tant les intérêts de la victime, que ceux des responsables. D'une part, en cas de faute présumée, la position de la victime est plus favorable qu'en droit commun, où elle doit prouver l'existence d'une faute. D'autre part, le responsable peut éviter une lourde charge financière, imposée par la mise en œuvre de sa responsabilité délictuelle, en prouvant l'absence d'une faute de sa part. Il n'est donc pas nécessaire de prouver une force majeure, la preuve de celle-ci étant plus difficile à rapporter que la preuve de l'absence d'une faute. Finalement, nous sommes restés ouvert à une éventuelle introduction, dans un futur plus ou moins éloigné, de la responsabilité objective, sans faute. L'introduction de celle-ci devrait être assortie d'une assurance obligatoire du responsable contre les conséquences de sa responsabilité ou d'un usage généralisé d'une telle assurance.

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RESEARCH ARTICLE

Use of Party-Appointed Experts in International Commercial and Investment Arbitration: Issues and Possible Solutions

Ömer Faruk Kafalı*

Abstract

In this article, experts in international commercial and investment arbitration will be briefly explained on the basis of the appointing authority and the subject matter on which they provide their services. The legal aspects of experts will be summarised, taking into consideration sources in international arbitration and various jurisdictions. The problems that arise from the use of party-appointed experts are then briefly mentioned. Penultimately, the already proposed recommendations are to be stated and evaluated. Last but not least, the article concludes by asserting that a pre-agreed procedural flow for the creation of the expert opinion and concurrent examination is necessary to overcome the flaws resulting from the use of party-appointed experts that lead to the inefficiency of proceedings. To limit the subject, this article intentionally does not address the experts' appointment and objection process and issues relating to the expert's opinion, specifically, the assessment and weight as evidence.

Keywords

Arbitration, experts, party-appointed experts, evidence

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I. Introduction

Arbitrators need facts and the law to perform their decision-making duties. Arbitrators primarily establish facts using documents and witness evidence.[1] Although experts are frequently used to understand facts and enable arbitrators to understand them in a broader sense, they can also provide evidence that helps establish a case's facts. This is particularly true if the issues in the dispute are related to scientific, technical or complex legal knowledge.[2]

A significant part of disputes encountered in international commercial and investment arbitration[3] includes facts that require specific knowledge.[4] If arbitrators want to assess facts to apply the corresponding legal rules properly, for instance, the opinion of an architect and engineer in a construction dispute or an accountant in a financial dispute is almost inevitable, unless the arbitrator has the required knowledge of the relevant subject.[5]

As statistics show, a significant portion of arbitrators across the globe are lawyers[6] with extensive knowledge in one or more industries.[7] Nevertheless, this knowledge rarely goes beyond a general understanding of industry-related issues.[8] Thus, at this stage, arbitrators must use experts' opinions as a report while resolving the issues

1 KJT Wach and T Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht' in Walter Eberl (ed), *Beweis im Schiedsverfahren* (1., Nomos 2015) 91.

2 M. Mosk, Richard. 'The Role of Facts in International Dispute Resolution (Volume 304)'. In Collected Courses of the Hague Academy of International Law, 41.

3 This argument is not exclusive for arbitration, but could be made for other international court and tribunals, too.

4 Gary B Born, *International Commercial Arbitration* (Kluwer Law International 2021) 2448.; Nigel Blackaby and others, *Redfern & Hunter On International Arbitration* (6th edition, Oxford University Press 2015), para. 6.135.; Wach and Petsch (n 1) 92.; Roman Mikhailovich Khodykin and Carol Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press 2019) 281.; Caroline Elisabeth Proske, *Expert witness conferencing in Schiedsverfahren* (Mohr Siebeck 2019) 1 <https://www.mohrsiebeck.com/10.1628/978-3-16-158274-5> accessed 25 October 2022.; Süheyla Balkar, *Milletlerarası Ticari Tahkim ve Etik* (1., On İki Levha Yayıncılık 2022) 165.

5 Blackaby and others (n 4), para. 6.133.; Rolf Arno Schütze, Dieter Tscherning, and Walter Wais, *Handbuch Des Schiedsverfahrens: Praxis Der Deutschen Und Internationalen Schiedsgerichtsbarkeit* (2., de Gruyter 1990) 222.; Mohamed S Abdel Wahab, 'Party-Appointed Experts in International Commercial Arbitration: A Necessity or a Nuisance?' in Franco Ferrari and Friedrich Jakob Rosenfeld (eds), *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues* (Kluwer Law International 2022) 181.; Steffen Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit* (Schriften zum Prozessrecht, Duncker & Humblot 2003) 189.; Proske (n 4) 1.; Süha Tanrıver, *Hukukumuzda Bilirkişilik* (Yetkin Yayınları 2017) 23.

6 In the construction industry, engineers and architects who have appropriate arbitral practice training, are also being appointed as arbitrators.

7 Blackaby and others (n 4), para. 6.135.; Energy, construction, environment and intellectual property are popular industries where arbitrators are expected to have knowledge of basic themes.; ICC, ICC Arbitration and ADR Commission Report Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, 19, para 5.8 https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf accessed 15 May 2022; Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Second edition, Informa law from Routledge 2019) 174.; Abdel Wahab (n 5) 183.; Andreas Reiner and Christian Aschauer, 'ICC Rules' in Rolf Arno Schütze (ed), *Institutional Arbitration: Article-by-Article Commentary* (C. H. Beck, Hart, Nomos 2013) 135.; Knoblach (n 5) 48–49.

8 Musa Aygül, *Milletlerarası Ticarî Tahkimde Tahkim Usûlüne Uygulanacak Hukuk ve Deliller* (2., On İki Levha Yayıncılık 2014) 264.; Roman Mikhailovich Khodykin and Carol Mulcahy, 'Commentary on the IBA Rules on Evidence, Article 5 [Party-Appointed Experts]', *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press 2019) 281.

in the case and rendering their decisions.[9] The expert assists the arbitral tribunal in adjudication and influences the proceedings and outcome.[10] Therefore, choosing an expert is deemed the second most crucial aspect of proceedings by some scholars.[11]

Similar to litigation, in international commercial and investment arbitration, experts are appointed by the arbitral tribunal ex officio, upon request, or by parties. Currently, in international arbitration proceedings, experts are involved heavily in arbitrations, and there is a tendency to rely more on party-appointed experts.[12]

In 90% of arbitrations, parties appoint experts and in 10% of arbitrations, the arbitral tribunal.[13] In particular, the expert adduced by the parties creates some problems ("party-appointed experts").[14]

Where the parties appoint experts, the relevant party selects an expert who will strengthen their case.[15] There is a beneficial relationship because the party will

9 See Stephan Wilske and Christine Gack, 'Expert Evidence in International Commercial Arbitration' in Dennis Campbell and Anita Alibekova (eds), *The Comparative Law Yearbook of International Business*, vol 29 (Wolters Kluwer 2007) 88.; Proske (n 4) 1.; For the same view for quantum issues see Doug Jones, 'Redefining the Role and Value of Expert Evidence' (2021) 39 <https://dougjones.info/content/uploads/2021/12/DJ-ICC-Expert-Evidence-Post-Conference-Updated-Chapter.pdf>.; See NA Kyung Lee, 'Selecting the Expert Witness as an Arbitrator in Patent Arbitrations' (2016) 70 Dispute Resolution Journal Aygül (n 8) 270.

10 Wach and Petsch (n 1) 98.; O'Malley (n 7) 168.; Christian Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration' in Tobias Zuberbühler, Philipp Habegger and Christoph Müller (eds), *Swiss Rules of International Arbitration Commentary* (2., Schulthess 2013) 313.;Alexandra Weiss and Karin Bürgi Locatelli, 'Der Vom Schiedsgericht Bestellte Experte-Ein Überblick Aus Sicht Eines Internationalen Schiedsgerichts Mit Sitz in Der Schweiz' (2004) 22 ASA Bulletin 479, 499.; Aygül (n 8) 270.

11 Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Third Edition, Cambridge University Press 2017) 197.

12 Experts are involved in two-thirds of arbitrations. For statistical proof see '2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process' (Queen Mary University of London and White and Case 2012) <https://arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf> accessed 20 April 2022.; Güneş Ünüvar, "Experts: Investment Arbitration", Oxford, Max Planck Encyclopedia of International Procedural Law(MPEiPro), 2021, https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3502.013.3502/law-mpeipro-e3502#law-mpeipro-e3502-div1-8 ; O'Malley (n 7) 145.; Stephan Wilske and Lars Markert, *Beck'scher Online-Kommentar ZPO* (Volkert Vorwerk and Christian Wolf eds, 44., Beck-Online 2022), § 1049 para. 9-10.; Thomas H Webster and Michael W Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (5th edn, Sweet & Maxwell 2021) 445.; Thomas H Webster and Michael W Bühler, *Handbook of UNCITRAL Arbitration* (3rd edn, Sweet & Maxwell 2019) 421.; See for reasons ibid 449, para. 29-04.;Rolf Trittmann and Boris Kasolowsky, 'Taking Evidence in Arbitration Proceedings Between Common Law and Civil Law Traditions- The Development of a European Hybrid Standard for Arbitration Proceedings' (2008) 31 University of New South Wales Law Journal 330.; Doug Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', *Dubai Arbitration Week 2020* (2020) 2.; Proske (n 4) 26.

13 '2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process' (n 12) 29.; In another recent survey, %96 of respondents argued for a right to rely on party-appointed expert evidence in 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (BCLP 2021) 9 <https://www.bclplaw.com/en-US/events-insights-news/bclp-arbitration-survey-2021-expert-evidence-in-international-arbitration.html> accessed 11 December 2022. ("BCLP Survey"); For similar results see IBA Arbitration Guidelines and Rules Subcommittee, "Report on the Reception of the IBA Arbitration Soft Law Products, (International Bar Association, 2016), para. 45 https://res.cloudinary.com/lbresearch/image/upload/v1474620896/soft_law_products_report_238116_954.pdf accessed 11 January 2023.

14 See for critique Richard M. Mosk, 'The Role of Facts in International Dispute Resolution (Volume 304)', *Collected Courses of the Hague Academy of International Law* (Brill) 21.

15 The BLCP Survey shows that party-appointed expert is preferred in arbitration, since parties and their representatives know more about the dispute and are more comfortable selecting to select the appropriate expert to assist them and the tribunal on expertise required issues in 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 13) 17. The BLCP Survey was conducted with 289 international respondents where majority (75%) of respondents were from a common law background and 44% of respondents were experts from various fields; Knoblach (n 5) 280–281.

directly pay the expert. This situation likely causes experts to stick to their[16] opinions and, as argued by practitioners and scholars, engage in advocacy, which could lead to experts not being neutral or objective.

Blackaby et al. assert that "one of the most unsatisfactory features of procedure in international commercial arbitration is the prevailing practise whereby the parties present conflicting expert evidence on matters of complex technical opinion".[17] This leads to both parties' efforts being wasted, and the tribunal is placed in a difficult position, which in the end induces delays and high costs.[18]

In the UNCITRAL Model Law, statutory laws of states, the ICSID Convention and Rules, UNCITRAL Arbitration Rules, the rules of many arbitral institutions, and binding provisions regulating the adduction of party-appointed experts are minimal.[19]

Soft law elements such as the Chartered Institute of Arbitrator's Protocol for the Use of Party-Appointed Experts Witnesses in International Arbitration ("CIArb Protocol") and the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") merit special attention for their detailed rules on party-appointed experts, which are important and widely used in international arbitration. [20] Thus, it is left to the tribunal and the parties to determine how the party-appointed expert evidence will be handled.[21]

In this regard, some non-binding rules and methods have been proposed to address flaws related to experts. For example, the experts join to prepare a joint opinion instead of a unilateral written report by each expert [22] or expert conferencing[22].

Party-appointed experts are deemed crucial to arbitration proceedings and cannot be ostracised.[23] There must be coherence in practise governing different aspects of expert use or clarity in the rules and practises to be followed in this respect.[24]

16 For readability purposes, the male form (he-his) for persons will be used in this article.

17 Blackaby et al., *Redfern and Hunter on International Arbitration*, para. 6.138.; See also Aygül (n 8) 269.

18 Knoblach (n 5) 282.

19 Nigel Blackaby and Alex Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration' (2016) 31 ICSID Review 655, 656; Patocchi, Paolo Michele and T Niedermaier, 'UNCITRAL Rules' in Rolf A Schütze (ed), *Institutional Arbitration: A Commentary* (Bloomsbury Publishing 2013) 1183, fn. 529.; Maurice Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 945.; Abdel Wahab (n 5) 191.; Sebastiano Nessi, 'Expert Witness: Role and Independence' in Christoph Müller, Sebastien Besson and Antonio Rigozzi (eds), *New Developments in International Arbitration 2016* (Schulthess Juristische Medien AG 2016) 101..; Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 24.; Aygül (n 8) 270.

20 Only 35% of practitioners believe that the IBA Rules provide sufficient protection against party-appointed experts not being objective, in 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 13) 9.

21 Aygül (n 8) 270.

22 Proske (n 4).

23 Nessi (n 19) 72.

24 Laurence Boisson de Chazournes and others, 'The Expert in the International Adjudicative Process: Introduction to the Special Issue' (2018) 9 Journal of International Dispute Settlement 339, 339.

A common framework that predictably regulates the roles and responsibilities of party-appointed experts is needed.[25] Due to the problems described above, the focus is to improve and strengthen the effective use of party-appointed experts through rules and methods. The primary aim is to ensure the neutrality and objectivity of party-appointed experts and cost efficiency in proceedings.[26]

To achieve these aims, the tribunal should establish a comprehensive procedure for obtaining expert opinion at an early stage in cooperation with the parties. After this stage, a concurrent examination of the party-appointed experts may be essential to test the expert opinion.

II. Experts in International Arbitration

A. Overview

The civil and common law divide appears in the use of experts in international arbitration.[27] There are observable differences in expert use, depending on the tradition. There may even be various usages within the tradition.[28]

International commercial and investment arbitration is a melting pot where different legal traditions collide and merge to a certain degree.[29] As a result, tribunal and party-appointed experts are included in the UNCITRAL Model Law, international agreements, arbitration rules and guidelines.[30]

Stakeholders in international arbitration found party-appointed experts to be more effective (%43), while slightly fewer found tribunal-appointed experts to be more effective (%31).[31] In support of the former, some argue that tribunal-appointed experts are exceptional in ICC Arbitration practise.[32]

25 Güneş Ünüvar, 'Experts: Investment Arbitration' [2021] Max Planck Encyclopedias of International Law <http://opil.ouplaw.com>, para. 57.; Nessi (n 19) 72.

26 Wach and Petsch (n 1), 92.; Nessi (n 19), 101.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12), 4.

27 Wilske and Gack (n 9) 77.; Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure' (2003) 36 Vanderbilt Journal of Transnational Law Vanderbilt Journal of Transnational Law 1313, 1330. ; C Mark Baker and Lucy Greenwood, 'In Search of an Exemplary International Construction Arbitration' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, vol 6 (Brill | Nijhoff 2013) 181.; Bernard Hanotiau, 'The Conduct of the Hearings' in LW Newman and RD Hill (eds), *Leading Arbitrators' Guide to International Arbitration* (Third, Juris Publishing, Incorporated 2014) 636.; LW Newman and RJ Klieman, *Take the Witness: The Experts Speak on Cross Examination* (Juris Pub 2006) 55.; Jörg Risse and Heiko Haller, 'Die „IBA-Regeln" Zur Beweisaufnahme in Der Internationalen Schiedsgerichtsbarkeit' in Walter Eberl (ed), *Beweis im Schiedsverfahren* (1., Nomos 2015) 118.; Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 554.; İnan Uluç, *Evidence-Taking in National and International Arbitration: The Reconciliation of Civil Law and Common Law Traditions* (Yetkin Yayınları 2021) 25.

28 For details of court practices of court and party-appointed experts in various countries see Proske (n 4) 13–25.; Aygül (n 8) 265.

29 Wilske and Gack (n 9) 81.; Vera Van Houtte, 'Party-Appointed Experts and Tribunal-Appointed Experts' in Stephen R Bond (ed), *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI* October 15, 2004 (Bruylant 2004).; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 1.; Knoblach (n 5) 45.

30 Proske (n 4) 25.; Aygül (n 8) 271.

31 '2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process' (n 12) 29.

32 István Varga, *Beweiserhebung in Transatlantischen Schiedsverfahren: Eine Suche Nach Kompromissen Zwischen*

Regardless of who appoints experts, experts can also be categorised based on the subject matter they are expertise in. Experts are mainly technical (scientific), legal, and quantum (valuation) experts.

The general function of each expert is to provide a well-reasoned, neutral, and objective opinion.[33] Each expert clarifies disputed or dispute-related issues that impact the material outcome of the case. Thus, they support tribunals in decision-making processes.[34]

B. Definition and Qualifications of Experts

An expert refers to "one with the special skill or knowledge representing mastery of a particular subject"[35] or "a person with special knowledge, skill or training in something."[36] In legal terminology, an expert is "a person with knowledge and skills who has learned over years of experience in a subject. Their opinions can be helpful in problem solving."[37]

Thus, an expert differentiates herself from a non-expert with a high level of special knowledge, skills, training, or experience in a particular subject or activity. Experts are qualified, objective, neutral and reputable individuals or organisations with exceptional knowledge of facts or experience[38] that falls within their expertise, who can be consulted to resolve disputes before a court or tribunal.[39]

In the international arbitration context, an expert gives an opinion on specific matters in a dispute to assist the arbitrators in solving the dispute.[40] Experts explain special situations that the arbitrators cannot thoroughly derive from the case.

Suppose the tribunal plans to appoint an expert before officially appointing the expert and assigning it to his/her task. In that case, the expert should submit

Deutscher Und US-Amerikanischer Beweisrechtstradition (Nomos 2006) 212.

33 Laurence Boisson de Chazournes and others, 'One Size Does Not Fit All-Uses of Experts before International Courts and Tribunals: An Insight into the Practice' (2018) 9 Journal of International Dispute Settlement 477, 492.

34 Wach and Petsch (n 1) 95.; O'Malley (n 7) 171.; Abdel Wahab (n 5) 182.; Knoblach (n 5) 265.

35 Merriam-Webster.com Dictionary, "expert," https://www.merriam-webster.com/dictionary/expert accessed 3 July 2022.

36 Oxford Learner's Dictionaries, "expert", https://www.oxfordlearnersdictionaries.com/definition/english/expert_1 accessed 3 July 2022.

37 The Law Dictionary, "expert", https://thelawdictionary.org/expert/ accessed 3 July 2022.; Aygül (n 8) 264.

38 See Donald Francis Donovan and others, 'Reconsidering the Role of Legal Experts as a Means to Greater Arbitral Efficiency' in Julie Bédard and Patrick W Pearsall (eds), *Reflections on International Arbitration: Essays in Honour of Professor George Bermann* (JURIS 2022) 303.

39 Isabelle Van Damme, 'The Assessment of Expert Evidence in International Adjudication' (2018) 9 Journal of International Dispute Settlement 401, 402.in particular in the settlement of disputes before the Court of Justice of the European Union (CJEU; M Mosk, 'Collected Courses of the Hague Academy of International Law The Role of Facts in International Dispute Resolution (Volume 304)' 126.

40 O'Malley (n 7) 145.

a curriculum vitae indicating qualifications and proving that she has the required expertise to fulfil the assigned duty.[41]

In addition to expertise, the expert must be unbiased and submit a declaration to the arbitral tribunal before the appointment.[42] This declaration must indicate any conflict of interest concerning the parties, their attorneys, advisers and the tribunal and disclose any existing facts or circumstances that may give rise to doubts about his impartiality.[43]

The independence and impartiality requirement of a tribunal-appointed expert should be understood strictly in contrast to a party-appointed expert. The expert can be challenged, and the appointment is terminated if there are justifiable doubts that the expert lacks those qualifications.[44]

Independence is a prerequisite for a neutral tribunal-appointed expert opinion. Impartiality, on the other hand, serves as objectivity. Without explicit provisions in arbitration laws or rules, both conditions are indispensable for a tribunal-appointed expert.[45]

C. Functions of Experts

Experts are primarily appointed to clarify disputed issues that have a material impact on the outcome. The arbitrators are not able to perform this task because they generally need more unique and technical knowledge in the decision-making process.[46]

Suppose the arbitrator can access the required knowledge to decide on the matter. In such cases, an expert may not be necessary, provided the parties have been given a fair opportunity to address the issues on which the arbitral tribunal relies.[47] This

41 Tobias Zuberbühler and others, *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration* (2., Schulthess 2022) 161.

42 Abdel Wahab (n 5) 190.; Makane Moïse Mbengue and Rukmini Das, 'Rules Governing the Use of Experts in International Disputes' (2018) 17 Law and Practice of International Courts and Tribunals 415, 434.;; Gillian M White, *The Use of Experts by International Tribunals* (Syracuse University Press 1965) 183.; Patocchi, Paolo Michele and Niedermaier (n 19) 1184.; Nessi (n 19) 74.; Jonathan W Lim, 'Tribunal-Appointed Experts in International Arbitration' in Franco Ferrari and Friedrich Jakob Rosenfeld (eds), *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues* (Kluwer Law International 2022) 212, 221.; Webster and Bühler, *Handbook of UNCITRAL Arbitration* (n 12) 450.;

43 Zuberbühler and others (n 42) 162.; Born (n 4) 2035.; Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (John Savage and Philippe Fouchard eds, Kluwer Law International 1999) 579.; Stavroula Angoura, *The Impartiality and Independence of Arbitrators in International Commercial Arbitration* (Nomos 2022) 121.

44 Wach and Petsch (n 1) 101.; O'Malley (n 7) 181–182.; Knoblach (n 5) 271-272.

45 Lim (n 43) 221.

46 Wach and Petsch (n 1) 95.; O'Malley (n 7) 171.; Abdel Wahab (n 5) 182.; White (n 43) 165.; Gideon E Kamya-Lukoda, 'Role of Expert Witnesses in Construction Arbitration: Delay and Disruption and Quantum Issues' in Renato Nazzini and Anthony J Morgan (eds), *Transnational construction arbitration: key themes in the resolution of construction disputes* / (Informa Law from Routledge 2018) 79.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 1.; Proske (n 4) 3.; Aygül (n 8) 270.

47 Wach and Petsch (n 1) 95.; *O'Malley* argues that even if an arbitrator is an expert in a field relating to the dispute, since

should be differentiated if the specific arbitrator was chosen intentionally as an expert on a subject, e.g., construction engineering.[48]

The expert will assist the tribunal in making an appropriate legal decision.[49] Because critical issues will be exposed and analysed by experts, their presence in the process potentially increases the parties' trust in the arbitration process and their compliance with the final award. In addition, experts may assist the tribunal in identifying the appropriate sources, offer additional support for a factual assertion, provide opinions on the conflicting legal rules and evidence and help the tribunal in selecting the appropriate facts or evidence.[50] Tribunal-appointed experts may evaluate and summarise the opinions of party-appointed experts and add further interpretations for the tribunal.[51] Furthermore, the expert can be the source of the facts if the expert observes, assesses and organises the facts after an inspection of sight, data or materials.[52]

The expert can be relied upon to support the validity and general acceptance of using a specific (scientific) method and the results of its application to the facts in the case.[53]

Despite the practical differences, there is overall consensus on the principle that the general function of experts is to provide well-reasoned and objective opinions.[54]

the role of the arbitrator is evaluating the evidence and not producing it, he/she cannot act as an expert itself, see for details O'Malley (n 7) 175–176.; See Similarily Ulrich Theune, 'DIS Rules' in Rolf Arno Schütze (ed), *Institutional Arbitration: Article-by-Article Commentary* (CH Beck, Hart Publishing, Nomos 2013) 266.; The ICC Commission on Arbitration and ADR foresees in its report on "Resolving Climate Change Related Disputes through Arbitration and ADR" that, any technical knowledge or understanding by a non-lawyer arbitrator who is an expert in other scientific or technical fields, would nevertheless need to be provided to the parties for comment on the relevant matter, before being applied in making any award or decision, see 'ICC Commission on Arbitration and ADR Report: Resolving Climate Change Related Disputes through Arbitration and ADR' (ICC 2019) ICC Commission on Arbitration and ADR 999 ENG 19–20.; Khodykin and Mulcahy (n 4) 290.; See ICC, 'ICC Arbitration Commission Report on Controlling Time and Costs in Arbitration' (ICC 2018) ICC Publication 861-2 20, para. 5.8.; Knoblach (n 5) 218.; See Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration* (Cambridge University Press 2013), para. 5-2.

48 Knoblach (n 5) 219.

49 Geoffrey Senogles, 'Some Views from the Crucible: The Perspective of an Expert Witness on the Adversarial Principle' (2018) 9 Journal of International Dispute Settlement 361, 363.

50 José E Alvarez, 'The Search for Objectivity: The Use of Experts in Philip Morris v Uruguay' (2018) 9 Journal of International Dispute Settlement 411, 418.; *White* opposes to this view and argues that the expert should not identify which facts are relevant and significant, nor assess and weigh them, see White (n 43) 165.

51 Van Damme (n 40) 402.in particular in the settlement of disputes before the Court of Justice of the European Union (CJEU; O'Malley (n 7) 174.

52 Van Damme (n 40) 402.in particular in the settlement of disputes before the Court of Justice of the European Union (CJEU; O'Malley (n 7) 186.; M. Mosk, Richard. 'The Role of Facts in International Dispute Resolution (Volume 304)'. In Collected Courses of the Hague Academy of International Law, 41.

53 Proske (n 4) 3.; Van Damme (n 40) 403.in particular in the settlement of disputes before the Court of Justice of the European Union (CJEU

54 de Chazournes and others (n 28) 492, 495.

D. Roles of Experts

When the tribunal appoints an expert, its primary role is to explain specific issues that are foreign to the tribunal and facilitate understanding by tribunal members (*evidentiary role*).

Some scholars argue that experts are also appointed to summarise (technical) evidence, present evidence in an understandable form and express comments on the claims (*advisory role*).[55] The function of this expert is to assist the tribunal in understanding complex facts or evidence.[56]

In any case, the experts' role should not be considered in isolation, but should always be relative to the overriding competence of the tribunal.[57] Arbitrators, counsel and experts generally believe that, regardless of whether the experts are acting on the party's instruction or the tribunal, the expert's duty is owed to the tribunal in both cases.[58] However, some believe that the party-appointed expert's additional role is to support the appointing party in its arguments.[59]

Experts should only present their professional opinions in cases. Accepting that the expert's conclusions are true is inappropriate. The tribunal will establish the facts based on the expert opinion and may even draw separate conclusions based on legitimate grounds.[60]

Therefore, the presence of an expert does not imply that the arbitrator will directly, without weighing and assessing the opinion, accept the opinions of experts and incorporate the opinion(s) into the award. This delegates its function as an adjudicator to an expert, which is prohibited in international arbitration.[61] The arbitrator will have

55 Michael E Schneider, 'Technical Experts in International Arbitration' (1993) 11 ASA Bulletin; Kluwer Law International 446, 450.; Dieter Hofmann and Oliver M Kunz, 'Commentary on the Swiss Rules, Article 27 [Tribunal-Appointed Experts]' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (2., Kluwer Law International 2018) 720–721.; O'Malley (n 7) 186.; Erik Schäfer and David B Wilson, 'Issues for Arbitrators to Consider Regarding Experts: An Updated Report of the ICC Commission on Arbitration and ADR' (ICC Commission on Arbitration and ADR 2021) 70.; James Flett, 'When Is an Expert Not an Expert?' (2018) 9 Journal of International Dispute Settlement 352, 355.;See also IBA Rules Art. 3(8) for review of documents requested for document production by an independent expert.

56 de Chazournes and others (n 34) 495.; Zuberbühler and others (n 42) 159.

57 White (n 43) 164.

58 Laurence Boisson de Chazournes, Makane Moise Mbengue, Rukmini Das, Guillaume Gros, One Size does not Fit All—Uses of Experts before International Courts and Tribunals: An Insight into the Practice, Journal of International Dispute Settlement, Volume 9, Issue 3, September 2018, 492, 495.

59 İbid.

60 Mohamed Bennouna, 'Experts before the International Court of Justice: What For?' (2018) 9 Journal of International Dispute Settlement 345, 345–346.

61 Blackaby et al., *Redfern and Hunter on International Arbitration*, para. 6.136.; Wach and Petsch (n 1) 97.; Tobias Zuberbühler and others, *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, (2., Schulthess 2022) 175. ; Oetiker (n 10) 312.; Schneider (n 56) 452.; White (n 43) 164.;
See Suez, Sociedad General De Aguas De Barcelona S.A. And Vivendi Universal S.A. V. Argentine Republic (ICSID Case No. ARB/03/19) Decision On Argentina's Application For Annulment, para. 306 https://www.italaw.com/sites/default/files/case-documents/italaw8783.pdf accessed 1 July 2022 :
"…endogenous factors amounted to a "significant" contribution within the meaning of Article 25(2)(b) and thus excluded the state of necessity defense. This, however, is a legal assessment on which neither of the economic expert reports could opine. In fact, if the Tribunal had looked for guidance on this legal question in any of the expert reports, it could have been

the final word on assessing the disputed issues and whether or not to rely on an expert's opinion.[62]

Unlike the tribunal-appointed expert, the party-appointed expert is appointed not only to present the position of the appointer but also sometimes to oppose the counterparty's expert opinion or even the opinion of the tribunal-appointed expert.[63] Some party-appointed experts may help to draft the pleadings of the case before the proceedings begin.[64]

The tribunal-appointed expert is an assistant/advisor to the tribunal and is sometimes critically called the "fourth arbitrator".[65] However, this does not mean that the expert will weigh the evidence and draw conclusions.[66]

If the parties have relied on experts and the tribunal needs to be convinced enough or needs consultation, it may appoint an expert to bridge the gap.[67] Although this is highly likely helpful for the tribunal in finally deciding on the case, it comes with the cost of a prolonged case outcome since the tribunal-appointed expert will need to read through the entire case file, which may include a room full of documents.[68] This approach has been used in practise.[69]

found to have committed the same annullable error that the Enron committee found, i.e., deference to an economic expert report where the tribunal should have made its own legal assessment of a requirement under international law."

62 Wach and Petsch (n 1) 97.

63 ibid 94–95.

64 Lew, Mistelis and Kröll (n 28) 578.; Kate Parlett, 'Parties' Engagement with Experts in International Litigation' (2018) 9 Journal of International Dispute Settlement 440, 441.; Aygül (n 8) 268.

65 Wach and Petsch (n 1) 96.; Oetiker (n 10) 313.; Wilske and Gack (n 9) 89.; for the perspective in International Law See Bennouna (n 61).; See Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya), Judgment [1985] ICJ Rep 192, 228, para 65; Mélida Hodgson and Melissa Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper' (2018) 9 Journal of International Dispute Settlement 453, 457.; Déirdre Dwyer, *The Judicial Assessment of Expert Evidence* (Cambridge University Press 2009) 195.

66 O'Malley (n 7) 170.

67 Blackaby and Wilbraham (n 19) 664.

68 See for critics ibid.

69 See Suez, *Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Award, 9 April 2015, para. 7–18 https://www.italaw.com/sites/default/files/case-documents/italaw4365.pdf accessed 9 April 2023; Perenco Ecuador Limited v Republic of Ecuador, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015, para. 585 ff. https://www.italaw.com/sites/default/files/case-documents/italaw6315.pdf accessed 27 March 2023 ; Abaclat and Others v Argentine Republic, ICSID Case No ARB/07/5, Procedural Order No 15, 20 November 2012, para. 11 ff. https://www.italaw.com/sites/default/files/case-documents/italaw1306_0.pdf accessed 1 April 2023; See for instance: "the expert evidence from both sides does not provide a sufficient degree of confidence as to the actual conditions in the Blocks. The Tribunal considers that there are too many gaps and conflicts between [the parties'] evidence on these key issues". (*Perenco Ecuador Limited v Ecuador*, Interim Decision on the Environmental Counterclaim, 2015, para. 581 ff.).

E. Legal Nature

The legal nature of a particular matter is essential because it determines the regime and consequences applicable to that subject. In international arbitration, there must be a common and settled understanding of the legal nature of experts.[70]

Depending on the legal background, the most significant views are that party-appointed experts can be classified as witnesses, judicial/adjudicatory assistants, expert evidence, party submission, or sui generis evidence. Although analogies can be drawn from domestic law and jurisprudence, expert evidence in international commercial arbitration can be classified as a means of evidence.[71]

The tribunal-appointed expert and its report are generally accepted as evidence.[72] The tribunal-appointed expert is neither a witness, since he will not testify on facts that were sensed with the organs, nor a fourth arbitrator who will participate in the deliberations and have a vote; he is an assistant to the tribunal[73], producing evidence and facilitating the understanding of specific matters beyond the knowledge of the arbitral tribunal.[74]

Similar to domestic law practises, the tribunal is not strictly bound by an expert's opinion and will freely appraise the opinion and may come to a different conclusion in the award.[75] The tribunal may partially or fully adopt the expert's findings if they align with the facts and evidence in the record, logic and legal rules.[76] For due process concerns, the tribunal, either rejecting the expert's conclusions or accepting them in the award, shall state the reasons for the decision.[77] Due to the nature of the case, significant weight is generally given in practise to tribunal-appointed experts, in contrast to party-appointed experts.[78]

Regarding party-appointed experts, the Art. 5(1) of the IBA Rules categorises those as a "means of evidence". This indicates that party-appointed experts are not mere submissions of parties[79] in international arbitration; they have their weight.[80]

70 Knoblach (n 5) 274.

71 Proske (n 4) 26.

72 Zuberbühler and others (n 39) 170.; Schäfer and Wilson (n 56) 75.

73 Proske (n 4) 14.

74 O'Malley (n 7) 167.; Lim (n 43) 212.; Oetiker (n 10) 314.; Commentators argue that the participation of the expert could raise important issues regarding the right to be heard and should be avoided, unless it is impossible to adapt the expert's findings properly and decide the dispute. See Schneider (n 56) 464.; Weiss and Bürgi Locatelli (n 10) 499.; Proske (n 4) 14.

75 Zuberbühler and others (n 39) 170.; See ICC Case No. 14079, Procedural Order May 2007, in ICC International Court of Arbitration Bulletin Vol. 25/Supplement (2014): 11; Oetiker (n 10) 313.

76 O'Malley (n 7) 199.

77 O'Malley (n 7) 200.; See ICC Case No. 12131 (2006) (Partial Award) in Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (n 12) 448.

78 O'Malley (n 7) 167.

79 Tanrıver, *Hukukumuzda Bilirkişilik* (n 5) 33.

80 Zuberbühler and others (n 42) 136.

Some Turkish scholars have also argued that although the party-appointed expert is an expert like the tribunal-appointed expert, this does not lead to the former sharing the exact legal nature as the latter in the sense of expert evidence, according to the Turkish Code of Civil Procedure ("HMK").[81] The latter view is based on the argument that a party-appointed expert has no duty to be independent and cannot be challenged.[82] Most Turkish scholars do not agree that a party-appointed expert's report is an evidence source.[83] Some Turkish scholars argue that party-appointed experts are a *type of sui generis* evidence (*takdiri delil*).[84] The main supporting argument of this view is that party-appointed experts are regulated within the sections of evidence in the HMK (Chapter 4 Section 7).[85]

Some German scholars argue that according to the German Code of Civil Procedure ("ZPO")[86], only tribunal-appointed experts can be categorised as expert evidence (*Sachverständigenbeweis*), and party-appointed experts cannot be categorised as the same under ZPO § 1049. The reason is that experts must be neutral and can be challenged.[87] Some scholars have stressed that the equality of arms principle might be violated if the party-appointed expert is accepted as expert evidence.[88]

The authors of the *Münchener Kommentar zur Zivilprozessordnung* stipulate that party-appointed experts are a means of *obtaining sui generis* expert evidence (*eine eigene Beweisform des Sachverständigenbeweises*).[89] *Knoblach* also argued that according to German arbitration provisions, a party-appointed expert cannot be classified as a party-appointed expert in court proceedings.[90] The author believes that party-appointed experts are a means of *sui generis* expert evidence.[91]

81 Code on Civil Procedure, Law No: 6100, Acceptance Date : 12.1.2011, Official Gazette 04.02.2011/27836.

82 Oğuz Atalay, 'Deliller (Tanık, Keşif, Bilirkişi, Uzman Görüşü)' in Hakan Pekcanıtez and others (eds), *Pekcanıtez Usul - Medenî Usûl Hukuku*, vol 15. (On İki Levha Yayıncılık 2021) 1959.; Tanrıver, *Hukukumuzda Bilirkişilik* (n 5) 33.; See for comprehensive views in Turkish law Hasan Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü (Özel Bilirkişi)* (Adalet Yayınevi 2021) 48–58.

83 Hakan Pekcanıtez, 'Özel Uzman (Bilirkişi) Görüşü ve Değerlendirilmesi', *Makaleler*, vol 2 (2016) 405.; Çiğdem Yazıcı-Tıktık, 'HMK m. 293'teki Uzman Görüşü Kurumu Ile Anglo-Sakson Hukuk Sistemindeki Uzman Tanık Kurumunun Karşılaştırılması' (2011) 7 Medeni Usul ve İcra İflas Hukuku Dergisi 79, 92.

84 Baki Kuru, *Medenî Usul Hukuku El Kitabı*, vol I (Yetkin Yayınları 2020) 822.; Selçuk Öztek, 'Bilirkişi Raporunun Hâkimi Bağlamaması', *Prof. Dr. Ejder Yılmaz'a Armağan*, vol 2 (2014) 1624–1625.; Ramazan Arslan and others, *Medenî Usul Hukuku* (7th edn, Yetkin Yayınları 2021) 494.

85 Öztek (n 85) 1624.; See for contrary position, Tanrıver, *Hukukumuzda Bilirkişilik* (n 5) 33.

86 Zivilprozessordnung (DE).

87 Wach and Petsch (n 1) 103, 109.; Knoblach (n 5) 277.; See for similar views, Martin Spitzer, 'Der Sachverständigenbeweis Im Österreichischen Zivilprozess' (2018) 131 Zeitschrift für Zivilprozess 25, 40.

88 Emel Hanağası, *Medeni Yargılama Hukukunda Silahların Eşitliği* (Yetkin Yayınları 2016) 422.; Especially if one party adduces multiple experts see Proske (n 4) 43.

89 Joachim Münch, *Münchener Kommentar Zur ZPO* (6., Beck-Online 2022), § 1049 para. 38, 39.; Ingo Saenger, 'ZPO §1049 Vom Schiedsgericht Bestellter Sachverständiger', *Zivilprozessordnung* (9., Beck-Online 2021), para. 5.

90 Knoblach (n 5) 276–77.

91 ibid 277.

Thus, as long as an expert opinion either establishes the facts or makes them clearer to understand, I consider party-appointed expert opinions as a means of evidence that the arbitrators will freely assess along with other evidence.[92] In case the party-appointed expert opinion is on legal issues, it can still be treated as evidence, but the arbitrators will have it easier to deny the points made in such an opinion than a scientific or technical expert's determination on matters.

F. Types of Experts

Experts can be categorised based on the appointing authority or the subject on which they will give an opinion. Based on the appointing authority, experts are either appointed/chosen by the parties or the arbitral tribunal appoints them. Based on the subject on which the expert will provide an opinion, they can be classified as technical (scientific), legal, and quantum (valuation) experts.

1. Based on the Appointing Authority

a. Party-Appointed Experts

A party-appointed expert is a person or organisation appointed by a party to report on specific issues as determined by the party.[93] As the definition indicates, this type of expert is an expert in the sense of the above definition (in Section 2 of Chapter 2); however, he or she is instructed and compensated by the party to the dispute. This distinguishes it from a tribunal-appointed expert and has other legal consequences. [94]

Parties in international arbitration practise generally desire complete control over expert evidence from selection until cross-examination of the expert. This is why the parties want to appoint experts.[95] Choosing an expert enables a party to put forward a case in which their expert opinion should be preferred to that of the counterparts.[96] This brings scepticism to their objectivity.[97] Party-appointed experts are often criticised for needing to be more objective, cherry-picking facts and information to ensure that they support the party appointing them.[98]

92 Ferhan Yıldızlı, *Uluslararası Tahkimde Zararın Değerlendirilmesi* (Ankara: Seçkin, 2020), 91.

93 Pekcanıtez (n 84) 397.; See for definitions in Turkish law, Elyıldırım (n 83) 30–31. Aygül (n 8) 271.; Schneider (n 56) 447.; Ekin Hacıbekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi* (On İki Levha Yayıncılık 2012) 124.

94 O'Malley (n 7) 145.; Atalay (n 83) 1958.

95 O'Malley (n 7) 145.

96 Bennouna (n 61) 346.

97 Abdel Wahab (n 5) 190.

98 Flett (n 56) 356.

b. Tribunal-Appointed Experts

A tribunal-appointed expert is a person or organisation appointed to report on specific issues. These particular issues should be explained the tribunal because the tribunal requires guidance due to a lack of expertise in deciding on a dispute.[99]

The tribunal-appointed expert is an independent and impartial natural or legal person engaged by the arbitral tribunal to act in the present case to clarify the missing knowledge that is needed for the tribunal to adjudicate the case and render an award.[100] The tribunal-appointed expert has expertise in one or more areas and is expected to inform the tribunal in those areas during proceedings.

Tribunal-appointed experts are seen more often in countries following civil law legal culture as part of the inquisitorial approach to establishing facts, which is overwhelmingly accepted by jurisdictions following this system.[101] The inquisitorial system primarily burdens the court or tribunal to engage in the fact-establishing process.[102] Therefore, civil law adjudicators tend to rely on experts appointed by courts or tribunals and give less weight to expert opinions provided by the parties.[103]

UNCITRAL Model Law Art. 26(1), EU-Vietnam Investment Protection Agreement ("EUVIPA") Chapter 3 Section A Art. 3.52[104], Turkish International Arbitration Law ("TIAL") Art. 12(A)[105], ICC Arbitration Rules Art. 25(2)[106], and IBA Rules Art. 6 and the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration Art. 6.1 ("Prague Rules") is an example of an explicit provision granting the tribunal the authority to appoint experts.

When analysing the above provisions that foresee the appointment of tribunal-appointed experts, two conditions enable (or even require) the tribunal to appoint an expert when there is a 1) specific technical issue and 2) the opinion of an expert is necessary to render a decision.[107] Both conditions must be present simultaneously, as

99 O'Malley (n 7) 169.; In an ICC case where the tribunal was composed of a lawyer with knowledge on Hungarian law, the tribunal rejected to appoint an expert on that matter, see Importer in the UK v Exporter in Hungary, Final Award, ICC Case No. 5418, 1987,', in Albert Jan Van Den Berg, *ICCA Yearbook Commercial Arbitration 1988*, vol XIII (ICCA & Kluwer Law International 1988) 102.

100 O'Malley (n 7) 165.; Aygül (n 8) 266. ; For the appropriateness for legal persons to act as an expert See Schneider (n 56) 456.

101 Aygül (n 8) 266.

102 Nessi (n 19) 74.

103 Khodykin and Mulcahy (n 4) 282.

104 "The Tribunal, at the request of a disputing party or, after consulting the disputing parties, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other matters raised by a disputing party in the proceedings."

105 "A) The arbitral tribunal may; 1. appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal"

106 "The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned."

107 Lim (n 43) 216.; Khodykin and Mulcahy (n 4) 285.; ICC (n 48), para. 62.; Schäfer and Wilson (n 56) 64.

the contrary approach would violate the tribunal's obligation to assess, evaluate and conclude its decision.[108]

Before appointing the expert, the tribunal should inform the parties explicitly of its intention to appoint an expert and consult them on the appropriate expert.[109] This would align with the international arbitration culture in which proceedings are planned and conducted with the participation and views of the parties discussed in case management conferences. The tribunal-appointed expert is appointed and trained by the arbitrators and is paid, in principle, by both parties under arbitration costs.[110]

2. Based on Subject Matter

Expert opinions can be submitted by parties or tribunal-appointed experts on various subjects. These subjects are technical (scientific) and legal and valuation (quantum) experts.[111]

According to a recent survey, financial/accounting experts were used most frequently (46%), followed by technical (35%) and industry-specific experts (17%), whereas legal experts were used less frequently (13%).[112] For instance, in *Bear Creek Mining Corporation v. Peru*, the claimant submitted a technical expert opinion on the technical review of the investor's projects in Peru and valuation experts for the damages claimed.[113]

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108 See Contractor (European Country), Contractor (Middle Eastern Country) v. Owner (Middle Eastern Country) (Final Award), ICC Case No. 4629, 1989 in Albert Jan Van Den Berg, *ICCA Yearbook Commercial Arbitration 1993*, vol XVIII (ICCA & Kluwer Law International 1993) 15.: "The arbitral tribunal 'may appoint one or more experts, define their Terms of Reference, receive their reports and/or hear them in person' (Art. 14(2) Rules of the ICC). The arbitrators are at liberty to decide whether such an appointment is necessary for the solution of the case. Such an expert may be useful or even necessary for technical questions. In the present situation, such utility is in no way established. On the contrary, the questions which are typically in the field of activity of an expert have already been covered by the [first expert's] report. This report describes the work done by the defendant party and is necessary for the determination of the payment claimed by the claimants. Other questions such as the ones quoted by respondent are to be resolved by the arbitrators. Moreover, it is their duty to interpret the contractual documents and evidences filed by the parties. Appointing a second expert would lead to a replacement of the arbitrators by an expert. Therefore, independently from the question of the cost of an expertise, the request of respondent is to be dismissed."

109 O'Malley (n 7) 166–167.; In practice, some tribunals engaged an unofficial or behind-the-scenes expert, described as *phantom expert*. This is a problematic approach, because of procedural fairness and the probable delegation of adjudication authority. For an internal advisor, explicit consent should be required. See Reiner and Aschauer (n 7) 136.; Parlett (n 65) 445.; Brendan Plant, 'Expert Evidence and the Challenge of Procedural Reform in International Dispute Settlement' (2018) 9 Journal of International Dispute Settlement 464, 470.; 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 13) 4.; Patocchi, Paolo Michele and Niedermaier (n 19) 1182.

110 Zuberbühler and others (n 42) 171.; Gino Lörcher, 'Der Vom Schiedsgericht Bestellte Sachverständige Im Verfahren' in Robert Briner and others (eds), *Law of International Business and Dispute Settlement in the 2Ist Century* (Carl Heymanns) 487.; Wilske and Markert (n 12), para. 2.1.
The tribunal might rule according to the applicable law to the arbitration procedure, that the losing party shall bear, among other, the expert costs. In arbitration proceedings, the arbitral tribunal according concludes a work contract with the expert on behalf and with the power of attorney of the parties, so that the fee claim is directed against the parties.

111 Born (n 4) 2449.; Hodgson and Stewart (n 66) 454.; O'Malley (n 7) 145.

112 '2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process' (n 12) 29.

113 See *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 608 ff. https://www.italaw.com/cases/2848 accessed 25 May 2022.

a. Technical (Scientific) Experts

Technical expertise is often required as a substantive area relevant to a case that is usually outside the competence of the tribunal, such as software, construction, oil and gas, mining, intellectual property, and the environment.[114] In addition, experts may be employed for planning/delay analysis, information regarding market practise, technology, and forensic analysis of evidence such as handwriting, photographs, or other data.[115]

When deciding on a legal dispute between parties, the tribunal must engage in scientific fact-finding if the case calls for it.[116] For instance, if a host state in an investor-state dispute argues that it declined to renew the investor's licence to operate because the investor harmed the environment, the case has to be proved by one or more scientists who specialise in chemistry or biology.[117] The unexplained failure to present scientific evidence can lead to adverse inferences.[118]

Technical (scientific) experts are the least problematic in terms of their value to the tribunal and the potential for a biassed opinion. Their opinion has to rely on some objective facts, defined best practises or industry standards that make their view objectively testable.[119]

b. Legal Experts

One would naturally expect that there is no need for legal experts in proceedings because arbitrators as adjudicators[120] and legal counsel of the parties would already have extensive knowledge on matters of law.[121] Acting as legal (tribunal-appointed) experts can be forbidden with a statutory provision in some countries like Türkiye.[122] However, in international arbitration and even sometimes domestic litigation, the a legal expert can be required, [123] especially if there is a foreign (domestic) law issue with which the arbitrators are unfamiliar.[123]

114 Blackaby and Wilbraham (n 19) 661.; Hodgson and Stewart (n 66) 455.; Mosk (n 40) 128.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 2.; Spitzer (n 88) 28.

115 Harris Bor, 'Expert Evidence' in Julian DM Lew, Harris Bor and et al. (eds), *Arbitration in England with chapters on Scotland and Ireland* (Kluwer Law International 2013) 503.; Mosk (n 14) 75.; Kamya-Lukoda (n 47) 82.

116 Joan E Donoghue, 'Expert Scientific Evidence in a Broader Context' (2018) 9 Journal of International Dispute Settlement 379, 382.

117 See *Methanex Corporation v United States of America*, ad hoc UNCITRAL Tribunal under NAFTA Ch 11, Final Award on Jurisdiction and Merits, 3 August 2005, www.italaw.com accessed 23 May 2022.; See Chemtura Corporation v Government of Canada, ad hoc UNCITRAL Tribunal under NAFTA Ch 11, Award, 2 August 2010, www.italaw.com accessed 23 May 2022.

118 Donoghue (n 116) 385.; O'Malley (n 7) 159.

119 Hodgson and Stewart (n 66) 455.

120 Ünüvar (n 26), para. 56.

121 Spitzer (n 88) 28.; See *VM Solar Jerez GmbH, M Solar Verwaltungs GmbH, Solarizz Holding Verwaltungs-GmbH, M Solar GmbH & Co. KG, Solarizz Holding GmbH & Co. KG and Helmut Vorndran v. Kingdom of Spain*, ICSID Case No. ARB/19/30, Decision on the Proposal to Disqualify All Members of the Tribunal, 18.10.2022, para. 23https://www.italaw.com/cases/8416 accessed 6 April 2023.

122 Despite seen in present court practice, the Turkish Civil Procedural Code (HMK) Art. 266(1) and Turkish Law on Experts (No. 6754) Art. 10(4) prohibits lawyers to be (court-appointed) experts. See for details Elyıldırım (n 83) 113–115.

123 O'Malley (n 7) 174.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 2.

The legal expert will help the tribunal assess the missing legal knowledge.[124] Legal experts present a particular challenge to arbitration tribunals because their opinions are closely intertwined with advocacy. Legal experts typically provide opinions on domestic and international law.

i. International Law

Arbitrators in international investment disputes are expected to be the foremost experts in international law and investment law.[125] In investment law, submitting a report from a party-appointed expert whose expertise is on international law is not plausible; since the expert presents views on points of law; instead, it would make sense to retain the expert as a co-counsel.[126]

A well-established tribunal will hardly be impressed if the relevant person is appointed as an expert and will know how to weigh the statements. Nevertheless, international legal experts should not be excluded in advance. However, less weight could be attributed to them by the arbitral tribunal if it did not consider them to be relevant.[127]

However, international law experts are frequently used in international investment law disputes. For instance, in the famous *Yukos v Russia* case, among others, the provisional application of the Energy Charter Treaty ("ECT"), possibly concerning the jurisdiction of the arbitral tribunal vis-à-vis cases lodged against Russia, was an issue for which an expert opinion was submitted.[128] As another example, in *Phillip Morris v. Uruguay,*[129] international law experts provided an opinion on the meaning of international intellectual property law, the interpretation of fair and equitable treatment, arbitrary treatment, and the requisites and burdens of proof applicable to denials of justice under customary international law.[130]

According to the principle of *the iura novi arbiter,* the arbitrator must exhaust all knowledge sources when determining the law's content. If the arbitrator cannot access the relevant information despite every effort, he or she shall use a legal expert. This is natural because the arbitrator should try to render an award that is safe to annul and subject to enforcement.[131]

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124 Wach and Petsch (n 1) 96.; Rolf Arno Schütze, *Das Internationale Zivilprozessrecht in Der ZPO: Kommentar* (2., De Gruyter 2011) 70–71.

125 Hodgson and Stewart (n 66) 455.

126 Blackaby and Wilbraham (n 17) 655, 661.

127 Dana H Freyer, LW Newman and RD Hill, 'Assessing Expert Evidence', *The Leading Arbitrators' Guide to International Arbitration* (2., Juris 2008) 441. Almost all respondents (%93) in the BCLP Survey share this viewsee 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 13) 9.

128 *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, para. 47 https://www.italaw.com/cases/1175 accessed 8 July 2022.

129 Alvarez (n 51) 414–418.

130 Alvarez (n 42) 418; Ünüvar (n 26), para. 53.

131 Centner (n 123) 112.; It is even possible that eight legal experts do not suffice to determine the applicable legal rules

ii. Foreign (Domestic) Law

Although arbitrators should also be appointed based on their knowledge of the relevant domestic law, legal experts are more often employed to present opinions on the application of domestic law.[132] Some have pointed to the particular circumstance of investment arbitration for the need to understand procedural and substantive areas of domestic law in jurisdictions unfamiliar to the arbitrators to account for the practise of resorting to legal experts.[133]

It is expected that the tribunal, or at least one of the members appointed by the parties or the court, has an extended knowledge of the law applicable to the dispute's merits. However, given the nature of complex multi-party arbitrations in practise, it is highly likely that arbitral tribunal members will need assistance in understanding specific provisions of foreign law that they need to become more familiar with.[134]

Additionally, if an amended legal provision has been so far back that it is difficult for the arbitrator to have a firm understanding of the issue, then a legal expert may be useful.[135] In such cases, legal experts can be appointed by the tribunal, or the parties can rely on party-appointed experts. [136]

In English courts, attorneys establish applicable foreign law by reference to expert evidence.[137] The Singapore International Commercial Court Practice Directions also allow the use of foreign law experts.[138]

Generally speaking, in countries following the civil law approach, courts have considerable authority to apply foreign law and determine its content.[139] In international arbitration, the responsibility for determining foreign law is generally divided between the parties to the plea and the tribunal. However, a different approach can be adopted in each case, depending on the counsel and the arbitrators. For instance, in Yukos v Russia, legal expert opinions were submitted on the constitutional legal aspects of the conclusion and application of the international treaties of Russia and the arbitrability

see II ZR 49/90 21.01.1991, Bundesgerichtshof, 2nd Civil Law Chamber https://research.wolterskluwer-online.de/document/02ca3283-2688-4f23-9628-77d13378047d accessed 30.12.2022.

132 Blackaby and Wilbraham (n 17) 661.; John Townsend, 'Expert or Advocate? How to Present Foreign Law' in Julie Bédard and Patrick W Pearsall (eds), *Reflections on International Arbitration: Essays in Honour of Professor George Bermann* (JURIS 2022) 192-193.

133 Blackaby and Wilbraham (n 17) 660.

134 Khodykin and Mulcahy (n 4) 287.

135 Centner (n 123) 98.

136 Rolf Arno Schütze, 'Der Beweis Des Anwendbaren Rechts Im Schiedsverfahren Und Die Feststellung Seines Inhalts' in Walter Eberl (ed), *Beweis im Schiedsverfahren* (1., Nomos 2015) 154.

137 Khodykin and Mulcahy (n 4) 287.

138 Singapore International Commercial Court Practice Directions, Rule 26 (2)https://www.judiciary.gov.sg/docs/default-source/amendments-docs/2022/sicc-pd_2022_v1.pdf?sfvrsn=4d986e38_2 accessed 11 December 2022.

139 See International Law Asociation Committe on International Commercial Arbitration, 'Ascertaining the Contents of the Applicable Law in International Commercial Arbitration' (2008) V Revista Brasileira de Arbitragem 163.

of taxation-related issues under Russian law.[140] Similarly, in *Joshua Dean Nelson v. The United Mexican State,* the disputing parties adduced expert reports concerning Mexican and U.S. civil and administrative law, specifically concerning corporations and bankruptcy law.[141] In a mining dispute filed against Peru, multiple expert opinions were acquired from both the claimant investor and the respondent host state. The opinions were related to Peruvian mining law provisions. Again, in *Phillip Morris v. Uruguay*, Uruguay law experts expressed views about whether the implemented law allegedly deprived the investor, extended the police power to protect health, protected the use of trademarks, considered trademarks as property, or enabled contradictory decisions by national courts.[142]

Over-reliance on domestic law experts is dangerous because there might be multiple views on a domestic law issue.[143] Additionally, lawyers may often be poor experts because they can easily cross the line between being in the shoes of an expert and advocating for the appointing party.[144] In addition, there is always the opportunity to engage with local co-counsel, who are naturally expected to know and have the capacity to make arguments on local law.

The tribunal may not have to appoint a real person directly, but it can choose to acquire knowledge from a university or institution such as the Max-Planck Institute (MPI) for International and Comparative Law or the MPI for International Procedural Law.

For the appointment of a foreign law expert, the crucial point is that the tribunal shall not, in any case, delegate its adjudication duty and authority to the legal expert.[145]

c. Quantum (Valuation) Experts

After a tribunal concludes that one or more parties are liable for damages but cannot calculate the damages because it is not able to determine it based on the knowledge of its members, quantum experts can be consulted.[146] If the tribunal needs to evaluate

140 Ünüvar (n 20), para. 48.; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, para. 47 https://www.italaw.com/cases/1175 accessed 8 July 2022.

141 Joshua Dean Nelson and Jorge Blanco v. United Mexican States, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020, para. 165. https://www.italaw.com/sites/default/files/case-documents/italaw11557_0.pdf accessed 9 July 2022.

142 Alvarez (n 51) 418.; Ünüvar (n 20), para. 53.; O'Malley (n 6) 173.

143 Hodgson and Stewart (n 66) 455.; Khodykin and Mulcahy (n 4) 287.

144 Blackaby and Wilbraham (n 17) 661.

145 Oetiker (n 10) 313.

146 Joshua B Simmons, 'Valuation in Investor-State Arbitration: Toward A More Exact Science' (2012) 30 Berkeley Journal of International Law 196, 208.; White (n 43) 128.
In investor-state arbitrations, generally, if the investor prevails partially or fully in its claims, damages are awarded. An UNCTAD study reviewing cases concluded in 2014 found that only 2% of cases concluded that year found a breach, but did not award damages to the investor. UNCTAD, 'UNCTAD IIA Issues Note' (UNCTAD 2015) 1 8 <https://unctad.org/system/files/official-document/webdiaepcb2015d1_en.pdf>. Similar statistics were found for cases concluded in 2015, see UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2015' (UNCTAD 2015) http://investmentpolicyhub.unctad.org/Upload/ISDS%20Issues%20Note%202016.pdf accessed 11 July 2022; Abdel Wahab (n 5) 183.

the value of a specific asset, set of goods or a company, quantum (valuation) experts are the types of experts that can be engaged by the tribunal or the parties. Quantum experts include cost engineers, accountants, and financial experts.

In some cases, it may be easily determinable for the tribunal, based on records, to calculate the claim of the claiming party. However, this is mostly not the case. How should an average arbitrator expect a melting furnace to explode in a facility, a fire surrounding and damaging a whole facility that becomes inoperable for months? Not only the price of the furnace but also the installation work, all damaged equipment, and financial losses due to inoperability must be calculated. In addition, when licences have been illegally ceased or the facilities of an investor projected to operate for decades in the relevant state have been expropriated, the expected income has to be calculated. Thus, the tribunal will need the opinions of one or more experts to award compensation.

The incapacity of fiscal skills of lawyers acting as arbitrators renders quantum experts the most visible expert category in arbitration[147]. Quantum experts are exptected to be a bridge for arbitral tribunals. However, practical application shows that crossing a bridge is challenging due to the availability of multiple calculation approaches and models for the same occasion.[148] For instance, the "income-based approach", which estimates the value of a business based on "discounted cash flow", the "market-based approach", which compares the subject of valuation to that of other similar businesses and the "assets-based approach" which is based on the idea that an asset is worth no more than it would cost to replace all its constituent parts.[149]

In particular, when it comes to investment arbitration, party-appointed quantum experts present the greatest challenge in increasingly high-stakes cases because they generally present widely divergent estimates of damages that tribunals struggle to understand and make use of. [150] Although there have been efforts to tackle these problems through collective[151] or individual efforts[152], arbitral tribunals have been criticised for decisions on damages or compensation that lack a sufficient explanation of how valuation was determined or the use of inconsistent methodologies in an effort

147 Ünüvar (n 20), para. 61.

148 Blackaby and Wilbraham (n 19) 661.; O'Malley (n 7) 173.; To overcome the challenges see Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 13–14.

149 Faruk Kerem Giray, *Milletlerarası Yatırım Tahkiminde Kamulaştırmadan Doğan Tazminat ve Tazminatın Hesaplanmasında Kullanılan Yöntemler* (2., Beta Basım 2013) 222 ff.; John A Trenor (ed), *The Guide to Damages in International Arbitration* (4., Law Business Research Ltd 2021) 164 ff.; Ferhan Yıldızlı, *Uluslararası Tahkimde Zararın Değerlendirilmesi* (Seçkin 2020) 122.

150 Blackaby and Wilbraham (n 19) 663.

151 The International Valuation Standards Council (IVSC), is a non-profit organisation dedicated to establishing and promoting global valuation standards. See International Valuation Standards at https://www.ivsc.org/.

152 See Faruk Kerem Giray, Milletlerarası Yatırım Tahkiminde Kamulaştırmadan Doğan Tazminat ve Tazminatın Hesaplanmasında Kullanılan Yöntemler, İstanbul, 2013, 229

to synthesise divergent expert valuations.[153] Such weaknesses in reasoning can lead to challenges to awards and, in some instances, to the annulment of damages awards.[154]

III. Problems Related to the Use of Party-Appointed Experts

The dominant use of party-appointed experts in international arbitration poses challenges. There are obvious concerns in practise as to their fair and efficient use.[155] Problems surrounding the use of party-appointed experts can be classified into two main categories: Bias and unregulated use of party-appointed experts.

A. Bias

The first category of the problem concerns the personality of the party-appointed expert, specifically, his potential to be biassed compared to the tribunal-appointed expert.[156]

It is unsurprising that the party-appointed expert was not completely independent. However, this lack of independence is a natural result when the nature of engagement is considered. Nevertheless, it is not the dependency itself that is creating the problems, but dependency affecting impartiality[158] in a way that leads to bias.[157]

The reality that experts are carefully chosen and paid for by the parties consciously or subconsciously impacts the framing of their view of supporting the party employing them. This does not mean that experts are directly or purposefully biassed. However, close engagement may influence them to adopt favourable positions or directions in the light of evidence for the benefit of the appointer.[158]

Bias can be especially present in the presence of full-time experts who have an interest in retaining them in future disputes. Bias is also a particular concern where the same counsel or parties consistently engage the same experts on related matters. A typical example of this is the constant appointment of the same expert by the same respondent state.[159]

153 *Simmons* rightly argues that "negative consequences of inaccurate and opaque valuations can extend to the entire arbitral system, beginning with lost confidence in awards and unreliable expectations about future cases." Simmons (n 147) 208.

154 Hodgson and Stewart (n 66) 456.; See e.g. *Venezuela Holdings, B.V. and others v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Annulment, 9 March 2017 https://www.italaw.com/sites/default/files/case-documents/italaw8536.pdf accessed 18 November 2022; *Occidental Petroleum Corporation and others v Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on Annulment, 2 November 2015 https://www.italaw.com/sites/default/files/case-documents/italaw4448.pdf accessed 18 November 2022.

155 Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 23.

156 Aygül (n 7) 270; Van Houtte (n 26) 136; Waincymer (n 17) 933; Klaus Sachs and Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence' (2011) 15 Arbitration Advocacy in Changing Times, ICCA Congress Series 135, 135.; Ziya Akıncı, 'Milletlerarası Tahkimde Bilirkişi', *Milletlerarası Tahkim Semineri 2010* 78.; Balkar (n 4) 167.

157 Balkar (n 4) 177; Catherine A Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 145.

158 Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 23.

159 ibid.

An experienced arbitral tribunal is the most important barrier to bias. [160] If there are serious signs recognised by the arbitral tribunal that hint at a partisan attitude of the party-appointed expert, the tribunal will not credit the expert's opinion and, although it would not exclude his opinion from the record, will deem it *de facto* inadmissible. [161]

B. Unregulated Use of Party-Appointed Experts

The second problem relates to the method by which party-appointed experts are adduced. There are no clear rules in practise besides the obvious soft law instruments (IBA Rules and CIArb Protocol). This leads mostly to an unregulated and hence unorganised use of party-appointed experts. Specifically, there are no rules on whom to appoint, how to appoint, and when to appoint. Most institutional rules contain only general provisions for obtaining evidence or establishing facts, leaving details to be determined by the tribunal and sometimes the parties.

This leads to a random flow that creates multiple issues. Appointing experts without being necessary at all or without the direction of the arbitral tribunal leads to unnecessary arbitration costs and delays in proceedings. For instance, if there are no clear rules on the engagement of experts, the party may not appoint an expert where it is required or, appoint an unrelated or unqualified expert. Additionally, without clear time limits, a party that had not considered engaging an expert may suddenly try to submit an opinion at a later phase in the proceedings, which delays the proceedings.

As the memorial style for written party submissions is generally practised in international arbitration, expert opinions are generally already submitted, which prevents them from having a common understanding of how to form the opinion and almost inevitably leads to conflicting experts.[162] Having "conflicting experts" is not the real problem, but the way the experts present diverse opinions is creating the issues. The experts will highly likely have produced opposing opinions relying on different facts, data and methodologies during the formation. In the end, the tribunal, which is already not familiar with the matters and is in need of clear guidance, will not be helped out.

Additionally, the absence of rules for the assessment of expert opinions can be problematic, at least for inexperienced arbitrators.

160 84% of respondents agreed that tribunals are 'generally capable of determining when a party appointed expert is not being objective in their testimony' (see 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 13) 14.

161 93% of respondents thought that 'a tribunal should give limited weight to the evidence of a party-appointed expert who breaches his/her duty to remain independent and assist the tribunal', see ibid.; Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last' (2008) 24 Arbitration International 137, 137.; Elena Samaras and Christof Strasser, 'Managing Party-Appointed Experts in International Arbitration--Analysis of the Current Framework and Best Practice Proposals-' (2013) 11 Zeitschrift für Schiedsverfahren 314, 314.

162 Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 34.

These challenges lead to prolonged proceedings, increased costs and reduced value for the expert's evidence.[163]

IV. Empirical proof of the Problems

For more than 17 years, The Queen Mary University School of International Arbitration, with the financial support of various legal firms such as White & Case, PriceWaterhouseCoopers (PwC) and Pinsent Masons, has conducted empirical studies that shed light on the developments, trends, and issues faced in international arbitration. [164] Reports from 2012, 2015, 2018, 2020, and 2021 indicate statistics regarding experts from which the need for development and change can be derived.

In the 2012 report, preferences were, in fact, more balanced: 43% found experts more effective when appointed by the parties, while 31% found tribunal-appointed experts more effective. Consistent with domestic litigation practise and culture[165], more civil lawyers (43%) than common lawyers (19%) found tribunal-appointed experts more effective. Those who preferred tribunal-appointed experts argued that party-appointed experts often act as partisan advocates for the party that appointed them, which regularly leads to the appointment of a third tribunal-appointed expert. According to them, a system in which an expert is appointed by the tribunal from the outset would bring about a more neutral expert opinion and save time and money.[166]

In the 2018 report, when asked whether arbitration rules should include standards of independence and impartiality of party-appointed experts, 69% respondents answered affirmatively, demonstrating a clear need.[167]

It is known in international arbitration that some figures are prominently known not only for their appointment as arbitrators but also for acting as counsel and experts, thus creating the phenomenon called "double hatting".[168] In the 2020 report, 57% of respondents indicated that arbitrators should be allowed to act as experts in other

163 Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last' (n 161) 137.; Samaras and Strasser (n 161) 314.

164 See Queen Mary University of London School of International Arbitration web page https://arbitration.qmul.ac.uk/research/

165 Süha Tanrıver, *Medenî Yargıda Bilirkişilik* (Yetkin Yayınları 2016) 32.

166 '2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process' (n 12) 29.

167 '2018 International Arbitration Survey: The Evolution of International Arbitration' (Queen Mary University of London and White and Case 2018) 33–34 <https://arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf> accessed 25 April 2022.

168 "Double hatting" is the practice of individuals switching roles as arbitrator, counsel and expert in different arbitral proceedings and as the common practice whereby "experienced practitioners who actively represent parties before arbitral tribunals serve as arbitrators in other cases." See for details Dennis H. Hranitzky, Eduardo Silva Romero, 'The 'Double Hat' Debate in International Arbitration' (2010) New York LJ).
See *Tethyan Copper Company v Islamic Republic of Pakistan* (ICSID Case No ARB/12/1); *SolEs Badojoz GmbH v Kingdom of Spain* (ICSID Case No ARB/15/38). The challenge was filed on 7 July 2017 and rejected on 5 September 2017.

Investor-State disputes.[169] Although more parties were in favour of the arbitration agreement, a substantial number of them potentially bear the fear that the small privileged arbitration community could influence each other.

In the 2021 report, when asked respondents as a party or counsel which procedural options they would leave out in order to have cheaper or faster proceedings, %13 selected to opt out for a party-appointed expert. This proves that party-appointed experts are still needed in international arbitration.

Some arbitrators adopted the view that party-appointed experts are sometimes used as 'hired guns', which they do not desire.[170] On the other hand, some counsel stated that a tribunal-appointed expert may also become a *de facto* fourth arbitrator, which, in their view, was undesired.[171]

V. Recommendations For the Use of Party-Appointed Experts

These critics of party-appointed experts are not restricted to international arbitration; they can also be observed in various domestic courts.[172] The IBA and the CIArb have developed comprehensive standards of conduct for party-appointed experts.[173] In addition, various recommendations have been proposed over the years for international commercial and investment arbitration and domestic litigation.[174]

A. Proactive Case Management

The tribunal has the primary responsibility and authority to determine and direct proceedings. Nevertheless, the parties' views and contributions are crucial for a flawless proceeding.

169 '2020 International Arbitration Survey:" Investor-State Dispute Settlement (ISDS)' (Queen Mary University of London and Corporate Counsel International Arbitration Group (CCIAG) 2020) 15 <https://arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf> accessed 21 April 2022.

170 Giovanni De Berti, 'Experts and Expert Witnesses in International Arbitration : Adviser , Advocate or Adjudicator?' in Nikolaus Pitkowitz and Alexandre Petsche (eds), *Austrian Yearbook on International Arbitration 2011*, vol 2011 (Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2011) 54.; Abdel Wahab (n 5) 191.; Waincymer (n 19) 933.; This argument is made especially for "professional experts" see Proske (n 4) 30.

171 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 12) 17.; '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' (Queen Mary University of London and White and Case 2021) 14 <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 20 April 2022.

172 For critics in Türkiye see Süha Tanrıver, 'Yasal Düzenleme ve Teorik Boyutuyla Bilirkişilik' (Lexpera 2022) <https://www.youtube.com/live/F_b6CuiIn1Q?feature=share&t=22667>.; For critics in the UK see Lord Woolf, " MR, *Access to Justice: Final Report to the Lord Chancellor of the Civil Justice System in England and Wales* (Final Report, 1996); Proske (n 4) 13-30.; Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 25–26.

173 Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 6.; Sachs and Schmidt-Ahrendts (n 22) 137.

174 See Fulya Teomete Yalabık, 'Questioning Expert Witnesses in Litigation and International Arbitration: How to Prevent Partisan Expert Reports and "Battle of Experts"' 16 Medeni Usul ve İcra İflas Hukuku Dergisi 133.

Jones proposes solutions in his "Party Appointed Experts Case Management Protocol" ("The Jones Protocol") to enhance the usefulness of party-appointed experts. He stresses proactive involvement by the arbitral tribunal and reinforcement of the expert's duty to assist the tribunal. [175]

Rather than leaving the matter to the expert's discretion, the tribunal should determine, in cooperation with the parties, at an early stage of the proceedings, the whole procedure concerning experts. The tribunal shall determine the disciplines for which expert opinion is required and a list of questions that they want the experts to address.[176] This ensures, from the outset, that the opinion(s) will be tendered only on relevant issues, preventing the procedure from having long and excessive proceeding costs.[177]

After the relevant disciplines are selected and experts are appointed early in the proceedings, the parties have the opportunity to challenge the experts. If the parties believe that they have found a proper ground that allows them to leave the expert to provide a biassed opinion, they should challenge it immediately. This improves the efficiency of the proceedings, avoiding later challenges and prolonging the assessment of the opinions.[178]

The tribunal could declare that it will impose cost sanctions on party-appointed experts who breach their duty to remain impartial and assist the tribunal. [179]

The arbitral tribunal will not be able to draw conclusions from two different opinions that address substantively different issues or issues. Therefore, within each expert discipline, the tribunal should establish a common list of questions and issues for the appointed experts to address.[180] Thus, arbitrators will understand whether a genuine difference in methodology or analysis leads to different opinions. Common questions and issues should be identified, if possible, with the assistance of the parties during the case management conference.[181]

It is vital that the tribunal maintains active oversight over this process, for example, by assisting when parties are unable to agree on the questions to be asked.

175 Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 24.

176 Bor (n 115) 509.; Blackaby and Wilbraham (n 19) 666–668.; Instructions to the expert should be drafted carefully to ensure that experts deal with all relevant matters, without leading them to adopt a particular line of position.

177 Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 34.; See for similar practice ICC (n 48) 13, para. 62.; 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 13) 19.

178 Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 34.

179 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 13) 9.

180 Since the memorial style for written party submissions is generally practiced in international arbitration, expert opinions are generally already submitted, which prevents party-appointed experts to address the same issues based on the same facts. See Jones for critics Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 34.

181 ibid 36.

Another vital point is that an objective analysis is only possible after all the factual evidence has been provided to both experts. A party-appointed expert who has only been provided evidence from the appointing party will not be able to create an objective opinion.[182] Hence, the tribunal has to ensure that the parties provide both their appointed and counterparts experts with the same factual evidence and common dataset, and expert reports should only be submitted after they have been established.[183]

B. Code of Conduct and Double Hatting

Although some arbitral rules and the IBA Guidelines on Conflicts of Interest in International Arbitration regulate the code of conduct for arbitrators[184], no widely accepted code of conduct in international arbitration that refers to party-appointed experts.[185] The Chartered Institute of Arbitrators (CIArb) Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration appears to be the only soft law instruments that comprehensively touches on the use of party-appointed experts in international arbitration.[186]

The lack of a code of conduct has led to the same individuals acting in various roles in international arbitration, the so-called "double hatting". Double hatting is an activity describing a situation where actors, such as arbitrators, party counsel, and experts in investor-state dispute resolution proceedings, play various roles in different proceedings with different roles in each proceeding, such as being an arbitrator in one proceeding and an expert in another.[187]

Double hatting has been criticised for a long time, and the Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) has worked on a draft code of conduct for arbitrators in international investment dispute resolution, aiming to prevent this phenomenon.[188] The draft code of conduct for arbitrators aims, among other issues, to reinforce the duty of independence and impartiality and regulates the practise of arbitrators acting as experts in international investment disputes.

182 That is one of the main reason the Memorial Style of submission is criticized, for details See ibid.

183 ibid.

184 Balkar (n 4) 37.

185 Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?' (2010) 26 Arbitration International 323, 323.; Balkar (n 4) 168.

186 The CIArb Protocol Article 4(1) foresees that the "expert's opinion shall be impartial, objective, unbiased and uninfluenced".

187 See Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 Journal of International Economic Law 301.legal counsel, expert witness, or tribunal secretary. If this claim is correct, it has implications for our understanding of which individuals possess power and influence within this community; and ethical debates over conflicts of interests and transparency concerning 'double hatting'-when individuals simultaneously perform different roles across cases. In this article, we offer the first comprehensive empirical analysis of the individuals that make up the entire investment arbitration community. Drawing on our database of 1039 investment arbitration cases (including ICSID annulments

188 https://unis.unvienna.org/unis/en/pressrels/2023/unisl343.html (accessed 6 May 2023)

Although not finally and formally adopted, the code of conduct foresees that as a principle, an arbitrator shall not act concurrently within a specified period of time following the conclusion of an international investment dispute as an expert in another international investment dispute involving (a) the same measures, (b) the same or related parties, or (c) the same provisions of the same treaty.

Double hatting has been already forbidden in the United States-Mexico-Canada Agreement (USMCA) Article 14.D.6(5)(c), such that the arbitrator shall not, for the duration of the proceedings, act as a party-appointed expert in any pending arbitration under USMCA.[189] Additionally, EU-Mexico Trade Agreement Article 13(1) of the "Resolution of Investment Disputes" section Article 13(1) foresees that arbitrators, upon appointment, shall refrain from acting as party-appointed experts in any pending or new investment protection dispute under EU-Mexico Trade Agreement or any other agreement or domestic law.[190]

C. Tribunal-Appointed Expert

Tribunal-appointed experts are generally not preferred over party-appointed experts. Nevertheless, the tribunal may appoint an expert if expertise is required to decide on the disputed matters and the parties have not adduced expert opinion.

The tribunal may appoint an expert whose competence is known to it, approach a specialist institution to identify expertise and invite the parties to offer suitable experts. The benefit of this process is reliance on the tribunal's competence to determine the key issues of the case sufficiently early in the proceedings to allow for the efficient deployment of the expert.[191]

Additionally, if there are multiple party-appointed experts and the tribunal feels lost due to the complexity of both opinions are not sufficiently clarifying the issues of expertise required, the tribunal can appoint an expert and resort to him as a guide.[192] In that case, the expert should preferably deal only with issues with which the party-appointed experts disagree.[193] This method is viable in situations where

189 United States-Mexico-Canada Agreement, entered into force on July 1, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf (accessed 5 May 2023); Ünüvar (n 26), para. 37.

190 EU-Mexico Trade Agreement, not in force yet, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/9f9e6630-7c43-49df-8a5f-653a23839b94/details (accessed 5 May 2023).

191 Khodykin and Mulcahy (n 4) 332.; Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 21.

192 Khodykin and Mulcahy (n 8) 330.; Tanrıver, *Hukukumuzda Bilirkişilik* (n 5) 34.

193 O'Malley (n 7) 172.; Abdel Wahab (n 5) 196.; Lim (n 43) 214.; See *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015, para. 585 https://www.italaw.com/sites/default/files/case-documents/italaw6315.pdf : "The Tribunal has now arrived at the point where it has narrowed the counterclaim on the principal issues of law and fact. The Tribunal has set out the main issues of fact and law which have divided the experts. However, with regard to many of the IEMS/GSI differences, the Tribunal does not feel able to prefer one above the other. It seems to the Tribunal that each was attempting to achieve the best result for the party by whom they were instructed, and that they crossed the boundary between professional objective analysis and party representation. It is clear to the Tribunal that the experts were effectively shooting at different targets and this has made the work of this Tribunal most difficult."

party-appointed experts disagree on a very specific point or when the tribunal has doubts as to the impartiality of the party-appointed experts.[194] For instance, in *S.D. Meyers v Government of Canada*, the tribunal decided whether a "[t]ribunal expert should be appointed pursuant to Article 27(1) of the UNCITRAL Rules to assist in the determination of issues that are outstanding as between the Disputing Parties' expert[s]".[195]

An empirical study shows that tribunal-appointed experts, an alternative to party-appointed experts, are less favoured by practitioners.[196] Not only does it help the party by fulfilling the burden of proof, but it also prolongs the case, leads to additional costs, and sometimes even does not solve the issue.[197] The use of a tribunal-appointed expert is associated with the risk that the tribunal will rely too heavily on the expert's opinion rather than making its own determination. The tribunal may end up delegating key decision-making responsibilities to the expert, especially if it's a legal issue.[198]

In some instances, having a tribunal-appointed expert may be cost-effective, especially if the parties have adduced experts on technical or legal matters but not on quantum.[199] Practise reveals that this method is not widespread[200], and some practitioners reveal that the use of tribunal-appointed experts might not be cost effective and time-efficient in every case.[201]

Although not realistic, in theory, a party-appointed expert can become a tribunal-appointed expert with consent from the counterparts.[202] A tribunal may be reluctant to appoint an expert. Court practise also shows that it is not mandatory to appoint a tribunal if it is not requested in a timely manner.[203]

194 Wilske and Gack (n 9) 893.; See Van Houtte (n 30).

195 *S.D. Myers, Inc. v. Government of Canada*, Procedural Order No. 17, 26 February 2001, para. 12https://jusmundi.com/en/document/other/en-s-d-myers-inc-v-government-of-canada-procedural-order-no-17-and-no-18-monday-26th-february-2001#other_document_1293 accessed 19 August 2022.

196 While %41 are in favour, %32 are against it, see 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 13) 9.

197 Wilske and Gack (n 8) 86, 94.

198 Jones, "Ineffective Use of Expert Evidence in Construction Arbitration", 10.

199 Khodykin and Mulcahy (n 4) 283.; Knoblach (n 5) 282.

200 *Wall* states that she has witnessed this only 11 times in 130 recent BIT cases where damages were awarded. See Vikki Wall, 'States as First Class Citizens? Special Treatment for States in International Disputes', *State involvement in arbitrations* (2022) <https://arbitrationblog.kluwerarbitration.com/2022/06/05/lidw-2022-states-as-first-class-citizens/>.

201 See Anne K Hoffmann and Nish Kumar Shetty, 'Evidence and Hearings' in Albert Jan Van Den Berg (ed), *International Arbitration: The Coming of a New Age?* (ICCA & Kluwer Law International 2012) 215.

202 Wach and Petsch (n 1) 111.; In line with IBA Guidelines 2.1 (waivable red list).

203 *4A_617/2010*, 14 June 2011, Schweizeriches Bundesgericht, 1st Civil Law Chamber https://www.swissarbitrationdecisions.com/sites/default/files/14%20juin%202011%204A%20617%202010.pdf accessed 11 September 2022.2011 involved a dispute between a Turkish company and its Polish contractor with regard to the construction of the boiler in an industrial power plant in Bulgaria. The pertinent contracts provided for ICC arbitration in Zurich and when a dispute arose as to the responsibility for the delays in the performance of the work, the Turkish company filed a request for arbitration. A three-member arbitral tribunal sitting in Zurich under the ICC rules was constituted.\n\nIn its award of September 30, 2010, the Arbitral tribunal rejected the claim and partly upheld the counterclaim.\n\nAn appeal was made and the following points from the opinion are interesting:\n\nBoth parties had resorted to party-appointed experts and the Appellant argued that the arbitral tribunal would have relied solely on the opinion of the other party's expert instead of the arbitrators appointing their own expert (see section 3 of the opinion in this respect

If the arbitral tribunal considers itself to have adequately informed the subject, it may reject a request to appoint an expert.[204] In doing so, the arbitral tribunal should expressly state the reasons for refusal in order to prevent any further concerns regarding due process.

D. Joint Appointment and Expert Teaming

A hybrid method of expert appointment could be used where either both parties nominate the expert to be appointed by the arbitral tribunal or, without the participation of the tribunal, directly appoint a single joint expert.[205] Alternatively, the parties may propose some experts, and the tribunal chooses one from each list, the so-called "Expert Teaming".[206]

If the parties can agree on a single joint expert, this would help reduce costs and streamlining the proceedings.[207] When agreeing on a single joint expert, the parties should clarify in terms of reference whether they will be bound by the conclusions of the joint expert and the report. Almost half (%46) of the stakeholders in arbitration believe that counsel should consider joint expert reports for better arbitration.[208]

The expert teaming method foresees each party exchanging a list of expert candidates and comments on the other candidates.[209] The tribunal then selects two experts, one from each list, to form the expert team. The arbitrators and the parties meet the expert team to establish the terms of reference that outline the expected qualifications of the report.[210] After that, a joint preliminary report will be circulated to the tribunal and the parties.[211] The expert team would be questioned at the hearing, including by the parties' expert

204 *III ZR 44/89* 21.12.1989, Bundesgerichtshof, 3rd Civil Law Chamber https://research.wolterskluwer-online.de/document/2ed8f851-18cd-4d0c-8431-aa4fcc527333 accessed 22 February 2023.; Survey shows that whether practitioners have had direct experience of a tribunal refusing to allow a party's request to appoint an expert. 73% had no experience of this. 24% had in fewer than five cases, 2% in between five and ten cases and just 1% in more than ten cases, See 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 13) 19.

205 Sachs and Schmidt-Ahrendts (n 150) 144.; Schäfer and Wilson (n 56) 65.; Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 22.; Also, the ICC Centre for ADR can be engaged to select experts whose experience is tailored to the particular needs of the parties. See 'ICC Commission on Arbitration and ADR Report: Resolving Climate Change Related Disputes through Arbitration and ADR' (ICC 2019) ICC Commission on Arbitration and ADR 999 ENG 26, para. 5.32.; Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (n 12) 446.

206 In the BCLP Survey, the most favoured alternative to the party-appointed expert was a tribunal-appointed expert nominated by the parties (%58), followed by a single joint expert directly appointed by the parties (%53), 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 13) 9.; Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (n 12) 446.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 10.

207 Khodykin and Mulcahy (n 4) 283.; See Schäfer and Wilson (n 56) 65.; This has been regulated in UK law after similar critics, see Aygül (n 8) 269.; See Fulya Teomete Yalabık, 'Questioning Expert Witnesses In Litigation And International Arbitration: How To Prevent Partisan Expert Reports And "Battle Of Experts' 16 Medeni Usul ve İcra İflas Hukuku Dergisi 133.

208 '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' (Queen Mary University of London and White and Case 2015) 30.

209 Sachs and Schmidt-Ahrendts (n 22) 145–146.

210 ibid 145.

211 ibid 145.

consultants[212].[213] This method can provide checks and balances for expert findings. This is potentially a way of ensuring the credibility of experts.[214]

E. Pre-Hearing Expert Meeting and Joint Report

A pre-hearing expert conference is a meeting between the party-appointed experts before the main hearing(s) in which they discuss the disputed expertise-required issues that need to be explained to the tribunal. The goal of this meeting is to streamline the expertise process and ultimately make the proceedings cost-efficient.[215]

After the exchange of initial or draft opinions[216], the parties' experts (within each discipline) can meet and discuss matters requiring expert opinions. [217] In this meeting, the experts will come together and discuss their understanding of the issues and initial views.[218] At such meetings, the experts should attempt to come to common ground on as many issues as possible, record them in writing, and submit a joint report.[219] For issues where experts have a difference of opinion, they should render separate views indicating the reasons for their disagreement, adding to that what their conclusions would be if they adopted the counter-expert's position.[220]

The joint report should identify, in summary form, (a) assumptions, methodology, and opinions on which the experts agree and (b) assumptions, methodology, and opinions on which they disagree.[221] This will help to avoid comparing apples to oranges in the future.

212 Experts hired directly by the parties to address areas of disagreement between the two members of the expert team.

213 Sachs and Schmidt-Ahrendts (n 22) 145.

214 ibid 146.; See also Nils Schmidt-Ahrendts, 'Expert Teaming -Bridging the Divide between Party-Appointed and Tribunal-Appointed Experts' (2012) 43 Victoria University of Wellington Law Review 653.

215 Bernd Ehle, 'Practical Aspects of Using Expert Evidence in International Arbitration' (2012) II Yearbook on International Arbitration 75, 82.; Zuberbühler and others (n 42) 145.; Parlett (n 65) 447.; Ünüvar (n 26), para. 23.; Webster and Bühler, *Handbook of UNCITRAL Arbitration* (n 12) 424.

216 *Jones* argues: "experts are far more likely to find areas of agreement through confidential discussions with each other, before they have formally declared positions in a written report. The tribunal should encourage these discussions to be held in camera without counsel present." Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 37.

217 *Jones* argues: "experts are far more likely to find areas of agreement through confidential discussions with each other, before they have formally declared positions in a written report. The tribunal should encourage these discussions to be held in camera without counsel present." See ibid.

218 Senogles (n 50) 364.; O'Malley (n 7) 161.; Abdel Wahab (n 5) 195.

219 Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 37.; Christoph Grenz, *Der Faktor Zeit Im Schiedsverfahren* (PL Acad Research 2013) 163.

220 Senogles (n 50) 364.; Wilske and Gack (n 9) 95.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 11.; Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 37.

221 Abdel Wahab (n 5) 195.; See for problems of instructions from counsel to experts not to agree during the meetings Khodykin and Mulcahy (n 4) 316. and Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last' (n 161) 145.; Hacıbekiroğlu (n 93) 126.; Anne V Schlaepfer and Vanessa A Duvanel, 'Direct and Re-Direct Examination' in Stephen Jagusch, Philippe Pinsolle and Alexander G Leventhal (eds), *The Guide to Advocacy* (Fifth edition, Law Business Research Ltd 2021) 73–74.; For the content of a joint report see CIArb Guidelines for Witness Conferencing in International Arbitration 36, para. 6(b); See *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Procedural Order No.2, 25 July 2012, para. 2 https://jusmundi.com/en/document/other/en-gold-reserve-inc-v-bolivarian-republic-of-venezuela-procedural-order-no-2-wednesday-25th-july-2012#other_document_17483 accessed 1 September 2022.
S.D. Myers, Inc. v. Government of Canada, Procedural Order No. 17, 26 February 2001, para. 12. https://jusmundi.com/en/document/other/en-s-d-myers-inc-v-government-of-canada-procedural-order-no-17-and-no-18-monday-26th-february-2001#other_document_1293 accessed 19 August 2022.; *Jones* argues that experts should as a first step prepare a joint

Thereafter, experts (within each discipline) should produce individual expert reports on areas of disagreement and not raise unrelated new matters. [222] Experts should reply to these expert reports, limiting their replies to what their opinions would be if counterparty experts' assumptions and methodologies were to be accepted.[223]

Limiting the scope of individual reports to areas of difference improves the tribunal's understanding of complex issues and enhances the efficiency of the use of party-appointed experts.[224]

The IBA Rules, the CIArb Protocol, and the UNCITRAL Notes encourage pre-hearing meetings between party-appointed experts who have submitted reports on similar or related issues.[225] The Case Management Techniques in the ICC Arbitration Rules also indirectly suggest this meeting.[226]

Notably, when multiple quantum experts are engaged by the parties, it would be beneficial for the tribunal to intervene and guide the party-appointed experts to provide views on or use the methods of the other expert and draw conclusions. Arbitral tribunals will make it easier to have a common ground to compare. This method can lead party-appointed experts to disassociate themselves from the parties and their counsel and play a more neutral role. Thus, the need for a tribunal-appointed expert would be diminished, and extensive costs and time losses would be avoided.[227]

Sachs argued that pre-hearing meetings are beneficial because them:

(a) Clarifying technical and factual issues

(b) outline areas of agreement and disagreement,

(c) focusing on relevant points

(d) narrow the differences between expert reports

(e) encourage scientific debate and, consequently, and

(f) render expert evidence more time- and cost-efficient and effective.[228]

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expert report, and not after the initial report, see Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 37.

222 Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 37–38.

223 Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 11.; Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 37–38.

224 Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 37.

225 CIArb Protocol, Art. 6; IBA Rules, Art. 5(4); 2016 United Nations and United Nations Commission on International Trade Law, 'UNCITRAL Notes on Organizing Arbitral Proceedings', para. 97–98 .; Hodgson and Stewart (n 66) 459–460.; Khodykin and Mulcahy (n 4) 315.

226 ICC Arbitration Rules Appendix IV, para. (b), para. (e).

227 Blackaby and Wilbraham (n 19) 668.; See *Crystallex International Corporation v Bolivarian Republic of Venezuela,* ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, 31-32, para. 130. https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf accessed 9 April 2023.

228 Klaus Sachs and Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence' (2011) 15 Arbitration Advocacy in Changing Times, ICCA Congress Series 135, 143–144.

When asked practitioners, the majority (54%) found the practise of experts conferring in advance of the main hearing to be useful, compared to only 7% who did not, and 34% who did not exclude the possibility but said that "it depends on the case".[229] Scholars also share the view that hearings "almost always do help".[230]

Meetings between experts in early[231] and before the main evidentiary hearing will help prevent lengthy and exhausting expert testimony phasis in the evidentiary hearings. This will not only shorten hearings, but it will also prevent experts from sticking to their initial opinions. Almost half (%46) of the stakeholders in arbitration believe that counsel should consider early meetings with experts to improve arbitration.[232]

Blackaby and *Wilbraham* note that such meetings will be fruitful when they occur between experts of the same qualification who discuss a narrow scope of specific issues and identify the principal issues dividing the experts. This is expected to distil lengthy complex reports into more digestible ones, thereby also assisting parties and the tribunal in more effectively preparing to question experts at a hearing.[233] However, when the divisions between experts are pivotal to the case, it may be difficult for experts to reach even a partial agreement.[234]

This method was helpful in *Hydro Energy 1 and Hydroxana Sweden v. Spain*, where quantum experts initially provided different opinions. The valuation estimates significantly differentiated between EUR 4 million and EUR 161 million. The experts later filed a joint memorandum containing a joint model and an accompanying memorandum highlighting the remaining areas of disagreement. The tribunal applied this joint model and found a settlement amounting to EUR 31 million.[235]

E. Examination

The first five recommendations above for the use of party-appointed experts relate to the formation of a well-understood opinion that can be evaluated by a tribunal that is not educated or experienced in the field.

229 '2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process' (n 12) 31.

230 de Chazournes and others (n 34) 496.

231 *Blackaby and Wilbraham* argue that it will take time before the tribunal (and even the parties) can determine the necessary issues to be illuminated with experts in complex investment cases, generally until after the first round of substantive submissions. See Blackaby and Wilbraham (n 19) 666.; Schäfer and Wilson (n 56) 64.

232 Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 11.; '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' (n 208) 30.

233 Parlett (n 65) 448.; Blackaby and Wilbraham (n 19) 666.; See CIArb Protocol Article 3(1).

234 Blackaby and Wilbraham (n 19) 665.

235 *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Award, 5 August 2020, para. 11-13https://www.italaw.com/sites/default/files/case-documents/italaw170209.pdf accessed 9 April 2023.

After the opinion of experts has been brought before the tribunal, the arbitrators will assess the views of the experts and test whether they are credible and worthy of being accepted as the basis of their decisions.

Like witnesses, party-appointed experts are being examined and their opinions cross-examined.[236]

Examination of the opinion(s) can be compared to the safety/homologation tests of new car models before they are allowed on the streets. These tests will determine whether the implants are functioning and safe. It is possible that experts consciously or mistakenly made incorrect assumptions or arithmetical mistakes with the material results. This can only be revealed through proper oral testimony and examination. [237]

This phase has been deemed so critical that, for instance, according to the CIArb Protocol, any expert who has provided a written opinion must give oral testimony, unless otherwise agreed by the parties. Failure to appear without a valid reason could cause the tribunal to disregard the expert's written opinion.[238]

Many arbitral rules foresee that at the evidentiary hearing, the parties or tribunal may question experts on issues raised in expert reports, submissions, or witness statements.[239]

Therefore, besides examining the tribunal, the counsel can also cross-examine the party-appointed experts.[240] There is strong support for the use of cross-examination in international arbitration to test experts. The vast majority of respondents believed that cross-examination was always or usually an effective form of testing an expert (86%).[241]

An expert who knows that he or she will be subject to cross-examination through an adversarial process by the opposing counsel is a further check on the process.[242] Because the counsel will work hard to find any error in the methodology or application based on the experts' views.

236 Wilske and Gack (n 9) 79.

237 Hodgson and Stewart (n 66) 458.; Tanrıver, *Hukukumuzda Bilirkişilik* (n 5) 32.

238 CIArb Protocol Art. 6.1. (h) and (i).

239 Khodykin and Mulcahy (n 4) 287.; M Serhat Sarısözen, *Medeni Usul Hukukunda Soru Yöneltme ve Çapraz Sorgu* (Yetkin Yayınları 2016) 349.

240 Tanrıver, *Hukukumuzda Bilirkişilik* (n 5) 32.

241 '2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process' (n 12) 26.; Abdel Wahab (n 5) 199.; More than two-thirds (%69) of respondents in the BCLP Survey share the view that any potential bias is cancelled out with cross-examination, see 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 13) 17.; See critics regarding cross-examination of party-appointed experts Proske, *Expert witness conferencing in schiedsverfahren*, 31 and Blackaby and others (n 17), 6.138.

242 Parlett (n 65) 451.; Aygül (n 8) 269.

G. Expert Conferencing

Expert conferencing[243] is a method of examination in which two or more party-appointed experts from opposing parties[244] present their opinions and are questioned by the arbitral tribunal or the Counsel during oral hearings jointly and simultaneously rather than sequentially and separately. [245]

The salient feature of this method is that it allows experts to interact with each other.[246] Expert conferencing has not been a recent phenomenon, and its application can also be found in domestic litigation in some states.[247] However, the search for solutions to cost-efficiency problems in international arbitration has led to its use as a procedural tool.

Expert conferencing can be applied in cases where complex factual and technical issues involve multiple opposing experts. [248] This method can be used where experts know each other, or the experts are seemingly to agree on some points.[249] If the issues where expert opinion is sought are highly controversial or the opposing experts did not opine on the same issue, the method may not be viable.[250]

The expert conferencing method can be potentially helpful if it is constructed and controlled firmly by an arbitral tribunal but is not left solely to experts or the legal counsel.[251] Where multiple areas of expertise are to be exposed, the tribunal may direct separate conferences.[252]

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243 See for various terms used by different authors, such as expert witness conferencing, conferencing, hot-tubbing or joint conferencing, for the same concept in Proske, *Expert witness conferencing in Schiedsverfahren*, 34-37.; Also see Wolfgang Peter, 'Witness "Conferencing"' (2002) 18 Arbitration International 47, 48.

244 Whereas the method is used mostly for party-appointed experts, this method is not excluded when there are also tribunal-appointed experts. For details see Proske (n 4) 39.

245 John Townsend, 'Crossing the Hot-Tub – Examining Adverse Expert Witnesses in International Arbitration' in LW Newman and BH Sheppard (eds), *Take the Witness: Cross-examination in International Arbitration* (JURIS 2010) 165.; Wilske and Gack (n 9) 94.; Foster (n 123) 123. ; Karl Pörnbacher, Philipp Duncker and Sebastian Baur, 'Gaspreisanpassungs-Schiedsverfahren – Hintergründe und prozessuale Besonderheiten' (2012) 10 SchiedsVZ | German Arbitration Journal 289, 298.; Weiss and Bürgi Locatelli (n 10) 482.; Proske (n 4) 38.; Michael Hwang, 'Witness Conferencing' in Jamie McKay (ed), *The Legal Media Group Guide to the World's Leading Experts in Commercial Arbitration* (2008) 3.; Michael Hwang and Colin YC Ong, 'Effective Cross-Examination in Asian Arbitrations' in LW Newman and Timothy G Nelson (eds), *Take the Witness: Cross-examination in International Arbitration* (2., JURIS 2018) 358. VV Veeder and et al. (eds), 'Act III: Advocacy with Witness Testimony' (2005) 21 Arbitration International 583, 605–606.

246 Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 32.

247 For Australia see: The New South Wales Uniform Civil Procedure Rules 2005, r 31.23. (https://legislation.nsw.gov.au/view/html/inforce/current/sl-2005-0418#sec.31.19), ibid 27–28.; For Canada see: Federal Courts Rules SOR/98-106, Rule 52.2 Code of Conduct for Expert Witnesses (https://laws-lois.justice.gc.ca/eng/regulations/sor-98-106/page-118.html#:~:text=1%20An%20expert%20witness%20named,person%20retaining%20the%20expert%20witness)

248 Bor (n 115) 508.; Hodgson and Stewart (n 66) 459–460.; Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 32.; Proske (n 4) 52.

249 J Christian Nemeth and Lisa Haidostian, 'The "Hot Tub" Method of Taking Expert Testimony Is Gaining Steam: What You Need to Know' [2014] IBA Arbitration News 91, 92.

250 Bor (n 115) 509.

251 de Chazournes and others (n 34) 496.; 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration Saving the Party-Appointed Expert' (n 13) 20.; Proske (n 4) 38.; Bor (n 115) 509.

252 CIArb Guidelines for Witness Conferencing in International Arbitration, 34, para. 5(1)(a).

The wording of UNCITRAL Model Law Art. 26 (2)[253] and statutes from various jurisdictions like Türkiye or Germany[254], which base their statutes on the Model Law, also seem to support expert conferencing.

No detailed rules on expert conferencing are found in the arbitration rules.[255] Therefore, the tribunal, advisably in the first procedural order[256], should not only determine and inform the participants of the proceedings how the expert and its opinion should be adduced but also the style and procedure of the examination of the experts, time limits, the stage at which the conferencing should take place and whether and how cross-examination will be performed.[257]

If not properly regulated early in the proceedings[258], the benefits of expert conferencing cannot be expected.[259]

The opposing experts should be placed at the same table in a position that enables them to look into each other's eyes and have a discussion.[260] The tribunal should limit the matters to be addressed by experts and should conduct a focused discussion rather than an occasional debate. Translators should be available if necessary.

To ensure the effectiveness of the method, the arbitral tribunal should also be well prepared, thoroughly read the written expert opinions, determine the specific matters it needs to understand and explain its opinions.[261] This method will not bear fruit if the arbitral tribunal does not carry out its responsibility to proactively manage the case, as previously described.

The arbitral tribunal will be able to ask each expert question. It is suggested that the arbitral tribunal examines both party-appointed experts to report on the same issues at the same hearing simultaneously and try to infer an understanding regarding their objectivity and receive a contrast between the experts (and their opinion), which

253 "Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue."

254 For the German perspective: Christoph Grenz (n 219) 154–155.; Klaus Sachs and Torsten Lörcher, 'Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter V: Conduct of the Arbitral Proceeding, § 1049 – Experts Appointed by Arbitral Tribunal' in Patricia Nacimiento, Stefan M Kröll and Karl-Heinz Böckstiegel (eds), *Arbitration in Germany: The Model Law in Practice* (2., 2015) 296.; Burkard Lotz, 'Der Sachvreständige Im Schiedsverfahren' (2011) 9 SchiedsVZ | German Arbitration Journal 203, 209.

255 Proske (n 4) 48.

256 Advisably after consultation and in agreement with the parties. Generally the tribunal is "pushing" the parties for conferencing, for details see ibid.

257 ibid 44.

258 Preferably, in the first case management conference. In case the tribunal is not in a position to foresee whether the conferencing will be necessary, it should at least foreshadow the possibility.

259 Proske (n 4) 50.; Hilmar Raeschke-Kessler, 'Witness Conferencing' in LW Newman and RD Hill (eds), *Leading Arbitrators' Guide to International Arbitration* (Third, Juris Publishing, Incorporated 2014) 699 <https://books.google.co.in/books?id=0bOIAwAAQBAJ>.

260 Blackaby and others (n 4), para. 6.185.; Proske (n 4) 53.; Raeschke-Kessler (n 259) 701.

261 Bor (n 115) 509.; Foster (n 123) 124.; Raeschke-Kessler (n 259) 698.

is more convincing by examining them.[262] After the arbitral tribunal examines the experts, it is imperative to grant the Counsel an opportunity to ask supplementary questions so as to adhere to the right to be heard by the parties.[263] The Counsel should ask additional questions on issues that have not yet been settled or addressed. The arbitral tribunal may also directly leave the floor to the party counsel and ask additional questions where certain points are not clear.

However, counsels must understand that this examination differs from a conventional cross-examination in which they lead the examined expert according to the interests of the party.[264] Counsels should allow experts to interact and an arbitral tribunal should intervene in cases where such interaction is not possible.

Whereas one may think that cross-examination is not necessary when experts already conference, *Proske* demonstrates in her study that in practise, mostly expert conferencing and cross-examination both take place in arbitration, with differences in each regarding their order.[265]

Cross-examination is considered necessary to uncover contradictions between the former opinions, for instance, published works, and the opinion of a party-appointed expert in arbitration proceedings, or to generally test the credibility of a party-appointed expert.[266] Quite occasionally, it is suggested that cross-examination (additional to the expert conferencing) is advisable[267] or necessary to ensure due process.[268]

Equal opportunity should be given to both parties during examination and cross examination.[269]

VI. Evaluation and Conclusion

Due to the capacity of arbitrators, technical, legal and quantum experts are heavily involved in international commercial and investment arbitration. Data and practise

262 Wach and Petsch (n 1) 96.; See Wolfgang Peter, 'Witness "Conferencing"' (2002) 18 Arbitration International 47.; Senogles (n 50) 364.; Blackaby and Wilbraham (n 19) 667.; O'Malley (n 7) 159.; Abdel Wahab (n 5) 194–196.; Caroline Elisabeth Proske, Expert witness conferencing in Schiedsverfahren (Mohr Siebeck 2019) 26 ff...; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 7.

263 Proske (n 4) 45.; Foster (n 123) 123.

264 For details see Proske (n 4) 44.; Hwang (n 245) 3.; For the argument by various authors that share the view that expert conferencing is only supplementary to cross-examination see Blackaby and others (n 4), para. 6.184.; Veeder and et al. (n 245) 609–610.

265 *Proske* stipulates that sometimes expert conferencing is first applied and sometimes later after cross-examination, see Proske (n 4) 47.

266 Martin Hunter, 'Expert Conferencing and New Methods' (2007) 4 Transnational Dispute Management 4, para. 11.; Proske (n 4) 45.; For the argument that credibility should not be subject at the expert conferencing See Raeschke-Kessler (n 259) 704.

267 Hunter (n 266) 4, para. 11.

268 Waincymer (n 19) 968.; For critics to this view see Proske (n 4) 46.

269 For details see Proske (n 4) 42.;

preferences show that party-appointed experts are generally preferred over tribunal-appointed experts. This is understandable, as the parties and their counsel want to have full control of their arguments and evidence, and the tribunal will also not need to find and appoint experts.

Experts clarify disputed issues that impact the outcome of the case, which the arbitrators are not able to do due to a lack of special and technical knowledge, thus supporting tribunals in the decision-making process.[270] The role of experts should always be considered in conjunction with the overriding competence and function of the tribunal.

Expert opinions in international commercial arbitration are crucial to the decision-making process, and it is only logical to classify them as evidence.[271] The arbitral tribunal is not strictly bound by expert opinions and can freely appraise them. Arbitrators may also reach different conclusions.[272]

The prevailing practise, where the parties present conflicting expert opinions on complex issues, leads to inefficient proceedings and the arbitration stakeholders are unsatisfied. One of the main reasons for this is the lack of explicit binding provisions in major international arbitration regulations, such as the UNCITRAL Model Law and arbitration rules. As a result, efforts have been made to overcome these problems through soft law elements such as the IBA Rules, the CIArb Protocol, and recommendations from experienced practitioners.

There is strong empirical evidence that bias and the unregulated use of party-appointed experts are crucial problems in international commercial and investment arbitration. This is why the focus is to prevent potential bias while the expert opinion is formed, having a well-structured and transparent process for party-appointed experts, which, in cooperation, simply guides the arbitral tribunal without the pressure of pleasing the parties.

In order to achieve these objectives, the arbitral tribunal should first establish rules for party-appointed experts in the first procedural order. The arbitral tribunal should set the issues and disciplines for which expert opinion is required and may expressly stipulate that no expert opinion is required for other matters and that they would not be called for testimony or that their costs would not be considered under arbitration costs. The arbitral tribunal shall address the qualifications of the experts sought and may also inform the parties that it will appoint experts if required.

270 Wach and Petsch (n 1) 95.; O'Malley (n 7) 171.; Abdel Wahab (n 5) 182.; White (n 43) 165.; Gideon E Kamya-Lukoda, 'Role of Expert Witnesses in Construction Arbitration: Delay and Disruption and Quantum Issues' in Renato Nazzini and Anthony J Morgan (eds), *Transnational construction arbitration: key themes in the resolution of construction disputes* / (Informa Law from Routledge 2018) 79.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 1.; Proske (n 4) 3.; Aygül (n 8) 270.

271 Proske (n 4) 26.

272 Zuberbühler and others (n 42) 170.; ICC Case No. 14079, Procedural Order May 2007, in ICC International Court of Arbitration Bulletin Vol. 25/Supplement (2014): 11; Oetiker (n 10) 313.

The arbitral tribunal should set out that, especially in an investment arbitration case, the expert should not have acted as an arbitrator in another international investment dispute involving (a) the same measures, (b) the same or related parties, or (c) the same provisions of the same treaty.

Then, the arbitral tribunal shall forward each expert a common set of questions and the same set of data and evidence to rely on and, if possible, ask the experts within each discipline to meet before the main hearing and produce a joint expert report explicitly mentioning areas of agreement and disagreement, accompanied by an individual report on the disagreed matters.[273]

It is generally useful to engage in a discussion with the counterparty's expert to identify the respective objectives and methods. In that respect, the preparation of a joint report would be very useful, and pre-hearing meetings would be helpful.[274] These rules should be determined in a procedural order, accompanied by a procedural timetable and should always be reinforced actively by the tribunal.

The tribunal is authorised to appoint an expert on its own. However, a single tribunal-appointed expert without any party-appointed expert involvement comes with the risk that arbitrators accept the conclusions of that expert without further analysis.[275]

To try to find a middle ground, the *Sachs Protocol* envisions a solution to the challenges the expert evidence is facing by merging the benefits of both tribunal and party-appointed experts. Nevertheless, there are concerns regarding experts' access to relevant documents and information, which would be readily available to party-appointed experts working closely with parties and their counsel. Despite its potential merits, the *Sachs Protocol* has not been widely adopted in international arbitration.[276] Although the *Sachs Protocol* addresses the credibility of experts, it is also criticised for being "heavily tilted to justifying tribunal-appointed experts".[277]

Conferencing experts is often effective because experts only discuss their professional views before the tribunal and the Counsel. Over time, with its successful applications, expert conferencing has gained some acceptance in international arbitration.[278] This method attempts to combat the shortcomings of traditional hearing,

273 Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 11.

274 de Chazournes and others (n 34) 496.

275 Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 10–11.

276 Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 22.; de Chazournes and others (n 34) 493.

277 Hodgson and Stewart (n 66) 461.

278 Raeschke-Kessler (n 259) 689.; Townsend (n 245) 165.; Webster and Bühler, *Handbook of UNCITRAL Arbitration* (n 12) 446.; Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 32.; Some state courts also adopted this method for experts, see Federal Court of Australia, Expert Evidence Practice Note 25 October 2016, https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt; Aygül (n 8) 285.; Akıncı (n 155) 79.

where long presentations and examinations occur sequentially and sometimes even on different days, resulting in the need for more efficient.[279]

This method for obtaining evidence is especially effective in complex arbitrations with difficult factual and technical issues where the parties rely on evidence from multiple experts. [280] In such circumstances, the conventional approach of examining experts from each side in a linear fashion does not always lead to a clear understanding of both the arbitral tribunal and the Counsel.[281] This is particularly the case when multiple and opposing expert statements are heard in different hearings over a long period.

However, through expert conferencing, experts can concurrently engage with opposing views directly and engage in a deeper examination of contentious issues.[282] The conferencing technique is potentially helpful when it is controlled and managed firmly by the tribunal.[283] Another advantage of conferencing experts over the traditional examination method is that it allows for an expert's opinion to be fully explored and tested by another expert. Moreover, conferencing experts can potentially shorten hearing times. Conferencing experts may not be suitable when experts have not been instructed to opine on the same issues.[284] However, even when experts present their opinions on different subject matters if their opinions are strictly interconnected, this method could be viable.[285] The spontaneity of the process can lead experts to express sincere opinions and forget any answer that they might have been expected to give to specific questions. This further engages the experts in vigorous conversation, where each expert explains to the arbitral tribunal why he/she disagrees with the views of the other, thereby facilitating the arbitral tribunal's understanding.[286] Sitting at the same table with a colleague can also help rephrase incorrect or exaggerated previous statements and consequently reduce the number of issues on which experts disagree.[287] If the tribunal is also well prepared and controls the process firmly, then the conferencing would be a dynamic and useful process where expertise issues can be heard and tested quickly.[288]

279 Wilske and Gack (n 9) 95.

280 Bor (n 115) 508.; Hodgson and Stewart (n 66) 459–460.; Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 32.

281 David W Brown, 'Oral Evidence and Experts in Arbitration' (2004) 2 Kluwer Law International & ICC 77, 85.; Proske (n 4) 31.; Christoph Grenz (n 219) 73–75.

282 Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 7.; Knoblach (n 5) 280.; Townsend (n 245) 165.; Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 32.

283 de Chazournes and others (n 34) 496.

284 Bor (n 115) 509.; Abdel Wahab (n 5) 205.; Jones, 'Redefining the Role and Value of Expert Evidence' (n 9) 33.

285 Proske (n 4) 38.

286 Abdel Wahab (n 5) 205–206.

287 Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration' (n 12) 8.; '2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process' (n 12) 28.; Wilske and Gack (n 9) 94.; Proske (n 4) 38.

288 Senogles (n 50) 364.

In conclusion, to address the problems arising from the use of party-appointed experts in international commercial and investment arbitration, the aforementioned methods could be helpful, depending on the circumstances. However, the tribunal's active involvement and early determination of the protocol on the use of party-appointed experts in every detail are indispensable. Designing the examination phase in a conferencing style will enable not only the prevention or disclosure of bias but also accelerate the process for the arbitral tribunal to understand the expertise required for technical, legal or quantum issues.

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RESEARCH ARTICLE

Environmental Intervention: An Activist Idea or Legal Tool? An Analysis of the Possibilities of Environmental Protection under the Principle of Non-Intervention

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Abstract

Climate change is arguably the single most important threat to all life on Earth. Through the 2015 Paris Agreement and annual United Nations (UN) climate change conferences, the international community has attempted to rally universal support for mandatory greenhouse gas emission reduction targets. If attained, it is likely that destructive global temperature rises would be at least slowed. The fact that States agree to pursue environmental protection objectives, but routinely fail to act accordingly provides essential context for this four-section critical discussion. 'Environmental intervention' as contemplated by this research topic is more than a mere activist idea. It necessarily represents a valid international law alternative given that the entire world faces a potentially catastrophic climate emergency. The various points considered in this discussion confirm that unilateral State intervention to prevent transborder pollution created in another State might seem justified under well-recognised 'Responsibility to Protect' principles. The materials assembled for present discussion purposes support an alternative conclusion. The combined effect of the international law emphasis placed on State sovereignty, and a dysfunctional, inconsistent international community commitment to achieving actual climate change mitigation likely condemns to failure any environmental intervention measures that the UN might advance through proposed treaties or similar international agreements.

Keywords

Environmental Intervention, Responsibility to Protect, Climate Change, The Principle of Non-Intervention, Humanitarian Intervention

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I. Introduction

Climate change as associated with global warming and other human contributions to the Earth's environmental degradation has inspired intense, often divergent opinions regarding the best environmental protection measures.[1] The article title references made to theoretical possibilities versus legal enactments (ideas versus enforceable laws) are a testament to this reality. There is a broad and ever deepening consensus that if the international community does not take immediate, aggressive, and sustained action to curb greenhouse gas (GHG) emissions, the environment will be irreversibly compromised.[2] Rising sea levels that might destroy numerous island States, violent storms that have increased in frequency and severity in recent years, sweeping wildfires – a small sampling of what climate change means in 2023, and what looms as even more environmental disasters for the foreseeable future if nothing meaningful is done to reverse its current directions.[3]

Current climate change realities bring the international law principles engaged in the following five section critical discussion into clearer focus. At its core, international law (IL) is understood as legal rules, norms, and standards that sovereign States and other international actors (such as non-governmental organisations for instance Greenpeace, or the World Wildlife Fund) accept as law.[4] By its nature, IL as applied in practice is often fluid. The ways that individual States conduct their international relations based on 'rules, norms, and standards' is inherently pragmatic and highly circumstance driven.[5] There may be an apparent international community consensus regarding climate change posing an existential threat to humankind – the Paris Agreement 2015 and the recent UN climate change conferences (such as COP 27) provide evidence of such expressed State commitments.[6] The sources cited throughout this discussion confirm a more sobering reality. If these IL sources were accepted as representative of current international community attitudes adopted towards climate change, environmental protection measures being made enforceable

1 Geneva Environmental Network, 'Human rights and the environment' (2022) [Online] <https://www.genevaenvironmentnetwork.org/resources/updates/human-rights-and-the-environment/> [15 October 2023], citing UNGA Resolution 76/300, 'The human right to a clean, healthy and sustainable environment' (28 July 2022).

2 Rachel Pepper and Harry Hobbs, 'The Environment is All Rights: Human Rights, Constitutional Rights and Environmental Rights' (2020) 44(2) *Melbourne University Law Review* 1, 3.

3 UN Conference on Environment and Development [1989] UNGA 313; A/RES/44/228 (22 December 1989). Of numerous examples, see Khodayar Samira Pardo 'Uneven Evolution of Regional European Summer Heatwaves Under Climate Change' (2023) [Online] <http://dx.doi.org/10.2139/ssrn.4594918> [14 October 2023], 2, 3.

4 Britannica 'The nature and development of international law' (October 2023) [Online] <https://www.britannica.com/topic/international-law#Definition%20and%20scope> [14 October 2023].

5 Ibid.

6 Because it concluded the first global stocktake of the global efforts to combat climate change under the Paris Agreement, COP 28 was especially significant. Countries decided to speed up action in all areas of climate action by 2030 after it was demonstrated that progress was moving too slowly in all areas, including lowering greenhouse gas emissions, enhancing resilience to a changing climate, and providing vulnerable countries with financial and technological support. In their upcoming round of climate agreements, governments are urged to expedite the shift from fossil fuels to renewable energy sources like wind and solar power. UN. United Nations Framework Convention on Climate Change. Declaration on Climate and Health. Conference of the Parties to the United Nations Framework Convention on Climate Change (28th session), December, 2023. <https://www.cop28.com/en/cop28-uae-declaration-onclimate-and-health> [4 March 2024].

against offending polluter States would appear to be moving closer to reality.[7] These attitudes are contrary to IL non-intervention principles, ones that have traditionally been interpreted as prohibiting States from taking unilateral action that interferes with another State's sovereign power exercised over its domestic affairs.[8]

The following hypothetical scenario illustrates this point. As a general IL proposition, State A armed forces cannot invade State B to prevent B's factories from causing cross-border pollution to A. Taken to its logical conclusion, 'environmental intervention' that might involve such A actions is presumptively illegal under current IL understandings (ones based upon the UN Charter 1945 and States' permitted rights of self-defence).[9] The research topic thus invites consideration of a provocative proposition – ***should*** States be permitted to take such direct actions against other States who are complicit in environmental harms being committed as a means of saving the Earth from further environmental harm? In the outlined scenario, an A invasion of B is a lawfully justified response that is designed to protect A, its people, and its ecosystems from further environmental harm attributable to B and its industrial or other polluting activities occurring within B's borders.[10]

In other words, can IL principles reasonably support an interpretation where States can either act unilaterally, or operate under United Nations Security Council authority as environmental intervenors to prevent ongoing, or future environmental damage? Four key IL concepts that frame this environmental protection discussion. These are: (i) eco-intervention; (ii) State sovereignty; (iii), what level of damage should constitute actionable transboundary environmental harm giving States legal justification to pursue eco-intervention; and (iv), 'Responsibility to Protect' (R2P) principles as otherwise defined under IL.[11] These concepts are each explained in Section II. The leading cases and academic commentaries that have considered these concepts are given closer Section III attention, where the possible legal justifications (also described as 'triggering events') for any States determined to pursue environmental intervention are also outlined.

In Section IV, an independent commentary focuses on the pragmatic aspects of IL and what environmental intervention might mean in practice. This commentary also examines whether the international community can likely find common ground regarding what climate change - environmental circumstances will give State versus

7 United Nations 'The right to a healthy environment' (2022) [Online] <https://www.un.org/en/climatechange/right-h…> [14 October 2023], citing Paris Agreement 2015.

8 Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2(1) *GIMPA Law Review*, 14, 34 <https://ssrn.com/abstract=3171769> [16 October 2023].

9 UN Charter 1945, Article 51 as a commencement point.

10 Ibid.

11 Christina Voigt, 'International Environmental Responsibility and Liability' (February 2021) [Online] <http://dx.doi.org/10.2139/ssrn.3791419> [15 October 2023], 2.

State intervention IL sanction.[12] The detailed Section V conclusions sound a pessimistic note: environmental intervention should be clearly defined under IL through a more robust Paris Agreement or similar IL instrument.[13] The Paris Agreement does not authorise sanctions to be imposed against States who do not reach its carbon emission reduction targets. The reasons why the Paris Agreement was negotiated in this way, and how this perceived Agreement weakness impacts larger global efforts to mitigate climate change and global warming are given deeper Section IV attention. There should be circumstances where States can intervene to protect themselves and the planet from environmental degradation. Intervention might conceivably take different forms. Economic sanctions imposed by the UN Security Council against offending States could be the primary option, with armed intervention regarded as a last resort when all other efforts have failed (the hypothetical State A versus State B scenario).

It is suggested that notwithstanding the clear appeal that environmental intervention may have for reasonable observers as a powerful environmental protection tool, pragmatism supports the strong Section IV and V doubts expressed regarding such measures ever becoming enforceable IL provisions. The currently fractured international community and its apparent inability to meaningfully move beyond Paris Agreement 2015 and COP rhetoric are the prime drivers of these doubts.[14]

II. Key Concepts

A. Eco-intervention

The short form used here to describe environmental intervention theory is readily defined. The Section I and II sources largely confirm that how eco-intervention is understood in practical terms is a more challenging, and less definitive exercise (especially the ways that its application might conceivably interact with the three other highlighted concept definitions outlined below).[15]Eco-intervention represents what its advocates argue is a logical, thus principles expansion of the accepted IL notion that in exceptional circumstances, the UN Security Council may authorise UN member States to intervene in other States' internal activities on the basis of UN Charter 1945 Chapter VII provisions.[16] These are the collective powers afforded to the Security Council to preserve peace across the international community.[17] The core powers exercisable here are rooted in this Article 39 language: the Council is

12 Ibid.

13 As defined under the Vienna Convention on the law of treaties 1969 (VCLT), Articles 2, 23 through 29.

14 A phrase taken from Charles rotter, 'Watts Up with That? COP28 in Dubai: A Crossroads of Rhetoric and Reality' (2023) [Online] <https://wattsupwiththat.com/2023/10/16/cop28-in-dubai-a-crossroads-of...> [16 October 2023].

15 Marcelo Varella, 'Right of Intervention and Right to Environmental Intervention' (September 2019) [Online] <http://dx.doi.org/10.2139/ssrn.3448158> [15 October 2023],2-4.

16 UN Charter 1945 Chapter VII, commencing with Article 39, through Article 52.

17 Ibid.

authorized to determine "the existence of any threat to the peace, breach of the peace, or act of aggression", with the additional authority to take any necessary military and non-military action that will restore "international peace and security".[18]

This Article 39 power is linked directly to the overarching IL obligation assumed by all UN members to resolve any international dispute through peaceful ('pacific') means. Charter Article 33 states that where States are involved in any dispute that carries the potential to endanger the "maintenance of international peace and security", such parties must first seek a solution by engaging in "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice…".[19] It is noted that when taken together, Articles 33 and 39 make no direct reference to the Security Council having authority to direct States to intervene when an environmental protection related dispute arises. The phrase 'international peace and security' must have its natural meaning stretched to a degree for UN Charter 1945 Chapter VII to accommodate environmental issues.[20]

It is suggested for present discussion purposes that this liberal approach to Chapter VII Security Council dispute resolution powers is valid. Of numerous examples, the current international environmental law scholarship confirms this IL area as a "relatively pragmatic discipline", where problem solving must be priorised over strict IL rules-based interpretations.[21] The following rationale is plainly sound, given international acceptance that the world now faces a climate emergency: IL must now sanction Security Council approaches that appear "… best suited to achieving the desired results in a given context".[22]

Using the State A – State B scenario outlined above, the following environmental intervention pathway could be authorized by the Security Council under its liberally interpreted Chapter VII powers: (1) State A satisfies the Council that State B generated transborder pollution is harming A's environment and human population; (2) the Council directs A and B to mediate their dispute; (3) mediation fails and A satisfies the Council that B will not cease its polluting activities; (4) the Council imposes economic sanctions on B; (5) B still refuses to relent, and the Council authorizes A and other States to take military action against B to intervene and stop further environmental harm.[23]

18 Ibid, article 39.

19 Ibid, article 33.

20 Jutta Brunnée, 'The Sources of International Environmental Law: Interactional Law' (2017) Samantha Besson & Jean d'Aspremont, eds., *Oxford Handbook on the Sources of International Law* (2017) [Online] <https://ssrn.com/abstract=2784731> [16 October 2023], 2-5.

21 As noted in this older article, John Dreyer, 'Military Intervention in Environmental Affairs' (2011) APSA 2011 Annual Meeting Paper [Online] <https://ssrn.com/abstract=1900361> [16 October 2023].

22 Brunnée, 2.

23 UN Charter, Chapter VII.

On this basis, it is ***theoretically*** permissible under IL principles to expand upon Article 39 Security Council powers whereby environmental protection – now an accepted human right[24] - becomes the functional equivalent justification of any authorised Council interventions to secure State populations from physical harm or destruction. For example, the Security Council authorized international community military intervention in the brutal, even horrific Yugoslavia conflict (1998).[25] In such circumstances, the right of intervention concept takes precedence over sovereignty, otherwise the accepted "basis of unity of nations and public international law" – as further explained in section II.[26] It is noted that not only has the Security Council never authorized any action that even approaches the five step A versus B chronology outlined above – such potential actions have never been debated by the Council membership.[27]

B. State Sovereignty

The points developed in section I collectively underscore a proposition that goes directly to appreciating the 'idea' versus 'legal tool' dichotomy that anchors this entire discussion. State sovereignty is defined under IL as the State possessing the ultimate decision-making authority regarding the maintenance of order, preserving control of internal affairs, and security over its borders.[28]The entire notion that IL is the law governing State to State relations thus logically depends on sovereign, independent States engaging in these relationships.[29] Non-state actors such as terrorist groups and NGOs might have dealings with States, but IL theory does not recognize such entities as having greater IL status than sovereign States.[30]

It is equally apparent that State sovereignty and environmental intervention are antithetical IL concepts. A State's sovereignty is compromised where eco-intervention is sanctioned under UN Charter Chapter VII auspices. The more important issue that flows directly from this tension is whether, to what extent, or for how intervention principles might permissibly prevail over sovereign State interests. If the section I chronology unfolded, how long could a State A-led international force occupy State B and remain a legitimately authorised intervenor and not become an unlawful invader, colonizer, or conqueror?[31]

24 Varella, 2, 4.

25 Security Council Resolution 1160 (1998), due the Kosovo conflict.

26 Dreyer, 3.

27 See e.g., United Nations 'Security Council Strongly Condemns Attacks against Critical Infrastructure, Unanimously Adopting Resolution 2573 (2021) [Online] < https://press.un.org/en/2021/sc14506.doc.htm> [16 October 2023].

28 Renata Giannini 'The Rule of Law: State Sovereignty vs. International Obligations' (2014) <https://ww1.odu.edu/content/dam/odu/offices/mun/2010/legal/issue-brief-2010-the-rule-of-law.pdf> [14 October 2023], 3.

29 Ibid.

30 Ibid.

31 International Committee of the Red Cross, 'Occupation and international humanitarian law: questions' (2023) [Online] <https://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm> [16 October 2023].

C. Transboundary Environmental Harm (TEH)

This definition is aligned with the literal meaning of the individual terms. Jervan offers this representative scholarly definition example: TEH is any harm caused in a State's territory (or other places under the State's jurisdiction or control) other than the State where the TEH originates. TEH includes air pollution, transboundary watercourse pollution, or transboundary waste shipments or dumping.[32] TEH is closely linked to the 'no-harm rule', whereby States cannot conduct or permit any activities within their sovereign territories (or those taking place in common spaces such as the high seas) without regard to other States' interest, or the need to pursue global environmental protection.[33]

When eco-intervention, State sovereignty, and TEH concepts are collectively considered, one can appreciate a principled, albeit entirely theoretical basis for eco-intervention operating as a State sovereign power exception. In the State A – State B hypothetical scenario, the State A arguments made to the Security Council would logically emphasize the following cause and effect relationship. State A can assert that eco-intervention would not be necessary if State B was not engaging in TEH misconduct. The R2P principle is now explained with this State A example providing context.

D. Responsibility to Protect (R2P) Principles

R2P principles have acquired ever-increasing IL prominence in recent years. R2P is both a political principle and emerging IL norm that is utilized to when four 'atrocity crimes' have been committed, or their commission appears imminent.[34] These crimes are: genocide, war crimes, ethnic cleansing, and crimes against humanity (the key offences defined by the International Criminal Court statute).[35] The United Nations World Summit (2005) gave R2P principles an express IL – normative standard endorsement. R2P is founded upon three conceptual pillars, namely: (1) the fundamental sovereign State responsibility to protect its civil populations; (2) a companion international community responsibility to assist any States seeking to achieve (1); (3), a second international community responsibility to take any necessary collective action when a given State fails to satisfy R2P obligation (1).[36]

32 Marte Jervan, 'The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-Harm Rule' (2014; revised 2020) [Online] <https://ssrn.com/abstract=2486421> [16 October 2023], 3, 4.

33 Ibid.

34 Karen Smith, 'A reflection on the Responsibility to Protect in 2020' (2020) [Online] <https://www.globalr2p.org/publications/a-reflection-on-the-responsibility-to-protect-in-2020/> [16 October 2023].

35 Ibid, and see Statute of the International Criminal Court 1998, Articles 5 through 8.

36 Smith, 3.

R2P principles have been invoked in circumstances where a State population has faced dire harm, and the State was unable or unwilling to discharge its obligations to protect the population from harm. A leading example is the 2011 Security Resolution dealing with Yemen and its civil war.[37] The Resolution includes the following provisions that essentially echo the R2P definition highlighted above: (i) "… Recalling the Yemeni Government's primary responsibility to protect its population", while (ii), strongly condemning continued human rights violations committed by the Yemeni authorities (including State agents' excessive use of force directed against peaceful protestors), where "acts of violence, use of force, and human rights abuses perpetrated by other actors" each engage R2P principles.[38] It is apparent that R2P also generally aligns with the eco-intervention, State sovereignty, and TEH concepts.

E. Observations and Propositions

This observation supports a further, albeit entirely theoretical eco-intervention proposition. These IL concepts have obvious utility in terms of determining their ultimate suitability for use as international environmental law building blocks (the present discussion 'idea') to construct robust, effective climate change mitigation IL provisions. These concepts could therefore be readily modified for use in wide ranging environmental protection contexts through a comprehensive eco-intervention treaty that every member State would be obligated to implement into and make enforceable under its relevant domestic laws (as contemplated under Vienna Convention 1969 treaty rules).[39]

The above observation thus prompts the following further enquiry, as framed by a simple, succinct question. The Rio Declaration published at the 1992 'Earth Summit' proclaimed the international community's commitment to these (among other) seemingly noble IL objectives: [40] (1) all humans are ***entitled*** "to a healthy and productive life in harmony with nature" (environmental protection as a human right);[41] (2) environmental protection is ***essential*** to every fully functioning sustainable development process;[42] (3) States shall ***cooperate*** "in a spirit of global partnership" regarding all Earth ecosystem protection, and restoration, where developed world countries will assume a leading role given their greater "contributions to global environmental degradation";[43] and (4), all States "shall enact effective environmental

37 Security Council Resolution 2014 (2011).

38 Ibid.

39 Vienna Convention on the law of treaties 1969, Articles 2, 23 through 30.

40 United Nations General Assembly, 'Rio Declaration On Environment And Development' (also A/CONF.151/26 (Vol. I) (1992) [Online] <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration> [16 October 2023].

41 Ibid, Principle 1.

42 Ibid, Principle 4.

43 Ibid, Principle 7.

legislation".[44] It is notable that after 31 years since the Rio Summit, these declared international community objectives have not been converted into enforceable IL environmental standards. The fundamental question that must be addressed in the following discussion sections is 'why?'

III. Cases and Academic Commentaries

A. Overview – Transboundary Harm Case Law

In their detailed 2021 eco-intervention analysis, scholars Erik Axelsson and Victor Schill provide a commencement point for considering the 'why' question posed at the Chapter 1 conclusion.[45] They observe that under currently prevailing IL principles governing potential State liability for its transboundary environmental damage is limited to the offending State paying provable compensation to the affected neighboring State(s).[46] There are no enforceable IL mechanisms that will permit a broader international community recovery for environmental harm that has any other effects.[47]

An example can be taken from the State A – State B scenario presented above. State B has a rare ecosystem ('Pure Island') that has been declared a United Nations (UNESCO) 'World Heritage Site', one UNESCO describes as a rare pristine island ecosystem that exists in the complete absence of alien plants, animals, and human impacts.[48] State B authorities have now permitted gold mining on Pure Island and international scientists have confirmed that Pure Island's ecosystem will be destroyed if the mining continues. This State B-sanctioned conduct does not have any transborder effects, thus State A (nor any other States, or other legal entities) does not currently have any legal right to prevent these State B activities.[49]

If this scenario is taken to its logical and sobering conclusion, State B can permit the destruction of a place that the international community (through UNESCO) has declared one that has value to the entire world – the ethos echoed, but never acted upon in the post-1992 Rio Summit era.[50] The following cases assist in appreciating the 'why' question answers supported by the further discussion points developed below.

44 Ibid, Principle 11.

45 Erik Axelsson and Victor Schill, 'Eco-Intervention, the Protection of Sovereignty and the Duty of the Sovereign State to Protect the Environment: An Analysis of Eco-Intervention in Connection with the Principle of Sovereignty and Other Norms of International Law' (2021) [Online] <https://www.diva-portal.org/smash/get/diva2:1598173/FULLTEXT01.pdf> [17 October 2023], 2, 3.

46 Ibid, 5.

47 Ibid.

48 UNESCO 'Heard and McDonald Islands' (2023) [Online] <https://whc.unesco.org/en/list/577> [17 October 2023], the example used to support this hypothetical scenario.

49 Ibid.

50 United Nations General Assembly, 'Rio Declaration On Environment And Development' (also A/CONF.151/26 (Vol. I) (1992).

B. Trail Smelter – An Important Commencement Point

This 1935 international arbitration decision is arguably the first important transborder environmental harm (TEH) ruling, one that has exerted continuing influence over all IL – TEH developments for almost 90 years.[51] The dispute facts remain a classic TEH example.

Commencing in 1932, the British Columbia, Canada based defendant owned and operated a zinc and lead metal smelting plant. The smelter operation emitted hazardous gas fumes (primarily sulfur dioxide) that were carried by prevailing winds across the United States border into neighbouring Washington State. There was significant scientific evidence assembled by US authorities that the smelter gases were causing plant life, forest, soil, and crop yield damage in Washington. Though an international agreement, Canada and the US agreed to establish an arbitral tribunal ('the 1935 Convention', with one member nominated by each State, and a neutral chairman).[52] The Tribunal relied on expert evidence tendered by each side.

In its initial (1938) decision, the Tribunal concluded that the smelter gas emissions resulted in Washington State harm between 1932 and 1937. The Tribunal ordered Canada to pay US authorities a $78,000 indemnity, one that constituted a 'complete and final indemnity and compensation for all damage which occurred between [these] dates'.[53] In its subsequent (1941) decision (1941), the Tribunal addressed three other questions posed in the 1935 Convention, namely: (1) how to determine responsibility, appropriate mitigation and indemnification related to future smelter transborder harm.[54] The Tribunal made the following 'future harm' finding: (i) no State has the right to have its sovereign territory used in any manner that causes "… injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence…".[55]

There is a clear global scholarly consensus regarding what the *Trail Smelter* arbitration decision means regarding all IL – environmental law evolution.[56] At its heart, the Trail dispute requires the Tribunal to decide competing State sovereignty claims – a crucial point, given the ways that sovereignty is central to all IL understandings (as confirmed by the Section II definitions). Canada was essentially advocating for a 'right

51 *Trail Smelter Case (United States v Canada)* (1935, 1938, 1941) [Online] <https://www.informea.org/en/court-decision/trail-smelter-case-united-states-v-canada> [17 October 2023].

52 Ibid, citing Convention For Settlement Of Difficulties Arising From Operation Of Smelter At Trail, B.C. 1935, '1935 Convention'.

53 Ibid.

54 Ibid.

55 See also Catherine Punella, 'An International Environmental Law case study: The Trail Smelter Arbitration' (2014) *International Pollution Issues* [Online] <https://intlpollution.commons.gc.cuny.edu/an-inter…> [17 October 2023].

56 Of numerous examples, see Rebecca M. Bratspies 'Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration' (2006), in *Transboundary Harm In International Law: Lessons From The Trail Smelter Arbitration*, Rebecca M. Bratspies & Russell A. Miller, eds., Cambridge University Press, 2006 (Article updated in 2012], [Online] <https://ssrn.com/abstract=1990519>]17 October 2023].

to pollute' that was driven by its economic development objectives. Conversely, the US sought to enforce its right to be secure from Canada's TEH.[57] The Tribunal reasoning thus supports two principles that remain embedded into all current IL frameworks - the 'polluter pays' principle, and duty assumed by all States to prevent TEH.[58]

A reasonable Trail tribunal ruling reader might assume that given how clearly the Tribunal articulated its reasons, there would be a natural progression from these two principles to a comprehensive legal framework supported by the international community concerning these State duties. The post-*Trail Smelter* case law is now considered with this assumption providing guidance, particularly with regard to how the present discussion 'idea' – 'legal tool' dichotomy must be understood today.

Where *Trail Smelter* required the clear adjudication of an environmental dispute where competing State sovereignty claims were central to all dispute resolution, the subsequent case law is less clear-cut. The *Gabcikovo-Nagymaros* dispute is a notable example.

C. Gabcikovo-Nagymaros

The 1997 *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* International Court of Justice (ICJ) is a notable example concerning the *Trail Smelter* legacy as influencing a non-air pollution environmental harm related dispute outcome.[59] This dispute had an extensive political history, one that was linked to a 1977 agreement between former Czechoslovakia and Hungary to build a hydroelectric dam complex on the Danube River.[60] By the early 1990s, shifting political and nationalist currents (including Czechoslovakia having been divided into two sovereign states (and European Union treaty membership admission) led to related concerns that the project would result in irreversible environmental harm (impacts on the Danube River watercourse).[61] Hungary specifically argued that upstream dam construction would irreversibly harm its downstream river sections – a transborder harm.[62]

EU pressure ultimately led to the dispute being referred to the ICJ. The Court made several comments that contribute to the view that it recognized how international environmental law was now driven by norms that are captured in the discussion Section II concept definitions. For example, the ICJ accepted that it must be "… mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment…"[63]

57 Ibid.

58 Punella, 'An International Environmental Law case study: The Trail Smelter Arbitration' (2014).

59 *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* 1997 I.C.J. 7 (ICJ), reprinted in 37 I.L.M. 162 (1998).

60 Ibid, [139].

61 Ibid, [25].

62 Ibid, [37].

63 Ibid, [140].

D. ICJ Role and Relevance

A brief explanation of the ICJ, its jurisdiction and dispute resolution approach each contribute to more fully appreciating why (or why not) *Gabcikovo-Nagymaros Project* is an important IL – TEH milestone. The Court is self-described by its UN leadership as a 'world court', one that operated under its two parts jurisdictional framework: (1) deciding IL-related disputes that States submit to the Court ('jurisdiction in contentious cases)'; (2) providing advisory opinions on legal questions as requested by UN institutions, specialized agencies or other organizations that have authority to make these requests ('advisory jurisdiction').[64]

A realist might offer an alternative description to the ICJ world court claim. The ICJ statute (through its Article 36) confirms that the Court does not possess compulsory jurisdiction.[65] In other words, the so-called 'world court' only renders biding decisions when the State parties or other defined entities with status agree to be bound by them. The *Nicaragua v US* case (1986) is a famous instance of a State party (the US) refusing to recognize the Court's jurisdiction after the US had originally accepted it.[66] The well-known ICJ advisory opinion rendered regarding the wall erected by Israel to separate the disputed Palestinian territory remains a theoretical abstract – the opinion did not seemingly influence IL-based change.[67] The following *Gabcikovo-Nagymaros Project* outcome comments are presented against these 'world court' claim shortcomings.

E. Outcome

However, for champions of environmental protection, the ICJ reasons are disappointing. *Gabcikovo-Nagymaros Project* was the first international dispute argued before the ICJ where environmental issues were "… fully pleaded and considered".[68] However, the Court expressly declined to pursue an otherwise golden opportunity to set new environmental protection standards that aligned with the Rio Declaration and what Mari Nakamitchi characterized as a chance to put "… the spirit of countless international environmental agreements and conventions into effect… ."[69] It can be convincingly argued that the ICJ could have taken the *Trail Smelter* 'polluter pays' and 'State environmental protection duty' principles to build out a coherent IL position, one that is summarized as: States may not unilaterally decide

64 International Court of Justice 'Jurisdiction' (2023) [Online] <https://icj-cij.org/jurisdiction> [17 October 2023].

65 International Court of Justice Statute 1946, Article 36.

66 Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, (1986) ICJ Rep 14 (1986).

67 *Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004 (ICJ). No comment is made or intended here regarding the current Israel – Hamas – Gaza conflict.

68 *Gabcikovo-Nagymaros Project*, [6].

69 Mari Nakamichi 'The International Court of Justice Decision Regarding the Gabcikovo-Nagymaros Project' (2017) 9(2) *Fordham Law Review* 337, 344.

to alter the natural environment where such alterations are opposed by neighbouring States (as supported by cogent, objective environmental impact evidence).[70]

This *Gabcikovo-Nagymaros Project* point can be taken one step further when assessing how it affects the project topic 'idea' versus legal tool comparisons. IL has always evolved incrementally – a reflection of its pragmatism as outlined in the article Introduction. The ICJ decision to remain silent concerning the full 'State duty' nature and scope means that other transborder environmental disputes must be located to determine where the law sits today. The ICJ could have sent a clear signal to the international community regarding these issues, and thus perhaps stimulated debate regarding what a comprehensive TEH treaty might include. *Gabcikovo-Nagymaros Project* thus carried IL framework evolution possibilities that have remained unexploited. More recent cases are now considered to determine if the ICJ has made more positive contributions to overall IL evolution in this area.

F. Costa Rica v. Nicaragua (2018)

This landmark 2018 ICJ decision represents the first time that the Court had rendered a decision awarding TEH-based damages.[71] The specific dispute facts are less important to the current discussion than the Court's analysis of all relevant TEH issues. Each State argued that as a matter of fundamental sovereignty, they could undertake works (such as road construction, or canal dredging along their shared border) without liability to other State for any TEH consequences.[72]

The Court concluded that any environmental damage that occurred in such circumstances, along with any resulting "… impairment or loss of the ability of the environment to provide goods and services, is compensable under international law".[73] IL compensation could conceivably include innocent States being indemnified by the harm producing States "… for such impairment or loss or payment for restoration of the damaged environment".[74] It is thus possible to logically conclude that *Costa Rica v Nicaragua* goes where the ICJ declined to venture in the earlier *Gabcikovo-Nagymaros Project* proceedings – providing a clear, cause and effect based treatment concerning how TEH is satisfactorily proven and compensated.[75]

70 Gerrit Betlem, 'Trail Smelter II: Transnational Application of CERCLA' (2007) 19(3) *Journal of Environmental Law* 396.

71 *Certain Activities Carried Out By Nicaragua In the Border Area (Costa Rica v. Nicaragua)* (Compensation Owed By The Republic Of Nicaragua To The Republic Of Costa Rica) (2018) [Online] < https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf> [17 October 2023].

72 Ibid, [2], [3].

73 Ibid, [3].

74 Ibid, [34].

75 Diane Desierto 'Environmental Damages, Environmental Reparations, and the Right to a Healthy Environment: The ICJ Compensation Judgment in Costa Rica v. Nicaragua and the IACtHR Advisory Opinion on Marine Protection for the Greater Caribbean' (2018) *EJIL Talk* [Online] <https://www.ejiltalk.org/environmental-damages-environmental-reparations-and-the-right-to-a-healthy-environment-the-icj-compensation-judgment-in-costa-rica-v-nicaragua-and-the-iacthr-advisory-opinion-on-marine-protection/> [17 October 2023].

G. Commentary

It is equally important to consider the obvious limitations that necessarily limit *Costa Rica v Nicaragua* precedent value in the present discussion context. The ICJ ruling concerned two States that agreed to submit their TEH dispute to the Court. Returning to the first State A versus State B TEH scenario, if B refuses to have the ICJ decide the dispute, State A's sole, presently lawful recourse would be the Security Council option outlined in Section II – the (as yet) untested IL – UN Charter 1945 Chapter VII avenues. Their more aggressive, and potentially unlawful alternatives are unilateral State A measures directed at State B (options that might include economic sanctions, or military force). These possibilities are more fully considered in Section IV.

IV. From Novel Ideas to Legal Frameworks – Can Environmental Intervention Achieve Recognition

Based on the Section III sources and related discussion points, the reasonable observer introduced earlier in this discussion might willingly accept the following set of propositions as an excellent environment intervention IL rules framework. Each is consistent with the Section II IL characterization as a "relatively pragmatic discipline", where over time enforceable international agreements would implement environmental protection – climate change mitigation activism as workable, thus practical legal tools. The 2015 Paris Agreement and its GHG reduction targets satisfy all Vienna Convention – IL requirements, ones that ensure the Agreement has legally binding international treaty status concerning climate change.[76] The Agreement could become a more comprehensive climate change legal tool if every member State is mandated to achieve its targets, or face the legal sanctions as further discussed below.[77]

The Paris Agreement was the product of intense, multi-year international negotiations. These processes tended to revolve around how best to resolve the following issues. The environmental science evidence is now regarded as indisputable – climate change is rapidly accelerating due to untamed global warming to the point where the entire planet must be treated as being on 'red alert'.[78] An accompanying reality cannot be ignored any longer: the world faces irreversible ecological harm and potential destruction in its present form unless the international community acts immediately and decisively to curb GHG emissions in every nation.[79]

76 VCLT Articles 2, 23 through 29.

77 Annalisa Savaresi, 'The Paris Agreement: Reflections on an International Law Odyssey' (2022) 8(7) *ESIL Conference Paper Series* [Online] <https://dspace.stir.ac.uk/bitstream/1893/26276/1/SSRN-id2912001.pdf> [17 October 2023], 3-5.

78 Pardo 'Uneven Evolution of Regional European Summer Heatwaves Under Climate Change' (2023), and see UN Meetings Coverage and Press Releases (SG/SM (2021)" 'New United Nations climate change report 'red alert' for planet, Secretary-General says, warning current emission plans not enough to adequately curb global temperature rise' (2022) [Online] <https://www.un.org/press/en/2021/sgsm20604.doc.htm> [19 October 2023].

79 Ibid.

The Paris Agreement debates were highly complex because such otherwise essential international community initiatives would invariably produce one or more of the following negative combined economic – environmental impact outcomes: (1) reducing GHG means utilising more expensive alternatives to carbon fuels that currently power much of the world's economic activity; (2) the costs to convert to clean ('green') energy will disproportionately impact developing world nations who are bound by Paris Agreement GHG emission targets; (3) the targets will only be attained if (i) the developed world States make proportionately greater contributions to GHG reductions (thus increasing their costs of Agreement compliance), or (ii) developing world nations are permitted a longer, or more flexible period to achieve compliance (thus reducing overall Agreement effectiveness in mitigating or ultimately reversing climate change).[80] As with any international treaty where numerous competing State interests are advanced during the negotiations process, the Paris Agreement provisions reflect where climate change objectives and carbon emission targets were created through compromise. The following commentaries that identify and discuss what are presented as inherent Paris Agreement weaknesses are understood with these IL realities clearly understood.

A. IL 'Idea' to Legal Tools – the Paris Agreement Provisions and Their Enforcement

IL has often been criticized for being weak and ill-suited for providing solutions to complex, real world global problems.[81] The suggested ICJ weaknesses and its institutional shortcomings as outlined in Section III are only one aspect of these broadly expressed IL criticisms. Numerous commentators challenge fundamental IL legitimacy on the bases that its frameworks are unduly weighed down with ideas and theory, with lesser attention directed at how practical enforcement powers capable of being exercised against State-related lawbreaking can be crafted and meaningfully implemented across the entire international community.[82]

At the risk of being influenced by recency bias, events such as the Russia – Ukraine war, the Hamas terror attacks launched against Israeli targets, and the Israeli military response that have not attracted decisive UN Security Council action to end the use of armed force.[83] This Council inactivity stands in stark contrast to the Council's UN Charter 1945 position (reinforced through Article 24) as the world's designated

80 As also explained in UN Meetings Coverage and Press Releases (SG/SM/20993 (26 October 2021).

81 Rotem Giladi and Yuval Shany, 'Assessing the Effectiveness of the International Court of Justice' (December 2020), in the *Cambridge Companion to the International Court of Justice*, Carlos Espósito, Kate Parlett and Callista Harris [Online] <https://ssrn.com/abstract=3801580> [19 October 2023], 3-4.

82 Paul Stephan, 'The Legitimacy of International Law' (January 2020), in *Palgrave Handbook of International Political Theory* (Palgrave MacMillan: New York, Howard Williams, David Boucher, Peter Sutch & David A. Reidy, eds., (2021) [Online] <https://ssrn.com/abstract=3521378> [18 October 2023], 5, 6.

83 Jeremy Farrall, 'The Populist Challenge and the Future of the United Nations Security Council' (May 2020) 35 *Maryland Journal of International Law* 1, 4 [Online] <https://ssrn.com/abstract=3611535> [19 October 2023].

peacekeeper.[84] The ways that these key problems might be resolved are beyond the scope of this discussion, but for present Section IV purposes, it is assumed that the Security Council can play a meaningful Paris Agreement GHG targets enforcement role if the international community adopted the following 'idea' to 'legal tools' solutions.

The central Paris Agreement negotiations revealed serious developed versus developing world tensions. These factors led directly to how the current GHG emission targets were set, and the ways that they might be achieved. It is noted that the Paris Agreement has no enforcement mechanisms in place regarding GHG target compliance, such as penalties, or other sanctions that the international community can impose through a central overseeing agency.[85] Stankovic is one of many IL – climate change scholars who agrees that "implementing strong enforcement measures is ***politically infeasible*** in the realm of international politics".[86] However, the above-noted IL criticisms directly contribute to how the Paris Agreement GHG targets might conceivably be made 'enforceable' using two different mechanisms.

B. The UNCLOS – IMO Example

The first Paris Agreement enforcement option is modeled on the UN Convention on the Law of the Sea 1980 (UNCLOS) provisions.[87] It is possible to establish a climate treaty body that is given equivalent oversight powers to those exercised by the International Maritime Organisation (ILO) (a primary UNCLOS organization).[88] The IMO role requires the following brief elaboration to more fully appreciate how the Paris Agreement and its member states' compliance could be similarly monitored and overseen.

The IMO is comprised of an Assembly (where all UNCLOS member states are represented), a Council that gives the IMO its primary leadership and policy directions, and five main Committees. The Marine Environment Protection Committee (MEPC) is the most relevant of these IMO committee structures for UNCLOS – Paris Agreement comparative purposes.[89]All UNCLOS member states are included in MEPC. This committee has been given primary Convention responsibility for devising and encouraging member state implementation of laws that increase prevention and

84 UN Charter 1945, Article 24.

85 Tatjana Stankovic 'The Paris Agreement's inherent tension between ambition and compliance' (September 2023) *Nature* [Online] <https://www.nature.com/articles/s41599-023-02054-6> [18 October 2023], 3.

86 Ibid.

87 United Nations Convention on the Law of the Sea 1980 (UNCLOS), and see UNCLOS Annex IX, International Organizations.

88 International Maritime Organization (IMO) (2023) [Online] <https://www.imo.org/en> [20 October 2023].

89 IMO 'Structure of IMO' (2024) [Online] <https://www.imo.org/en/About/Pages/Structure.aspx> [5 March 2024].

control of pollution from ships.[90] The MEPC also reviews the overall international community "… adoption and amendment of conventions and other regulations and measures to ensure their enforcement…"[91] In this important respect, the MEPC is the single most important IMO unit regarding how ship-related environmental harms are addressed under IL auspices.[92]

The UNCLOS provisions and all subsequent Convention developments confirm the following IL realities. The IMO and its committees like MEPC are not akin to an international law of the sea police force. The IMO organs (including MEPC) lack any substantive legal power to authorise military intervention or other direct UNCLOS provisions enforcement where States breach Convention rules concerning ocean pollution or sea habitat protection.[93] One can readily appreciate why such power – even if it existed – would be contrary to the fundamental principle that all effective IL measures are based upon State consensus and cooperation, with military intervention on any issue a clear last resort.[94]

However, if the above cited Stankovic observations made regarding IL are taken to their logical conclusion, a Paris Agreement body that functioned like the IMO (notably its 40 Member States' IMO Council, and an MEPC oversight equivalent) would represent a positive environmental protection step. Stankovic argues that in the current international climate politics sphere, States must exert 'social pressure' where the international community member who honour their Paris Agreement commitments are praised for their climate change mitigation leadership, while 'climate laggards' invite strong, focused criticism.[95] For Stankovic, international organizations are key players in the social pressure process.[96] The IMO through its committees' activities has made the UNCLOS provisions more effective through such efforts.[97] For these clear reasons, a Paris Agreement institutional counterpart to the IMO and its MEPC represents a sound environmental protection step – one that takes the Agreement closer to being enforced through 'legal tools' as contemplated by this discussion topic.

Further, there is ***some*** persuasive power in the pro-Agreement contention that its flexibility and emphasis placed on State to State cooperation will eventually achieve positive climate change results. Agreement detractors raise a compelling

90 Ibid.

91 Ibid, and see also Saiful Karim, 'IMO Institutional Structure and Law-Making Process. In: Prevention of Pollution of the Marine Environment from Vessels' (2015) <https://doi.org/10.1007/978-3-319-10608-3_2> [5 March 2024], [2.3].

92 Ibid, and see UNCLOS Articles 37, 38.

93 Ibid.

94 Ibid.

95 Stankovic 3, 4-5.

96 Ibid.

97 Robert Beckman, 'The Relationship Between UNCLOS and IMO Instruments' (2017) 2(2) *Asia-Pacific Journal of Ocean Law and Policy* 245.

counterargument – the climate change 'red alert' status means that no time must be wasted to achieve its GHG emission targets.[98] The second proposed Agreement revisions are presented with these competing viewpoints in place.

However, the 'some persuasive power' comment offered above invites an (at least) equally persuasive counterargument. The entire Paris Agreement negotiations process did not yield any concrete member State agreements regarding punishments for Paris violators. These Agreement breaches could conceivably take one of two forms: (1) failing to implement the Agreement into domestic law (a Vienna Convention obligation); (2) punishing any State that does not meaningfully enforce the Agreement greenhouse gas emissions reduction targets.[99]

This apparent Paris Agreement shortcoming is readily understood when the geopolitical dynamics are fully appreciated. The UN leadership that has been driving the global climate change mitigation agenda made a pragmatic decision. It would be better to have a relatively weak, aspirational international community instrument than none at all.[100]. This observation reflects reality – a point given further attention below.

C. A Reinvigorated Security Council?

The second option represents a more aggressive Paris Agreement enforcement tool, one that could elevate Section II eco-intervention and R2P concepts to legal tools status. A Paris Agreement that is expanded to include specific Security Council powers that build upon the current UN Charter Chapter VII provisions.[101] The seemingly most logical Paris Agreement – Security Council linkage is readily outlined. The Paris Agreement could be amended whereby the Agreement member states would accept the Security Council possesses the power to enforce the Agreement GHG emission targets in one of two ways. These are: (1) imposing economic sanctions on States that do not meet their accepted targets; and (2), where sanctions do not achieve Agreement compliance, the Security Council may authorize the use of armed force (where willing States are prepared to commit military resources).[102]

If this approach was adopted by the Paris Agreement membership, international peacekeeping concepts that are reflected in numerous prior Security Council resolutions authorizing military – armed force intervention are effectively repurposed

98 Savaresi, 4, and UN Meetings Coverage and Press Releases (SG/SM (2021).

99 Vienna Convention on the law of treaties, Articles 23-30.

100 Imad Ibrahim, 'The Paris Agreement Compliance Mechanism: Preparing For COP 26 In Glasgow And Beyond' (2021) 11 *Wake Forest Law Review Online* [Online] <https://ssrn.com/abstract=3958371> [27 February 2024].

101 UN Charter Chapter VII.

102 As contemplated by Chapter VII.

to sanction environmental intervention.[103] It is suggested that this Security Council power would operate as a true last resort – a narrowly defined State sovereignty exception. It would only be invoked where the Paris Agreement's usual emphasis placed on international community cooperation to reach all climate mitigation goals.[104]There is merit in the 2021 Brady Dennis assertion that the UN leadership that eventually secured the Paris Agreement has now assumed "the role of the globe's exhorter-in-chief for bolder climate action", a position that criticizes wealthy nations where GHG target inaction is confirmed.[105] It is equally clear that even the strongest climate change – environmental protection rhetoric does not necessarily achieve desired results.

An important point must be factored into this specific discussion point. Under UN Charter Chapter VII, the five permanent Security Council members (China, France, Russian Federation, United Kingdom, and United States) must agree on the specific resolution terms.[106] Where any one of these members vetoes a proposed resolution, it cannot pass and thus it will have no IL effect.[107]

D. The State A – State B Scenario

It is assumed that State B transborder air pollution generated by its factories continues to cause TEH in State A. Its government then unilaterally imposed trade sanctions and established strict border controls governing all State B traffic in retaliation for these TEH events. This State A action does not solve the TEH problem. State A then requests that State B agree to have the ICJ adjudicate this dispute. State B refuses to accept ICJ jurisdiction. State A then seeks a Security Council resolution (Resolution 1) whereby economic sanctions are imposed on State B across the entire international community. State C is State B's largest trading partner, and notwithstanding all three States being Paris Agreement members, State C declines to enforce the resolution.

When the Security Council concludes that Resolution 1 has not motivated State B to cease its TEH causing activities, Resolution 2 is proposed whereby an international armed force is authorized to enter State B and use military means, if necessary to shut down polluting State B factories. Security Council permanent member State D vetoes Resolution 2. State B TEH continues to pollute State A ecosystems, and

103 Farrall, 6-7.

104 Brady Dennis, 'The U.N. chief's relentless, frustrating pursuit to bring the world together on climate change' (October 2021) *Washington Post* [Online] <https://www.washingtonpost.com/climate-environment/2021/10/25/antonio-guterres-climate-change/> [19 October 2023].

105 Ibid.

106 The power of veto originates in Article 27 of the United Nations Charter, even if the term "veto" is not used in it. United Nations Security Council 'Current Members' (2023) [Online] <https://www.un.org/securitycouncil/content/current-members> [20 October 2023].

107 Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge University Press 2020) 48..

State A ultimately declares war on State B. The following commentary builds on this scenario.

E. Commentary - IL Fundamental Weakness and Pragmatic, Consistent Enforcement

The world has not yet seen a situation unfold such as these State A – State B scenario events. Some observers might therefore argue that the scenario is far-fetched and thus a poor illustration of the Section II concepts in action. Voight and other commentators provide a convincing rebuttal – the fact that these scenario events have never unfolded cannot logically mean that as climate change impacts worsen, the scenario remains unrealistic.[108] State B is presumptively violating the Paris Agreement and thus it is permitting illegal TEH to continue. In general terms, wrongdoer states like B assume an international responsibility "…to cease that act, to offer assurances of non-repetition, and to make full reparation of the injury caused by the internationally wrongful act, including compensation for environmental damage…"[109]

State B has not accepted this international responsibility. The Security Council is revealed here as a weak, flawed international community institution if its resolutions are either unheeded, or a single permanent member veto effectively prevents the Council from exceptionally utilizing armed force to stop State sanctioned TEH. Its high minded language aside, the current Paris Agreement does not guarantee that the international community will save the planet from GHG-based climate change, global warming, and environmental destruction. A war has not yet been fought between States regarding a need for eco-intervention such as that depicted in the State A – State B scenario. The likelihood of such events must logically increase as destructive climate change outcomes also increase in both their frequency and severity.[110]

This commentary closes with a provocative, but logically sound IL observation. The Paris Agreement as currently structured does not have any GHG emission target enforcement mechanisms. The two Agreement revisions outlined above would include such mechanisms, but each has significant practical limitations. An IMO-styled Paris Agreement is (at best) an international community 'exhorter-in-chief' that lacks true enforcement capabilities. The proposed express Security Council – Paris Agreement power is easily undermined unless full permanent member consensus exists to use UN Charter Chapter VII peace and security maintenance provisions to their fullest permitted extent.[111] These realities underscore the concluding observation and its two

108 Christina Voigt, 'International Environmental Responsibility and Liability (February 2021) [Online] <http://dx.doi.org/10.2139/ssrn.3791419> [19 October 2023].

109 Ibid, 4-5.

110 A point taken from reading Caitlin Werrell and Francesco Femia 'Climate Change, the Erosion of State Sovereignty, and World Order' (2016) 22(2) *Brown Journal of World Affairs* 221, 235 [Online] <https://www.jstor.org/stable/26534704>.

111 UN Charter 1945, Chapter VII.

elements: (1) State A can rightly argue that the combined effect of climate change, State A's sovereign right to protect its citizens and ecosystems from State B TEH, coupled with a weak IL framework (the ICJ and Security Council procedural gaps and related shortcomings) left it with no choice but to either accept destructive TEH, or take military action as its last resort; given (1), State A's invasion is an ultimate act of eco-intervention that satisfies the Section III R2P definition. The article conclusions are directly influenced by these commentary points.

V. Conclusions

It is suggested that the various Section II conceptual definitions, Section III IL case law, and the Section IV Paris Agreement discussion points collectively leave little doubt the eco-intervention is now more than a mere activist idea when the entire topic and its environmental protection ramifications are fairly considered. State sovereignty principles remain an IL framework lynchpin. Any actions taken by the international community to further environmental protection ambitions (or those undertaken by individual states like A in its State B invasion scenario) are exceptions to sovereignty being respected by all other States. One may reasonably conclude that the Paris Agreement as currently constructed implicitly recognizes State sovereignty as remaining paramount – or the Agreement would have included more vigorous, clearly defined enforcement mechanisms such as those IL reform possibilities outlined in Chapter IV.

Eco-intervention on a scale contemplated in the State A – State B dispute may still seem unlikely, but the discussion confirms that the core topic element is likely closer to occurring than at any previous time: Eco-intervention is potentially justified where IL does not provide a clear, workable answer to increasingly dire TEH threats that originate in States that are unable or unwilling to remedy them. The question posed in the project Introduction must be answered affirmatively, with a further qualification. States ***should*** be permitted to take such eco-intervention actions where these are reasonably necessary to save the Earth from further environmental harm. It is acknowledged that in the State A – State B context, if State A may permissibly rely on the combined effects of all four Section II concepts to justify military invasion as its last resort to combat State B's TEH activities, other willing States might join its cause. Conversely, State C or other State B allies might rally to its defence. The world order contemplated by adherence to the UN Charter and its Security Council as global peacemaker would collapse into ruin.

This potential unraveling of the international community and its Paris Agreement commitments does not detract from the final conclusion clearly supported by this discussion. When the current IL framework weaknesses are stripped away, States can

act on the powerful ideas that provide environmental protection with its persuasive appeal. If the current climate change mitigation framework created under Paris Agreement auspices do not work very well, and the proposed enhancements of Agreement GHG emission targets cannot be converted into workable legal tools, R2P gives State A its IL justification to unilaterally act if necessary to protect its environment and people from State B TEH. This is a sobering, but legally sound restatement of where IL and environmental protection principles are today.

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RESEARCH ARTICLE

Implementation of the Concept of "Bring Your Own Device" (BYOD) within the Scope of Labour Law

Hasan Alparslan Ayan*

Abstract

The process of digitalisation has a profound impact on the global landscape. The ramifications of this phenomenon on the workforce are inescapable. Technological developments exert an influence on employment relationships. From this point forward, information technology (IT) devices will become a requisite component for employees in order to fulfil the obligations inherent to an employment contract. It is therefore becoming more common for employees to use the devices they bring to the workplace. The concept of BYOD (Bring Your Own Device) refers to the use of an employee's personal IT devices for work-related purposes. Concurrently, this situation leads to issues within the employment relationship. To resolve these issues, it is essential to consider the BYOD concept within the context of labour law. The aim of this study is to evaluate the characteristics of the BYOD concept in employment relationships in comparison with German and Turkish labour law. In consideration of the nature of BYOD, only situations of the utilisation of IT devices will be addressed, and the use of other work resources will not be subject to evaluation. Although there is no direct court decision on the BYOD, the decisions of the Turkish Constitutional Court and the Court of Cassation, as well as the German Federal Labour Court and the Court of Justice of the European Union, which pertain to this concept, will be included in this study. As the primary focus of this article is on the BYOD concept, a concise overview of alternative concepts is provided. After this juncture, the employer's right of the management and workplace practises will be analysed within the context of BYOD. In the context of the use of personal IT devices within the framework of the employment relationship, certain issues emerge that affect the work and rest periods of employees. In addition, the BYOD application is inextricably linked to the issue of personal data. It is an inevitable consequence of the BYOD that an employee's personal data, in conjunction with third parties, will be on the IT devices. Therefore, measures have been developed to protect personal data on IT devices. These topics will be explained under mobile device management (MDM) tools. The final issue to be addressed is the legal status of software on the employee's IT devices. In this context, the issues of intellectual property rights and licencing agreements will also be discussed in a separate section dedicated to the BYOD.

Keywords

BYOD, Types of BYOD, Employment Contract, Employer's Liability, Employee Claims, Appropriate Remuneration, Mobile Device Management (MDM)

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Introduction

The utilisation of information technologies (IT), including computers, tablets, and smartphones, has become an indispensable aspect of contemporary working practises. Previously, there was a clear delineation between the technological resources provided by the employer and those of the employee. However, this boundary is becoming blurred, as an increasing number of employees prefer to use personal IT devices in their workplaces[1]. Research indicates that candidates expect their potential employers to permit them to use their existing personal IT devices for work[2]. The widespread acquisition and leasing of these devices, coupled with employers' efforts to reduce investment costs, have integrated these tools into the operational processes of workplaces[3].

On the whole, this approach may appear to be advantageous to both parties to the employment contract. However, the concept of BYOD in employment relationships causes some legal conflicts, few of which have been analysed to date. In the absence of legal regulations regarding the BYOD, the parties to the employment contract should shape the framework for its use. This leads to unresolved issues. Issues are of central importance and encompass a number of key areas, including cost, liability, maintenance/repair, working/resting periods, the limits on the usage rights of employees' devices, data protection, intellectual property rights and licence agreements[4].

I. Concepts

A. BYOD: "Bring Your Own Device"

In the United States, the utilisation of personal IT devices in the workplace is discussed under the concept of *"Bring Your Own Device" (BYOD)*[5]. Similarly, in Germany, the concept is referred to as *"Bring dein eigenes Gerät mit (und nutze es für*

1 Gerlind Wisskirchen and Jan Peter Schiller, 'Aktuelle Problemstellungen im Zusammenhang mit „Bring Your Own Device"' [2015] Der Betrieb 1163, 1163; Dirk Pollert, 'Arbeitnehmer-Smartphone als Betriebsmittel – ein kostensparendes Modell?' NZA-Beilage 152, 152.

2 For further details regarding the results of the study, please refer to the following. Jin Hwa Lee and Hasan Tinmaz, 'A Perceptional Analysis of BYOD (Bring Your Own Device) for Educational or Workplace Implementations in a South Korean Case' (2019), 6 Participatory Educational Research, 51, 61. See also Christian Hoppe, 'Bring your own device (BYOD)' in Stefan Kramer (ed), *IT-Arbeitsrecht* (3rd edn, CH BECK 2023) para 726.

3 Oliver Zöll and Jacek B Kielkowski, 'Arbeitsrechtliche Umsetzung von „Bring Your Own Device" (BYOD)' [2012] Betriebs-Berater, 2625, 2625.

4 Wisskirchen and Schiller (n 1) 1163; Ferdinand Grieger, 'Bring Your Own Device in Der Unternehmenspraxis' [2023], MMR 168, 168.

5 Shefiu Olusegun Ganiyu and Rasheed Gbenga Jimoh, 'Characterising Risk Factors and Countermeasures for Risk Evaluation of Bring Your Own Device Strategy' (2018) 7 International Journal of Information Security Science, 49, 49.

die Arbeit)"[6]. The concept is also prevalent in Turkish law as *"Kendi Cihazını Getir"*[7]. The focus is on employees using their own devices for work-related purposes, both within and outside the workplace, and reaching an agreement with their employer on this matter[8]. The term "IT device" should be understood to encompass a broad range of technical work tools capable of inputting and outputting information, such as smartphones, laptops, tablets, wearable technologies, in as well as computer programs/softwares, databases, internet services, and digital platforms installed on these devices[9].

The BYOD can be defined in a variety of ways. First, it refers to an employee using his/her own IT devices to replace workplace tools[10]. Although the employer is legally obliged to provide the necessary tools for the job, the parties may agree that the employee will provide his/her own equipment. In this case, the employer avoids the cost of maintaining IT devices in the workplace[11]. Second, BYOD can be applied on an optional basis. In this case, the employer does not relinquish their responsibility to provide devices; instead, the employer allows the employee to use his/her own devices within the work organisation[12]. Third, the parties may not regulate BYOD practises. This implies that although the employer tolerates the use of personal devices, no binding conditions are set forth in the employment contract. This practise is known as *"BYOD Wildwuchs"* and is not recommended due to the significant risks it poses to company data[13].

The consequences of implementing a BYOD policy are contingent on the specific types of BYOD models selected. The utilisation of BYOD as a replacement for workplace tools may reduce costs, electronic waste, and energy consumption.

6 Wolfgang Däubler, *Digitalisierung und Arbeitsrecht* (7th edn, Bund Verlag 2020) 99; Stefan Bartz and Marco Grotenrath, '„Bring Your Own Device"-Geräte in internen Ermittlungen' [2019] CCZ 184, 184; Burkard Göpfert and Elena Wilke, 'Nutzung privater Smartphones für dienstliche Zwecke' [2012] NZA 765, 765.

7 Ulaş Baysal, 'İşçiye Ait Taşınabilir İletişim Cihazlarının İş Amaçlı Kullanılması' [2018] Sicil İş Hukuku Dergisi 65, 66.

8 Hoppe (n 2) para 726; Ganiyu and Jimoh (n 5) 49; Däubler (n 6) 99. The concept of bring-your-own-device (BYOD) inherently pertains to the utilisation of personal IT devices by employees. See, Christine Monsch, *Bring Your Own Device (BYOD): Rechtsfragen der dienstlichen Nutzung arbeitnehmereigener mobiler Endgeräte im Unternehmen* (Duncker & Humblot 2017) 22; Wisskirchen and Schiller (n 1) 1163; Pollert (n 1) 153. For an explanation of the BYOD types, see COPE, POCE, and CYOD concepts.

9 Alexander Raif and Philipp Nann, 'Arbeitsrecht 4.0 – Möglichkeiten und Hürden in der digitalen Arbeitswelt' [2016] GWR 221, 222; Isabell Conrad and Jochen Schneider, 'Einsatz von „privater IT" im Unternehmen Kein privater USB-Stick, aber „Bring your own device" (BYOD)?' [2011] ZD 153, 153. For the relationship between Industry 4.0 and BYOD, see Jens Günther and Matthias Böglmüller, 'Arbeitsrecht 4.0 – Arbeitsrechtliche Herausforderungen in der vierten industriellen Revolution' [2015], NZA 1025, 1030.

10 Falk Müller, 'Bring Your Own Device (BYOD) im öffentlichen Dienst' [2021], öAT 23, 23. One perspective on the literature addresses the issue under two headings: real BYOD (allowing the use of a private devices for work purposes) and unreal BYOD (consenting to the private use of a workplace IT devices). See, Grieger (n 4) 168. For the concept of workplace tools (Arbeitsmittelbegriff), see Daniel Klocke and Sophia Hoppe, 'Der Anspruch auf essenzielle Arbeitsmittel' [2022], NZA-RR 515, 516.

11 Wisskirchen and Schiller (n 1) 1163; Stefan Kascherus and Martin Pröpper, 'Bring your own device (BYOD) - Mitbestimmung bei der Nutzung privater technischer Geräte' [2021], Betriebs-Berater 756, 756.

12 This option represents the most prevalent form of BYOD in Germany, as not all employees are willing or able to use personal IT devices for work-related purposes. See Monsch (n 8) 24; Hoppe (n 2) 729.

13 Monsch (n 8) 24; Zöll and Kielkowski (n 3) 2625.

Nevertheless, if it has an adverse effect on productivity, it will cease to be a viable option. Similarly, in the case of optional BYOD practises, additional expenses may be incurred, such as those associated with the protection of company data or the updating of software on personal devices. It is therefore unsurprising that certain concepts were developed to mitigate the disadvantages associated with the BYOD[14]. It is crucial to engage in discourse on these related concepts to gain a deeper understanding of the matter at hand.

B. COPE – "Corporate-Owned, Personally-Enabled"

This alternative model is distinct from BYOD, where the employer is responsible for providing the IT device. The employee is permitted to use the device for personal purposes and to configure it according to personal preferences[15].

In this model, the employee is responsible for ensuring that software is updated and that the technical functionality of the device is maintained. This includes the performance of maintenance and repair tasks. To safeguard the confidentiality of company data, the employer is responsible for installing the software on the device in advance. As the employee does not own the device, it is more convenient to monitor, remotely control, and ensure data security. Nevertheless, since the employer retains the financial responsibility for the purchase of the device and the employee is unable to utilise their own device, the anticipated cost savings and employee satisfaction that are purported to be achieved through the implementation of the BYOD policy are not realised[16].

C. POCE – "Personally-Owned, Corporate-Enabled"

In contrast to the COPE model, the IT device in question is owned by an employee. Although the employee utilises the device for work-related purposes, the operating system and software remain the property of the employee. Nevertheless, the employer is obliged to pay a lump sum in advance for the provision of the device, and the employee is obliged to grant the employer the necessary permission for remote access to the device[17].

D. CYOD – "Choose Your Own Device"

In this model, the employee is afforded a discretionary right regarding the IT device they will use; however, there are also predetermined IT devices provided by

14 Raif and Nann (n 9) 222; Grieger (n 4) 169; Göpfert and Wilke (n 6) 766; Däubler (n 6) 99.

15 Thomas Faas, 'WhatsApp & Outlook auf dem beruflichen Smartphone: Haftungsrisiken und Auswege' [2018] ArbRAktuell 594, 594; Baysal (n 7) 73; Ganiyu and Jimoh (n 5) 49.

16 As a prerequisite for COPE is the possession of the requisite technical expertise in support and maintenance, its use is recommended solely for employees with technical backgrounds in these fields. See Hoppe (n 2) para 727.

17 Bartz and Grotenrath (n 6) 184–185.

the employer[18]. As the tools used for work are the property of the employer, the employer is entitled to set usage conditions and limits, even if the employee uses the device for personal purposes[19]. In contrast to COPE, an employer is also responsible for providing device support and maintenance, thereby eliminating the need for an employee to possess specific technical expertise to operate the device[20]. The option to use personal devices may enhance employee satisfaction and productivity[21].

II. Legal basis for BYOD and contractual parties' agreement

A. Employer's right to management

Turkish law does not regulate the use of personal devices for work. The utilisation of IT devices for work purposes raises many concerns related to privacy, personal data protection, and the condition of the work. To obviate uncertainty and avoid litigation, it is imperative to establish a legal framework for BYOD and to delineate the obligations of the relevant parties[22].

In the event that the work assigned to the employee is only broadly outlined in the employment contract, as stipulated by Article 399 of the Turkish Code of Obligations No. 6098 (TCO), the employer must specify the content, place, and time of the work to be performed in a concrete manner[23]. In general, an employer is entitled to exercise his/her managerial prerogatives to determine and modify working conditions without the consent of the employee, provided that this does not constitute a significant alteration and does not contravene the legal standards[24]. Therefore, the determination right of the employer is applicable only in instances where the working conditions have not been determined by legal provisions, collective bargaining, employment contracts, or workplace practises[25].

18 Regarding CYOD, see Hoppe (n 2) para 727; Wisskirchen and Schiller (n 1), 1163.

19 Baysal (n 7) 73.

20 Any use of the IT device for purposes other than work can be defined as private use. For a detailed delineation of the distinctions between private and work-related use, see: Zeki Okur, *İş Hukuku'nda Elektronik Gözetleme* (Legal Yayıncılık 2013) 147.

21 Monsch (n 8) 27; Hoppe (n 2) para 726; Günther and Böglmüller (n 9) 1030.

22 Unlike Turkish legislation, German law allows for regulating BYOD in employment contracts with the involvement of the work council in accordance with 87 BetrVG. For further insight, see Kascherus and Pröpper (n 11) 756; Günther and Böglmüller (n 9) 1031; Conrad and Schneider (n 9) 157; and Däubler (n 6) 102.

23 Sevgi Dursun Ateş, *İşverenin Yönetim Hakkı* (Seçkin Yayıncılık 2019) 54. In terms of Turkish law, on the legal consequences of an employer's right to management, see Tankut Centel, *Introduction to Turkish Labour Law* (Springer 2017) 15; Ömer Ekmekçi, M Refik Korkusuz and Ömer Uğur, *Turkish Individual Labour Law* (2nd edn, Onikilevha Yayıncılık 2023) 33–34. See also, Şebnem Kılıç, 'Employment Law' in Şebnem Kılıç (ed), *Introduction to Turkish Business Law* (Peter Lang 2022) 165.

24 Dursun Ateş (n 23) 29. In accordance with the employer's orders, the employee is duty-bound to adhere to the instructions provided. For a comprehensive examination of this topic within the context of Turkish law, see Toker Dereli, Yeşim Pınar Soykut Sarıca and Aslı Taşbaşı, *Labour Law in Turkey* (3rd edn, Kluwer Law International 2023) 141.

25 Nuri Çelik and others, *İş Hukuku Dersleri* (36th edn, Beta Yayınevi 2023) 312; Mollamahmutoğlu Hamdi, Muhittin Astarlı and Ulaş Baysal, *İş Hukuku* (7th edn, Lykeion 2022) 85; Sarper Süzek, *İş Hukuku* (23rd edn, Beta Yayınevi 2023) 85. In accordance with Gewerbeordnung 106, the onus falls upon the employer to provide a more detailed delineation of the specific content, location and time of the tasks to be performed. See also Kascherus and Pröpper (n 11) 757.

It is evident that an employer's management rights do not constitute a legal basis for BYOD[26]. IT devices owned by the employee are not subject to the employer's instructions. In accordance with Article 413/I of the TCO, unless otherwise agreed or customary, the employer is obliged to provide the necessary tools and materials for work. Otherwise, the employer will be in default for failing to perform preparatory acts necessary for the execution of the work, which will result in continuing payment obligations under Article 408 of the TCO[27]. Furthermore, in accordance with Article 24/II-f of the Labour Act No. 4857 (LA), failure to comply with the stipulated working conditions will entitle the employee to terminate the contract without further notice[28]. Consequently, the extent to which the employee will use personal tools for work purposes and the manner in which such use will be undertaken is a matter for agreement between the parties[29].

Instructions to employees to use their own IT devices instead of those in the workplace is an extension of management rights. However, this does not concretise existing obligations; rather, it expands them and transfer employer responsibilities to the employee. This exceeds the limits of the legitimate authority to issue instructions[30]. The implementation of a BYOD policy requires a clear delineation of the respective responsibilities associated with the use of personal IT devices at work[31].

B. Agreement with the Employment Contract

It can be argued that the most crucial tool in regulating the implementation of BYOD is, in fact, employment. The prevailing view in the literature is that the BYOD must be explicitly agreed upon in the employment contract or addendum[32]. This perspective posits that establishing a BYOD model through legal relationships outside the employment relationship, such as through lease agreements, is never in the interests of the employee. This is because a legal relationship outside an employment contract lacks the principles and protections intended to protect the employee[33].

26 Müller (n 10) 23; Kascherus and Pröpper (n 11) 761.

27 Baysal (n 7) 67; Süzek (n 25) 500. A similar conclusion can be reached regarding German law. See Däubler (n 6) 99.

28 For a decision on this topic, please see. Court of Cassation, 9th Division, 8.12.2020, 2016/29695, 2020/17632, (lexpera.com.tr), accessed 09.07.2024.

29 Hoppe (n 2) para 729; Grieger (n 4) 169; Baysal (n 7) 68; Efe Yamakoğlu, *Bilişim Teknolojilerinin Kullanımının İş Sözleşmesi Taraflarının Fesih Hakkına Etkisi* (Onikilevha Yayıncılık 2020) 104.

30 Wisskirchen and Schiller (n 1) 1166; Zöll and Kielkowski (n 3) 2626; Däubler (n 6) 100.

31 Hoppe (n 2) para 729.

32 For a detailed examination of the characteristics of the employment contract, see M. Refik Korkusuz and Ömer Uğur, 'Turkish Individual Labour Law' in M Refik Korkusuz and Ferna İpekel Kayalı (eds), Turkish Private Law (3rd edn, Seçkin Yayıncılık 2024) 114; Centel (n 23) 67; Dereli and others (n 24) 81; Kılıç (n 23) 177. Parties to the employment contract may deviate from the principle of the provision of work equipment by the employer and may agree on the use of the employee's own work equipment in accordance with the BYOD concept. On this subject, see Katja Chandna-Hoppe, 'Essentielle Arbeitsmittel und mobile Arbeit' [2023], RdA 152, 157. For those who adhere to this viewpoint, see Monsch (n 8) 31; Pollert (n 1) 154; Däubler (n 6) 101.

33 Müller (n 10) 23; Grieger (n 4) 169.

The agreement, whether incorporated into the employment contract or presented as an addendum, may be addressed by the parties during the hiring process. Should the intention be to implement the aforementioned agreement during employment, note that this constitutes a significant alteration to the working conditions. The provisions of BYOD must diverge from the conventional notion that an employer provides tools as a fundamental aspect of work. Consequently, the consent of the employee is required in accordance with Article 22/I of the LA[34].

Furthermore, if a collective labour agreement contains a stipulation requiring employees to use their personal devices, this provision is in the interests of the employer. However, Article 36/I of the Act on Trade Unions and Collective Labour Agreements No. 6356 stipulates that the employment contract provision that is more beneficial to the employee should prevail. Therefore, if the individual employment contract explicitly stipulates that the employer will provide IT devices, the collective labour agreement provision will not be applicable[35].

C. Agreements Other than Employment Contracts

The minority view posits that the use of personal IT devices for work-related purposes should be regulated through legal relationships with individuals other than employment contracts. In such cases, the existence of obligations independent of the employment relationship becomes crucial, particularly regarding whether additional compensation will be provided to the employee. It is also necessary to consider the circumstances in which an employee shares his/her IT device with other colleagues or where the employer exercises partial control over the device. In such cases, it may be necessary to categorise the arrangement under other legal relationships[36].

In our opinion, not regulating the BYOD implementation within the scope of the employment contract but rather establishing it through other legal relationships is not conducive to protecting the interests of the employee. Therefore, it is appropriate to regulate specific provisions regarding BYOD within the framework of the employment contract terms rather than through other legal relationships.

34 Kılıç (n 23) 207; Ömer Ekmekçi, M Refik Korkusuz and Ömer Uğur (n 23) 132; Halûk Hâdi Sümer, *İş Hukuku Uygulamaları* (7th edn, Seçkin Yayıncılık 2019) 151; Dursun Ateş (n 23) 230. It is evident that the employer's decision to cease providing employees with IT devices represents a significant alteration to the established working conditions. For further insight into this topic, see Court of Cassation, 9th Division, 10.11.2020, 2017/18389, 2020/15521, (lexpera.com.tr), accessed 09.07.2024.

35 For conditions for the application of the benefit (more favourable) principle in collective agreements, see Dereli and Others (n 24) 373-374; Seda Ergüneş Emrağ, *Yararlılık İlkesi* (Onikilevha Yayıncılık 2022) 91. This is also the opinion in German labour law. See Hoppe (n 2) para 733.

36 Zöll and Kielkowski (n 3) 2626.

D. Workplace Practises

In general, employees are not entitled to use their own IT devices to fulfil their work obligations without the employer's consent. Nevertheless, given that employees frequently express a preference for working with their personal devices, the practise of BYOD is a prevalent reality within the context of employment relationships. Should an employer permit such a practise, the question of whether employees have the right to BYOD based on workplace practises becomes debatable.

The workplace practise is defined as the formation of a specific act by an employer in the workplace that is repeated regularly. The continuous provision of a benefit unilaterally provided by the employer, with the implicit acceptance of employees, constitutes a workplace practise that becomes a contractual provision under the employment contract. It is sufficient for employees to understand that such a benefit is provided unilaterally by the employer in accordance with the principle of good faith[37]. In order for a valid workplace practise to exist, several conditions must be met. Primarily, the practise must be of a general nature and provided by the employer to all employees or a specific section. Furthermore, the practise must be repeated if it becomes customary in the workplace[38].

In the literature, there is no consensus regarding whether a BYOD agreement can arise through a workplace practise. One perspective posits that if an employer permits the use of private IT devices for work purposes in accordance with the German Civil Code (Bürgerliches Gesetzbuch/BGB) 151, the employee may benefit from BYOD without the necessity of a separate agreement due to the existence of the workplace practise[39]. However, an opposing perspective maintains that BYOD cannot be based on a workplace practise, as its use primarily concerns the employer's interests[40].

The practise of BYOD should not emerge as a workplace practise. As a rule, BYOD serves the interests of the employer, for example, by reducing operating costs. The bringing of personal IT devices to the workplace may also entail certain burdens for the employee, which could disrupt the balance between the obligations set forth in the employment contract. Therefore, any such agreement must be explicitly agreed upon by the contracting parties.

37 Ömer Ekmekçi, M Refik Korkusuz and Ömer Uğur (n 23) 32; Sümer (n 34) 117. In accordance with the established case law of the Geman Federal Labour Court, workplace practise is defined as the regular repetition of certain behaviours by an employer that may lead employees to conclude that they will be permanently benefited. For further insight, direct to following judgments; BAG, 28.06.2006, 10 AZR 385/05, NZA 2006, 1174; BAG, 28.05.2008, 10 AZR 274/07, NZA 2008, 941, (beck-online), accessed 16.07.2024. For an examination of the role of workplace practises in the hierarchy of sources of labour law in the context of Turkish legislation, see Centel (n 23) 14.

38 Hamdi, Astarlı and Baysal (n 25) 85; Çelik and others (n 25) 270; Süzek (n 25) 80. See also, Ömer Ekmekçi, M Refik Korkusuz and Ömer Uğur (n 23) 32-33; Centel (n 23) 14. For the role of entrenched workplace practises, see Dereli and Others (n 24) 84. For entrenched workplace practises versus customary in labour law, see Kılıç (n 23) 164.

39 For the perspective that BYOD in the workplace may emerge through workplace practise, see Dirk M Barton, 'Betriebliche Übung und private Nutzung des Internetarbeitsplatzes „Arbeitsrechtliche Alternativen" zur Wiedereinführung der alleinigen dienstlichen Verwendung' [2006] NZA 460, 461.

40 The perspective that BYOD in the workplace does not emerge from the workplace (see Monsch (n 8) 43.

III. Regulation of BYOD Provisions in Employment Contracts

A. Prohibiting the Private Use of Devices

As stated previously, any provisions related to the use of BYOD must be incorporated into the employment contract or an addendum. The question of whether employees must accept prohibitions on the private use of IT devices during and outside working hours is raised in the employment contract. In addition, the use of unlicensed software on the device or the allowing of third parties, such as family members, to use it for private purposes presents a risk to the security of work-related data[41].

Employers may restrict the personal use of IT devices during working hours regardless of the characteristics of BYOD usage, if it jeopardises the performance of duties[42]. However, in private time, the situation remains debatable.

In the literature, *Lipp* posits that a prohibition that extends beyond working hours would constitute a restriction on an employee's property rights. She further argues that such a prohibition would only be valid if significant compensation is provided to the employee[43]. *Koch* holds that insofar as the device in question remains the property of the employee, its personal use cannot be prohibited[44]. *Monsch* also posits that the nature of the BYOD model, where the integration of work and personal use of IT devices is inherent, renders the prohibition of personal use incompatible with the BYOD concept[45].

The prohibition on personal use of IT devices constitutes disproportionate interference with the fundamental rights of employees. In lieu of an outright prohibition on personal use, as outlined below, the segregation of personal and work-related data on the device would prove a more effective means of safeguarding the employee's fundamental rights.

B. Effects of Work and Resting Periods

The advent of portable devices has enabled employees to contact each other at any time and from any location. The distinction between work and resting time is becoming increasingly indistinct[46]. In light of the fact that BYOD entails the utilisation of IT

41 Conrad and Schneider (n 9) 159.

42 Zöll and Kielkowski (n 3) 2627.

43 Katharina Lipp, 'Bring Your Own Device (BYOD) – Das neue Betriebsmittel', *Law as a service (LaaS): Recht im Internet- und Cloud-Zeitalter [Tagungsband Herbstakademie 2013]* (OlWIR, Oldenburger Verlag für Wirtschaft, Informatik und Recht 2013) 747.

44 Frank A Koch, 'Arbeitsrechtliche Auswirkungen von „Bring your own Device" – Die dienstliche Nutzung privater Mobilgeräte und das Arbeitsrecht' [2012], ITRB 35, 35. For a similar opinion, see Däubler (n 6) 101.

45 Monsch (n 8) 46.

46 Grieger (n 4) 171. Alongside its advantages, BYOD carries the risk of an increasing mix of work and resting time. See

devices owned by employees and that these devices are likely to remain operational for the purpose of engaging in personal activities, the implementation of specific regulations pertaining to working hours is imperative. It is therefore necessary to consider whether personal IT devices should be used during periods of free time during work hours[47].

Working time refers to the hours an employee spends performing their occupational duties. In addition, in accordance with Article 66 of the LA, the period spent awaiting work is considered working time. In this context, the primary motivation of the legislator in legally limiting working hours is to protect employee health. The advent of modern flexible working models has facilitated the flexibilisation of working times[48]. Nevertheless, when establishing working hours in the context of BYOD usage, it is imperative to consider the health of employees and respect their *right to disconnect*[49].

At this point, it is essential to consider whether the implementation of a BYOD policy will result in employees having extended accessibility for work-related purposes. In the German literature, this issue has been examined in the context of standby duty[50]. According to the literature, if an employer requires an employee to be accessible via an IT device outside of work, this should be regarded as working time, given that the employee is constantly on call and therefore unable to use their free time as they wish[51]. An alternative perspective posits that if the employee, while maintaining the IT device for the employer's use, can determine when to perform the tasks, it cannot be classified as working time[52]. Similarly, in the absence of explicit regulation concerning accessibility via the IT device and in the absence of the employer's directive, the reason for the working hours cannot be attributed to the employer. Consequently, no working time or wage payment obligation arises[53]. Furthermore, in consideration of the evolving of European labour law, it is imperative to underscore the employer's obligation to maintain accurate documentation of working periods in the context of BYOD practises. In this regard, it is incumbent upon the employer to implement a monitoring system that will record and document working hours regularly[54].

Hoppe (n 2) para 726.

47 Zöll and Kielkowski (n 3) 2628; Pollert (n 1) 154; Göpfert and Wilke (n 6) 768; Baysal (n 7) 73.

48 Centel (n 23) 137; Süzek (n 25) 800. For an examination of the concept of working time, see Ömer Ekmekçi, M Refik Korkusuz and Ömer Uğur (n 23) 107. For information on the regulation of working time within the context of workplace organisation, see Toker and Others (n 24) 157; Kılıç (n 23) 196-197.

49 Müller (n 7) 25. For suggestions on the employee's right to disconnect, see Deniz Ugan Çatalkaya, 'Kişisel Yaşamı Kapsamında İşçinin, İşverence "Ulaşılabilir Olmama" Hakkı' (2016) 74 Journal of Istanbul University Law Faculty 737, 743. See also F Burcu Savaş Kutsal, *İşçinin Ulaşılabilir Olmama Hakkı* (Seçkin Yayıncılık 2024), 102.

50 Regarding the duration of standby duty under German law, see Sevil Doğan, *İş Hukukunda İşçinin İş ve Aile Yaşama Uyumunun Sağlanması* (Seçkin Yayıncılık 2022) 366.

51 Monsch (n 8) 52; Hoppe (n 2) para 756; Pollert (n 1) 154.

52 Wisskirchen and Schiller (n 1) 1167.

53 Wisskirchen and Schiller (n 1) 1167.

54 For further information regarding the judgement of the Court of Justice of the European Union dated 14/05/2019 on

In the Turkish legal literature, as in European labour law, the argument is put forth that the working time of employees using IT devices should be documented[55]. This approach is of particular significance for employees in the context of BYOD. As the literature indicates, documentation of working periods is crucial for the protection of employee rights and the substantiation of claims in the event of a dispute between an employee and employer. Similarly, the documentation of working periods is of vital importance in terms of determining the employee's overtime work and ensuring a work-life balance[56].

Documentation of working periods is indirectly regulated in our legislation. Since the Labour Act does not directly regulate the documentation of working periods, the regulations issued pursuant to Articles 63 and 41 of the Labour Act (Article 9 of the Regulation on Working Periods Pursuant to the Labour Law and Article 10 of the Regulation on Overtime Work and Working for Excessive Periods Pursuant to the Labour Law) obligate the employer to document the working periods. Nevertheless, there is no stipulation regarding the manner in which the work should be documented. This matter shall be at the discretion of the employer[57]. Thus, the question of how to document working periods should be addressed by the contractual parties within the framework of the BYOD agreement[58].

An evaluation of the impact of BYOD usage on rest periods is also required[59]. In general, rest periods are defined as the time between the conclusion of the daily workday and the start of the subsequent work period. In accordance with Article 69/V of the LA, in workplaces where shift work is in operation, it is not permissible to require an employee to commence the next shift without a minimum of 11 consecutive hours of rest. In accordance with Article 46 of the LA, the employer is obliged to provide the employee with a minimum of 24 consecutive hours of rest within a 7-day period, with full remuneration provided that the employee has worked on the previous working days[60].

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the recording and documentation of working periods, refer to the Judgement in Case C-55/18 Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank, (https://curia.europa.eu/jcms/jcms/j_6/en/), accessed on 08.08.2024. A recent decision by the Federal Labour Court established that employers are now required to record and document all working periods of their employees. This obligation is not contingent on the size of the workplace or the existence of a work council. For the related judgement, see BAG, 13.09.2022, 1 ABR 22/21, (https://www.bundesarbeitsgericht.de), accessed on 09.08.2024. However, according to two recent rulings of the BAG (04.05.2022, 5 AZR 359/21 and 5 AZR 474/21), the obligation to record working periods does not increase the burden of proof in overtime proceedings.

55 For an evaluation of the Case C-55/18 Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank judgement in terms of Turkish labour law, see Namık Hüseyinli and Emre Ünal, 'Avrupa Birliği Adalet Divanı Kararı Işığında, Türk İş Hukuku'nda Çalışma Sürelerinin Kayıt Altına Alınması' (2024), 7 Necmettin Erbakan Üniversitesi Hukuk Fakültesi Dergisi 44, 47.

56 Hüseyinli and Ünal, (n 55), 64.

57 Hüseyinli and Ünal, (n 55), 51.

58 It can also be posited that when the use of personal IT devices outside the workplace is involved, the determination of working periods should be based on the employee's autonomy in structuring the standby period and the extent to which the employer's instructions impinge upon the employee's freedom during their free time.

59 Hoppe (n 2) para 756; Zöll and Kielkowski (n 3) 2628; Baysal (n 7) 73. For an examination of the concept of rest periods, see Ömer Ekmekçi, M Refik Korkusuz and Ömer Uğur (n 23) 116; Toker and others (n 24) 189; Kılıç (n 23) 203-204.

60 Centel (n 23) 149; Süzek (n 25) 860.

In the context of BYOD, it is our opinion that activities such as sending emails or making phone calls should not be considered interruptions to the rest periods, provided they do not require prolonged and strenuous preparation[61]. In other words, from an equity standpoint, an employee's use of a personal IT device for brief communication, such as making phone calls or preparing e-mail texts, should not be considered a cessation of the resting period. Conversely, a work-related activity that necessitates a prolonged preparatory period and is of a nature that precludes the benefit of a rest period should be regarded as an interruption to the resting period.

In conclusion, it would be prudent to regulate working and resting periods when drafting contractual provisions related to BYOD to prevent disputes[62]. Although there is no specific legal regulation on this issue in Turkish law, it is of particular importance to respect the employee's right to disconnect. For example, precautions may be implemented, such as deactivating software on an employee's personal IT devices at the end of the work or preventing email server activation during rest periods. Similarly, it is possible to pre-plan which employees can be contacted in the event of an emergency in a predetermined order and how such contact will be made in order to minimise the workload[63].

C. Occupational Health and Safety Precautions

The advent of digitalisation and the concomitant increase in the use of BYOD have resulted in a shift towards flexible forms of work. Despite this, the onus remains on the employer to ensure that requisite precautions are taken and risk assessments are conducted within the context of occupational health and safety[64]. In accordance with Article 4 of the Occupational Health and Safety Act No. 6331, it is the responsibility of the employer to ensure the health and safety of employees in relation to their work.

Considering the inherent risks associated with the distinctive structure of BYOD implementation, employers must implement occupational health and safety precautions in accordance with Article 417/2 of the TCO[65]. With this regulation, employers are obliged to guarantee the availability of requisite health and safety precautions and to provide suitable equipment. In addition, employees must adhere to these stipulations[66]. In this context, it is essential to consider the working conditions

61 Those who espouse a comparable perspective on this matter concerning German labour law, see Monsch (n 8) 59; Wisskirchen and Schiller (n 1) 1167.

62 Baysal (n 7) 73.

63 Further information that may be taken within the scope of the employee's right to disconnection is available in Savaş Kutsal (n 49) 111. In accordance with the principle of employee protection, the following measures should be taken by the employer. For further details see Ugan Çatalkaya (n 49) 750.

64 Müller (n 11) 24. Regarding the identification of factors and precautions for the risk assessment of BYOD use, see Ganiyu and Jimoh (n 5) 50.

65 Regarding health risks arising from long periods of time spent in front of IT devices, see Savaş Kutsal (n 49) 41.

66 Dereli and Others (n 24) 145; Ömer Ekmekçi, M Refik Korkusuz and Ömer Uğur (n 23): 209; Sümer (n 34): 459.

(such as illumination, screen quality and size) and ergonomic postures. Furthermore, the issue of mental stress on employees, such as burnout, and increased accessibility and psychosocial risks should be addressed. In addition, employees should be required to stop working and immediately inform their employer if they notice any health-threatening effects from IT device use[67].

D. Appropriate Payment to the Employer

When an employee uses his/her own IT device for work-related purposes, questions arise regarding whether the employer will compensate for this use and who will bear the costs associated with the support, maintenance, software, and repair of the devices. It is necessary to distinguish between the use of BYOD as a replacement for workplace IT devices and its optional application[68].

In German law, the use of BYOD as a substitute for workplace tools, as delineated in 670 of the BGB, is contingent upon 675[69]. In such cases, an employee who has incurred expenses on behalf of the employer is entitled to claim reimbursement. Expenses eligible for reimbursement include those incurred by the employee during fulfilling their work duties, as well as costs that are a direct consequence of fulfilling the contract. The provision of IT devices without appropriate compensation would result in the cost burden being shifted to the employee, which would render such a provision invalid under 307/I of the BGB[70]. The compensation should be based on the IT device's current value. In accordance with German law, such compensation may be claimed either on the basis of receipts or a pre-determined lump sum[71].

In Turkish law, in accordance with Article 413/II of the TCO, an employee is permitted to dedicate his/her tools or materials to work provided that such an arrangement is agreed upon by the employer[72]. In the absence of an agreement or customary practise to the contrary, the employer must provide the employee with appropriate compensation. This encompasses the device itself (work tools), software

According to the Turkish Court of Cassation, occupational health and safety rules must be strictly followed by employees. In this regard, in addition to the precautions to be taken by the employer, the employee also has obligations. See Court of Cassation, 9th Division, 12.6.2023, 2023/10610, 2023/8946, (lexpera.com.tr), accessed on 09.07.2024. Obligation to take measures for occupational health and safety (see Centel (n 23) 123-124.

67 Kascherus and Pröpper (n 11) 759.

68 Pollert (n 1) 154.

69 Hoppe (n 2) para 728. See also Chandna-Hoppe, (n 32), 153.

70 Wisskirchen and Schiller (n 1) 1166.

71 Monsch (n 8) 69–70. For decisions of the Federal Labour Court (Bundesarbeitsgericht-BAG) concerning the payment of appropriate compensation, see BAG, 12.01. 2005, 5 AZR 364/04, NZA 2005, 465; BAG, 11.10.2006, 5 AZR 721/05, 28, (beck-online), accessed 15.07.2024. In cases where equipment is required to fulfil an obligation, the question arises of whether and to what extent the employee can demand the provision of such resources. Aside from old rulings and in light of the changing conditions of new work models (such as BYOD), the Federal Labour Court addressed this issue in a landmark judgement and concluded that employees have the right to demand the provision of work equipment. For the decision, see BAG 10.11.2021, 5 AZR 334/21, NZA 2022, 401 ff., (beck-online), accessed 08.08.2024. For an evaluation of the decision, see Klocke and Hoppe (n 10) 515; Chandna-Hoppe (n 32) 153.

72 Centel (n 23) 133; Süzek (n 25) 499.

used on the device (materials), connection and subscription fees, electricity costs, technical support, and repair expenses. Article 414 of the TCO provides the relevant provision for establishing the requisite expenses. In accordance with this stipulation, the employer is obliged to bear all costs associated with the completion of assigned tasks, as well as any expenses incurred by the employee in the course of their duties, if they are carried out outside the usual place of work[73]. In the event that the expenses are deemed necessary for the satisfactory completion of the work, they may be compensated in a lump sum in accordance with the provisions laid down in Article 414/II of the TCO. However, as stipulated in Article 414/III of the TCO, agreements where compulsory expenses are partially or completely covered by the employee are invalid. In accordance with Article 416/I of the TCO, payment for expenses shall be provided with each salary payment, unless a shorter period is agreed upon or is customary practise.

In the optional BYOD implementation, the employer is typically responsible for providing the necessary work tools. Nevertheless, in this context, the employee may opt to use their own IT device due to its familiarity and ease of use. In the absence of a contrary agreement, the employee bears the costs associated with the use of BYOD[74].

E. Liability Clauses

1. Regarding employer claims

The implementation of the BYOD concept within the context of labour law gives rise to questions about the field of legal liability. In the context of BYOD implementation, employer liability claims against employees frequently relate to the safeguarding of information infrastructure or the protection of company data and secrets[75]. In particular, significant financial losses may result if third parties, such as clients or commercial partners, submit compensation claims against the employer due to data losses caused by incidents such as a cyber attack, jailbreak[76], or the use of outdated antivirus software on the IT system[77].

In German law, an employer's compensation claim is based on the provisions laid down in BGB 280/I and 241/II[78]. These provisions stipulate that in the event of a debtor breaching an obligation arising from a contractual relationship, the creditor is

73 Baysal (n 7) 68.

74 Pollert (n 1) 154.

75 Kascherus and Pröpper (n 11) 758.

76 Jailbreak bypasses the device's protection mechanisms and security infrastructure to instal unlicensed software, especially applications that are not officially available in the app store. Applicable to iOS-based devices. See this topic, Ganiyu and Jimoh (n 5) 56.

77 Zöll and Kielkowski (n 3) 2627; Däubler (n 6) 108.

78 Kascherus and Pröpper (n 11) 758.

entitled to demand compensation for the resulting damage. To establish liability on the part of the employee, the employer is required to prove fault in accordance with the stipulations set forth in BGB 280/II and 619a. The extent of damage is determined on the basis of the specific circumstances of the case, the seriousness of the fault, and the employee's duty of loyalty. In this context, it is incumbent upon the employer to regulate the requirements of access to the network and the security settings of IT devices with a view to safeguarding work-related data. Furthermore, the employer must inform the employee about these measures[79].

In accordance with Turkish legislation, the realisation of these possibilities causes employee liability under Article 400 of the TCO. In accordance with the stipulations of this regulatory framework, the employee bears responsibility for any damages incurred by the employer due to the employee's actions or omissions. In liability, the second paragraph of the regulation requires an evaluation of the nature of the work, its inherent dangers, the necessity for expertise and training, and the employee's abilities and qualifications, both as they are known or expected by the employer[80]. If the IT device utilised by an employee has caused damage, consideration should be given to the employee's training and expertise. Furthermore, if the employee's role (for example that of a data security specialist) entails a significant degree of responsibility, it can be concluded that the work is risky and prone to loss[81].

2. Regarding employee claims

A claim by an employee against their employer may arise in the event of the theft, loss, or damage of an IT device. It is recommended that employers insure these devices to prevent disputes; however, there is no legal obligation for employers to do so[82].

Nevertheless, the employer bears the responsibility of safeguarding the devices that the employee brings to the workplace for work-related purposes, as stipulated in the employment contract. In German law, this obligation is based on BGB 241/II[83]. In Turkish law, in consideration of the protective purpose of Article 413 of the TCO, it is stated that the onus is on the employer to bear the risks associated with the equipment during the performance of the work[84]. Consequently, it is incumbent

79 Monsch (n 8) 79; Conrad and Schneider (n 9) 158.

80 Centel (n 23) 106; Gaye Baycık, *Türk-İsviçre Hukukunda İşçinin Hukuki Sorumluluğu* (Yetkin Yayınları 2015) 160. For the legal liability of the employee to be accepted, it is clear that there must be an unintended decrease in the employer's assets, an appropriate causal link between the employee's act contrary to the contract, loss (damage), and the employee's fault. See, Court of Cassation, 9th Division, 23.11.2022, 2022/14705, 2022/15027, (lexpera.com.tr), accessed 09.07.2024.

81 Baysal (n 7) 70.

82 Zöll and Kielkowski (n 3) 2628; Baysal (n 7) 69. For an overview of employers' legal liability in general, see Centel (n 23) 38.

83 Monsch (n 8) 82.

84 Centel (n 23) 133; Baysal (n 7) 69.

upon the employer to take all reasonable measures to protect the devices from loss or damage. For example, in the event of loss or theft, it is necessary to remotely erase company data. However, this should not automatically erase personal data. Lockable cabinets should also be provided to reduce the risk of theft. The specific measures to be implemented are contingent on the context, scale of the workplace, and objectives associated with the adoption of BYOD[85].

It is important to highlight that the implementation of a policy that replaces working tools with personal IT devices increases the necessity for additional precautions because such devices require use for the fulfilment of work duties. However, in optional BYOD usage, the question of employer responsibility remains open to debate. In instances where the use of the device for professional purposes is not obligatory for the completion of work tasks, it is proposed that the onus of responsibility for potential loss or damage should fall upon the employee[86]. Similarly, Turkish legislation has established that damages resulting from risks unrelated to the performance of work duties do not fall under the purview of employer liability[87].

Failure by an employer to comply with the aforementioned obligations may result in damages for which the employee is entitled to claim compensation. In German law, the basis for such claims is established by the provisions of BGB 276/I and 280/I. In contrast to employee liability, the provisions laid down in BGB 619a do not apply in this context[88].

In Turkish law, the protection of devices brought by employees to the workplace can be seen to arise from an employer's duty of care towards the employee. If this obligation is not fulfilled and it results in harm, the employer may be held liable under the contractual liability provisions, allowing the employee to claim compensation for the damages incurred[89].

F. Obligation to Deliver Personal BYOD Devices

It is possible that, during an employment relationship, the employer may have a legitimate interest in requesting the employee's personal IT device and stored data. Such circumstances may include, for example, suspicion of misconduct (in the context of internal investigations), device maintenance and software updates, installation programmes, device disposal, and compliance checks related to BYOD agreements[90].

85 Hoppe (n 2) para 752; Zöll and Kielkowski (n 3) 2627.

86 Monsch (n 8) 93. For decisions of the Federal Labour Court in this direction, see BAG, 22.06.2011, 8 AZR 102/10, NZA 2012, 91; BAG, 23.11.2006, 8 AZR 701/05, NZA 2007, 870, (beck-online), accessed 15.07.2024.

87 Baysal (n 7) 70.

88 Göpfert and Wilke (n 6) 767.

89 Orhan Ersun Civan, *İşçinin Yan Yükümlülükleri* (Beta Yayınevi 2021) 95.

90 Raif and Nann (n 9) 222.

In light of the fact that BYOD does not affect device ownership, it has been observed that a specific agreement is required for an employee to be bound by an obligation to deliver the device to the employer[91]. The aforementioned obligation should be limited to the exceptional circumstances mentioned above, and the conditions under which the employee is required to deliver the device and its data should be clearly defined. Furthermore, it would be prudent to determine whether the employer will provide a comparable device during the aforementioned return period[92].

In the context of internal investigations or the termination of an employment contract, the obligation to deliver the device is of particular significance. In accordance with German legislation, as set forth in BGB 667, even in the absence of a specific agreement between the parties, an employee is obliged to deliver all work-related communication data, documents and records stored on his/her personal computing devices[93]. Following termination of the employment contract, the employer is entitled to delete the remaining work-related data on the device and is also obliged to safeguard any third-party data[94]. In cases where there is a suspicion of misconduct, a comparable interpretation is applicable. In such cases, depending on the circumstances of the specific case, the employer may request the BYOD device on the grounds of the employee's obligation. Ultimately, an employee may invoke defences of property law in accordance with BGB 858 and 861[95].

In accordance with Turkish legislation, if the parties have consented to a delivery obligation under the terms of the contract, the employee is bound by law to deliver the device to the employer. Nevertheless, in the absence of an agreement between the parties, it is our opinion that the obligation to deliver should only be considered justified in exceptional cases where the predominant interests of the employer justify the device's return, based on the specific circumstances of the individual case. In balancing interests, factors such as the seriousness of a suspicion of miscorruption, the potential extent of harm incurred if the device is not returned, or the duration of deprivation from the device can be considered. In addition to the aforementioned considerations, Article 443 of the TCO provides that employees are obliged to return any items they have received from their employers during their employment[96]. Based on this provision, in alternative models in which device ownership is retained by the employer (such as COPE or CYOD), upon termination of the employment contract, the employee is obliged to deliver the devices to the employer[97].

91 Monsch (n 8) 95; Bartz and Grotenrath (n 6) 187.

92 Kascherus and Pröpper (n 11) 759.

93 Monsch (n 8) 96; Däubler (n 6) 110. In essence, this relates to agency agreements and associated payment services. However, given the absence of a regulatory framework within the context of BGB §§ 611-630.

94 Hoppe (n 2) para 740.

95 Bartz and Grotenrath (n 6) 186.

96 Centel (n 23) 169; Hamdi, Astarlı and Baysal (n 25) 617.

97 In a case that was the subject of a trial, the employee did not deliver the computer provided by the employer and the software

IV. Protection of Personal Data in BYOD

A. Protection of Personal Data of Third Parties

In accordance with the legislation in question, the employer is bound by law to act as the data controller when collecting, processing and storing personal data during the employment relationship[98]. In the context of the implementation of a BYOD policy, the presence of personal data on an employee's private devices gives rise to considerations under data protection legislation[99]. Although the BYOD devices belong to the employee, they do not solely contain the employee's personal data due to their use for work. Instead, these devices may also process or store personal data related to third parties, such as company, business partners, employees, and customers[100]. Consequently, the use of BYOD poses significant risks, particularly in professions where third-party personal data are frequently processed for example finance, healthcare, and legal sectors[101].

In the literature concerning the relationship between IT devices and personal data, it is emphasised that sensitive data should not be stored on BYOD devices. This implies that employers should refrain from using employees' personal IT devices, particularly when processing sensitive personal data[102].

An employer may assign employees to perform data processing activities. This employee may also be employed under the BYOD scheme. The presence of third-party personal data on personal IT devices does not make an employee data processor. They are only part of the data controller organisation.[103] As the data controller, the employer bears the responsibility of ensuring compliance with personal data protection regulations while continuing commercial activities and supervising data processors. In the context of a workplace where BYOD is permitted, it is of paramount importance for the employer to implement the necessary measures to

dongle required for the use of the programme; as a result, the employer was compensated. The Turkish Court of Cassation, however, ruled that the cost of the lease and the new system provided by the employer as a result of an employee's action can be claimed from the employee. See here, Court of Cassation, 9th Division, p. 24.3.2015, 2013/15795, 2015/11674, (lexpera.com.tr), accessed 09.07.2024.

98 Ömer Ekmekçi, M Refik Korkusuz and Ömer Uğur (n 23) 99-100. For the main legal actors in the protection of personal data within the framework of the employment contract, see Centel (n 23) 125-126; Nazlı Elbir, *Kişiliğinin Korunması Bağlamında İşçiye Ait Kişisel Verilerin Korunması* (Yetkin Yayınları 2020) 157; Elif Küzeci and Şebnem Kılıç, '6698 Sayılı Kişisel Verilerin Korunması Kanunu'nun İş Sözleşmesi Çerçevesinde Değerlendirilmesi: Veri Sorumlusu, Veri İşleyen ve Diğer Aktörler' (2019) 16 Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi 947, 962.

99 Wisskirchen and Schiller (n 1) 1163; Pollert (n 1) 154; Günther and Böglmüller (n 9) 1030.

100 Axel Bertram and Roland Falder, 'Datenschutz im Home Office-Quadratur des Kreises oder Frage des guten Willens?' [2021] ArbRAktuell 95, 97.

101 Bernd Schmidt and Anna-Kristina Roschek, 'Datenschutz Im Anwaltlichen Home- Und Mobile-Office' [2021], NJW 367, 370; Conrad and Schneider (n 9) 154. Regarding finance professions, see Grieger (n 4) 169.

102 Bertram and Falder (n 100) 97; Kascherus and Pröpper (n 11) 759; For sensitive personal data, see Elbir (n 98) 134.

103 Regarding the discussion of the concepts of data controllers and data processors in the employment relationship, see Küzeci and Kılıç (n 98) 970-971. See also Baysal (n 7) 71; Däubler (n 6) 104.

ensure compliance with data protection regulations[104]. If an employee is granted access to a company's IT resources, the focus should be on the measures that need to be implemented under the BYOD framework[105]. At this juncture, the role of *Mobile Device Management (Mobilgeräteverwaltung)* becomes particularly salient[106].

Mobile Device Management (MDM) tools are software that facilitate secure registration, configuration, updating, monitoring of compliance with data policies, and remote data wiping of devices[107]. Before implementing a BYOD, the employer may investigate whether the employee's device meets the requirements of mobile device management and prohibit the use of noncompliant devices. Consequently, the employee must consent to the installation of such software on the device[108].

It is also incumbent upon the employer to ensure the separation and protection of work-related and personal data in the context of BYOD[109]. Solutions have been developed to address this issue. In accordance with the *container solution (Containerlösung/ Sandboxing)*, work-related data are segregated from other applications on the device and stored in an encrypted data container[110]. The separation of work-related and personal data is achieved without any restriction on the personal use of the BYOD device[111]. Implementing the container solution necessitates employee consent because the employer is prohibited from storing work-related data on an employee's IT device without permission due to property rights. In this regard, it may be necessary for employees to undergo training to become familiar with the software[112].

In contrast, in *virtualisation solutions*, work-related data are not stored locally on the BYOD device; rather, they remain on the company's server. This implies that the BYOD device is only a conduit for data visualisation[113]. In the absence of storage activity, the necessity to obtain employee consent is obviated. Although it increases the costs of data security, virtualisation is the optimal mobile device management solution for BYOD devices because it prevents the mixing of personal data belonging to employees in the workplace, business partners and customers with employees' private data[114].

104 Müller (n 10) 23. Regarding the concept of a data processor and the fact that it can be a separate person (employee) who performs data processing activities on behalf of the data controller (employer), see Elbir (n 98).

105 For the measures taken by the employer, see Hoppe (n 2), para 736.

106 Däubler (n 6) 104.

107 Ganiyu and Jimoh (n 5) 50.

108 Bartz and Grotenrath (n 6) 185.

109 Hoppe (n 2) para 736; Zöll and Kielkowski (n 3) 2625; Elbir (n 98) 318.

110 Conrad and Schneider (n 9) 156.

111 Bertram and Falder (n 100) 97; Wisskirchen and Schiller (n 1) 1164; Raif and Nann (n 9) 222; Müller (n 10) 24; Kascherus and Pröpper (n 11) 757.

112 Pollert (n 1) 153.

113 Zöll and Kielkowski (n 3) 2625; Bartz and Grotenrath (n 6) 185.

114 Monsch (n 8) 137; Grieger (n 4) 171.

Conversely, safeguarding work-related data on BYOD devices requires certain responsibilities for the employee. It would be prudent to explicitly delineate these obligations in the BYOD agreement. The most notable of these obligations pertain to device access and usage controls.[115]

In order to ensure *access control* of a BYOD device, it is essential that the employee assumes responsibility for restricting any unauthorised individuals, such as family members and friends, from accessing the device[116]. It is important that employees do not leave the BYOD device unattended. Furthermore, the employee must comply with any security scans predetermined by the employer within a reasonable timeframe. If the employee does not consent to such an intervention, the employer is entitled to exclude the device from the BYOD. In such a scenario, the employer is bound by law to provide the necessary IT equipment for the employee to fulfil their professional obligations[117].

Usage control for a BYOD device is aimed at preventing potential data loss and mitigating cyber-risks and crimes in the workplace network. Employees must use antivirus software on their BYOD devices and avoid actions such as rooting[118], which involves significant alterations to the IT device's operating system[119]. Such manipulated devices can create opportunities for attacks against mobile device management. In addition, employment contracts may impose restrictions on using other cloud computing systems or copying business data via a BYOD device[120]. It is suggested in the literature that the employer should have the authority to remotely wipe work-related data from the device in case of loss or theft to prevent data and reputational damage to clients[121]. Consequently, it can be stated that in the event of loss or theft, an employee is obliged to immediately inform the employer in accordance with his/her duty of loyalty[122].

A further measure that can be adopted by employers within the context of a BYOD policy is the implementation of a *blacklist*. In accordance with management rights, the employer is responsible for establishing the minimum technical specifications that a device must adhere to for it to be utilised within the scope of a BYOD initiative. Conversely, some devices and software have functions that may compromise the confidentiality, integrity, or availability of work-related data. The employer is

115 Hoppe (n 2) para 736.

116 Hoppe (n 2) para 737; Grieger (n 4) 170.

117 Däubler (n 6) 107.

118 Root can be used to make system changes to IT devices. Pre-installed programmes can be uninstalled, and, in some cases, the entire operating system can be changed. It can be used on Android-based devices. See Ganiyu and Jimoh (n 5) 56.

119 Raif and Nann (n 9) 222; Zöll and Kielkowski (n 3) 2627; Müller (n 10) 24.

120 Hoppe (n 2) para 758; Kascherus and Pröpper (n 11) 759.

121 Monsch (n 8): 144; Wisskirchen and Schiller (n 1): 1164; Müller (n 10): 24; Kascherus and Pröpper (n 11): 760; Ganiyu and Jimoh (n 5): 61.

122 Hoppe (n 2) para 741; Pollert (n 1) 154.

entitled to prohibit the use of programmes and devices that are classified as critical for security[123]. Once the list has been made public in the workplace, employees are required to cease using the devices and software in question within a reasonable timeframe and to delete the software.

Moreover, it is observed in the legal literature that a *whitelist* application, which stipulates that employees can only use devices and applications that have been explicitly permitted, is invalid. Such a prohibition, which applies to all existing devices and applications without consideration of their respective risks, constitutes an undue infringement of employees' rights to possess and utilise their personal IT devices, thereby violating their fundamental rights[124].

B. Protection of Personal Data of the Employee

When BYOD devices are used in an employment relationship, it is inevitable that personal data belonging to third parties, such as the business partners and customers, as well as the employee's personal data, will be present on the device, given that it belongs to the employee. Consequently, the scope of an employer's intervention and control authority is constrained by the employee's right to privacy, which is enshrined in fundamental rights. It is evident that data of the use of the device must be safeguarded[125].

In Turkish labour law, the protection of personal data belonging to employees is governed by two distinct legal instruments: the TCO and the Personal Data Protection Act No. 6698 (PDP). In accordance with Article 419 of the TCO, personal data processing is permitted if necessary for an employment contract or related to the employee's suitability for the position under consideration. Moreover, in accordance with Article 4 of the PDP, personal data processing on an employee's device must adhere to principles of good faith, accuracy, and up-to-dateness when necessary; it must be processed for specific, explicit, and legitimate purposes; it must be relevant, limited, and proportionate to the purposes for which it is processed; and it must be retained for the duration prescribed by law or necessary for the purposes for which it is processed[126].

In this context, the employer is permitted to access work-related data on the employee's personal device, which the employee has chosen to use for work purposes, from a remote location. Nevertheless, such an intervention may prove to be disproportionate and potentially harmful to the employee's data. It is therefore argued

123 Grieger (n 4) 171; Däubler (n 6) 106.

124 According to German law, contractual provisions forcing employees to comply with the white list are invalid pursuant to 307 BGB. See, Monsch (n 8) 146.

125 Bertram and Falder (n 100) 97; Wisskirchen and Schiller (n 1) 1164; Baysal (n 7) 72; Däubler (n 6) 105; Elbir (n 98) 229.

126 Centel (n 23) 126; Baysal (n 7) 72; Elbir (n 98) 86.

in the literature that for a BYOD application to be legally compliant, there must be a clear separation between work-related and personal data[127]. Consequently, one of the most crucial measures to protect employee personal data is the implementation of effective mobile device management[128].

Conversely, if the employer does not implement effective mobile device management, whereby work-related data are stored alongside personal data on the BYOD device, the employer is required to intervene in the personal data to gain regular access to the work-related data. In practise, this situation can arise, particularly in the context of *email monitoring*[129]. Nevertheless, in the absence of compelling and legitimate interest on the part of the employer and not coupled with the employee's consent, the employer is not entitled to access the email system on the BYOD device. Given the inherent imbalance of power and dependency in the employment relationship between employers and employees, it is not feasible to consider employee consent as a valid basis for all actions[130]. It follows that only explicit consent, which is informed and based on the employee's free will regarding the employer's intervention in personal data, should be recognised[131].

In BYOD practises, the protection of an employee's personal data encompasses the safeguarding of data stored on their mobile device against remote wiping by the employer, which is facilitated through the use of MDM tools. In accordance with the Federal Data Protection Act 35/II, employers are obliged to delete data stored on IT devices located outside the workplace under specific circumstances. If a data container method is employed, only work-related data are subject to remote deletion; thus, personal data are not affected. Nevertheless, in the event that both work-related and personal data are not separated and are subject to deletion, the employee is entitled to claim damages in accordance with BGB 280/I, 241/1, and 823/1. It has been observed that in instances where a data container method is not employed, the principle of proportionality dictates that access to data should be prevented rather than deleted entirely[132].

127 Monsch (n 8) 149; Ganiyu and Jimoh (n 5) 53. For the opinion that, in addition to the employer, the employee also has an obligation to separate work-related and private data on the device, see Bartz and Grotenrath (n 6) 185.

128 Bartz and Grotenrath (n 6) 185.

129 In a decision of the Turkish Constitutional Court, it was emphasised that the e-mail data of the employee is personal data and must be protected. According to this decision, it should be determined whether there are legitimate grounds that justify the examination of the communication tools and content that the employer makes available to the employee. In this inspection, a distinction should be made between examining the communication flow and the content, and more serious grounds should be sought for the examination of the content. See, Constitutional Court, App no 2016/13010, 17/9/2020, § 70, (kararlarbilgibankasi.anayasa.gov.tr), accessed on 09.07.2024.

130 Wisskirchen and Schiller (n 1) 1165.

131 Baysal (n 7) 72; Elbir (n 98) 238.

132 Monsch (n 8) 150.

V. Licences and Intellectual Property Rights in BYOD Devices

The defining characteristic of BYOD models, irrespective of whether they are replacing existing workplace devices or are optional, is the utilisation of licenced software by employees for work-related purposes, or conversely, the incremental adoption of company-owned software for personal use[133]. It is established that the transfer of usage rights from intellectual property rights on computer programmes is typically conducted through licence agreements[134]. It is therefore imperative to consider licence agreements in the context of employment relationships involving BYOD use to avoid violations of intellectual property rights[135].

In German law, the regulations of licence agreements are primarily governed by the provisions set forth in the German Intellectual Property Rights Code (UrhG), specifically 69a and the subsequent sections. In accordance with Article 99 of the legislation, an employer is held accountable for infringements of intellectual property rights, even in instances where the employer is not aware that an employee is using unlicensed software or employing software for work-related (commercial) purposes that are prohibited[136]. The employer is held liable for such infringements if they occur within the context of the work-related activities[137]. To illustrate, if an employee utilises a personally owned device with unlicensed software (i.e. pirated copies) for the fulfilment of work duties, thereby conferring a commercial benefit upon the work, the employer becomes liable[138]. However, it should be noted that this provision does not extend to situations involving the private use of software[139].

In Turkey, the possibility of licencing agreements concerning intellectual property rights is regulated under Article 48/II of the Code of Intellectual Property Rights and Artistic Works (as an abbreviation: Intellectual Property Act/IPA). Computer programmes (software) and databases (databank) used on BYOD devices are regarded as intellectual property rights and are thus subject to licencing agreements in accordance with Article 2/I-1 of the IPA. Furthermore, the licensee is obliged to utilise the licenced subject matter in accordance with the terms of the contract. The use of the licenced subject matter is determined by the parties in accordance with the provisions of the contract (Article 48/I of IPA)[140]. Consequently, licencing agreements may stipulate whether the relevant software may be used exclusively for private or work-related purposes or for both. In the event of non-compliance with the

133 Zöll and Kielkowski (n 3) 2625; Göpfert and Wilke (n 6) 767.

134 Gökhan Şahan, *Bilgisayar Programı İmâl Sözleşmesi* (Yetkin Yayınları 2016) 167.

135 Hoppe (n 2) para 754; Pollert (n 1) 153; Kascherus and Pröpper (n 11) 757.

136 Georg Herrnleben, 'BYOD – die rechtlichen Fallstricke der Software-Lizenzierung für Unternehmen' [2012] MMR 205, 206.

137 Hoppe (n 2) para 754.

138 Conrad and Schneider (n 9) 157.

139 Monsch (n 8) 154.

140 Ömer Arbek, *Fikir, and Sanat Eserlerine İlişkin Lisans Sözleşmesi* (Yetkin Yayınları 2005) 186.

terms of the contract, such as the utilisation of software prohibited for work-related use on a BYOD device for work purposes, this constitutes a breach of contract. In such instances, the stipulations of the legislation safeguarding the right holder are invoked, and the licensee is held accountable for the right holder.

A thorough examination of Turkish labour law revealed no explicit provisions addressing the ramifications of using intellectual property materials without a licence or for work-related purposes within the context of work-related activities. In the context of BYOD, it is essential to differentiate between scenarios where software licenced to the employer is used on an employee's personal IT device and instances where software licenced to the employee is employed for work-related purposes[141].

The utilisation of licenced software on an employee's personal IT device is contingent on the stipulations set forth in the licence agreement. In light of the possibility of licences being allocated to specific individuals in the workplace, conducting a review of the licence terms in order to prevent any potential violations and ensure that the necessary licencing is in place, should it be required. Conversely, employees may use software for which they hold a licence for work purposes. In some cases, the licence terms for software on devices may stipulate that software is intended for personal use only and is therefore not suitable for work-related applications. Such restrictions are binding on third parties in accordance with Article 48/I of the IPA. Consequently, the utilisation of licenced software intended for employee use for work-related purposes, namely the commercialisation of the programme, would necessitate the employer obtaining a licence.

In legal literature, it is observed that if the licensee is a legal entity, the licence right is intended for use by natural persons employed within the legal entity. In the event that employees act in contravention of the terms of the licence agreement and cause damage to the rights holder, the legal entity is held responsible under Article 116 of the TCO for the actions of its agents[142]. Nevertheless, in the event that an employee uses pirated software on a BYOD device in the absence of a licence agreement between the employer and the rights holder, it is our opinion that the employer's liability would be subject to the provisions set forth in Article 66 of the TCO, which pertains to the liability of employers for the actions of their employees.

To preclude the potential for legal disputes, contract provisions relating to the use of personal IT devices for work-related purposes should explicitly stipulate that licenced software may be employed without a reservation for work-related applications. It is recommended that a blacklist approach be employed to determine which software is prohibited. In addition, the presentation of evidence demonstrating

141 Monsch (n 8) 152.

142 Şirin Aydıncık, *Fikri Haklara İlişkin Lisans Sözleşmeleri* (Arıkan 2006) 176.

the status of software licences may be required regularly for verification. In instances where uncertainty persists, the employment contract may require the delivery of devices for conducting necessary inspections.

Conclusion

A review of the legislation on Turkish labour law reveals the absence of any explicit provisions regulating the practise of BYOD. It is closely linked to the protection of personal data and intellectual property law. It can thus be argued that the legislative burden on legislators is intensifying. The issues addressed within the BYOD context apply to other models provided they are compatible with their inherent characteristics. The following conclusions can be drawn regarding labour law.

1. In the employment relationship, the use of employees' personal IT devices for work-related purposes necessitates the existence of a specific agreement, such as provisions set forth in the employment contract or an addendum. Implementing mobile device management systems to segregate and control data on IT devices is essential. Thus, it follows that workplace practises or the employer's management rights do not constitute the basis for BYOD. The regulation of this model through legal instruments other than an employment contract is at odds with the fundamental principles in place to protect employees.

2. The BYOD encompasses an employee's personal IT devices. Given the continuous accessibility of such devices for personal use, special regulations regarding working hours need to be established. When considering the issue of working hours in the context of BYOD, it is necessary to consider the periods of standby duty for employees. In cases where there is a dispute regarding these periods, the decision of the Court of Cassation is often dependent on whether the employee is allowed to move freely during the standby period. In determining working hours for employees using BYOD devices outside of the workplace, it is necessary to consider the extent to which the employee is able to structure their standby duty freely, as well as the degree to which employer instructions restrict their activities during this time. Regarding periods of rest, it is of the utmost importance to strike a balance between the utilisation of BYOD devices and the respect of employees' private lives. In this context, in our opinion, it is incumbent upon the employer to consider the employee's right to disconnect from constant access, although the employee's right to disconnect has not yet been regulated.

3. In the BYOD policies, where employees use their personal IT devices for work-related purposes, Article 413/II of TCO allows them to claim expenses related to their work. This includes the device itself, connection and subscription fees, electricity costs, technical support, and repair expenses. However, in the case of optional BYOD,

the onus is generally laid down on the employer to provide the necessary working tools. Nevertheless, in this scenario, due to the employee's familiarity with and ease of use of their own IT device, unless otherwise agreed, the employee assumes the financial responsibility for BYOD.

4. The utilisation of BYOD may cause liabilities. It is essential to consider the respective responsibilities of both the employee and the employer in relation to these liabilities. From the standpoint of the employee, the source of liability is determined by the provisions of Article 400 of TCO. In accordance with this stipulation, the employee is held accountable for any damages incurred by the employer because of negligence. In accordance with paragraph 2 of this article, consideration should be given to an employee's training and expertise if an IT device used by an employee causes harm. If the role performed by an employee (for example a data security specialist) requires a high level of responsibility, it may be inferred that the work is inherently prone to loss. On the other hand, from the perspective of the employer, the obligation to safeguard the devices brought by employees to the workplace arises from the employer's duty to supervise the employee. Failure to fulfil this obligation, which would result in harm, could lead to the employer's liability under contractual liability provisions, allowing the employee to claim compensation for the damages incurred.

5. In the BYOD, it is necessary to address the issue of delivering devices to the employer as a separate matter. If the parties have stipulated a delivery obligation within the contract, the employee is bound by the terms of the agreement to deliver the device to the employer. In the absence of an agreement between the parties, the delivery obligation should be considered only in exceptional cases, which are justified by the employer's main interests in light of the specific conditions of the case. In balancing interests, factors such as criminal suspicion, the potential extent of harm incurred if the device is not returned, or the duration of its deprivation may be considered. Furthermore, in accordance with Article 443 of the TCO, an employee must return any items received from the employer in connection with the work. In the alternative models (COPE or CYOD), upon termination of the employment contract, the employee is also required to return the relevant devices to the employer.

6. To ensure adequate protection of personal data, it is of the utmost importance to segregate data stored on BYOD devices. In this regard, it is the employer to implement the necessary technical measures, including the use of data containers and virtualisation solutions. Furthermore, an additional measure that an employer may implement in accordance with a BYOD policy is the creation of a blacklist. In accordance with the stipulations of management rights, the employer is vested with the authority to determine the minimum technical prerequisites that must be

satisfied for the device to be utilised in a BYOD. Nevertheless, certain devices and software may possess functions that could compromise the confidentiality, integrity, or availability of work-related data. It is within the prerogative of the employer to prohibit the use of such programmes and devices that are classified as critical for security reasons.

7. The practise of BYOD is a prominent feature of the utilisation of computer programmes installed on IT devices for the fulfilment of duties. The transfer of usage rights over intellectual property rights in programmes is subject to the terms set forth in licencing agreements. It is therefore imperative that attention be paid to licencing agreements in order to avoid infringements of intellectual property rights in employment relationships involving BYOD use.

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RESEARCH ARTICLE

Uncitral Model Law on Electronic Transferable Records: Is It an Applicable Legal Framework for Bills of Lading Under Turkish Law?*

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Abstract

The purpose of the "Model Law on Electronic Transferable Records" adopted by UNCITRAL on July 13, 2017, is to provide a legal framework for the digitisation of paper-based transferable documents or instruments. For this purpose, it is recognised that "*functional equivalence*" must be achieved between a paper-based document and an electronic record. The law also adopts the principle of "*technological independence*". In accordance with this principle, the law does not recommend or endorse the use of a particular technology, method or product for electronic transactions. Similarly, the choice of paper-based documents covered by the law is left to national law. The important thing is that the document is transferable. However, UNCITRAL states that the use of electronic bills of lading in particular, should be facilitated because of its importance in maritime trade among transferable documents. It is also important for our country to adopt the MLETR to ensure international harmonisation and the development of international trade. For this reason, this study analyses whether the bill of lading qualifies as an electronic transferable record, as stipulated in the MLETR under Turkish law. In this context, it is explained whether the conditions of writing, signature, transferability, and control can be achieved in an electronic environment.

Keywords

UNCITRAL, Paperless Trade, Bill of Lading, Electronic Transferable Records, Model Law on Electronic Transferable Records, Functional Equivalence, Technological Neutrality

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I. Introduction

Electronic commerce has been on the agenda of the United Nations Commission on International Trade Law (UNCITRAL)[1] since the 1990s. UNCITRAL has prepared conventions, model laws, legislative guides, and explanatory texts; with the purpose of facilitating the use of electronic means to engage in commercial transactions. In this regard, UNCITRAL adopted the Model Law on Electronic Transferable Records (MLETR) with Explanatory Notes[2] on July 13, 2017.

The main purpose of MLETR is to provide a legal framework for digitalisation of paper-based transferable documents or instruments. The UNCITRAL Working Group IV clarified that one of the main objectives of MLETR is to facilitate the use of electronic bills of lading[3]. A bill of lading is a negotiable instrument issued by a carrier or its agent in international trade to certify the receipt of goods for shipment. It serves as proof of the contract of affreightment and of ownership of the goods.

As is the case in many countries whose names are mentioned below, it is important and necessary to take the provisions of MLETR as an example to regulate the bill of lading as an electronic transferable record as well as to trade it electronically in Turkish law. Thus, it will be possible to achieve international harmonisation and improve trade between our country and the others.

In our study, the question of whether the bill of lading can qualify as an electronic transferable record, as stipulated in the MLETR, will be answered from a legal perspective and by taking into account the relevant rules in Turkish law. In this context, after briefly mentioning the definition and functions of the bill of lading under Turkish law, it will be explained whether the condition of writing, signature, transferability, and control can be achieved in an electronic environment. Finally, the electronic transfer of the bill of lading according to the forms of transfer are discussed.

On the other hand, since the MLETR has already adopted the principle of "*technological neutrality*" which we will further explain below, we will not specifically address technological means, such as *registry*, *token*, *distributed ledger*, or other ones that can be used for an electronic bill of lading, nor how they will be implemented.

1 For detailed information on the establishment and objectives of UNCITRAL, see also Yüksel Bozkurt and Ebru Armağan, "UNCITRAL ve UNCITRAL Model Kanunu'na Genel Bir Bakış" [2011] 2(2) Türkiye Adalet Akademisi Dergisi 135-172., 138ff.

2 See "Explanatory Note to the UNCITRAL Model Law on Electronic Transferable Records", https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf accessed May 25, 2024. For a Turkish translation of the Model Law, see also Ahmet Said Ber, 'Elektronik Olarak Devredilebilir Kayıtlara İlişkin UNCITRAL Model Kanunu' [2019] 1(2) Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi Dergisi 445-452., 446ff.

3 UN Commission on International Trade Law Working Group IV, 'Legal issues relating to the use of electronic transferable records' (*United Nations Digital Library*, 2012) <https://digitallibrary.un.org/record/734248?v=pdf> accessed 24 July 2024.

II. The Need for the Use of Electronic Bill of Lading

As the landscape of global commerce is rapidly evolving, digitisation of trade documents has become necessary to accelerate and advance international trade. Maritime transport underpins the majority of international trade and hence stands at the front of this digital transformation. In order to facilitate digitisation of shipping industry, the world's largest shipping companies, MSC, Maersk, CMA CGM, Hapag-Lloyd, ONE, Evergreen, Yang Ming, HMM, and ZIM founded the Digital Container Shipping Association (DCSA) in April 2019, recognising the need for collaboration[4].

The urgency of this digital shift was further emphasised in April 2020 when the International Chamber of Commerce (ICC) called on all governments to take immediate legislative or executive action to abolish any requirement for key trade documents, such as bills of lading, to be presented in paper format[5]. Bill of lading has been specifically mentioned in that call because it plays a pivotal role in international trade.

The call of ICC emphasised the importance of all states to rapidly adopt legal frameworks to clarify the functional and legal equivalence of electronic and paper-based commercial documents. As a legal framework, the ICC recommended that all states adopt the Model Law on Electronic Transferable Records (MLETR) of the United Nations Commission on International Trade Law. This is because the MLETR provides a legal framework for the electronic transfer of many negotiable instruments, such as electronic bills of lading, bills of exchange, bills of exchange, checks, and bills of exchange. In this Model Law, each negotiable instrument is not mentioned individually to facilitate and accelerate digital transformation; instead, the term "electronic transferable records" is preferred. The fact that negotiable instruments can be issued as electronic transferable records is important for removing legal barriers to electronic commerce[6].

According to UNCITRAL data, the countries that have adopted the MLETR or adopted legislation influenced by the provisions of MLETR are Bahrain, Belize, France, Kiribati, Papua New Guinea, Paraguay, Singapore, Timor-Leste, the United Arab Emirates (Abu Dhabi Global Market), the United Kingdom of Great Britain, and Northern Ireland[7,8].

4 For more information, please visit the DCSA official website at https://dcsa.org/about-us.

5 International Chamber of Commerce, "ICC Memo To Governments and Central Banks on Essential Steps to Safeguard Trade Finance Operations", April 6, 2020, https://iccwbo.org/news-publications/policies-reports/icc-memo-to-governments-and-central-banks-on-essential-steps-to-safeguard-trade-finance-operations/ accessed May 25, 2024.

6 World Trade Organisation, "The Promise of TradeTech: Policy Approaches to Harness Trade Digitalisation", 12.04.2022, https://www.wto.org/english/res_e/reser_e/book_launch_12april22_e.htm accessed July 24, 2024. For an analysis of the concept of "*electronic transferable record*" from its origins in US law to its most recent definition by UNCITRAL, see Zvonimir Šafranko, "The Notion of Electronic Transferable Records" [2016] 3(2) Intereulaweast 1-31., 4ff.

7 For the status of MLETR, see https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_ transferable_records/ status accessed 21 September 2024.

8 Gülfer Meriç and Tuğçe Tomrukçu**,** "Türk Hukukunda Konişmento Kavramı Kapsamında Elektronik Konişmento ve Elektronik Konişmento Girişimleri," [2022] 7(3) REGESTA 527-562., 556.

While UNCITRAL has been working on MLETR, to provide a legal framework for electronic transferable records, recent actions taken by the industry have further emphasised the urgent need to implement digital solutions in maritime trade. Building on this momentum, the Future International Trade (FIT) Alliance was launched in February 2022. This coalition, comprising five founding members: Baltic and International Maritime Council (BIMCO), DCSA, International Federation of Freight Forwarders Associations (FIATA), ICC, and Society for Worldwide Interbank Financial Telecommunications (SWIFT), aims to raise awareness and accelerate the adoption of a standards-based electronic bill of lading[9].

The potential impacts of this digital transformation are substantial. A research conducted by the McKinsey Global Institute revealed that adoption of electronic bill of lading would result in savings of $6.5 billion in direct costs[10]. However, the benefits extend far beyond. Electronic issuance of a bill of lading accelerates payment movements; ensures the accuracy of documents and facilitates their storage. It also ensures that bills of lading are stored in encrypted digital systems and that fraud and forgery are prevented; provides transparency in supply chains; protects the environment and nature by reducing the use of paper; and increases the competitiveness of our country against foreign countries[11].

III. General Principles Adopted in the MLETR

The MLETR is based on three fundamental principles[12]:

(i). *Non-discrimination against the use of electronic communications* ensures that there should be no disparity of treatment between paper-based documents and electronic records[13]. This principle is expressly stipulated in Article 7/1 of MLETR. According to this article, "*an electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form*". Thus, the MLETR aims to eliminate the barrier between transferable documents and electronic transferable records by recognising the transfer of rights through electronic

9 For more information, please visit the FIT Alliance official website at https://www.fit-alliance.org/.

10 Didier Casanova and others, 'The multi-billion-dollar paper jam: Unlocking trade by digitalising documentation' (*McKinsey & Company*, 4 October 2022) <https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/the-multi-billion-dollar-paper-jam-unlocking-trade-by-digitalizing-documentation#/> accessed July 24, 2024.

11 UK Law Commission. "Electronic Trade Documents: Report and Bill" (*Electronic Trade Documents*, 2023) <https://www.lawcom.gov.uk/project/electronic-trade-documents/> accessed July 24, 2024. Also see United Nations Economic Commission for Europe (UNECE), 'White Paper on Transfer of Model Law on Electronic Transferable Records - Compliant Titles' (September 2023) <https://unece.org/sites/default/files/2023-09/WhitePaper_Transfer-MLETR.pdf> accessed 21 September 2024, 7-8; Göker Tataroğlu and Pınar Çağlayan Aksoy, *Karşılaştırmalı Hukukta Tokenize Edilmiş Konişmentolar* (1st edn, On İki Levha Yayıncılık 2023)., 28 ff; Pınar Çağlayan Aksoy, Meral Şengöz and Menekşe Hüryaşar, 'Tedarik Zincirlerinde Kağıtsız Ticaret Dönemine Doğru: Dijital Dünyadaki Gelişmeler ve Blokzincir Teknolojisi Elektronik Ticaret Dokümanları Bakımından Neler Getirecek?' [2023] XXXIX(1) BATİDER 67-125., 69; Ahmet Said Ber, *Elektronik Konişmento* (1st edn, Seçkin Yayınları 2018)., 61.

12 Časlav Pejović and Unho Lee, "UNCITRAL Model Law on Electronic Transferable Records as a Potential Legal Regime for the Use of Electronic Bills of Lading" [2022] 57(1) European Transport Law: Journal of Law and Economics 13-32., 15.

13 Ibid., 16.

records, which allows electronic bills of lading to enjoy the same treatment as bills of lading[14].

(ii). *Technological neutrality* refers to non-discrimination between various technologies that may be used for electronic transferable records. This principle ensures that electronic transferable records can be used in any technology[15]. The reason for this is to prevent the rules of law from becoming incompatible with future technological developments[16]. In fact, legislative procedures take a very long time, whereas technology develops very rapidly. If legislation focuses only on a particular type of technology, when it evolves, the legislation will become outdated and ineffective sooner than expected. This is related to the sustainability of specific legal regulations. The aim is to avoid cumbersome and confusing repeated legislative changes[17].

On the other hand, this does not mean that any technology can be used for electronic transferable records for legal recognition; an electronic transfer of rights using such technology must meet the requirements under the MLETR. In recent years, various technologies have been developed to enable the transfer of interests through electronic records: registry, token, and distributed ledger. If the requirements of MLETR are met, rights can be legally transferred by such technologies[18].

(iii). *Functional equivalence* is the primary mechanism used to recognise the legal effects of electronic records[19]. This principle allows the implementation of electronic transactions according to existing domestic laws without eliminating the legal requirements and procedures of paper-based negotiable instruments[20]. The legal effect is given to an electronic record if it serves the same purposes and functions as the corresponding paper-based document. The principle of functional equivalence therefore requires that the same functions of a paper-based document be available in electronic records. Thus, MLETR thus applies to electronic transferable records that are functionally equivalent to transferable documents[21].

14 Ibid., 16.

15 Jung-Ho Yang, "Applicability of Blockchain based Bill of Lading under the Rotterdam Rules and UNCITRAL Model Law on Electronic Transferable Records" [2019] 23(6) Journal of Korea Trade 113-130., 121-122; Pejović and Lee (n 13), 16; Çağlayan Aksoy, Hüryaşar and Şengöz (n 12), 84; Ber, Konişmento (n 12), 88. See also Explanatory Note, para. 18.

16 For the same opinion, see Zeynep İstemi, "Devredilebilir Elektronik Kayıtlar Hakkında UNCITRAL Model Kanunu" [2020] 5(1) ÇÜHFD 1771-1797., 1776; Çağlayan Aksoy, Hüryaşar and Şengöz (n 12), 84.

17 Chris Reed, 'Taking Sides on Technology Neutrality' [2007] 4(3) Journal of Law, Technology and Society 263-284., 283-284.

18 Pejović and Lee (n 13), 16.

19 Ibid., 16.

20 Pejović and Lee (n 13), 16; Yang (n 16), 122; Guo Yu, "Functional Equivalence to a Piece of Paper: A Comment on the UNCITRAL Model Law on Electronic Transferable Records" [2022] XXVI Dispute Resolution, Digital Economy And Contemporary Issues In Harmonisation Of International Commercial Law 1-27., 2-3; Ryan Harrington, "News from the United Nations Commission on International Trade Law (UNCITRAL): the Work of the Fiftieth Commission Session" [2017] 22(4) Uniform Law Review 996-1009., 997; İstemi (n 17), 1784.

21 Pejović and Lee (n 13), 16.

The second chapter of MLETR regulates the principle of functional equivalence. In this chapter, functional equivalence rules are provided for "writing" (art. 8), "signature" (art. 9), "transferable document or instrument" (art. 10), and "control" (art. 11). These provisions will be explained in detail below when analysing whether the MLETR applies to paper-based bills of lading under Turkish law.

IV. Bill of Lading under Turkish Law

A. Definition and Content

Bills of lading are regulated by article 1228 and the rest in the Turkish Commercial Code (TCC), numbered 6102. Article 1228/1 of the TCC defines the bill of lading. According to this article, "*a bill of lading is a bill that proves that a contract of carriage has been made, shows that the goods have been received by the carrier or loaded on the ship, and that the carrier is obliged to deliver the goods only in return for its presentation*".

The contents of the bill of lading are listed in fifteen paragraphs pursuant to article 1229 of the TCC. This provision provides that the absence of any one or more of the elements listed in the fifteen paragraphs shall not affect the validity of the bill of lading. In other words, the bill of lading will continue to be valid even if one or more of the elements listed under article 1229 of the TCC are missing, provided that the bill of lading complies with the definition stipulated under article 1228 of the TCC. Therefore, the bill of lading is not a document strictly bound by form[22]; which makes it easier to digitise in this respect.

In conclusion, if the bill of lading proves that the contract of affreightment has been concluded, if it shows that the goods have been received by the carrier or loaded on board the ship, and if the carrier is obliged to deliver the goods only upon presentation of the bill of lading, even if the elements stipulated under article 1229 of TCC are not included in the bill of lading, it will be considered a valid bill of lading[23]. Certainly, this also applies to the electronic bill of lading. Therefore, for an electronic bill of lading to be valid, it is sufficient that it meets the conditions stipulated under article 1228 of the TCC.

22 Hakan Karan, *Elektronik Konişmento* (1st edn, Turhan Kitabevi 2004) 40; Ber, Konişmento (n 12), 32. *Karan* asserts that the bill of lading is not strictly prescribed in format; however, its essential functions implicitly dictate certain key elements that must be present, making it functionally bound by form. See Karan (n 23), 40.

23 The legal effectiveness of a bill of lading is not subject to the explicit inclusion of the term "bill of lading" within the document itself. If a document incorporates all the requisite substantive elements stipulated under TCC, it shall be deemed a valid bill of lading, regardless of whether it is explicitly labelled as such. See Emine Yazıcıoğlu, *Kender - Çetingil Deniz Ticareti Hukuku* (17th edn, Filiz Kitabevi 2022) 367.

B. Functions of the Bill of Lading

The bill of lading serves various functions. The electronic bill of lading must also maintain these functions. In this regard, these functions should be examined individually.

1. Function as Evidence

The first function of the bill of lading is the function of evidence. The bill of lading primarily identifies the carrier, as the carrier is the person entitled to issue the bill of lading[24]. However, it should be clarified that the carrier is deemed as the carrier not because he issues the bill of lading but because he undertakes the carriage[25]. On the other hand, the carrier must issue the certificate upon request of the shipper[26].

In addition to identifying the carrier, the bill of lading proves the carrier. Pursuant to article 1238/1 of TCC, "*the person who signs the bill of lading as the carrier or the person on whose behalf and on whose account the bill of lading is signed shall be deemed to be the carrier*". The legislator provides a presumption here, and it is not possible to prove the contrary of this presumption[27]. In this respect, a person who signs a bill of lading as the carrier, or who signs a bill of lading by a representative on his/her own behalf as the carrier, is legally deemed to be the carrier.

Article 1238/2 of the TCC provides for the presumption that the shipowner shall be deemed to be the carrier in cases where the carrier cannot be identified from the bill of lading, but the shipowner may prove the contrary by documenting the identity of the carrier. Article 1238/3 of the TCC, on the other hand, stipulates that if the bill of lading is issued by the master or another representative of the carrier and the carrier cannot be identified from the bill of lading, the master or representative issuing the bill of lading shall be deemed to be the carrier together with the shipowner. Therefore, even if the bill of lading fails to identify the carrier, the shipowner, master, or other representative who issued the bill of lading shall be deemed to be the carrier to prevent any damage to the rights of the bearer.

Article 1230 of TCC stipulates that "*the legitimate bearer of the bill of lading is authorised to take delivery of the goods. If the bill of lading is issued in more than one copy, the goods shall be delivered to the legitimate bearer of a single copy*". Therefore, the consignee is the legitimate bearer of the bill of lading. The right of the bearer of a bill of lading to take delivery of goods arises from the bill of lading as a

24 The master or any other representative of the shipowner is a representative acting on behalf and for account of the carrier when issuing the bill of lading. See Karan (n 23), 36.

25 Yazıcıoğlu, Deniz Ticareti (n 24), p. 375.

26 Tahir Çağa and Rayegân Kender, *Deniz Ticareti Hukuku – II: Navlun Sözleşmeleri* (9th edn, On İki Levha Yayıncılık 2009) 67-68; Karan, (n 23) 36.

27 Yazıcıoğlu, Deniz Ticareti (n 24), 375.

document of title[28]. However, for the bearer of the bill of lading to demand delivery of the goods, the bill of lading must have been duly transferred to him. The person who becomes the bearer by duly transferring the bill of lading is the consignee[29]. Identification of the consignee is an important function of the bill of lading.

One of the most important functions of a bill of lading is to prove the existence of a contract of affreightment between the parties[30]. Article 1228/1 of the TCC, which contains the definition of the bill of lading, begins with the words "*a bill of lading is a document which proves that a contract of affreightment has been concluded...*". As explained above, according to article 1229 of the TCC, the absence of one or more of the elements of the bill of lading does not affect the validity of the bill of lading; however, the bill of lading must comply with the definition stipulated under article 1228 of the TCC. In this respect, the bill of lading shall prove that a contract of affreightment has been concluded.

The relationship between the carrier and bearer of a bill of lading shall be determined according to the bill of lading[31]. Article 1237 of the TCC provides for this principle. The article also provides that the relationship between the carrier and the shipper shall be subject to the provisions of the contract of affreightment[32]. Where a separate written agreement is not concluded between the parties, the relationship between the carrier and the shipper is subject to the bill of lading.

The relationship between the carrier and the consignee is determined according to the principles stipulated in the bill of lading and is not subject to the contract of affreightment[33]. However, in practise, "incorporation clause" is used in the bills of lading to refer to the charter party to incorporate the terms and conditions contained in the charter party into the contents of the bill of lading[34]. This issue is regulated by article 1237/3 of the TCC. Accordingly, if there is a reference to the voyage charter party in the bill of lading, a copy of the charter party must be given to the bearer of the bill when it is transferred. Therefore, the condition for the provisions of the charter party to apply to the bearer of the bill of lading is the presentation of these provisions to the bearer. In this respect, for the provisions of the charter party to

28 Paul Todd, *Principles of the Carriage of Goods by Sea* (1st edn, Routledge 2015) 238; Meetali B. Shambarkar, 'Ambiguous Status of Electronic Bill of Lading in the Era of Digitalisation: An Overview' (2020) 3 Int'l JL Mgmt & Human 475.

29 Yazıcıoğlu, Deniz Ticareti (n 24), 376.

30 However, the bill of lading is not the contract of affreightment itself; it is only a means of evidence. See Karan (n 23), 43.

31 This principle applies to both charter and liner contracts. Therefore, the relationship between the carrier and the bearer of a bill of lading is subject to the bill of lading in both charter and liner carriage. However, in the case of charter carriage, the relationship between the carrier and the shipper is subject to the affreightment contract. See Çağa and Kender (n 27), 83.

32 Beyond its function regarding the contract of affreightment, the bill of Lading has significant implications. It plays a crucial role in sales contracts between sellers and buyers, as well as serving as a crucial document in credit arrangements involving banks and other parties. In addition, the bill of lading is of vital importance in customs procedures between governmental authorities and those engaged in import-export activities. See Karan (n 23), 41.

33 See H Murat Demirkıran, *Taşıyanın Konişmento İçeriğinden Sorumluluğu* (1st edn, Arıkan Yayınları 2008) 20.

34 Çağa and Kender (n 27), 71-72.

be asserted against the bearer of the bill of lading, a copy of the charter party must be given to the bearer of the bill of lading. In this case, the legislator has stipulated that the provisions of the charter party may be asserted against the bearer of the bill of lading if their qualifications allow. In addition, it is regulated that mandatory provisions shall be applied in the relationship between the bearer of the bill of lading and the carrier, as stipulated in article 1243 of the TCC. As a result, the bill of lading determines the relationship between the carrier and the consignee. It is also taken as the basis for the relationship between the carrier and the shipper in cases where the contract of affreightment is not in writing.

The bill of lading also serves as proof for the goods. When the carrier takes delivery of the goods or when the goods are loaded on board, a bill of lading is issued for these goods, and records on the type, quantity, value, mark, and external condition of the goods are also recorded in this bill of lading[35]. These records are important in terms of the carrier's liability[36]. The carrier shall report the condition of the goods in the bill of lading[37]. The consequences of failure to do so are stipulated in article 1239/2 of the TCC, which presumes that the goods have been received or loaded in good condition. This is because, by Article 1239/1 of the TCC, the legislator entitles the carrier to make a reasoned reservation if he knows or suspects that the declarations regarding the goods stated in the bill of lading do not reflect the truth. Without prejudice to these reservations, article 1239/3 of the TCC presupposes that the cargo has been received or loaded as declared in the bill of lading. The contrary of this presumption cannot be proved against the consignee who takes over the bill of lading in good faith. However, if a reasoned reservation is made, the records in the bill of lading shall not constitute a presumption.

2. Function as a Document of Title

A bill of lading functioning as a document of title means that the bearer of the bill of lading can dispose of the goods even if the goods are in transit[38]. In this way, goods can be sold or pledged while in the possession of the carrier[39]. For a bill of lading to fulfil its function as a document of title, all of the conditions stipulated under article 1234 of the TCC must be met. First, the goods must have been received by the master

35 In essence, a bill of lading serves two functions. It acts as an official receipt confirming either the cargo has been loaded onboard or has been delivered to the carrier for subsequent shipment, while providing a record of the nature, quantity, and condition of the goods. This allows the seller to collect the fee by establishing that he or she has fulfilled the obligation of delivery. On the other hand, the buyer can then place the goods on the market or obtain credit on the bill of lading. See Karan (n 23), 50.

36 Todd (n 29), 38.

37 In practice a record such as "in apparent good order and condition" is written to demonstrate that the cargo is in good condition. A bill of lading containing this record is called a clean bill of lading. See Yazıcıoğlu, Deniz Ticareti (n 24), 379; Ecehan Yeşilova Aras, *Konişmentonun İspat Kuvveti* (1st edn, Güncel Hukuk Yayınları 2006) 195.

38 Yeşilova Aras (n 38), 45-46; Demirkıran (n 34), 15.

39 Karan (n 23), 58; Yazıcıoğlu, Deniz Ticareti (n 24), 382; Yeşilova Aras (n 38), 45-46.

or another representative of the carrier. In addition, the bill of lading must have been duly transferred. It is also necessary for the carrier or master to possess the goods during the transfer of the bill of lading[40].

If these conditions stipulated under article 1234 of the TCC are fulfilled, the person who takes over the bill of lading has indirect possession of the goods by taking over the bill of lading[41]. Further, as stated above, the person who duly takes over the bill of lading shall acquire ownership of the goods, and the person who lends the bill of lading against a pledge shall acquire the right to pledge over the goods[42].

3. Function as Documentation of Carrier Undertaking to Carry and Deliver Goods When the Bill of Lading is Presented

Bill of lading documents that the carrier undertakes to carry and deliver goods to the legal bearer at the port of destination upon presentation of the bill of lading. The cargo can only be legitimately released upon presentation of the original bill of lading[43]. Upon receipt of the cargo at the designated port, a bill of lading must be appropriately annotated to indicate that the goods have been duly received. In cases where multiple original copies of a bill of lading are issued, the bearer of the original copy is entitled to claim the goods without presenting other copies. It is important to note that once the goods are delivered to the legitimate bearer of a single original copy, the carrier's obligation arising from the bill of lading is considered fulfilled with respect to all other copy holders[44]. This legal framework highlights the bill of lading's role not just as a receipt or contract of carriage but also as a document of title that confers upon its holder the right to claim the goods.

V. Applicability of MLETR to the Bills of Lading

A. Requirement of Transferability

The MLETR focuses on the transferability of documents and instruments[45]. According to the MLETR, "*transferable documents or instruments*" are described as paper-based documents that entitles the bearer to claim the performance of the

40 For discussions on this condition, see Çağa and Kender (n 27), 100-114; Demirkıran (n 34) 21-23.

41 Çağa and Kender (n 27), 100 and 120; Karan (n 23), 58. For discussions on this subject, see Çağa and Kender (n 27), 100-123.

42 As a result of the bill of lading's function as a document of title, a description of the goods is essential. This obligation arises naturally from the fact that the bill of lading is a delivery or loading receipt. See Karan (n 23), 58.

43 This consideration is a direct consequence of the bill of lading's status as a negotiable instrument. See Demirkıran (n 34), 19.

44 However, it should be noted that an electronic bill of lading cannot and does not need to be issued in multiple originals. See Časlav Pejović, 'Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions' [2001] Journal of Business Law 461-488., 484.

45 Explanatory Note, para. 20.

obligation indicated in the document or instrument and to transfer the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument (art. 2/para. 3 of MLETR).

As understood from the provision, a transferable document or instrument must authorise the bearer to "claim the right included in the document or instrument" and to "transfer that right by the transfer of the document or instrument". The determination of which documents have these characteristics and fall within the scope of the MLETR is left to national law. The Explanatory Note lists bills of exchange, cheques, promissory notes, consignment notes, warehouse receipts, insurance certificates, air waybills, and bills of lading as examples of transferable documents or instruments that may be covered by the MLETR[46]. However, the MLETR has already excluded certain types of instruments. As stated in article 1/3 of MLETR, "*this law does not apply to securities such as shares and bonds and other investment instruments*".

Under Turkish law, qualifications specified in article 2, paragraph 3 of MLETR define negotiable instruments[47]. According to article 645 of the TCC, which is one of the general provisions of negotiable instruments, the right contained in a negotiable instrument cannot be asserted separately from the document nor can it be transferred to other parties. Unlike other documents or instruments, for a document to qualify as a negotiable instrument, three elements are required: First, the document must be in writing, including the legal requirements stipulated in the law. Thus, the right contained in the negotiable instrument becomes tangible upon the issuance of the document. However, as we discuss below, the condition for the document to be written should not prevent it from being issued in an electronic environment[48]. Second, the rights contained in the document must be transferable[49]. Third, interdependence should be set between the document and the right[50]. This last element prevents the right embodied in the negotiable instrument from being claimed and transferred separately from the document (art. 645 of TCC). The issuance of the document in a manner that includes the formal requirements stipulated in the law according to the type of negotiable instrument indicates that this interdependence has been established.

TCC regulates the legal nature of the bill of lading in articles 1230 et seq. under the subheading "*its nature as a negotiable instrument*". The most decisive feature distinguishing bill of lading from other transport documents is that it is a negotiable instrument. The carrier's ability to deliver goods is conditional upon the presentation

46 Explanatory Note, para. 38.

47 For the same opinion, see İstemi (n 17), 1781.

48 Abuzer Kendigelen and İsmail Kırca, *Kıymetli Evrak Hukuku, Genel Esaslar, Kambiyo Senetleri* (1st edn, On İki Levha Yayıncılık 2019) 5.

49 Kendigelen and Kırca (n 49), 7.

50 Hasan Pulaşlı, *Kıymetli Evrak Hukukunun Esasları* (10th edn, Adalet Yayınevi 2023) 4; Kendigelen and Kırca (n 49), 8; Fırat Öztan, *Kıymetli Evrak Hukuku* (25th edn, Yetkin Yayınları 2021) 13ff.

of a bill of lading (art. 1228/1 of TCC), which is a result of the fact that a bill of lading is a negotiable instrument. Therefore, the bill of lading contains an undertaking that the goods will be delivered to the person who appears as the legitimate bearer in the document upon presentation of the bill of lading[51].

In this case, the bill of lading, which is a negotiable instrument under Turkish law, can be converted into an electronic record under the MLETR and subject to electronic transactions provided that the other conditions to be examined below are also met.

On the other hand, it is also necessary to consider whether the sea waybill, which is frequently encountered in practise, should be included in the scope. Since the development of technology enables ships to travel faster, in some cases, cargo arrives at the port before the consignee receives a bill of lading transmitted by mail[52]. However, if the consignee cannot present a bill of lading, he/she is not entitled to take delivery of the cargo. In response to this problem, nowadays, sea waybills are used as an alternative to the bill of lading[53]. Sea waybills are non-negotiable transport documents[54] and hence do not qualify as negotiable instruments. As a result, they do not fall within the scope of the MLETR under Turkish law.

B. Requirement of Functional Equivalence

As briefly mentioned, the purpose of the principle of functional equivalence is to ensure that the provisions and consequences recognised in domestic law for paper-based negotiable instruments are also applicable to electronic transferable records[55]. As for the bill of lading, to achieve functional equivalence, the electronic bill of lading shall satisfy the functions of the bill of lading under Turkish law, which are functioning as evidence, as documentation of carrier undertaking to carry and deliver goods when the bill of lading is presented and as a document of title. The first two functions pose minimal challenges for electronic bills of lading because they must be fulfilled efficiently. Yet the bill of lading's function as a document of title may introduce important challenges because this function controls the transfer of specific legal rights, such as possession[56], which will be dealt with below.

51 Meltem Deniz Güner Özbek, "Yeni Türk Ticaret Kanunu'nda Konişmento ve Konişmentonun İspat Kuvveti" [2012] 18(3) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 233-254., 236; Feyza Çalık, 'Konişmento', (LL.M. thesis, Akdeniz Üniversitesi Sosyal Bilimler Enstitüsü 2018) 21; Ber, Konişmento (n 12), 38.

52 Emine Yazıcıoğlu, 'Deniz Yük Senedi ve Deniz Yük Senedi ile Belgelenen Taşımalara İlişkin Bazı Sorunlar'. in Rayegan Kender and Samim Ünan (eds), *Prof Dr Tahir Çağa'nın Anısına Armağan* (Beta Yayınları 2000) 652-653.

53 Yazıcıoğlu, Deniz Ticareti (n 24), 384-385.

54 A common feature of the existing sea waybill forms is the inclusion of the "non-negotiable" record. See Yazıcıoğlu, Deniz Yük Senedi (n 53), 657-658.

55 Pejović and Lee (n 13), p. 16; İstemi (n 17), 1786.

56 For the same opinion, see Pejović (n 45), 16; Yang (n 16), 123.

In the second chapter of the MLETR, under the subtitle "*Provisions on Functional Equivalence*", the conditions for "*writing*" (art. 8), "*signature*" (art. 9), "*transferable documents or instruments*" (art. 10) and "*control*" (art. 11) are regulated. In the following, it will be analysed whether the bill of lading can be included within the scope of the MLETR, considering the provisions of Turkish law. Thus, the question of whether a functional equivalence can be established between a paper-based bill of lading and a bill of lading as an electronic record under Turkish law will be discussed.

1. Writing

MLETR aims to provide equivalence between paper-based instruments, documents, and electronic records by stating in article 7/1 that "*an electronic transferable record shall not be deprived of legal effect, validity or enforceability solely on the grounds that it is in electronic form*"[57].

Article 8 of MLETR states that, "*where the law requires that information should be in writing, that requirement is met with respect to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference*".

Under Turkish law, the requirement of a document to be in writing does not necessarily entail the text to be on paper. It is also possible for a document to be issued in the form of an electronic record; in other words, it can be created electronically[58]. In fact, the Turkish Code of Civil Procedure (CCP) recognises the concept of "instrument" in a broader sense. Article 199/1 of the CCP accepts that data such as written or printed text, documents, drawings, plans, sketches, photographs, films, images or sound recordings, data in electronic media and similar information carriers that are capable of proving the facts of the dispute are instruments to provide evidence. Importantly, the information contained in the electronic form of the document is accessible so that it can be referred to later, as stipulated in article 8 of MLETR.

It should be noted that, the fulfilment of the written form requirement stipulated in article 8 of MLETR depends upon the bill of lading fulfilling the formal requirements stipulated in article 1229/1 of the TCC. However, as explained above, even if one or more of these elements are not present, at least the elements stipulated under article 1228/1 of the TCC must be present.

57 Henry D. Gabriel, 'The UNCITRAL Model Law on Electronic Transferable Records' [2019] 24(2) Uniform Law Review 261-280., 272.

58 Reha Poroy and Ünal Tekinalp, *Kıymetli Evrak Hukuku Esasları* (19th edn, Vedat Kitapçılık 2010) 21; Pulaşlı (n 51), 3; Kendigelen and Kırca (n 49), 4-5; Karan (n 23), 119; Çalık (n 52), 41-42.

Article 6 of MLETR provides that nothing in the Model Law prevents the inclusion of information in an electronic transferable record in addition to that contained in a transferable document or instrument. Therefore, there are no obstacles to the voluntary inclusion of additional information into an electronic transferable record[59].

2. Signature

In accordance with article 9 of MLETR, "*where the law requires or permits a signature of a person, that requirement is met by an electronic transferable record if a reliable method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic transferable record*".

The general rule under Turkish law is that where the law requires a contract to be in writing, the signatures of the parties to the contract must be affixed by hand. However, there are provisions that allow this signature to be made electronically. The reliable method required to indicate the identity and intention of a person in an electronic environment is "*secure electronic signature*".

Article 15/1 of the Turkish Code of Obligations (TCO) states that "*a secured electronic signature also has all the legal consequences of a handwritten signature*". In 2004, Electronic Signature Law numbered 5070 entered into force, which replicated this rule. Article 4 of the Electronic Signature Law defines secure electronic signature. According to this article, "*secure electronic signature is an electronic signature that a) depends exclusively on the signatory, b) is created with a secure electronic signature creation tool that is only at the disposal of the signatory, c) provides the identification of the signatory based on the qualified electronic certificate, d) enables the determination of whether any subsequent changes have been made to the signed electronic data*". For texts to be sent through secure electronic signature to replace the written form, they must be sent in accordance with the Electronic Signature Law and must be saved and stored by the recipients in a computer environment.

In TCC, it is allowed to issue the bill of lading both electronically and to add the signature on it electronically. Article 1526/2 of the TCC states that "*the signature of the bill of lading, the waybill, and the insurance policy can also be signed by hand, facsimile printing, staples, stamps, or any mechanical or electronic means in the form of symbols. To the extent permitted by the laws in which they are issued, the records to be included in these bills can be written, created and sent by handwriting, telegram, telex, fax and other electronic means*".

In addition, according to article 205/2 of CCP, "*electronic data duly created with a secure electronic signature shall have the force of a paper-based document*". Thus, it

59 İstemi (n 17), 1787. See also Explanatory Note, paras. 56 and 57.

is stipulated that electronic data created with a secure electronic signature must also be of the quality of a document in terms of the power of proof[60].

3. Bill of Lading as Transferable Document

The MLETR applies to "*electronic transferable records*" (art. 1/1). An electronic transferable record is defined in the MLETR as "*an electronic record that meets the requirements of Article 10*" (art. 2/para. 2). Article 10/1 of MLETR stipulates that "*where the law requires a transferable document or instrument, that requirement is met by an electronic record if:*

(a) The electronic record contains the information that would be required to be contained in a transferable document or instrument; and

(b) A reliable method is used:

(i.) To identify that electronic record as the electronic transferable record;

(ii) To render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and

(iii) To retain the integrity of that electronic record".

Therefore, for an electronic record to be considered an electronic transferable record, it must contain the information required for a transferable document or instrument, and a reliable method must be used for this purpose[61].

Although it is beyond the scope of this paper, article 12 of MLETR sets out general standards concerning the reliability of a method. To protect technological neutrality, the MLETR does not define a "reliable method" is. This is left to market participants to choose and implement the digital models, platforms, or systems they wish to use and for courts to determine whether the standard of reliability has been met in the event of any disputes[62].

Article 10 of MLETR was introduced into law as a result of discussions in the doctrine regarding the "*uniqueness*" approach of a transferable document or instrument. The uniqueness approach aims to prevent the circulation of multiple documents or instruments related to the same performance and thus avoids the existence of

60 Kendigelen and Kırca (n 49), p. 5.

61 Tataroğlu and Çağlayan Aksoy (n 12), 40; İstemi (n 17), 1787.

62 Theodora A Christou and John L Taylor, 'Blueprint Paper on Digital Trade and the UNCITRAL Model Law on Electronic Transferable Records' (*European Bank for Reconstruction and Development (EBRD)*, April 2023) <https://www.ebrd.com/documents/legal-reform/blueprint-paper-on-digital-trade.pdf> accessed 24 July 2024, 34. The electronic "methods" could range from email, text, or social media "methods" through to sophisticated block chain "methods" of communication, if hosted by reliable distributed ledger providers that employ cryptographically secure "hash", or equivalent techniques to ensure secure, traceable, and auditable transactions. The electronic methods used also should be reliable for proving transfers between parties. See Blueprint Paper (n 70), 34 fn. 55.

multiple claims for the performance of the same obligation[63]. However, uniqueness is a relative notion that poses technical challenges in an electronic environment. This is because uniqueness is not compatible with the nature of electronic records, which are generally more vulnerable to duplication. In fact, practises relating to the use of electronic transferable records are not yet well established[64].

For these reasons, the requirement of "*uniqueness*" was abandoned in the drafting process of the MLETR, a significant turn from the approach taken in the UNCITRAL Model Law on Electronic Commerce[65].

Article 10 of MLETR highlights the need to avoid the possibility of the existence of multiple claims to perform the same obligation by combining two approaches "*singularity*" and "*control*"[66]. According to the Explanatory Note, article 10/1(b)(i) sets forth the requirement that implements the "singularity" approach and article 10/1(b)(ii) implements the "control" approach[67]. It is stated in the Explanatory Note that control is closely related to the requirement contained in article 10, paragraph 1(b)(ii)[68]. Hence, articles 10 and 11 that regulate the issue of "control" must be read together[69]. The question arises in the doctrine from article 10/1(b)(i) as to whether there is a single electronic transferable record as a separate object or an expression of a single right to performance[70]. It is also pointed out that an electronic-transferable record must be subject to control, same as a paper-based document, and article 10/1(b)(ii) provides a functional equivalence rule that sets the relationship between control and an electronic transferable record[71].

4. Control

According to article 11/1 of MLETR, any requirement for the possession of a paper-based document or instrument is met for an electronic transferable record if a reliable method is used to establish that the record is in the exclusive control of an identified person (11/1/a and b). The person in control may be a natural or legal person or another entity that is able to possess a transferable document or instrument[72].

63 Explanatory Note, para. 81.

64 Explanatory Note, para. 82; Pejović and Lee (n 13), 17-18; Yang (n 16), 123.

65 Unho Lee, 'Assessment of Legal Instruments and Applicability to the Use of Electronic Bills of Lading' [2020] 24(2) Journal of Korean Trade 31-52., 34; Pejović and Lee (n 13), 18. See also Explanatory Note, paras 96 and 97.

66 Explanatory Note, para. 83; İstemi (n 17), 1786.

67 Explanatory note, paras. 97 and 98.

68 Explanatory Note, para. 106.

69 Gabriel (n 58), 274; Pejovic and Lee (n 13), 20.

70 Gabriel (n 58), 274-275.

71 Pejovic and Lee (n 13), 20.

72 Explanatory Note, para. 115.

The title of article 11 refers to "control" and not to "possession". *Yu* stated that the use of the concept of "control" is to emphasise the importance of the concept of "control" and the necessity to interpret the notion considering the international character of the Model Law[73].

As stated in the Explanatory Note of MLETR, article 11 provides "*a functional equivalence rule for the possession of a transferable document or instrument*"[74]. The notion of "control" is not defined in MLETR.

Since documents or records in electronic form, which are not tangible, cannot as a matter of law be "possessed", it was important to provide for a functional equivalent of "possession" and MLETR chose to adopt the concept of "control" over an electronic transferable record as the functional equivalent of possession.

Under Turkish Law, the special rights and protections granted to paper-based negotiable instruments and documents are subject to "*possession*". The definition of possession may vary in each jurisdiction. In article 973 of Turkish Civil Code (Civil Code), possession is defined as the "*effective control over a thing*". Possession has the function of publicity and is a presumption of ownership[75]. Due to the principle of publicity, the acquisition of real rights in chattel depends on the transfer of possession. For example, the transfer of chattel ownership requires the delivery of possession to the acquirer (art. 763/1 of Civil Code). Although there are exceptions, article 985 of the Civil Code states the presumption of ownership as follows: "*The possessor of a chattel is presumed to be its owner*".

As noted above, one of the important functions of possession is to determine who is entitled to the rights. While examining MLETR, it is pointed out that this function of possession should be taken into account electronically and not possession itself[76]. According to article 11 of MLETR, the person in control of an electronic transferable record is in the same legal position as the possessor of an equivalent paper-based transferable document or instrument and may transfer the electronic record by the transfer of control over that record. This final version of the article is accepted to be correct because when a reliable method is used to establish the party that has control, that party has the rights incorporated in the electronic transferable record, including the rights to transfer or claim performance under it[77].

Under Turkish law, possession is transferred among parties present in person by the delivery of the object itself or by means by which the recipient can gain effective

73 Yu (n 21), 14. See also Explanatory Note, para. 109.

74 Explanatory Note, para. 105.

75 Kemal Oğuzman, Özer Seliçi and Saibe Özdemir, *Eşya Hukuku* (Filiz Kitabevi 2016) 45.

76 Gabriel (n 58), 273.

77 Ibid., 274.

control over it (art. 977 of Civil Code). Transfers among persons who are absent are completed upon delivery of the object to the transferee or his/her representative (art. 978 of Civil Code). Possession can also be transferred without physical transfer. If a third party or the transferor retains possession of the object in terms of a special legal relationship, possession of the object may be acquired without physical delivery (art. 978/I of Civil Code). Finally, delivery of documents of title to goods consigned to a carrier or warehouse is equivalent to the delivery of the goods themselves (art. 980 of Civil Code).

As will be seen below, the transfer of possession is a mandatory element for the transfer of registered bearer and payable to order bills of lading. The concept of "transfer of possession" covers all types of transfers.

The functions of possession in negotiable instruments are to ensure publicity and to transfer the ownership of the instrument and the rights contained in it in case of transfer of the instrument (with a written declaration of transfer if the instrument is registered, or with endorsement if the instrument is payable to order). These functions of possession are realised by "establishing control" over the bill of lading electronically. In other words, instead of the transfer of possession, the "transfer of control" creates a gaining effect[78].

VI. Applicability of MLETR to the Transfer of Bills of Lading

A. Forms of Transfer of Bill of Lading

Under Turkish law, bills of lading should be issued in three ways according to the form of transfer: registered, bearer, or payable to order (art. 1228/3 of TCC).

1. Registered Bills of Lading

Registered bills of lading are issued in the name of a particular person. Because they do not contain the word "to order", they are not legally acceptable as commercial papers that are payable to order. A registered bill of lading is only payable to the person or entity named in the document or to their order. In other words, by a registered bill of lading, the ownership of the goods is determined by the named purchaser or his/her agent, and the goods can only be claimed by the person whose name is written on the bill of lading or who proves to be its legal successor.

In order to transfer a registered bill of lading, the transfer of possession of the bill of lading is necessary in any case (art. 647/1 of TCC). In addition, a written declaration of transfer is also required in the registered bill of ladings (art. 647/2

78 İstemi (n 17), 1789.

of TCC). This declaration of transfer should be understood as the agreement of the assignment of claims regulated in article 183 and the following provisions of the TCO. A creditor may assign a claim to which he is entitled to a third party without the debtor's consent, unless the assignment is forbidden by law or contract or prevented by the nature of the legal relationship. Under the TCO, the validity of a contract is not subject to compliance with any particular form, unless a particular form is prescribed by law (art. 12 of TCO). However, as regulated by Article 184 of TCO, the agreement of the assignment of claims is valid only if it is made in writing.

This declaration can be written on a negotiable instrument or on separate pieces of paper (art. 647/2 of TCC). In addition, the declaration of a transfer must contain the signature of the transferor, and the identity of the transferee must be understood[79]. The person who takes over the bill of lading in this way must prove that he/she is the legitimate bearer of the goods to be delivered[80].

İstemi states that registered negotiable instruments do not have the "transferability" characteristic accepted in the MLETR; although it is possible to transfer them by way of assignment of claims, registered negotiable instruments are not actually issued for the purpose of transfer and therefore should not fall within the scope of the MLETR[81]. In Explanatory Note paragraph 21 on the scope of application of the MLETR, it is stated that certain documents or instruments, which are generally transferable but whose transferability is limited due to other agreements, do not fall under the definition of "transferable document or instrument" contained in the MLETR. Therefore, the MLETR would not apply to those documents or instruments. However, this conclusion should not be interpreted as preventing the issuance of those documents or instruments in an electronic transferable records management system because such prohibition is likely to result in unnecessary multiplication of systems and increased costs[82]. The requirement of a written agreement of assignment of claims for the transfer of registered negotiable instruments may lead to the conclusion that this type of negotiable instrument is not covered by the MLETR because of MLETR Explanatory Note paragraph 21. This is because, unlike an endorsement, an agreement of assignment of claims is not a special form of transfer under negotiable instrument law. However, this agreement does not limit the transfer of registered negotiable instruments; on the contrary, the agreement enables the transfer. A registered bill of lading is less transferable than a registered bill of lading and a bearer one[83], but we cannot agree with the view that it does not have the characteristic of "transferability"

79 Poroy and Tekinalp (n 59), 70; Pulaşlı (n 51), 58; Kendigelen and Kırca (n 49), 39; Ersin Çamoğlu, *Kıymetli Evrak Hukukunun Temel İlkeleri* (2nd edn, Vedat Kitapçılık 2023) 12; Çalık (n 52), 31.

80 Karan (n 23), 63; Çalık (n 52), 31.

81 İstemi (n 17), 1781. For the view that the MLETR excludes registered negotiable instruments from its scope, see Çağlayan Aksoy, Hüryaşar and Şengöz (n 12), 84.

82 Explanatory Note, para. 21.

83 Çalık (n 52), 30.

at all. This is because the main reason for issuing negotiable instruments is to provide the right in the document with the ability to be "transferred" in a fast and secure manner. In addition, in cases where a declaration of transfer is made on a registered negotiable instrument, there is no significant difference between this declaration and the endorsement, which we will examine below. The differences between the two arises in their provisions and consequences[84].

2. Bearer Bills of Lading

Bearer bills of lading are bills of lading in which the bearer is deemed the legitimate bearer from the text or form of the bill (art. 658/1 of TCC). Unlike a registered bill of lading, a right arising from a bearer bill of lading can be claimed by the person in possession at the time of presentation. This means that the person who holds the paper-based bill of lading has the right to claim the goods listed on it, regardless of whether he/she is the rightful owner or not. According to article 646/2 of the TCC, unless there is fraud or gross fault, the carrier is relieved of his obligation by delivering goods to the bearer of the bill of lading.

Bearer bills of lading are transferred only upon delivery of the document (art. 647/1 of TCC), without the need for endorsement or assignment of claims. Therefore, they are the most transferable types of negotiable instruments.

3. Payable to Order Bills of Lading

Negotiable instruments payable to order are regulated under article 824 of the TCC. These instruments can be written as payable to order voluntarily, or they can have this character from the law. The negotiable instruments, which constitute the second group, are deemed to be written to order by law even if they do not contain the word "to order". In the case of negotiable instruments that may be issued voluntarily to the order, the issuer of the document must clearly write "to order" in the document's text[85]. Article 1228/3 of the TCC regulates that a bill of lading may be issued in registered, bearer, or payable to order; therefore, a bill of lading is a negotiable instrument that may be issued in payable to order form at will. In other words, no bill of lading is considered to be payable to order legally[86].

84 Kendigelen and Kırca (n 49), 39.

85 Poroy and Tekinalp (n 59), 75-76; Pulaşlı (n 51), 69; Kendigelen and Kırca (n 49), 34-35; Öztan (n 51), 42-43; Ali Bozer and Celal Göle, *Kıymetli Evrak Hukuku* (5th edn, Banka ve Ticaret Hukuku Araştırma Enstitüsü 2016) 32; Mehmet Bahtiyar, Nihat Taşdelen, Levent Biçer and Esra Hamamcıoğlu, *Kıymetli Evrak Hukuku* (1st edn, Beta Yayıncılık 2022) 20; Çalık (n 52), 34.

86 Pulaşlı (n 51), 69; Çamoğlu (n 80), 14; Öztan (n 51), 43; Bahtiyar, Taşdelen, Biçer and Hamamcıoğlu (n 86), 22; Çalık (n 52), 35; Ber, Konişmento (n 12), 39; Yazıcıoğlu, Deniz Ticareti (n 24), 374. Regarding that the bill of lading is legally a negotiable instrument payable to order due to article 831/2 of the TCC, see Poroy and Tekinalp (n 59), 76.

Endorsement and transfer of possession are required for the transfer of a bill of lading payable to order (art. 648/2 of TCC). According to article 831/2 of the TCC, the provisions of the bill of exchange regarding the form of endorsement and the rights of the bearer shall also apply to the bill of lading.

An endorsement is a written declaration of an intent to transfer rights contained in the negotiable instruments payable to order[87]. This declaration of intent must be written on the bill of lading or on a paper called "*allonge*" attached to the bill of lading and signed by the endorser (art. 683/1 of TCC). The endorsement may include the person in whose favour the endorsement is made, or it may consist only of a signature without indicating the person in whose favour the endorsement is made (art. 683/2 of TCC).

The endorsement of the bill of lading fulfils only the functions of "*transfer*" and "*identification*"; but not the function of "*guarantee*"[88]. The function of transfer of the endorsement ensures that all rights arising from the bill of lading pass to the transferee (art. 684/1 of TCC). The second function of endorsement is to identify the legitimate bearer regulated under article 686 of the TCC. For a bearer of a bill of lading to be accepted as a legitimate bearer, he/she must have the possession of the bill of lading and be entitled in form. According to article 686/1 of the TCC, the legitimate bearer of a bill of lading is the person who holds it through a proper chain of endorsement. For a proper chain of endorsement, the first endorsement must be made by the beneficiary, and the endorser of each endorsement must be the person endorsed in the previous endorsement. This chain of endorsement must go all the way to the last bearer. Therefore, the last bearer who claims on the basis of the bill of lading shall be considered the legitimate bearer only if he proves his entitlement in this way through a proper chain of endorsement[89]. The last function of the endorsement is guarantee. This means that each endorser is liable to the subsequent endorser and the bearer if the bill is not paid (art. 685/1 of TCC). However, since there is no reference to the function of guarantee of the endorsement among the provisions regarding the bill of lading in the TCC, the endorsement does not have this function in the bill of lading. Therefore, the issuer of the bill of lading, i.e. the carrier, is the only person liable for the bill[90].

Payable to order bills of lading provide a more secure method for transferring ownership than bearer bills of lading because they require endorsement by the named party. This helps prevent unauthorised individuals from claiming the goods.

87 Kendigelen and Kırca (n 49), 200; Poroy and Tekinalp (n 59), 154; Pulaşlı (n 51), 172; Çalık (n 52), 36.

88 Yazıcıoğlu, Deniz Ticareti (n 24), 374; Karan (n 23), 61.

89 Poroy and Tekinalp (n 59), 166; Kendigelen and Kırca (n 49), 212; Pulaşlı (n 51), 186-187; Çamoğlu (n 80), 77; Öztan (n 51), 112; Bozer and Göle (n 86), 98; Bahtiyar, Taşdelen, Biçer and Hamamcıoğlu (n 86), 98; Çalık (n 52), 37.

90 Yazıcıoğlu, Deniz Ticareti (n 24), 374; Karan (n 23), 62; Çalık (n 52), 37.

B. Electronic Transfer of a Bill of Lading

Article 15 of MLETR provides an explicit provision on how to ensure functional equivalence in the electronic environment regarding endorsement. According to this article, "*where the law requires or permits the endorsement in any form of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if the information required for the endorsement is included in the electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9*". In other words, if the electronic transferable record contains the information necessary for the endorsement and this information complies with the characteristics of the writing (art. 8) and signature (art. 9) that we have examined above, the requirements of the endorsement are also fulfilled in terms of the electronic transferable record.

Article 15 of MLETR uses the term "*endorsement*". Under Turkish law, "endorsement" is only mandatory for the transfer of negotiable instruments payable to order. However, Explanatory Note paragraph 152 states that exclusion of other conditions for transfer from the scope of the article is contrary to the purpose of the article. Therefore, article 15 of MLETR does not refer to any specific type of requirement but includes all of them[91]. As a matter of fact, functional equivalence should be ensured when electronically transferring registered and bearer bills of lading. Therefore, under this heading, an evaluation is made not only for endorsement but also for all forms of transfer under Turkish law.

In that case, the written declaration of transfer in a registered bill of lading and the endorsement in a payable to order bill of lading must be fulfilled electronically. For this purpose, the electronic transferable record (bill of lading) must contain the information necessary for the transfer, and this information must comply with the characteristics of writing (art. 8 of MLETR) and signature (art. 9 of MLETR).

First, the question of whether a written declaration of transfer or endorsement can be signed electronically should be answered. We have stated above that the provisions of the bill of exchange regarding the form of endorsement also apply to the bill of lading (art. 831/2 of TCC). Article 756/1 of the TCC rules that statements on a bill of exchange must be signed by hand. Any mechanical means or an approved sign or official document cannot be used instead of a handwritten signature (art. 756/2 of TCC). However, this provision is excluded from the provisions for the form of endorsement. Therefore, it does not apply to bills of lading. Since article 1526/2 of the TCC allows the bill of lading to be signed by any mechanical or electronic means, it should be possible to affix the signatures required for the transfer of the bill of lading electronically[92].

91 Explanatory Note, para. 152.

92 Çalık (n 52), 40. For the view that endorsement can be signed electronically, see Karan (n 23), 172.

Second, it is important to consider whether the assignment of claims required for the transfer of a registered bill of lading can be established electronically. We previously discussed that the transfer statement required for the assignment of claims in a registered bill of lading is considered a contract subject to the requirement of a written form, whether on the instrument itself or on a separate document. Therefore, the question of whether this contract can be established in electronic form under Turkish law should also be addressed.

Article 1/1 of the TCO rules that the conclusion of a contract requires the mutual expression of intent by both parties. As previously stated, the validity of a contract is not subject to compliance with any particular form unless the law prescribes that form. Where a contract must be in writing, it must be signed by all the persons on whom it imposes obligations. For a written form to be fulfilled, it is necessary to have the parties' intentions materialised in a tangible document and signed by the parties. It does not matter on which material the text is written; however, it is important that the text is durable, continuous, and signed by the parties[93]. Assignment of claims is subject to written form; thus, these requirements should be met[94]. It does not matter which tools are used; in other words, assignment of claims can be formed in an electronic environment. As it is also stated above, a secured electronic signature has all the legal consequences of a handwritten signature, and both the TCO and Electronic Signature Law allow a document to be signed in an electronic environment.

VII. Conclusion

As worldwide trade has been gradually shifting towards electronic commerce, the need for an efficient legal framework to facilitate the use of electronic bills of lading has become evident. The UNCITRAL Model Law on Electronic Transferable Records constitutes a crucial step for digitising trade documents, particularly bills of lading. The MLETR has been adopted by various countries and crucial organisations such as the International Chamber of Commerce have highlighted its importance in facilitating digital transformation in maritime trade.

The MLETR adopts three fundamental principles: non-discrimination, technological neutrality, and functional equivalence. The principle of functional equivalence adopted in the MLETR ensures that electronic bills of lading have

93 Arif Barış Özbilen, *Sözleşmelerin Şekli ve Şekil Yönünden Hükümsüzlüğü* (1st edn, On İki Levha Yayıncılık 2016) 56ff.; Fikret Eren, *Borçlar Hukuku Genel Hükümler* (25th edn, Yetkin Yayınları 2020) 308ff.; Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler Cilt-1*, (20th edn, Vedat Kitapçılık 2022) 146ff.; Gökhan Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1* (2nd edn Seçkin Yayıncılık 2019), 534ff.; Haluk Nomer, *Borçlar Hukuku Genel Hükümler* (19th edn, Beta Yayınları 2023), 126-128.

94 Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler Cilt-2* (20th edn, Vedat Kitapçılık 2022) 585; Eren (n 94) 1368; Hatice Tolunay Ozanemre Yayla, *Alacağın Devri İşleminin Geçerliliği ve Sebeple Olan İlişkisi (İlliliği)* (1st edn, Turhan Kitabevi 2019) 225ff.; Mustafa Alper Gümüş, 'Alacağın Temliki Sözleşmesinin Şekli' [2011] 10 (2) İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi 9-34., 9ff.

the same legal status as paper-based bills of lading. The principle of technological neutrality allows technological innovations by not preferring any specific technology. Technology is advancing rapidly; therefore, legal frameworks should be flexible and adaptable, and these principles ensure this.

In the final analysis, bills of lading can be issued electronically under Turkish law. This paper provided potential implications of adopting the MLETR under Turkish law regarding digitisation of the bills of lading. Considering the above evaluations, we conclude that the MLETR is a convenient legal framework for electronic bill of lading regulations under Turkish law. However, MLETR often refers to substantive law on several issues. Therefore, adapting the MLETR to Turkish law and making it applicable under Turkish law would require the enactment of new legislation. This legislation should provide for the signing of bills of lading by electronic signature and other similar methods, regulate the establishment of control in the electronic environment, and allow electronic transactions on bills of lading. Provisions should also be laid down to permit electronic transfer and presentation of bills of lading.

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Analyzing Whistleblowing Provisions in Turkish Law in the European Context

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Abstract

Whistleblowing at the workplace is the act of reporting or disclosing information about illegal, unethical, or improper activities occurring within an organization. This disclosure can be made by an employee or any member of the organization who has access to confidential information. Whistleblowing aims to expose misconduct that might otherwise remain hidden, such as fraud, corruption, safety violations, and other forms of malpractise, to protect public interest and ensure accountability. It often involves notifying higher authorities, regulatory bodies, or the public about wrongdoing. This act of notification is crucial for workplace transparency and accountability. However, balancing the duty of loyalty owed by employees to their employer with their right to freedom of expression poses significant challenges. Determining which actions are protected by whistleblowing principles is vital for maintaining this balance. Concerning this issue, the European Court of Human Rights (ECtHR) has developed a checklist to assess which whistleblowing actions warrant protection. This research analyzes Turkish regulations concerning workplace whistleblowing considering the ECtHR's decisions. By examining the alignment of Turkish provisions with international standards, this study seeks to provide comprehensive insights into current laws' protection of whistleblowers while ensuring organizational integrity.

Keywords

Whistleblowing, Disclosing Information, Workplace, Employment, ECtHR

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Introduction

The fundamental element that distinguishes employment contracts from other contracts is the dependency of employees on their employers. This means that there is a personal relationship between the parties to an employment contract, and this relationship leads to certain obligations. The duty of loyalty is one of these obligations and requires an employee to perform his duties with loyalty and protect the employer's legitimate interests under Article 396(1) of the Turkish Code of Obligation (TCoO).

The duty of loyalty includes an obligation not to disclose an employer's trade secrets. An employee cannot use any information related to business' trade secrets, which are learned during the course of work, for their own benefit or disclose them to others for the duration of the employment relationship. Furthermore, the employee is obligated to keep secrets even after the termination of the employment relationship to protect the employer's legitimate interests as per section 396(4) of the TCoO.[1]

The limitation of the employee's obligation to keep information secret is an illegal practice. In this respect, actions and practices that are contrary to the law, statutes, and moral rules will not be considered trade secrets; thus, the employee is not under the obligation to keep the information secret. To exemplify, disclosing or reporting a practice in a workplace that is illegal or unethical to the media, institutions, or organizations by an employee is called whistleblowing. In this research, the concept of whistleblowing in Turkish employment law is examined with a particular focus on whether it constitutes a breach of the duty of loyalty.

I. Whistleblowing Concept

The term whistleblowing emerged in the 1950s as a slang word to denote individuals who disclose fraudulent actions at their workplaces; thus, whistleblowers were mostly seen as spies.[2] The term whistleblowing originates from "to blow the whistle on" which means to stop the game by blowing a whistle when a foul occurs in sports, or the act of the police trying to draw public attention to a crime by blowing a whistle.[3] In other words, it can be expressed as a way of opposing a problem.[4] By contrast, whistleblowing was also used in a similar way to the terms "snitching"

1 Fatih Uşan, *İş Hukukunda İş Sırrının Korunması (Sır Saklama ve Rekabet Yasağı)* (Seçkin Yayıncılık, Ankara 2003), Tuncay, Can, İşçinin Sadakat (Bağlılık) Yükümlülüğü, (Prof. Dr. Hayri Domaniç'e 80. Yaş Günü Armağanı, Beta Yayıncılık, İstanbul 2001) 1043-1086. Arzu Arslan Ertürk, *Türk İş Hukukunda İşçinin Sadakat Borcu*, (XII Levha Yayıncılık, İstanbul 2010) Gülsevil Alpagut, 'İşçinin Sadakat Borcu ve Türk Borçlar Kanunu ile Getirilen Düzenlemeler' (2012) 7(25) Sicil İş Hukuku Dergisi, 23-32., Fevzi Demir and Demir Güvenç, 'İşçinin Sadakat Borcu Ve Uygulaması' (2019) 11(1) Kamu İş Dergisi, 1-37. Zeki Okur, 'İş Hukukunda İşçinin Düşünceyi Açıklama Özgürlüğü' (2016) 8(4) Kamu İş Dergisi, 1-47.

2 Robert A., Larmer, 'Whistleblowing and Employee Loyalty' 1992 11 (2) Journal of Business Ethics 125, 125.

3 Ufuk Aydın, 'İş Hukuku Açısından İşçinin Bilgi Whistleblowing' Anadolu Üniversitesi Sosyal Bilimler Dergisi, (2002- 2003) 2(2), 81. Kemal Eroğluer and Gizem Sarıbay Öztürk, 'İş Hukuku ve Örgütsel Boyutuyla Haber Uçurma (Whistleblowing)' in Sevinç Köse and Mustafa Alp (eds), *Örgütsel Davranış ve İş Hukukuna Yansımaları* (Seçkin, 2020) 345; Fatih Gültekin, *İş İlişkisinde İfade Özgürlüğü* (1th, Onikilevha, 2024) 199.

4 Daniele Santoro and Manuala Kumar, *Speaking Truth to Power–A Theory of Whistleblowing* (1st, Springer, 2018). 47.

and "tattling", but the emphasis in whistleblowing is announcing illegal or unethical situations.[5] Hence, the term whistleblowing cannot be used in the same context as snitching or tattling.

The aspect of this issue that concerns labor law is striking a balance between an employee's duty of loyalty, which arises from an employment contract, and whistleblowing. This involves determining which statements made by the employee fall under whistleblowing and which violate the duty of loyalty. This distinction is crucial in determining whether an employee is protected under whistleblowing regulations or faces consequences for breaching the duty of loyalty.[6]

Whistleblowing is a notification to the public that allows access to an organization's, private or public, confidential information.[7] For this purpose, the public interest is essentially prioritized over the interests of the businesses; thus, harmful activities within the workplace are against the law or ethics are reported.[8] Because hiding information within a business can sometimes be relatively easy, whistleblowing serves as a valuable tool to shed light on wrongdoings in workplaces.[9] In particular, where businesses lack transparency and information is hidden, whistleblowing activity might be likened to a "public's watchdog".[10] However, when employees' loyalty to employers is considered, disclosing information might be considered a tragic but ethical choice.[11] It should be stated that a business culture should support the act of whistleblowing not only because it will ensure transparency and accountability but also because it would contribute to the development of a sense of justice within the business.[12]

The term whistleblowing is not a new phenomenon. Silas Deane, an American citizen sent to France by the Congress as the Representative of the American Colonies in Europe, was carrying secret instructions to sell American goods in Europe and

5 Eroğluer and Sarıbay Öztürk (n.3) 345.

6 Aydın (n.3) 96.

7 Nuri Çelik, Nurşen Caniklioğlu, Talat Canbolat and Ercüment Özkaraca, *İş Hukuku Dersleri* (36th. Edn., Beta, 2023) 319; Hugh Collins, K. D. Ewing and Aileen Mccolgan, *Labour Law* (Cambridge University, 2012) 438; Tae Kyu Wang, Kai-Jo Fu, and Kaifeng Routledge Yang, 'Do Good Workplace Relationships Encourage Employee Whistle-Blowing?' (2018) 41 (4) Public Performance & Management Review, 768, 768; Santoro and Kumar (n.4) 38; Larmer (n.2) 125; Gültekin (n.3) 200.

8 Mustafa Alp, 'Avrupa Birliği'nin 2019/1937 Sayılı Birlik Hukukuna Aykırılıkları Bildirenlerin Korunması (Whıstleblowing) Yönergesi Işığında İşçinin Hukuka Aykırılıkları İfşa Etmesi' (2021) 23 (1) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 1, 14.

9 Sulette Lombard, 'Regulatory Policies and Practices to Optimize Corporate Whistleblowing: A Comparative Analysis', in Sulette Lombard, Vivienne Brand and Janet Austin (eds), **Corporate Whistleblowing Regulation, Theory, Practice, and Design** (Springer, 2020) 4.

10 Gülsevil Alpagut, 'İfşa-İhbar Hakkına İlişkin Avrupa Birliği Yönergesi ve Avrupa İnsan Hakları Mahkemesi İçtihatları' in Alpay Hekimler (ed), Festschritt Für Otto Kaufmann Armağanı (Legal, 2021) 4; Vickjilenca Abazi, 'Truth Distancing? Whistleblowing as Remedy to Censorship during COVID-19' (2020) 11(2) European Journal of Risk Regulation 375–381.

11 Larmer (n.2) 126.

12 Mustafa Alp, *Çalışanın İşvereni ve İş Arkadaşlarını İhbar Etmesi, Çalışanın Hukuka, Etik Kurallara Aykırılıkları İfşa Hakkı ve İhbar ve Borcu, Whistleblowing* (Beta, 2013) 145; Eroğluer and Sarıbay Öztürk (n.3) 356

to procure weapons for the war. Additionally, it was necessary to seek assistance from France for the War. He successfully secured the shipment of arms from the French King. However, Silas Deane demanded money from the Congress to keep this news secret but subsequently reported the incident to the newspaper, leading to its disclosure to the public after the Congress refused to offer compensation.[13]

Another example occurred just a few months after the signing of the Declaration of Independence in 1777.[14] Captain John Grannis, representing the sailors, presented a petition to Congress concerning the inhumane and barbaric treatment of captured British soldiers. This led to the suspension of Commander Hopkins, who retaliated by filing a slander lawsuit against those who reported him.[15] Imprisoned sailors Samuel Shaw and Richard Marven stated in a petition to Congress on July 23, 1778, that they did the right things under the law and their beliefs. This case constituted a ground for America's Whistleblower Protection Act.[16] The Act stipulates that all individuals in the service of the United States must report any misconduct, fraud, or crime they encounter during their duties to Congress or any other appropriate authority as soon as possible.[17]

Then, whistleblowing began to become popular when Time Magazine announced three women as "Persons of the Year" because they reported irregularities within their organizations to their managers and legal authorities.[18] Similar situations have also been seen in China, where Shuping Wang's actions in the 1990s led to the addressing of HIV and hepatitis epidemics; similarly, in 2020, Dr Ali Fen and Winlang might be another popular example of whistleblowing since they announced the first example of COVID-19 cases.[19] Based on the explanation provided above, whistleblowing refers to the act of informing the authorities, the press, or third parties about wrongful practices occurring within an institution or workplace.[20] When the definition of whistleblowing is scrutinized, three elements can be derived from the definition: the individual, the subject and the action.

1. Individual Element

For whistleblowing to be discussed in the context of employment law, the person in question must be associated with the relevant workplace (insider).[21] Hence, a

13 Santoro and Kumar (n.4) 11.

14 Christopher Klein, 'US Whistleblowers First Got Government Protection in 1777' (26 September 2019) <https://www.history.com/news/whistleblowers-law-founding-fathers> accessed: 10.12.2021.

15 Santoro and Kumar (n.4) 12.

16 Whistleblower Protection Act (1778).

17 Shawn Marie Boyne, 'Financial Incentives and Truth-Telling: The Growth of Whistle-Blowing Legislation in the United States' in Gregor Thüsing and Gerrit Forst (eds), *Whistleblowing - A Comparative Study* (Springer, 2016) 279.

18 Eroğluer and Sarıbay Öztürk (n.3) 344-345.

19 Abazi (n.10) 377.

20 Alp (n.8) 4.

21 Mustafa Alp, 'Avrupa İnsan Hakları Mahkemesi'nin Heinisch/Almanya Kararı Işığında Whistleblowing (İşçinin İfşa ve

whistleblower can be a dependent person of a business, such as an employee, official, or contractual staff, or someone who operates in close relation to the organization like a customer or supplier. It must be stated that the whistleblower, being part of the business and consequently, in a position to learn about the action, must take the risk of breaching the duty of loyalty by disclosing information learned during the work.[22] The identity of the person committing the unlawful or unethical act does not matter on this issue. A person could be any employee at the workplace and not necessarily someone bound by an employment contract, including a board member or even the chairman of the board.

2. Subject Element

The subject of whistleblowing, as stated above, involves behaviors that are contrary to the law and ethical standards of businesses. Not only legal violations but also deviations from professional ethical principles set by the institutions and organizations to which the workplace is subject are considered in this context.[23] Unethical situations, even if they do not constitute a legal violation, can also be considered within the scope of whistleblowing.[24] This includes exposing practices such as the use of low-quality materials or charging for unnecessary repairs, which can be regarded in favor of the public interest. Any deviations that can be anticipated to benefit the public interest are considered within the scope of whistleblowing.[25]

3. Action Element

The final element required for whistleblowing is the disclosure of unlawful or unethical actions to internal channels, external institutions, or organizations.[26] Although reporting misconduct is typically seen as positive action, external whistleblowing can sometimes have adverse effects on an organization. In contrast, internal whistleblowing tends to positively influence organizational governance and encourages ethical behavior.[27] The internal channels of a business can be exemplified by the ethics committee, company lawyer, auditor, and board of directors, while external channels can be exemplified by authoritative governmental institutions and the mass media.[28] In both cases, a person or institution does not necessarily

İhbarı) ve İş İlişkisinde İfade Özgürlüğü', Prof. Dr. Polat Soyer'e Armağan (2013) 15, Özel Sayı, DEÜHFD, 385, 388.

22 Ibid, 388.

23 Ibid, 389.

24 Alp (n.8) 12.

25 Collins, Ewing, and Mccolgan (n.7) 438; Alp (n.21) 389.

26 Collins, Ewing, and Mccolgan (n.7) 441.

27 Dawid Mrowiec, 'Factors Influencing Internal Whistleblowing: A Systematic Review of the Literature' (2022) 44 Journal of Economics and Management, 143.

28 Büşra Gizem Üner, 'Ifsa ve İhbar Hakki' (2024) 10(2) Anadolu Üniversitesi Hukuk Fakültesi Dergisi, 779.

have a special authority to apply legal sanctions.[29] For example, as an external whistleblowing channel, the media does not have authority over a subject or can enforce any sanctions. [30] However, it should also be noted that it is necessary for the media to meet strict conditions if they are informed about unlawful or unethical actions.[31] These restrictions will be discussed below in light of ECtHR decisions.

II. Effective Protection of Whistleblowing

Whistleblowing may lead individuals to a series of significant risks because they might be seen as "spies" in the workplace[32], and the whistleblowers may confront retaliation, blacklisting, significant emotional stress, and loss of employment status, income, reputation, and relationships.[33] This is because these types of behaviors might be considered disloyalty to business by employers, and this consideration might lead to the termination of the employment contracts.[34] Accordingly, legal whistleblowing regulations are becoming increasingly important worldwide.[35] In the context of our topic, it is important to consider which provisions should be addressed in the protection of an employee who performs whistleblowing.[36]

Article 5 of the ILO Convention No. 158 states that the termination of a contract will not be deemed for a valid reason if it involves filing a complaint against the employer participating in proceedings against the employer for alleged violations of laws or regulations or making a complaint to the competent administrative authorities[37]. The convention protects employees who report breaches of law in the workplace against termination of their employment contract. Additionally, the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, adopted by the EU, imposes an obligation on all EU Member States to enact specific legal regulations by the end of 2021. This directive also introduces some new principles regarding what whistleblowing could entail and protects whistleblowers.[38]

29 Alp (n.21) 390.

30 Carmen R. Apaza, Yongjin Chang, Srisombat Chokprajakchat, and Thomas Devine, "Summary and Conclusions" in Carmen R. Apaza and Yongjin Chang (eds), *Whistleblowing in The World* (Palgrave Macmillan, 2017), 81; Alp (n.21) 390.

31 Collins, Ewing, and Mccolgan (n.7) 441.

32 Larmer (n.2) 135.

33 Vivienne Brand, "The Ethics of Corporate Whistleblowing Rewards" Edt: Sulette Lombard, Vivienne Brand, Janet Austun; **Corporate Whistleblowing Regulation, Theory, Practice,** and Design (Springer, 2020) 38; Eroğluer and Sarıbay Öztürk (n.3) 356-357.

34 Larmer (n.2) 135.

35 Alp (n.8) 1.

36 Alp (n.8) 4.

37 Gültekin (n.3) 206.

38 Alp (n.8) 4; Gültekin (n.3) 209.

1. Evaluation of Whistleblowing in the Context of European Law

In the realm of the protection of whistleblowing activities, some tools have been adopted to establish a legal framework for the protection of employees reporting breaches related to European law both inside and outside of the workplace.[39] In this context, when European legal instruments is scrutinized, firstly, in 2010, the Parliamentary Assembly's Committee of Legal Affairs and Human Rights defined whistleblowing as a "generous, positive act" carried out by brave individuals who choose to address the wrongs they encounter rather than take the easier path of staying silent.[40] At that time, most member states lacked laws to protect whistleblowers. Consequently, the Assembly recommended that the Committee of Ministers create guidelines based on the principles set out in Resolution 1729.[41] The Parliamentary Assembly of the Council of Europe, under the title "Protect of Whistleblower" states that[42]

- *6.1.1. The definition of protected disclosures shall include all bona fide warnings against various types of unlawful acts, including all serious human rights violations which affect or threaten the life, health, liberty and any other legitimate interests of individuals as subjects of public administration or taxpayers, or as shareholders, employees or customers of private companies.*
- *6.1.2. the legislation should therefore cover both public and private sector whistle-blowers, including members of the armed forces and special services,*
- *6.2.2- This legislation should protect anyone who, in good faith, makes use of existing internal whistle-blowing channels from any form of retaliation (unfair dismissal, harassment or any other punitive or discriminatory treatment).*
- *6.2.3- Where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower, external whistle-blowing, including through the media, should likewise be protected.*
- *6.2.4- Any whistle-blower shall be considered as having acted in good faith provided, he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives.*[43]

39 Abazi (n.10) 645.

40 Anna Myers, *Protection of Whisteblowers* (Council of Europe, 2022) para 85. <https://rm.coe.int/cdcj-2022-01-evaluation-report-on-recommendation-cmrec-2014-7p/1680a6fee1> accessed 09.09.2024.

41 Parliamentary Assembly Resolution 1729 on the Protection of "Whistle-blowers" (2010).

42 Parliamentary Assembly, 'Resolution 1729 Final Version Protection of "Whistle-blowers"' <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851#:~:text=the%20public%20interest.-, 6.2.,other%20punitive%20or%20discriminatory%20treatment> accessed 09.09.2024.

43 Ibid, Para 6.

Second, in 2014, the Committee of Ministers adopted Recommendation CM/Rec (2`014)7 on whistleblower protection, which was developed by the European Committee on Legal Co-operation (CDCJ) of the Council of Europe and acknowledged its explanatory memorandum. The CDCJ encourages and assists in the implementation of this recommendation, which outlines a set of principles to guide member states in reviewing their national laws or when introducing or amending legislation and regulations as needed within the context of their legal systems.[44] The aim is to assist member states in creating and developing a legal framework that effectively protect whistleblowers. Although the recommendations seek to establish a common set of principles for all member states, the manner in which each country applies these principles has varied.[45] However, according to the Council of Europe's report in 2022, notable progress has been made since the adoption of the Recommendation CM/Rec(2014); however, significant efforts are still needed.[46] The protective measures in Recommendation CM/Rec(2014)7 are mainly administrative, and the states must recognize the importance of strong organizational policies and protections.[47]

Third, until the adoption of the EU Directive 2019, the EU and the European Commission heavily relied on the Council of Europe's efforts.[48] In October 2019, the European Parliament enacted the "Directive on the Protection of Persons who Report Breaches of Union Law."[49] According to the Directive, whistleblowers play a significant role in uncovering and preventing violations of European Union laws and in protecting the welfare of society.[50] As explicitly stated in Article 1 of the Directive, the primary objective is to enhance the enforcement of Union law and policies in specific areas. In this sense, the Directive goes beyond the protection of freedom of expression and whistleblowing; it primarily aims at improving and developing EU law.[51]

EU Directive 2019 emphasizes that whistleblower protection is part of the right to freedom of expression and has created a common framework for Member States that intend to ensure, in a broadly consistent way, the effective protection

44 European Committee on Legal Co-operation, 'Protection of Whistleblowers' <https://www.coe.int/en/web/cdcj/activities/protecting-whistleblowers> accessed 09.09.2024.

45 Council of Europe, 'Protection of Whistleblowers' (2014) 18. <https://rm.coe.int/16807096c7> accessed 09.09.2024.

46 Myers (n.40) 8.

47 Ibid.

48 European Parliament, 'Protecting whistle-blowers in the EU' (September 2024) 2. <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/747103/EPRS_BRI(2023)747103_EN.pdf> accessed 09/09/2024.

49 Directive (Eu) 2019/1937 of the European Parliament and of The Council of 23 October 2019 (On the Protection of Persons who Report Breaches of Union Law.

50 Jan Tadeusz Stappers, 'EU Whistleblower Protection Directive: Europe on Whistleblowing' (2021) 22 ERA Forum, 87, 89.

51 Ibid, 87. Arnaud Van Waeyenberge and Zachariah Davies, 'The Whistleblower Protection Directive (2019/1937): A Satisfactory but Incomplete System' (2021) 12 European Journal of Risk Regulation, 236, 238; Abazi (n.10) 645.

of whistleblowers.[52] It is important to highlight that in the course of drafting the Directive, as Article 10 of the European Convention on Human Rights (ECHR) is related to freedom of expression, the relevant decisions of the European Court of Human Rights (ECtHR) and the Council of Europe's recommendations in 2014 should be taken into consideration.[53]

The underlying reasons for the enactment of the Directive include a retaliation concern among employees reporting a wrong practice in a workplace.[54] However, measures have been taken at EU level in a few sectors. Regulations to protect whistleblowers are mostly implemented in financial services. Accordingly, for instance, protection is provided by 2019 Directives in the areas of public procurement; financial services, products, and markets; prevention of money laundering and financing of terrorism; product safety; transport safety; environmental protection; radiation and nuclear safety; food and feed safety; animal health and welfare; public health; consumer protection; privacy and protection of personal data; and security of networks and information systems (Article 2).[55]

The European Commission has stated that the protection of the right to disclose and report will provide better protection for the EU's financial interests and contribute to a fair and well-functioning single market.[56] According to the Commission, 49 percent of EU citizens does not even know where to report corruption.[57] In the initial impact assessment of the Directive, the importance of whistleblowers in detecting fraud and corruption is emphasized.[58] Accordingly, by providing effective protection for whistleblowers, the Directive will benefit the EU's competitiveness by contributing to the integrity of the internal market, increasing cross-border investment in the EU, reducing corruption and fostering economic growth.[59] As indicated, this goal is based not on the protection of employee freedom of expression but mainly on strengthening the enforcement of EU law.[60] Therefore, the Directive's aim is not to directly protect employees expressing their opinions in the workplace: instead, the right to disclose is adopted as a tool to ensure the application of EU law.[61] In other words, the protection of employees will play an effective role as a necessary means to achieve these goals.

52 Directive (Eu) 2019/1937 of the European Parliament and of The Council of 23 October 2019 (On the Protection of Persons who Report Breaches of Union Law, Recital 1.

53 Alpagut (n.10) 8.

54 Stappers (n.50) 89.

55 Directive (Eu) 2019/1937 of the European Parliament and of the Council of 23 October 2019 (On the Protection of Persons who Report Breaches of Union law, Article 2.

56 Ibid, Recital 2.

57 Factsheet on Whistleblower Protection, European Commission, April 2018; Stappers (n.50) 99.

58 Stappers (n.50) 88. The Commission estimates that the revenue lost from fraud and corruption affecting the EU is between €179 and €256 billion annually (p. 138).

59 Stappers (n.50) 88.

60 Ibid, 88.

61 Alpagut (n.10) 8.

However, the Directive has not defined the concept of whistleblowing nor referred to this concept, but it is applicable to protecting whistleblowers in workplaces.[62]

The concept of breach is also broadly defined to include actions and ignorance that constitute violations.[63] In this context, according to the Directive, breaches that have already occurred; breaches that have not yet been committed but are very likely to occur; actions or ignorance for which the whistleblower has reasonable grounds to believe constitutes a legal violation; attempts to conceal breaches; and incidents related to legitimate concerns and suspicions where no evidence can be presented are considered within the scope.[64]

There are three types of reporting procedures: internal reporting, where a person reports to their workplace; external reporting to relevant authorities outside the workplace; and public reporting, which refers to reporting to the media.[65] When the EU Directive was adopted, there was considerable debate over whether individuals were required to report misconduct to their employer through internal channels before being allowed to communicate with an authoritative body.[66] Public disclosure of information is subject to stricter criteria and is treated as a last resort (ultima ratio). On this issue, Article 15 of the Directive prerequisites to exhaust other internal and external channels. Furthermore, preamble 33 of the Directive states that although balancing interests is not required for internal or external whistleblowing, it should be considered in cases of public disclosure. Hence, when these legal materials are taken into consideration, it can be concluded that there might be a hierarchy among these procedures. According to Article 7(2) of the Directive (EU) 2019/1937 of the European Parliament, Member States should ensure that internal reporting is preferred over external reporting.[67] This shows that the Directive significantly expands the rights of whistleblowers and creates numerous obligations for organizations within the EU.

These provisions show that the definition of whistleblower is quite broad and there is no distinction between public institutions and the private sector. In addition, the importance of internal channels within the workplace is highlighted. Furthermore, if internal channels are ineffective or not available, external channels such as media disclosure can be used. Lastly, it is assumed that as long as the whistleblower does not have a clearly malicious intent, they are acting in good faith.

62 Abazi (n.10) 645.

63 Alpagut (n.10) 15.

64 Directive, Article 5.

65 Abazi (n.10) 645.

66 Boris Dzida, 'Wann dürfen Arbeitnehmer gegen ihren Vorgesetzten Anzeige erstatten?' (2021) 6 ArbRB 192.

67 Alp (n.8) 16-17.

2. Evaluation of the Principles of the European Court of Human Rights

According to Article 10 of the ECHR, the scope of freedom of expression includes individuals in private law.[68] The employee's, as individuals, freedom of expression may override the duty of loyalty to the employer.[69] The same principle applies to employees in public workplaces. According to ECtHR judgements, which will be explored below, a notification to external authorities should be the last resort. In assessing to notify external authorities, the potential harm to the employer, the motive behind the employee's report, the public's right to information and the authenticity of the information should be taken into consideration, and it should be ensured that any potential sanctions applied to the employee should be proportionate. Accordingly, the ECtHR created a checklist to determine whether whistleblowing acts can be assessed within the framework of freedom of expression. The checklist requires the following questions to be answered:

1. Whether there is a public interest in disclosing the information.
2. Whether the applicant has an alternative means of making the disclosure.
3. Whether the authenticity of the disclosed information has been checked.
4. Whether the person making the disclosure has acted in good faith.
5. Whether the disclosed information is harmful to the employer's business
6. Whether the sanction applied to the person who made the disclosure is proportionate.[70]

Based on these principles, it must be noted that public interest must be considered while considering whistleblowing actions. Conflicts of interest are also of significance, especially when comparing the employer's interest and the benefits of disclosing information to the public. If the information is to be disclosed to the media (publicly), it should first be examined whether notification of external channels has been used as a last resort. In other words, it must be determined whether the requirement to first attempt internal channels has been fulfilled. In addition, the accuracy of the information must be verified. The whistleblower's motives are also important, and any decision should consider whether the sanction applied is proportional to the act of whistleblowing.

68 *Heinisch v. Germany* (Application no. 28274/08) Judgment Strasbourg (21 July 2011) para 43-46.

69 Alp (n.8) 7.

70 *Heinisch v. Germany* (Application no. 28274/08) Judgment Strasbourg (21 July 2011) para 70-92. For the applicability of the ECHR to employment relations see: *Georgiadis v Greece* App No. 21522/93 (ECtHR, 29 May 1997) para 34. *Buchholz v Germany,* App No. 7759/77 (ECtHR, 6 May 1981), para 45.

It should be noted that the ECtHR points out that refusing to conduct a criminal investigation due to a lack of evidence differs from an act of whistleblowing that does not reflect reality.[71] Furthermore, it should be accepted that the employee acted in good faith when making the report.[72] On this basis, the research discusses the *Heinisch* case[73], which was the first case to address whistleblowing in the private sector, and the *Gawlik* case[74] decided by ECtHR in 2021.

In *Heinisch*, Brigitte Heinisch, a nurse working in a care home, complained about the shortage of nurses and reported this situation to the institution in an internal way. After not receiving any resolution and becoming ill due to excessive workload, she became unable to work. In this context, several inspections have been carried out at the workplace and several deficiencies have been identified by the relevant authorities. The employer was then warned that her employment contract would be terminated.[75] At the same time, a complaint was filed with the prosecutor's office alleging that even the basic hygiene care for the elderly was inadequate in the care home. Following the distribution of a leaflet[76] about the deficiency of the care home by Heinisch and her colleagues, in conjunction with their union, the care home management terminated her contract without notice due to preparing and distributing the brochure.[77]

When applying the six criteria mentioned above, the ECtHR first determined that the information disclosed by the applicant was in the public interest. Additionally, as explained in the case, Heinisch initially used internal channels and approached the employer to resolve the situation. When it comes to whether the alleged deficiency actually exists before resorting to relevant external channels, the reality of the situation was confirmed through inspections conducted in the workplace.[78] Following the Heinisch case, the ECtHR also expressed that it cannot be expected from a whistleblower employee to predict whether the facts reported will ultimately result in a criminal prosecution.[79] Lastly, considering that the elderly require special protection, Heinisch's good faith was recognized, and he was protected against unfair dismissal.[80]

By contrast, in another case reflected in the decisions of the ECtHR, Gawlik, who was the deputy chief physician at a hospital, found 11 unnatural deaths according to

71 *Gawlik v. Liechtenstein* (Application no. 23922/19) Judgment Strasbourg (16 February 2021).

72 Collins, Ewing, and Mccolgan (n.7) 441.

73 *Heinisch v. Germany* (Application no. 28274/08) Judgment Strasbourg (21 July 2011).

74 *Gawlik v. Liechtenstein* (Application no. 23922/19) Judgment Strasbourg (16 February 2021).

75 *Heinisch v. Germany* (Application no. 28274/08) Judgment Strasbourg (21 July 2011), para 9.

76 Ibid, para 18-22.

77 Ibid, para 28.

78 Orhan Ersun Civan, *İşçinin Yan Yükümlülükleri* (Beta, 2020) 227.

79 Alp (n.8) 7-8.

80 Alpagut (n.10) 13.

a report prepared by Spiegel.[81] Gawlik, who determined that patients without severe pain were given very high doses of morphine—believing that illegal euthanasia was being practiced—reported the situation to the prosecutor, and as a result, his employment contract was terminated without notice.[82] The case was examined by the ECtHR following a lawsuit filed against the termination of Gawlik's employment contract.

The facts of the case of Gawlik represent a typical example of the dilemma many employees confront when they want to report illegal actions in the workplace. In this case, although the hospital has an internal complaint system that allows employees to anonymously report their complaints through an online form, Gawlik did not use this internal whistleblowing system, nor did he communicate with the board of trustees or the hospital director.[83] The underlying reason for this may be that the applicant's supervisor was the person he believed to be responsible for the euthanasia of the patients. Additionally, this supervisor oversaw the internal whistleblowing channel. Although other individuals were also assigned to handle whistleblowing matters, the Court noted that such information was not widely known within the hospital. However, Gawlik acted without sufficiently investigating the accuracy of the information given that he did not check the medical paper records and electronic files. Given the suspicion of illegal euthanasia, it is undeniable that immediate action was necessary to stop the alleged murder. However, Gawlik was noted to be able to easily access the paper medical records; therefore, no investigation would have led to a significant delay.[84]

Consequently, employees are advised to use internal reporting channels first if they suspect that their employers are at fault.[85] In addition, whistleblowers risk their jobs if they turn to an external institution without adequately evaluating the facts. In this context, employees should first use the company's internal reporting channels that are properly functioning if they exist.[86] In this context, a systematic review of internal whistleblowing channels recommends some implication policies to ensure proper functioning of internal channels. Implementing a clear and fair internal whistleblowing policy is essential. This includes establishing a set of guidelines that provide both non-anonymous and anonymous reporting channels for employees.[87] Once a report has been received, the organization must conduct a thorough and reliable examination of the issue. Additionally, it is recommended that an audit

81 *Gawlik v. Liechtenstein* (Application no. 23922/19) Judgment Strasbourg (16 February 2021) para 1.

82 Ibid, para 16.

83 Ibid, para. 14.

84 Ibid, para 18.

85 Alp, (n.12) 68.

86 Dzida (n.66) 193.

87 Mrowiec (n.27) 164-167.

committee should be involved in the development and implementation of the internal reporting system to oversee its operation and ensure its effectiveness.[88] By contrast, it should be noted that there might be circumstances that make it lawful to directly address external whistleblowing channels, which will be revealed below.

In practice, many employees do not know where and how to find an internal reporting system. In addition, employees must trust the internal reporting system. The more reliable a reporting channel is, the higher the likelihood that employees will opt to provide internal information to their employer rather than going directly to an external authority. Hence, good internal communication with the employer is indispensable. Employers should take measures to protect the identity of the whistleblower and should allow anonymous reporting through the reporting system. Employees who are not afraid of retaliation when openly addressing complaints may prioritize internal reporting channels over going directly to an external forum if they feel assured. In the mentioned case, it was decided that the freedom of expression should not be violated.

The ECtHR's Gawlik decision demonstrates that a whistleblower must sufficiently clarify their suspicion of illegal action to their superiors before reporting it to governmental law enforcement authorities. The decision emphasized that the whistleblower should not have limited themselves to electronic medical files but should have also examined more comprehensive paper medical records to check the validity of their suspicion. Furthermore, the termination of employment was deemed proportionate action in comparison to the institution's reputation caused by Gawlik's actions. Differing from the 2011 Heinisch decision, the ECtHR does not describe these requirements for clarifying the facts by the whistleblower. Therefore, the new decision can be understood as emphasizing the obligation of whistleblowers to carefully examine facts and documents before reporting to an external authority.[89]

In this regard, it would be valuable to discuss recent ECtHR judgments. *Halet v. Luxembourg* judgment, delivered by the Grand Chamber on February 14, 2023.[90] This case centered on Raphaël Halet, a whistleblower involved in the LuxLeaks scandal, which exposed corporate tax avoidance practices. Halet disclosed internal documents from his employer, PricewaterhouseCoopers (PwC), to a journalist.[91] He was subsequently convicted by Luxembourg courts for violating professional secrecy, but he argued that the conviction violated his right to freedom of expression. The Grand Chamber of the ECtHR overturned the earlier judgments, ruling in favor of Halet,

88 Ibid.

89 Dzida (n.66) 193.

90 *Halet v Luxembourg* (Application no. 21884/18) Strasbourg Judgement, 14 February 2023.

91 Ibid, para 10.

finding that his criminal conviction was a disproportionate interference with his right to freedom of expression under Article 10 of the ECHR.[92] The Court emphasized that the disclosed information contributed to the public debate on tax practices and was of legitimate public interest.[93] This case marks a significant development for whistleblowers, strengthening their protection when disclosing information of public concern, even if it affects their employer's reputation.

Last but not least, when ECtHR case law and EU Directive 2019/1937 were examined, it can be said that similar criteria to those in the ECtHR case law were introduced regarding the exercise of the right to disclosure and whistleblowing under EU Directive 2019/1937. However, the ECtHR and the EU approach to the duty of loyalty, particularly in the context of whistleblowing, stem from how each body balances the duty of loyalty with the right to freedom of expression and the protection of whistleblowers. First, while the ECtHR emphasizes the need for a case-by-case assessment of whether whistleblowing disclosure serves the public interest, the EU Directive presumes public interest for the specific issues it covers (the issues listed in Article 2), eliminating the need for a separate public interest evaluation for these cases. Second, whereas The ECtHR case law traditionally requires that whistleblowers act in good faith, the EU Directive does not explicitly require the whistleblower to act in good faith. Third, the Court's rulings often emphasized that internal channels should be used before external reporting (such as to the media) unless compelling reasons exist to bypass internal mechanisms. By contrast, the Directive does not prioritize internal over external disclosure. Whistleblowers are allowed to go directly to external authorities without first reporting internally, thereby offering more flexibility but potentially undermining the employer's ability to address issues internally. On the other hand, both instruments adopt the "last resort" principle for media disclosures, which requires whistleblowers to exhaust internal or external reporting channels before going public. This means that the EU Directives have a rightful distinction between governmental external institutions and mass media disclosure.

In summary, the ECtHR approach is more nuanced, requiring evaluations of good faith and public interest on a case-by-case basis, with an emphasis on internal disclosure before external reporting. By contrast, the EU Directive offers broader protections for whistleblowers, presuming public interest in certain cases and not strictly requiring good faith or internal reporting first, making it a more streamlined but potentially less employer-friendly framework.

92 Ibid, para 36.

93 Ibid, para 201-205.

III. Reflections of the Whistleblowing in Turkish Law

1. Evaluation of the Concept of Whistleblowing within the Scope of the Duty of Loyalty of Employees

An employment contract establishes a personal relationship between employees and employers and creates an expectation that employees will act properly and refrain from certain actions.[94] In other words, due to an employment contract that imposes the duty of loyalty, an employee is generally obligated to contribute to the purpose of the business and to protect the legitimate interests of the employers.[95] On this basis, the scope of the duty of loyalty is that an employee acts or, if necessary, refrains from certain actions to protect the employer's interests.

The duty of loyalty in employment relations should be understood as somehow renouncing personal interests for both parties.[96] It should not be expected that an employee's interest will be more than that of the employer, or *vice versa*.[97] It is often emphasized that an employee who discloses situations constituting a crime will not be considered acting against the duty of loyalty when a superior public interest is considered.[98]

The duty of loyalty encompasses the obligation to protect and watch over an employer's interests in accordance with an employee's position within the business by considering rules of good faith.[99] The duty of loyalty is regulated by Law No. 6098, which defines the criterion of the duty of loyalty as the protection of the employer's legitimate interests. The scope of these legitimate interests varies according to the specific circumstances of the employment relationship and the values of one's working life.[100] Therefore, because the obligation imposed on an employee by an employment contract is not fundamentally a liability for results; therefore, the duty of loyalty is considered a responsibility to achieve the main purpose of the contract. This obligation requires employees to perform their duties in line with the rules of honesty and within a trust relationship. Therefore, the duty of loyalty is a fundamental obligation of an employment contract.[101]

94 Aydın Başbuğ and Mehtap Yücel Bodur, *İş Hukuku* (6th. Edn., Beta, 2021) 141.

95 Münir Ekonomi, *İş Hukuku – Ferdi İş Hukuku*, (1st. Edn. V. 1, İstanbul Teknik Üniversitesi, 1976) 111; Muammer Vassaf Tolga, *İş Hukuku* (3th. Edn., Türkiye Ticaret Postası, 1958) 141; Tuncay (n.1) 1047; Sarper Süzek, *İş Hukuku* (21th. Edn., Beta, 2023) 360; Öner Eyrenci, Savaş Taşkent, Devrim Ulucan and Esra Baskan; *Bireysel İş Hukuku* (10th. Edn.: Beta, 2020) 133; Ömer Ekmekçi and Esra Yiğit, *Bireysel İş Hukuku Dersleri* (5th. Edn., Onikilevha , 2023) 388; Ercan Akyiğit, *Bireysel İş Hukuku* (3nd. Edn., Seçkin 2023) 203; Arzu Arslan Ertürk (n1) 140; Alp (n.72) 115; Ute Teschke-Barle, *Arbeitsrecht Schnell Erfasst* (6th. Edn., Springen, 2006) 87; Frank Hahn and Lisa Käckenmeister, Arbeitszeitrecht, Edt: Frank Hahn, Gerhard Pfeiffer and Jens Schubert (Nomos, 2018) en. 21.

96 Larmer (n.2) 125.

97 David Lewis, 'Whistleblowing in A Changing Legal Climate: Is It Time to Revisit Our Approach to Trust and Loyalty at The Workplace?' (2011) 20(1) Business Ethics, 71, 71.

98 Çelik, Caniklioğlu, Canbolat and Özkaraca (n.7) 319; Larmer (n.2) 125.

99 Kenan Tunçomağ and Tankut Centel, *İş Hukukunun Esasları* (9th. Edn.: Beta, 2018), 102; Süzek (n.95) 360; Arslan Ertürk (n.1) 182.

100 Süzek (n.95) 360.

101 Hamdi Mollamahmutoğlu, Muhittin Astarlı and Ulaş Baysal, *İş Hukuku* (7th. Edn. LYKEION, 2022), 602.

The duty of loyalty forms a broad manifestation of the principles of good faith in employment relations, and it can generally be defined as actions in accordance with the principles of good faith aimed at protecting the employer's legitimate interests.[102] To illustrate, actions such as saving goods in a fire, immediately reporting malfunctions and taking necessary precautions against such malfunctions, avoiding behaviors that disrupt harmony at the workplace and protecting the employer's reputation are included within the scope of the duty of loyalty.

By contrast, reducing the number of defective goods to decrease the shrinkage in inventory counts and benefit from the inventory bonus provided by the employer constitutes a violation of the duty of loyalty.[103] In this regard, it should be noted that the Turkish Employment Law, which regulates the conditions for just termination, often includes the right to terminate due to violations of moral and good faith rules (Article 25/II), which are mostly related to breaches of the duty of loyalty.[104] It is not possible to fully specify what constitutes the duty of loyalty or to define the scope of this obligation.[105] However, it can be said that the primary limit is the interests of the employer.[106]

It is not possible to achieve a perfect balance between the duty of loyalty and freedom of expression.[107] Nonetheless, the main point is that an employee cannot use his/her freedom of expression in a way that disrupts the order of the business, causes damages, or puts it in serious danger. If an employee's freedom is restricted arbitrarily even though it is not based on such considerations, these restrictions are considered unlawful.[108] An employee's expression of thoughts that disrupt the workflow and peace in the workplace cannot be justified. In this respect, freedom of expression is somewhat limited to the right to criticize the employer. Regarding providing an understanding of this limitation, Alp said that employees must act in good faith and whistleblowing should not be motivated by intentions such as harming the employer or seeking personal gain but should be done in the public interest. More importantly, the matters disclosed must be true, and unfounded accusations should be avoided.[109] The key consideration is whether the employee acted in good faith, and if the employee believed in the truth of the matters reported in good faith, like ECtHR

102 Ibid, 602; Ekmekçi and Yiğit (n.95) 388 fp.

103 Y9HD., 10.02.2020, E. 2017/15415, K. 2020/1782.

104 Çelik/Caniklioğlu/Canbolat/Özkaraca (n.7) 317; Plaintiff's actions, which are clearly explained in the statements of the defendant witnesses, such as receiving commissions from customer companies due to the works outsourced by the defendant factory and goods purchase contracts due to his work as a factory manager, and having the supplier company buy a mobile phone are within the scope of behavior that does not comply with honesty and loyalty according to Article 25/II-e of the Labor Law. Requests for severance and payment of notice must be rejected.

105 Haluk H. Sümer, *İş Hukuku Uygulamaları* (7th. Edn., Seçkin, 2019) 119.

106 Tunçomağ and Centel (n.99) 102.

107 Ekmekçi and Yiğit (n.95) 388-389.

108 Kenan Tunçomağ, *Türk İş Hukuku* (1th, Edn., V. I, Sulhi Garan, 1971) 211.

109 Alp (n.21) 418.

case law, he/she should not face any sanctions under labor or criminal law.[110] In this regard, it should be noted that acting in good faith is a criterion sought by ECtHR case law but not by EU Directives. It is not easy to detect whether an employee acted in good faith or bad faith, but if the employee first approaches internal channels, there might be an inclination to consider that the employee acted in good faith.

The duty of loyalty also encompasses the ancillary obligation of an employee to first initiate internal company or business channels for the resolution of his/her criticisms and complaints toward the employer regarding the operation of the business.[111] This obligation is not absolute, and there are some exceptions. First, it should be stated that if these internal channels have not been made well-known within the company, the expected benefit would be obtained from internal channels.[112] In addition, if the employee does not expect any just outcome from reporting the situation to the internal channels or if the employee anticipates that evidence will be destroyed when they inform their supervisor, they can simultaneously/directly approach the relevant authority (tax office, police, ministry).[113]

The stakeholders should be, at the same time, aware that publicizing a workplace problem without utilizing internal complaint and criticism channels might constitute a violation of the employee's duty of loyalty, and the employee cannot defend his/her actions based on freedom of expression. This result is consistent with Heinisch's decision of the ECtHR. On this issue, wrongful accusations against the employer and statements that insult the honor and dignity of the employer are grounds for termination for just cause under Turkish Employment Law. While not as severe, continuously making statements against the employer and negatively affecting the harmony of the workplace can lead to termination for valid reasons. In this context, whether the continuation of the employment relationship becomes possible and whether termination is seen as a last resort are determinative factors that can be used to categorize dismissal as fair or unfair.

2. Legal Provisions Related to Whistleblowing in Turkish Employment Law

The provisions regarding whether an employee who reports an illegal violation in the workplace will face any retaliation are included in the Turkish Employment Law and the Occupational Health and Safety Law. Additionally, the articles concerning freedom of expression contained in the 1982 Constitution should also be generally considered. Finally, because failing to report a crime is regulated as a punishable offense under the Turkish Penal Code, reporting a crime observed in the workplace

110 Ibid, 418.

111 Civan (n.78) 45-69.

112 Dzida (n.66) 193.

113 Aydın (n.3) 87.

is also recognized as a legal obligation. The aforementioned legal provisions include the following:

- Freedom of Expression (Turkish Constitution Art.26)
- An employee's right to apply to administrative or judicial authorities against an employer (Employment Law Art. 18/3)
- The right of employees to appeal to labor inspectors authorized for labor inspection and investigation (Employment Law Art. 96/1)
- The notification obligation of workplace doctors and occupational safety specialists (Law No. 6331 Art. 8).
- False accusations that insult honor and dignity (Employment Law Art. 25/ II-b)
- The offense of failing to report a crime (Turkish Penal Code Art. 278-280).

First, according to Article 26 of the Turkish Constitution, everyone has the right to express their thoughts and opinions as individuals or collectively through speech, writing, images, or other means. In this context, no legal provision can be introduced that would result in sanctions against whistleblowing individuals within the framework of freedom of expression. As stated in Article 26(2) of the Constitution, the exercise of these freedoms may be restricted for purposes such as the protection of national security, public order, public safety, the fundamental qualities of the Republic, the indivisible integrity of the State with its country and nation, the prevention of crimes, the punishment of offenders, the non-disclosure of information duly classified as state secrets, the protection of others' reputations or rights, their private and family lives, or professional secrets prescribed by law, or to ensure the proper operation of judicial duties. Indeed, this provision constitutes a basis for the criteria of public interest established by both ECtHR judgements and EU materials.

Second, the continuation of the employment contract might be unpleasant for the employer if the employee files a lawsuit or complaints to the administrative authorities against the employer. Therefore, although it can be said that this situation might be a valid reason for termination under Article 18/3 of Employment Law No. 4857, it is explicitly stated that an employee's application to administrative or judicial authorities against his/her employer does not constitute a valid reason. Accordingly, it is understood that whistleblowing by an employee does not constitute a valid reason for termination. This constitutes a fundamental guarantee for employees who disclose actions and practices that violate the laws or who bring a claim to court against their employers.

Third, according to Article 96 of the Employment Law, employers are prohibited from directly or indirectly suggesting, coercing employees to conceal or alter the truth and from behaving badly toward employees who have applied to relevant authorities, brought a claim, provided information and statements during inspections, or made complaints or threats for termination. These provisions clearly prevent threats of termination against employees who have applied to administrative or judicial authorities or made statements to labor inspectors during inspections. This provision does not refer to media and internal channels but refers to governmental external authorities. Therefore, it shows greater fitness to the EU Directives, which does not prioritize internal methods over external ones, than the ECtHR judgements.

Fourth, Article 8 of Law No. 6331 mandates that a workplace doctor and safety specialist appointed to guide and consult an employer on occupational health and safety issues and generally employees of the employer be charged with identifying any deficiencies and malfunctions related to occupational health and safety, considering relevant legislation and technical developments at the workplace. They must determine preventive measures, make recommendations, and report them to the employer in writing. This may be a functional equivalent of internal channels established by ECtHR judgements and EU legal documents. If measures are not taken, the situation must be reported to the Ministry's relevant departments, the authorized union representative, if available, or the employee representative (external authorities). If a workplace doctor or safety specialist does not report the deficiency, the certification of the workplace doctor and safety specialist will be suspended (for three months for the first instance, and six months in case of recurrence).

The legislator has introduced a protection for whistleblowing laws on occupational health and safety by regulating that an employer cannot terminate the employment contract of a workplace doctor or safety specialist, and whistleblowers cannot be subjected to any loss of rights just because of reporting. Employers who breach these provisions will be sentenced to compensation of not less than the annual salary. Moreover, employees can also apply to the competent external authority in cases where the measures taken for occupational health and safety in the workplace are insufficient and, hence, their rights cannot be restricted due to these actions (Law No. 6331, Art. 18/3). This may be an exception to the rule of primarily exhausting internal channels in European materials. Nevertheless, unlike European materials, it should be emphasized that the provision is specific to health and safety issues. When these provisions are scrutinized, it is observed that the right to whistleblowing concerning occupational health and safety measures is secured.[114] However, it should be noted that this right is limited to the initial warning of the employer to exhaust internal channels and then to report the situation to the Ministry.

114 Civan (n.78) 222.

The internal channel must be designed, established, and operated in a manner that protects the integrity, accuracy, and confidentiality of the disclosed information, thereby preventing unauthorized employees from accessing it. On this issue, Alp commented on the related provision of the Directive on internal channels: This directive aims to create neutral and transparent whistleblowing channels subject to specific and clear rules, particularly preventing delays.[115] It seeks to ensure that the whistleblower receives an acknowledgment of the application within seven days (the latest deadline) and feedback within three months (the latest, thereby avoiding unnecessary delays. The employee should be informed in advance about whom or which authority to report, how to file the report, and what protection measures will be taken.[116] Additionally, it should allow for the permanent storage of this information in accordance with Article 18 of the Directive, enabling the initiation of new investigations. The underlying reason for this is that violations of occupational health and safety measures endangers employees' right to life, which should be prioritized over employers' economic interests.

Fifth, it was mentioned that the boundary of an employee's right to whistleblowing is limited to illegal practices. In this regard, practices that violate the statutes will not be considered trade secrets, and the employee is not obliged to keep the information confidential. The main purpose is to prioritize public interest over employers' interests. According to Article 25/II of the Employment Law No. 4857, actions and statements against the honor and dignity of the employers and baseless accusations and attributions to the employer are grounds for termination of an employment contract. In contrast, if the accusation or attribution made by the employee reflects the truth, the employer cannot terminate the employment contract on the grounds of violating moral and good faith principles.

If the act of whistleblowing is not based on truth and is baseless, the employment contract can be terminated on just grounds when ECtHR decisions, which require consideration of whether the disclosed information is truthful, are taken into account. Additionally, the conflict between the duty of loyalty and the right to disclosure and whistleblowing should be examined. In this regard, in developed legal systems, since the excessive limitation of an employee's rights and freedoms is not acceptable, it is also important to define the boundaries of an employee's duty of loyalty.[117] On this basis, it is clear that on the one hand, the limit on the duty of loyalty is that an employee is not obligated to waive or excessively limit his/her personal rights and fundamental freedoms because it conflicts with the employer's interests. For example, an employee cannot be forced to work under unhealthy and insecure conditions.[118]

115 Alp (n.8) 21-22.

116 Ibid.

117 Üner (n.28) 786.

118 Ibid, 786.

On the other hand, the employee is also responsible for safeguarding the employer's legitimate interests under the duty of loyalty. These legitimate interests include preventing economic harm to the business and ensuring an employer's competitive ability. However, only lawful or legitimate interests fall under this protection, and interests that are illegal, unethical, or immoral cannot be defended under the duty of loyalty.[119] Therefore, disclosing or reporting actions that constitute a crime does not violate the duty of loyalty. For instance, although a bank has a valid interest in keeping financial data and management details confidential to maintain its competitive ability, an employee who exposes fraudulent accounting practices is not considered to have breached his/her duty of loyalty by revealing these criminal activities[120]. Hence, to analyze if the termination of the contract constitutes an unfair dismissal, in addition to the truthfulness of the information disclosed, the proportionality of the duty of loyalty with the right to disclosure should also be considered.

Proportionality refers to the principle that prohibits the use of a "steam hammer to crack a nut if a nutcracker would do".[121] In other words, the limitation should not exceed the boundaries of what is necessary and suitable for attaining legitimate objectives in the public interest.[122] In other words, a balance must be struck between the employer's legitimate legal interests and the overriding public interest.[123] However, it should be noted that if a whistleblower initially approaches internal authorities under European standards, this would create a presumption that the whistleblower's good faith will be performed in a proportional way.

According to a case decided by the Regional Court of Appeal in Ankara, the contract of an employee working in an animal shelter managed by the City Council was terminated by the Council for publicizing information about the killing of animals via mass media, allegedly damaging the institution's reputation. The court decided that the termination was not based on a just cause. Furthermore, it is noted that the Council had already been previously fined for the act reported, confirming that the whistleblower's report was not baseless.[124] Although the decision did not explicitly focus on whether the act of whistleblowing constituted a violation of the duty of loyalty or could be evaluated within the context of freedom of expression, it highlighted that the termination was not based on a just cause because the Council has been fined for alleged actions, thus proving the truthfulness of the report. Additionally,

119 Alp, (n.72) 121; Mollamahmutoğlu/Astarlı/Baysal (n.101) 605.

120 Üner (n.28) 786.

121 Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International 1996) 2.

122 Ibid. J. Ceno, 'Compulsory Mediation: Civil justice, Human rights and Proportionality' (2014) 6(3) International Journal of Law in the Built Environment, 286, 293.

123 Christian Alexander, *Gesetz gegen den unlauteren Wettbewerb: UWG,* Köhler/Bornkamm/Feddersen (Edts) (42th Edit. Beck, 2024), GeschGehG 5 Ausnahmen en 44.

124 Ankara Regional Court of Appeal, 8HD (29.11.2018), E. 2017/4517, K. 2018/2912.

the employee's actions should be prioritized over the employer's interests because the disclosure of the act of killing animals is also related to the public interest. In this case, in the realm of European standards, there is no doubt that there was overriding public interest, and the truthfulness of the disclosed information was proved, but the court did not consider whether the employee first brought the case to internal channels. On this issue, because the Council has already been alleged and fined on the same issue, the case might be regarded as an exception to primarily exhausting internal channels. Consequently, in the case of a potential reemployment case, compensation for not reemploying the employee should be determined, considering that the termination was made in bad faith.

Conclusion

The concept of whistleblowing refers to the disclosure of legal or ethical violations in a workplace to competent authorities, third parties, or the media. In employment law, protecting employees who report illegal or unethical practices in the workplace to competent authorities or the media is of great importance. This is because individuals who perform whistleblowing actions may be subjected to accusations such as being spies or snitches in the workplace and may face retaliation, the most severe being termination. The protection of individuals who report violations of EU law is provided for by the Directive titled "Protection of Persons Reporting on Breaches of Union Law" (Directive 2019/1937), dated October 23, 2019, in EU law. Additionally, ECtHR decisions regarding whether whistleblowing can be evaluated within the scope of freedom of expression in the workplace, particularly the Heinisch and Gawlik cases, should be considered.

In ECtHR decisions, the right to freedom of expression supersedes the duty of loyalty to the employer. Therefore, employee protection is necessary. However, this requires public interest. The employee is also obliged to investigate the accuracy of the information. In particular, internal channels should be preferred first. Moreover, good faith among employees is required, and the outcome should be proportionate.

In Turkish Law, making false accusations and imposing responsibility to check the truthfulness of information against an employer are accepted as valid reasons for termination of an employment contract. It is also regulated that an employee's application to administrative or judicial authorities against his/her employer does not constitute a valid reason for termination (Employment Law Art. 18/3). It is also stipulated that an employee cannot be subjected to any sanctions for making statements to inspectors authorized for inspection and investigation. (Employment Law Art. 96/1). Considering the impact of occupational health and safety measures on an employee's right to life, the obligation of workplace doctors and safety specialists

has been legislated to notify the Ministry about deficiencies in the workplace, and they are protected against termination. (Law No. 6331, Art. 8). Lastly, the offense of failing to report a crime is specifically regulated in Articles 278-280 of the Turkish Penal Code, stipulating that it is an obligation to report a crime committed in the workplace.

The duty of loyalty is an obligation arising from an employment contract and requires the protection of the employer's legitimate interest. The verification of the truthfulness of information and reporting a violation occurring in the workplace to the employer should be considered the requirements of loyalty. Therefore, the situation should be evaluated according to the specifics of each case and proportionality principles.

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