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CONTENT | İçindekiler

ARTICLES | Makaleler

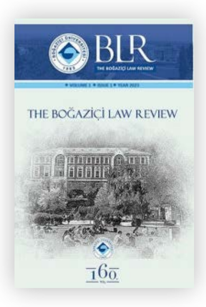
Research Article | Araştırma Makalesi
Right to Safe Water: Arguments for Its Legal Entitlement in Pakistan
Güvenli Su Hakkı: Pakistan Bağlamında Hak Sahipliğine Dair Tartışmalar
Waqar Afzal, Aisha Azeem 115

Research Article | Araştırma Makalesi
How the UN Security Council's Failure to Uphold International Law Has Contributed to Violence and Chaos in the Muslim World: The Wars of Aggression Against Yemen (2015-) and Gaza (2023-)
Birleşmiş Milletler Güvenlik Konseyinin Uluslararası Hukuku Uygulamadaki Başarısızlığının Müslüman Dünyasında Şiddet Ve Kaosa Katkısı: Yemen'e (2015-) Ve Gazze'ye (2023-) Yönelik Saldırı Savaşları
Berdal Aral 130

Research Article | Araştırma Makalesi
Telif Haklarının Milletlerarası Hukukî Himâyesinin Temel Prensipleri
Basic Principles of International Legal Protection of Copyrights
Mustafa Ateş 154

Research Article | Araştırma Makalesi
Arbitration of Post-Closing M&A Disputes and Confidentiality Obligations of Target Management As Factual Witnesses: Secrets To Keep or Secrets To Tell?
Kapanış Sonrası Birleşme ve Devralma Uyuşmazlıklarında Tahkim ve Hedef Şirket Yöneticilerinin Tanık Olarak Gizlilik Yükümlülüğü: İfşa Edilebilen Bilgilerin Kapsamı
Sıla Karakoç Göksu 172

Research Article | Araştırma Makalesi
Artık Değer Hesabında Borç Özgülenmesi Hakkında Yargıtay Uygulaması ve Değerlendirilmesi
The Practice and Evaluation of the Court of Cassation on Debt Attribution in Calculation of Matrimonial Profit
Zafer Zeytin 197



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Right to Safe Water: Arguments for Its Legal Entitlement in Pakistan

Güvenli Su Hakkı: Pakistan Bağlamında Hak Sahipliğine Dair Tartışmalar

Waqar Afzal, Aisha Azeem

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RIGHT TO SAFE WATER: ARGUMENTS FOR ITS LEGAL ENTITLEMENT IN PAKISTAN

GÜVENLİ SU HAKKI: PAKİSTAN BAĞLAMINDA HAK SAHİPLİĞİNE DAİR TARTIŞMALAR

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ABSTRACT

In Pakistan, where over 21 million people, or around 10% of the population, faces challenge of access to safe drinking water, this article discusses the serious problem of insufficient sanitation facilities and water purification systems. Even though 92% of the total population has access to potable water, only 36% of the total water is safe to drink. In addition, almost 75% of the population does not have access to proper sanitation, which increases the likelihood of water-related illnesses. A great deal of avoidable misery has ensued because of our inability to satisfy fundamental human needs. This study contends that the right to obtain clean water for human consumption is upheld implicitly by Constitution of Islamic Republic of Pakistan 1973 and explicitly by international human rights legislation, and the interpretations of Pakistani courts. By interpreting the access to safe water as a legal entitlement, it urges the government to make sure all its residents have access to clean water.

Keywords: right to safe water, human rights, constitutional right, right to life, human dignity, Pakistan

ÖZ

Bu makale, nüfusun yaklaşık %10'ununa tekabül eden 21 milyondan fazla insanın temiz içme suyuna erişim sorunu yaşadığı Pakistan'da, ciddi bir sorun olarak görülebilen yetersiz sanitasyon (hijyen) tesisleri ve su arıtma sistemlerini ele almaktadır. Toplam nüfusun %92'sinin içme suyuna erişimi olmasına karşın toplam suyun sadece %36'sı içmek için güvenlidir. Buna ek olarak, nüfusun neredeyse %75'inin uygun sanitasyona erişimi yoktur, bu durum da su ile bulaşan hastalıkların görülme olasılığını artırmaktadır. Temel insani ihtiyaçları karşılama noktasındaki yetersizliğimiz nedeniyle aslında büyük ölçüde kaçınılabilir olan bir sefalet ortaya çıkmıştır. Bu çalışma, bireysel tüketim için temiz su elde etme hakkının 1973 Pakistan İslam Cumhuriyeti Anayasası tarafından örtülü olarak, uluslararası insan hakları hukuku kuralları ve Pakistan mahkemelerinin yorumları tarafından ise açıkça desteklendiğini iddia etmektedir. Bu çalışma kapsamında güvenli suya erişimi hakkı hukuken ileri sürülebilir bir hak olarak yorumlanmak suretiyle hükümet tüm sakinlerin temiz suya erişimini sağlamaya çağrılmaktadır.

Anahtar Kelimeler: Güvenli (temiz) su hakkı, insan hakları, anayasal hak, yaşam hakkı, insan onuru, Pakistan

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1. INTRODUCTION

The issue of access of safe water has only gotten worse since the latest rains.[1] Almost one third of Pakistan was submerged in water in July 2022 due to monsoon floods, which worsened the country's water and sanitation problems.[2] It may appear like flooding would alleviate a water deficit, but in fact, it contaminates the existing water supply much more. Since all life depends on water, everyone should have access to a reliable source that is both safe and plentiful. There are measurable health benefits that can be achieved by increasing access to safe drinking water. Water that does not cause a considerable risk to human health over the course of an individual's lifetime is considered "safe drinking water" according to the World Health Organisation (WHO).[3] The WHO found that 80 percent of human disorders in developing countries are caused by biological water contamination.[4] Due to inadequate sanitation and unsafely managed drinking water supplies, over 2.3 billion people worldwide are at danger of contracting water-borne diseases.[5] Globally, water quality has been steadily improving, even without human intervention, according to the UNICEF Joint Monitoring Programme Report 2000–2017.[6] Worldwide, it shows a 16% improvement in cleanliness and a 10% improvement in the availability of safely managed drinking water.[7]

Water contains a number of contaminants that must be carefully monitored and handled, including germs and viruses, metal toxins, industrial and domestic waste, medicines, and other potentially harmful substances. The present water crisis in Pakistan has several root reasons, including climatic changes that impact yearly precipitation, insufficiently built water storage structures, and governmental pressures. The substantial growth of both industry and people is another contributor to the increase in demand.[8] In 2019, Pakistan experienced significant economic challenges, spending around USD 1.5 billion, because

[1] Waseem Ishaque, Khalid Sultan, and Zia ur Rehman, 'Water management and sustainable development in Pakistan: environmental and health impacts of water quality on achieving the UNSDGs by 2030' (2024) 6 Frontiers in Water 1267164.

[2] Rabeea Noor, et al., 'A comprehensive review on water pollution, South Asia Region: Pakistan' (2023) 48 Urban Climate 101413.

[3] Jay Rajapakse, Miriam Otoo, and George Danso, 'Progress in delivering SDG6: Safe water and sanitation' (2023) 1 Cambridge Prisms: Water e6.

[4] Prosperous Ahiabli, Peter Adatara, and Ruth Cross, "'There is water available and so our hearts are at peace': exploring the impact of access to safe water on women's subjective well-being in Ghana' (2023) 13 (9) Journal of Water, Sanitation and Hygiene for Development 735-748.

[5] V. Baltag, 'Progress on drinking water, sanitation and hygiene in schools: global overview on the WASH programme' (2023) 33 (2) European Journal of Public Health 160-190.

[6] Jennyfer Wolf, et al., 'Burden of disease attributable to unsafe drinking water, sanitation, and hygiene in domestic settings: a global analysis for selected adverse health outcomes' (2023) 401 (10393) The Lancet 2060-2071.

[7] Charles Nnamdi Olise, Ikechukwu Eke Emeh, and B. A. Amujiri, 'Water Sanitation and Hygiene (WASH) Programme and the Hygiene Situation in Anambra State: A Focus on Aguata and Anambra East Local Government Areas' (2023) 20 (1) African Renaissance 215.

[8] Javed Nawab, et al., 'Drinking water quality assessment of government, non-government and self- based schemes in the disaster affected areas of Khyber Pakhtunkhwa, Pakistan' (2023) 15 (3) Exposure and Health 567-583.

of inadequate water purification.[9] Even with UNICEF's help, the price of supplying water purification facilities increased from PKR 48 billion to PKR 72 billion between 2016 and 2017. Given the current state of the country's infrastructure, one could argue that Pakistan's provision of clean water will necessitate financial backing.[10] Unemployment, illness rates, and economic instability are just a few of the current issues that are projected to worsen soon. Right to safe, affordable drinking water, and water is a vital resource under the international human rights law. Pakistanis are struggling to stay alive due to water contamination and shortages caused by ineffective water management on the part of the government and other responsible authorities.[11] Half of all water-related illnesses and 40% of all deaths in Pakistan are caused by water that is not fit for human consumption, according to studies and surveys on community health.[12] High levels of arsenic in Pakistan's drinking water could harm almost 60 million people. Furthermore, about 1,832 youngsters have lost their lives in the past four years because of water-related illnesses and drought.[13] Sewage is the leading source of water contamination, although pesticides, fertiliser, and industrial effluents also contribute to the problem.[14] Only 20% of the population has access to clean water for drinking. Worst case scenario for public health: water that is not fit for human consumption. Water quality declines and human health is negatively impacted by the release of hazardous chemicals and untreated waste into water bodies by industries.[15] Factors including ignorance, antiquated treatment methods, inexperienced staff, and sloppy quality control all play a role. An internal and international water war is likely to break out if the current crisis continues.

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[9] Toqeer Ahmed, Mohammad Zounemat-Kermani, and Miklas Scholz, 'Climate change, water quality and water-related challenges: a review with focus on Pakistan' (2020) 17 (22) International Journal of Environmental Research and Public Health 8518.

[10] Amanullah, et al. 'Effects of climate change on irrigation water quality' (2020) Environment, climate, plant and vegetation growth 123-132.

[11] Khulud Qamar, et al., 'Water sanitation problem in Pakistan: A review on disease prevalence, strategies for treatment and prevention' (2022) 82 Annals of Medicine and Surgery 104709

[12] Anh M. Ly, Hayley Pierce, and Michael R. Cope, 'Revisiting the Impact of Clean Water and Improved Sanitation on Child Mortality: Implications for Sustainable Development Goals' (2022) 14 (15) Sustainability 9244.

[13] Jamil Ahmed, et al. 'Drinking water, sanitation, and hygiene (WASH) situation in primary schools of Pakistan: the impact of WASH-related interventions and policy on children school performance' (2022) 29 Environmental Science and Pollution Research 1259-1277.

[14] S. Ali, 'Clean drinking water and future prospective' (2022) 74 (1) Pakistan Journal of Science 28-39

[15] Ashfaq Ahmad Shah, et al. 'Assessment of safety of drinking water in tank district: an empirical study of water-borne diseases in rural Khyber Pakhtunkhwa, Pakistan' (2016) 6 (4) International journal of environmental sciences 418-428.

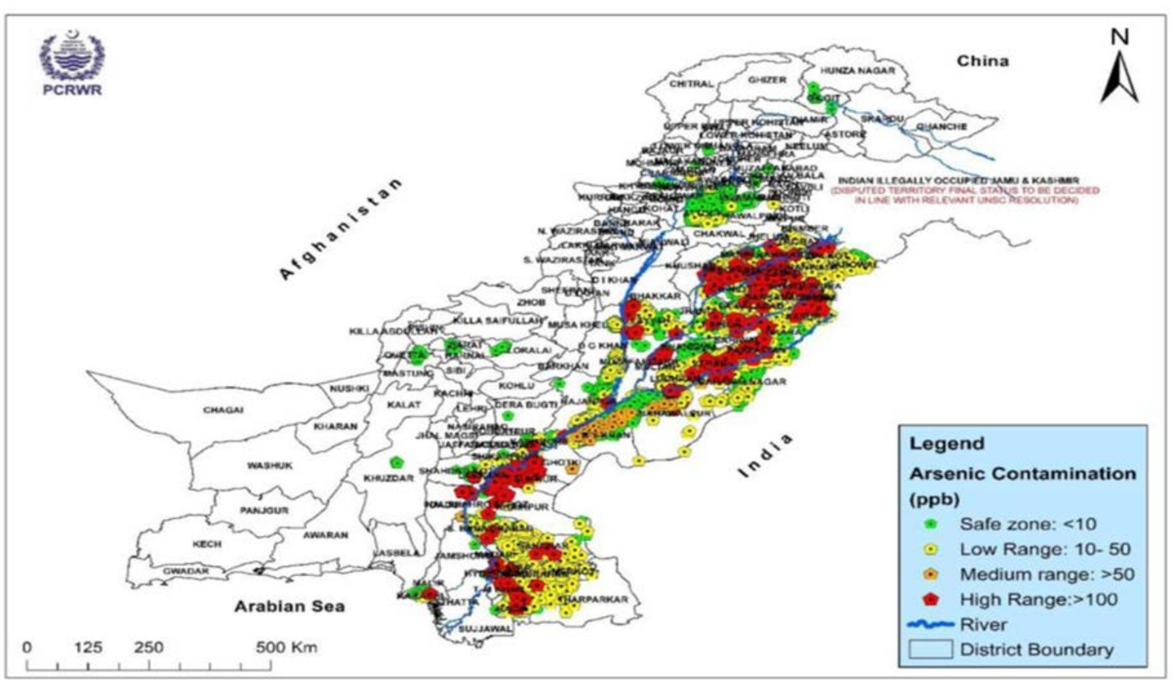

Figure 1: Arsenic affected areas in Pakistan. Source Pakistan Council of Research in Water Resources (PCRWR), Islamabad (2023).

The right to human dignity is included in the fundamental rights guaranteed by the Constitution of Pakistan. Resultantly, the courts in Pakistan have been among the first to rule that this right depends on a liveable climate and a clean environment. To realise the ancillary rights to life and dignity of life, as well as in courts around the globe, Pakistan is on level with other countries in this regard. There is an irrefutable and permanent connection between environmental circumstances and human dignity. The basic principle of human dignity is that every person, regardless of their generation, deserves to be treated with dignity and respect by everyone, to have a complete and meaningful existence, to make their own decisions, and to be free from the oppression of those in authority.[16] In numerous factual and legal contexts, including those pertaining to civil, political, socioeconomic, and cultural rights, the idea of human dignity has been utilised.[17] The concept that every individual possesses inherent value can permeate practically every facet of human existence, including interactions with the natural world, if it is codified in legislation. Pakistani courts have begun to follow the same line of reasoning as the Human Rights Committee (HRC), which interpreted governments' positive responsibilities under article 6 of the ICCPR.[18] Article 9 of the Constitution guarantees the right to life and human dignity, which includes the right to drinkable water.[19] This article delves into the potential interpretations of this right. From a global human rights vantage point, the article will initially investigate the concept of a

[16] Misbah Fida, et al., 'Water contamination and human health risks in Pakistan: a review' (2023) 15 (3) Exposure and Health 619-639.

[17] Nadia Khadam, et al., 'Constitutional Right to Water: Analyzing The Legal Framework and A Way Forward for Formal Water Governance in Pakistan' (2023) 58 (6) Journal of Southwest Jiaotong University

[18] Inga T. Winkler, *The human right to water; Research handbook on International Water Law* (Edward Elgar Publishing, 2019) 242-254.

[19] The Constitution of Islamic Republic of Pakistan, article 9.

right to clean drinking water. Second, the study will draw attention to important patterns in interpretation that are crucial to determining the right to safe drinking water based on the Constitution and how the courts should read it.

2. RIGHT TO SAFE DRINKING WATER IN INTERNATIONAL HUMAN RIGHTS LAW

The issue of water has been causing international disputes, rising populations, and other climatic changes are some of the major problems of our day that could impede the achievement of human development objectives. To start with the UN Charter 1945, for instance, Article 55[20] of the UNO Charter is significant in setting the framework for the various economic, cultural, and social rights including the right to water. The article mentions higher standards of living, employment, and good social and economic conditions. Furthermore, it includes health and education. Access to safe water and effective sanitation has been an integral part of the right to health.

Because having access to water is essential for both the survival of life and human development, it is necessary to guarantee all the necessary living conditions for attaining the objectives of human development, which must include the right to water for basic life subsistence.[21] It is inconceivable to maintain this mindset in a world where water and sanitation remain inaccessible to millions of people. No one can live a decent life or exercise their civil and political rights in the absence of economic and social rights; thus, it is high time that this perspective changed.[22] People can only improve their lot in life and develop their talents when their economic and social rights are fully and effectively enforced.

Everyone has the right to a minimum level of food, clothes, housing, medical treatment, and social services that is sufficient to ensure his or her health and the health of his or her family, as stated in Article 25 of the Universal Declaration of Human Rights (UDHR) 1948.[23] This trend is supported by the arguments that surrounded the inclusion of the right to a decent standard of living in the UDHR. Whether or not to include this right was a contentious issue right up until the conclusion. Additionally, the world community chose to develop two Covenants on Economic, Social, and Cultural Rights and the Covenant on Civil and Political Rights, when considering how to make the Declaration a legally enforceable instrument.[24] This decision is also indicative of the fact that certain governments continue to hold the view that these rights give rise to distinct responsibilities.

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[20] The United Nation Organisation Charter, article 55

[21] Ralph P. Hall, Barbara Van Koppen, and Emily Van Houweling, 'The human right to water: the importance of domestic and productive water rights' (2014) Science and engineering ethics 20 (2014): 849-868.

[22] Tamar Meshel, 'Human rights in investor-state arbitration: the human right to water and beyond' (2015) 6 (2) Journal of international dispute settlement 277-307.

[23] Takele Soboka Bulto, 'The emergence of the human right to water in international human rights law: Invention or discovery' (2011) 12 Malborne Journal of International Law 290.

[24] Nehaluddin Ahmad, 'Human right to water under international law regime: an overview' (2020) 46 (3) Commonwealth law bulletin 415-439.

The ICCPR in its 'right to life' includes the state parties' obligation to protect the right to life. Conventionally, the right has been interpreted in its negative obligations requiring the states not to interfere in the right to life of individual or deprive one of life without due process of law. However, in recent developments, the right to life has been interpreted by setting positive obligations on the states to protect life, making its interpretation wider.[25] The HRC interpreted it by stating:

"The right to life has often been too narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures. In this connection, the Committee considers it would be desirable for states parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."[26]

The method suggests looking at the right to life in a broader context. The HRC finds that in order to defend the right to life, member states must act to decrease infant mortality, malnutrition, and epidemics, as stated in the inherent charter of the right to life. Having access to medicines is crucial for achieving all of these beneficial goals. Human rights provisions at the international and regional levels urge action to ensure everyone has a chance to live.[27] As an example, the European Convention on Human Rights (ECHR) enshrines the affirmative obligation of governments to accomplish its full realisation.[28] Within the sphere of safeguarding the right to life, the commission incorporates sufficient and suitable medical treatment. This line of thinking is based on the African Commission on Human and Peoples' Right's interpretation, which holds that, in cases where the conditions are inhumane, the right to life encompasses protection from environmental degradation and pollution. The right to subsist in a dignified manner is guaranteed in the Indian Constitution.[29] The bare necessities for maintaining life include safeguarding one's health and having access safe water. As part of its definition of 'arbitrary deprivation' of life, the right to exist with complete dignity is enshrined.

As part of their responsibility to safeguard human life, states must act to improve societal factors that put people at risk of physical harm or make it difficult for them to live their lives as they see fit. High rates of criminal and gun violence, pollution of the environment, traffic and industrial accidents, life-threatening diseases like malaria and AIDS, widespread substance abuse, extreme poverty, and homelessness are all examples of these

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[25] United Nations Human Rights Committee, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to life, para 26; UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982<https://www.refworld.org/docid/45388400a.html> accessed 16 September 2019; HRC, General Comment No. 6. The Right to Life (Article 6 of the International Covenant on Civil and Political Rights) (UN Doc. HRC/GC/6; 1982) 5

[26] ibid.

[27] Dimitris Xenos, 'Asserting the right to life (Article 2, ECHR) in the context of industry' (2007) 8 (3) German Law Journal 231-253.

[28] Linos-Alexander Sicilianos, 'Preventing violations of the right to life: Positive obligations under Article 2 of the ECHR' (2014) 3 Cyprus Human Rights Law Review 117.

[29] ibid.

broader conditions.[30] In order to address the right to life, it is necessary to take both short-term steps to guarantee that people have access to food, water, shelter, healthcare, electricity, and sanitation, and long-term steps to promote and facilitate adequate general conditions, such as strengthening emergency health services and response operations. Action plans for the advancement of the right to life should also be developed by states parties. These plans should include strategies to combat the stigmatisation of diseases, including STDs, which limits people's ability to get medical treatment.[31] They should also include specific plans to educate people about non-violence and de-radicalization initiatives, as well as campaigns to raise awareness about domestic violence.as well as for expanding availability of screenings and therapies to lower rates of maternal and newborn mortality.[32] When called upon, States Parties should also establish disaster management plans and contingency plans to better prepare for and respond to natural and man-made disasters like hurricanes, tsunamis, earthquakes, radioactive accidents, and massive cyberattacks, all of which can have a negative impact on the right to life.[33] Due to their far-reaching effects, several duties concerning the necessities for fully exercising the right to life can only be fulfilled in stages.

To enhance the scope of right to safe drinking water, article 10, The United Nations Watercourses Convention, finds that the right to access safe water for drinking will take precedence against the right to use water for agriculture, power generation, or any other use inside a state and against any other riparian state.[34] The International Law Commission (ILC) on declarations and resolutions regarding international watercourses, together with their comprehensive reports.[35] Furthermore, The Convention emphasises the need for collaboration based on equal sovereignty, territorial integrity, and the international watercourse, to provide a general framework for both current and future generations. Undoubtedly, the Convention is currently and will continue to be the most authoritative legal document in the realm of International Water Law. Regrettably, despite almost the last 27 years of preparatory work and a decade since its approval, the UN Watercourse Convention has a slim likelihood of being enacted.[36]

The Stockholm Conference, convened in 1972, was a United Nations gathering focused

[30] United Nations Human Rights Committee, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to life, para 26; UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982<https://www.refworld.org/docid/45388400a.html> accessed 16 September 2019

[31] ibid.

[32] ibid.

[33] ibid.

[34] Alena Drieschova, Mark Giordano, and Itay Fischhendler, 'Climate change, international cooperation and adaptation in transboundary water management' (2009) Adapting to climate change. Thresholds, values, governance 384-398.

[35] Andrea M. Keessen, and Helena FMW van Rijswick, 'Adaptation to climate change in European water law and policy' (2012) Utrecht Law Review 38-50.

[36] ibid.

on the human environment.[37] The Stockholm Declaration specifically stated that access to safe water is a human right.[38] The Declaration is an early environmental instrument that acknowledges the essential entitlement to an environment that enables a life of respect and prosperity. It also emphasises the need to protect the earth's natural resources, such as water, flora, and fauna, land, and air for the advantage of both current and future generations.[39] The primary objective of this conference was to assess the scarcity and inefficient utilisation of water, as well as any concerns to sustainable development associated with scarcity.[40] Forty-nine Experts from different states unanimously agreed that 'access to clean water and sanitation' is an international human right.

International human rights are inherently indivisible and linked. However, in practice, their enforcement was divided into two distinct tiers.[41] The indivisibility of human rights is evident in the UDHR, which serves as a fundamental statement on human rights. However, it is important to note that the declaration is not legally enforceable. The legal framework of human rights is divided into two separate covenants, namely the ICCPR and the ICESCR. The principles of indivisibility of human rights are essential for implementing the international human rights framework established by the international bill of rights. The implementation of a particular human rights element is interconnected with other human rights.

The issue over the justiciability of ESCRs has arisen due to the unequal treatment of human rights. The CRRs have been extensively integrated into domestic constitutions, allowing them to be justifiably invoked when domestic courts can assess any legislative or executive action that goes against the principles of civil and political rights.[42] In contrast, Economic, Social, and Cultural Rights (ESCRs) did not receive the same degree of protection, as a breach of these rights did not grant courts the authority to define the extent of states' responsibilities. The CESCR has consistently endeavoured to raise the status of rights under ICESCR to the equivalent level enjoyed by civil and political rights.[43] The implementation of ESCR is a gradual process that involves several stages, including recognition, safeguarding, and fulfilment of obligations. States that are parties to the ICECSR are obligated to ensure that no rights guaranteed by the covenant are denied. Instead, they must

[37] E. Thomas Sullivan, 'The Stockholm conference: A step toward global environmental cooperation and involvement' (1972) 6 Indiana Law Review 267.

[38] ibid.

[39] Michael W. Manulak, 'Multilateral solutions to bilateral problems: The 1972 Stockholm conference and Canadian foreign environmental policy' (2015) 70 (1) International Journal 4-22.

[40] Muhammad Mizanur Rahaman, and Olli Varis., 'Integrated water resources management: evolution, prospects and future challenges, (2005) 1 (1) Sustainability: science, practice and policy 15-21.

[41] Nathan Geffen, 'Justice after AIDS Denialism: Should there be Prosecutions and Compensation?' (2009) 51(4) Journal of Acquired Immune Deficiency Syndromes 454–5.

[42] Gauthier De Beco, 'The indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities' (2019) 68 (1) International & Comparative Law Quarterly 141-160.

[43] Victoria Hamlyn, 'The Indivisibility of Human Rights: Economic, Social and Cultural Rights and the European Convention on Human Rights' (2008) 40 BLJ 13.

demonstrate that they have made every effort to protect these rights.[44]

The notion of human rights is evolving.[45] Enforcing states can modify civil, political, economic, social, and cultural rights, except for non-derogable rights.[46] States have the authority to impose restrictions or establish the means of implementing different human rights within their jurisdictions. However, it is crucial for them to ensure that the actions taken are unbiased and implemented with utmost dedication to uphold the principles of human rights. Consequently, the implementation of the ESCR is consistently evaluated based on the ability of nations to uphold these rights.[47] For example, the evaluation of the right to health and its implementation will vary according to distinct criteria in developed, developing, and least-developed nations.

3. RIGHT TO SAFE WATER IN PAKISTAN

3.1. RIGHT TO SAFE WATER-RELATED OBLIGATIONS OF PAKISTAN UNDER INTERNATIONAL LAW

Pakistan was among the early adopters of the 2030 Agenda, making it a part of their National Agenda through a resolution passed by the National Assembly No. 113 on February 19, 2016.[48] The Ministry of Planning, Development and Special Initiatives and the UNDP have signed a framework agreement under a National Initiative for SDGs, as part of Vision 2025.[49] This agreement aims to create strategies for achieving the SDGs based on the priorities of the Federal and Provincial governments. It will involve collaboration with the private sector, civil society, and academia. As part of the National Initiative for the Sustainable Development Goals (SDGs), each of the four provincial governments is responsible for creating their own projects that align with the SDGs.[50] These projects will be tailored to the specific priorities and preferred approaches of each province. As a result, SDGs task forces were created in the Planning and Development Department, while SDG committees and task forces were established in national and provincial parliament. The SDGs acknowledge that each goal has a ripple effect on other targets due to the interrelated nature of the challenges. For example, pursuing SDG 6 requires the simultaneous achievement of targets in Goal 4 (quality education), Goal 10 (reduced inequalities), Goal 5 (gender equality),

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[44] Ashley M. Fox, and Benjamin Mason Meier, 'Health as freedom: addressing social determinants of global health inequities through the human right to development' (2009) 23 (2) Bioethics 112-122.

[45] Stephen P. Marks, ' The Evolving Field of Health and Human Rights: Issues and Methods' (2002) 30 Journal of Law, Medicine & Ethic 739-754, 752.

[46] Anthony D'Amato, The concept of Custom in International Law (1971 Cornell University Press) 90.

[47] Yoshiko Kojo, 'Global Issues and Business in International Relations: Intellectual Property Rights and Access to Medicines' (2018) 18 International Relations of the Asia-Pacific 5-23, 11.

[48] Arnaud Diemer, and Faheem, 'Sustainable Development Goals and Education in Pakistan: the new challenges for 2030' (2020) Paradigms, Models, Scenarios and Practices for Strong Sustainability 359- 370.

[49] Waqas Ahmed, et al., 'Assessing and prioritizing the climate change policy objectives for sustainable development in Pakistan' (2020) 12 (8) Symmetry 1203.

[50] Jaebeum Cho, Alberto Isgut, and Yusuke Tateno, 'Pathways for adapting the Sustainable Development Goals to the national context: the case of Pakistan' (2017) 24 (2) Fostering productivity in the rural and agricultural sector for inclusive growth in Asia and the Pacific 53.

Goal 13 (climate action), and so on. Governments should strategically exploit the interconnectedness of the Sustainable Development Goals (SDGs) to effectively achieve the goals.[51] The connection between human dignity and access to clean water is permanent and unquestionable. The concept of the right to human dignity asserts that every person, both now and in the future, has the entitlement to be treated with equal respect by others, to have the freedom to live their life to the fullest, make choices, and be protected from arbitrary actions by those in positions of authority.[52] The UDHR begins its preamble with a strong recognition of the dignity of every individual and a commitment to its importance in human rights.[53] It states that acknowledging the inherent dignity and equal and inalienable rights of all human beings is the basis for freedom, justice, and peace in the world. The principle of human dignity has been utilised in diverse factual and legal contexts, encompassing civil, political, socio-economic, and cultural rights. The General Comment's discussion focuses on the implementation of water rights.[54] The CESCR has observed that although the Covenant allows for gradual realisation and recognises the limitations imposed by resource availability, it also places immediate obligations on State parties. Once the concept that every individual in the human race possesses equal value is firmly established in legal systems, its implementation may be observed in almost every aspect of human existence, including the manner in which humans engage with their surroundings.[55] The UN Special Rapporteur on the human rights to safe drinking water and sanitation states that the fulfilment of these rights involves both ensuring equal access for all population groups and improving the quality of services offered. The human right to water encompasses five distinct dimensions, as outlined in General Comment No. 15 of the UN Committee of Economic, Cultural, and Social Rights.[56] These dimensions include the provision of adequate, secure, satisfactory, physically reachable, and inexpensive water for personal and household purposes.

Pakistan has recognised the rights to sanitation and water within regional cooperation organisations.[57] Pakistan recognised the importance of access to sanitation and safe drinking water as a basic human right before the approval of the UN Resolution in 2010.[58] It also emphasised the significance of prioritising sanitation based on national standards.

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[51] Rana Tahir Naveed, et al., 'Small and medium-sized enterprises failure in providing workers' rights concerning Sustainable Development Goals-2030 in Pakistan' (2022) 13 Frontiers in Psychology 927707.

[52] R. Saheed, H. Hina, and M. Shahid, 'Water, Sanitation and Malnutrition in Pakistan: Challenge for Sustainable Development' (2021) 6 Global Politics Review 1-14.

[53] Ralph P. Hall, Barbara Van Koppen, and Emily Van Houweling, 'The human right to water: the importance of domestic and productive water rights' (2014) 20 Science and engineering ethics 849- 868.

[54] Nehaluddin Ahmad, 'Human right to water under international law regime: an overview' (2020) 46 (3) Commonwealth law bulletin 415-439.

[55] Salman MA. Salman, 'The human right to water and sanitation: is the obligation deliverable?' (2014) 39 (7) Water International 969-982.

[56] Henry Carey, 'The special rapporteur on the human rights to safe drinking water and sanitation: an assessment of its first dozen years' (2020) 16 (2) Utrecht Law Review 33-47

[57] Ghulam Mujtaba, et al., 'A holistic approach to embracing the United Nation's Sustainable Development Goal (SDG-6) towards water security in Pakistan' (2024) 57 Journal of Water Process Engineering 104691

[58] Rayees Ahmad Wani, and Ishfaq Ahmad Bhat, 'Water, Essential for Survival: Scrutinizing the Water Conflict of India-Pakistan' (2022) The Journal of Oriental Research Madras 151-159.

Pakistan has formally ratified all major human rights treaties, including the Convention on the Rights of the Child in 1990 and the Convention on the Elimination of All Forms of Discrimination Against Women in 1996.[59] In 2008, the ICECSR was legally adopted by Pakistan.[60] In 2010, both the ICCPR and the Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment were ratified. Regardless of any concerns or declarations made by the country, it is obligated by international law to protect the human right to water. The concerns mostly relate to Pakistan's adherence to the principals of Islam, the terms of the constitution, and the rejection of the authority of other judicial bodies, such as the ICJ.[61] Pakistan has formally approved and accepted all of the Geneva Conventions. Nevertheless, it has not yet given its formal approval to the optional protocols.[62] Consequently, the obligations pertaining to the release of water, as outlined in General Comment 15, as well as in treaty and customary law, can be fully enforced.

3.2. RIGHT TO SAFE WATER-RELATED OBLIGATIONS OF PAKISTAN UNDER DOMESTIC LAW

The Constitution of Pakistan does not provide a guarantee for the rights to water and sanitation.[63] As of 2018, UNEP Reports that around 88 nations have officially incorporated a specific constitutional provision guaranteeing the right to a healthy environment or access to water.[64] Furthermore, around twelve additional countries acknowledge the existence of a fundamental entitlement to a healthy environment and the availability of water implicitly, often through the recognition of rights such as the right to life, dignity, or health. Pakistani courts have been at the forefront of recognizing that a sound environment and a stable climate are crucial for upholding the constitutionally guaranteed right to human dignity.[65] Pakistan is on equal footing with regards to the recognition of the concept of human dignity, as it has been acknowledged in many time periods, geographical locations, and cultures.[66] This recognition is evident in both international and local law, as well as in courts worldwide.

Furthermore, the right to dignity in Pakistan has served as the fundamental constitutional basis for compelling actions, particularly in relation to the subject matter of this article. The progressive analysis of the significance of dignity in legal matters, as demonstrated in these decisions, has also influenced the legal principles applied to address environmental issues,

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[59] James R. May, and Erin Daly, 'Human Dignity and Environmental Outcomes in Pakistan' (2019) 10 PLR 1.

[60] Misbah Fida, et al., 'Water contamination and human health risks in Pakistan: a review' (2023) 15 (3) Exposure and Health 619-639.

[61] ibid.

[62] ibid.

[63] Naveen Kumar Arora, and Isha Mishra, 'Sustainable development goal 6: global water security' (2022) 5 (3) Environmental Sustainability 271-275.

[64] ibid.

[65] Ayesha Jawad, Sana Akhter, and Aqsa Hamid, 'A Critique on the construction of environmental rights as a human right in Pakistan: a new dimension in the 21st century' (2022) 4 (4) Pakistan Journal of Social Research 458-467.

[66] Dianxi Zhang, et al. 'Water scarcity and sustainability in an emerging economy: a management perspective for future' (2020) 13 (1) Sustainability 144.

such as the rights to water and a stable climate, which will be examined in the following section. The findings of the court in *Asghar Leghari v Federation of Pakistan*[67], the High Court ruled that the government must take significant action to address climate change. The court interpreted those fundamental rights in the constitution, including the right to life, includes the positive obligations of the state including protection of safe and clean environment. The same may be interpreted under the right to human dignity, complemented with constitutional ideals of social and economic rights. The court found that the international standards on health environmental principles of sustainable development are the state obligations under the right to life and dignity of human life.[68] According to the findings in the case, the term 'life' is highly significant as it encompasses all aspects of human existence. Life encompasses all the privileges and resources that an individual born in a democratic nation is legally and constitutionally allowed to enjoy with honour and respect.[69]

Courts could go beyond their traditional role and ensure that governmental choices affecting the environment are made solely based on human dignity, in all its different forms, without facing accusations of judicial activism. Ultimately, the preservation of human dignity is arguably the determining factor in assessing the required amount of clean water, establishing suitable environmental measures for the extraction of natural resources, and promoting climate justice.

The Supreme Court of Pakistan, in *Government of Sindh Versus Secretary Health Department*, has interpreted the scope of health-related challenges under the right to life. The case originally involved the domain of federal and provincial legislative authority over health and related issues. The Constitution is federal. It defines legislative lists for both centre and the provinces. The court while interpreting the obligation of the government towards protecting health and related issues commented that the protection of health is an integral part of the right to life. Finding of the court finds: "Art. 9---Right to life---Scope---Right to healthcare---Right to life undoubtedly entailed the right to healthcare which meant that everyone had the right to the highest attainable standard of physical and mental health and this comprised of access to all kinds of medical services including but not limited to hospitals, clinics, medicines and services of medical practitioners which must not only be readily available and easily accessible to everyone without discrimination, but also of high standard---Federal Government had an obligation to carry out all necessary steps to ensure realization of this goal."[70]

The judgement from the highest court of Pakistan has clearly outlined the elements of the government's responsibilities in safeguarding public health within the framework of the right to life. The elements of the right to healthcare align with the provisions of Article 12

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[67] Muhammad Saad Saleem, Aqsa Tasgheer, and Tehreem Fatima, 'Investigating Judicial Activism in Pakistan: Analyzing Significant Precedents in the Promotion of Environmental Sustainability' (2023) 3(2) Journal of Religious and Social Studies 1-19.

[68] Martin Lau, 'The role of environmental tribunals in Pakistan: Challenges and Prospects' (2018) 20 (1) Yearbook of Islamic and Middle Eastern Law Online 1-48.

[69] ibid.

[70] The Constitution of Islamic Republic of Pakistan 1973, article 9.

of the ICECSR. The state has a responsibility to safeguard the well-being of its inhabitants, encompassing both their bodily and mental health.[71] Furthermore, the judgement stipulates that access to healthcare services is a prerequisite for the right to life. An in-depth examination of the conclusions in the ruling indicates that the broader understanding of the right to life by the constitutional courts is advantageous in safeguarding aspects of life that are not explicitly addressed in the fundamental rights outlined in the constitution. The ruling has paved the door for health-care facilities to be considered as obligations of the state, since it has been interpreted within the framework of the right to life.

4. CONCLUSION

The arguments conclude that human right to safe water exists in the domestic laws of Pakistan indirectly and international human rights law directly. The courts in Pakistan have interpreted right to safe water under the right to life and human dignity in line with international human rights law. The courts have adopted an approach of interconnectedness of fundamental rights enshrined in the Constitution of Islamic Republic of Pakistan 1973 that is similar to the approach taken by the treaty bodies working for the international human rights law such as the ESCR and the HRC. This paper argues that the indirect interpretation of right to safe water under the right to life and human dignity may be a transitional solution. To find a sustainable access to safe water, the state has to do more in term of enhancing the status of access to safe water as an independent right as well as taking all possible policy steps to realise the right to access to safe water.

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[71] Amr Ibn Munir, 'Article 9 of the Constitution of Pakistan: The Right to Life or Substantial Due Process?' < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4522566> accessed 18 April 2024.

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How the UN Security Council's Failure to Uphold International Law Has Contributed to Violence and Chaos in the Muslim World: The Wars of Aggression Against Yemen (2015-) and Gaza (2023-)

Birleşmiş Milletler Güvenlik Konseyinin Uluslararası Hukuku Uygulamadaki Başarısızlığının Müslüman Dünyasında Şiddet Ve Kaosa Katkısı: Yemen'e (2015-) Ve Gazze'ye (2023-) Yönelik Saldırı Savaşları

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HOW THE UN SECURITY COUNCIL'S FAILURE TO UPHOLD INTERNATIONAL LAW HAS CONTRIBUTED TO VIOLENCE AND CHAOS IN THE MUSLIM WORLD: THE WARS OF AGGRESSION AGAINST YEMEN (2015-) AND GAZA (2023-)*

BİRLEŞMİŞ MİLLETLER GÜVENLİK KONSEYİNİN ULUSLARARASI HUKUKU UYGULAMADAKİ BAŞARISIZLIĞININ MÜSLÜMAN DÜNYASINDA ŞİDDET VE KAOSA KATKISI: YEMEN'E (2015-) VE GAZZE'YE (2023-) YÖNELİK SALDIRI SAVAŞLARI

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ABSTRACT

This paper draws on the perverse use of international law by hegemonic powers on the subject of the use of force in international relations. In order to expose the distortive interpretation and implementation, by major powers, of the UN Charter and other instruments and sources of international law, this study draws on two cases of the wars of aggression targeting Yemen and Gaza respectively. The failure of the UN Security Council to take punitive action against the Saudi-led coalition forces and Israel, as the two perpetrators of crimes of aggression against the victimises peoples, in order to end hostilities, has been a tragic testimony to the endurance of the colonial and asymmetrical roots of existing rules and principles of international law. The two cases and the dominant narrative surrounding them which has tended towards blaming the victims also point to the complicity between the centres of political power and the predominant media.

Key words: Hegemonic international order, wars of aggression against Yemen and Gaza, genocide in Gaza, UN Security Council resolutions

ÖZET

Bu makale, öncelikle, içinde bulunduğumuz yüzyılda hegemonik Batı güçleri tarafından uluslararası hukukun çarpık kullanımlarını ve Birleşmiş Milletler Güvenlik Konseyinin güç kullanımına dair suiistimal niteliğindeki yönlendirmelerini genel anlamda eleştirmektedir. Ardından, Müslüman dünyasındaki mevcut sorunları körükleyen iki olay ele alınmaktadır: Yemen (2015-) ve Gazze'deki (2023-) savaşlar. Makale, Birleşmiş Milletler Güvenlik Konseyi'nin bu iki krizdeki tutumunun ardındaki ikiyüzlülüğün ve çifte standardın mevcut uluslararası düzenin güvenilirliğini azalttığını savunmaktadır. Bu makale, başta ABD olmak üzere, hegemonik uluslararası aktörler tarafından kullanılan stratejileri ve hala büyük ölçüde Batı'nın kontrolünde olan uluslararası ana akım medyanın, Yemen ve Gazze'deki saldırı savaşlarının faillerini aklamak üzere ne şekilde kullanıldığını ortaya koymayı amaçlamaktadır. Burada, aynı zamanda, görünüşte Husileri iktidardan uzaklaştırmak amacıyla gerçekleştirilen, Suudi Arabistan liderliğindeki çok uluslu askeri müdahaleye bir yasal çerçeve kazandırmak amacıyla, Yemen krizine ilişkin olarak alınmış olan Birleşmiş Milletler Güvenlik Konseyi

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kararlarına ve önde gelen Batılı güçler ile medyanın ürettiği söylemsel çarpıtmalara yer verilmiştir. Makale, İsrail'in Ekim 2023'te Gazze'ye yönelik hayata geçirdiği ve halen vahşetini yitirmemiş olan soykırım niteliğindeki saldırısını incelemekte ve Birleşmiş Milletler Güvenlik Konseyi'nin bu korkunç trajediye karşı sergilemiş olduğu performansı sorgulamaktadır. Yemen örneğinde olduğu gibi, burada da, mevcut uluslararası düzenin hâkim güçleri ve onların medya organları tarafından Filistinlilerin mağduriyetini inkâr etmek ve Gazze'deki Siyonist suçları örtbas etmek amacıyla üretilen çarpık anlatılar ele alınmaktadır. Bu çalışma, Yemen, Ukrayna ve Gazze'deki savaşların hâkim güçler tarafından ne şekilde ele alındığını karşılaştırarak emperyalizm, uluslararası hukuk ve BM sistemi arasındaki bağlantılara dair bazı eleştirel değerlendirmelerle devam etmektedir. Makale, hâlâ büyük ölçüde Batı güçlerinin etkisi altında olan mevcut uluslararası düzenin yasal ve kurumsal temellerinin "adaletin şaşması" sonucunu doğuran ve Müslüman dünyasının daha da marjinalleşmesine yol açan vahim durumuna ilişkin bazı değerlendirmelerle sona ermektedir.

Anahtar kelimeler: Hegemonik uluslararası düzen, Yemen ve Gazze'ye karşı saldırı savaşları, Gazze soykırımı, BM Güvenlik Konseyi kararları

1. INTRODUCTION

This paper begins with an overall critique of the perverse uses of international law and the abusive manoeuvring of the UN Security Council by hegemonic Western powers in this century on the use of force in this century. It, then, looks into the two cases which, the paper claims, have added fuel to the existing grievances of the Muslim world: the wars in Yemen (2015-) and Gaza (2023-). It argues that the hypocrisy and double standards which underlay the attitude of the UN Security Council in these two crises, have further diminished the credibility of the existing international order. This essay seeks to unfold the strategies deployed by hegemonic international actors, first and foremost the United States (US/USA), and the internationally prevalent mainstream media still mainly controlled by the West to absolve the perpetrators of the wars of aggression in Yemen and Gaza. Then, simultaneously, it inquiries into the UN Security Council resolutions on the Yemeni crisis as well as on the discursive distortions produced by major Western powers and the media in order to render some legality to the Saudi-led multinational military intervention in Yemen which was ostensibly intended to oust the Houthis from power. The paper proceeds with an investigation into Israel's genocidal assault on Gaza in October 2023 which has yet to lose its ferociousness and then probes into the performance of the UN Security Council in dealing with this horrendous tragedy. As is done in the case of Yemen, this will be done together with the perverse narrative produced by the overlords of the current international order and their media outlets to deny the victimhood of the Palestinians and gloss over the Zionist crimes in Gaza. This study proceeds with some critical remarks about the links between imperialism, international law and the UN system by making comparisons between the wars in Yemen, Ukraine, and Gaza to see how they have been handled by international hegemonic actors. The paper ends with a few remarks on the regrettable state of the legal and institutional underpinnings of existing international order, still largely under the sway of Western powers, that has perpetually resulted in the 'miscarriage of justice' which in turn has led to the further marginalization of the Muslim world.

2. THE ABUSIVE 'USE' OF INTERNATIONAL LEGAL RULES ON THE USE OF FORCE AS A MAJOR COMPONENT OF THE VICTIMISATION OF THE MUSLIM WORLD

On a host of issues from self-determination to the use of force, from *jus in bello* to the principle of non-intervention, international law is often neither consistently interpreted nor fairly applied. The international order is still reflective of the hegemonic privileges and immunities of the bloc of Western powers led by the US. The marginalization of the Third World and the Muslim World through, *inter alia*, one sided application of international law which often operates to the benefit of hegemonic powers is a major aspect of the existing international legal system and decision-making apparatus in spite of the relative decline of the Western power and the emergence of rising powers such as China, India and Brazil. This suggests that neo-colonial domination, imperialistic interventions, and economic exploitation still stand as the major characteristics of the asymmetrical relationship between the West and the Rest.

The hegemonic use of international law as part of the overall Western attempts to maintain its global control of the natural sources, energy supply lines, decision-making apparatus, economic and financial riches within the existing 'globalized' international order, combined with its discursive monopoly, is not likely to go away in the foreseeable future. This asymmetry is nowhere more visible then on the subject of the rules and principles of international law dealing with the use of force. International legal norms on the use of force have disappointingly not delivered us from the hell of wars and conflicts during the Cold War simply because they have been among the most intensely infringed norms of international law since 1945.

Most instances of military aggression since the founding of the UN have not been terminated thanks to the sanctions or military enforcement actions authorised by the Security Council. American imperialistic aggressions especially in southeast Asia and central America, those by the Soviet Union in eastern Europe and Afghanistan, and the ones carried out by the British and French in colonial territories and in a number of post-colonial countries like Egypt, and finally Israeli military aggressions and seizure of territory from Palestinians and neighbouring Arab states did not result in successful mobilization of the collective security system within the Security Council. A rare occasion when the Security Council showed its fist by fully implementing the powers it assumed under Chapter VII of the UN Charter[1] was the Iraqi occupation of Kuwait in August 1990. Iraq was punished and condemned to years of international sanctions simply because it was the 'wrong' state to have engaged in the illegal use of force.

After the Cold War, it was claimed by a triumphant US that this new episode in human history would herald the birth of a 'new' international order that would be more peaceful and just than the previous one. Sadly, however, there have been many instances when a

[1] Charter of the United Nations (26 June 1945) UNTS XVI.

panoply of Western actors, first and foremost, the US and Britain, have been engaged in military aggressions against numerous states and non-state actors in Asia and Africa. These illegal[2] military campaigns from the occupation of Afghanistan (2001) and Iraq (2003) to the carpet bombing of Syria on the pretext of fighting ISIS (2014) caused enormous suffe-ring to the peoples inhabiting the countries facing these military assaults. Not surprisingly, the 'aggressors' have almost never been punished for their crimes. This lack of fairness and culture of immunity for the 'sacred cows' of the international system, also have also played themselves out in cases when an ally/friend of the West has launches (illegal) armed attack and/or military intervention against a non-Western state or non-Western non-state actor. Even in this age in which international law is considered by many to be 'universal' and 'fair', any state or non-state subject that happens to be viewed by the hegemonic West as 'unf-riendly/hostile', the global legal and political apparatus, alongside the mainstream Western media, will most likely be mobilized against the latter in order to condemn it to a probable victimhood, possibly at the hands of a Western 'ally'.

Hence, the West extends its *de facto* immunity from the norms of international law on the use of force to its non-Western allies that happen to serve Western imperial interests against states and non-state actors viewed as 'hostile', 'unruly', 'extremist/fanatical' or 'terrorists'. In such instances, the West not only protects its non-Western 'allies' from any punitive action by, say, the UN, but also tends to provide active military, logistical and political support for its aggressive 'friends'. This was the case when, for instance, with American encouragement, Ethiopia occupied Somalia in 2006 which lasted for three years. This serious breach of international law, also constituting 'international crime' as well as a violation of obligations *erga omnes*, was not even 'condemned' by the UN Security Council during the course of the crisis. On the contrary, the Council was supportive of Ethiopia throughout its illegal military campaign in Somalia an indication of which was its branding of armed resistance to the Ethiopian occupation as "acts of violence and extremism".[3]

This is the overall legal background that needs to be furnished so that we could make sense of the two deeply traumatic incidents, still raging at the time of writing, involving military aggressions with thoroughly disturbing humanitarian consequences: military assa-ults on Yemen and Gaza/Palestinians by a Saudi-led coalition of states and Israel respecti-vely.

2 They were illegal because they all lacked *specific* authorisations for the use of force as conferred by the UN Security Council on the eve of armed aggression against the victim states. Besides, the imperialistic ambitions of the pioneer-ing states, in particular, the USA and Britain, were known to be the real motives behinds the military campaigns in question.

3 UNSC Res. 1766 (23 July 2007) UN Doc. S/RES/1766

3. MAIN STRATEGIES DEPLOYED BY HEGEMONIC INTERNATIONAL ACTORS AND THE MAINSTREAM MEDIA TO VINDICATE THE PERPETRATORS OF THE WARS IN YEMEN (2015-) AND GAZA (2023-)

3.1. THE CASE OF YEMEN

In September 2014, President Abd-Rabbu Mansour Hadi of Yemen was ousted and the capital Sana'a seized by the opposition Houthi[4] forces that represented a little over one third of the population of Yemen and belonged to a moderate version of Shia Islam. Feeling threatened by the overthrow of President Hadi, on 25 March 2015, Saudi Arabia announced the onset of a military intervention in Yemen, coined Operation Decisive Storm, jointly with scores of Arab states, namely Egypt, Bahrain, Kuwait, Qatar, the United Arab Emirates, Jordan, Sudan, and Morocco. The dual purpose of the military campaign was to back up and restore the authority of the Hadi government and to neutralize the Houthi 'aggression' against the Yemeni people.[5] Whereas initially it was expected to achieve its goals within a few days, this operation has proven to be a failure for the aggressors and disastrous for the people of Yemen. Since 2015, tens of thousands of innocent civilians have been killed and many more have been wounded in the Yemeni war. Indeed, based on the estimation of the UN Development Program, it was revealed that, between 2015 and May 2023, 370,000 people died "as a result of the war, with indirect causes such as lack of food, water, and health services causing almost 60 percent of deaths."[6]

In the course of the war, more than half the population of Yemen (over 18 million people) have been forced to seek humanitarian assistance due to the devastation of the economy and food shortages, the latter of which derived mainly from the land, naval and air blockade imposed on Yemen by anti-Houthi Coalition Forces. Roughly 4.5 million Yemenis have been internally displaced as a result of war. Between 2016 and 2022, Yemen recorded the highest record of cholera cases whereby 2.5 million Yemenis were reported to suffer cholera and 4,000 died of cholera.[7] As noted in Al Jazeera, the Yemeni campaign "has produced a humanitarian crisis of the highest magnitude."[8]

Among the international supporters of the Coalition Forces, it is the US which has been most firmly behind this military intervention whose flagship, Saudi Arabia, "has been

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[4] Houthis are officially known as Ansar Allah.

[5] May Darwich, 'Escalation in Failed Military Interventions: Saudi and Emirati Quagmires in Yemen' (2020) 11 Global Policy 103, 104.

[6] Kali Robinson, 'Yemen's Tragedy: War, Stalemate and Suffering' 2023 Foreign Affairs <https://www.cfr.org/backgrounder/yemen-crisis> accessed 12 August 2024

[7] UNICEF, 'Yemen Humanitarian Situation Report No. 1' (19 May 2024) < https://reliefweb.int/report/yemen/unicef-yemen-humanitarian-situation-report-no-1-january-march-2024-enar#:~:text=SITUATION%20OVERVIEW%20AND%20HUMANITARIAN%20NEEDS,estimated%20to%20be%20internally%20displaced.> accessed 13 August 2024.

[8] Alex Preve, 'The US is complicit in Saudi atrocities in Yemen' Al *Jazeera English* (19 March 2020) <https://www.aljazeera.com/opinions/2020/3/19/the-us-is-complicit-in-saudi-atrocities-in-yemen> accessed 13 August 2024.

accused, by a United Nations Commission of experts, of committing war crimes in Yemen."[9] The US has also given direct military support to some of the operations in Yemen. Alongside the Coalition Forces, the US is equally responsible for some of the war crimes, including indiscriminate bombings leading to large number of civilian deaths.[10] Today, although the crisis emanating from the illegal military intervention in Yemen has subsided, it has not fully come to an end.

3.2. THE CASE OF GAZA

Gaza has been under Israeli military occupation since 1967. While, on paper, Israel pretended that it was withdrawing from Gaza in 2005, its *de facto* occupation has to this day continued unabated granting that the area has since been encircled by Israeli forces from land, sea and air. On top of this agony, Israel has imposed a deadly siege and blockade of Gaza since 2007 which turned Gaza into an open-air prison. Israel's genocidal war began on the same day that the Operation Al Aqsa Flood was launched by a group of Palestinian resistance fighters against a variety of Israeli targets on the 7th of October, 2023. Since the 7th of October, the degree of devastation in Gaza and the huge number of mostly civilian deaths (at least 50 thousands) and the far greater number of those who have been wounded (at least 105 thousands), combined with the military siege of Gaza and the deadly economic blockade that has deprived the Gazans of the most basic essentials of life, has turned this tiny piece of land into a graveyard. Israel's ruthless all-out assault on Gaza since October has also witnessed a full blown genocide which continues to this day.

We could point our fingers mainly at five strategies deployed by Western political establishment and the dominant media, which we might call 'whitewashers', have been trying their utmost to render the victimhood of the Yemenis and the Gazans as invisible as possible:

First, the dominant –Western- centres of decision-making, media and most of the academia have by and large avoided the discussion as to whether the Saudi-led multinational military intervention against Yemen was 'legal' under international law. In an article which exceptionally dares to intrude into this 'forbidden' area, Tom Ruys and Luca Ferro express their frustration thus:

> *Having regard to the fierce debates that similar interventions have given rise to in the past, the complete lack of an in-depth debate and legal analysis regarding Operation Decisive Storm is flabbergasting. Besides… the silence on the legality of the operation is indeed deafening.*[11]

In the case of the Israeli military offensive against Gaza, the Israeli apologists either ste-

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9 ibid.

10 'Q & A on The Conflict in Yemen and International Law' *Human Rights Watch* (6 April 2015) <https://www.hrw.org/news/2015/04/06/q-conflict-yemen-and-international-law> accessed 13 August 2024. This does not in any way imply that forces loyal to the Houthis have not committed any human rights violations or acts that constitute war crimes.

11 Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen' (2016) 65 International and Comparative Law Quarterly 61, 70.

ered clear of this vitally important question (as to whether this offensive was 'legal' under international law) or lightly assumed that the deadly assault on Gaza by Israel was, as officially claimed by the Zionist state, an act of 'self-defence' against the Al-Aqsa Flood, an operation launched by Palestinian military forces against various Israeli targets on October the 7th, 2023.

Second, they have tended to blame the victims, Palestinians, for the existing tragedy as they chose to resist occupation. To justify the wars in Yemen and Gaza, the 'whitewashers' have narrowed down their lenses to specific instances. Hence, they have pointed their fingers at the Houthi takeover in Yemen in 2014 and the 7th of October military offensive of the Palestinian armed groups against a variety of Israeli targets, by overlooking the historical and broader political context of colossal atrocities committed against the Palestinians by the Zionist forces of occupation and the historical marginalization of the Houthi minority in Yemen. This strategy is devised to divert discussions away from Israel's all-out assault on Gaza and its horrific crimes within Gaza (and partly in the West Bank) and to confine the epicentre of discussions to Israel's alleged right of self-defence as a 'proper' response to the Operation Al-Aqsa Flood which had been launched in southern Israel.[12] This approach that fully disregards the Israeli occupation of Palestinian territories and its incremental genocide against the Palestinian people since the Naqba of 1948 is intended to 'justify' Israeli crimes and aggression or at least render them 'more palatable' to ordinary people. A similar distorted logic also played itself out when the Western political centres, media, and, in large part, the academia have sought to justify the Saudi-led military aggression against Yemen by unthinkingly drawing on Hadi's letter to the UN Security Council in which he openly called for outside military intervention which, in his view, would be an act of self-defence against the Houthi aggression. This defence of the 'indefensible' was simply absurd because, at the time when he wrote a letter to the UN, Mansur Hadi was no longer the official President of Yemen. What is more, while condemning the Houthi forces, the Security Council never authorised outside military action in Yemen.[13]

It is well-known that military 'intervention by invitation' of the government of a state has been a much abused rhetorical device with extremely weak legal foundations in the light of the chequered history of intervention by invitation. This pretext was too frequently used to justify American military interventions or occupations especially in Central America and the Middle East, from the occupation of Grenada (1983) to the military intervention in Lebanon in 1958. These 'invitations' were made by largely unpopular and/or weak political leaders under challenge by the opposition. The Soviet Union also justified its military interventions and/or occupations of Hungary (1956), Afghanistan (1979), and Syria (2015) by the pretext of having been invited by (deeply unpopular) incumbent rulers. The misuse

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[12] In fact, the zone of the military operation consisted of Palestinian villages which had been grabbed by Israel through brute force.

[13] For an extensive and scholarly analysis of the legally dubious nature of the Saudi-led military intervention in Yemen, with specific reference to the 'legality' of military intervention by invitation, see Themistoklis Tzimas, 'Legal Evaluation of the Saudi-Led Intervention in Yemen: Consensual Intervention in Cases of Contested Authority and Fragmented States' (2018) 78 The Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV*)* 147-187.

of 'intervention by invitation' in practice combined with the adoption of two crucial UN General Assembly Declarations in 1965[14] and 1970[15] suggested that an internal conflict within a state was a matter for that state alone. It is announced in the Friendly Relations Declaration (1970), that "all peoples have the right freely to determine, without external interference, their political status." That is why 'intervention by invitation' greatly lost its 'acceptability' from the early 1970s even for 'willing' –imperialistic- states such as the UK which attested to this view 'in principle'.[16] 'Intervention by invitation' is both a breach of the principle of non-intervention and self-determination.[17]

The third pretext used by the same actors has been to link the targets of military aggression –Houthis of Yemen and Hamas in Gaza- with terrorism, blame them for endangering regional peace and security, or portray them simply as a 'proxy' of a 'hostile' foreign power (Iran). Indeed, this is the type of argument which has been constantly used in the Yemeni context to denigrate the Houthi forces, stigmatise them as 'trouble-makers' and a 'proxy' of Iran, and condemn them to a pariah status. In addition, the alleged presence of Al-Qaida and ISIS (Islamic State of Iraq and ash-Sham) in Yemen as two prominent terrorist organizations were also incorporated into the narrative of hegemonic international actors as supplements to other justifications. The issue of terrorist networks was also taken up by the UN Security Council in its resolutions on the Yemeni crisis. The portrayal of the Houthis as 'villains' was enough to whitewash the destruction of Yemen by the invading armies. The same recrimination of Palestinian fighters as 'terrorists' was also a common theme of the Israeli propagandists.[18]

The fourth type of distortion which has come out from the 'whitewashers' is to equalize the monstrous crimes of international humanitarian law committed by the military aggressors -Israel and the Saudi-led multinational military forces- with the far less severe crimes committed by the other party. In the case of the Gaza tragedy, this truly shameless posture has been at work since the beginning of the ruthless military assault on Gaza by tirelessly drawing attention to the mostly fabricated crimes allegedly committed by the Palestinian armed groups during the Operation Al-Aqsa Flood at which time 1200 Israelis were killed: Israelis and their supporters have alleged that, during the Operation Al Aqsa Flood, many

[14] UNGA Res 2131 (XX), 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty' (21 December 1965) UN Doc. A/RES/2131(XX).

[15] UNGA Res 2625(XXV), 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the UN' (24 October 1970) UN Doc. A/RES/2625(XXV).

[16] David Harris, *Cases and Materials on International Law* (3rd edn, Sweet & Maxwell 1983) 651.

[17] Ruys and Ferro (n 11) 87.

[18] On this see, for instance, Bret Stephens, 'Hamas Bears the Blame for Every Death in This War' (*The New York Times*, 15 October 2023) <https://www.nytimes.com/2023/10/15/opinion/columnists/hamas-war-israel-gaza.html>; Ahmad Ibsais, 'Palestinians are being dehumanised to justify occupation and genocide' (*Aljazeera,* 20 August 2024) <https://www.aljazeera.com/opinions/2024/8/20/palestinians-are-being-dehumanised-to-justify-occupation-and-genocide>; Michael Knights, 'The Houthi War Machine: From Guerrilla War to State Capture' (2018) 11(8) CTCSentinel <https://ctc.westpoint.edu/houthi-war-machine-guerrilla-war-state-capture/>; Reuters, 'U.S. says Yemen's Houthis bear "major responsibility" in conflict' (14 June 2021) <https://www.reuters.com/world/middle-east/us-says-yemens-houthis-bear-major-responsibility-conflict-2021-06-04/> accessed 7 January 2025.

'civilians' had been killed and most of the hostages had been innocent civilians. In the Yemeni case, the 'whitewashers' have been highlighting instances of atrocious behaviour by the Houthi forces[19] during the conduct of hostilities as though they are equal in gravity to those committed by the intervening states. The truth of the matter is that the Saudi-led coalition have for years imposed full military blockade in Yemeni shores, airspace and borders leading to the mass killings of thousands of people due to starvation and absence of treatment, in addition to the collective killings of innocent civilians in the course of indiscriminate bombing campaigns. In the language of international law, these strategies and actions constitute war crimes, crimes against humanity and extremely grave human rights abuses. This type of distortion is premised on equalizing the victim and victimiser both from the viewpoint of international law and international morality by pointing to the breaches of international humanitarian law simply because both sides have been engaged in some form of war crimes and violations of international humanitarian law.

Fifth, both in the Yemeni and Gaza cases, the unceasing black propaganda against the Houthis and Hamas served well to conceal the disastrous human tragedies caused by the military aggressions and the targeting of civilians which eventually victimised the entire population in Yemen and Gaza (and the West Bank). In the case of Yemen, the Houthis were demonized by the pro-Western and pro-Coalition propagandists to the extent that they managed to create a climate which, for a long time, sought to conceal the hard truth about war crimes and crimes against humanity. The massive human suffering in Yemen was, thus, mostly fell on deaf ears. The West kept on thrusting the barrage of accusations on the Houthis as the 'devil incarnate' to the extent that every act of war crime or death by starvation became almost 'irrelevant'. The same rhetorical manipulation was evident in Gaza where, according to the mainstream Western narrative and political dictation, Hamas was for all to blame as the 'felon'. The huge death and destruction which befell on the Gazans could thus be rendered similarly 'invisible' because Hamas was to blame for every evil deed in this 'war'. This was a strategy of psychological manipulation which, by incessantly repeating the mantra of Hamas as the 'bad guy', was designed to depict the Israeli assault on Gaza as the inevitable response of a *responsible state* that cared for the security of its people. After all, weren't the Israelis claiming that they were mainly targeting the 'Hamas terrorists' and not the ordinary people?[20]

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[19] Not unexpectedly, there is proof to indicate the existence of some serious breaches of the law of armed conflict by Houthi forces too. See, for instance, a recent report by Human Rights Watch, entitled "Yemen: Events of 2023", on the abuses of international humanitarian law by the warring parties, including those committed by the Houthi forces, https://www.hrw.org/world-report/2024/country-chapters/yemen#cc98ff. Instances of abuse include, *inter alia,* arbitrary arrests and the prevention of the delivery of humanitarian aid to groups deemed hostile to the Houthis. Similarly, a report by Amnesty International which was made public in 2020 also put some blame on the Houthis in so far as the war crimes in Yemen were concerned: Amnesty International, 'Yemen War: No End in Sight' (24 March 2020) <https://www.amnesty.org/en/latest/news/2015/09/yemen-the-forgotten-war/> accessed 7 January 2025.

[20] Although of course those who perished under the rubbles in Gaza were overwhelmingly civilians.

3.3. A REVIEW OF THE UN SECURITY COUNCIL RESOLUTIONS ON THE YEMENI CRISIS AND THE DECEPTIVE NARRATIVE SURROUNDING THEM

Roughly a year before the Saudi-led military intervention, the UN Security Council Resolution No. 2140[21], adopted in February 2014, had established a Sanctions Committee to oversee the insertion of an assets freeze and travel ban on selected individuals and entities that were allegedly threatening security, peace, and stability in Yemen. It was later followed by the UN Security Council Resolution No. 2216[22] which was adopted on 14 April 2015 soon *after* the Saudi-led operation had already been launched. While the resolution did not in any way condemn the armed assault against Yemen, it asked the Houthis to end violence and "withdraw their forces from all areas they have seized, including the capital Sana'a". It urged all the political/military factions in the country to engage constructively for peace and conciliation. The said resolution also imposed an arms embargo on the Houthis. However, there was nothing in the Resolution No. 2216 which could be interpreted as a mandate to launch military intervention in Yemen. This is not at all surprising given that none of the Coalition states were victims of an 'armed attack' by the Houthi forces and therefore could not possibly invoke the right of individual or collective self-defence against (Houthi-controlled) Yemen. One could easily predict that neither Russia nor China could have possibly been persuaded not to veto a resolution which would have directly approved military intervention against Yemen.

On the other hand, the conflict in Yemen was an 'internal' one and could thus be properly described as an instance of 'power struggle' within Yemen. This meant that it was unthinkable to depict the seizure of power by Houthis as 'military aggression' against Yemen. Besides, when Hadi sent an invitation to a host of surrounding states to embark on a military intervention, he was no longer the president.[23] On the other hand, even if one assumed that Iran had been providing Houthis with arms, ammunition and logistics, this would not have been counted as an 'armed attack' by Iran against Yemen.

Resolution 2451[24], adopted on December 2018, expressed its support for the agreements among the political groups in Yemen in order to reach an accommodation. Resolution 2452[25], adopted on January 2019, formed a UN Mission to back up the Hodeidah Agreeement. Resolution 2456[26], adopted on February 2019, renewed financial sanctions and travel ban on selected targets in Yemen, while endorsing the persistence of the arms embargo. Resolution 2624[27], passed in February 2022, renewed the arms embargo which had been imposed on Yemen; besides, it labelled the Houthis as a 'terrorist group'.

[21] UNSC Res. 2140 (26 February 2014) UN Doc. S/RES/2140.

[22] UNSC Res. 2216 (14 April 2015) UN Doc. S/RES/2216.

[23] These issues are also raised by Ruys and Ferro, see Ruys and Ferro (n 11) 72.

[24] UNSC Res. 2451 (21 December 2018) UN Doc. S/RES/2451.

[25] UNSC Res. 2452 (16 January 2019) UN Doc. S/RES/2452.

[26] UNSC Res. 2456 (26 February 2019) UN Doc. S/RES/2456.

[27] UNSC Res. 2624 (28 February 2022) UN Doc. S/RES/2624.

When the pertinent resolutions are held to a critical scrutiny, it becomes clear that two common threads that bind them are their reticence about blaming the Coalition Forces for the outbreak of the Yemeni crisis and their assertiveness about blaming and punishing the Houthis.

3.4. A REVIEW OF UN SECURITY COUNCIL RESOLUTIONS ON THE GENOCIDAL ISRAELI ASSAULT ON GAZA AND THE DECEPTIVE NARRATIVE SURROUNDING THEM

In the case of the all-out assault on Gaza and the genocide, the UN Security Council remained tight-lipped for a very long time. Then, it adopted resolutions on the delivery of humanitarian assistance, subsequently called for a "humanitarian pause", and finally put its weight behind a partial –and not a permanent- ceasefire. Throughout the Gaza crisis, almost all of the Council resolutions, such as Resolution 2712, dealing with this tragedy, were unyielding about incriminating Hamas as much as Israel.[28] The only resolution which spoke of "an immediate, full, and complete ceasefire", was adopted on 10 June 2024, which meant that the Council, under enormous pressure from the US and some of its allies, had refused to push for a ceasefire until after the passage of eight months. However, even this resolution failed to demand an immediate and "full withdrawal of Israeli forces from Gaza".[29]

3.4.1. The Genocidal Israeli Assault on Gaza

The now all too familiar cliché that stemmed from Western capitals to condemn the Palestinian resistance forces as 'terrorists' was used immediately following the Operation Al-Aqsa Flood on 7th of October 2023. The truth in fact was that this was a military offensive by armed resistance groups based in Gaza directed at a number of enemy targets in southern Israel. However, the hegemonic powers and the media immediately depicted the operation as a 'monstrous' and an 'inhuman' 'terror attack'. They felt no need to present the broader historical context of the Palestinian problem and existing strictures that almost condemned the Palestinians living in the occupied territories to a wretched existence. In this dominant narrative, Israel ought to be 'tolerated' even if this meant the destruction of Gaza and the mass killing of its inhabitants because Israel had the right to defend itself. This is by now a familiar story which was similarly fabricated to condemn armed resistances to military occupations in other Muslim geographies. For instance, the patriots who fought against foreign occupation in Afghanistan (initially joint US-British occupation; 2001-2021), Iraq (initially joint US-British occupation; 2003-2011), and Somali (Western-backed Ethiopian occupation: 2006-2009) were likewise branded by the same as 'terrorists', and the unspeakable crimes committed against them and their sympathisers, accordingly, fell on deaf ears.

The 7th of October military operation by armed Palestinians against a powerful army,

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[28] UNSC Res. 2712 (15 November 2023) UN Doc. S/RES/2712. The Resolution expressly "*calls for the immediate and unconditional release of all hostages held by Hamas and other groups*" and "*calls on all parties to refrain from depriving the civilian population in the Gaza Strip of basic services and humanitarian assistance*".

[29] UNSC Res. 2735 (10 June 2024) UN Doc. S/RES/2735.

which took the whole word by surprise, was a last-ditch attempt by Palestinians before the *Palestinian problem* was forever forgotten and removed from the agenda of the international diplomacy. At the time, normalization process between Israel and some Arab states, including an impending normalization with Saudi Arabia, was in full swing. Netanyahu had even bragged before the UN General Assembly about Israel's territorial consolidation of the entire Palestine without any strip of land being apportioned for Palestinians. The military offensive resulted in the killing of about 1200 Israelis and the seizure of some Israeli military premises, police headquarters and settlements. Israel's damning counter-offensive came later during the day. Since October 7th when the Zionist genocidal assault on Gaza began, at least 50 thousand Palestinians have been killed and more than 105 thousand of them have been wounded (as of November 2024). Israeli army encircled Gaza from land, air and sea and for months have deliberately targeted civilian settlements and civilians. Hence, the bombing of hospitals, refugee camps, UN compounds, schools, and mosques, along with the intentional killings of journalists, doctors, health and aid workers became a routine occurrence. Two thirds of those who have been killed in Gaza have been women and children. Through a further tightening of existing blockade against the inhabitants of Gaza, the killing spree has been escorted by lack of water, food, medicine and electricity in Gaza. Furthermore, Gaza has now been largely destroyed and rendered unliveable. The ruthlessness of the genocidal war in Gaza has already taken its place in the annals of collective evil deeds in human history. As noted by Moses, "*Israel's campaign is now recognised as having generated civilian deaths at a rate higher than any other war of the twenty-first century.*"[30] Western powers and the subservient media continued to remain silent for weeks despite the untold sufferings meted out on the people of Gaza as a result of Israel's all-out assault on Gaza and its genocidal targeting of civilians.

The West, as a collective power-bloc has up until now maintained its cold-blooded stance by refusing to pressurize Israel into agreeing to a ceasefire and to withdraw its forces from Gaza. At legal level, the West takes comfort in arguing that Israel maintains its right to defend itself against Palestinian 'terrorists'. The West's lack of moral and legal concerns is also linked to its strong identification with the Zionist entity whose main *raison d'être* is to abort the possibility of an Arab (in a broader context, Islamic) emancipation from the imperialist yoke and the unity among Arab nations.[31] Furthermore, politically speaking, Israel, as a neo-colonial apartheid state, is a contemporary heir to Western colonialism. Alongside providing military and political support to Israel, the shameful silence of the USA, most of Europe and a few others associating themselves with the West, in the face of Zionist atrocities is also related to the depth of the Zionist influence over the financial, political, military,

[30] Jeremy Moses, 'Gaza and the Political and Moral Failure of the Responsibility to Protect' (2024) 18 Journal of Intervention and Statebuilding 211.

[31] On Israel as an asset for Western imperialism, see A. W. Kayyali, *Zionism, Imperialism, And Racism* (Croom Helm 1979); Richard Becker, *Palestine, Israel and the U.S. Empire* (PSL Publications 2013); Hyman Lumer, 'Zionism in the service of imperialism' (*People's World*, 7 November 2023) <https://www.peoplesworld.org/article/zionism-in-the-service-of-imperialism/> accessed 7 January 2025.

cultural and intellectual setup of the West.[32] The presidents and prime ministers of major Western countries have acted pliantly during the whole course of this crisis and repeatedly expressed their adherence to the 'cause' of 'protecting' Israel against its 'enemies'.[33] Finally, Western power-bloc also tries to cleanse its conscience by the implicit presumption that Palestinians deserve this genocide because they have refused to fight against Hamas and have overwhelmingly stood behind the Palestinian 'terrorists'.

Even if, for a second, we leave aside the moral obnoxiousness of the humanitarian consequences of the genocidal assault on Gaza, international law tells us a story that is completely different from the one which the West and the dominant media outlets have been telling. This dominant perception fully ignores the fact that Gaza had been under Israeli military occupation since 1967, which was not only 'illegal' under international law, but was an act of 'international crime' that had been incessantly perpetrated by Israel since it doggedly refused to withdraw from Gaza (and the West Bank) in spite of the UN Security Council resolutions (e.g. Resolution 242[34] of 1967) and was a breach of *jus cogens* norms of international law which form the helm of the pyramid of international legal rules.

We ought to bear in mind that, under international law, territorial gain by force is no longer permissible. This is a rule which has been firmly established at least since the adoption of the Charter of the UN in 1945. The ban on the use of force as enshrined in Article 2(4) of the UN Charter inherently implied the outlawing of the grabbing of territory by brute force which has also been a well-established norm of customary international law. This prohibition was later reaffirmed by two UN General Assembly resolutions, adopted by consensus, respectively in 1970 and 1974.[35] Both the Friendly Relations Declaration and the Resolution on the Definition of Aggression ruled out the seizure of territory by military aggression. This explains why the surprise military offensive launched by armed groups based in Gaza against Israeli targets could not possibly be defined as an 'armed attack' or a 'terrorist attack'. This is another way of saying that, since Gaza[36], alongside the West Bank

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[32] On this, see John J. Mearsheimer and Stephen M. Walt, *The Israel Lobby and US Foreign Policy* (Penguin Book, 2007); Ramzy Baroud, 'The uneven alliance: How America became pro-Israel' (*Aljazeera,* 9 March 2017), < https://www.aljazeera.com/features/2017/3/9/the-uneven-alliance-how-america-became-pro-israel> ; Gregory Mauze, 'Israeli Networks of Influence in Brussels: Behind the Scenes' (*OrientXXI,* 31 January 2019) <https://orientxxi.info/magazine/israeli-networks-of-influence-in-brussels-behind-the-scenes,2886> accessed 7 January 2025.

[33] Donald Earl Collins, 'Western narcissism and support for genocidal Israel go hand in hand' (*Aljazeera*, 11 January 2024) <https://www.aljazeera.com/opinions/2024/2/11/western-narcissism-and-support-for-genocidal-israel-go-hand-in-hand> ; Owen Jones, 'What atrocity would Israel have to commit for our leaders to break their silence?' (*The Guardian*, 3 October 2024) <https://www.theguardian.com/commentisfree/2024/oct/03/slaughter-gaza-women-children-israel-7-october>; Tuğba Altun, 'West continues to support Israel despite rising deaths in Gaza genocide' (*Anadolu Agency,* 5 October 2024) <https://www.aa.com.tr/en/europe/west-continues-to-support-israel-despite-rising-deaths-in-gaza-genocide/3352042> accessed 7 January 2025.

[34] UNSC Res. 242 (22 November 1967) UN Doc. S/RES/242. The resolution asked for the "withdrawal of Israel armed forces, from territories occupied in the recent conflict."

[35] UNGA Res 2625(XXV) (n 14) ; UNGA Res 3314(XXIX), 'Definition of Aggression' (December 14, 1974) UN Doc. A/RES/3314(XXIX).

[36] Gaza has been under the *de facto* Israeli occupation since 2005 when the Zionist state officially announced its withdrawal from the area.

and East Jerusalem, has been under Israeli military occupation since 1967, Palestinians in Gaza were legally qualified to exercise the right of self-defence if Palestine is considered a 'state'. If Palestine is not considered as a 'state', then, the right of Palestinian becomes a matter of resistance against a foreign occupier- Israel. This is also related to the right of a people to enjoy its right of self-determination. As asserted by Aral,

> *The right of a people to liberate their homeland/country through armed resistance against alien occupation is as natural a right as a human's right to live. In contrast, an occupying power has no right of self-defense against those who are under military occupation.*[37]

Both the international law of treaties and customary international law confer on the victims of armed attack (including military occupation) the right of self-defence. Therefore, Operation Al-Aqsa Flood, far from being a terrorist attack and a crime against humanity, was a legal and legitimate act of self-defence against a ruthless occupier which had, to the shame of international institutions like the UN, turned Gaza into an open-air prison since 2007 by imposing an all-out military blockade on Gaza and full embargo on the inhabitants of Gaza.

The mainstream politics and media in the West, the latter of which holds the ability to exert overwhelming influence and thus shape or at least influence public perceptions in many non-Western societies, have, all along the Gaza tragedy, deliberately ignored the historical context and the surrounding international conditions that led to the Al-Aqsa Flood. Among the goals of the military operation against Israel was the desire to reverse the tide of normalization between a variety of Arab states and Israel which, if went unabated, would strike a deadly blow to the Palestinian aspirations for self-determination and freedom from occupation, enslavement and grave human rights abuses. The great bulk of Western governments chose to ignore all this.

Overall, the prevalent Western representation of the Gaza tragedy has been to reduce the whole gamut of Israeli crimes, wilful killings of Palestinians, unrelenting bombardment, excessive uses of banned weapons, wide scale rapes and other sexual crimes, the targeting of hospitals, schools and residential areas, torture and ill treatment of Palestinians, simply to a 'war' between 'Israel and Hamas'. Nothing could be further than truth. This is in fact a war of annihilation which Israel waged against the whole of Palestinians already under its military occupation. If this were not the case, then, the Zionist state would not have overwhelmingly targeted the civilians and civilian settlements in Gaza, and it would not have reoccupied, killed and taken thousands of Palestinians as prisoners in the West Bank where, since October the 7th, around 800 people (as of November 2024) have been killed. Besides, if this were to be simply a confrontation between Israel and Hamas, then, the overwhelming majority of Palestinians would have opposed the Al-Aqsa Flood operation as 'needless' and would have blamed Hamas for the unprecedented suffering which they have endured in Gaza and less intensely in the West Bank for the last ten months. In fact, the opposite is

[37] Berdal Aral, 'Israel's Fateful March: From Settler Colonialism to Genocidal State' (Fall 2023) 25 Insight Turkey 181, 184-185.

true, given the rapidly escalating mass support for Hamas among Palestinians, not only in Gaza, but also in the West Bank, both as a military and political force, since it dared to stand against the ruthless Zionist enemy.

Another perverseness of the dominant discourse is its failure to advocate effective international measures against Israel. Generally deterred from more robust resolutions by the combined impact of the three unwilling permanent members from the West, USA, UK and France, all that the UN Security Council has done since the onset of the hostilities only after the devastating consequences of the Gaza genocide created international furore, has been to call for a ceasefire without however forcing Israel to withdraw from Gaza.

3.4.2. The Perversity of UN Security Council Resolutions in the Genocidal War (2023-2024) against the People of Gaza

Throughout the Gaza crisis, the miniscule number of Council resolutions which were adopted on the subject of Israel's genocidal assault on Gaza *failed to put any accusation directly on Israel.* Instead, the pertinent resolutions were worded in passive form to avoid an incrimination of the Zionist aggressor and thus resigned themselves solely to the mentioning of specific problems that needed some form of solution or at least alleviation of humanitarian misery. The one-sided prejudice of such resolutions was striking given that they were holding both sides –Israel and Palestinians- equally accountable for the crimes which transpired throughout the genocidal war in Gaza. Almost all of these limited number of resolutions spoke of "all parties" when demanding that a particular obligation ought to be respected in regard to the laws of war and/or to the relieving of vast human suffering. Although any sensible person would know that Israel was waging a war of annihilation against the people of Gaza whereas the Palestinian resistance was a 'defensive' force that was waging a war of national liberation against the Israeli army of occupation, this was largely cleared away from the predominant Western discourse.

One glaring example could suffice: In Resolution 2712[38], the operative paragraphs begin in Article 1 with the following statement: "Demands that all parties comply with their obligations under international law, including international humanitarian law, notably with regard to the protection of civilians." This same resolution also calls for "the immediate and unconditional release of all hostages held by Hamas and other groups" (Article 3) and calls on "all parties to refrain from depriving the civilian population in the Gaza Strip of basic services and humanitarian assistance". (Article 4) These statements are neither morally nor legally acceptable, as they fully ignore the power imbalance between Palestinians and Israel, while seeking to draw parallels and parity between the genocidal assault of Israel on the Palestinian people and the seizure of Israeli hostages by Palestinian armed groups. The said article almost consecrates the lives of a few hundred Jews as hostages and appears quite dismissive about the mass killings of thousands of Palestinians under the most excruciating circumstances. This is a testimony to the Council's pro-Israeli partisanship that has all along endeavoured to treat the 'victim' as 'victimiser'.

[38] UNSC Res. 2712 (n 26)

Resolution 2720[39] of 22 December 2023 was almost a replica of the previous Security Council Resolution 2712. It expressed frustration with the failure of reducing humanitarian suffering in Gaza and failure in the delivery of humanitarian assistance. The resolution is far from blaming Israel for its international crimes. In the resolution, there is no call for a ceasefire and the withdrawal of occupation troops from Gaza. The resolution, as others, considers both parties as being equally responsible in diffusing the crisis. For instance, Article 2 "reiterates its demand that all parties to the conflict comply with their obligations under international law, including international humanitarian law", whereas in Article 9, the Security Council] "calls for all parties to adhere to international humanitarian law and in this regard deplores all attacks against civilians and civilian objects, as well as all violence and hostilities against civilians, and all acts of terrorism". Article 7 is similarly bewildering on account of its hypocrisy and double standards, because it "demands the immediate and unconditional release of all hostages, as well as ensuring humanitarian access to address medical needs of all hostages", considering that there is no mention of thousands of Palestinians kidnapped by Israeli security forces in the West Bank and arbitrarily put to prison under the most egregious conditions. Article 12 of Resolution 2720 is precisely intended to get rid of Hamas as the most potent political and military actor that has put up armed resistance against the occupation forces, because it intends to leave the whole Palestinian political scene to the monopoly of the Palestinian Authority, led by Mahmoud Abbas. It says, it "stresses the importance of unifying the Gaza Strip with the West Bank under the Palestinian Authority."

The Palestinian Authority is known to have almost entirely lost its popular appeal, prestige and credibility due to widespread corruption with which it has been entangled, its failure to stand against Israeli military occupation and its collaboration with the Zionist security apparatus in order, so to speak, quash 'terrorism'. This also suggests that major international actors that have a seat in the Security Council have no qualms about interfering in Palestinian domestic politics in favour of a particular faction –those embodying mainly a secular and pliant posture- and are –more or less- united in their longing for a largely emasculated Hamas because it espouses military resistance against the Zionist enemy, refuses to recognize Israel and the Oslo 'peace process', *and* grounds itself in an Islamic worldview.

Resolution 2728[40] of 25 March 2024 was also an expression of the pro-Israeli bias of the Security Council. While in the preamble, it condemns "attacks against civilians and civilian objects" which implicates Israel more than the Palestinian side, as if to counterbalance it, the same paragraph also deplores "all acts of terrorism", most probably as a reference to Hamas, although the Palestinian armed groups had been waging a war against the forces of occupation and therefore had been far from engaging in terrorism. Although Resolution 2728 expressed the Council's "deep concern about the catastrophic humanitarian situation in the Gaza Strip", it failed to demonstrate any tangible signs of change vis-à-vis its posture in the Gaza crisis which had turned Gaza into a graveyard. While the unbearable conditions in

39 UNSC Res. 2720 (22 December 2023) UN Doc. S/RES/2720.

40 UNSC Res. 2728 (25 March 2024) UN Doc. S/RES/2728.

Gaza and international pressure prompted the Council to demand "an immediate ceasefire for the month of Ramadan respected by all parties leading to a lasting sustainable ceasefire", it failed to bolster its decision with possible coercive measures in case Israel failed to act upon it. Besides, the following one-sided injunction which was unjustly dictated on the Palestinian side cropped up in this resolution too: It said, the Security Council "demands the immediate and unconditional release of all hostages", which was still not reciprocated by a parallel call on Israel to release thousands of Palestinian 'hostages' or 'captives' arbitrarily arrested in the West Bank by Israeli security forces after 7 October (2023). Not unpredictably, Israel acted in total disregard of this resolution and continued its genocidal assault in Gaza.

The only Security Council resolution which, at least, on paper, spoke of "an immediate, full, and complete ceasefire", but not a permanent ceasefire ("three-phase ceasefire"), was adopted on 10 June 2024, after the passage of more than eight months during which time untold sufferings had already been meted out on the Palestinians in Gaza. Yet, even this resolution, Resolution 2735, was far from demanding a complete withdrawal of the Israeli troops from Gaza.[41] It was indeed worded deceptively because it said that the Security Council "welcomes the new ceasefire proposal announced on May 31, which Israel accepted, calls upon Hamas to also accept it." In fact, the opposite was true: Hamas accepted the peace proposal, while Israel refused it. Like previous resolutions on the Gaza catastrophe, this resolution also refused to make reference to Chapter VII of the UN Charter, dealing with "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression" in order to avoid undertaking any forceful action against the Zionist aggressor if it did not comply with the Security Council resolutions.

The persistence of most of the Western states to treat Israel as a 'normal state' even after Israel's horrific assault on Gaza is truly shocking. Secure in the knowledge that the West was fully behind it, the International Olympic Committee desisted from banning Israel's participation to the 2024 Paris Olympic Games. Israel also been saved from facing a possible exclusion from joining the Eurovision Song Contest which was held in May 2024. This is in sheer contrast with the treatment meted out at South Africa during the Apartheid era when it faced military and economic sanctions escorted by academic, cultural, and sporting boycott of its citizens, which were mainly, although not exclusively, driven by the UN. While the Nazis in Germany were branded as *hostis humani generis* because of their military aggression, horrific crimes, cruelty, utter disregard for international law and morality, genocidal killings of various peoples, no such designation has been made for Israel although its pattern of behaviour based on sheer greed, wickedness, hostile intent against others, systematic racism, war crimes of all sorts, crimes against humanity, and crimes against peace and its perpetration of genocide, military aggression and territory grabbing has already paralleled, if not surpassed, the Nazi Germany's practices. Most of the political leaders in the West were perfectly happy about meeting the Prime Minister and members of the Israeli cabinet at least until the arrest warrant issued against Benjamin Netanyahu and Yoah Gallant by the

41 UNSC Res. 2735 (n 27)

International Criminal Court in November 2024. Even today they continue to view Israel as a 'state' like others while turning a blind eye to its abnormal origins, perpetual military aggressions, its colonial-settler character, its being an apartheid state and its endless chain of other grave crimes.

4. COMPARING THE UN AND WESTERN ATTITUDES IN THE THREE LATEST CASES OF AGGRESSION: WARS IN YEMEN, UKRAINE, AND GAZA

Following the Russian military occupation of Ukraine in 2022, members of NATO were quick to condemn this armed attack, which was immediately followed by Western sanctions against Russia. They immediately demanded that Russia should withdraw from the occupied territories.[42] In addition to all that, the West has armed Ukraine with a broad range of sophisticated weapons. By contrast, members of NATO not only failed to condemn Israel's genocidal assault on Gaza in October 2023, but mostly condoned Israeli aggression and brutality by, *inter alia*, sticking to the pretext which one found in the catchphrase, "Israel has the right to defend itself". The West even went further by supplying the Israeli war machine with diverse range of weapons.[43] In order to justify the siege of Gaza and the ruthless killing of Palestinians by Israeli forces, Western governments and media immediately began dehumanising ordinary Palestinians, including children.[44] This contrasting attitude in two similar cases is an instance of Western hypocrisy and double standards of *epic proportions.*

Indeed, the Western hypocrisy, conventionally found expression in the unprincipled posture of the Western group in the UN Security Council often determined by realpolitik calculations, has become ever more conspicuous in the Gaza tragedy. While immediately after the onset of the Russian military aggression against Ukraine in 2022, Western governments denounced the 'illegality' of this action, by contrast, the same group of states mostly failed to 'remember' the legal rules of the game when Israel launched its barbaric attack on Gaza in 2023. As a result, most of those upholding liberal ideas in the Global South have been profoundly disappointed about the liberal project and other rules of the game, including the norms of international law.[45] The West's lack of sincerity in the proper implementation of international law and human rights is aptly noted by Cafiero:

> *People of the Global South have long understood the West to be hypocritical on human rights issues and never consistent in calls for applying international law. But*

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[42] On the international legal aspects of the war in Ukraine, see 'War in Ukraine and International Law' (April 2024) 26 (Special Issue) International Community Law Review. However, the West was not able to deploy the UN Security Council against the Russian aggressor simply because the latter was a permanent member of this body with the accompanying right of veto.

[43] Lindsay German, 'The hypocrisy of the West is exposed' (*Counterfire*, 23 November 2023) <https://www.counterfire.org/article/the-hypocrisy-of-the-west-is-exposed/> accessed 27 November 2024

[44] Chelsea Ngoc Minh Nguyen, 'Gaza vs Ukraine: A double standard that has broken the world order' (*OpenDemocracy*, 10 June 2024) <https://www.opendemocracy.net/en/gaza-ukraine-hypocrisy-geopolitics/> accessed 27 November 2024

[45] ibid.

> *never before has such hypocrisy been as in-your-face as it is amid the current horrors out of Gaza.*[46]

This hypocrisy has also extended to the Western indifference to, and even encouragement of, the illegal military intervention of Yemen by a coalition of Arab states led by Saudi Arabia in 2015. Leading Western states such as US, Britain, and France have not only turned a blind eye to this legally indefensible military intervention in the Yemeni soil and the atrocities which the invading armies committed, including the condemnation of civilians to starvation as a war strategy, but also provided the aggressors with arms and intelligence, in addition to giving them logistical support.[47] Disappointingly, US President Donald Trump used five vetoes after taking office in January 2017, "four of which were related to halting arms sales where either Saudi Arabia or the United Arab Emirates (UAE) were included in the resolutions."[48]

The 2020 report of the UN Group of Eminent International and Regional Experts on Yemen called on the UN Security Council to authorize military action ('military enforcement action', as envisioned by Article 42 of the UN Charter) in order to bring the Yemeni campaign to an end. The report also drew on the grave violations of international humanitarian law, including civilian killings, starvation, prevention of the distribution of humanitarian aid, sexual assault, and the use of child soldiers. Finally, the report also enjoined states not to sell weapons to the warring parties given that this served the prolongation of the conflict.[49]

In the light of the disastrous consequences of the Saudi-led military intervention in Yemen, the UN ought to be condemned for its failure to bring about an effective solution to this drawn out war. The chief actors within the UN Security Council ought to be blamed for their lack of a genuine commitment to peace and for their hypocrisy.[50]

The Security Council presently musters a great deal of authority which has turned it into a colossal, centralized power. In the words of Hurd,

> *Never before…has the military capacity of the most powerful states ever been collectively organized toward a single purpose and encoded in law that is binding on both*

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[46] Giorgio Cafiero, 'War on Gaza: In Munich, the Global South once again saw blatant hypocrisy of western leaders' (*Middle East Eye*, 24 February 2024) <https://www.middleeasteye.net/opinion/war-gaza-munich-global-south-saw-blatant-hypocrisy-western-leaders> accessed 27 November 2024

[47] Abdulaziz Kilani, 'Ending Western hypocrisy is the key to ending the war in Yemen' *TRTWORLD* (2019) <https://www.trtworld.com/opinion/ending-western-hypocrisy-is-the-key-to-ending-the-war-in-yemen-12729189> accessed 27 November 2024.

[48] ibid.

[49] 'UN Group of Eminent International and Regional Experts on Yemen Briefs the UN Security Council Urging an end to impunity, an expansion of sanctions, and the referral by the UN Security Council of the situation in Yemen to the International Criminal Court' (3 December 2020) Independent Investigation, UN Human Rights Office of the High Commissioner <https://www.ohchr.org/en/press-releases/2020/12/un-group-eminent-international-and-regional-experts-yemen-briefs-un-security?LangID=E&NewsID=26563> accessed 27 November 2024.

[50] Tzimas (n 13) 187.

the powerful and the rest.[51]

The composition of the Security Council and its decision-making process suggest that, for the Council to show determination in exerting its power when a major international security crisis erupts, the Great Powers of 1945, as permanent members in the Council with the accompanying veto power, ought to be in agreement among themselves. If such consensus is lacking, the system of collective security inevitably becomes dysfunctional.[52] This is the major structural defect behind the Security Council's apparent apathy and lack of determination for mandating robust action in many situations endangering international peace and security, *inter alia,* brought about by military aggression.

The Security Council's practice is a testimony to the fragility of the link between law and politics in the international arena. This is particularly due to the heavy impact of the Council's *practice* on the way the members conceive, interpret and apply the UN Charter rules about the competence and the modus operandi of the Council.[53] The leading members' concern with law and justice immediately diminishes when they reckon that their high policy interests are at stake during discussions for a draft resolution tabled before the UN Security Council. Indeed, the Security Council is an organ of the UN within which, in particular, the permanent members often deliberate on the basis of national interests. This we have witnessed in almost every major crisis which transpired after the Cold War, from wars and conflicts in the Middle East to the ones in Ukraine and Kosovo.[54]

This is an indication that international law and dominant international institutions are still marked by the damning influence of colonialism and the colonial heritage.[55] The power asymmetries that privilege the West against the 'developing world', manipulative use of international law by hegemonic powers, imperial assaults against a host of states and non-state actors in the South by leading Western actors, and the 'predatory' globalization[56] that benefits mostly the main centres of global capitalism, are all testimonies to the colonial roots of international law, the endurance of imperialism, and the inequity of the existing international order. Orientalist clichés and endemic racism against 'non-whites' are still among the markers of the hegemonic international order and the dominant international discourse that sustains it.

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51 Ian Hurd, 'The UN Security Council and the International Rule of Law' (2014) The Chinese Journal of International Politics 2.

52 ibid 6.

53 ibid 16.

54 Sebastian von Einsiedel David M. Malone and Bruno Stagno Ugarte, 'Introduction' Sebastian von Einsiedel, David M. Malone and Bruno Stagno Ugarte (eds.), *The UN Security Council in the Twenty-First Century* (Lynne Rienner Publishers 2016) 16.

55 On the relevance of colonialism for international law, see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge University Press 2002); Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2004).

56 A term coined by Richard Falk to draw on the unfairness and the top-down organizing structure of globalization in our age. See Richard Falk, *Predatory Globalization: A Critique* (Polity Press, 1999).

5. CONCLUSION

Throughout the crises in Yemen and Gaza, the international order and the prevailing international media have rarely made recourse to international law, justice, morality or peace. The dominant media have chosen to act as propagandists of imperialistic power centres whose view of international legal rules, their interpretation and implementation in concrete circumstances on the use of force, international peace and security, collective security system, international humanitarian law, principle of sovereignty, or self-determination is largely influenced by Western concerns about the dictates of international political economy, national self-interests and long term geopolitical strategies in the non-Western world. In Yemen, the Houthis were demonized by the pro-Western and pro-Coalition propagandists to the extent that the latter managed to create a climate which, for a long time, sought to conceal the mass killings of innocent people by indiscriminate bombardment of the Coalition Forces and the deadly blockade of Yemen by the same, both of which victimised almost the entire population. Western body-politics kept on thrusting the barrage of accusations on the 'Houthis' as the 'devil incarnate' to the extent that the serious violations of the law of armed conflict (*jus in bello*), including the targeting of civilian settlements and civilians as well as death by starvation or by curable diseases like cholera due to the deprivations caused by the international blockade, were rendered either easier to stomach or simply 'invisible'.

The latest episode in the long chain of the Palestinian ordeal has *a fortiori* proven yet again that Israel, Israelis and the Zionists have been able to muster enormous economic, political and media power globally. This means that they have become an inseparable and indispensable part of the imperialist hegemony which has largely imposed its will, first and foremost, in the Arab and Muslim world. Despite its genocidal policies and the ruthlessness of its military occupations, Israel still maintains its status as the 'sacred cow' of this 'predatory' and 'unjust' globalized international order. The Gaza genocide case which has been watched live by the whole world since October 2023, has been a tragic testimony to the bitter truth that there is 'nothing new on the Western front'.

This is another way of saying, then, that Muslim lives do not matter for the overlords of the existing unfair and grossly unequal international order. In this distorted and hypocritical system, any Western actors or a non-Western actor with Western credentials could afford to commit ethnic cleansing, engage in military interventions and occupy the territory of a Muslim country or non-state actor should it be considered as 'hostile' or 'unruly', commit all sorts of war crimes, and crimes against humanity on a massive scale with impunity if the blood that is spilled belongs to Muslims whatever their ethnic or cultural origins. On critical issues, like the use of force, this international order is premised on a perverse interpretation of international legal norms, a still Western-centric view of politics, society, human rights and law, and the manipulative use of the UN Security Council. As such, this order stifles the aspirations of the Global South and more specifically the Muslim world for justice and peace.

Israel being a major bastion of imperialist aggression, there exists an intricate liaison

between the Zionist state, Zionist lobbies world over, political power centres in the West, global capitalism, and the mainstream media. The morally bankrupt posture which the most powerful members of the Western world have adopted during the war of annihilation in Gaza and the prevalent Western insinuation that 'humans' that are worthy of support and protection in times of 'humanitarian crisis' like wars, genocide and ethnic cleansing are only the 'white' people that belong to Western civilisation, are indicative of the moral baseness and the rapidly declining legitimacy of the existing international order. This rationale also explains why the West collectively stood behind Ukraine militarily and politically following the invasion of its territory by Russia and gave *en masse* refuge to the fleeing Ukrainians who found solace in various European countries. This also explains, why, Israel, unlike Russia (and Byelorussia for siding with Russia), has not been banned from joining the 2024 Olympic Games, a symbolic but very powerful symptom of the malaise that infects the international order which is conspicuous with its lack of genuine commitment to peace and justice, its hypocrisy and double standards.

The sovereignty of the Third World states has accordingly been put at risk, *inter alia,* on account of the frequently arbitrary uses of force by Western powers, their allies and associates like Israel, Ethiopia, and Saudi Arabia. Instances of military occupation and illegal military intervention by a host of 'privileged' actors with apparent impunity, have been variably justified by either vilifying one of the parties in an internal power struggle or by disregarding the right of a people to self-determination or by alleging that a particular regime has been involved in serious human rights violations, or simply, as too frequently done since the end of the Cold War, by claiming to fight against (mostly international) 'terrorism'.

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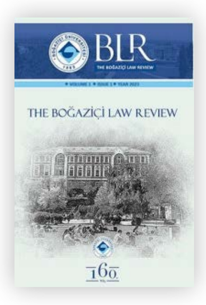

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Telif Haklarının Milletlerarası Hukukî Himâyesinin Temel Prensipleri

Basic Principles of International Legal Protection of Copyrights

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TELİF HAKLARININ MİLLETLERARASI HUKUKÎ HİMÂYESİNİN TEMEL PRENSİPLERİ

BASIC PRINCIPLES OF INTERNATIONAL LEGAL PROTECTION OF COPYRIGHTS

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ÖZET

1886 tarihli Edebiyat ve Sanat Eserlerinin Korunması Hakkında Bern Sözleşmesi eser sahibinin haklarıyla ilgili ilk sözleşmedir. Roma'da 1961 yılında imzalanan sözleşme bağlantılı haklarla ilgili ilk milletlerarası hukuk metinleridir. 1994 yılında imzalanan TRIPs fikri mülkiyet haklarının tamamını içerir. 1996 yılında kabul edilen telif hakları ve icralar ve fonogramlarla ilgili WIPO İnternet Anlaşmaları ise, dijital teknolojiler ve internetin ortaya çıkardığı kolaylıklara karşı eser ve bağlantılı hak sahiplerinin telif haklarının daha etkili himâyesinin teminini amaçlar. Milletlerarası sözleşmelerin temel hedefi, taraf devletin hükümran olduğu topraklarda, o devletin vatandaşı olmayanların telif haklarının hukukî himâyesinin sağlanmasıdır. Bunun için fikrî haklar alanında asgarî standartlar koyarlar. Milletlerarası antlaşma ve sözleşmelerle yer alan prensipler sayesinde yabancı devlet vatandaşları, hakların ihlâl edildiği devletin ulusal mevzuatının o devlet vatandaşına sağladığından daha iyi ve bazen de onların da fevkinde himâyeye mazhar olabilmektedir. Bunu sağlayan prensipler "ulusal işlem", "otomatik koruma" ve "korumanın bağımsızlığı" ilkesidir. Bunlara "asgari haklar" başlığı altında bir başka prensibi de ilave temek mümkündür. Bu tebliğde özellikle Bern Konvansiyonu esas olmak üzere, Roma, TRIPs ve WIPO İnternet Antlaşmalarında tanınan telif haklarının söz konusu prensipler uyarınca himâyesi ve bu himâyenin nasıl gerçekleştiğine özetle temas edilmektedir.

Anahtar Kelimeler: telif haklarına dair milletlerarası anlaşmalar, ulusal işlem prensibi, otomatik koruma prensibi, korumanın bağımsızlığı prensibi, asgari haklar prensibi.

ABSTRACT

The Berne Convention for the Protection of Literary and Artistic Works dated 1886 is the first agreement regarding the rights of the author. The convention signed in Rome in 1961 is the first international law text regarding related rights. TRIPs, signed in 1994, includes all intellectual property rights. The WIPO Internet Agreements on copyrights and performances and phonograms, adopted in 1996, aim to ensure more effective protection of the copyrights of the owners of works and related rights against the conveniences created by digital technologies and the internet. The main goal of international agreements is to ensure strong legal protection of the copyrights of those who are not citizens of that state in the territories where the state party is sovereign. For this reason, they set minimum standards in the field of intellectual property rights. Thanks to the principles contained in international treaties and agreements, citizens of foreign states can be protected better than, and sometimes above, the protection provided by the national legislation of the state where their rights are violated. The principles that ensure this are "national treatment", "automatic protection" and "independence of protection". It is possible to add another principle to these under the title of "minimum rights". In this symposium statement, the protection of copyrights recognized in Rome Convention, TRIPs and WIPO Internet Agreements, especially the Berne Convention, in accordance with the said principles and how this protection is realized are briefly touched upon.

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Keywords: international conventions on copyright, principle of national treatment, principle of automatic protection, independence of protection, minimum rights principle.

EXTENDED SUMMARY

One of the basic features of the products that constitute the subject of intellectual property law is that they have the ability to circulate in all lands in the world, regardless of geographical and political borders between countries. Once a work of science, literature, music, art or cinema becomes public, it is not possible to prevent this work from being used in any country in the world in a short time or from benefiting from it in various ways by physical measures, or it is extremely difficult to achieve this. The same phenomenon is valid for goods and services to which other matters of intellectual property such as invention, trademark and design apply.

The fact that the application of national legal norms protecting intellectual property is limited to the territory of the state to which it belongs has caused intellectual property goods and services that have the ability to easily cross country borders to be deprived of legal protection in other countries. As a result, the developments in the transportation, distribution and circulation of goods and services, as well as production, in the West with the industrial revolution, have obliged states to make bilateral and multilateral agreements and contracts to ensure the protection of the intellectual property products of their own countries and their citizens in other countries.

In this context, the first international agreements that would serve the protection of intellectual property on a global scale began to be accepted in the last quarter of the 19th century. The first example of these in the field of industrial property is the Paris Convention, which was signed in Paris by 11 states in 1883. The Paris Convention regulates issues related to patents, utility models, designs (industrial drawings and models), factory and commercial goods, trade names, geographical indications and unfair competition. However, our subject of presentation is copyright.

The first accepted amendment to the international protection of copyrights was the Berne Convention for the Protection of Literary and Artistic Works dated 1886. The Berne Convention is about the rights of the author. The first international agreement on related rights was signed in Rome in 1961. The Trade-Related Intellectual Property Agreement (TRIPs), which was pioneered by the World Trade Organization (WTO), was adopted in 1994 to protect both industrial property and copyrights. The WIPO internet agreements, adopted in 1996, aim to provide more effective protection for the copyrights of work and related rights owners against the conveniences created by digital technologies and the internet.

The aim of international agreements is to ensure effective protection of copyrights in every country that is party to them. For this reason, they set minimum standards in the field of intellectual property rights. These protection standards are the basic principles that must be complied with in every country that is party to the agreement. In this way, rights within the scope of intellectual property law gain legal protection at a minimum level and binding standards worldwide.

Thanks to the principles contained in international treaties and agreements, citizens of foreign states can be protected better than, and sometimes above, the protection provided by the national legislation of the state where their rights are violated. The principles that ensure this are "national treatment", "automatic protection" and "independence of protection". It is possible to add another principle to these under the title of "minimum rights". In this presentation, the protection of copyrights recognized in the TRIPs and WIPO Internet Agreements, especially the Berne Convention, in accordance with the said principles and how this protection is realized are briefly touched upon.

In this context, the general framework of the aforementioned conventions and agreements and Turkey's position against this legislation are briefly mentioned, and then the nature of the principles

of national action, automatic protection, independence of protection and minimum rights, their application in member states and what kind of functions they serve are explained.

1. GİRİŞ

Fikrî mülkiyet hukukunun konusunu oluşturan ürünlerin temel özelliklerinden biri de, ülkeler arasındaki coğrafi ve siyasi sınırlara takılmaksızın dünya üzerindeki bütün topraklarda tedavül kabiliyetine sahip olmalarıdır. İlim, edebiyat, musiki, güzel sanat veya sinema alanında herhangi bir eser bir kez alenîleştiğinde, artık onun kısa süre içinde dünyanın herhangi bir ülkesinde kullanılması veya çeşitli şekillerde istifade edilmesine fiziki tedbirlerle engel olunması mümkün değildir. Bu olgu buluş, marka ve tasarım gibi fikrî mülkiyetin diğer konularının uygulandığı mal ve hizmetler bakımından da geçerlidir.

Fikrî mülkiyeti koruyan ulusal normların tatbikinin ait bulunduğu devletin topraklarıyla sınırlı olması, ülke hudutlarını kolayca aşma kabiliyetine sahip fikrî mülkiyete konu mal ve hizmetlerin başka ülkelerde hukukî himâyeden mahrum kalmasına sebep olmuştur. Bunun sonucu olarak Batıda sanayi devrimi ile birlikte üretimin yanı sıra mal ve hizmetlerin naklinde, dağıtımında ve dolaşımında kaydedilen gelişmeler, devletleri, kendi ülkeleri ve tebaalarına ait fikrî mülkiyet ürünlerinin başka ülkelerde himâyesini temine matuf iki veya çok taraflı anlaşma ve sözleşmeler yapmaya mecbur bırakmıştır. 19. yüzyılın son çeyreğinde fikrî mülkiyetin küresel çapta korunmasına hizmet edecek ilk milletlerarası sözleşmeler kabul edilmeye başlanmıştır. Bunların sınaî mülkiyet alanındaki ilk örneğini, 1883 tarihli Paris Konvansiyonu teşkil eder. Bu Sözleşme patentler, sınai resim ve modelleri, fabrika ve ticaret malları, ticaret unvanları, coğrafi işaretler ve haksız rekabete ilişkin konuları düzenler.

Telif haklarının milletlerarası himâyesi için kabul edilen ilk düzelme ise, Edebiyat ve Sanat Eserlerinin Korunması Hakkında 1886 tarihli Bern Sözleşmesidir. Bern Sözleşmesi eser sahibinin haklarıyla ilgilidir. Bağlantılı haklarla alâkalı ilk milletlerarası anlaşma ise 1961 yılında Roma'da imzalanmıştır. Hem sınai mülkiyet hem de telif haklarının korunması amacıyla Dünya Ticaret Örgütünün (DTÖ) öncülüğünde hazırlanan Ticaretle Bağlantılı Fikrî Mülkiyet Anlaşması (TRIPs) ise 1994 yılında kabul edilmiştir. Biri telif hakları diğeri icralar ve fonogramların himâyesini amaçlayan WIPO İnternet Anlaşmaları ise 1996 yılında kabul edilmiştir.

Milletlerarası sözleşmelerin temel hedefi, telif haklarının kendisine taraf olan her devletin hükümran olduğu topraklarda, o devletin vatandaşı olmayan hak sahiplerinin haklarının etkin bir biçimde hukukî himâyesinin sağlanmasıdır. Bunun için fikrî haklar alanında asgarî standartlar koyarlar. Bu standartlar taraf devletler için uyulması mecburi temel prensipler niteliğini taşır. Bu suretle fikrî mülkiyet hukuku kapsamına giren haklar, dünya çapında asgarî düzeyde ve bağlayıcı standartlarda hukukî himâyeye kavuşur.

Milletlerarası anlaşma ve sözleşmelerde yer alan prensipler sayesinde yabancı devlet vatandaşları, hakların ihlâl edildiği devletin ulusal mevzuatının o devlet vatandaşına sağladığından daha iyi ve bazen onların da fevkinde himâyeye mazhar olabilmektedir. Bu anlaşmalara konulan “asgarî haklar” (minimum rights), “ulusal işlem” (national treatment), “otomatik koruma” (automatic protection) ve “korumanın bağımsızlığı” (independence of protection) prensipleriyle sağlanır.

İşbu çalışmanın konusu, aslında lisansüstü bir teze veya monografik bir çalışma kapsamında irdelenmeye değer bir konudur. Ancak bugüne dek memleketimizde müstakil bir inceleme konusu olarak bu mevzu gündeme gelmediği gibi, üzerinde kayda değer ölçüde durulmuş da değildir. Bu makaleyle, telif hukuku alanına ilişkin milletlerarası sözleşmeler, bunların muhtelif etkileri ve diğer yönleriyle incelenmeye değer konu olduğu hususunda genç akademisyenlerin dikkatlerinin çekilmesi de hedeflenmiştir.

Bu çalışma Balıkesir Üniversitesi tarafından düzenlenen Fikri Mülkiyet Hukukunda Güncel Gelişmeler 2. Uluslararası Sempozyumu'nda özet olarak sunulan bildirinin tam metninden oluşmaktadır. Bir bildiri metninin sınırlılıkları dikkate alınarak, fazla detaya girilmemiştir. Bu cümleden olarak tebliğde; Bern Konvansiyonu esas alınarak Roma Sözleşmesi, TRIPs ve WIPO İnternet Anlaşmalarıyla benimsenen prensipler ışığında telif haklarının milletlerarası himâyesi ve bu himâyenin nasıl gerçekleştiğine özetle temas edilmektedir.

2. TELİF HAKLARININ HİMÂYESİNE MATUF MİLLETLERARASI SÖZLEŞMELER

2.1. 1886 BERN SÖZLEŞMESİ

Fikir ve sanat eserleri üzerindeki telif haklarıyla ilgili ilk milletlerarası düzenleme 09.09.1886 tarihinde İsviçre'nin Bern şehrinde 10 devlet tarafından imzalanan Edebiyat ve Sanat Eserlerinin Himâyesine Dair Sözleşme'dir.[1] Sözleşme'yi 2024 itibarıyla 181 devlet imzalamıştır. Sözleşmenin ilk metninin 17. maddesi gereğince her 20 yılda bir gözden geçirilmesi öngörülen metin 1908'de Berlin, 1914'te Bern, 1928'de Roma, 1948'de Brüksel, 1967'de Stockholm, 1971 ve 1979'da Paris'te revize edilmiştir.[2]

Sözleşmenin temin ettiği hukukî himâye; (a) eserleri yayımlanmış olsun veya olmasın, Bern Birliği Devletlerinden birinin vatandaşı olan eser sahiplerini; (b) Bern Birliği devletlerinden birinin vatandaşı olmasa bile eserleri bunlardan birinde ilk defa yayımlanan eser sahiplerini; (c) bir Birlik Devleti ile ve Birlik Devleti olmayan başka bir ülkede eşzamanlı yayımlanan eser sahiplerini kapsar. Birlik Devletlerinden birinin vatandaşı olmasa bile ikametgâhları bunlardan birinde bulunan eser sahipleri de bu Sözleşmenin amaçları doğrultusunda o devletin vatandaşları ile benzer muameleye tabi tutulur (Bern 3).

Bern Sözleşmesi'nde ayrıca idarî düzenlemelere de yer verilmiştir. Sözleşmenin icrası, üyelik şartları, katılım prosedürleri ve icrayı gerçekleştirecek bir Birliğin kurulması, görevleri ve çalışması ile sözleşmede öngörülen özel hükümlerden yararlanmak isteyen gelişmekte olan devletlerle ilgili bazı özel hükümler de Sözleşmede yer almıştır. Bu tebliğde sadece Bern

1 Bern Sözleşmesinin tarihçesi ve yorumu hakkında ayrıntılı bilgi için bkz. Sam Ricketson, *The Bern Convention for the Protection of Literary and Artistic Works: 1886-1986* (Kluwer 1987); Sam Ricketson and Jane J Ginsburg, *International Copyright and Neighbouring Rights - The Berne Convention and Beyond, Vol. I & II* (2nd edn, Oxford University Press 2006); Ayrıca bkz. Stephen M. Stewart, *International Copyright and Neighbouring Rights* (2nd edn., Butterworths 1989); Michael Blakeney, *The International Protection of Industrial Property: From the Paris Convention to the TRIPS Agreement* (WIPO/IP/CAI/1/03/2 2003).

2 Ayrıntı için bkz. WIPO, 'Guide To The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)' *(WIPO)* <https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf>

Sözleşmesi'nin hakların hukukî himâyesine dair hükümleri ve asgarî haklarla ilgili hükümlerine özetle temas olunmaktadır.

Türkiye, Sözleşmenin 1948 tarihli Brüksel metnine 1952 yılında 5777 sayılı Kanunla taraf olmuştur.[3] 1995'te de 1979'da tadil edilen 1971 Paris Metnine iştirak etmiştir.[4]

2.2. 1961 ROMA SÖZLEŞMESİ

Bern Sözleşmesi eser sahibinin haklarıyla ilgilidir; bağlantılı hakları içermez. Bu husustaki ilk milletlerarası sözleşme 1961 yılında ILO ve UNECSCO öncülüğünde 18 devlet tarafından Roma'da imzalanmıştır.[5] Roma Sözleşmesi icracılar, fonogram yapımcıları ve radyo ve televizyon yayın kuruluşlarının haklarını düzenler. Sözleşmede icarlar, fonogramlar ve radyo ve televizyon yayınları için icranın, tespitin ve yayının gerçekleştiği tarihten itibaren 20 yıllık koruma süresi tanınmıştır. Türkiye bu Sözleşmeye 7.7.1995 tarih ve 4116 sayılı Kanunla katılmıştır.[6]

2.3. 1994 TRIPS ANLAŞMASI

Fikrî mülkiyete konu mal ve hizmetlerin ülkelerin iktisadi, sosyal ve kültürel kalkınma ve gelişimlerinde giderek artan önemi, bir yönüyle bu ürünlerin uluslararası ticaretini artırırken diğer yönüyle bunlar üzerindeki hakların sınıraşan ihlâllerinde de adeta patlamaya yol açmıştır. Bunun sonucu olarak Dünya Ticaret Örgütünün (DTÖ) öncülüğünde yıllarca süren müzakereler neticesinde Fas'ın Marakeş şehrinde 114 ülke ve Avrupa Birliği tarafından 15 Nisan 1994 tarihinde kısaca TRIPs[7] olarak anılan Sahte Mallar da Dâhil Ticaretle Bağlantılı Fikrî Mülkiyet Anlaşması imzalanmış ve 1 Ocak 1995 tarihinde yürürlüğe girmiştir.[8]

TRIPs, fikir ve sanat eserleri ile bağlantılı hak konuları üzerindeki telif hakları dâhil patent, tasarım, marka, entegre devreler, coğrafi işaretler ve ticarî sırlar gibi sınaî mülkiyetle ilgili hak konularının tamamını kapsaması yönüyle, fikrî mülkiyet hukukunun uluslararası

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[3] Edebiyat ve Sanat Eserlerini Korumak İçin Kurulan Bern Birliğine Katılma Hususunda Hükümete Yetki Verilmesine Dair Kanun, Kanun Numarası: 5777, Kabul Tarihi: 28.05.1951, RG: 2.6.1951 – 7824. Katılmayla ilgili Bakanlar Kurulu Kararı, Karar Numarası: 3/13589, Kabul Tarihi: 28.01.1951 (Düstur, III. Tertip, C. 32, 1462-1467).

[4] Edebiyat ve Sanat Eserlerinin Korunmasına İlişkin Bern Sözleşmesinde Değişiklik Yapan 1979'da Tadil Edilen Paris Metnine Katılmamızın Uygun Bulunduğu Hakkında Kanun, Kanun Numarası: 4117, Kabul Tarihi: 7.7.1995, RG: 12.7.1995 – 22341. Sözleşmenin Paris Türkçe Metni için bkz. RG: 21.10.2003 – 25266.

[5] Roma ve bağlantılı haklarla ilgili sair sözleşmeler hakkında bkz. Mustafa Ateş, 'Fikri Haklar ve Bağlantılı Haklara İlişkin Uluslararası Sözleşmeler ve Türkiye' *Fikir ve Sanat Hukukuna Dair Makalelerim* (Adalet Yayınevi 2016) 515, 530-552.

[6] Kanun için bkz. İcracı Sanatçılar, Fonogram Yapımcıları ve Yayın Kuruluşlarının Korunmasına Dair Kanun, Kanun Numarası: 4116, Kabul Tarihi: 7.7.1995, RG: 12.7.1995 – 22341. Roma Sözleşmesinin Türkçe metni için bkz. İcrası Sanatçılar, Fonogram Yapımcıları ve Yayın Kuruluşlarının Korunmasına Dair 26.10.1961 Tarihli Roma Sözleşmesi, Tarihi: 26.10.1961, RG: 21.10.2003 – 25266.

[7] Anlaşmanın İngilizce adı "*Trade-Related Aspects of Intellectual Property Rights including Counterfeit Goods*" şeklinde olup kısaca "TRIPs" olarak anılmaktadır.

[8] Daniel Gervais**,** *The TRIPS Agreement: Negotiating History* (Sweet & Maxwell 2012).

seviyede en geniş ölçüde himâyeyi amaçlayan bir anlaşmadır.[9]

Bern Sözleşmesi'nin 1971 Paris metni kapsamında korunan eser ve eser sahibi haklarının TRIPs tarafından da tanınıp himâye edildiğine işaret edilmektedir (md. 9). İlâveten Bern Sözleşmesi'nde yer almayan telif hakkına konu olabilecek bilgisayar programları ve veri tabanlarını da himâye altına almaktadır (md. 10). Ayrıca bilgisayar programları ve belirli şartlar altında da sinema eserleriyle ilgili kiralama hakkı tanınmıştır (md. 11). Anlaşmada icracılar, fonogram yapımcıları ve yayın kuruluşlarının bağlantılı haklarının himâyesine dair hükümlere de yer verilmiştir (md. 14). Anlaşma fotoğraf ve uygulamalı sanatlar hariç olmak üzere eser sahibinin hakları ile icracı ve fonogram yapımcılarının haklarının himâyesi için asgarî 50 yıllık ve radyo-televizyon yayınları için de 20 yıllık koruma öngörmüştür (md. 12 ve md. 14/5).

TRIPs diğer anlaşmalara nazaran bağlayıcı karakteri en yüksek uluslararası bir metindir. Uyulmaması halinde dünya ticaret rejiminden dışlanma gibi ağır yaptırımlar içeren TRIPs'e Türkiye, 26 Ocak 1995 tarih ve 4067 sayılı Kanunla 31.12.1994 tarihinden geçerli olmak üzere taraf olmuştur.[10]

2.4. 1996 WIPO TELİF HAKKI ANLAŞMASI VE İCRALAR VE FONOGRAMLAR ANLAŞMASI

Telif haklarıyla ilgili iki önemli milletlerarası anlaşma 1996 yılında kısaca WIPO olarak anılan Dünya Fikrî Mülkiyet Teşkilatı öncülüğünde karara bağlanmıştır. Bunlardan biri eser sahibinin haklarının internet ortamında çoğaltılması, yayılması ve paylaşılması fiilleriyle yoğun ihlâllerine karşı eser sahiplerinin himâyesini ve diğeri ise icralar ve fonogramlar üzerinde bağlantılı hak sahiplerinin telif haklarının internet ortamında korumasını amaçlar.

İlki Telif Hakları Anlaşması (*WIPO Copyright Treaty*), ikincisi ise İcralar ve Fonogramlar Anlaşması (*WIPO Performances and Phonograms Treaty*) olarak adlandırılır. Her ikisine birden "WIPO İnternet Anlaşmaları" da denilen bu metinler 20.12.1996 tarihinde Cenevre'de kabul edilerek Bern Sözleşmesinin 1971 Paris Metnine taraf ülkeler ile AB üye ülkelerinin katılımına açılmıştır. Türkiye WIPO Telif Hakları Anlaşması[11] ve WIPO İcralar ve Fonogramlar Anlaşmasına[12] 2007 yılında katılmıştır.

WIPO Telif Hakkı Anlaşmasının koruma konusunu (i) bilgisayar programları ve (ii) veri derlemeleri (veri tabanı) oluşturur. Bunlar üzerinde eser sahibinin (i) yayma, (ii) kiralama ve (iii) umuma iletim hakları özel olarak düzenlenmiştir. Koruma süresi 50 yıl olarak belirlenmiştir.

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[9] Ayrıntı için bkz. Mustafa Ateş, 'Taklit ve Korsan Malların Uluslararası Ticareti ve GATT-TRIPs Anlaşmasının Bu Ticaretin Önlenmesine İlişkin Hükümleri' *Fikir ve Sanat Hukukuna Dair Makalelerim* (Adalet Yayınevi 2016) 605-666.

[10] Kanun Numarası: 4067, Kabul Tarihi: 26.01.1995, RG: 29.01.1995 – 22186.

[11] 02.05.2007 tarihli ve 5647 sayılı Kanunla katılmıştır. Bkz. WIPO Telif Hakları Andlaşmasına Katılmamızın Uygun Bulunduğu Hakkında Kanun, Kanun Numarası: 5647, Kabul Tarihi: 2.5.2007, RG: 8.5.2007-26516. Sözleşme metni için bkz. Karar Sayısı: 2008/13597, RG: 14.05.2008 – 26876.

[12] ibid.

WIPO İcracılar ve Fonogram Anlaşması ise, dijital ortamda şarkıcı, oyuncu ve fonogram yapımcılara ait ürünler üzerindeki (i) çoğaltma, (ii) kiralama, (iii) yayma ve (iv) umuma iletim haklarını düzenler. İcracılar için ayrıca manevi haklar da öngörülmüştür. Hakların korunması için 50 yıllık süre tanınmıştır.

2.5. TELİF HAKLARIYLA İLGİLİ DİĞER ANLAŞMALAR

Gerek eser sahibinin haklarıyla gerekse bağlantılı haklarla ilgili yukarıda zikredilenlerden başka uluslararası anlaşma ve sözleşmeler de mevcuttur. Bunlara örnek olarak 1971 Evrensel Telif Hakları Sözleşmesi (UCC), Uydular Vasıtasıyla Program Sinyalleri Dağıtılması Hakkında 1974 Brüksel Sözleşmesi, Avrupa Televizyon Yayınları Sözleşmeleri gösterilebilir.[13] Ele alınan konu bakımından Türkiye'nin taraf olduğu en önemli uluslararası anlaşmalar yukarıda kısaca temas edilenlerdir. O nedenle diğer anlaşmalar üzerinde durulmayacaktır.

Ancak Türkiye henüz tarafı olmasa da diğer anlaşmalardan son dönemde kabul edilmiş olması sebebiyle WIPO Görsel-işitsel İcralar Pekin Anlaşması'na değinmekte fayda vardır. Bu Anlaşma WIPO öncülüğünde 2012 yılında sonuçlanıp yeterli sayı olan 30 ülkenin katılımı veya tasdikiyle birlikte 28 Nisan 2020'de yürürlüğe girmiştir. Anlaşmayla tespit edilmiş görsel-işitsel (*audiovisual*) icralar üzerinde icracı sanatçılara tanınmış mali ve manevi haklar düzenlenmiştir. Sinema eserleri gibi görsel-işitsel icraların tespitleri üzerinde icracı sanatçılara (oyunculara) bunların; (i) çoğaltılması, (ii) yayılması, (iii) kiralanması ve (iv) kamuya erişilebilir kılınması hakları tanınmıştır. Anlaşma sanatçılara ayrıca tespit edilmemiş canlı icralarıyla ilgili; (i) yeniden yayın hariç olmak üzere radyo-televizyonla yayın hakkı, (ii) radyo-televizyon yayını için yapılan icralar dışında umuma iletim hakkı ve (iii) yapılan icraların tespiti hakkı tanımaktadır. Anlaşmaya göre icracılar, icralarının icracısı olarak tanınmalarını talep hakkı ve itibarlarına zarar verecek şekilde icralarının kullanılması ve değiştirilmesine itiraz şeklinde manevi haklara sahiptir. Anlaşma âkit taraflara hakları için Bern Sözleşmesi'nin 9(2) maddesinde olduğu gibi üç basamak testi kapsamında istisna ve kısıtlamalar koyabilmesine imkân vermektedir. 50 yıllık koruma süresi öngörülen Pekin Anlaşması'nda, anlaşmayla tanınan haklara sahip olma ve faydalanmanın herhangi bir formaliteye tabi tutulamayacağı da hüküm altına alınmıştır.

Pekin Anlaşması'na Nisan 2024 tarihi itibarıyla 43 devlet katılmış veya onay vermiştir. Türkiye ise bugüne dek Anlaşmaya katılım yönünde bir irade beyanında bulunmamıştır.

3. BERN SÖZLEŞMESİ ÖZELİNDE TELİF HAKKI HİMÂYESİYLE İLGİLİ TEMEL PRENSİPLER

3.1. GENEL OLARAK

Milletlerarası sözleşmelerin amacı telif haklarına küresel ölçekte etkili bir hukukî himâye sağlamaktır. Bunun için sözleşmelere fikrî haklar alanında asgarî koruma standartları konulduğu gibi ulusal ölçekte bu standartlara uygun düzenlemelerin yapılması

[13] Telif hukuku alanında uluslararası anlaşmalar hakkında ayrıntılı bilgi için bkz. Ateş, Uluslararası Sözleşmeler (n 5) 515-552.

ve hakların bu standartlarda korunmasını temin için bir takım temel prensiplere de yer verilmektedir.

Bu prensipleri Bern Sözleşmesi bazında (i) asgarî haklar, (ii) ulusal işlem, (iii) otomatik koruma ve (iv) korumanın bağımsızlığı olmak üzere dört başlık altında mütâlaa etmek mümkündür.[14] Asgarî haklar Bern Sözleşmesi'nin muhtelif maddelerine serpiştirilmiştir. Diğer prensipler ise 1971 yılında kabul edilip 1979'da revize edilen Paris Belgesinin 5. maddesinde düzenlenmiştir.

Mezkûr maddenin "Eser sahipleri, bu Sözleşme kapsamında korunan eserlerle ilgili olarak, işbu Sözleşmeyle özel olarak tanınmış haklar gibi menşe ülkesi dışındaki Birlik ülkelerinde, o ülkenin kanunlarının kendi vatandaşlarına tanımış olduğu mevcut veya ileride tanıyacakları haklardan da yararlanırlar" hükmünü içeren birinci fıkrası "ulusal işlem" prensibini yansıtır.

İkinci fıkranın "Bu haklardan yararlanma ve bunları uygulama herhangi bir formaliteye tabi olmayacaktır" şeklindeki ilk cümlesi "otomatik koruma" ilkesine ve "bu gibi yararlanma ve uygulama, eserin kaynak ülkesindeki mevcut korumadan bağımsız olacaktır" şeklindeki ikinci cümlesi "korumanın bağımsızlığı" prensibine işaret eder.

Bu prensipler TRIPs Anlaşması tarafından da teyit edilmiştir. Hatta bu güçlendirilmiş bir teyittir. Zira TRIPs'e göre Bern Konvansiyonundaki ulusal muamele, otomatik koruma ve korumanın bağımsızlığı ilkeleri, Bern Sözleşmesine taraf olmayan DTÖ üyelerini dahi bağlayıcıdır (md. 1/2 ve md. 3/1). TRIPs Anlaşması daha da ileri giderek bir DTÖ üyesinin başka herhangi bir ülkenin vatandaşlarına tanıdığı avantajların aynı zamanda tüm DTÖ üyelerinin vatandaşlarına da tanınması yükümlülüğü getirmiştir. Bu kabil uygulamalara "en ziyade müsaadeye mazhar devlet" veya "en çok kayrılan ülke muamelesi" denilir. Bu kurala göre "fikrî mülkiyet ürünleri üzerindeki hakların korunmasıyla ilgili olarak, bir üye tarafından, diğer bir ülkenin vatandaşlarına tanınan herhangi bir imtiyaz, muafiyet, fayda ya da ayrıcalık bütün diğer TRIPs üyelerinin vatandaşlarına derhal ve kayıtsız-şartsız olarak tanınacaktır" (md. 4).[15]

Bu başlık altında milletlerarası hukukun telif haklarının himâyesi için kabul ettiği asgarî haklar, ulusal muamele, otomatik koruma ve korumanın bağımsızlığı başlıkları altındaki dört temel prensibe Bern Sözleşmesi özelinde temas olunacaktır.

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[14] Bu prensiplerle ilgili bkz. Ateş, Uluslararası Sözleşmeler (n 5) 520-521; Mustafa Ateş, *Fikir ve Sanat Eserleri Üzerindeki Hakların Kapsamı ve Sınırlandırılması* (Seçkin Yayınevi 2003) 42-44.

[15] Bir TRIPs üyesinin tanıdığı bu yükümlülük dışında kalan müsaade, imtiyaz, muafiyet ya da faydaların neler olduğu aynı maddede şu şekilde gösterilmiştir: (a) Uluslararası hukukî yardım anlaşmalarından kaynaklanan ya da genel nitelikte ve fikir mülkiyetinin korunması ile sınırlı olmayan yasa uygulaması; (b) Bern Sözleşmesi (1971) hükümlerine uygun şekilde tanınan ya da Roma Sözleşmesi'nin öngördüğü ulusal uygulama işlevi taşımayan ve bir başka ülkede kabul edilen uygulama; (c) Bu Anlaşmada öngörülmeyen, sanatçılar, plak yapımcıları ve radyo ve televizyon kuruluşlarının haklarına ilişkin uygulama; (d) Dünya Ticaret Örgütü Anlaşmasının yürürlüğe girmesinden önce (1.1.1995) yürürlükte bulunan fikir mülkiyetinin korunmasına ilişkin ve TRIPs Konseyi'ne bildirilmiş olan ve diğer üyelerin vatandaşlarına karşı katı ya da haksız bir ayırım oluşturmayan uluslararası anlaşmalardan kaynaklanan uygulama.

3.2. ASGARÎ HAKLAR PRENSİBİ

3.2.1. Genel Olarak

Devletlerin fikrî mülkiyet kurallarını düzenleyen kanunlar genel olarak mülkîlik esasına dayanır. Her devlet bu hakları kendi hükümranlık alanı olan topraklarda kendi yasama organı tarafından kabul edilen yasalarla himâye eder. Kural olarak yabancıların hakları da bu çerçevede himâye görür. Ancak yukarıda sözü edilen türden milletlerarası anlaşma ve sözleşmelerle bir ülkede yabancılara o devletin milli hukukunun sağladığı ile aynı seviyede veya onların da fevkinde hukukî himâye temin edilebilmektedir. Bunu sağlayan prensiplerin başında "asgarî haklar" ilkesi gelir.

Asgarî haklar prensibi, bir Birlik devletinde yabancı telif hakkı sahiplerine sağlanan hukukî himâyenin belli bir seviyenin altında olmamasını ifade eder. Milletlerarası mevzuatla tanınmış bulunan telif hukukuyla ilgili hakların tamamı neredeyse "asgarî" seviyedir. Ancak taraf devletler milletlerarası mevzuatta belirtilenlerden daha üst seviyede hak ve hukukî himâye tanıma yetkisine sahiptir. Asgarî haklar prensibi, bir anlaşmaya taraf olan devlete, kendi ülkesinde bulunan anlaşmaya taraf diğer ülke vatandaşlarını hiç değilse o anlaşmayla tanınmış bulunan haklardan faydalandırma borcu yükler.

Bu yükümlülüğün kapsamına yalnızca anlaşmayla tanınan haklar değil koruma süreleri ve haklara getirilen tahdit ve istisnalarla ilgili minimum standartların kabulü ve tatbiki de dahildir. Buna göre her âkit devlet yabancıya ait eserleri, kendi ülkesinde anlaşmada öngörülenden daha kısa olmayan bir süreyle himâyeye mecburdur. Keza telif hakları için anlaşmada öngörülen zorunlu tahdit ve istisnalar, anlaşmaya taraf devletin ülkesinde de tatbik edilmek zorundadır.

Belirtmek gerekir ki milletlerarası sözleşmelerle kabul edilen asgarî haklar prensibi sadece yabancı hak sahiplerine yönelik olarak uygulanır. Bu prensibin kural olarak ulusal hukuk kapsamında himâye gören hak sahiplerine tatbiki zorunlu değildir. O nedenle bir âkit devlet kural olarak kendi vatandaşına asgari haklar standardını uygulamaya mecbur olmadığı gibi, iç hukukuyla asgari haklardan daha üstün standartları da benimseyebilir.

3.2.2. Bern Sözleşmesi'nde

Asgarî haklar Bern Sözleşmesinin 2.10.1979'da tadil edilen 24.07.1971 tarihli Paris Belgesinin 5. maddesinde "bu Sözleşme ile korunan eserler üzerinde yine bu Sözleşme ile özel olarak tanınmış haklar" şeklinde ifade edilmiştir. Asgarî hakların konusunu Sözleşmenin 2. maddesinde belirtilen fikir ve sanat mahsulleri oluşturur. Tarzı ve ifade şekli ne olursa olsun edebiyat, bilim ve sanat alanındaki her türlü eser Sözleşmenin 2(1) maddesi kapsamındadır.

Fikir ve sanat eserleri anılan maddede örnek kabilinden zikredilmiştir. Bern Birliği üyeleri mezkûr maddede belirtilen fikrî mahsullere kaideten "eser olarak" hukuken himâye sağlarlar. Zira maddenin 6. fıkrası "bu maddede zikredilen eserlerin, bütün Birlik ülkelerindeki koruma kapsamında olduğu ve bu korumadan eser sahibi ile haleflerinin faydalanacağı" hükmünü hâvidir. Sözleşmede üye devletlerce tanınması gereken haklarsa manevî ve malî haklar olmak üzere iki kategoride tanzim edilmiştir.

Eser sahibine tanınması mecburî manevî haklar mükerrer 6. maddede gösterilmiştir. Mezkûr madde uyarınca, malî haklarından bağımsız ve bu hakların devrinden sonra dahi eser sahibine, eseri üzerindeki bu statüsünü ileri sürmek ve eserinin her türlü tahrifine, bozulmasına veya diğer değişikliklerine veya şeref veya itibarına zarar verebilecek her türlü küçük düşürücü fiillere itiraz hakkı tanınmaktadır. Maddenin bu hakların koruma süresi ve eser sahibinin ölümünden sonra kendilerine manevî hakları kullanma yetkisi tanınan kişilere ilişkin ikinci fıkrası hükmü de emredicidir.

Himâyesi gereken mali haklar Sözleşmenin 8 vd. maddelerinde düzenlenmiştir. Bunlardan tercüme hakkıyla ilgili 8. madde; eserlerin çoğaltma ve yayma haklarına dair 11. madde ve mükerrer 11. madde hükümleri; eserin işlenmesi, düzenlenmesi ve eserde yapılacak diğer değişikliklere izin verme hususundaki 12. madde; eserlerin sinematografik işlenmesine ve çoğaltılmasına ve bu şekilde işlenen ve çoğaltılan eserlerin dağıtımı ile işlenen ve çoğaltılan eserlerin umuma iletimine ve umumî mahallerde temsiline ilişkin haklar ve işleme eser niteliğindeki sinematografik eserlerin özgün eser gibi korunmasını öngören 14. madde emredicidir. Eserin yeniden satışından pay isteme hakkına dair mükerrer 14. madde üye devletin tercihine bağlıdır. Üye devletler edebiyat, bilim ve sanat eserleri üzerindeki emredici hükümlerden doğan münhasır nitelikteki mali hakları hukuken korumak zorundadırlar.

Ancak üye ülkelerce söz konusu malî haklara Sözleşmede izin verilen çekinceler, sınırlama ve istisnalar getirilebilir. Bunların 9/2. maddedeki üç basamak testine uygun olması gerekir. Sözleşmede istisna ve tahditlerin neler olabileceğine dair hükümler de yer almıştır. Bu bağlamda Paris (1971) Metni'nin ekinde yabancı eserlerin çevirisi ve çoğaltılmasıyla ilgili olarak gelişmekte olan ülkeler için özel istisnai imkânlar öngörmüştür. Çoğaltma ve tercüme haklarıyla ilgili Madde 2$^{\text{mük}}$, Madde 9(2), Madde 10(2), ve Madde 10$^{\text{mük}}$ hükümleriyle "on yıl kuralı" olarak da adlandırılan Madde 30(2)(b) hükmü dahil olmak üzere eser sahibinin münhasır haklarına dair mevcut tahdit ve istisnalar genişletmiştir. Mesela Madde 30(2)(b) uyarınca yazar, eserin aslının ilk yayımından itibaren 10 yıllık süre zarfında üye devletlerden herhangi birinde, koruma talep edilen dilde bir tercümesini yayımlamaz veya yayımlatmaz ise, tercümeye izin verme yetkisi sona erer. 10 yıllık süre dolduğunda koruma talep edilen dilde tercümeye izin verme yetkisi sona erdiği için yazarından izin almaya gerek kalmadan herkes eseri tercüme edebilir.

Sözleşmenin hakların himâye süresinin eser sahibinin hayatı boyunca ve ölümünden sonra elli yıl devam edeceğini öngören 7. maddesi de emredicidir. Manevi hakların mali hakların korunduğu süre boyunca himâyesini öngören Mükerrer Madde 6/2 de emredicidir. Fotoğraf ve uygulamalı sanat eserleri için bu süre 25 yıldan aşağı olamaz (md. 7/4).[16] Maddede belirtilen süreler asgarî sınırı gösterir; üye devletler daha uzun koruma süresi kabul edebilirler (md. 7/6). Nitekim AB ülkelerinde söz konusu süreler 70 yıl olarak belirlenmiştir. Türkiye 50 yıl olan koruma sürelerini AB Müktesebatına uyum sağlamak maksadıyla 4110 sayılı Kanunla FSEK'te yapılan değişikliklerle 1995 yılında 70 yıla çıkarmıştır.

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[16] Bununla birlikte WIPO Telif Hakları Anlaşması'nın 9. maddesinde *"Âkit Taraflar, fotoğraf eserleri konusunda Bern Sözleşmesi'nin 7(4) maddesi hükümlerini uygulamayacaktır"* denilmiştir.

3.2.3. Diğer Sözleşmelerde

1961 tarihli bağlantılı haklarla ilgili Roma Sözleşmesi de icracılar ve fonogram yapımcıları ile yayın kuruluşlarının bağlantılı hakları kapsamında tespit, çoğaltma, yayma, yayın ve tekrar yayın ve umumi mahallerde temsil gibi asgarî haklar tanımıştır. Bunlar korumanın konusunu oluşturan icralar, fonogramlar ve film yapımlarının mahiyetine uygun şekilde Bern Sözleşmesine benzer biçimde düzenlenmiştir. Özel koruma konuları üzerinde TRIPs ve WIPO Anlaşmalarında da bazı asgarî haklara yer verilmiştir.

Buna göre TRIPs Anlaşması telif haklarının himâyesine ilişkin Bern Sözleşmesi hükümlerine atfın yanı sıra (md. 9), bilgisayar programlarının ve derlemelerin (veri tabanlarının) telif hakkı kapsamında himâyesini öngörmüştür (md. 10).[17] Anlaşmanın mezkûr hükümleri ile kiralama hakkını düzenleyen 11. maddesi, koruma süresiyle ilgili 12. maddesi ile sahte ve korsan eser ticaretiyle mücadele ve bu ticaretin önlenmesine[18] dair Üçüncü Kısım hükümlerinin asgarî haklara ilişkin düzenlemeler olduğunu söylemek mümkündür.

WIPO Telif Hakları Anlaşması da TRIPs gibi Bern Sözleşmesi'ne atıfta bulunarak orada yer alan hakları saklı tutmak suretiyle (md. 1), dijital teknolojilere karşı eser üzerindeki telif haklarının himâyesini amaçlar. Anlaşmada bilgisayar programları ve veri tabanları Bern Sözleşmesi anlamında eser kabul edilerek, bunlar üzerindeki yayma, kiralama, umuma iletim hakları teminat altına alınmıştır. Ayrıca eserlerin dijital teknolojiler kullanılarak ihlâlinin önlenmesi için âkit devletlere teknolojik tedbirler alma yükümlülükleri tahmil edilmektedir. WIPO İcracılar ve Fonogramlar Anlaşması da fonogram ve icarlar üzerinde WIPO Telif Hakları Anlaşması gibi dijital teknolojilerle ilgili asgarî haklar tanımaktadır. Bu Anlaşmada icracılara ve fonogram yapımcılarına tanınmış bulunan haklar da taraf devletlerce himâyesi gereken asgarî haklardandır.

3.3. ULUSAL MUAMELE PRENSİBİ (NATIONAL TREATMENT RULE)

Bir anlaşmaya taraf devletin kendi vatandaşına uyguladığı muamelenin aynısını diğer üye devletlerinin vatandaşlarına da tatbik etmesine "ulusal muamele" denir.[19] Bu kural gereğince bir milletlerarası sözleşmeye taraf olan devlet kendi vatandaşıyla o sözleşmeye taraf diğer ülke vatandaşı arasında ayrımcılık yapamaz. O nedenle bu prensip "ayrımcı muamele yasağı" ya da "eşit işlem kuralı" olarak da adlandırılır.

Nitekim Bern Sözleşmesinin 5(1) maddesinde eser sahiplerinin, Sözleşme kapsamında korunan eserleriyle ilgili olarak bu Sözleşmeyle özel olarak tanınmış haklar gibi menşe ülkesi dışındaki Birlik ülkelerinde, o ülkenin kanunlarının kendi vatandaşlarına tanımış olduğu

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[17] Bu konuda ayrıntı için bkz. Mustafa Ateş, 'Copyright and Related Rights Protection Under the TRIPs Agreement' *Fikir ve Sanat Hukukuna Dair Makalelerim* (Adalet Yayınevi 2016) 585-601.

[18] Bu konuda ayrıntı için bkz. Ateş, Taklit ve Korsan (n 9) 605-658.

[19] Bu konuda ayrıntı için bkz. Ulrich Loewenheim, 'The Principle of National Treatment in the International Conventions Protecting Intellectual Property' in: Liber Amicorum and Joseph Straus (eds), *Patents and Technological Progress in a Globalized World* (Springer-Verlag Berlin Heidelberg 2009) 593-599.

mevcut veya ileride tanıyacakları haklardan da yararlandırılmaları öngörülmüştür.[20] Madde 5'in 1. fıkrası haklardan yararlanmayla ilgili ulusal muameleyi düzenlemiştir. 5. maddenin 3. fıkrası menşe ülkede himâyenin iç hukukla düzenleneceğini, ancak eser sahibinin bu Sözleşmeyle korunan eserin menşe ülkesinin vatandaşı olmaması halinde, eser sahibinin o ülkede, o ülkenin vatandaşı olan eser sahipleri ile aynı haklardan yararlanacağı hüküm altına alınmıştır.

Görüldüğü gibi Bern Sözleşmesi'ne taraf bir ülkenin vatandaşı, aynı Sözleşmeye taraf başka bir ülkede koruma talep ettiği takdirde, korumanın talep edildiği ülke, talepte bulunan eser veya hak sahibine kendi vatandaşı gibi muamele etmek zorundadır; yabancıyı kendi vatandaşından ayrı tutamaz. Ancak Sözleşme hükümlerinin tatbiki bakımından üye devlet yanında "menşe devlet" veya "kaynak ülke" kavramına büyük önem atfedilmiştir.[21] Sözleşme menşe devletin tespitinde eserin ilk yayımlandığı yeri esas kabul etmiştir. Buradaki "yayımlamayı" geniş yorumlamak ve "aleniyet" olarak anlamak gerekir. Çünkü fikir ve sanat ürünü çoğaltılarak elde edilen nüshaların dağıtılması suretiyle kamuya sunulması dışında başka yöntemlerle de umuma arz edilebilmektedir. Bu sebeple eserin yayımlanması ve yayım dışındaki herhangi bir yöntemle ilk kez umuma arzı suretiyle aleniyete kavuştuğu ülke her nere ise "menşe devlet" veya "kaynak ülke" orasıdır. Ancak Sözleşmenin 5. maddesinin 4. fıkrasına göre "menşe devlet" ile kastedilen; eserin ilk defa yayımlandığı (umuma arz edildiği) Bern Birliğine üye devlettir.

Zira fikir ve sanat eserleri, onu meydana getiren kimsenin vatandaşı bulunduğu devletin dışında bir ülkede de yayım veya başka bir yolla aleniyete intikal edebilir. Örneğin bir Alman vatandaşı eserini ilk önce Fransa'da yayımlayabilir. Bu gibi hallerde kaynak ülke Almanya yani yazarın mensubu olduğu devlet değil, ona ait eserin ilk defa kamuyla buluştuğu yer olan Fransa'dır. Bir eserin eşzamanlı olarak birden fazla Bern Ülkesinde yayımlanması veya İlk defa Bern ülkesi olmayan bir devlette yayımlanması da söz konusu olabilir. Bu gibi hallerde yaşanacak tereddütlerin izalesi için "menşe devlet" tabiri ile anlaşılması gerekenin ne olduğu Sözleşmenin 5(4) maddesinde özel olarak tarif edilmiştir.

Buna göre; eserin ilk defa bir Bern Birliği ülkesinde yayımlanması durumunda, kaynak ülke o ülkedir. Eser koruma süreleri farklı olan birden çok Birlik ülkesinde aynı anda yayımlandığı takdirde kaynak ülke, mevzuatıyla en kısa koruma süresini benimsemiş olan ülkedir. Eserin Birlik dışındaki bir ülkeyle bir Birlik ülkesinde eşzamanlı yayımlanması halinde ise kaynak ülke, eserin yayımlandığı Birlik ülkesidir. Sinema eserlerinde kaynak ülke özel olarak tanımlanmış olup, kural olarak yapımcının ikametgâhı veya çalışma merkezinin bulunduğu Birlik ülkesi kaynak ülkedir. Birlik ülkelerinin birinde yapılan mimari eserlerin kaynak ülkesi ise o ülkedir.[22]

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[20] Bern Sözleşmesinde ulusal muamele konusuyla ilgili ayrıntılı bilgi için bkz. David Vaver, 'The National Treatment Requirements of the Berne and Universal Copyright Conventions [Part 1]' (1986) 17 (5) International Review of Industrial Property and Copyright Law 577-607.

[21] Brian Fitzgerald, Sampsung Xiaoxiang Shi, Cheryl Foong and Kylie Pappalardo, 'Country of Origin and Internet Publication: Applying the Berne Convention in the Digital Age' (2011) Nigerian Institute of Advanced Legal Studies (NIALS) Journal of Intellectual Property (NJIP) 38-73.

[22] Bu konuda ayrıntılı bilgi için bkz. Ricketson ve Ginsburg (n 1) 278 ff.

Bern Sözleşmesi yayımlanmamış eseri de himâye eder. Yayımlanmamış eser bakımından kaynak ülke, eser sahibinin vatandaşı bulunduğu Bern Birliği ülkesidir. Keza Birlik Üyesi vatandaşına ait eserin ilk defa Birliğe üye olmayan herhangi bir devlette yayımlanmış olması halinde de eser sahibinin kendi ülkesi kaynak ülke sayılır.

TRIPS Anlaşması ise, bu anlaşmanın bütün üyelerce uygulanmasını öngörmektedir (md. 1/1). Anlaşmanın 3(1) maddesinde de açıkça, TRIPs Üyelerinin diğer üye devlet vatandaşlarına, milletlerarası sözleşmelerden doğan istisnalar haricinde, kendi vatandaşları hakkındaki tatbikattan daha az bir koruma öngöremeyeceği hükme bağlanmıştır. Buna göre "*Her üye, diğer üyelerin vatandaşlarına, Paris Sözleşmesi (1967), Bern Sözleşmesi (1971), Roma Sözleşmesi ya da Entegre Devrelere İlişkin Fikrî Mülkiyet Andlaşması ile öngörülen istisnalar dışında, fikrî mülkiyetin korunması ile ilgili olarak, kendi vatandaşları hakkındaki uygulamadan daha az bir koruma öngörmez. Bu yükümlülük icracılar, plak yapımcıları ve radyo-televizyon kuruluşları bakımından sadece bu Andlaşmada öngörülen haklar için uygulanır*."

Dahası TRIPs; bir üye devletin başka bir ülkeye "en ziyade müsaadeye mazhar millet" (*most favored nation*) tatbikatının bu Anlaşmaya taraf ülkelere tatbiki yükümlülüğü de getirmektedir. Buna göre; fikri mülkiyetin korunması ile ilgili olarak, bir üye devlet tarafından, diğer bir ülkenin vatandaşlarına tanınan herhangi bir öncelik, yarar, bağışıklık yahut imtiyaz bütün diğer üye devletlerin vatandaşlarına derhal ve şartsız tanınacaktır (TRIPs 4/1).

3.4. OTOMATİK KORUMA

Aslında bu prensip, ulusal muamelenin herhangi bir formaliteye bağlı olmadan yabancıya tatbiki suretiyle sağlanan korumayı ifade eder.[23] Otomatik koruma ilkesi gereğince eserin meydana getirilmesiyle birlikte hukukî himâye otomatik olarak kazanılır. Bu prensip eserin bir sicile tescili ve bir mercie tevdîi ya da esere işaret, bandrol, hologram vb. bir sembol koyma mecburiyeti gibi formalitelere tabi tutulmaksızın hakların himâyesini öngörür. Zira telif hakkına konu bir ürün üzerinde hak sahipliği eserin vücuda getirilmesiyle birlikte kendiliğinden (*ipso jure*) iktisap olunur. İktisabıyla birlikte telif hakkı himâyesi, tescil, tevdi veya başka herhangi bir formaliteye gerek kalmadan elde edilir.[24]

Herhangi bir formaliteye tabi olmaksızın himâyenin temel prensibi açıkça Bern Sözleşmesinin 5(2) maddesinde yer almıştır. Bu prensip bağlantılı hak himâyesi bakımından da geçerli olup, telif hakkıyla ilgili diğer uluslararası anlaşmalarda da ifadesini bulmuştur. Örneğin TRIPs Anlaşmasının 9(1) maddesi ve WIPO Telif Hakları Anlaşmasının 1(4) maddesi bu ilkeyi düzenler.

Bağlantılı haklarla ilgili 1961 Roma Sözleşmesi fonogramlar için hak sahibinin ismi ve ilk yayın yılının yanında (P) sembolünün bulundurulmasını öngörmüştür (md. 11). Buna mukabil WIPO İcracılar ve Fonogram anlaşmasında, hakların kullanılması ve korunmasının herhangi bir formaliteye tabi olmadığı hükme bağlanmıştır (md. 20).

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[23] Chris Dombkowski, 'Simultaneous Internet Publication and the Berne Convention' (2013) 29 (4) Santa Clara High Technology Law Journal 643, 646.

[24] Bu konuda bkz. Mustafa Ateş, 'Fikir ve Sanat Eserlerinde Tescil, Tevdi ve İşaret Koyma Gibi Formalitelerin Hukukî Mahiyeti' *Fikir ve Sanat Hukukuna Dair Makalelerim* (Adalet Yayınevi 2016) 485-511.

Ülkelerin hukuk sistemlerine bakıldığında genellikle *formalitesiz koruma* ilkesine halel gelmeksizin gönüllü kayıt ve tescil sistemleri öngörüldüğü görülmektedir. Gönüllü kayıt ve tescil sistemleri ülkeden ülkeye değişiklik gösterdiği gibi bunların işleyişi ve hukukî etkileri bakımından da çeşitlilik göstermektedir. Türkiye'de FSEK'in 13. maddesiyle bazı eserler için mecburî olsa da, kural olarak hak ihdasını amaçlamayan ancak hakların etkili himâyesine hizmet eden bir kayıt ve tescil sistemi benimsenmiştir.[25]

3.5. KORUMANIN BAĞIMSIZLIĞI

Korumanın bağımsızlığı, Bern Sözleşmesi kapsamındaki himâyenin, menşe devlette yani eserin ilk kez ortaya çıktığı ülkede mevcut olan korumaya bağlı olmamasını ifade eder. Çünkü Bern Birliğine üye devletler, kendi ülkelerindeki telif haklarına tanınan korumanın aynısını kural olarak yabancılara ait eserlere de tatbik ederler. Bunun sebebi, Bern Sözleşmesi kapsamındaki himâyenin, kural olarak eserin ortaya çıktığı (kaynak) ülkede mevcut olan korumaya bağlı olmamasıdır.

Buna göre fikir ve sanat eserleri, kaynak ülkede himâye sağlanıp sağlanmadığına ve hangi ölçüde sağlandığına bakılmaksızın sözleşmeye taraf diğer bir ülkedeki daha avantajlı hukukî himâyeden yararlanabilmektedir. Buna "bağımsız koruma" denilmektedir ki, Sözleşmenin 5(2) maddesinde bu haklardan yararlanma ve kullanılmanın herhangi bir formaliteye tabi olmayacağı belirtildikten sonra; "bu türden bir yararlanma ve bu türden bir kullanımın eserin menşe devletindeki himâyenin varlığından bağımsız olacağı" ifade edilmiştir.

Korumanın bağımsızlığı, hakların menşe ülkede korunup korunmamasından bağımsız olmasını ifade ettiğine göre, yabancı bir esere sağlanan himâyenin düzeyi ve eser sahiplerinin haklarını himâyesine yönelik teminat talep etme yolları, korumanın uygulandığı ülke hukukuna göre belirlenir. Nitekim 5. maddenin 2. fıkrasının ikinci cümlesinde ise "Sonuç olarak, bu Sözleşmenin hükümleri dışında, korumanın kapsamı ve eser sahibine haklarını korumak için sağlanan telafi yollarının, yalnızca korumanın talep edildiği devletin kanunlarına göre belirleneceği" belirtilmiştir.

Örneğin bazı hallerde sözleşmeye taraf bir devlet, eserin sözleşmedeki asgarî süreden daha uzun bir süre korunması kuralını benimsemiş olabilir. Bu durumda eser Bern Sözleşmesindeki asgarî koruma süresine değil, koruma talep edilen ülkenin kanunundaki daha uzun süre himâye elde edebilir. Bununla birlikte, bir âkit devletin Sözleşmede öngörülenden daha uzun bir koruma süresi sağlaması ve eserin menşe ülkede himâyenin sona ermesi durumunda, menşe ülkedeki himâye sona erdiğinde koruma reddedilebilir. Zira Madde 7(8) uyarınca her durumda sürenin korumanın talep edildiği ülke mevzuatı ile düzenlenmesi gerekiyorsa da; bu ülke mevzuatında aksine bir hüküm bulunmadıkça söz konusu süre, eserin kaynak ülkesinde belirlenen süreden daha fazla olamaz.

[25] Bu konuda bkz. Mustafa Ateş, *Fikrî Haklarla İlgili Hukukî İşlemler FSEK m. 48-65* (Seçkin Yayınevi 2023) 370-372, 409-413.

4. TELİF HAKKI HİMAYESİYLE İLGİLİ TEMEL PRENSİPLERİN ULUSAL HUKUKLARA ETKİSİ

Milletlerarası anlaşmalara konulmuş olan asgarî haklar, ulusal muamele, otomatik koruma ve korumanın bağımsızlığı prensipleri, yukarıda yapılan izahattan da görüldüğü veçhile büyük ölçüde himâyenin talep edildiği devletteki yabancı ülke vatandaşlarının menfaatlerinin himâyesine hizmet eder. Zira milletlerarası sözleşmelerde düzenlenen asgarî haklardan yararlanma yetkisi kural olarak yalnızca yabancı ülke vatandaşlarına tanınmıştır. Bahse konu mevzuatın asli amacı, yabancı ülkede bulunan bir âkit devlet vatandaşının haklarının himâyesinin teminidir.

Asgarî haklar gibi ulusal işlem, otomatik koruma ve bağımsız koruma prensiplerinin kabulünün temelinde de aynı mülâhaza bulunmaktadır. Nitekim bir fikir ve sanat eseri sahibinin kendi devletinden o ülkede tanınmamış bir hakkın Bern Sözleşmesi'ne göre asgarî haklardan olduğunu ileri sürerek korumasını talep edemeyeceği ileri sürülmüştür.[26] Uluslararası sözleşmelerde asgarî haklardan sadece yabancıların istifade edebilecek olması, üye devletleri, vatandaşlarının yararlanacağı hakları, uluslararası mevzuatla tanınan hakların seviyesinin altına düşürmemeye icbar eden bir etkiye sahiptir.[27] Dolayısıyla milletlerarası sözleşmede yer alan prensipler, bir yönüyle o sözleşmeye taraf yabancı devlet vatandaşını koruma amacını taşıyor olsa da, dolaylı olarak anlaşmaya taraf devletlerin fikrî mülkiyet haklarının himâyesine ilişkin milli normları arasında yakınsamaya yol açarak, fikrî mülkiyet alanındaki mevzuatları yeknesaklaştırma gibi bir tesir icra etmektedirler.

Nitekim Türkiye, 1995 yılında AB ile imzalanan Gümrük Birliği Anlaşması ile AB'nin fikrî mülkiyet haklarına ilişkin müktesebatına uyum sağlamanın yanı sıra, AB'nin tarafı olduğu uluslararası sözleşmelere taraf olmayı da taahhüt etmiştir. Bunun sonucu olarak taraf olunan uluslararası hukuk normlarındaki asgarî hakları 1995 yılı ve sonrasında kabul edilen yasalar veya yasa değişiklikleriyle iç hukukuna iktibas etmiştir. Bugün fikir ve sanat hukuku alanında Bern, Roma, TIPS veya WIPO Sözleşmelerinde öngörülmüş bulunan asgarî hakların büyük ölçüde FSEK'e ithal edildiğini söylemek mümkündür. Diğer bir ifadeyle FSEK milletlerarası hukukun benimsediği asgarî hakların düzeyinin altında değildir.

Ancak Tekinalp'in de ifade ettiği gibi, gelecekte ortaya çıkabilecek bir farklılıktan ya da yerli hukuk uygulamasında bugün bazı haklara uluslararası hukuktakinden farklı bir anlam yüklenmesinden dolayı Türk vatandaşları zarar görebilir.[28] Bu sebeple FSEK'e marka, tasarım ve patent gibi sınai mülkiyet haklarının korunmasına ilişkin mülga KHK'lerde olduğu üzere, Türkiye Cumhuriyeti kanunlarına göre yürürlüğe konulmuş bulunan uluslararası anlaşma hükümlerinin FSEK hükümlerinden daha elverişli olmaları halinde anlaşmalardaki elverişli hükümlerin kendilerine doğrudan tatbikini talep edebileceklerine dair hüküm konulmasında yarar vardır. Aksi takdirde Türkiye'de bulunan bir yabancı herhangi bir uyuşmazlıkta Türk Mahkemesinden kendisi için daha avantajlı milletlerarası hukuk kuralının tatbikini talep edebilecek iken, davaya bakan mahkemenin mensubu bulunduğu ülkenin

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[26] Ünal Tekinalp, *Fikrî Mülkiyet Hukuku* (5. basım, Vedat Kitapçılık 2012) 54.

[27] ibid 64.

[28] ibid 65.

vatandaşı kendisi için dezavantajlı milli hukukun öngördüğü telafi şekline boyun eğmek zorunda kalacaktır.

Ancak, telif haklarının mahiyeti itibarıyla temel insan hakları arasında olduğu dikkate alındığında Türk vatandaşının kendi ülkesi içerisinde Türkiye'nin taraf olduğu anlaşmadaki daha avantajlı kuralın mevcut hak arama mekanizmaları dâhilinde tatbikini talep etmesinin mümkün olduğunu söylemek de mümkündür. Zira Anayasa'nın 90. maddesinin son fıkrasına göre "*Usulüne göre yürürlüğe konulmuş Milletlerarası andlaşmalar kanun hükmündedir. Bunlar hakkında Anayasaya aykırılık iddiası ile Anayasa Mahkemesine başvurulamaz. Usulüne göre yürürlüğe konulmuş temel hak ve özgürlüklere ilişkin milletlerarası andlaşmalarla kanunların aynı konuda farklı hükümler içermesi nedeniyle çıkabilecek uyuşmazlıklarda milletlerarası andlaşma* hükümleri esas alınır." Aynı şekilde bu türden bir farklı muamelelere maruziyetten dolayı bireysel başvuru yoluyla da hak aranmasının mümkün olduğun kanaatindeyiz.[29]

5. SONUÇ

Fikrî mülkiyeti koruyan ulusal normların tatbikinin ait bulunduğu devletin topraklarıyla sınırlı olması, ülke hudutlarını kolayca aşma kabiliyetine sahip fikir ve sanat eserlerinin de dahil olduğu fikrî mülkiyete konu mal ve hizmetlerin başka ülkelerde hukukî himâyeden mahrum kalmasına sebep olmuştur. Hakların başka ülkelerde de korunması için devletler iki veya çok taraflı anlaşmalar yapma yoluna gitmiştir. İlim, edebiyat ve sanat eserleri üzerindeki hakların küresel ölçekte himâyesiyle ilgili ilk milletlerarası sözleşme 1886 yılında kabul edilen Bern Sözleşmesi'dir. Daha sonra 1961 tarihli Roma Sözleşmesi, 1994 tarihli TRIPs Anlaşması ve 1996 tarihli WIPO internet anlaşmaları da gelişen iktisadi, sosyal ve kültürel hayatın ve teknolojik gelişmelerin ortaya çıkardığı ihtiyaçlara göre tasarlanan milletlerarası hukuk metinleridir.

Başta Bern Sözleşmesi olmak üzere milletlerarası anlaşmalarda âkit devlet vatandaşlarının yine anlaşmaya taraf başka ülkelerdeki telif haklarının etkili bir biçimde himâyesi için bazı temel prensiplere yer verilmiştir. Telif hukuku alanında bu prensipler Bern Sözleşmesi özelinde asgarî haklar, ulusal muamele, otomatik koruma ve korumanın bağımsızlığı başlıkları altında sıralanmaktadır.

Asgarî haklarla ilgili olarak Bern Sözleşmesi'nin 5/1. maddesinde; eser sahiplerinin, bu Sözleşme ile korunan eserler konusunda, bu Sözleşme ile özel olarak verilen haklarda olduğu gibi kaynak ülke dışındaki Birlik ülkelerinde, bu ülkelerin kanunları ile kendi vatandaşlarına tanıdıkları mevcut veya ileride tanıyabilecekleri haklardan yararlanacağı ifade edilmiştir. Mezkûr hükümde geçen "bu sözleşme ile özel olarak verilen haklar" tabiri, anlaşmaya taraf diğer ülke vatandaşına ait olup anlaşmanın âmir hükümleri gereğince üye devletlerin korumaya mecbur bulundukları hakları ifade eder.

Minimum standartlar niteliğindeki bu türden hak ve menfaatler için "asgari haklar" terimi kullanılır. Bunlar, âkit her devletin Sözleşme mûcibince ulusal mevzuatıyla tanımak zorunda bulunduğu malî ve manevî hakları ifade eder. teknik bir tarif yapılacak olursa; Bern

[29] Bu konuda ayrıntı için bkz. Mustafa Ateş, 'Fikrî Hakların Anayasal Himâyesi Üzerine Notlar' *Prof. Dr. Burhan Kuzu'nun Anısına Armağan* (On İki Levha Yayıncılık 2023) 921-956.

ve Roma Sözleşmeleri ile TRIPs ve WIPO İnternet Anlaşmalarında öngörülmüş olup da, bu Sözleşme veya Anlaşmalar uyarınca taraf devletlerin kendi iç hukuklarıyla da kabul etmek ve tanımak zorunda bulunduğu haklara "asgarî haklar" denilir. Dolayısıyla bir milletlerarası sözleşmeye taraf olan devlet, o sözleşmede emredici mahiyette düzenlenen hakları tanımak ve bu haklar için hukukî himâye sağlamak zorundadır.

Bern Sözleşmesi veya telif haklarının korunmasıyla ilgili diğer uluslararası sözleşmelerde yer verilen ulusal muamele, otomatik koruma ve korumanın bağımsızlığı prensiplerinin ana hedefi aslında bir üye devlet vatandaşı için yabancı bir ülkede asgarî haklarının hukukî himâyesine hizmet etmektedir. Anlaşmaya taraf devlet, bir âkit devlet vatandaşı ile kendi vatandaşı arasında ayrımcılık yapamaz. Keza asgarî haklardan yararlanma ve bunların uygulanması o ülkede herhangi bir formaliteye tabi tutulamaz. Buna göre bir ülkede hakların iktisabı veya himâyesi için eserlerin husussî bir sicile tescili ulusal kanunla zorunlu olsa bile, hukukî himâye için bu şartları sağlaması yabancı eser sahibinden talep edilemez. Bu gibi faydalanma ve uygulamalar, eserin menşe ülkesindeki mevcut korumadan bağımsız olmak zorundadır. Hakların korunması için talepte bulunulan ülke mevzuatı, menşe ülke mevzuatına göre daha avantajlı bir himâye sağlıyorsa, kural olarak kaynak ülke mevzuatına göre değil o ülkenin daha avantajlı mevzuatına göre koruma sağlanacaktır.

Milletlerarası sözleşmelerde yer alan prensipler, âkit devletler için uyulması mecburi kurallardan oluşur ve bunları diğer üye devletlerin vatandaşlarına tatbik etmek zorundadırlar. Şayet ulusal mevzuat milletlerarası standartları karşılamıyorsa, kendi vatandaşına yabancıya göre daha elverişsiz bir koruma sağlamak gibi bir durumla karşılaşacaktır. Bu duruma düşmek istemeyen devletler, kendilerini, ulusal telif hukuku mevzuatlarını uluslararası kurallara uyumlaştırmaya mecbur hissedeceklerdir. Bunun neticesinde bir yandan ulusal koruma standartlarında iyileşme sağlanırken diğer yandan ulusal mevzuatlar arasında kendiliğinden bir yakınsama ve yeknesaklaşma gerçekleşmiş olacaktır.

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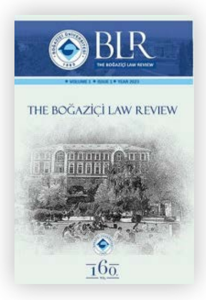

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Arbitration of Post-Closing M&A Disputes and Confidentiality Obligations of Target Management As Factual Witnesses: Secrets To Keep or Secrets To Tell?

Kapanış Sonrası Birleşme ve Devralma Uyuşmazlıklarında Tahkim ve Hedef Şirket Yöneticilerinin Tanık Olarak Gizlilik Yükümlülüğü: İfşa Edilebilen Bilgilerin Kapsamı

Sıla Karakoç Göksu

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ARBITRATION OF POST-CLOSING M&A DISPUTES AND CONFIDENTIALITY OBLIGATIONS OF TARGET MANAGEMENT AS FACTUAL WITNESSES: SECRETS TO KEEP OR SECRETS TO TELL?*

KAPANIŞ SONRASI BİRLEŞME VE DEVRALMA UYUŞMAZLIKLARINDA TAHKİM VE HEDEF ŞİRKET YÖNETİCİLERİNİN TANIK OLARAK GİZLİLİK YÜKÜMLÜLÜĞÜ: İFŞA EDİLEBİLEN BİLGİLERİN KAPSAMI

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ABSTRACT

This article examines senior management's role in post-closing mergers and acquisitions ("M&A") arbitrations, where they testify as factual witnesses for the acquirer of the target company and have a standstill confidentiality obligation to the selling shareholders. This article will analyze this phenomenon from the viewpoints of both selling shareholders and the arbitral tribunals.

The involvement of the top management of the target in any post-closing M&A disputes would be crucial, given their first-hand knowledge of the transaction. Hence, the selling shareholders may take some ex-ante measures, by concluding a separate confidentiality agreement with these individuals, whose interests have been shifted upon closing and became more aligned with the acquirer. Once any proceeding commences, the selling shareholders may request the exclusion of the witness statement, either relying on the close relationship between the witness and the acquirer or the confidentiality obligation of the witness to the selling shareholders.

The arbitral tribunal begins by assessing whether it possesses the authority to exclude the witness based on the individual's prior confidentiality obligations. Following this determination, the arbitral tribunal evaluates whether exclusion is appropriate under the specific circumstances of the case. In reaching its decision, the arbitral tribunal may review the content of the witness's statement. If the evidence is deemed relevant and falls within the scope of the witness's confidentiality obligations, the tribunal must carefully balance the competing interests of the parties involved. To establish a coherent framework and more predictable results for both parties and their counsels, this article suggests recourse to more established rules as in work-product doctrine, under which the tribunal should evaluate in deciding the disclosure of the confidential information by the top management as factual witnesses, whether the acquirer has i) a substantial need for the confidential information to present its case and ii) whether the acquirer lacks any ability to obtain the information by other means without undue hardship.

Keywords: post-closing M&A, arbitration, confidentiality obligation, factual witness

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ÖZET

Birleşme ve devralmalarda ("M&A"), hedef şirket üst düzey yöneticilerinin kapanış sonrası ortaya çıkan tahkim uyuşmazlıklarında satıcı hissedarlara karşı gizlilik yükümlülüğü altında olmalarına karşın, tahkim yargılamasında alıcı taraf adına fiili tanık olarak yer aldıkları durumların ne tür sonuçlar doğuracağı oldukça önem arz etmektedir. Bu makale, işbu hususu hem satıcı hissedarlar hem de hakem heyetinin perspektifinden ele alıp analiz etmeyi amaçlamaktadır.

Hedef şirketin üst düzey yöneticilerinin M&A sürecine ilişkin detaylara ilk elden hakim olmaları, kapanış sonrası M&A uyuşmazlıklarına dahil olmalarını kritik hale getirmektedir. Bu bağlamda, satıcı hissedarlar, işbu yöneticilerin çıkarlarının kapanıştan sonra alıcı tarafla daha uyumlu hale gelebileceğini öngörerek, bu kişilerle işlem esnasında veya öncesinde gizlilik sözleşmesi yapmayı öngörebilmektedir. Tahkim sürecinin başlamasıyla birlikte ise satıcı hissedarlar, bu tanıkların alıcı tarafla olan yakın ilişkisine veya satıcılara karşı gizlilik yükümlülüklerine dayanarak tanık ifadelerinin hakem heyetince değerlendirilmeye alınmamasını talep edebilecektir.

Hakem heyeti, öncelikle tanığın gizlilik yükümlülükleri doğrultusunda beyanlarının hariç tutulup tutulamayacağına ilişkin karar verme yetkisini değerlendirir. Bu tespitin ardından, tanık beyanlarının hangi koşullar altında geçersiz sayılmasının uygun olacağı hususunun belirlenmesi gerekecektir. Hakem heyeti, bu hususta karar verirken tanığın ifadesini ve bu ifadenin içeriğini gözden geçirmeyi talep edebilir. Şayet sunulan delil hem konuyla doğrudan ilgili hem de tanığın gizlilik yükümlülükleri kapsamına giriyorsa, hakem heyeti, tarafların rekabet halindeki menfaatlerini dikkatlice değerlendirerek bir sonuca ulaşabilecektir.

Taraflar için daha tutarlı bir çerçeve ve öngörülebilir sonuçlar sağlamak adına, bu makale, hakem heyetinin hedef şirketin üst düzey yöneticilerinin tanık olarak dinlenmesi sırasında satıcı hissedarlara ait gizli bilgilerin açıklanmasına ilişkin bir karar verirken, "work-product doctrine" (iş-ürün doktrini) gibi yerleşik kurallara başvurmasını önermektedir. Bu bağlamda, hakem heyetinin, i) alıcının kendi davasını desteklemek için işbu açıklanması beklenen gizli bilgilere duyduğu ihtiyacın önemini ve ii) bu bilgilerin alıcı tarafından aşırı bir zorluk olmaksızın başka yollarla elde edilip edilemeyeceği hususunu değerlendirerek bir sonuca ulaşabileceği savunulmaktadır.

Taraflar için daha tutarlı bir çerçeve ve öngörülebilir sonuçlar sağlamak adına, bu makale, hakem heyetinin hedef şirketin üst düzey yöneticilerinin tanık olarak dinlenmesi sırasında satıcı hissedarlara ait gizli bilgilerin açıklanmasına ilişkin bir karar verirken, "work-product doctrine" (iş-ürün doktrini) gibi yerleşik kurallara başvurmasını önermektedir. Bu bağlamda, hakem heyetinin, i) alıcının kendi davasını desteklemek için işbu açıklanması beklenen gizli bilgilere duyduğu ihtiyacın önemini ve ii) bu bilgilerin alıcı tarafından aşırı bir zorluk olmaksızın başka yollarla elde edilip edilemeyeceği hususunu değerlendirerek bir sonuca ulaşabileceği savunulmaktadır.

Anahtar Kelimeler: kapanış, birleşme devralmalar, tahkim, gizlilik yükümlülüğü, tanık.

1. INTRODUCTION

The past years have been challenging in many ways, primarily due to the pandemic and lockdowns in different parts of the world. However, one of the world's largest banks, Morgan Stanley, reports a record year for the M&A industry worldwide.[1] According to the bank, in 2023, there was a notable rebound from the year before, with over $5 trillion in global M&A volume across all sectors, with companies in the pursuit of scaling, retaining new

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[1] 'M&A to Rebound in 2024' (Morgan Stanley, 27 March 2024) <https://www.morganstanley.com/ideas/mergers-and-acquisitions-rebound-2024> accessed 4 December 2024.

capabilities, and accessing new markets.[2] The survey revealed predictions and anticipation of a highly engaged and active market with a record-setting pace. According to Deloitte, the market could witness trends that point towards the dawn of the next big M&A run, resulting in even greater deal size and volume.[3] The increase in the M&A activity would further highlight the importance of the post-acquisition integration process between two companies which raises various cultural and identity crisis, thereby, may negatively affect the expected synergies from M&A.[4] To mitigate these risks, the acquirers, usually prefer to keep the top executives of the target who would play an essential role in the integration process in both the pre- and post-closing phase of the transaction.[5]

There are many benefits in keeping the target's top management after acquisition[6]. First and foremost, if kept after closing, the incumbent management would play a pivotal role in providing a smooth transition, by easily transferring the knowledge and technology from the target to the acquirer.[7] Their existence would also foster the cultural alignment between the acquirer and the rest of the target company.[8] By leveraging their experience in running target's operation and industry expertise, they would also be capable of minimizing any disruption throughout the integration process and increase the success of the post-merger performance of the target[9]. This is particularly accurate in high-tech and knowledge intensive industries, where the management are usually the founders or patent holders. Thus, it would be wise for the acquirer to benefit from the target's human capital.

Having said that, it is now quite common for parties to have a post-closing M&A dispute either arising from breaching of contractual representation and warranties or from purchase price adjustments on the target's profits or turnover.[10] The central question this article will address is whether, in such circumstances, the acquirer should be allowed to submit the witness statement of top management of the target as evidence to support his case, considering the high tendency to keep the top management after closing.

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[2] ibid.

[3] Adam Reilly, '2024 M&A Trends Survey' (Deloitte United States, 5 October 2020) <https://www2.deloitte.com/us/en/pages/mergers-and-acquisitions/articles/m-a-trends-report.html> accessed 4 December 2024.

[4] Nancy Hubbard and John Purcell, 'Managing Employee Expectations during Acquisitions' (2001) 11(2) Human Resource Management Journal 17.

[5] Athina Vasilaki, 'The Relationship Between Transformational Leadership and Postacquisition Performance' (2011) 41(3) International Studies of Management Organization 42; Marc J Epstein, "The Drivers of Success in Post-Merger Integration' (2004) 33(1) Organizational Dynamics 174; Bruce Nolop, "Rules to Acquire By' (2008) 85(9) Harvard Business Review 56.

[6] Bruce T Lamont and others, 'Integration Capacity and Knowledge-based Acquisition Performance' (2018) 49(1) Organizational Management 103–114.

[7] Melissa E. Graebner, 'Momentum and serendipity: How acquired leaders create value in the integration of technology firms' (2003) 25(8/9) Strategic Management Journal 751–777.

[8] Riikka M. Sarala, Eero Vaara and Paulina Junni, 'Beyond Merger Syndrome and Cultural Differences: New Avenues for Research on the 'Human Side' of Global Mergers and Acquisitions (M&As)' (2019) 54(4) Journal of World Business 307–321.

[9] Graebner (n 7) 751–777.

[10] Alexander W. Nürk, *Drafting Purchase Price Adjustment Clauses in M&A: Guarantees, Retrospective and Future Oriented Purchase Price Adjustment Tools* (Herstellung Diplomica Verlag GmbH 2009) 11.

This article will first examine this phenomenon from the selling shareholders' perspective both before and after the dispute has been arisen, evaluate the relevant precautions to alleviate the risks stemming from such witness evidence, and, most importantly, determine whether the selling shareholders are entitled to request from the tribunal to exclude the top management from testifying before the arbitral tribunal. This will be followed by the tribunal's perspective to the matter as how they would react once they come across with such a request. The first question will be asked whether the tribunal has the power to exclude the evidence, and if so, on what ground they could do so and what could be the potential implications of this decision on the fate of the arbitral award. Thereafter, the discussion will proceed, if the tribunal review the content of the witness statement and decide not to accept it, would the tribunal be able to un-ring the bell and disregard the information disclosed by the witness while resolving the dispute?

Finally, the article will conclude that the lack of established rules in deciding on the exclusion of the witness evidence in such cases results in legal uncertainty where parties and even arbitrators would be unable to foresee which type of evidence will be admitted during the arbitral proceedings. This Article suggests applying the disclosing criteria set forth by work-product doctrine where the tribunal decides not to exclude the evidence if i) there is a substantial need for this confidential information to be disclosed during the proceedings and ii) the party requesting disclosure lacks any ability to obtain the substantial equivalent information from alternative sources and by other means without undue hardship.

2. FROM THE SELLING SHAREHOLDERS' VIEW

It is crystal clear that, the interests of the management shifts upon the closing, as they have more aligned with the acquirer than the selling shareholders. This, obviously, affects their potential witness statement. Considering the fact that they are the key persons throughout the whole process of such transaction, the selling shareholders may try to request the exclusion of the management from being a witness on behalf of the acquirer before any arbitral tribunal.

2.1. EX-ANTE MEASURES

During the transaction, the selling shareholders' primary concern would not be that of the transferring employees, including management, of the target. Therefore, most of the time they do not include any provision dealing with the management's role in post-closing M&A disputes. However, once a post-closing M&A arbitration begins, sellers may find the former management of their company listed as fact witnesses, whose interests often shift, aligning more closely with the acquirer that potentially affect the content of their testimony in ways that would not favor the sellers. To mitigate this risk, the selling shareholders and their counsel may consider taking several proactive measures during the transaction.

First and foremost, the selling shareholders may create a team to be involved in all stages of the deal, consisting of individuals that would not keep their position after closing at the

target, which may prevent the potential bias in their testimony.[11] The selling shareholders may also consider including a provision that may allow them to approach the management in cases of any post-closing disputes. Although the management team might be reluctant to testify for the selling shareholders, at least, the selling shareholders would have the right to ask them to do so. Additionally, the selling shareholders may conclude a separate confidentiality agreement with the management which includes a specific provision that prevents management team that was active at any stage of the deal from disclosing the confidential information to the acquirer or even discussing the dispute with the acquirer at all. However, sellers and their legal teams often overlook such protective provisions. This raises another question of what arguments sellers can present before an arbitral tribunal when faced with these challenges.

2.2. EX-POST ACTIONS

There could be two potential arguments that can be raised by the selling shareholders, either relying on the close relationship between the witness and the acquirer or if applicable, the confidentiality obligation of the witness owed to selling shareholders.

Under some jurisdictions, a group of individuals who have a commercial or familial relationship with the parties, are not allowed to testify as witnesses before courts or tribunals.[12] This problem was encountered during the Iran-United Stated Claims Tribunal, where the tribunal did not allow the party representatives or party witnesses to testify rather only provided "information" in relation to the case.[13] A similar issue was discussed under the decision of French Court of Appeal decision, which set aside the ICC award, where the court stated that the statement of the one of the party's vice presidents as a witness lacked any degree of credibility considering its position, though it was accepted by the tribunal.[14]

Nevertheless, over time, the arbitral rules have explicitly acknowledged that there is no such limitation in international arbitration. For instance, Article 27/2 of the UNCITRAL Arbitration Rules states that "*witnesses … may be individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party*". In UNCITRAL Working Group discussions, it was clarified that "*in any way relating to any party*" is an encompassing and non-exhaustive term that do not only cover persons acted on behalf of a party but rather refers a more extensive group of individuals, including officers, employees, shareholders, associates, partners, or legal counsels.[15] Similarly, under Article 4/2 of the IBA Rules, Article

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[11] Carsten Wendler, Eric Leikin and Stuti Gadodia, 'The Curious Case of Crossover Witnesses in Post-M&A Arbitration' (Passle, 5 December 2023) <https://blog.freshfields.us/post/102iube/the-curious-case-of-crossover-witnesses-in-post-ma-arbitration> accessed 3 December 2024.

[12] Working Group Discussions II, 47th Session, 10-14 September 2007, New York, UN Doc A/CN.9/64 para 29.

[13] David D Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, Oxford University Press 2013) 612-613.

[14] Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press 2013) 92-104.

[15] Working Group Discussions II, 50th Session, 9-13 February 2009, New York, UN Doc A/CN.9/669 para 78.

27/3 of the Swiss International Arbitration Rules and Article 20.7 of the LCIA, the party's officers, employee, owners, shareholders, or other representatives are allowed to present evidence as a witness.[16] Therefore, the argument of excluding the witnesses based on their commercial or familial relationship with the parties would not be accepted by the tribunal. However, the relevant party may seek the annulment or prevent enforcement of the award where the applicable law does not permit a group of individuals to testify before courts or tribunals and where the tribunal renders its award based on the statement provided by such individuals.

Under the second argument, the selling shareholders' counsel should first inquire to whether the management concluded a confidentiality agreement before or at the time of the transaction. The subject of this confidentiality agreement shall include the management's obligation to keep the sensitive information of the selling shareholders' that they have gathered before or during the transaction confidential and not to disclose to the acquirer or any other third party. Without an explicit agreement, one may think for a second to rely on the employment agreement of the management that most of the time includes a confidentiality obligation, and even if not, the doctrine and court decisions have already verified the inherent nature of this "confidentiality" that is embedded in the employment agreements.

However, the "party" who signed the employment agreement with the top management is most of the time "the target" itself, not the selling shareholders. Therefore, it is the target not the selling shareholders that is entitled to enforce such obligation against the management. The selling shareholder would not be entitled to ask the management to not to disclose any information relevant to the target or the transaction. However, if the selling shareholders concluded a separate confidentiality agreement, then they may invoke the management's obligation to keep the information in relation to the selling shareholder and the transaction confidential for a period of time, preferably, indefinitely. By raising this argument, the selling shareholders may request the arbitral tribunal to exclude this witness from the proceedings.

In articulating and presenting their arguments, the applicable evidentiary rules would be much of importance for parties. The parties have the freedom, subject to mandatory overriding rules, to agree on the applicable evidentiary rules. However, the parties to an arbitration agreement rarely do so.[17] Most of the time *lex arbitri* and the institutional rules governing the arbitration have had to be examined in relation to their relevant provision

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[16] Article 4/2 of the IBA Rules: "*Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative*"; Article 27/3 of the Swiss International Arbitration Rules: "*Any person may be a witness in the arbitration. It is not improper for a party, its officers, employees, legal advisors, or counsel to interview witnesses or potential witnesses*"; Article 20.7 of the LCIA: "*Subject to any order by the Arbitral Tribunal otherwise, any individual intending to testify to the Arbitral Tribunal may be treated as a witness notwithstanding that the individual is a party to the arbitration or was, remains or has become an officer, employee, owner or shareholder of any party or is otherwise identified with any party*".

[17] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International BV 2014) 1650; Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International BV 2012) 192.

for disclosing of confidential information as evidence before the tribunal. For example, if *lex arbitri* is English law, there are relevant precedents that the tribunal may recourse. In *Porton Capital Technology Funds v 3M UK Holdings Limited*, the court decided that as long as the witness is subject to a confidentiality obligation owed to the opposing party, then the witness's evidence can only be presented at the hearing.[18] This means that the counsels relying on the witness's statement can never be sure what their witness would testify during the proceedings. Considering the golden rule of the advocacy where the counsels should not ask a witness a question that they are not confident about the answer to, the appeal of nominating the incumbent managers as a witness against the previous shareholders in post-closing M&A disputes would significantly diminish in the eyes of the acquirer.

Institutional rules may also provide some insights and grounds for selling shareholders' counsel to rely on, though many of them do not include an explicit provision. Under Article 22/3 of the ICC 2021 Rules and Article 21 of the ISTAC Rules, the tribunal is empowered to take any orders to protect trade secrets and confidential information.[19] By raising the confidentiality agreement concluded with the witness, the selling shareholder may request the tribunal to exclude the witness from the proceedings without submitting his/her statement, highlighting how the information that will be disclosed by the management would inflict irreparable harm to their business and commercial standing. Moreover, as will be detailed below, the tribunal's discretion to exclude evidence is not absolute. The tribunal is bound by an obligation to act fairly and impartially, ensuring that all parties are granted a reasonable opportunity to present their cases. Any deviation from these principles may render the award susceptible to challenge. As such, the selling shareholder should also highlight that the witness-gating would not prejudice the acquirer's rights to present its case, by referring to the acquirer's opportunity to nominate different witnesses or request a document production from the selling shareholder, where applicable.

3. FROM THE OTHER SIDE OF THE BENCH: HOW SHOULD THE ARBITRAL TRIBUNAL PROCEED?

The tribunal's response to these potential two arguments shall also need to be discussed. Concerning the first argument, where the selling shareholder requests the tribunal to exclude the evidence based on the relationship between the witness and the acquirer, it would probably not be accepted considering the explicit rules that allows those individuals to testify before tribunals. However, one of the fundamental duties of the tribunal is to render

[18] Porton Capital Technology Funds v 3M UK Holdings Ltd [2011] EWHC 2895 (Comm) (07 November 2011).

[19] Article 22/3 of the ICC Rules: *"Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information*".

Article 21 of the ISTAC Rules: "*Unless otherwise agreed by the parties, the arbitral proceedings are confidential. At the request of one of the parties, the Sole Arbitrator or Arbitral Tribunal may give any order concerning the confidentiality of the arbitration and the proceedings, and may take necessary measures to protect trade secrets, along with other confidential information"*.

an enforceable award that finally settles the disputes between the parties.[20] If, under the *lex arbitri*, there are mandatory overriding rules that prevents certain group of individuals from being witnesses and testifying before courts, then the tribunal may also prefer not to go down that road to save the award.[21]

The second argument, where the witness is under confidentiality obligation to the selling shareholders, would deserve a more delicate assessment. The first problem that needs to be discussed in relation to this argument would be whether the tribunal has the power to exclude the evidence based on the prior confidentiality obligation. The second problem with this issue is that in order to proceed, the arbitral tribunal may be required to examine the content of the witness evidence to decide its admissibility. In the end, if the tribunal decides to exclude the evidence, is the arbitral tribunal truly capable of disregarding the content of the witness statement? Finally, the tribunal's power to decide the admissibility of the evidence that contains confidential and sensitive commercial information will be discussed.

3.1. DOES THE TRIBUNAL HAVE THE POWER TO EXCLUDE THE EVIDENCE?

Many of the other arbitration rules also confer broad discretion to decide on admissibility of the evidence.[22] For instance, according to UNCITRAL Model Law Article 19/2 "*the power conferred upon the arbitral tribunal includes the power to determine the admissibility (…) of any evidence*".[23] A similar provision has been incorporated into many prominent arbitra-

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[20] See, e.g., ISTAC Rules Article 34 ("*The Sole Arbitrator or Arbitral Tribunal must make every effort necessary to render an enforceable award");* ICC Rules, Art. 42 *('the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law'*); LCIA Rules, Art. 32.2 (*providing that the tribunal 'shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat'*); SIAC Rules, Art. 41.2 *(providing that the tribunal 'shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of any Award'*); WIPO Rules Arbitration Rules, Art. 64.e (*providing that the 'Tribunal may consult the Center with regard to matters of form, particularly to ensure the enforceability of the award'*); Günther Horvarth, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18 Journal of International Arbitration 135.

[21] Michal Kocur, 'Witness Statements in International Commercial Arbitration', in Beata Gessel and Kalinowska vel Kalisz (eds.), *The Challenges and the Future of Commercial and Investment Arbitration* (Court of Arbitration Lewiatan 2015) 173.

[22] Jurgis Bartkus 'The Admissibility of Evidence in International Commercial Arbitration', Doctoral Dissertation, Vilnius 2023; Jason Fry et al., The Secretariat's Guide to ICC Arbitration. Paris: International Chamber of Commerce, (International Chamber of Commerce 2012) 268; Thomas H. Webster, Michael Bűhler, Handbook of ICC Arbitration: Commentary, Precedents, Materials (4th edn, Sweet & Maxwell 2021) 443; Ilias Bantekas and others, UNCITRAL Model Law on International Commercial Arbitration: A Commentary (Cambridge University Press 2020) 547.

[23] The UNCITRAL Secretariat stated that this Article 19 of the Model Law is one of the provisions which constitute the "Magna Carta of Arbitral Proceedings" thus might be regarded as "the most important provisions" of the Model Law. See also Howard Holtzmann and Joseph Neuhaus*, A Guide to the UNCITRAL Model Law on International Commercial Arbitration. Legislative History and Commentary* (Kluwer Law International 1989) 564.

tion rules, including LCIA[24] and SIAC[25]. A distinct formulation has been adopted under ISTAC Rules Article 29, which states as follows: "*The Sole Arbitrator or Arbitral Tribunal shall consult all means it deems to be appropriate in order to establish the facts of the case*".

In the same vein, under Article 9/1 of the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), the tribunal is empowered to determine the admissibility, relevance, materiality, and weight of the evidence.[26] Under Article 9/2 of the IBA Rules, the arbitral tribunal has been granted a discretion to exclude evidence on one or more of the grounds (a)-(g). As it is seen these Articles presume that the evidence is "admissible" unless excluded, otherwise, if it had been to "include" evidence that was relevant or material, it would put a large burden on the arbitral tribunal to assess each piece of evidence for potential inclusion.[27]

Furthermore, unlike the others, IBA Rules contain a specific provision in relation to confidentiality, whereby the tribunal would have discretion to exclude evidence on the grounds of commercial or technical confidentiality that the tribunal determines to be compelling. Although this Article does not specify the types of confidential information, the information that top management will reveal as a factual witness may include sensitive details in relation to the selling shareholder's business at the time of the transaction. However, the tribunal is not obligated to render the evidence inadmissible, unless they are "compelling", as "ordinary" confidentiality would be insufficient.[28] This issue was handled by English courts, in *Science Research Council v Nasse*, where the court stated

> "*there is no reason why, in the exercise of its discretion to order discovery, the tribunal should not have regard to the fact that documents are confidential, and that to order disclosure would involve a breach of confidence… the tribunal may have regard to the sensitivity of particular types of confidential information, to the extent to which the interests of third parties… may be affected by disclosure, to the interest is preserving the confidentiality of personal reports, and to the wider interest which may be seen to exist in preserving confidentiality.*"[29]

Grounded on these relevant articles and case law, the tribunals, usually take a liberal

[24] Article 22/vi of the LCIA: "*The Arbitral Tribunal shall have the power (…) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal.*"

[25] Article 19.2 of the SIAC: *"The Tribunal shall determine the relevance, materiality, and admissibility of all evidence. The Tribunal is not required to apply the rules of evidence of any applicable law in making such determination."*

[26] Article 9/1 of the IBA Rules: "*The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.*"

[27] Ashford (n 14) 146.

[28] ibid 165.

[29] Science Research Council v. Nasse [1980] AC 1028.

stance towards the admissibility of the evidence.[30] Practice has shown that arbitral tribunals admit almost any evidence submitted to them in support of parties' position, as they retain significant discretion in assessing and weighing the evidence.[31] Scholars also supported this approach by observing that "*tribunals nearly always adopt a flexible approach to admissibility of evidence; it is unlikely that a party will be prevented from submitting evidence that may genuinely assist the tribunal in establishing the facts.*"[32] This is because the tribunal does not apply the strict rules of evidence of the *lex arbitri.* Rather, they rely on the discretion granted by the various institutional rules to determine the admissibility of the evidence. The exclusion of the evidence is narrowly confined in that the evidence submitted by the parties, provided it is relevant, is generally be admitted, with concern regarding its probative force going to weight rather than its admissibility.[33] By doing so, the arbitral tribunals safeguard their awards from being challenged as they would not run the risk of failing to establishing the truth. Thus, once the tribunal come across with a request by the selling shareholders requesting the exclusion of the top management to testify as a factual witness, the tribunal would have a broad discretionary power in deciding to accept or refuse this evidence and ultimately to exclude the witness from the proceeding. One step further, even the relevant institutional rules do not provide any explicit provisions on the discretionary power of the tribunal to exclude the evidence, in particular, witness or experts from the proceedings, there are arbitral awards where the tribunal decided to do so.

Such a situation happened in *Flughafen v Venezuela* where there was a conflict between an expert and a party, wherein the Claimant alleged that the expert appointed by the Respondent had relied on confidential information it had received from its previous relationship with the Claimant.[34] Although the tribunal acknowledged that it had power to exclude the expert by extending the scope of Article 34/1 of the ICSID rules,[35] it did not decide to do so due to the Claimant's failure to specify the confidential nature of the information it had shared with the expert. However, what matter here is that, even though there is not any explicit provision in ICSID rules, the tribunal evaluated to exclude the expert based on its confidentiality obligation to the opposing party under the admissibility of the evidence by

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30 W. Michael Reisman and Eric E. Freedman, 'The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication' (1982) 76 (4) The American Journal of International Law 783; Siyuan Chen, 'Re-assessing the Evidentiary Regime of the International Court of Justice: A Case for Codifying its Discretion to Exclude Evidence' (2015) 13(1) International Commentary on Evidence 39; Julian Lew, Loukas Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 561.

31 Lew et al (n 31) 561.

32 Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford: Oxford University Press 2015) 378; Waincymer (n 17) 793; Born (n 17) 1123-1126.

33 Laird C. Kirkpatrick,'Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement' (1992) 25(3) Loyola of Los Angeles Law Review 847.

34 Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Decision on Claimants' proposal for disqualification of one of Respondent's expert witnesses, and request for inadmissibility of evidence, 29 August 2012.

35 Article 34/1 of the ICSID Rules: "*The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.*"

stating that "*there can be no doubt that the Tribunal has competence to accept or exclude any evidence submitted by one of the parties.*"[36]

That being said, the arbitral tribunal has the power to decide on the exclusion of the witness evidence that would be provided by the management, who owed a confidentiality obligation to the selling shareholders. The rest of the article will deal with how the tribunal exercises its authority in determining the exclusion of the witness evidence and if the evidence is deemed inadmissible, would the tribunal be able to un-ring the bell and disregard the information disclosed by the witness while resolving the dispute?

3.2. CAN THE TRIBUNAL DELIBERATELY DISREGARD THE CONTENT OF THE EVIDENCE?

A special situation presents itself when the tribunal is asked to review documents to determine their confidential nature. If the determination cannot be made without a review of the documents and a demand is made for such a review, should the tribunal perform that task itself knowing that it may be influenced by what it sees?

As described by Chris Guthrie, arbitrators are subject to informational blinders, where they may not be able to disregard the highly relevant though inadmissible evidence under evidentiary rules.[37] This was proved by an experiment conducted by Andrew Wistrich, Jeffrey Rachlinski and Chris Gutherie; even though the judges themselves ruled that the information was privileged and therefore inadmissible, the information protected by the privilege appears to have had a substantial impact on their assessment of liability.[38]

There are a couple of psychological explanations for such a result. For example, in accordance with the ironic process theory, once people suppress information, they must keep the forbidden thought available so that they can compare it to their existing mental state and confirm that they are not thinking of the forbidden thought.[39] Thus, thought suppression is an ironic process that creates the opposite of what is wanted.[40] Secondly, as to the mental contamination theory, new information comes with new stimuli that facilitates new beliefs that might persist, even if the information is discredited.[41] Thus, the arbitrators who are exposed to inadmissible evidence might not even realize how this information has affected their judgment. To insulate their deliberation and decision-making process from inadmis-

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[36] Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela at para 11-13; para 37.

[37] Chris Guthrie, 'Misjudging' (2007) 7(420) Nevada Law Journal 435.

[38] Chris Guthrie and Jeffrey J Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) 153 (1) University of Pennsylvania Law Review 1279-81; See also Stephan Landsman & Richard F. Rakos, 'A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation' (1994) 12(2) Behavioral Sciences and The Law 113.

[39] Daniel M. Wegner, 'Ironic Processes of Mental Control.' (1994) 101(1) Psychological Review 34.

[40] Daneil M. Wegner and Ralph Erber, 'The Hyper-accessibility of Suppressed Thoughts.' (1992) 63 (6) Journal of Personality and Social Psychology 908.

[41] Thomas Gilovich, Dale Griffin and Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge University Press 2002) 180

sible evidence, they need to prevent this information from influencing how the subsequent information is processed, which is quite challenging, as each new information changes how they think and leads to belief perseverance.[42] Thereby, there are potential psychological underpinnings proving that inadmissibility can affect how arbitrators would interpret the evidence presented later by contaminating their decision-making process. Although the arbitrators cannot incorporate the inadmissible evidence into their reasoning, they may have tendency to use it to assess the credibility of other evidence.

To ensure that the arbitrators are protected from the informational blinders and not affected by the content of the witness statement of the top management, Article 3(8) of the IBA Rules may provide a leeway.[43] In accordance with this Article, in exceptional circumstances, the tribunal may, after consultation with the parties, appoint an independent and impartial expert to conduct the review. While the appointment of such an independent expert may cost time and money, in light of the danger of prejudice, if a party asks for such an independent review, careful consideration should be given to all of the relevant factors before deciding on the tribunal's response.[44]

3.3. HOW CAN THE TRIBUNAL EXERCISE THEIR POWER TO EXCLUDE?

3.3.1. Reconciling the competing interests of the Parties

There is no black and white to the answer of how an arbitral tribunal can or should exercise its authority to exclude the witness statement. Rather the tribunal shall need to balance and reconcile the competing interests of the parties. On one hand, one party has a legitimate expectation with respect to its confidential information to be protected by the witness appointed by the other party. On the other hand, the other party desires to present its case by including the target's management as a witness to their case and benefit from the rights accorded to it, namely, right to a fair hearing, that includes, right to be heard and equality of arms.

To start with the right to be heard, the fundamental procedural right protected by the various arbitration rules and national laws, any violation of this right by the tribunals may end their award being annulled or not enforced in accordance with New York Convention[45]. The scope of right to be heard is wide enough that covers right to present and adduce evi-

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[42] Lee Ross, Mark R. Lepper and Michael Hubbard, 'Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm.' (1975) 32(5) Journal of Personality and Social Psychology 880.

[43] See, e.g., National Labor Relations Board v Jackson Hospital Corp., 257 F.R.D. 302, 307; Edna Sussman, 'Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them' (2014) 24(3) The American Review of International Arbitration 494.

[44] ibid 49.

[45] Maxi Scherer, 'New York Convention: Violation of Due Process, Article V(1)(b)' (2012) Queen Mary School of Law Legal Studies Research Paper No. 163/20138 47.

dence and responding to the evidence presented by the opposing party.[46] However, this right is not without limit, as such, the tribunal has a discretion to accept or reject the evidence submitted by the parties, without being violated their right to be heard.[47] This is acknowledged explicitly by the various national laws and arbitral institutional rules where the parties shall need to be granted "reasonable" opportunities to present their cases by submitting relevant documentary evidence in support of their claims. The "reasonableness" would be assessed by the tribunal given the circumstances of each case and their decision, as suggested by *Klaus Berger* and *Ole Jensen*, shall be protected by "procedural judgement rule".[48] This is formulated as the reflection of "business judgement rule" in due process assessment where the arbitrator shall be entitled to take procedural management decisions after filtering the specifics of the case through their reasonable discretion. Thus, while deciding on the admissibility of the witness statement by top management, the tribunal shall carefully examine whether excluding such evidence would deprive the acquirer of a "reasonable" opportunity to present its case. The tribunal shall also conduct the arbitral proceeding by respecting the equal treatment of the parties which means that the tribunal shall treat all parties in the same manner without any distinction or discrimination.[49]

Thus, in terms of taking evidence, the principle affords both parties adequate opportunities to present themselves on the matter before tribunal[50]. This is explicitly acknowledged by the New York Convention Article 5/1/b where the enforcement of an arbitral award may be refused if the parties were not able to present their cases adequately and by IBA Rules Article 9/2/g where the tribunal is empowered to exclude evidence on the basis of concerns of fairness or equality of the parties.

Upholding a claim of confidentiality prevents a party from having access to otherwise relevant material that may enable it to support its claim. This would create a sort of imbalance between parties where one party may freely adduce evidence and the other may stuck up with the witness's confidentiality obligation that may shed light to the matter.[51] The imbalance may not be resolved by simply extending the same attitude to the claimant as it may not necessarily be relevant to a claimants' evidence and may not be matched by confi-

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[46] Emmanuel Gaillard and George Bermann, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Brill 2017) 172; Hakan Pekcanıtez, 'Hukuki Dinlenilme Hakkı' (2000) İzmir Dokuz Eylül Üniversitesi Hukuk Fakültesi, 753.

[47] Bilgehan Yeşilova, 'Yargılama Diyalektiği ve Silahların Eşitliği' (2009) 86 (1) TBB Dergisi 54.

[48] Klaus Peter Berger and J Ole Jensen, 'Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators' (2016) 32(3) Arbitration International 419-420.

[49] Ilias Bantekas, 'Equal Treatment of Parties in International Commercial Arbitration, (2020) 69(4) International and Comparative Law Quarterly 994; Müslüm Akıncı, 'İdari Yargılama Hukukunda Savunmada Fırsat Eşitliği' (2010) 1 (2) Türkiye Adalet Akademisi Dergisi 37; Güney Dinç, "Avrupa İnsan Hakları Sözleşmesi'ne Göre Silahların Eşitliği' (2005) 57 TBB Dergisi 253-306.

[50] Gökçen Topuz and Belkıs Konan, "Geçmişten Günümüze Türk Hukukunda Hâkimin Tarafsızlığı İlkesi" (2017) 66(4) Ankara Üni. Hukuk Fakültesi Dergisi 777; Emel Hanağası, *Medeni Yargılama Hukukunda Silahların Eşitliği* (Yetkin Yayınları 2016) 43.

[51] ibid.

dentiality considerations on the part of the claimant's part.[52] The situation would be further exacerbated if the acquirer were not in a position to provide alternative admissible evidence that has similar evidentiary value from the content-wise to the witness statement of the top management of the target.

These two important rights, the right to be heard and the right to equal treatment, are in clash with the right of the selling shareholder's expectations from the potential witness to keep its confidential information safe. In particular, in relation to its state of mind during the transaction or any other commercially sensitive information. From the broader context, the tribunal may consider the positive effect of the "privacy" of the arbitral proceedings to settle the clashes of interests. Under most jurisdictions and arbitral rules, it is acknowledged that the proceedings would be held in private, where each party is entitled to exclude the public from arbitration hearings and other proceedings.[53] In addition to that, the parties are under obligation not to disclose any of the information or materials provided for and disclosed during the proceedings.[54] Considering this double protection, the disclosure of confidential information by the management may not be that much harmful to the selling shareholders, but instead would shed light on the tribunal to reach the truth and justice. However, any confidentiality may be lost if the award is subject to the judicial challenge, particularly if the award contains confidential information disclosed by the witness.

3.3.2. The Paranoia of Non-Recognition and Non-Enforcement

In accordance with Article V/1/b of the New York Convention

> "*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was unable to present his case*".

Suppose that the tribunal decides to exclude the witness evidence attempted to be submitted by the top management of the target company, as in our case, thereby, the acquirer contemplates challenging the award based on Article V/1/b of the New York Convention. In that situation, the national court would first determine the scope of the due process right contained in this clause where the New York Convention does not provide any lead. From the outset, this defense covers a range of circumstances where one party was "*unable to present his cases*" that, for instance, right to submit evidence, make legal and factual submissions

[52] ibid.

[53] François Dessemontet, 'Arbitration and Confidentiality' (1996) 7(3) American Review of International Law 8; Loukas Mistelis, 'Confidentiality and Third-Party Participation' (2005) Vol 21 (2) Arbitration International 205; Ziya Akıncı, Milletlerarası Tahkim (2nd edn, Vedat Kitapçılık 2021) 354.

[54] Ileana Smeureanu, *Confidentiality in International Commercial Arbitration* (Wolters Kluwer 2011) 118.

to the tribunal and comment on evidence and submissions in the case file.[55] However, the exact delineation needs to be based on either i) the national law of the recognition forum, ii) the national law of the arbitral seat, iii) the national law standard, which is developed specifically for international arbitration, or iv) internationally uniform standard which is derived from New York Convention.[56]

Once the court contends that the due process right includes the party's right to adduce evidence before the tribunal, it may decide whether there should be any causal link between the breach of such right and the outcome of the arbitral proceedings. Although some scholars believe the enforcement of the award can only be refused if it has an impact on the decisions of the tribunal,[57] the majority view does not look for further causal link or damages due to the breach of due process.[58] The Convention itself also does not require any link, as the breach of due process per se, is considered to be sufficiently important to justify the non-enforcement without the need for the party invoking it to establish actual damage any causal link.[59] This means that even if the witness statement of the top management may not have any influence on the decision of the tribunal, the acquirer may still challenge the award.

In practice, despite such a broad scope of Article V/1/b, the rate of non-recognition and non-enforcement of arbitral awards is quite rare.[60] However, this may be the result of the liberal approach of the arbitral tribunals and their utmost effort to respect the procedural rights of the parties. The arbitral tribunals, dedicated to ensuring that all parties have a full and fair opportunity to present their case, and cognizant of the time and costs involved in applying formal rules of evidence, often exercise discretion to admit evidence that may not strictly comply with the traditional admissibility standards. The survey conducted on the ability of judges to disregard inadmissible evidence has revealed that 33% of the arbitrators never excluded evidence and 55% excluded evidence only about 25% of the time.[61] Thus 88% of arbitrators admit evidence even though it is inadmissible under evidentiary standards at least 75% of the time.[62] Only 1% of the arbitrators always exclude such evidence[63].

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[55] Berger and Jensen (n 48) 419-420; Reinmar Wolff et al., *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 1958. A Commentary* (2nd edn, Bloomsbury Publishing 2019) 291.

[56] Born (n 17) 3828.

[57] Wolff et al. (n 55) 311.

[58] Born (n 17) 3828.

[59] Philippe Fouchard, Berthold Goldman and Emmanuel Gaillard, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Wolters Kluwer Law & Business 1999) 987.

[60] Roger P. Alford, 'Empirical Analysis of National Courts Vacatur and Enforcement of International Commercial Arbitration Awards' (2022) 299(1) Journal of International Arbitration 301 (describing itself as "the most comprehensive empirical study of national court enforcement of international commercial awards ever published").

[61] Guthrie and Rachlinski (n 38) 1279-1281; S Landsman and RF Rakos, 'A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation' (1994) 12(1) Behavioral Sciences Camp 113.

[62] Guthrie and Rachlinski (n 38) 1281.

[63] ibid.

Moreover, research indicates that parties are more likely to accept and comply with an arbitral award when they perceive the process to be fair. The inclusion of evidence they present and the acknowledgment of their "voice" during the tribunal's proceedings significantly contribute to their sense of procedural justice, even if the submitted evidence ultimately proves to be non-determinative.[64] Given the increasing proclivity of parties to challenge awards, arbitrators' practice of generally admitting evidence serves essential objectives. Therefore, there is a chicken-and-egg situation where the national courts reluctance to decide non-enforcement may result from the tribunal's flexible attitude in following the procedural matters raised by the parties. The problem examined under this article would not be an exception to this. The tribunal may prefer not to risk their award being challenged by the acquirer based on the exclusion of the witness statement by the top management of the target. Otherwise, the acquirer may successfully claim that it has not had an opportunity to present its case.

From the selling shareholders' view, if the tribunal takes a liberal stance and admits the witness evidence, can they rely on Article V of New York Convention for non-enforcement? Once everything is in order in terms of Article V/I, the selling shareholders' last resort could be Article V/II, which allows parties to challenge the award based on its potential violation of the public policy before the enforcement courts. Thus, the question would be whether the favorable decision on the admissibility of the confidential information as a witness statement could run the risk of infringing "public policy" of the relevant national law, another ground in Article V/2 of the New York Convention. If this confidential information has been obtained "*illegally*", the selling shareholders would have a strong argument, as this may be found by national courts against their public policy. Thereby, the award may be declared not to be enforced or recognized.[65]

4. POSSIBLE FRAMEWORK TO ASSESS THE ADMISSIBILITY OF THE TOP MANAGEMENT'S WITNESS EVIDENCE

4.1. THE CURRENT LEGAL LANDSCAPE

Thus, in terms of confidentiality, the tribunal would have to consider the kind of confidentiality involved in the facts of the matter and then decide whether the confidentiality involved would outweigh the needs for a just arbitral award at the expense of the opposing parties' right to be heard and right to equal treatment. While doing so, the tribunal, as explained above, has a broad discretionary power to decide on the admissibility of such

64 ibid.

65 AM Kubalczyk, 'Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation' (2015) 3(1) Groningen Journal of International Law 85; See also Reisman and Freedman (n 30) 737.

evidence.[66] The problem here is that there are no *ex-ante* rules that arbitrators could rely on, instead, they act more like "*I know it when I see it*" approach.[67] As such, the decisions of the tribunal on the admissibility of the evidence will not be based on the specific rules, but instead, on its own discretion. A natural result of this is legal uncertainty, where parties and even arbitrators would be unable to foresee which type of evidence will be admitted during the arbitral proceedings.

Several considerations have been listed in the doctrine and national courts' decisions as i) the evidentiary value of the confidential information, ii) the sensitivity of the confidential information, iii) the interest in preserving the confidentiality of the private communications iv) the extent to which the disclosure of such evidence may affect the interest of the third parties, v) the broader interest that may be deemed to exist in preserving the confidentiality information.[68] Therefore, confidentiality obligation of the witness, by itself, may not be a sufficient reason to refuse to disclose the relevant information or document. This is also confirmed by Article 9.2 IBA Rules, where the tribunal is not obligated to render the evidence inadmissible, unless they are "*compelling*". However, the tribunal may deem it appropriate to take some measures to preserve the confidentiality of the information as much as it can, by, for example, allowing the witness to testify before the tribunal without the acquirer being present in the courtroom.[69]

Although arbitrators have some guiding principles as to the criteria, there are still a lot of unanswered questions as to whether the tribunal considers all the criteria as cited above, or should give more weight to the sensitivity of the confidential information? More importantly, how can the parties foresee which criteria the tribunal would rely on? This complexity leads to various conflicting decisions regarding the admissibility of the confidential information as evidence. When the issue was about the evidence containing confidential information that was requested from the relevant party, the tribunal may reject to order to disclose such information. For instance, the tribunal rejected the request of a credit company with regards to the disclosure of the credit card security systems provided by another company, who was the respondent of the case, where the tribunal found it highly confidential for the service provider.[70] In another instance, the tribunal assessed the relevance of the information at hand and its financial importance and value,[71] and did not directly reject the disclosure request.

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[66] Franco Ferrari and Friedrich Rosenfeld, *Handbook of Evidence in International Commercial Arbitration: Key Issues and Concepts* (Wolters Kluwer 2022) 255; Bartkus (n 22) 68; Fry et al (n 22) 268; Webster, Bűhler (n 22) 443; Bantekas (n 22) 547.

[67] *William Park, Arbitration's Discontents: Of Elephants and Pornography (eds.) Foundations and Perspectives of International Trade Law (London: Sweet and Maxwell 2001) 258–268.*

[68] Ashford (n 14), 165; Nathan O'Malley, *Rules of Evidence in International Arbitration An Annotated Guide* (Routledge 2019) 315.

[69] Ashford (n 14) 145.

[70] As cited in R Marghitola, *Document Production in International Arbitration* (Kluwer Law International 2015) 93.

[71] Euroflon Tekniska Produkter AB v Flexiboys i Motala AB. (2012) Swedish Supreme Court, No. 1590-11

For disputes that include the confidentiality obligation owed to or owed by the third parties, the tribunals were much more straightforward by deciding affirmatively on the admissibility of the confidential information. For instance, in ICC case No.19299/MCP, one of the witnesses owed a confidentiality obligation to the claimant who requested the tribunal to exclude his statement as evidence, where the tribunal ruled that

> *"(…) it would not be appropriate to exclude evidence on the basis of a contractual confidentiality obligation that is external to the dispute before the Tribunal, especially, when the evidence in question appears to be relevant. The Tribunal does not believe it to be correct to exclude the evidence at this stage of the proceedings. (…) the Claimants are free to challenge the evidence in whatever manner they deem fit, whether at the forthcoming hearing and/or through their post-hearing briefs. What weight (if any) is to be given to the evidence will be determined by the Tribunal in light of all the relevant circumstances at a later stage."*[72]

However, there are conflicting decisions concerning this issue. As in one of the UNCITRAL case, the tribunal found the confidentiality obligation of a third party as a sufficient ground to refuse the admissibility of the document by stating that

> "*the parties have refused the production of a number of documents on the ground of them containing confidential commercial information. To the extent that some such refusals are based on the nature of the transaction or information contained in the pertinent documents, particularly if it relates to intra-company information or business transactions involving third parties, a refusal might be well justified on these grounds."*[73]

To reconcile these interests, the arbitrators "weigh" the interests, as described by Hans Kelsen- not as a solution, but merely as a formulation of the problem.[74] This is mainly because there are no explicit guidelines on balancing different criteria in reconciling these clashing interests, in other words, they do not specify which of the balancing criteria should be considered more important in the matter at hand. Therefore, the tribunal would assess the admissibility based on its subjective views and experience. As such, while engaging in this balancing exercise, the arbitral tribunal should follow a set of rules within a well-established framework to establish predictability and coherence. This article suggests that in deciding on the disclosure of confidential information through the witness statement of the management, the tribunal may recourse to the parameters in determining the exception to privileges, in particular the work-product doctrine that protects the communications created for the use in contemplated or existing litigation, but with a lower threshold.

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[72] Gujarat State Petroleum Corporation Limited, Alkor Petroo Limited, and Western Drilling Constructors Private Limited v. The Republic of Yemen and the Yemen Ministry of Oil and Minerals, ICC Case No. 19299/MCP, 25 February 2013.

[73] Merrill & Ring Forestry L.P. v. The Government of Canada, ICSID Case No. UNCT/07/1

[74] Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange Ltd. 2005) 352.

4.2. WORK-PRODUCT DOCTRINE AND DISCLOSURE OF CONFIDENTIAL INFORMATION BY FACTUAL WITNESSES

The work-product doctrine allows the attorneys to keep the information derived from their clients or third parties in the preparation of the litigation confidential where it allows the attorneys to refuse to testify or submit any evidence under any circumstances, subject to showing i) a substantial need for this confidential information to be disclosed during the proceedings and ii) that the party requesting disclosure lacks any ability to obtain such information by other means without undue hardship.[75] The "*substantial need*" has been defined by the US Supreme Court as "where the relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparations of one's case."[76] This was followed by the definition of "*undue hardship*" that refers to the availability of alternative means in securing the evidence where there are "*no longer available or can be reached only with difficulty.*"[77]

Amongst legal scholars, there are various suggestions for applying work-product doctrine to the exceptions to the duty of confidentiality in arbitration. Confidentiality, in this context, *"is concerned with information relation to the content of the proceedings, evidence and documents, addresses, transcripts of the hearings or the award"*[78] which the parties to the arbitration are not allowed to disclose to third parties. In this sense, it resembles to the central question of this article, where the witness has a confidentiality obligation to the selling shareholders not to disclose the relevant information during arbitral proceedings. This confidentiality duty in arbitration is not absolute, as even when the parties to an arbitration agreement expressly include a detailed confidentiality clause in their agreement, confidentiality may be no longer protected.[79]

The emerging view amongst courts from different jurisdictions seem to be that disclosure of arbitration communications and materials may be compelled.[80] However, there is no consensus on when and on what grounds the disclosure can be ordered, which makes the

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[75] Christoph Henkel, 'The Work Product Doctrine as a Means Toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration' (2011) 37 (1) North Carolina Journal of International Law 1094; *See also* E Thornburg, 'Rethinking Work Product' (1991) 77(1) Virginia Law Review 1524-50.

[76] Hickman v. Taylor, 329 U.S. 495, 511-12 (1947); Associated Elec. and Gas Ins. Services Ltd. v. European Reinsurance Co. Of Zurich [2003] 1 All E.R. 253 (Eng.); United States v. Amerada Hess, Corp., 619 F.2d 980, 980 (3d Cir. 1980).

[77] Hickman v. Taylor (n 76).

[78] Expert Report of Dr. Julian D. M. Lew in Esso/BHP v Plowman, (1995) (Special Issue) Arbitration International 283.

[79] Henkel (n 75) 1112.

[80] For the UK see Ali Shipping v. Shipyard Trogir [1998] 2 All E.R. 136 (Eng.); For the France see Nafimco v. Foster Wheeler Trading Company AG Cour d'appel [CA] Paris, Jan. 22, 2004, note Bureau (Fr.); For Australia see Esso Austl. Res. Ltd. v Plowman (1995) 128 ALR 391; For the US see United States v. Panhandle E. Corp. 118 F.R.D. 346 (D. Del. 1998).

confidentiality in international commercial arbitration an uncertain concept.[81] To establish a more predictable approach, the scholars suggest that the work-product doctrine and propositions of the exceptions may simply be utilized as a practical and well-established standard to allow disclosure where "*production of those facts is essential*" for the administration of justice.

In both scenarios, the decision-maker is expected to balance the competing interests of the parties that if the need of one party to gain access to protected documents outweighs the interests of the other party in protecting its confidential information from disclosure, the documents will be disclosed.[82] In doing so, the work-product doctrine looks for two concurrent factors: substantial need and inability to obtain the substantial equivalent of the information by other means without undue hardship.[83]

This article goes one step further and suggests applying the well-established principle in deciding the disclosure in the context of the work-product doctrine to the case where the tribunal is evaluating the exclusion of witness evidence based on the confidentiality obligation of the witness to the opposing party. Here again, the tribunal shall need to reconcile the competing interest, on the one hand, the legitimate expectation of the selling shareholders with respect to its confidential information to be protected by the witness, and on the other hand, the acquirer's right to be heard and present its case. While doing this, the tribunal would first assess whether the acquirer (new shareholders) of the target is in substantial need of presenting the statement of the management as evidence to the tribunal. The "substantial need" is defined as "*where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparations of one's case, discovery may properly be had.*"[84] Therefore, the test requires a showing that the discovering party needs the materials to prove his case. This would also require "substantial equivalent test" where a party is not entitled to discover a document merely because he cannot get the same information from the same person if the substantial equivalent is available from an alternative source.[85] This means that the acquirer must prove that the information the witness will disclose would be quite important to present his case that without the witness being testify before the tribunal, the acquirer could not obtain similar information without hardship. However, the facts of the case would be the deciding criteria for the tribunal, where for example, there are multiple actors took part in the transaction who are not bound by confidentiality obligation and the statement of the proposed witness would not be the only source for acquirer to present its case, then tribunal may not allow the disclosure of the confidential information

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81 Kyriaki Noussia, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* (Springer Science & Business Media 2010) 157; Alexis C. Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 16(4) American University International Law Review 970-976; Katie Chung and Michael Hwang, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration' (2009) 26(1) Journal of International Arbitration 610.

82 Carolyn J McFatridge, 'The Work Product Doctrine Revisited' (1987) 23 (1) Tulsa Law Review 118.

83 Henkel (n 75) 1063.

84 Hickman v. Taylor (n 76).

85 Henkel (n 75) 1063; McFatridge (n 83) 108.

by that witness.

The acquirer should also fulfill the second limb of the test where he should prove that he will be unable to obtain the substantial equivalent information disclosed by the witness without going to great lengths; or lack of knowledge of where else to obtain the information; or show that the information is entirely unavailable elsewhere.[86] For example, the acquirer may claim that it is the proposed witness who negotiated the deal on behalf of the selling shareholders or that the witness prepared and reviewed the transaction documents and attended all the internal meetings of selling shareholders where they discuss the specific details of transaction, and where the witness would be able to verify the inside of the selling shareholders' mind. That is precisely why the acquirer might be unable to find substantial equivalent evidence apart from what the proposed witness would testify before the tribunal. However, the tribunal's final decision of the tribunal would depend upon the circumstances of each case. Thus, the tribunal and the parties shall need to assess the specific details with utmost attention.

5. CONCLUSION

The statistics and forecasts have proven a global appetite for M&A transactions. The drastic increase in such deals comes with an increase in the M&A disputes, mostly stemming from the breaches of representation and warranties or purchase price adjustments on target's profits or turnover. In these circumstances the role of top management of the target company, who are kept by the acquirer after closing, could be very crucial in the decision of the arbitral tribunal.

Upon the completion of the deal, the interests of the top management have been shifted, and a natural consequence of such shift would be that they may be asked to testify for the acquirer in the case of a post-closing M&A disputes. In the event of such a situation, the seller may take some precautions beforehand, by for example, creating a team to be involved in all stages of the deal, consisting of individuals that would not keep their position after closing at the target, or including a provision in the transaction documents that may allow them to approach management in cases of any post-closing disputes. More importantly, the selling shareholders may conclude a separate confidentiality agreement with the management, which includes a specific provision that prevents the management team that were active at any stage of the deal from disclosing the confidential information to the acquirer or even discussing the dispute with the acquirer at all. After the arbitral proceedings have commenced the selling shareholders may raise two fundamental arguments and request exclusion of the witness evidence provided by the top management of the target by relying on i) the close relationship between the witness and the acquirer or ii) if applicable, the confidentiality obligation of the witness to selling shareholders.

Upon such requests, the tribunal would first examine whether it has a power to do so and if so, on what grounds the tribunal may decide on not to accept the witness evidence. The institutional rules and national laws grant the arbitrators a broad discretionary power

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[86] Henkel (n 75) 1101.

to evaluate the admissibility of the evidence. Most of the time, the tribunals take a liberal stance and admit almost any evidence submitted them in support of parties' position, as they retain significant discretion in assessing and weighing the evidence. However, they still need to evaluate the fate of the witness evidence of the top management of the target who has a confidentiality obligation to the selling shareholders. While doing so, the tribunal tries to balance and reconcile the competing interests of the parties.

On the one hand, one party has a legitimate expectation with respect to its confidential information to be protected by the witness appointed by the other party. On the other hand, the other party desires to present its case and benefit from the rights accorded to it, namely, right to a fair hearing, which includes the right to be heard and equality of arms. The first problem with this matter is that if the tribunal needs to see the content of the witness statement and then even if the tribunal decides not to accept it as evidence, could they be able to disregard the information they have learned from the top management who most of the time plays a crucial role at each stage of the transaction. As a solution to this problem, this article suggests, that the tribunals, after consultation with the parties, may appoint an independent and impartial expert to review the content of the witness statement and make the preliminary decision on whether the witness statement include confidential information, thereby, breaches the confidentiality agreement concluded with the selling shareholders.

Another problem would be that in accordance with which criteria the tribunal would decide on to whose interests it will give priority. Although some rules have been developed by national courts, they are not as helpful as they seem, because they lack any guidance to which criteria the tribunal attaches more weight to while reconciling different interests. This leads tribunals to render inconsistent decisions that work against the fundamental principle of legal certainty. To establish a coherent framework and more predictable results for both parties and their counsels, this article suggests recourse to more established rules as in the work-product doctrine where the tribunals decide on disclosure of confidential information if the relevant party proves i) a substantial need for this confidential information to be disclosed during the proceedings and ii) that the party requesting disclosure lacks any ability to obtain such information by other means without undue hardship.

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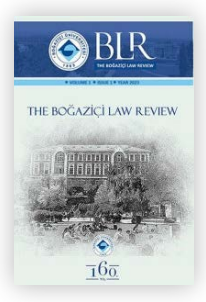

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Artık Değer Hesabında Borç Özgülenmesi Hakkında Yargıtay Uygulaması ve Değerlendirilmesi

The Practice and Evaluation of the Court of Cassation on Debt Attribution in Calculation of Matrimonial Profit

Zafer Zeytin

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ARTIK DEĞER HESABINDA BORÇ ÖZGÜLENMESİ HAKKINDA YARGITAY UYGULAMASI VE DEĞERLENDİRİLMESİ*

THE PRACTICE AND EVALUATION OF THE COURT OF CASSATION ON DEBT ATTRIBUTION IN CALCULATION OF MATRIMONIAL PROFIT

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ÖZET

Yargıtay'ın kredili mal ediniminde yasal mal rejimi dönemi ve sonrasına sarkan borç ödemelerinde, kalan borcun güncellenerek malın tasfiyedeki sürüm değerinden düşülmesi şeklindeki içtihadı somut olayın özelliklerine, özellikle maldaki değer artışının büyüklüğüne bağlı olarak borçlu eş lehine veya aleyhine olabilmektedir.

Edinilmiş mala edinilmiş maldan yapılan katkı nedeniyle bir denkleştirme alacağı tanıyan Yargıtay borç güncelleme içtihadının getirdiği ve yukarıda tartışılan sorunlar, malın kişisel mal olarak nitelendirilebildiği hallerde çözülür görülmektedir. Mal rejimi sürerken yapılan ödemelerin, mal rejimi sona erdikten itibaren yapılacak ödemelerle kıyaslandığında daha az olduğu hallerde ikame ilkesi nedeniyle malı kişisel mal kabul ederek edinilmiş mal grubuna denkleştirme alacağı tanımak, böylece kişisel mala ait borcu da göz ardı etmek kanımızca hem kanunun lafzına hem de amacına uygun olacaktır. Bunun dışındaki hallerde ise kalan nominal borç sürüm değerinden az olacağı için kanunun lafzından ayrılmaya, borcu güncellemeye kanımızca gerek bulunmayacaktır.

Anahtar Kelimeler: mal rejimi, edinilmiş mallara katılma, artık değer hesabı, borç güncellemesi, Yargıtay.

ABSTRACT

The jurisprudence of the Court of Cassation in the case of debt payments that extend to the period of the statutory matrimonial property regime and beyond when acquiring property on credit, the residual debt should be updated and deducted from the market value of the property in liquidation, depending on the circumstances of the specific case, in particular the extent of the increase in the value of the property, in favour or against the debtor spouse

The problems discussed above and brought by the case law of the Court of Cassation, which recognizes an equalization claim due to the contribution made to the acquired property from the acquired property, seem to be solved in cases where the property can be characterized as individual property. In cases where the payments made during the property regime are less compared to the payments to be made after the termination of the property regime, it would be in accordance with both the wording and the purpose of the law to recognize an equalization claim to the acquired property group by accepting the property as individual property due to the principle of substitution, thus ignoring the

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debt belonging to personal property. In other cases, since the remaining nominal debt will be less than the version value, in our opinion, there will be no need to depart from the letter of the law and update the debt.

Keywords: matrimonial property regime, participation in acquired property, calculation of matrimonial profit, debt update, Court of Cassation.

EXTENDED SUMMARY

The differences between acquired property and individual property and the legal consequences of this difference become clearer, especially with the contributions made after the termination of the matrimonial property regime. The precedents of the Court of Cassation also provides explanations on how the equalization claims arising from the contributions on the acquired property will be shaped if the property is accepted as individual property. This equalization claim essentially aims to equalize the value of the property and the contribution made, and the Court of Cassation sets forth certain criteria on how this claim should be calculated in order to prevent the debtor spouse's damages.

The Court of Cassation's practice of updating the debt and deducting it from the sale value of the property in liquidation in cases of acquisition of property on credit and debt payments related to the period of the property regime and beyond, may result in favor or against the debtor spouse, depending on the circumstances of the concrete case, especially the amount of the increase in the value of the property. As the Court of Cassation recognizes an equalization claim for the contributions made from the acquired property, the Court of Cassation thinks that it can solve the problems related to the debt update jurisprudence limited to the cases where the property can be considered as individual property.

In cases where the payments made during the matrimonial property regime are lower than the payments to be made after the liquidation of the matrimonial property regime, accepting the property as individual property in line with the principle of substitution and granting an equalization claim to the acquired property group, thus ignoring the debts of the individual property, is considered as a solution in accordance with the wording and purpose of the law. In other cases, since the remaining nominal debt will be lower than the sale value of the property, updating the debt becomes unnecessary. The law does not require updating debts in such cases or deviating from its wording. The main issue here is whether the amount of the debt is in accordance with the value of the property and whether this difference in value will be to the detriment of the debtor. In order to eliminate the confusion regarding the updating of the debt, the existing precedent of the Court of Cassation is based on scrutinizing each concrete case and taking into account the changes in value that will occur during the payment of the debt.

In conclusion, the precedents of the Court of Cassation regarding the acquisition of property on credit and the debts remaining after the property regime vary according to the characteristics of the concrete cases and may be in favor or against the debtor. The increase in the value of the property, the payments made and other concrete factors are important factors that affect how such precedents will be shaped. The Court of Cassation, with its judgements on situations such as debt updating and the acceptance of property as individual property, tries to demonstrate an approach in accordance with both the wording of the law and the purpose.

1. GİRİŞ

2002 yılında yürürlüğe giren edinilmiş mallara katılma rejimi, Yargıtay uygulamalarıyla kendine özgü bir mal rejimi halini almıştır. Eşlerin katılma alacaklarının belirlenmesinde esas alınan artık değerin nasıl hesaplanacağı, Türk Medeni Kanunu (TMK) 231 ve devamı maddelerinde gösterilmiştir. TMK 231'e göre artık değer, eklenmeden ve denkleştirmeden elde edilen miktarlar da dahil

olmak üzere her eşin edinilmiş mallarının toplam değerinden bu mallara ilişkin borçlar çıkarıldıktan sonra kalan miktardır.[1] Elde edilen bu artık değere, diğer eş kanunen (artık değerin yarısı) veya sözleşmeyle belirlenen bir oranda katılır; bu da o eşin katılma alacağını oluşturur.[2]

Artık değer hesabında edinilmiş mallar ve borçları yer alırken, eşin kişisel malları ile borçları artık değer hesabında dikkate alınmaz.[3] Ayrıca eşlerin kendi malları (edinilmiş ve kişisel) arasındaki kaymalar, TMK 230'a göre denkleştirme alacağı olarak hesaplanır; eşlerin birbirlerine yaptıkları katkılardan doğan değer artış pay alacağı (TMK 227) da edinilmiş mal grubunun aktifini ve/veya pasifini ilgilendirdiği sürece artık değer hesabında dikkate alınacak kalemler arasında yer alır.[4]

Bir eşin edinilmiş ve kişisel malları arasında meydana gelen mal kaymalarının nasıl denkleştirileceği TMK 230'da düzenlenmiştir. TMK 230, borçların özgülenmesi hakkında üç temel hüküm getirmiştir:

"(1) Bir eşin kişisel mallara ilişkin borçları edinilmiş mallardan veya edinilmiş mallara ilişkin borçları kişisel mallarından ödenmiş ise, tasfiye sırasında denkleştirme istenebilir.

(2) Her borç, ilişkin bulunduğu mal kesimini yükümlülük altına sokar. Hangi kesime ait olduğu anlaşılamayan borç, edinilmiş mallara ilişkin sayılır.

(3) Bir mal kesiminden diğer kesimdeki malın edinilmesine, iyileştirilmesine veya korunmasına katkıda bulunulmuşsa, değer artması veya azalması durumunda denkleştirme, katkı oranına ve malın tasfiye zamanındaki değerine veya mal daha önce elden çıkarılmışsa hakkaniyete göre yapılır."

TMK 230 birinci fıkrası nominal bir denkleştirme öngörmektedir. Örneğin eşe miras kalan (kişisel) malın veraset ve intikal vergisi edinilmiş mallardan ödenmiştir, bu miktar nominal olarak artık değer hesabında yer alır. Denkleştirmenin nominal olması gerektiği hususu birinci fıkrada açık olmamakla beraber, üçüncü fıkradaki gibi bir denkleştirmeden de söz edilmemektedir. Dolayısıyla denkleştirmenin nominal olması esas kabul edilmelidir. Paranın satın alma gücündeki kayıpların taraflar arasında nasıl denkleştirileceği konusu, mevcut yasal düzenlemelerle belirlenmiştir. Bu düzenlemeler, malın sürüm değeri ile borcun

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[1] Şahin Akıncı, 'Edinilmiş Mallara Katılma Rejiminin Tasfiyesinde Karşılaşılan Bazı Meseleler ve Çözüm Önerileri' (2016) Cevdet Yavuz'a Armağan Cilt I, 170; Banu Fatma Günarslan, 'Değer Artış Payı Alacağının Artık Değer Hesabına Etkisi' (2015) Erciyes Üniversitesi Hukuk Fakültesi Dergisi, 11; Gerçek Onur Oy ve Osman Oy, *Boşanma ve Miras Hukuku Uygulamasında Edinilmiş Mallara Katılma Rejiminin Tasfiyesi (El Kitabı)* (Platon Hukuk 2023), 128.

[2] Hükümde "mallar ve borçlar" ifadesi "çoğul" olarak kullanıldığından tasfiye kavramının amacına uygun olarak kanun koyucu külli tasfiyeye açıkça işaret etmektedir. Bunun aksi yani cüzi tasfiye sadece uyuşmazlık konusunun münferit bir mal olması halinde söz konusu olabilir. Yargıtay'ın yerleşik içtihadına göre davacıdan her bir mal için katılma alacağını dava dilekçesinde belirtmesini talep etmek yargılama sonucunda her bir talep için katılma alacağına hükmetmek ne Kanunun lafzına ne de tasfiye amacına uygundur. Hâkimin uygulamak zorunda olduğu maddi hukukun açık düzenlemesini taleple bağlılık usulü ilkesini ileri sürerek uygulamamak hâkim hukukunun kabul ediliş amacı ile, ya da mahkeme masraflarının paylaştırılması ile açıklanamaz. Çünkü belirsiz olan alacak mahkeme kararı ile belirlenecektir.

[3] Günarslan (n 1) 11; Oy ve Oy (n 1) 129.

[4] Daha fazla bilgi için bkz. Zafer Zeytin, *Edinilmiş Mallara Katılma Rejimi ve Tasfiyesi* (5. basım, Seçkin Yayınları 2021).

nominal değerinin dikkate alınmasını öngörmektedir. Kanımızca, somut olay haklı kılmadıkça, denkleştirme alacaklarının TÜFE, TEFE ya da kanuni faiz gibi endekslerle güncellenmesine gerek yoktur.

İkinci fıkra, borçların hangi mal grubuna özgüleneceğine ilişkindir. Kanunun açık hükmü (TMK md. 230 f. 2) gereği, her borç ilgili olduğu mal grubunu ilgilendirir. Yani, kişisel mala ait borçlar kişisel malı, edinilmiş mala ait borçlar ise edinilmiş malı ilgilendirir. Eğer bir malvarlığı kredi ile alınmış ve borç ödemeleri tamamlanmadan mal rejimi sona ermişse, kalan borç, mal hangi mal grubuna aitse o grubun borcu olacaktır.

Örneğin, taşınmazın bir kısmı peşin, bir kısmı kredi kullanılarak satın alınmışsa, TMK md. 219›a göre bu taşınmaz karşılık verilerek edinildiğinden edinilmiş mal olarak kabul edilir. Bu nedenle, taşınmaza ilişkin kredi borcu da edinilmiş mal grubuna ait olacaktır ve mal rejiminin sona erdiği tarih itibariyle, taşınmazın sürüm değerinden düşülmelidir. Mal rejiminin sona ermesinden sonra borç ödemeleri borçlu tarafın malvarlığından (kişisel veya edinilmiş) yapılmış ya da hiç yapılmamış olabilir, ancak bu durum artık değer hesabını etkilemez.

Bazı olaylarda, edinilmiş mal olan bir taşınmazın kredi borcu, taşınmazın sürüm değerini aşabilir; bu, özellikle faiz oranlarının yüksek olduğu ve kredi ödemelerinin henüz başlamadığı dönemlerde görülür. Böyle bir durumda, borçlu eşin artık değer hesabında bir değer azalması söz konusu olabilir. Ancak, bu değer azalmasına diğer eş katılmayacağı gibi, bu eşin katılma alacağı da olmayacaktır (TMK 231 f. 2). Yargıtay 2. HD benzer bir durum için verdiği bir kararında şöyle demektedir: "*Tüm dosya kapsamı birlikte değerlendirildiğinde; mahkemece aracın alınmasında banka kredisi kullanıldığının kabulü yerinde ise de, hükme esas alınan bilirkişi raporu hüküm kurmaya elverişli değildir. Şöyle ki, aracın edinilmesi için kadın tarafından 22.400,00 TL bedelli 48 ay vadeli kredi kullanıldığı, boşanma dava tarihine kadar (04.07.2012) 2 aylık taksitin ödendiği, hükme esas alınan hesap raporunda oranlama yapılmadan kredinin kalan borcunun aracın güncel değerinden düşülerek artık değerin belirlenerek katılma alacağının hesaplandığı anlaşılmaktadır. O halde, mahkemece, yukarda açıklanan Dairemizin ilke ve uygulamalarına göre, boşanma dava tarihine kadar yapılan kredi ödemelerinin toplam kredi ödemelerine ve güncel değere oranlaması yapılarak artık değere katılma alacağına hükmedilmesi gerekirken yetersiz bilirkişi raporuna göre karar verilmesi hatalı olmuş, bozmayı gerektirmiştir.*"[5] Bu durumda Yargıtay, edinilmiş mala ilişkin kalan kredi borcunun sürüm değerinden nominal olarak düşülmesi yerine, oranlama yapılarak borcun güncellenmiş değer üzerinden düşülmesini yerleşik bir içtihat olarak kabul etmektedir. Yargıtay, edinilmiş mala ait borçların iki döneme yayılması durumunda, kanunda örtülü bir boşluk olduğunu değerlendirmiş ve bu duruma yönelik içtihadını geliştirmiştir. Çalışmamızda, Yargıtay'ın bu yerleşik içtihadı ayrıntılı olarak incelenecektir.

Bu incelemeye geçmeden önce iki hususa kısaca değinmek gerekir. Birincisi, bir malın hangi mal grubuna özgüleneceği meselesidir. Bir malın edinilmiş mal mı yoksa kişisel mal mı olduğu sorusu değerlendirilirken, "mal rejimi sürerken karşılık verilerek edinilen malların edinilmiş mal olduğu" ilkesinin yanı sıra ikame ilkesinin de göz önünde bulundurulması

[5] Yargıtay 2. Hukuk Dairesi, 2021/5668 E., 2021/7765 K., 26.10.2021 T.

gerekir. Eğer mal rejimi süresince ödenen miktar, mal rejimi sona erdikten sonra ödenen miktardan daha az ise, mal ikame ilkesi gereği kişisel mal olarak kabul edilmelidir.[6]

İkinci husus ise, TMK 230 f. 3 gereği, edinilmiş maldan kişisel mala yapılan katkı oranına tekabül eden bir değişken denkleştirme alacağı*nın* gündeme gelebil*mesidir. Diğer eş, hesaplanan bu denkleştirme alacağı üzerinden katılma alacağına hak kazanabilir. Ancak, TMK 227'deki değer artış payı alacağından farklı olarak, burada nominal değer garantisi olmadığı gibi dava edilebilir bağımsız bir alacak da söz konusu değildir. Bir maldan diğer mala yapılan katkı sonucunda denkleştirme alacağının katkıdan daha az olması ya da hiç olmaması mümkündür. Eğer edinilmiş mal lehine bir denkleştirme alacağı hesaplanır ve bu artık değer hesabına dahil edilirse, mal rejiminin sona ermesinden itibaren mal sahibi eşin kalan kredi borcunu ödeyip ödememesi veya hangi mal grubundan ödeyeceği önemli değildir. Çünkü mal kişisel mal olup borç da kişisel mal borcudur ve TMK 231'a göre değişken denkleştirme alacağı dışında artık değer hesabında bir rolü olmayacaktır.*

Bu iki husus, çalışmamızın kapsamını genişletmemek adına detaylandırılmamıştır; ancak konumuzla yakından ilgilidir.

Yargıtay'ın, edinilmiş mallara ait borçların iki döneme yayılmasını katılma alacağı hesabında dikkate almasıyla ilgili geliştirdiği içtihatlarına ait kararlarında açık bir gerekçeye rastlanmamaktadır. Yargıtay'ın, mal rejimi döneminde edinilmiş mala yapılan katkılara rağmen, malın kalan borçları nedeniyle diğer eşin bir hak sahibi olamamasını somut olay adaletine aykırı bulduğunu varsaymaktayız. Ancak, bu düşüncemizi destekleyecek somut bir örnek karara ulaşmış değiliz. Bu çalışmada, ulaştığımız ve aşağıda yer verilen kararlarda uygulanan yöntemleri inceleyerek, Yargıtay'ın bu içtihadının hangi eşin lehine ya da aleyhine sonuç doğurduğunu ve bu içtihadın mevcut yasal düzenlemeler karşısındaki geçerliliğini tespit etmeye çalışacağız.

Bu çalışmada, iki farklı ihtimale dayanan örnek olaylar üzerinden konuyu değerlendireceğiz (Örnek 1 ve Örnek 2). Her iki örnekte kanunun lafzına sadık kalınarak artık değer hesabı yapılmıştır.

Örnek 1'de kalan borcun, malın tasfiye anındaki sürüm değerinden fazla olduğu bir durum ele alınmaktadır. Bu durumda, artık değer mevcut değildir ve diğer eşin katılma alacağı oluşmaz. Örneğin, 330.000 TL'ye edinilmiş mal niteliğindeki bir taşınmaz satın alınmış ve bunun 60.000 TL'si peşin, kalan 270.000 TL'si ise 120 ay geri ödemeli krediyle finanse edilmiştir. Toplam geri ödeme tutarı, anapara, faiz ve diğer giderlerle birlikte 540.000 TL'dir (aylık 4.500 TL x 120 ay). İlk 20 aylık ödeme süresi tamamlandığında, 90.000 TL kredi ödenmiş, geriye 450.000 TL borç kalmıştır. Taşınmazın tasfiye tarihindeki sürüm değeri ise 400.000 TL olarak belirlenmiştir. Taşınmaz sahibi eşin başka mal varlığı yoktur ve tasfiyede sürüm değeri 400.000 TL'dir. Bu ihtimalde eşin artık değeri kalan kredi borcu 450.000 TL'nin düşülmesiyle eksiye düşecektir. Artık değer hesabında değer azalması dikkate alınmayacağından artık değer sıfır olacaktır ve diğer eşin artık değer üzerinde bir katılma alacağı söz konusu olmayacaktır.

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[6] Akıncı (n 1) 171.

Örnek 2'de ise kalan borç sürüm değerinden azdır. Bu durum artık değere ve katılma alacağına neden olur. Örnek 2'de ilk 100 ay (450.000) mal rejimi döneminde ödenmiş ve kalan 20 ay ise mal rejiminin sona ermesinden sonra ödenecektir. Değişkenleri mümkün olduğunca sabit tutarak sağlıklı bir değerlendirme yapmak istendiğinden Örnek 2'de de sürüm değerinin değişmediği kabul edilmiştir. Sürüm değeri 400.000 TL olan bu ihtimalde mal sahibi eşin artık değeri 400.000 – 90.000 = 310.000 TL olacaktır. Bunun sonucu olarak diğer eşin katılma alacağı 155.000 TL'dir.

Bu iki örneğin sonuçları, TMK 231 hükmündeki "bu mallara ilişkin borçlar çıkarıldıktan sonra kalan miktardır" ifadesine dayanmaktadır. TMK 231'e göre, eklenmeden ve denkleştirmeden elde edilen miktarlar da dahil olmak üzere, her eşin edinilmiş mallarının toplam değerinden bu mallara ilişkin borçlar çıkarılır. Bu ifade, kişisel mallara ait borçların, edinilmiş mallar lehine bir denkleştirme yapılmış olsa bile, artık değer hesabında dikkate alınmayacağını ve yalnızca edinilmiş mallara ilişkin borçların artık değer hesabında dikkate alınacağını belirtmektedir.

Edinilmiş mallara ait borçların artık değer hesabında dikkate alınması gerektiği hususu[7], hem doktrinde hem de Yargıtay içtihatlarında tartışmasız kabul edilmiştir. Ancak burada tartışılan konu, borcun kanunun lafzına uygun olarak nominal değer üzerinden mi, yoksa Yargıtay içtihadına uygun olarak güncellenmiş bir şekilde mi artık değer hesabına dahil edilmesi gerektiğidir.

2. YARGITAY İÇTİHATLARINDA KALAN BORCUN GÜNCELLENMESİ

Yargıtay, edinilmiş mal borçlarının iki döneme yayılması durumunda, kalan borç veya taksit sayısını, toplam borç miktarı veya toplam taksit sayısına oranlayarak sabit bir borç oranı belirlemektedir. Bu sabit borç oranı üzerinden kalan borç miktarını, malın sürüm değeri üzerinden güncelleyerek artık değer hesabında dikkate almaktadır. Yargıtay kararlarında bu yöntem biraz karmaşık ifade edilse de nihayetinde bu sonuca ulaşılmaktadır. Ancak, kalan borcun neden güncellendiği konusunda Yargıtay kararlarında net bir açıklama bulunmamaktadır. Konunun daha iyi anlaşılması adına aşağıda bazı güncel Yargıtay kararlarına yer verilecek ve bu kararlar örneklendirilecektir.

Bu konudaki Yargıtay kararlarından yapılan alıntılar şöyledir:

Karar 1) "Kredi borcu ödemelerinin bir kısmının mal rejiminin devamı süresince, bir kısmının da daha sonraki tarihlerde yapılmasında, mal rejiminin geçerli olduğu dönemin sonrasına sarkan ödemeler, dava konusu taşınmazın borcu kabul edilerek tasfiye gerçekleştirilir.

Yukarıda açıklandığı gibi iki döneme yayılan kredi borcu ödeme tablosu mevcut olduğunda; öncelikle, mal rejiminin sona erdiği tarihte henüz vadesi gelmediği için ödenmemiş

[7] Akıncı (n 1) 172; Günarslan (n 1) 10-11.

kredi borç miktarını (100)[8]*, toplam kredi borcuna oranı (100/120 =0,83=) bulunur. Sonra bulunan bu kredi borç oranının (%83), taşınmazın toplam satın alım (50.000 peşin+ 350.000 kredi = 400.000) bedeli karşısındaki oranına dönüşümü (350.000 x 0,83 =290.500 / 400.000 = 0,72) gerçekleştirilir. Tespit edilen bu oranın (%72), taşınmazın tasfiye tarihindeki (karara en yakın) sürüm (rayiç) değeri ile çarpılmasıyla (600.000 x 0,73 = 438.000) borç miktarı belirlenir. Bu ilke ve esaslara göre saptanan taşınmazın borç miktarı, tasfiye tarihindeki sürüm değerinden düşüldükten sonra kalan miktar (600.000-438.000 = 162.000), değer artış payı ve/veya artık değere katılma alacağı hesaplamasında göz önünde bulundurulur."*[9]

Karar 2) "Öncelikle, mal rejiminin sona erdiği tarihte henüz vadesi gelmediği için ödenmemiş kredi borç miktarının, toplam kredi borcuna oranı bulunur. Sonra bulunan bu kredi borç oranının, taşınmazın toplam satın alım bedeli karşısındaki oranına dönüşümü gerçekleştirilir. Tespit edilen bu oranın, taşınmazın tasfiye tarihindeki (karara en yakın) sürüm (rayiç) değeri ile çarpılmasıyla borç miktarı belirlenir. Bu ilke ve esaslara göre saptanan taşınmazın borç miktarı, tasfiye tarihindeki sürüm değerinden düşüldükten sonra kalan miktar, değer artış payı ve/veya artık değere katılma alacağı hesaplamasında göz önünde bulundurulur. Somut olayda ise davalı lehine denkleştirme yapılırken izah edilen şekilde oranlama yapılmadığı, sadece mal rejimi sona erdikten sonra kalan kredi borcunun (nominal borcun), meskenin tasfiye tarihi itbariyle sürüm değerinden düşümü ile yetinildiği anlaşılmaktadır."[10]

Karar 3) "Yukarıda açıklandığı gibi iki döneme yayılan kredi borcu ödeme tablosu mevcut olduğunda; öncelikle, mal rejiminin sona erdiği tarihte henüz vadesi gelmediği için ödenmemiş kredi borç miktarının, toplam kredi borcuna oranı bulunur. Sonra bulunan bu kredi borç oranının, aracın toplam satın alım bedeli karşısındaki oranına dönüşümü gerçekleştirilir. Tespit edilen bu oranın, aracın tasfiye tarihindeki (karara en yakın) sürüm (rayiç) değeri ile çarpılmasıyla borç miktarı belirlenir. Bu ilke ve esaslara göre saptanan aracın borç miktarı, tasfiye tarihindeki sürüm değerinden düşüldükten sonra kalan miktar, değer artış payı ve/veya artık değere katılma alacağı hesaplamasında göz önünde bulundurulur...

Taraf beyanları, banka kayıtları ve tüm dosya kapsamı birlikte incelendiğinde, mahkemece araç için kullanılan kredinin kalan toplam borcunun aracın değerinden düşülerek artık değere katılma alacağı hesaplandığı, davalının 11.10.2013 tarihinde 30 ay vadeli 20.000 TL bedelli taşıt kredisi kullandığı, boşanma dava tarihine kadar taksit ödemesi yapılmadığı, 30 aylık taksidin borç olarak kaldığı, aracın kredi dışında 12.000 TL peşinat kullanılarak (TMK mad. 222/3) 32.000 TL bedelle satın alındığı, aracın güncel değerinin de 32.000 TL olduğu anlaşılmıştır. Açıklanan nedenlerle aracın kredi ve peşinat kullanılarak alındığına yönelik mahkemenin kabulü yerinde ise de, boşanma dava tarihinden sonra kalan kredi borcunun denkleştirmesinin hatalı hesaplanarak

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[8] Bu karadaki italik, kalın ve parantez içindeki ifadeler yazar tarafından hesaplamanın anlaşılması amacıyla farazi olarak eklenmiştir.

[9] Yargıtay 8. Hukuk Dairesi, 2016/4519 E., 2019/10165 K., 11.11.2019 T.; Yargıtay 8. Hukuk Dairesi, 2016/16546 E., 2018/20342 K., 18.12.2018 T.; Yargıtay 8. Hukuk Dairesi, 2015/19637 E., 2017/11511 K., 26.09.2017 T.

[10] Yargıtay 8. Hukuk Dairesi, 2018/16276 E., 2019/1020 K., 05.02.2019 T.

karar verilmesi doğru olmamıştır. O halde, mahkemece yapılacak iş, yukarda açıklanan Daire-miz'in ilke ve uygulamalarına göre, araç için kullanılan krediye ilişkin evlilik birliği içinde ödeme yapılmadığı ve peşinatın edinilmiş maldan karşılandığı gözetilerek, 12.000 TL peşinatın yarısı oranında artık değere katılma alacağına hükmetmek olmalıdır."[11]

Karar 4) "Tasfiyeye konu malın, bedelinin tamamının ya da bir kısmının kredi ile karşılanması durumunda, kredi veren kuruluşa yapılan geri ödemelerin isabet ettiği dönemden, miktarından ve taksit sayısından hareketle mal rejiminin tasfiyesi sonucunda eşlerin alacak miktarları belirlenir. 4721 Sayılı TMK'nin 202/1. maddesi gereğince edinilmiş mallara katılma rejiminin geçerli olduğu dönemde yapılan ödemelerde, eşler lehine değer artış payı ve/veya artık değere katılma alacağı hakları doğabilecektir. Kredi borcu ödemelerinin bir kısmının mal rejiminin devamı süresince, bir kısmının da daha sonraki tarihlerde yapılmasında, mal rejiminin geçerli olduğu dönemin sonrasına sarkan ödemeler, dava konusu taşınmazın borcu kabul edilerek tasfiye gerçekleştirilir…

Yukarıda açıklandığı gibi iki döneme yayılan kredi borcu ödeme tablosu mevcut olduğunda; öncelikle, mal rejiminin sona erdiği tarihte henüz vadesi gelmediği için ödenmemiş kredi borç miktarının, toplam kredi borcuna oranı bulunur. Sonra bulunan bu kredi borç oranının, taşınmazın toplam satın alım bedeli karşısındaki oranına dönüşümü gerçekleştirilir. Tespit edilen bu oranın, taşınmazın tasfiye tarihindeki (karara en yakın) sürüm (rayiç) değeri ile çarpılmasıyla borç miktarı belirlenir. Bu ilke ve esaslara göre saptanan taşınmazın borç miktarı, tasfiye tarihindeki sürüm değerinden düşüldükten sonra kalan miktar, değer artış payı ve/veya artık değere katılma alacağı hesaplamasında göz önünde bulundurulur…"[12]

Karar 5) "Şöyle ki, ilgili bankadan gelen yazı cevabı ekinde bulunan kredi sözleşmesi ve kredi borcu ödeme tablosuna göre taşınmazın edinilmesinde kullanılan kredinin 48 ay vadeli olduğu, boşanma dava tarihine kadar (15.04.2009) 16 aylık taksitin ödendiği, boşanma dava tarihinden sonra 32 aylık taksitin kaldığı ancak davacı-davalı kadın tarafından boşanma dava tarihinden sonra 24 ayda toplu ödeme ile kredinin kapatıldığı anlaşılmaktadır. O halde, mahkemece, yukarıda açıklanan Dairemizin ilke ve uygulamalarına göre, peşinat ile tasfiyeye konu taşınmaz için kullanılan kredinin boşanma dava tarihinde kadar yapılan kredi ödemelerinin toplam kredi ödemelerine ve edinme değerlerine oranlaması yapılarak sonucuna göre artık değere katılma alacağına hükmedilmesi gerekirken yazılı şekilde karar verilmesi hatalı olmuş, bozmayı gerektirmiştir."[13]

Karar 6) "Tasfiyeye konu araç evlilik birliği içinde 17.400,00 TL bedelle 26.03.2010 tarihinde davalı kadın adına satın alınmış olup, boşanma dava dosyası içerisindeki kredi evraklarından bu alım bedelinin 15.100,00 TL'sinin 25.03.2010 tarihinde Denizbank'tan davalı adına çekilen ihtiyaç kredisi ile karşılandığı, 36 ay vadeli kredinin 7 adet taksitinin evlilik birliği içine, kalan taksitlerin ise mal rejiminin sona erdiği boşanma dava tarihinden sonraya isabet ettiği anlaşılmaktadır. Mahkemece yapılacak iş, öncelikle

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[11] Yargıtay 8. Hukuk Dairesi, 2018/13534 E., 2018/17392 K., 16.10.2018 T.

[12] Yargıtay 2. Hukuk Dairesi, 2021/10685 E. 2022/1578 K., 21.2.2022 T.; Yargıtay 2. Hukuk Dairesi, 2021/5668 E., 2021/7765 K., 26.10.2021 T.; Yargıtay 2. Hukuk Dairesi, 2021/7035 E., 2022/6223 K., 23.6.2022 T.

[13] Yargıtay 2. Hukuk Dairesi, 2021/5345 E., 2021/8998 K., 1.12.2021 T.

araç alımında kullanılan kredi yönünden boşanmadan sonraya kalan taksit (29/36) oranı (%80)[14] *ile çekilen kredi miktarı çarpılmalı (%80 x 15.100), bulunacak meblağın (12.163) aracın edinme tarihindeki değeri içinde karşılık gelen orana (12.163/ 17.400= % 69) dönüşümü gerçekleştirilmeli, bu oran ile aracın (bozma ile güncelliğini yitireceğinden) bozmadan sonra verilecek karara en yakın tarih itibariyle belirlenecek sürüm (rayiç) değeri çarpılmalı ve (%69 x sürüm değeri) borç miktarı belirlenmelidir. Bu borç miktarı aracın tasfiye tarihindeki sürüm değerinden düşüldükten sonra kalan artık değer üzerinden talep miktarı ve temyiz edenin sıfatı gözetilerek katılma alacağı hesaplanmalıdır.*"[15]

3. YARGITAY İÇTİHADINDA BORÇ GÜNCELLEME YÖNTEMİ

Yukarıda verilen Yargıtay kararları ve benzerlerine bakıldığında, mal rejimi devam ederken edinilmiş mala edinilmiş maldan yapılan katkılar için denkleştirme yapılarak ve bu denkleştirme üzerinden katılma alacağının hesaplandığı sonucuna varmak yanlış olmayacaktır (bkz. Karar 3). Mal edinilmiş mal olduğundan, katkılar TMK m. 230 f. 3 kapsamında değerlendirilmeyip, denkleştirme borcun dönüştürülerek sürüm değeri üzerinden güncellenmesi yöntemiyle hesaplanmaktadır. Yargıtay'ın bu güncellenme yönteminin anlaşılır hale getirilmesi, uygulama ve değerlendirmede kolaylık sağlayacaktır. Burada yapılan açıklamalar sübjektif değerlendirmelere dayanmakta olup, konuya ilişkin hem Yargıtay'ın hem doktrindeki diğer yazarların farklı düşünceleri saklıdır.

Yargıtay kararlarında kullanılan hesaplama yönteminin daha iyi anlaşılabilmesi için, kalan borç oranının malın satın alma değeri üzerinden mi yoksa mal sahibine toplam maliyeti (ödeme + anapara + faiz) üzerinden mi güncelleneceğinin netleştirilmesi gerekir. Kararlara bakıldığında, kullanılan "toplam satın alma bedeli" ifadesiyle, alınan kredi (anapara) ve peşinatın kastedildiği anlaşılmaktadır. Karar 6'daki araç örneği de bu sonucu açıkça desteklemektedir. Dolayısıyla, malın borçlu mal sahibi eşe toplam maliyetinin (faiz dahil) oranlamada bir önemi bulunmamaktadır.

Ayrıca kararlarda malın güncel sürüm değeri üzerinden gerçekleşen güncelleme işlemleri dikkate alındığında da malın edinim değeri (peşinat + kullanılan kredi/borç miktarı, yani anapara) üzerinden dönüştürmenin yapılması (mal sahibi eşe toplam maliyetinin göz ardı edilmesi) paralelliğin sağlanması açısından daha doğru görünmektedir. Diğer bir ifadeyle kalan borç oranı ile sürüm değerinden düşecek kalan borç miktarı hesaplanırken borçlu eşe malın toplam maliyeti (peşinat + anapara + faiz) dikkate alınmamaktadır.

Buna göre

1. Öncelikle edinilmiş bir mal için iki dönemde, edinilmiş mal rejimi döneminde ödenmiş ve daha sonraki dönemde ödenecek borç bulunmalıdır. Bu şartın sağlanmadığı örneğin malın evlenmeden önce alınıp, mal rejimi döneminde edinilmiş mallardan

[14] Kararlardaki italik, kalın ve parantez içindeki ifadeler hesaplamanın daha kolay anlaşılması amacıyla yazar tarafından eklenmiştir.

[15] Yargıtay 8. Hukuk Dairesi, 2017/13402 E., 2019/4165 K., 16.4.2019 T.

borcun bir kısmının sonra da kalan borcun mal rejiminden sonra ödendiği hallerde mal kişisel maldır ve TMK m. 230 f. 3 hükmü doğrudan uygulanmalıdır.

2. Kalan borç miktarı ile toplam borç miktarı (anapara + faiz) veya kalan taksit sayısı ile toplam taksit sayısı oranlanacak ve kalan borç oranı bulunacaktır. (KBO)
3. Kalan borç oranı (KBO) ile malın edinimde kullanılan kredi/borç (kredi için ödenen faiz ve diğer maliyetler dikkate alınmamaktadır) çarpılarak kalan borcun kullanılan kredi/borç karşılığı hesaplanacaktır. (KBK)
4. Kalan borcun karşılığı (KBK) ile malın edinim değeri (MED) oranlanınca da karşımıza kalan borcun edinim oranı çıkmaktadır. (KBEO)
5. Son olarak da KBEO ile malın tasfiyedeki sürüm değeri çarpılarak malın sürüm değerinden düşülecek kalan borcun sürüm değeri karşılığı bulunacaktır (KBSK).
6. Sürüm değerinden kalan borç miktarı çıkartılınca kalan değer de mal sahibi eşin diğer eşle paylaşmak durumunda kalacağı artık değer hesabındaki aktifi oluşturacaktır.

Kalan borç edinim oranı (KBEO) ile malın sürüm değerinin çarpılması sonucu bulunan kalan borcun sürüm değeri karşılığı (KBSK) artık değer hesabının pasif kısmında yer alacaktır. Bu içtihatla artık değer hesabında dikkate alınan edinilmiş malın sürüm değeri gibi Yargıtay kalan borcu da kendi yöntemiyle güncellenmektedir.

4. BORÇ ÖZGÜLENMESİNE İLİŞKİN DOKTRİNDEKİ ÖRNEKLER, YARGITAY GÜNCELLEME İÇTİHADI VE KANUNİ HESAPLAMA YÖNTEMİ KARŞILAŞTIRMASI

Yargıtay borç güncelleme içtihadına ilişkin, Karar 3'teki gibi ve kanaatimiz ile de örtüşen bir Avukat meslektaşımızın verdiği örneği burada tekrarlamak yerinde olacaktır. "Örneğin; 1.000.000 TL'ye 25.01.2016 tarihinde kredi ile satın alınan evin 200.000 TL'lik kısmı evli iken (yasal mal rejimi sürerken)[16] ödenmiş olsun, evlilik içinde ödenen paranın gayrimenkulün değerine oranı %20›dir. Taşınmazın 22.03.2018 tarihindeki güncel değeri 1.400.000 TL ise, bunun %20›si evlilik içinde edinilmiş mal sayılır, o da 280.000 TL›dir. Edinilmiş 280.000 TL›nin 1/2›si olan 140.000 TL boşanmada mal paylaşımı esnasında diğer eşe ait olacaktır. Bunun dışında evin devam eden kredi ödemeleri krediyi kullanan kişi tarafından yatırılmaya devam eder ve diğer eşin kalan kısımla ilgili bir hak iddiası kalmaz."[17]

Bu örnekten anlaşıldığı gibi edinilmiş mala edinilmiş maldan yapılan katkıya denkleştirme alacağı tanınması ve bunun da diğer eşle katılma alacağı olarak paylaşılması söz konusudur. Aslında değer artış payı alacağında olduğu gibi her bir katkı ile her bir katkıya düşen değer artış hisseleri üzerinden sonuca varmak gerekir. Ancak bu yöntem zahmetli ve masraflıdır. Çünkü her bir katkı ile katkıya tekabül eden değer artışı/azalışı dikkate alınarak denkleştirme alacağının hesaplanması gerekir.[18]

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16 Yazar tarafından eklenmiştir.

17 Bu örnek ve yorum Stj. Av. Ahmet Tarık Koçak'a ait makaleden alınmıştır: Ahmet Tarık Koçak, 'Kredi ile Alınan Malların Yasal Mal Rejimi Açısından Değerlendirilmesi' <https://www.hukukihaber.net/kredi-ile-alinan-mallarin-yasal-mal-rejimi-acisindan-degerlendirilmesi> (Erişim Tarihi: 21.03.2024).

18 Zeytin (n 4) N. 448.

Konuya ilişkin doktrinde Güneş tarafından Yargıtay 8. HD 2019/6186 Esas 2019/11679 Karar 24.12.2019 tarihli kararını esas alarak verilen örnekte 100.000 TL'lik mal için ödenen peşin 20.000 TL (80.000 TL için 60 ay x 1800 TL = 108.000 TL geri ödemeli banka kredisi kullanılmıştır). Yargıtay'ın kararına dayanarak Güneş tarafından verilen örnekte, 100.000 TL'lik bir mal için yapılan hesaplamalar detaylandırılmıştır; ödenen peşin tutar ve geri ödemeli banka kredisi dikkate alınarak malın sürüm değeri üzerinden denkleştirme yapılmış ve diğer eşin katılma alacağı belirlenmiştir.

Bu hesaplamada:

1. Peşin ödeme: 20.000 TL peşin ödenmiştir.
2. Kredi ödemesi: 80.000 TL kredi alınmış ve 60 ay boyunca 1.800 TL ödenmiştir (toplam geri ödeme: 108.000 TL).
3. Denkleştirme: Peşin ödeme (20.000/100.000) üzerinden 1/5 oranıyla 300.000 TL'lik sürüm değeri karşılığı olarak 60.000 TL denkleştirme yapılmış. Ayrıca, mal rejimi dönemine denk gelen 24/60 oranı ile kalan sürüm değeri 240.000 TL üzerinde 96.000 TL daha denkleştirme hesaplanmıştır.
4. Artık Değer: Toplamda (60.000 + 96.000) 156.000 TL artık değer olarak belirlenmiş ve bunun yarısı, yani 78.000 TL diğer eşin katılma alacağı olarak hesaplanmıştır.[19]

Güneş'in verdiği örneği Yargıtay'ın güncelleme yöntemi ile hesaplanmasında şu adımlar izlenmiştir:

1. Kalan Borç Oranı (KBO): Örnekten hareketle kalan borç oranı 0,6 olarak hesaplanmıştır (36/60 veya 64.800/108.000).
2. Kalan Borcun Kullanılan Kredi Karşılığı (KBK): Bu oran üzerinden kalan borcun kullanılan kredi karşılığı 48.000 TL olduğu hesaplanmıştır (0,6 x 80.000).
3. Kalan Borcunun Karşılığının Edinim Değerine Oranı (KBEO): Bu da %48 olarak belirlenmiştir (48.000/100.000).
4. Kalan Borcun Sürüm Değeri Karşılığı (KBSK): 0,48 ile malın sürüm değeri (300.000 TL) çarpılmış ve 144.000 TL kalan borcun sürüm değeri karşılığı olarak belirlenmiştir.
5. Artık Değer: 300.000 TL'den 144.000 TL çıkartılarak 156.000 TL artık değer bulunmuş ve bu değerin yarısı (78.000 TL) diğer eşin katılma alacağı olarak hesaplanmıştır.

Görüldüğü üzere Güneş'in verdiği örnekte ulaşılan sonuç ile Yargıtay güncelleme yöntemi ile bulduğumuz sonuç aynıdır.

Acaba Yargıtay içtihadına göre güncelleme yöntemi uygulamadan, kanunun öngördüğü şekilde borcun düşülmesi ile Güneş'in örnek olayını esas alarak artık değer hesaplasak nasıl bir sonuca ulaşırız?

Kanunun öngördüğü hesaplama yöntemine göre:

1. Kalan Borç: Mal rejimi sonrasına kalan borç miktarı 36 ay olup, toplamda 64.800 TL (1.800 TL x 36 ay) olarak belirlenmiştir.

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[19] Nermin Sakarya Güneş, *Edinilmiş Mallara Katılma Rejiminde Katılma Alacağı* (Seçkin Yayınları 2022) 85ff.

2. Artık Değer: 300.000 TL'lik sürüm değerinden kalan borç miktarı (64.800 TL) çıkarılınca, artık değer 235.200 TL olarak bulunmuştur.
3. Katılma Alacağı: Artık değerin yarısı olan 117.600 TL, diğer eşin katılma alacağı olarak hesaplanmıştur.

Farklılıklar: Yargıtay'ın güncelleme içtihadına göre hesaplanan katılma alacağı 78.000 TL iken, kanunun öngördüğü hesaplama sonucu 117.600 TL olarak belirlenmiştir. Bu da hak sahibi eşin aleyhine ve borçlu eşin lehine 39.600 TL'lik bir fark oluşturuyor.

Burada unutulmaması gereken husus ister Yargıtay içtihadına ister kanun hükmüne göre katılma alacağı hesaplansın borçlu eşin kalan borçtan (1800 x 36 = 64.800 TL) sorumluluğunun değişmeden devam edeceğidir.

Tablo 1

Örnek Güneş / Sürüm Değeri TL	**300.000**
Yargıtay İçtihadına Göre Katılma Alacağı	78.000
Kanuna Göre Katılma Alacağı	117.600 ⬆
FARK	**39.600**

Bu konuya ilişkin Uluç'un[20] verdiği Karamercan'ın[21] da tekrar ettiği örnek esas alındığında da aynı sonuçla karşılaşılmaktadır. Uluç örneğinde 45.000 TL peşinat ve 135.000 TL kredi kullanılarak (72 ay x 2100TL) 180.000 TL değerinde bir daire alınmıştır. Kredi borcunun 48 ayı mal rejimi dönemine kalan 24 ayı mal rejimi sonrası döneme tekabül etmektedir. Dairenin tasfiyedeki sürüm değeri 360.000 TL'dir. [22]

Hesaplama:

1. Peşinat ve Kredi Kullanımı: 45.000 TL peşinat ve 135.000 TL kredi kullanılarak daire alınmıştır. Kredi borcunun 48 ayı mal rejimi dönemine, 24 ayı ise mal rejimi sonrası döneme denk gelmektedir.
2. Sürüm Değeri: Dairenin tasfiye anındaki sürüm değeri 360.000 TL olarak belirlenmiştir.
3. Katılma Alacağı: Uluç'un hesaplama yöntemi ve Yargıtay'ın güncelleme içtihadı dikkate alındığında, bu örnekten 135.000 TL katılma alacağı sonucu çıkmaktadır. Her iki yöntemin benzerliğini Güneş'in verdiği örnekte ortaya koymuştuk. Bu nedenle burada tekrar etmiyoruz.[23]

Kanunun öngördüğü hesaplama yöntemine göre:

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[20] Yusuf Uluç, *Mal Rejimleri ve Tasfiyesi* (Yetkin Yayınları 2014) 1359-1360.

[21] Fatih Karamercan, *Mal Rejiminin Tasfiyesi* (2. basım, Seçkin Yayıncılık 2024) 785 vd.

[22] Uluç Örnek Hesaplama: 45.00 (peşinat)/180.000 = 1/4, ¼ x 360.000 = 90.000 EM, 360.000-90.000 = 270.000, 270.000 x 48/ 72 = 180.000 EM, 90.000 + 180.000 = 270.00 AD, 270.00 x ½ = 135.000 KATILMA ALACAĞI.

[23] Yargıtay İçtihat Sistematiği Hesaplama: 24/72(KBO) x 135.000 = 45.000 (KBK), 45.000 / 180.000 (MED) = 0,25 (KBEO), 0,25 x 360.000 = 90.000 (KBSK). 360.000 – 90.000 = 270.000 x ½ = 135.000 TL KATILMA ALACAĞI.

1. Kalan Borç: 24 ay boyunca 2.100 TL olan ödemeler toplamda 50.400 TL kalan borcu oluşturuyor.
2. Artık Değer: Malın sürüm değerinden kalan borç düşüldüğünde (360.000 – 50.400) 309.600 TL artık değer bulunuyor.
3. Katılma Alacağı: Artık değerin yarısı olan 154.800 TL, diğer eşin katılma alacağı olarak hesaplanmış.

Farklılıklar: Bu örnekte, Yargıtay'ın güncelleme içtihadına göre hesaplanan katılma alacağı 135.000 TL iken, kanunun öngördüğü hesaplama ile bulunan katılma alacağı 154.800 TLdir. Arada 19.800 TL'lik bir fark oluşuyor ve bu fark hak sahibi eşin aleyhine, borçlu eş lehine gerçekleşiyor.

Her iki yöntemde de borçlu eşin sorum olduğu kalan borç miktarı 50.400 TL'dir.

Tablo 2

Örnek Uluç / Sürüm Değeri TL	**360.000**
Yargıtay İçtihadına Göre Katılma Alacağı	135.000
Kanuna Göre Katılma Alacağı	154.800 ↑
FARK	**19.800**

5. ÖRNEK 1 VE ÖRNEK 2 İLE YARGITAY GÜNCELLEME İÇTİHADI VE KANUNİ HESAPLAMA YÖNTEMİNİN KARŞILAŞTIRMALI DEĞERLENDİRMESİ

Yukarıda verilen Güneç ve Uluç örnekleri ile Yargıtay içtihadına göre yapılan hesaplamalarında sonuç borçlu eş lehine olmuştur. Diğer bir ifadeyle borçlu eş daha az katılma alacağı ödemek durumunda kalmakta, alacaklı eş ise daha az katılma alacağı elde etmektedir.

Yukarıda paylaştığınız Örnek 1'e dönersek Yargıtay içtihadına göre yapılan hesaplama üzerinden kalan borçlanma oranı (%83 = 450.000/540.000 veya 100/120) kullanılarak artık değer hesabı yapılmaktadır. Özetle:

1. İlk aşamada, mal için kullanılan kredi miktarıyla kalan borç oranı çarpılarak (270.000 TL x %83 = 224.100 TL) kalan borç karşılığı (KBK) bulunur.
2. Bu tutar (224.100 TL), malın edinim değeri ile oranlandığında (224.100/330.000) kalan borcun edinimdeki oranı %68 (KBEO) olarak hesaplanmaktadır.
3. Daha sonra, bu oran (%68) malın tasfiyedeki sürüm değeri ile çarpıldığında, artık değer hesabında pasif tarafta yer alacak kalan borcun sürüm değeri karşılığı 272.000 TL (KBSK) olarak bulunur.
4. Artık değer hesaplamasında (400.000 TL - 271.636 TL = 128.363 TL) toplam artık değer, 128.363 TL olarak tespit edilir ve diğer eşin katılma alacağı ise bu değerin yarısı olan 64.181 TL olur.

Sonuç olarak, Yargıtay'ın içtihadına göre yapılan bu hesapla borçlu eşin aleyhine sonuçlanmaktadır. Kalan borcun malın sürüm değerinden fazla olduğu ve kanuni hesaplamaya

göre katılma alacağının söz konusu olmayacağı bu durumda, Yargıtay içtihadına göre yapılan hesaplama ile diğer eş 64.181 TL katılma alacağına sahip olmaktadır. Bu örnekte Yargıtay içtihadı, Güneş ve Uluç örneklerinden farklı olarak borçlu eşin aleyhine olmaktadır.

Yukarıda paylaştığınız Örnek 2'de, Yargıtay'ın içtihadına göre yapılan hesaplama sonucunda borçlu eşin diğer eşe ödemesi gereken katılma alacağı artmaktadır. Detaylara bakacak olursak:

1. Kanuna göre hesaplama:
   - Malın sürüm değeri: 400.000 TL
   - Kalan borç: 90.000 TL
   - Artık değer: 400.000 - 90.000 = 310.000 TL
   - Diğer eşin katılma alacağı: 310.000 TL'nin yarısı = 155.000 TL
2. Yargıtay'ın içtihadına göre hesaplama:
   - Kalan borç oranı: (20 ay / 120 ay) = %16
   - Kalan borcun kullanılan kredi karşılığı: 270.000 TL x %16 = 43.200 TL
   - Bu miktarın edinim değerine oranı: 43.200 / 330.000 = %13
   - Kalan borcun malın sürüm değerine oranlanması: %13 x 400.000 = 54.545 TL
   - Artık değer: 400.000 - 54.545 = 345.455 TL
   - Diğer eşin katılma alacağı: 345.455 TL'nin yarısı = 172.727 TL

Sonuç olarak bu durumda, kanuna göre diğer eşe ödenmesi gereken katılma alacağı 155.000 TL iken, Yargıtay içtihadına göre bu miktar 172.727 TL'ye çıkmaktadır. Yani borçlu eş, Yargıtay kararına göre 17.727 TL daha fazla katılma alacağı ödemek zorunda kalacaktır.

6. GÜNEŞ, ULUÇ ÖRNEKLERİ İLE ÖRNEK 1 VE ÖRNEK 2'NİN FARKLI SONUÇLARININ DEĞERLENDİRİLMESİ

Yargıtay içtihadına göre yapılan hesaplamaların Güneş ve Uluç örneklerindeki borçlu eş lehine, bizim verdiğimiz Örnek 1 ve Örnek 2'de borçlu eş aleyhine olmaktadır. Bu durum, Yargıtay içtihadında kullanılan hesaplama yönteminin değişken parametreler karşısında (kalan borç oranı, malın edinim değeri, sürüm değeri vb.) farklı sonuçlar doğurabileceğini gösteriyor. Keyfiliğin önüne geçmek, kanun koyucunun iradesi ile hâkim hukukunun arasında gerekçeli bir değerlendirme yapabilmek için bunun açıklığa kavuşturulması gerekir. Bu amaçla aşağıda bazı örnek hesaplamalara yer verilmiştir. Bu hesaplamalarda sadece malın sürüm değeri değiştirilmiştir:

Tablo 3 Yargıtay Güncelleme İçtihadına Göre Borç Özgüleme

Örnek 2.1				
	KALAN BORC MİKTARI	90.000	TOPLAM BORÇ MİKTARI	540.000
	KALAN BORÇ TAKSİDİ	20	TOPLAM BORÇ TAKSİDİ	120

	KALAN BORÇ ORANI	0,1666	ALINAN BORÇ	270000
	PESIN ÖDEME	60.000		
	KALAN BORCUN ALINAN BORC KARŞILIĞI	45000	EDİNİM DEĞERİ	330000
	KALAN BORÇ EDİNİM ORANI	0,1363	**SÜRÜM DEĞERİ**	**400000**
	KALAN BORCUN SÜRÜM D. KARŞILIĞI	54545,45		
	ARTIK DEGER	345454,55		
	KATILMA ALACAGI	**172727,27**		
Örnek 2.2				
	KALAN BORC MİKTARI	90.000	TOPLAM BORÇ MİKTARI	540.000
	KALAN BORÇ TAKSİDİ	20	TOPLAM BORÇ TAKSİDİ	120
	KALAN BORÇ ORANI	0,1666	ALINAN BORÇ	270000
	PESIN ÖDEME	60.000		
	KALAN BORCUN ALINAN BORC KARŞILIĞI	45000	EDİNİM DEĞERİ	330000
	KALAN BORÇ EDİNİM ORANI	0,1363	**SÜRÜM DEĞERİ**	**700000**
	KALAN BORCUN SÜRÜM D. KARŞILIĞI	95454,54		
	ARTIK DEGER	604545,46		
	KATILMA ALACAGI	**302272,73**		
Örnek 2.3				
	KALAN BORC MİKTARI	90.000	TOPLAM BORÇ MİKTARI	540.000
	KALAN BORÇ TAKSİDİ	20	TOPLAM BORÇ TAKSİDİ	120
	KALAN BORÇ ORANI	0,1666	ALINAN BORÇ	270000
	PESIN ÖDEME	60.000		
	KALAN BORCUN ALINAN BORC KARŞILIĞI	45000	EDİNİM DEĞERİ	330000
	KALAN BORÇ EDİNİM ORANI	0,1363	**SÜRÜM DEĞERİ**	**1000000**
	KALAN BORCUN SÜRÜM D. KARŞILIĞI	136363,63		
	ARTIK DEGER	863636,37		
	KATILMA ALACAGI	**431818,18**		

Görüldüğü üzere Yargıtay güncelleme içtihadı ile sürüm değeri 400.000,-TL 700.000,- TL ve 1.000.000,- TL olduğu örneklemelerde katılma alacağı sırasıyla 172727,27, 302272,73 ve 431.818,18 TL olmaktadır.

Tablo 4 Kanuna Göre Borç Özgüleme

Örnek 2.1				
	KALAN BORC MİKTARI	90.000	TOPLAM BORÇ MİKTARI	540.000
	KALAN BORÇ TAKSİDİ	20	TOPLAM BORÇ TAKSİDİ	120
	KALAN BORÇ ORANI	0,1666	ALINAN BORÇ	270000
	PESIN ÖDEME	60.000		
	KALAN BORCUN ALINAN BORC KARŞILIĞI	45000	EDİNİM DEĞERİ	330000
	KALAN BORÇ EDİNİM ORANI	0,1363	**SÜRÜM DEĞERİ**	**400000**
	KALAN BORCUN SÜRÜM D. KARŞILIĞI	136363,63		
	ARTIK DEGER	310.000		
	KATILMA ALACAGI	**155000**		
Örnek 2.2				
	KALAN BORC MİKTARI	90.000	TOPLAM BORÇ MİKTARI	540.000
	KALAN BORÇ TAKSİDİ	20	TOPLAM BORÇ TAKSİDİ	120
	KALAN BORÇ ORANI	0,1666	ALINAN BORÇ	270000
	PESIN ÖDEME	60.000		
	KALAN BORCUN ALINAN BORC KARŞILIĞI	45000	EDİNİM DEĞERİ	330000
	KALAN BORÇ EDİNİM ORANI	0,1363	**SÜRÜM DEĞERİ**	**700000**
	KALAN BORCUN SÜRÜM D. KARŞILIĞI	136363,63		
	ARTIK DEGER	610.000		
	KATILMA ALACAGI	**305000**		
Örnek 2.3				
	KALAN BORC MİKTARI	90.000	TOPLAM BORÇ MİKTARI	540.000
	KALAN BORÇ TAKSİDİ	20	TOPLAM BORÇ TAKSİDİ	120
	KALAN BORÇ ORANI	0,1666	ALINAN BORÇ	270000
	PESIN ÖDEME	60.000		

	KALAN BORCUN ALINAN BORC KARŞILIĞI	45000	EDİNİM DEĞERİ	330000
	KALAN BORÇ EDİNİM ORANI	0,1363	**SÜRÜM DEĞERİ**	**1000000**
	KALAN BORCUN SÜRÜM D. KARŞILIĞI	136363,63		
	ARTIK DEGER	910.000		
	KATILMA ALACAGI	**455000**		

Görüldüğü üzere kanuna göre borcun artık değer hesabında güncellenmeden dikkate alınmasında sürüm değeri 400.000, 700.000 ve 1.000.000 TL olduğu örneklemelerde katılma alacağı sırasıyla 155.000,- 305.000,- ve 455.000,- TL olmaktadır. Yargıtay içtihadı ile kanun hükmü gereği yapılan katılma alacağı karşılaştırmalı tablosu aşağıdaki şekildedir.

Tablo 5 Karşılaştırmalı Borç Özgüleme

Sürüm Değeri TL	**400.000**	**700.000**	**1.000.000**
Edinim Değeri TL	**330.000**	**330.000**	**330.000**
Yargıtay İçtihadına Göre Katılma Alacağı	172.727,27 ↑	302.272,73	431.181,18
Kanuna Göre Katılma Alacağı	155.000	305.000 ↑	455.000 ↑
FARK	**17.727**	**2.728**	**23.819**

Yukarıda verdiğiniz örneklere göre, Yargıtay içtihadı ve kanun hesaplamalarının borçlu eş ve alacaklı eş üzerindeki etkileri, malın edinim değeri ve tasfiyedeki sürüm değeri arasındaki farkın büyüklüğüne göre değişiklik göstermektedir. Özellikle şu durumların tespiti öne çıkıyor:

1. Malın değer artışı büyük olduğunda (en az bir katı, örneğin, edinim 330 bin TL, sürüm değeri 700 bin TL veya 1 milyon TL gibi): Yargıtay içtihadına göre yapılan hesaplama, kanuna göre yapılana kıyasla borçlu eş lehine, alacaklı eş aleyhine sonuçlanmaktadır. Bu durumda, Yargıtay'ın yöntemi ile hesaplanan katılma alacağı daha düşük çıkmaktadır.
2. Malın değer artışı sınırlı olduğunda (örneğin, edinim 330 bin TL, sürüm değeri 400 bin TL gibi): Yargıtay'ın hesaplaması, kanuna göre yapılana kıyasla borçlu eş aleyhine, alacaklı eş lehine sonuçlanmaktadır. Bu durumlarda, Yargıtay içtihadına göre hesaplanan katılma alacağı daha yüksek olmaktadır.
3. Kalan borcun malın sürüm değerini aşması halinde: Kanuna göre artık değer ortaya çıkmamakta, dolayısıyla katılma alacağı da hesaplanmamaktadır. Ancak Yargıtay'ın yöntemine göre artık değer ve katılma alacağı hesaplanabilmektedir, bu da borçlu eşin aleyhine bir durum yaratmaktadır.

Diğer bir ifadeyle Yargıtay içtihadına göre kalan borcun dönüştürülüp güncellenmesi yöntemi şu iki duruma göre farklı sonuçlar doğurur:

1. Kalan borç sürüm değerini aştığında:

- Borçlu eş aleyhine, alacaklı eş lehine bir durum oluşur. Bu, borçlu eşin daha fazla katılma alacağı ödemesi gerektiği anlamına gelir.

2. Kalan borç sürüm değerinden az ve malın değer artışı edinim değerinin bir katı veya daha fazla olduğunda:

   - Borçlu eş lehine, alacaklı eş aleyhine bir sonuç ortaya çıkar. Bu durumda, borçlu eşin ödeyeceği katılma alacağı miktarı azalır.

Sonuç olarak şu genellemeyi yapmak mümkündür: Yargıtay'ın içtihadına göre kalan borcun dönüştürülerek güncellenmesi yöntemi, malın değer artışının fazla olduğu durumlarda borçlu eş lehine (daha az katılma alacağı), değer artışının sınırlı olduğu durumlarda ise borçlu eş aleyhine (daha fazla katılma alacağı) sonuçlanmaktadır.

SONUÇ

Yargıtay'ın kredili mal ediniminde mal rejimi dönemi ve sonrasına sarkan borç ödemelerinde, kalan borcun güncellenerek malın tasfiyedeki sürüm değerinden düşülmesi şeklindeki içtihadı somut olayın özelliklerine, özellikle maldaki değer artışının büyüklüğüne bağlı olarak borçlu eş lehine veya aleyhine olabilmektedir.

Yargıtayın borç güncelleme içtihadının yasal bir dayanağı mal rejimi hükümleri arasında bulunmamaktadır. Türk Medeni Kanunu'nun (TMK) 232. maddesi, mal rejiminin tasfiyesinde malların sürüm değerlerinin esas alınacağını belirtmektedir. Ancak borçların güncellenerek tasfiye edilmesiyle ilgili herhangi bir yasal hüküm bulunmamaktadır. Yargıtay'ın yasal mal rejiminin tasfiyesinde banka hesaplarındaki nominal bakiye miktarını enflasyon ya da kanuni faiz oranı ile güncelleyerek hesaplama yapması göz önüne alındığında,[24] mal kavramını genişletici bir yorumla borçları da kapsayacak şekilde ele aldığı düşünülebilir. Ancak bu genişletici yorum, borcun güncellenmesi için yeterince tatmin edici bir gerekçe oluşturmamaktadır.

TMK m. 231'de geçen "artık değer, eklemeler ve denkleştirmelerden elde edilen miktarlar da dahil olmak üzere her eşin edinilmiş mallarının toplam değerinden, bu mallara ilişkin borçlar çıkarıldıktan sonra kalan miktardır» ifadesi, borcun güncellenmesi gerektiğine dair bir hüküm de içermemektedir.[25] Hüküm külli tasfiyeye işaret etmekteyse de taleple bağlılık ilkesi nedeniyle cüzi tasfiye de mümkündür. Ancak külli tasfiyenin söz konusu olduğu

[24] Yargıtay 8. Hukuk Dairesi, 2019/4622 E., 2019/10918 K., 4.12.2019 T. Mal rejimi sona erdiği anda mevcut paranın tasfiye tarihi itibari ile güncellenerek (Kanun faiz, tefe tüfe oranı veya ortalamaları veya başka bir endeksle) artık değer hesabında dikkate alınması, borçlu eşin bu parayı tüketerek harcadığı; üzerinde tasarruf etmediği veya edemediği hallerde haksızlığa yol açacaktır. Bu nedenle bu içtihada temkinli yaklaşmak gerekir.

[25] Hüküm açıkça külli tasfiyeye ve borçların aktiften düşülmesine işaret etmektedir. Ancak cüzi tasfiyeyi de yasaklamamakta, taraf iradelerine bırakmaktadır.

halde, her bir malın cüzi tasfiyesini talep eden Yargıtay uygulaması hukuka uygun değildir.[26] Külli tasfiyede bir malın borcunun kendi sürüm değerinden fazla olmasına rağmen, diğer malların sürüm değerleri ile hesaplanınca hesabın artık değer vermesi mümkündür. Cüzi tasfiyede bunun aksi, yani bir malın borcunun sürüm değerinden fazla olması nedeniyle artık değerin ortaya çıkmaması olabilir. Özellikle eksik değerin dikkate alınmamasına ilişkin hükümden yola çıkarak, külli tasfiyede her bir mala ait katılma alacağının belirlenmesinin talep edilmesi;[27] cüzi ve külli tasfiyede borcun güncellenmesi kanunun lafzına aykırı olacaktır. Diğer bir ifadeyle artık değer hesabında değer eksilmesinin göz önüne alınmaması şeklindeki hüküm, edinilmiş mala ait borcun malın sürüm değerinden fazla olması halinde nominal olarak dikkate alınmasını yasaklıyor şeklinde yorumlanmamalıdır. Artık değer bu halde sıfır olup, diğer eşin katılma alacağı olmayacaktır. Ancak bu durumda edinilmiş mala mal rejimi süresince borç ödemesi ile yapılan katkıdan diğer eşin yararlandırılmaması söz konusu olabilmektedir. Yargıtay borç güncelleme içtihadı ile kanımızca bu haksızlığın önüne geçmeye çalışmaktadır. Yargıtay, kanundaki bu örtülü boşluğu doldurmak için edinilmiş maldan edinilmiş mala yapılan katkı için denkleştirme öngörmektedir. Bunun yaparken de kanunun açık hükmünü "*bu mallara ilişkin borçlar çıkarıldıktan* sonra kalan" hükmünü ihlal etmemeye çalışmaktadır.

Denkleştirme kalan borcun, alınan borç oranı üzerinden malın edim değeri karşılığına dönüştürülmesi ile sürüm değeri ile güncellenerek yapılmakta ve katılma alacağı hesaplamaktadır. Bu hesaplamaların bazen borçlu eş aleyhine bazen lehine olduğunu yukarıda ortaya koyduk. Kanun koyucunun yasal mal rejimi ile evlilik birliğindeki ekonomik birlikteliği adil bir paylaşıma tabi tutmayı amaçladığı aşikardır. Ancak bunun menfaat çatışmaları nedeniyle her zaman sağlanamayacağı, Yargıtay içtihadı ile de bunun sağlanamadığı ve sağlanamayacağı ortadadır. Kalan borcun sürüm değerinden az olduğu hallerde nominal borcun sürüm değeri üzerinden dönüştürülerek güncellenmesiyle artık değer hesabında dikkate alınması diğer eşin katılma alacağını azaltmaktadır. Kanımızca bu hukuka uygun değildir. Çünkü bu halde diğer eşin sırf eş sıfatına bağlı olarak gerçekleştirdiği karine olarak kabul edilen katkısının karşılığı olan katılma alacağının bir kısmından borcun güncellenmesi ile mahrum kalmaktadır.

Edinilmiş mala edinilmiş maldan yapılan katkı nedeniyle bir denkleştirme alacağı tanıyan Yargıtay borç güncelleme içtihadının getirdiği ve yukarıda tartışılan sorunlar, malın kişisel mal olarak nitelendirilebildiği hallerde çözülür görülmektedir. Mal rejimi sürerken yapılan ödemelerin, mal rejimi sona erdikten itibaren yapılacak ödemelerle kıyaslandığında daha az olduğu hallerde ikame ilkesi nedeniyle malı kişisel mal kabul ederek edinilmiş mal grubuna denkleştirme alacağı tanımak, böylece kişisel mala ait borcu da göz ardı etmek kanımızca

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[26] Krş. Şükran Şıpka ve Ayça Özdoğan, *Yargı Kararları Işığında Soru ve Cevaplarla Eşler Arasındaki Malvarlığı Davaları* (2. basım, On İki Levha Yayıncılık 2017) 254. Şıpka ve Özdoğan külli tasfiye ile cüzi tasfiye arasında bir fark olmadığını verdikleri örnekle ortaya koymaktadırlar. Ancak bunun esas sebebi, artık değerin aynı oranlama yöntemiyle hem cüzi hem de külli tasfiyede hesaplanmasında yatmaktadır. Borcun malın sürüm değerinden fazla olduğu hallerde ise kanuna göre hesaplanan artık değer külli ve cüzi tasfiyede farklı sonuç verecektir. Yargıtay içtihadında ise oranlama esas olduğundan bir fark olmayacaktır.

[27] Yargıtay 2. Hukuk Dairesi, 2022/4471 E., 2022/8862 K., 3.11.2022 T.; 2022/7568 E., 2023/6449 K., 25.12.2023 T.

hem kanunun lafzına hem de amacına uygun olacaktır. Bunun dışındaki hallerde ise kalan nominal borç sürüm değerinden az olacağı için kanunun lafzından ayrılmaya, borcu güncellemeye kanımızca gerek bulunmayacaktır. Meğerki somut olayın özellikleri bunu haklı kılsın.

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