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CONTENTS

AN ASSESSMENT of THE IMPLEMENTATION of the DATA PROTECTION REGULATIONS in CRIMINAL PROCEEDINGS*

Kişisel Verilerin Korunmasına İlişkin Düzenlemelerin Ceza Muhakemesi Süreçlerinde Uygulanmasına İlişkin Bir Değerlendirme

Seçkin KOÇER**

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ABSTRACT

The new ways of committing crimes, which have changed with technology, have also changed the modalities of preventing and investigating crimes. All these changes are based on the exponential increase of sharing personal data. For this reason; it is important to keep up-to-date the provisions of legislation that deal with the procedures of prevention and investigation of crimes. It is seen that these updates are generally done in a way that serves both prevention and investigation crimes and protecting personal data. Reforms introduced in the European Union legislation regarding the protection of personal data in recent years also consider a similar balance. In this context, many regulations of Directive 2016/680, which deals with the protection of personal data in the prevention and investigation of crime, aim to protect personal data as well as to carry out seamless procedures in this regard. Even in many regulations, this concern is at a level that goes beyond the purpose of protecting personal data. In Türkiye, on the other hand, uncertainties regarding data protection in this field still exist. It is clear that the Law on the Protection of Personal Data, which came into force in 2016, did not meet the expectations in this regard. It is seen that there are not even basic rules regarding the protection of personal data processed by law enforcement officers, public prosecutors and courts in the procedures of prevention and investigation of crimes. In our study, uncertainties and contradictions in this area have been underlined, and some amendments to the Law on the Protection of Personal Data have been proposed.

Key Words: Protection of personal data, data protection in judiciary and law enforcement, Personal Data Protection Law.

ÖZET

Teknoloji ile birlikte değişen yeni suç işleme yöntemleri, suçun önlenmesi ve aydınlatılmasına ilişkin yöntemleri de

* There is no requirement of Ethics Committee Approval for this study.

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değiştirmiştir. Esasında tüm bu değişimlerin temelinde, kişisel verilerin paylaşımının öngörülemeyen bir boyuta ulaşması yatmaktadır. Bu nedenle; suçun önlenmesi ve aydınlatılmasına ilişkin süreçleri ele alan mevzuat hükümlerinin güncel tutulması önem arz etmektedir. Söz konusu güncellemelerin genel itibariyle; hem suçun önlenmesi ve aydınlatılması hem de kişisel verilerin korunması amacına hizmet edecek şekilde yapıldığı görülmektedir. Avrupa Birliği mevzuatında kişisel verilerin korunmasına yönelik son yıllarda gerçekleştirilen reformlar da benzer dengeyi öngörmektedir. Bu bağlamda suçun önlenmesi ve aydınlatılması süreçlerinde kişisel verilerin korunmasını ele alan 2016/680 sayılı Direktif'in pek çok düzenlemesi de kişisel verileri korumayı amaçladığı kadar söz konusu süreçlerin sorunsuz bir şekilde yürütülmesi kaygısını gütmektedir. Hatta bir çok düzenlemede bu kaygı, kişisel verilerin korunması amacının önüne geçecek düzeydedir. Türkiye'de ise söz konusu alana ilişkin belirsizlikler halen devam etmektedir. 2016 yılında yürürlüğe giren Kişisel Verilerin Korunması Kanunu'nun beklentilere cevap vermediği açıktır. Bu bağlamda; kolluk görevlilerinin, Cumhuriyet savcısının ve mahkemelerin suçun önlenmesi ve aydınlatılmasına yönelik süreçlerde işledikleri kişisel verilerin korunmasına ilişkin temel kuralların dahi bulunmadığı görülmektedir. Çalışmamızda, bu alana ilişkin belirsizlikler ve çelişkiler ortaya konulmaya çalışılmış, Kişisel Verilerin Korunması Kanunu'na yönelik bazı değişiklikler dikkate sunulmuştur.

Anahtar Kelimeler: Kişisel verilerin korunması, yargı ve kolluk süreçlerinde verilerin korunması, Kişisel Verilerin Korunması Kanunu.

INTRODUCTION

In today's world, the concern for the protection of fundamental rights has been gaining significance with the increase in the use of technology in every walks of life. Recent amendments made in Europe to safeguard data protection for natural persons are seen as the results of the internet age[1]. The two important documents, the General Data Protection Regulation (hereafter, GDPR) and the Law Enforcement Directive (hereafter LED), have been adopted to ensure harmonisation among member states in the matter of data processing. While the former sets out data protection principles with regard to general data processing, the latter enshrines data protection principles in law enforcement proceedings.

The choice of two separate documents is under criticism in some ways, such as the difficulty experienced in the distinction of the scope of the documents and the intertwined structure of data processing[2]. However, it is evident that the documents are essentially created because of the unique features of each field. For instance, the regulations of the LED are shaped by considering the necessity of prevention, investigation or prosecution of offences. In fact, law

1 Paul De Hert, Vagelis Papakonstantinou, 'The Police and Criminal Justice Data Protection Directive: Comment and Analysis' [2012] 22:6 Society for Computers & Law 7.

2 Ibid 7.

enforcement authorities in each member state may need more flexible rules while fulfilling their duties[3]. Moreover, flexibility among member states when combatting crimes is also another reason for a separate regulation[4]. For these reasons, data protection rules and principles in law enforcement have been regulated in a directive, rather than in the form of a regulation.

The GDPR can not apply to the activities of courts when courts act in their judicial capacities. However, member states could set out specific rules on the protection of personal data in judicial proceedings which must be in compliance with the general terms of the GDPR. As it is underlined in article 55/3 of the GDPR, supervisory authorities are not entrusted with the task of supervising courts in their judicial activities. That rule is laid down to ensure the protection of the independence of the courts. That is, when courts act in their judicial capacities, they are not under the supervision of a personal data protection authority. However, member states could entrust specific bodies in the judiciary to enhance awareness on the processing of personal data.

Even though the LED sets out that the provisions shall be implemented for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, to what extent member states will apply is still in question. Particularly, the implementation of data protection rules during criminal procedures differs among member states. This ambiguity becomes manifestly evident when data processing activities are carried out by courts.

The LED does not completely exclude the processing of personal data by courts and other judicial bodies from its scope. At this point, it is stated in recital 80 of the LED that there should not be any superior authority over the courts to monitor the processing of personal data by courts and other judicial bodies during functioning judicial tasks, otherwise the independence of the judiciary may be damaged. It is also valid for the proceedings conducted by public prosecutors[5]. However, the LED does not preclude member states from introducing protective measures regarding the protection of personal data during judicial proceedings[6]. That is, it may be pointed out that the LED recommends member states to specify the data protection rules in court proceedings. In some member states, new regulations which are deemed coherent with the LED have been introduced.

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3 Liane Colonna, 'The New EU Proposal to Regulate Data Protection in the Law Enforcement Sector: Raises the Bar But Not High' [2012] 2 IRI Promemoria 2.

4 Murat Volkan Dülger, Onur Özkan, 'Kolluk Teşkilatında ve Ceza Yargılamalarında Kişisel Verilerin Korunması: Unutulan Direktifin Kapsamlı ve Karşılaştırmalı Analizi' [2020] 91 Ceza Hukuku Dergisi 91.

5 See recital 80 of the LED.

6 See recital 20 of the LED.

On the other hand, Türkiye does not have robust enough data protection provisions for court or other judicial proceedings even though the Turkish Personal Data Protection Law (hereafter, PDPL) sets the bar as high as the EU data protection regulations in many specific issues. The PDPL explicitly enumerates exemptions including data processing by judicial authorities or execution authorities as to investigation, prosecution, judicial or execution proceedings[7]. That is, if data is processed by a judicial authority during an investigation or prosecution, data subjects shall not be entitled to exercise their rights. Moreover, any other provisions of the PDPL shall not apply in any data processing by judicial authorities when they act in their judicial function.

Conversely, provided that data processing is deemed necessary for the investigation of an offence, the provisions of the PDPL would partially apply. In that case, article 10 of the PDPL on the data controller's obligation to inform, article 11 on the rights of the data subjects as well as article 16 on the obligation to register with data controllers' registry shall not be applied. Apart from the abovementioned articles, all other articles of the PDPL shall be applied in a proceeding of crime investigation.

These principles will be under scrutiny in this article and concrete suggestions will be made to make clarification in this regard.

A. The General Approach of the LED on the Data Processing in Criminal Proceedings

The LED lays out a variety of data protection principles ranging from the rights of data subjects to the responsibilities of data controllers which are mainly corresponding to the relevant provisions of the GDPR. In this chapter of the article, all these matters will not be looked into in detail as the main focus of the article is the applicability of data protection rules in criminal proceedings which are conducted by public prosecutors and judges.

The main standout of the LED is the endeavour to strike a balance the between protection of the personal data of natural persons and the smooth flow of the criminal proceedings[8]. As a reflection of this concern, the LED draws a general picture rather than providing bounding details in many articles. That is, in many articles, the final say is left to the discretion of member states. For instance, the LED, instead of setting out a specific timeframe for personal data to be erased in a particular case, leaves that decision to member states[9].

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7 See the English translation of the Turkish Personal Data Protection Law, https://www.kvkk.gov.tr/Icerik/6649/Personal-Data-Protection-Law accessed on 10 November 2022.

8 Onur Helvacı, 'Data Protection in the European Union Framework in General and in Criminal Investigations, The Balance Between National Security and Right to Privacy' [2021] 21 Law & Justice Review 187.

9 Article 5 of the LED underlines that *"Member States shall provide for appropriate time*

One of the most distinct novelties of the LED is to the necessity of classification of data considering the position of data subjects in criminal proceedings. Pursuant to that, member states shall provide data controllers with an explicit distinction between suspects, convicts, victims as well as other persons involving any criminal procedure[10]. This regulation underlines that any data processing in criminal procedure should be designed according to the position of data subjects[11]. In other words, implementing the same rules for different persons could not be considered in line with the provisions of the LED. There could have been a particular regulation to distinguish between serious offences and minor offences[12]. Even though this regulation is set forth to raise the bar in data protection, the lack of certain rules of how member states could lead to uncertainty in this regard.

Providing data subjects with rights in criminal proceedings is handled in two different manners. The LED firstly emphasises that member states shall make some certain information available to data subjects without any restriction. These are the identity and the contact details of the controller, the contact details of the data protection officer (where applicable), the purposes of the processing for which the personal data are intended, the right to lodge a complaint with a supervisory authority and the contact details of the supervisory authority and the existence of the right to request from the controller access to and the rectification or the erasure of personal data and the restriction of processing of the personal data concerning the data subject. Namely, the abovementioned information must be made available to any person whose data involved in a criminal procedure, regardless of whether this procedure is an investigation or prosecution.

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limits to be established for the erasure of personal data or for a periodic review of the need for the storage of personal data. Procedural measures shall ensure that those time limits are observed."

10 Article 6 of the LED reads *"Member States shall provide for the controller, where applicable and as far as possible, to make a clear distinction between personal data of different categories of data subjects, such as:*
(a) persons with regard to whom there are serious grounds for believing that they have committed or are about to commit a criminal offence;
(b) persons convicted of a criminal offence;
(c) victims of a criminal offence or persons with regard to whom certain facts give rise to reasons for believing that he or she could be the victim of a criminal offence; and
(d) other parties to a criminal offence, such as persons who might be called on to testify in investigations in connection with criminal offences or subsequent criminal proceedings, persons who can provide information on criminal offences, or contacts or associates of one of the persons referred to in points (a) and (b)."

11 This distinction may also be used to determine timeframes for data storage and regular reviews. (Article 29 Data Protection Working Party opinion on some key issues of the Law Enforcement Directive (17 EN WP 258), accessed on 10 September 2022.)

12 Ibid (n 4) 6.

However, member states are not obliged to provide data subjects with some information to avoid obstructing official or legal inquiries, investigations or procedures, to avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties, to protect public security, to protect national security and to protect the rights and freedoms of others. The information which may not be shared is also enumerated in the LED. These are the legal basis for the processing, the period for which the personal data will be stored, or, where that is not possible, the criteria used to determine that period, where applicable, the categories of recipients of the personal data, including in third countries or international organisations, where necessary, further information, in particular where the personal data are collected without the knowledge of the data subject[13]. The reason for these regulations is shown as not to undermine law enforcement proceedings[14]. Nonetheless, member states should implement these restrictions on a case by case basis instead of a blanket exemption[15].

The same grounds for not sharing information could be used in terms of exercising the right to access and the right to rectification or erasure of data as well. But the LED articulates that when member states put restrictions on the use of these rights, data subjects could apply national data protection authority to exercise these rights on his/her behalf[16]. This is an important novelty for both member states and data subjects[17].

The answer to the question of "is the data subject entitled to use these rights during a criminal investigation or a court proceeding?" is left to the discretion of member states. The LED leaves the void in question to be filled by each member state[18]. Member states may enact laws to lay out the details of how a data subject enjoys his/her rights during a criminal proceeding. However, as it will be seen below, this approach has already created unharmonised data protection environment among member states.

The LED also specifies which activities must be recorded by a data controller or a processor during a law enforcement proceeding, including the purpose of the processing to the envisaged time limits for erasure of data[19].

13 See article 13 of the LED.

14 Paul de Hert, Vagelis Papakonstantinou, 'The New Police and Criminal Justice Data Protection Directive A First Analysis' [2006] 7:1 New Journal of European Criminal Law Review 12.

15 Ibid (n 12).

16 See article 17 of the LED.

17 Juraj Sajfert, Teresa Quintel, 'Data Protection Directive (EU) 2016/680 for Police and Criminal Justice Authorities' [2019] Edward Elgar Publishing 13 <https://ssrn.com/abstract=3285873> accessed on 10 November 2022.

18 See article 18 of the LED:

19 See article 24 of the LED.

This records should be made available to the national data protection authority upon request.

Having considered all these details introduced by the LED, it could be stated that the LED enshrines a good many data protection provisions pertinent to prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. These provisions are also applicable during an investigation or prosecution procedure that is conducted by either a public prosecutor or a judge. According to an opinion, the Directive does not overtly or covertly applies if it's scope also covers data processing in court proceedings[20]. On the other hand, Backer and Hornung suggest that even though competent authorities in the context of the LED may be found ambiguous, courts and public prosecution offices fall within the scope of the LED[21]. Considering the scope of the LED, which explicitly underlines both investigation and prosecution phases, there is no doubt that the LED applies to data processing in these phases[22]. However, as it is seen in many articles, member states are given a large margin of appreciation to determine the data protection principles in these proceedings. For instance, even though a data controller must designate a data protection officer, courts and other judicial authorities are exempted from this obligation[23]. Another exemption is about the supervision of the national data protection authority over courts and other judicial authorities when they carry out a judicial function. In this case, supervisory authorities are not competent to monitor their data processing activities[24]. According to some researchers, this exemption is the result of the endeavour to lower possible tension between judicial authorities and national supervisory authority and to protect the independence of the judiciary[25]. Such kind of blurred provisions paves the way for new uncertainties.

B. Data Protection Procedures in Criminal Proceedings in Some Countries

1. France

In France Data Protection Act, specified amendments have been made to bring the Act in compliance with the LED. Chapter three of the Act is mainly

20 Ibid (n 9) 192.

21 Matthias Backer, Gerrit Hornung, 'Data Processing by Police and Criminal Justice Authorities in Europe – The Influence of the Commission's Draft on The National Police Laws and Laws of Criminal Procedure' [2012] 28 Computer Law&Security Review 630.

22 Seçkin Koçer, *Ceza Muhakemesinde Kişisel Verilerin Korunması* (Adalet Yayınevi, September 2022) 62.

23 See article 32 of the LED.

24 See article 45 of the LED.

25 Ibid (n 9) 191.

allocated to the processing of personal data by the law enforcement authorities[26]. After the general provisions, the Act lays down the responsibilities of authorities who are liable to data processing activities, namely the responsibilities of data controllers and processors. For instance, the authorities should take all reasonable measures to ensure that inaccurate or incomplete data are erased or rectified without delay and not transmitted. Furthermore, having made a risk assessment process, data controllers and processors should take distinct measures to prevent any unauthorised data processing activities[27]. On the other hand, the courts in France are not obliged to appoint a data protection officer, if they carry out judicial activities.

The rights of data subjects are under restrictions provided that the investigations, prosecutions, administrative proceedings as well as public safety and national security are at stake. In these cases, data subjects could not be entitled to exercise their rights, such as the right to information and right to access. However, the French regulation ensures that data subjects have two significant paths to follow. Firstly, in the case of restrictions, data subjects could apply to the national data protection authority to exercise their rights. The national data protection authority shall assign one of its members who are also among the representatives of high jurisdictions, namely the Council of State, the Court of Cassation or the Court of Auditors. Additionally, data subjects could file a judicial appeal in the wake of being informed by the relevant authority regarding the restriction.

2. United Kingdom

Data protection principles in law enforcement procedures are laid down in the Data Protection Act which also includes data protection rules in general. Pertinent to article 31 of the Act, it is set out that the provisions in that chapter would apply to the data processed for the purposes of prevention,

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[26] According to section 87 of the Act, the Chapter on data protection on law enforcement issues applies to the "processing of personal data implemented for the purposes of prevention and detection of criminal offences, investigations and prosecutions in this area or execution of criminal sanctions, including the protection against threats to public security and the prevention of such threats, by any competent public authority or any other body or entity entrusted, for the same purposes, with the exercise of authority and the prerogatives of public power.
The processing is only lawful if and insofar as it is necessary for the performance of a task carried out, for one of the purposes set out in the paragraph above, by a competent authority within the meaning of the same first paragraph and where the provisions of Articles 89 and 90. Processing ensures in particular the proportionality of the retention period of personal data, taking into account the purpose of the file and the nature or seriousness of the offences concerned."

[27] For more detailed information; https://www.cnil.fr/fr/la-loi-informatique-et-libertes#article87

investigation, detection or prosecution of criminal offences or the execution of criminal penalties. The Act also enumerates data protection principles, including requirement of lawful and fair processing with a specified, explicit and legitimate purpose. Moreover, data processing in law enforcement procedures shall be adequate, relevant and not excessive, kept up to date as well as processed in a secure manner.

Data processing in law enforcement in the UK is based on the distinction to be made between suspects, convicts, victims, witnesses and other persons. Furthermore, the rights of data subjects are also included in the Act. According to this chapter, data subjects are conferred the right to be informed, the right of access, the right to rectifiation and the erasure of data. However, these rights can not be exercised in the course of an investigation or a criminal proceeding. These are quintessential provisions showing that the Act is in compliance with the LED in many sections[28].

The provisions with regard to the supervisory authority in the Act is corresponding to the regulations set out in the LED. To monitor and take some actions if needed, Judicial Data Processing Panel has been established in the UK. The Panel consists of two judges of senior courts and a judge of the Upper Tribunal or the Employment Appeal Tribunal.

The Panel is responsible for;

- Promoting awareness of data protection law amongst the courts and tribunals judiciary,
- Ensuring effective guidance, including judicial training, is in place to ensure compliance with obligations that arise under data protection law both where courts and tribunals act in a judicial capacity and where judges/panel members otherwise carry out data processing functions in the course of their appointment,
- Ensuring an effective system is in place to investigate complaints in relation to data processing both where courts and tribunals act in a judicial capacity and where judges/panel members otherwise carry out data processing functions in the course of their appointment,
- Communicating with the Information Commissioner, in so far as appropriate, concerning compliance with data protection law[29].

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28 See part 3 of the Data Protection Act.

29 For more information, see 'The UK Judicial Data Protection Panel Judicial Data Protection Complaints Handling Policy', <https://www.judiciary.uk/wp-content/uploads/2019/04/Judicial-data-processing-complaints-handling-policy-June-2021.pdf,> accessed on 17 September 2022.

3. Ireland

In Ireland, the rules on processing of personal data are laid down in the Data Protection Act which enshrines chapters including "Processing of Personal Data for Law Enforcement Purposes". That is, the rules covering the processing of personal data could also be applied in law enforcement proceedings. However, there are some restrictions on the obligations of data controllers and the rights of data subjects due to the aim of safeguarding judicial independence. For instance; pursuant to article 158 of the Data Protection Act, it is laid down that provisions on the details of supervisory authority[30], the necessity of data protection officers as well as rights of data subjects are restricted provided that the restrictions are deemed as necessary and proportionate for judicial independence. In addition to that, the Act also lays out some specific provisions, such as the publication of court judgments, court decisions or court lists. The processing of personal data will be considered as lawful if that processing is about the publication of a court judgment or decision or list of court hearings.

According to the Data Protection Act, the chief justice of Ireland[31] has the authority to assign a judge who acts as a supervisor of the processing of personal data by courts in judicial proceedings. The assigned judge shall enhance awareness among judges regarding the provisions of GDPR, Directive 2016/680 as well as other regulations on the protection of the personal data. Besides, he/she shall investigate any complaint as to the processing of personal data during judicial proceedings.

CONCLUSION

It is obvious that with the exponential use of technology, the way of committing crimes has significantly changed. As a result of this development, the modalities of conducting an investigation or prosecution have been forced to be evolved. Having adopted these novel modalities, law enforcement authorities have started to process more data than before.

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30 Even though the provisions on supervisory authority in Ireland is corresponding to the it's counterparts in member states, the data processing by police and armed force fall within the competence of the Irish authority. (David Wright, Paul De Herts, *Enforcing Privacy, Regulatory, Legal and Technological Approaches* (Springer, 2016) 443.)

31 The chief justice in Ireland is the president of the Supreme Court and is naturally considered as the head of the judicial branch. Chief justice in Ireland was conferred with two specific responsibilities. Firstly, he/she is the first member of the presidential commission in Ireland which means he/she acts on behalf of the president in his/her absence. Secondly, the chief justice in Ireland is a member of the Council of State which is a body of consultation for the president. (For more detailed information;
'The Supreme Court of Ireland, The Role of Chief Justice' , http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/0/B86A2D50F97D4EB480257315005A41D2?openDocument&l=en) accessed on 25 September 2022.)

Data processing activities in law enforcement procedures have evolved to an inevitable matter to be handled by legislation in many countries. The LED, which is a complementary document of the GDPR, has been introduced to strike a balance between the protection of personal data and ensuring the efficiency of law enforcement.

In our article, some novelties launched by the LED have been touched upon, such as the categorisation of data subjects according to their positions in investigations and prosecutions. Besides, the new ways of exercising rights of data subjects are also quite significant to underline in this regard. That is, data subjects are given two paths to follow. One of which is to directly apply to the data controller to exercise the relevant right. The second one is the use of that right in an indirect way, through the national data protection authority. The latter is deemed as one of the important tools to further strengthen the use of rights by data subjects.

One could think that the provisions laid down by the LED are not applicable for the data processing activities of courts and other judicial authorities. The LED does not set out an explicit regulation to end all discussions on this matter. However, considering the scope of the LED, which explicitly underlines both investigation and prosecution phases, we think that data processing activities during these phases are covered by the LED in a general manner. On the other hand, the LED leaves a large margin of appreciation to member states in some issues. Furthermore, given the fact that judicial independence must be observed by all, the competence of national data protection authorities has been excluded from the judicial activities of courts and other judicial authorities. Again, the LED draws a general picture and leaves the rest to each state to clarify.

Although Türkiye has a dedicated data protection law since 2016, this legislation is not clear enough to cover data protection issues in criminal proceedings. Pursuant to the 1st paragraph of article 28 of the PDPL, the Law shall not be applied if personal data are processed by judicial authorities or execution authorities with regard to investigation, prosecution, judicial or execution proceedings. This provision clarifies that there is an absolute exemption if the courts or other judicial authorities act in their judicial capacities. That is, it is not likely to implement any provision laid down in the PDPL, including the principles of lawful data processing as well as the rights of data subjects.

One of the most confusing provisions of the PDPL is laid down in the 2nd paragraph of article 28 which regulates a partial exemption. According to that provision, article 10 of the PDPL on the data controller's obligation to inform, article 11 on the rights of the data subjects as well as article 16 on the obligation to register with the data controllers' registry shall not be applied provided that

data processing is necessary for the prevention of committing a crime or for a crime investigation[32].

Namely, if data processing is undergone during a crime investigation which is orchestrated by the public prosecution office, the provisions of the PDPL would apply, except the specific provisions mentioned above. However, it is not clear how this regulation would apply considering the details of the first paragraph of the same article since in the first paragraph, investigation phase is also indicated among the absolute exemptions. If the PDPL implies that data processed by police forces during an investigation fall within the PDPL, how data processed by the public prosecutor offices could be separated from the former is not clear as the work of public prosecutor office and police is inextricable. It would be a better way to prepare a guideline covering these issues by the Personal Data Protection Authority(PDPA). After having prepared the guideline, the PDPA should make it public and share it with data controllers and processors, specifically. If not, it does not seem possible to come to a clear conclusion in this regard.

In addition to the abovementioned points, there are other issues that should be taken into account when an amendment in the PDPL would be on the table. If the PDPL would be amended by considering these issues, it would pave the way for a safer data protection environment.

Provided that personal data processed by courts or other judicial authorities would fall out of the PDPL, it would mean that individuals would be deprived of their rights and the novelties introduced by the PDPL would be meaningless. Yet, as it is indicated in our study, many provisions of the PDPL would be seamlessly applicable in the field of public prosecution and court proceedings. For this reason, there should be some amendments to be made in the PDPL to make the implementation of data protection rules applicable in both prosecution and court proceedings. That is, article 28/1.d of the PDPL should be repealed and be replaced by a new provision that strengthen the rights of data subjects.

When an amendment would be discussed, a new supervisory authority[33] must be laid down to monitor data processing during prosecution and court proceedings. This new authority must be made up of judges with a certain seniority since the balance between law enforcement interests and data protection could be struck would be ensured only in this way[34]. Furthermore, the duties of this authority and the current PDPA should be drawn clearly.

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32 See article 28 of the PDPL

33 Some researchers suggest that the PDPA, which is responsible for data processing activities in a general manner, should be the supervisory body for data processing in law enforcement in Türkiye as well. (Ibid (n 5) 115.)

34 Ibid (n 4) 5.

After having made such amendments in the PDPL, there should be some guidelines to be issued and delivered to data controllers and processors. The lack of guidelines in this field would cause further problems which would be difficult to solve.

In case there would not make any amendments in the PDPL, there is an undeniable need to clarify some points, such as the applicability of the partial exemption provision regarding an investigation of a crime. Some concrete steps must be taken to ensure that the PDPL would apply in the field of police work.

The rights of data subjects in judicial proceeding should be specified by law and made public on the websites of courts, respectively. In fact, the content of the court websites should be revised and shaped with a user-friendly approach to enhance access to justice for all.

The websites of courts and public prosecution offices should include information on data processing, including on which purpose and by whom data is processed, contact points for data subjects, etc[35].

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[35] See the website of the German Federal Constutional Court, https://www.bundesverfassungsgericht.de/EN/Verfahren/Datenschutz%20f%C3%BCr%20den%20justiziellen%20Bereich/Datenschutz%20f%C3%BCr%20den%20justiziellen%20Bereich_node.html.

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A GLOBAL STREAM FROM ADVERSARIAL JUSTICE TO NON-ADVERSARIAL JUSTICE: IS THERE A TENDENCY TO INQUISITORIAL TRADITION IN THE CRIMINAL PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT?*

İtham Ceza Adaleti Sisteminden Tahkik Ceza Adaleti Sistemine Küresel Bir Akım: Uluslararası Ceza Mahkemesinin Ceza Muhakemesinde Tahkik Geleneğine Bir Eğilim Var mı?

Sercan TOKDEMİR**

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ABSTRACT

This paper is divided into two main parts. In the first part, criminal procedural models named as inquisitorial and adversarial procedural systems and the convergence of them are analysed with a comparative perspective. In the second part, our focus will be on the criminal procedural system of the International Criminal Court (ICC). In this paper, the principal criminal procedural systems, which are adversarial system based on common law and inquisitorial system based on civil law, are examined in international courts, especially in the ICC, on a global scale concerning transitions between those traditions. Our purpose is to find an answer to the following question: To what extent is there a "drift" towards more inquisitorial justice at the ICC? To answer this question, one needs to begin with taking a closer look at the concepts of adversariality and inquisitoriality. Our aim is not only to examine the criminal procedural systems, but also to ascertain a functional and effective model considering domestic approaches. The paper puts forward to claim that a more effective criminal procedure model could be created in the cooperation of constituents in international criminal procedure. The unification of constituents in the criminal proceedings demonstrate that the court is not a battleground as in adversarial-common courts; on the contrary, the constituents in the proceedings act with a team spirit. Eventually, it seems that such a criminal procedure at the international level could be exercised within an inquisitorial tradition, which is seen as a more functional model taking into account particularly political and social global developments.

Key Words: Criminal Procedural System, Inquisitorial Justice, Adversarial Justice, Judge, Prosecutor, Victim, Restorative Justice

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* There is no requirement of Ethics Committee Approval for this study.

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ÖZET

Bu çalışma iki ana kısımdan oluşmaktadır. Birinci kısımda tahkik ve itham sistemleri olarak adlandırılan ceza muhakemesi modelleri ve birbirleriyle yakınlaşmaları karşılaştırmalı bir bakış açısıyla incelenmiştir. İkinci kısımda odak noktamız Uluslararası Ceza Mahkemesi'nin (UCM) ceza muhakemesi sistemi üzerine olmuştur. Çalışmada, uluslararası mahkemelerde özellikle UCM'de içtihat hukuku temelli itham sistemi ve Avrupa hukuku temelli tahkik sistemleri olan temel ceza muhakemesi sistemleri, evrensel (global) bir düzeyde aralarındaki geçişler de dikkate alınarak incelenmiştir. Amacımız, şu sorunun cevabını bulmaktır: UCM'de ne dereceye kadar daha çok tahkik sistemine doğru bir eğilim vardır? Bu soruyu cevaplandırmak için, itham ve tahkik kavramlarına daha yakından bakmakla başlamak gerekir. Amacımız sadece ceza adaleti sistemlerini incelemek değil, ayrıca ulusal yaklaşımları da düşünerek fonksiyonel ve etkili bir ceza adaleti sistemini araştırmaktır. Çalışmada, uluslararası ceza muhakemesindeki unsurların işbirliği ile daha etkin bir ceza muhakemesi modeli oluşturulabileceği iddia edilmektedir. Ceza muhakemesine katılanların kollektifliği itham sistemindeki gibi mahkemenin bir çatışma alanı olmadığını, aksine muhakemeye katılanların takım ruhuyla hareket ettiğini göstermektedir. Nihayetinde, global düzeyde özellikle politik ve sosyal gelişmeleri de göz önünde bulundurmak suretiyle daha fonksiyonel bir model olarak görünen tahkik geleneğinden hareketle uluslararası düzeyde bir ceza muhakemesinin kurulabileceği tespit edilmiştir.

Anahtar Kelimeler: Ceza Muhakemesi Sistemi, Tahkik Sistemi, Itham Sistemi, Hakim, Savcı, Mağdur, Onarıcı Adalet

INTRODUCTION

There have been growing concerns about international justice procedures for a perfect and functional justice model for approximately two decades. In that respect, broadly speaking, legal, sociological, and cultural deliberations by foremost jurists have emanated from the establishment of *ad hoc*[1] tribunals for Yugoslavia (ICTY, 1991)[2] and Rwanda (ICTR, 1994)[3], followed by a permanent international criminal court (ICC, 1998)[4]. The purpose of these

1 Cengiz Başak, *Uluslararası Ceza Mahkemeleri ve Uluslararası Suçlar* (1 bs, Turhan Kitapevi 2003) 28 ff; Tezcan Durmuş, M Ruhan Erdem and Murat Önok, *Uluslararası Ceza Hukuku* (6 bs, Seçkin Yayıncılık 2021) 334 ff.

2 For the development of the tribunal see Ebru Çoban Öztürk, 'The International Criminal Court: Jurisdiction and the Concept of Sovereignty' (2014) 10 European Scientific Journal 141, 144–145; Tezcan, Erdem and Önok (n 1) 335 ff. For lessons learned about the ICTY's life see Minna Schrag, 'Lessons Learned from ICTY Experience' (2004) 2 Journal of International Criminal Justice 427, 433–434.

3 For the development of the tribunal see Öztürk (n 2) 145; Tezcan, Erdem and Önok (n 1) 352 ff.

4 The International Criminal Court <http://www.hrw.org/topic/international-justice/international-criminal-court> accessed 19 December 2022. "During the Preparatory committee meetings, a 'Like-Minded Group' of states supportive of a new court emerged, an agreement was reached to hold a conference in the summer of 1998 to finalize and conclude the treaty"; and the Rome Statute was adopted by a vote of 120 to 7, with 21 abstentions. Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 148. The Rome Statue, by which a

deliberations has been 'to set paradigmatic fair trial standards' and 'a practical model' all over the world.[5] One of the goals of the international tribunals is "to provide exemplary procedures to serve as a model for rebuilding a legal system devastated by war crimes and human rights violation".[6] These elucidations seems to be rooted in inspiring debates around two main national law systems: *Common Law and Civil Law*. Justice values are considered upon distinctive backgrounds saliently in procedural law within these traditions[7], namely 'adversariality' and 'non-adversariality'[8].

permanent and universal criminal court, namely the ICC, was founded, came into force in 2002. The Rome Statute of the International Criminal Court <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf > accessed 19 December 2022. For the historical development of the court see Öztürk (n 2) 142–144; Hamide Zafer, 'Ulusal Hukuk Sistemlerinin Roma Statüsü Ile Uyumlaştırılması-Alman Modeli' (2007) 6 MÜHFD (Aydın Aybay'a Armağan) 289, 289–290; Tezcan, Erdem and Önok (n 1) 359 ff; Bernhard Graefrath, 'Universal Criminal Jurisdiction and an International Criminal Court' (1990) 1 European Journal of International Law 67, 2; Albin Eser and others, *The Rome Statute of the International Criminal Court: A Commentary*, vol II (Antonio Cassese, Paola Gaeta and John RWD Jones eds, 1st edn, Oxford University Press 2002) 1535 ff. *Telli* defines the court as a "hybrid court". See Kutlay Telli, *Cezasızlık Olgusuna Karşı Uluslararası Ceza Mahkemeleri ve Uluslararası Suçlar* (1 bs, On İki Levha Yayıncılık 2015) 15. From my point of view, with the establishment of the ICC, domestic substantive and procedural criminal law has become an internationally applicable legal science going beyond the locality. For the role of national courts in comparative international law see Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 International and Comparative Law Quarterly 57, 57–92.

5 Richard Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' in Ralph Henham and Mark Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (Ashgate 2011) 105. See also Richard Vogler, *A World View of Criminal Justice* (1st edn, Ashgate 2005) 6 ff; Cryer and others (n 4) 425.

6 Schrag (n 2) 428. According to *Delmas-Marty*, "the criminal law appears to be both a protection and a threat for fundamental rights and freedoms or, in other words, not only 'a law which protects' but 'a law from which protection' is required". For the opinion of *Delmas-Marty* see Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577, 578. In brief, human rights are not only the "shield" but also the "sword" of criminal law. One can easily say that human rights have a defensive and offensive role in "neutralizing and triggering the criminal." See ibid 578, 579 ff.

7 Hereinafter: The concept of non-adversariality will be preferred instead of 'inquisitoriality' to mention these traditions.

8 John Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals Beyond the Adversarial–Inquisitorial Dichotomy' (2009) 7 Journal of International Criminal Justice 17, 17 ff; Vogler, *A World View of Criminal Justice* (n 5) 24 ff, 148 ff; Arie Freiberg, 'Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms' (2011) 8 European Journal of Criminology 82, 82 ff; Gregory A McClelland, 'A Non-Adversary Approach to International Criminal Tribunals' (2002) 26 Suffolk Transnational Law Review 1, 1 ff; Cryer and others (n 4) 425; Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 106; Halil Cesur, 'The Analytical Value of

It is an undeniable fact that 'international justice is imperfect justice'. Thus, we need a judicial 'restorative justice system'[9] which meets some indispensable (international)[10] human rights standards, such as the equality of arms, the right to a fair trial, and the right to be heard and to be judged by an impartial and independent tribunal.[11] The issue of the international criminal procedural law

the Adversarial-Inquisitorial Dichotomy in Approaches to Proof: The Examples of England and Turkey' (2018) 6 Ceza Hukuku ve Kriminoloji Dergisi 155, 156.

9 Freiberg (n 8) 93. Restorative justice is one of the most deliberated and challenged areas of criminology in the post-modern era, especially victim-offender mediation family group conferences, healing and sentencing circles, and community restorative boards. RJ offers a new vision of criminal justice that re-orientates the current system away from retributive thought to a more transformative and comprehensive method of doing justice. There are three central questions in this system to repair the harm and emphasise empowering ordinary persons: "What happened", "what harm resulted" and "what should be done". Drawing general framework, three "key stakeholders" come into play in the process of restorative justice: the victim, the offender and the community. To maximize the participation of these stakeholders, particularly the main victims and offenders 'in the search for repairing, healing, accountability and deterrence' is one of the foundational aims of the system. It is recognised by the restorative justice paradigm that the necessity for victims, the community and even the offender is created by the crime. For more information see Sercan Tokdemir, 'Honor Crimes in Turkey: Rethinking Honour Killings and Reconstructing the Community Using Restorative Justice System' (2013) 4 Law & Justice Review 75, 257 ff. A discussion of restorative justice regarding a critical and comparative point of view dealing with the historical process, definition, mentality, applied models, main principles and aims. See Sercan Tokdemir, 'Ceza Adaleti Sistemine Yeni Bir Yaklaşım: Tamamlayıcı Bir Sistem Olarak "Onarıcı Adalet" Mekanizması' (2017) 21 Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi 75, 75 ff.

10 The field of international human rights is considered as convergence of both adversarial and inquisitorial procedural systems. S Anogika Souresh, 'The Adversarial vs Inquisitorial Dichotomy in International Criminal Law: A Redundant Conversation' (2019) 5 International Comparative Jurisprudence 81, 83.

11 Jackson (n 8) 25; Mireille Delmas-Marty, 'Global Crime Calls for Global Justice' (2002) 10 European Journal Crime Criminal Law & Criminal Justice 286, 286 ff; Cryer and others (n 4) 430–436; Kelly D Askin, 'Reflections on Some of the Most Significant Achievements of the ICTY' (2002) 37 New English Law Review 903, 903 ff. The best way to protect and secure human rights is providing facilities at domestic level, one of which is individual application to the institutional court. However, not all rights are available for individual application. For example, an individual application can be made to the Turkish Constitutional Court only for the rights under the common protection of the Turkish Constitution, the ECHR and its Additional Protocols. The rights in the subject of an individual application can be exemplified as follows: right to life, freedom from torture, freedom from slavery and forced labour, freedom of thought, belief and religion, right to liberty and security, right to a fair trial, no punishment without law, respect for private and family life, freedom of expression, freedom of assembly and association, right to an effective remedy, protection from discrimination. See Seyithan Kaya, 'Anayasa Mahkemesi Kararları Çerçevesinde Bireysel Başvuruya Konu Olan Haklar' (2018) XXII Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi 57, 69–85; Seyithan Kaya, *2017 Anayasa Değişiklikleri Çerçevesinde Anayasa Yargısı* (1 bs, Adalet Yayınevi 2018) 143–158.

model has been a much-disputed subject within inquisitorial and adversarial procedural traditions.

The paper begins by laying out the procedural dimensions of the research and first gives a brief overview of terminological basis of these concepts and a detailed examination of domestic criminal justice systems[12] including a comparative analysis based on these concepts for the best 'problem-solving'[13] approach. Having evaluated the role or functions of the ICC in international criminal law in short, criminal procedural dimensions will be discussed in order to seek the best criminal procedural model for the court. Before analysing the role of three actors-the judge, prosecutor and victims-; the paper will discuss the origins of the procedural regime at the ICC; then the paper will focus on an analysis related to a substantial "fall" from adversariality into inquisitoriality. Finally, the paper has argued that the best system should be non-adversariality (inquisitoriality) mentioning the significance of the unification of constituents in the courts like a team instead of a *battleground* as in adversarial-common courts.

I. A COMPARISION OF INQUISITORIAL AND ADVERSARIAL CRIMINAL JUSTICE SYSTEMS

A. Concepts of Inquisitorial and Adversarial

The terms inquisitorial[14] and adversarial[15] are two different concepts and refer to completely different law cultures. There is a commonly held view that the 'latter' term is based on the line of 'prosecutor-victim' whilst the 'former'

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12 For an evaluation of the gap between theory and practice from a domestic approach see Elizabeth Nevins-Saunders, 'Judicial Drift' (2020) 57 American Criminal Law Review 331, 331 ff.

13 Freiberg (n 8) 89; for the concept of 'problem-solving justice' see Tyrone Kirchengast, 'Mixed and Hybrid Systems of Justice and the Development of the Adversarial Paradigm: European Law, Inquisıtorial Processes and the Development of Community Justice in the Common Law States' [2019] Revista Da Faculdade Direito Universidade Federal Minas Gerais 513, 526 ff.

14 Inquisitorial is also described as non-adversarial. For more information about the term see Freiberg, *op cit*, p. 82 ff. *Sklansky* uses interchangeable "inquisitorial" and "civil law" terms for inquisitorialism because the use of these terms externalizes "a particular understanding of the legal systems of Continental Europe". See David Alan Sklansky, 'Anti-Inquisitorialism' (2008) 122 Harvard Law Review 1634, 1639.

15 The adversarial system is called the "accusation system" because it constitutes the basis for one to be accused by another person to be punished as a criminal and the accuser must prove the guilt. Nurullah Kunter, Feridun Yenisey and Ayşe Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, 16. Bası, İstanbul 2008,* (16 bs, Beta Yayınevi 2008) 77. *Sklansky* uses the anti-inquisitorialism term for adversarialism to emphasise its contrary. See Sklansky (n 14) 1635 ff. *Cesur* highlights the difference between the concepts of "accusatorial' and "adversarial'. See Cesur (n 8) 157, fn 6.

term takes shape on the line of 'prosecutor-defendant'.[16] Considering these concepts from a 'terminological point' may contribute to understanding them before making some evaluations on a shift from adversarial to inquisitorial.

In that sense, *Ambos* examines the terminology and draws our attention to the Middle Age known as 'dark times'.[17] Then, the *inquisitorial procedure* was addressed as *inquisition/inquiry* and was based on *judicial control* by the judge responsible for the investigation of the cases; thus the inquisitorial concept was generally described in civil law. The inquisitorial judgements were shaped under two phases: Investigation and pre-trial, which are undertaken by *the prosecution* and/or '*examining/investigating judge*' *(juge d'instruction)*. In both systems, a state institution like the police force initiates the proceedings.[18] In that respect, *Parisi* also compares these terms to Medieval European Law. The inquisitorial procedure was prompted by a 'judicial system' named *exofficio -processus per inquisitionem* whereas adversarial proceeding was attempted merely by a 'private party' named *processus per accusationem*.[19]

However, on one hand, as *Cryer et al.* stated, there is a wrong perception that adversarial law is an 'accusatorial' model while inquisitorial is not.[20] On the other hand, *Ambos* asserts that both systems are accusatorial because the hands of an institution separate from the pre-trial judge initiate prosecution and indictment.[21] Accordingly, 'no domestic systems represent a pure model'.[22] Moreover, *Freiberg* notes that inquisitorial is a problematic concept and prefers non-adversarial instead of it.[23]

To me, it seems that the non-adversarial concept should be used instead of the inquisitorial. I would say that 'things are known through their opposites'. In

16 Teresa Armenta Deu, 'The Inquisitorial-Accusatorial Dichotomy in Criminal Proceedings: Meaning and Usefulness' (Internatıonal Associatıon of Procedural Law 2009) 1, 2; Sercan Tokdemir, 'The Powers of the Prosecutor in the Turkish Criminal Justice System' (Thesis of Master (unpublished), University of Sussex (Law School) 2013) 3. For a defendant as a passive subject in criminal procedural law or the authority of individual defence see Doğan Soyaslan, *Ceza Muhakemesi Hukuku* (8 bs, Yetkin Yayınları 2020) 202 ff.

17 Kai Ambos, 'International Criminal Procedure:'Adversarial','Inquisitorial'or Mixed?' (2003) 3 Third International Criminal Law Review 1, 2–4.

18 Francesco Parisi, 'Rent-Seeking through Litigation: Adversarial and Inquisitorial Systems Compared' (2002) 22 International Review of Law and Economics 193, 194–197; Claus Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 Journal of International Criminal Justice 603, 604; Freiberg (n 8) 96; Jackson (n 8) 35; Vogler, *A World View of Criminal Justice* (n 5) 25–27, 28 ff; Ambos (n 17) 2–4. See also art.64/8. of the Rome Statue

19 Parisi (n 18) 194.

20 Cryer and others (n 4) 425.

21 Ambos (n 17) 3; Kai Ambos, *Internationales Strafrecht* (5 Aufl, C H Beck 2018), § 8, Rn 20-22.

22 Cryer and others (n 4) 425; Deu (n 16) 4.

23 Freiberg (n 8) 98.

other words, if adversarial concept is used as non-adversarial, which means the opposite meaning of inquisitorial, inquisitorial concept can be perceived easily. *Vice versa,* for instance, *Sklansky* uses an anti-inquisitorial term, referring to the words of William Connolly: 'contrast-model'.[24]

B. Inquisitorial and Adversarial Criminal Justice Systems: A Comparative Analysis

1. In General

There are two[25] major criminal justice systems in the world, which are opposite to each other, namely inquisitoriality and adversariality.[26] While the adversarial justice system is based on "common law tradition", the inquisitorial justice system has a relationship with "civil law tradition".[27] It is suggested that two systems should converge; however, inquisitorial and adversarial systems, as criminal procedure systems, are different from each other both in theory and in practice.[28] There is also a third system named the "cooperation system" implemented in the Continental European procedural law today.[29] With regards to the relationship between the criminal procedure authorities, three criminal procedural systems, inquisitoriality, adversariality, and cooperation are accepted.[30]

One can say that these domestic legal traditions, whose meanings and methods are different, have an important distinction and this distinction has different effects throughout the proceedings and leads to different procedures.

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24 Sklansky (n 14) 1635–1636.

25 The dichotomy, nowadays, has been a much-disputed subject within the concepts of procedural law and economics. See Alice Guerra and others, 'Deterrence, Settlement, and Litigation under Adversarial versus Inquisitorial Systems' [2022] Public Choice 1, 1; Parisi (n 18) 192 ff. For historical developments of both systems in Europe see Souresh (n 10) 82–83.

26 Albin Eser, '"Adversatorish" Versus "Inquisitorisch"- Auf Der Suche Nach Optimalen Verfahrensstrukturen', *Prof. Dr. Feridun Yenisey'e Armağan*, vol I (1 bs, Beta Yayınevi 2014) 807 ff; Cesur (n 8) 156–157. For an experimental approach in terms of deterrence, settlement and litigation under adversarial versus inquisitorial systems see Guerra and others (n 25) 1–26.

27 Christopher Osakwe, 'Modern Soviet Criminal Procedure: A Critical Analysis' (1983) 57 Tulane Law Review 439, 447; Freiberg (n 8) 83; Ambos (n 21), § 8, Rn 27, fn 53; Guerra and others (n 25) 1–2; Cesur (n 8) 156.

28 Diehm, *op cit*, p. 6. James W Diehm, 'The Introduction Of Jury Trials And Adversarial Elements into The Former Soviet Union And Other Inquisitorial Countries' (2001) 11 J. Transnational Law & Policy 1, 6.

29 Sercan Tokdemir and Özlem Çelik, 'Kamu Davası ve Toplumsal Algılar', *Prof. Dr. Feridun Yenisey'e Armağan*, vol I (Beta Yayınevi 2014) 1490; Veli Özer Özbek, Koray Doğan and Pınar Bacaksız, *Ceza Muhakemesi Hukuku* (15 bs, Seçkin Yayıncılık 2022) 43.

30 Özbek, Doğan and Bacaksız (n 29) 41.

The inquisitoriality refers to "Continental or Romano-Germanic tradition" and the adversariality implies "Anglo-American tradition". Considering that the role of the parties and, of course, judges reveal the main difference between the "procedural systems", the aim of both is to find the truth.[31] "Discovery of the truth"[32], "protection of the accused from government misconduct" and "promoting respect for the criminal justice system" can be mentioned as basic functions of criminal procedural law in this context.[33] Historically, criminal procedural law has gone through three phases in terms of its purpose, as follows, the protection of the accused, the punishment of the criminal, and the search for the truth. Revealing the material truth, ensuring the fulfilment of the principles of the democratic state of law, and ensuring legal peace can also be mentioned as the second prominent purpose of criminal procedural law.[34]

2. Fundamental Features of Systems

The characteristic features of the inquisitorial and adversarial justice systems and the differences[35] between them can be summarized as follows.

a. Inquisitorial Justice System

In the inquisitorial justice system[36], public agencies carry out the criminal investigation and trial objectively, and only one case is brought before the court.

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31 Cryer and others (n 4) 424–425. Also see Ambos (n 17) 1 ff; Ambos (n 21), § 8, Rn 27, fn 53. For the aim of criminal procedural law, see Bahri Öztürk and others, *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku* (Bahri Öztürk ed, 16 bs, Seçkin Yayıncılık 2022) 31; Özbek, Doğan and Bacaksız (n 29) 39–40.

32 Eser (n 26) 823–826.

33 Exum, J. J. (2008), The Essence of the Rules: A Comparison of Turkish and U.S Criminal Procedure" in: In Turkish Criminal Procedural Code translated by Dr Yenisey, Bahçeşehir University; editors: Jelani Jefferson Exum and Ayşe Tezel, p.2-3. Jelani Jefferson Exum, *The Essence of the Rules: A Comparison of Turkish and U.S. Criminal Procedure, Turkish Criminal Procedure Code* (Jelani Jefferson Exum and Ayşe Tezel eds, Yenisey Feridun tr, 1st edn, Beta Yayınevi 2009) 2–3. Other purposes of criminal procedure are: "Accuracy", "efficiency", "respect", "fairness", "quality", adversarial", "participation", "appeals" and "justice". See Tokdemir and Çelik (n 29) 1497. Criminal procedure law is very useful as a branch of law for society because it is a tool for punishing the criminal. It is also useful for the person because his/her innocence can be proved at the end of the trial. Thus, the person is acquitted based on the decision that he is not guilty. See Soyaslan (n 16) 44.

34 Kunter, Yenisey and Nuhoğlu (n 15) 25; Feridun Yenisey and Ayşe Nuhoğlu, *Ceza Muhakemesi Hukuku Ders Kitabı* (2 bs, Bahçeşehir Üniversitesi Yayınları 2014) 71–72; Feridun Yenisey and Ayşe Nuhoğlu, *Ceza Muhakemesi Hukuku* (10th edn, Seçkin Yayıncılık 2022) 81. For the history of criminal procedural law see Öztürk and others (n 31) 33–34.

35 Cesur (n 8) 156. The basis of the difference between the two systems can be relied on 12th Century (Medieval) European Law. See Parisi (n 18) 194. According to *Eser*, criminal procedural systems can be compared critically on three points: the roles of the participants and the effectiveness of the criminal procedure, and the type and the scope of truth-seeking. See Eser (n 26) 816, 833.

36 Eser (n 26) 811–812; Guerra and others (n 25) 1 ff; Souresh (n 10) 81 ff.

Even if the interests of the defence counsel are considered in the investigation stage, there is a judicial examination (*juge d'instructio*n) under the supervision of the judge. A dossier is created for the entire case, during which the police follow the instructions of the prosecutor and the examining judge. When it comes to the trial stage, the judge has the access to the dossier, unlike the judge at the investigation stage. To find the truth, the trial judge more actively plays a very crucial and intervening role.[37] The judge takes action-*ex officio*[38]-and decides about the incident. In other words, there is no need for another organ for him/her to act.[39] The inquiry is under the control of and conducted by an impartial[40] judge who takes an active role in the inquiry. Witnesses are summoned by the court. The order of trial is determined, and the judge conducts the most of examinations. Experts are determined and examined by the judge if needed. As for lawyers etc., they play a passive role.[41] *Schabas* summarizes the role of the judge in the inquisitorial proceedings as follows:

Under the inquisitorial system, instructing magistrates prepare the case by collecting evidence and interviewing witnesses, often unbeknownst to the accused.[42]

Vogler argues that four fundamental features can be mentioned for the inquisitorial procedural model. The first crucial feature is the hierarchical structure of authority. The inquisitorial system relied upon "a hierarchical system of authority in which power is delegated downwards through a chain of subordinate officials of decreasing status". That is to say, the first and main characteristic is that this system is an authoritarian procedural model. The second feature is that the inquisitorial system has an ongoing bureaucratic process. Third, it is "the use of different forms of intolerable pressure against defendants to achieve cooperation. Finally, the "ideology and ruling dynamic of the inquisitorial system" is not based on law, and *vice versa*, on "rational deduction and forensic inquiry".[43]

Kunter et al. mention five main features of the inquisitorial procedural model. Beginning with the position of the judge that he/she is almost in the position of the plaintiff and can take the incidents on his own as soon as he/she has heard about them. Furthermore, the judge is free in the matter of collecting

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37 Cryer and others (n 4) 425. For more information see William A Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 251–252; Özbek, Doğan and Bacaksız (n 29) 42–43; Souresh (n 10) 82.

38 *Processus per inquisitionem* in Latin. See Parisi (n 18) 194.Par

39 Tokdemir and Çelik (n 29) 1490–1491.

40 The right to an impartial judge is a fundamental principle for due process, which requires a fair and impartial court. See Nevins-Saunders (n 12) 348.

41 Diehm (n 28) 6.

42 Schabas (n 37) 250.

43 Vogler, *A World View of Criminal Justice* (n 5) 25, 26.

evidence, that is, he/she is not bound up by the evidence collected by the prosecutor and defence counsel. When it comes to the proceeding, every stage in the process is secret and not accusatorial. That is to say, the accused has not had an active role and his/her written statement is taken. Last but not least, the accused and the judge does not get position equally and the accused might be arrested with a warrant until before the verdict.[44]

To sum up, 'what is not in the file is not in the world'. This is the main feature of the inquisitorial system.[45]

There has been a shift from the classical inquisitorial system to the neo-inquisitorial system in the historical developments. Neo-inquisitorial justice system is a distorted inquisitorial model in which the powers of the prosecutor are much more than the powers of the judge. In other words, there is a weaker judge against the prosecutor. In the mere inquisitorial system dominated in Europe until the 19th century, "a (nother) judge would enter a judgment based on an official review of the file". Under neo-inquisitoriality, the trial was conducted not by the parties, but by a judge. The judge does not establish the conviction regarding evidence orally; he/she devotes himself/herself to confirming points in a written dossier. Hereby, the pre-trial stage, namely "the production dossier" is more significant. However, at this stage defence counsel has a limited role.[46] Within this system, the state, acting objectively and on behalf of those who are involved in the case, including the accused, actively investigates the circumstances of the crime to reveal what happened. At that point, the state has the duty of collecting both exculpatory[47] and inculpatory[48] evidence.[49]

In the classic inquisitorial procedure, the two-pronged investigation is the duty of the state and a 'neutral officer of the state' conducts the investigation. In that regard, the dossier regime is the main typical feature of the inquisitorial justice style. The prosecutor opens an investigation in light of the gathered information and decides whether the evidence is satisfactory to make the first move for the procedure. In addition, the dossier of the prosecutor must include

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44 Kunter, Yenisey and Nuhoğlu (n 15) 78.

45 William Burnham and Jeffrey D Kahn, 'Russia's Criminal Procedure Code Five Years Out' (2008) 33 1, 2.

46 Peter H Solomon Jr, 'Post-Soviet Criminal Justice: The Persistence of Distorted Neo-Inquisitorialism' (2015) 19 Theoretical Criminology 159, 159, 160, 161.

47 The term means, "Involving **the** removal **of** blame **from someone".** For definition see, exculpatory<https://dictionary.cambridge.org/dictionary/english/exculpatory> accessed 19 May 2022.

48 The term inculpatory means "implying or imputing guilt, tending to incriminate or inculpate". For definition see inculpatory<https://www.merriam-webster.com/dictionary/inculpatory#:~:text=Definition%20of%20inculpatory,or%20inculpate%20an%20inculpatory%20statement> accessed 19 May 2022.

49 Burnham and Kahn (n 45) 1–2.

both *inculpatory* and *exculpatory* proofs. It means that the prosecutor has to be a 'non-partisan' in the pre-trial investigation to ensure impartiality. As for the neo-inquisitorial procedure mode, a 'directive manager' mandates inquisitorial proceedings. That is to say that the concept of neo-inquisitorial refers to a judge-oriented procedure (*judge d'instruction, or instructing magistrate*).[50]

Solomon highlights that the neo-inquisitorial system leads to "fair outcomes" only under two conditions. First, the conduct of the inquiry through pre-trial must be neutral. The second condition is that the judge must be present at the trial for impartially questioning the accusation and ruling the trial.[51]

b. Adversarial Justice System

The adversarial justice system[52], conversely, suggests two "adversarial parties" which take their case to court. Adversarial parties named prosecution and defence counsel conduct their own investigations. The judge, who intervenes in a case only in procedural matters raised by the parties, is in the position of a referee. It would not be wrong to say that this system is suitable for a jury system. In this system, parties are equal. The judge does not participate in the discussions between the parties[53] and the process of the public case develops in the presence of the parties.[54] In brief, a dispute related to a criminal case takes place between two sides in adversarial proceedings. In theory, both the prosecutor and defence counsel have equal positions before a passive and neutral adjudicator concerning the preparation of the criminal case and presentation of evidence. The task of the judge is to provide that the parties obey the procedural rules. The parties can achieve fairness by controlling their

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50 Ambos (n 17) 9; Kress (n 18) 612; Solomon Jr (n 46) 78.

51 Solomon Jr (n 46) 161.

52 Eser (n 26) 810–811; Souresh (n 10) 81 ff; Cesur (n 8) 156. The proponents accept that the adversarial justice system is the best model of criminal procedural law in terms of "protecting individual dignity and autonomy". See Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 Legal Studies 519, 525. For the disadvantages of adversariality see Özbek, Doğan and Bacaksız (n 29) 42. For important assessments about retiring from the adversarial justice system to the inquisitorial justice system in some common law countries such as America, England, Canada etc. in favour of a hybrid model taking an example of international criminal procedure see Kirchengast (n 13) 513 ff.

53 Eser (n 26) 816. The judge, as the audience listens to the parties. See Kunter, Yenisey and Nuhoğlu (n 15) 76.

54 Cryer and others (n 4) 425, 426. Also, see Souresh (n 10) 81–82. Mehmet Emin Yapar, *Ceza Muhakemesinde İddia Pazarlığı* (1 bs, Adalet Yayınevi 2013) 45. *Schabas* describes the courtroom in an adversarial system as a "battleground". Adversarial trials depend on 'Hegelian dialectic' called thesis+antithesis=synthesis. The prosecutor, the accused and the lawyer take place in the thesis+antithesis part of the formula, and the judge decides by synthesizing what was put forward by those. See Schabas (n 37) 251; Jackson (n 8) 22; Özbek, Doğan and Bacaksız (n 29) 41.

case by choosing evidence and "the issues with the trial as the battleground on which the issue of the defendant's guilt is resolved".[55]

Another striking issue could be the collection of evidence. The collection of evidence is carried out entirely by the parties of the case in terms of deciding the case. The lawyer of the prosecutor and the accused/suspect collects evidence related to the case at the beginning. The decision is based on the collected evidence and it is not possible to obtain new evidence during the trial process. The judge or the jury has no competence in collecting evidence. The main duty of the judge is to administer the case within the framework of procedural rules.[56] In other words, the judge is a passive figure who intervenes in how the parties should act in procedural matters, whether they enjoy equal rights while presenting their evidence and defending on behalf of the client, the state and the accused.[57] In this system, in conclusion, an impartial decision-maker consists of the jury or the judge. There are strict rules set by law regarding the presentation of evidence and the conduct of the trial process. The case has two adversaries and only one win at the end of the trial.[58] To sum up, 'what is not proven by first-hand evidence presented at trial is not in the world'. This is the main feature of the adversarial system.[59]

The main features of the adversarial system can be summarized as follows: In advance, the accusation is needed for the judge who acts in the position of the referee in a match, which means that he/she is not free to collect evidence and is bound up with the evidence presented by the parties. Subsequently, the accused cannot be arrested with a warrant before the definitive verdict as a consequence of the equality of the parties. In addition, there is freedom for everyone regarding accusation; and the criminal procedure has similarities with civil procedure. Lastly, the proceeding is verbal, accusatorial and open from the beginning to the end. Since the judge has a passive position, the accusation is only for the parties in this system.[60] It can be concluded in the sayings of, respectively, *Nevins-Saunders* and *Freiberg*:

> *Ultimately, the adversarial system rests on a belief that when both parties are adequately represented, the process is not only more fair but also more likely to reveal the truth.*[61]

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55 McEwan (n 52) 520. The judge is seen as a "passive arbitrator" in an ideal adversarial system. See Cesur (n 8) 157.

56 Yapar (n 54) 45.

57 Burnham and Kahn (n 45) 2.

58 Yapar (n 54) 45.

59 Burnham and Kahn (n 45) 2.

60 Kunter, Yenisey and Nuhoğlu (n 15) 77; Özbek, Doğan and Bacaksız (n 29) 41–42.

61 Nevins-Saunders (n 12) 343.

The adversarial paradigm: The parties and not the judge have the primary responsibility for defining the issues in dispute and for investigating and advancing the case.[62]

3. A Brief Comparison of Systems

Despite the extraordinary development of the adversarial system over two decades, the inquisitorial system has been the dominant model in the world for the last eight hundred years. It can be said that the influence of this system persists tenaciously. In contrast to the adversarial system, the inquisitorial system has differences through a variety of "regional traditions".[63]

As a term, inquisitoriality has the nature of inquiry and adversariality has the nature of contest.[64] Trials in the inquisitorial system are in general shorter than the adversarial system's trials. Because most of the evidence is presented to the court before the trial begins. Adversarial trials, on the contrary, take longer and are more comprehensive. Trials under an adversarial system are complicated and very few cases move to the trial stage. Most cases end with a "reasonable compromise" between the prosecutor and the suspect before the prosecution stage, which is called "plea bargaining". This institution is not allowed in the inquisitorial system. No convictions can be given before the court evaluates the evidence collected during the investigation phase.[65] The former legal regime presents a competition between parties in bringing evidence to vanquish the opponent, which is absent or weaker in the latter legal regime. It is claimed that this competition has an effect on truth-telling and improves decision-making.[66] The truth is also sometimes interpreted differently in both. It means "objective truth" in inquisitoriality and "procedural truth" in adversariality.[67] Since the parties are the active subjects of the trial process in the adversarial system, they determine the future of the case throughout the trial; while the judge has an important role in terms of the course and outcome of the case in the inquisitorial system.[68]

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62 Freiberg (n 8) 83 (cited Australian Law Reform Commission 2000: paragraph 1.117).

63 Vogler, *A World View of Criminal Justice* (n 5) 25.

64 Diehm (n 28) 6. On this basis, the inquisitorial system differentiates from the adversarial system in terms of the source of law, exclusionary rules, investigatory and pretrial procedures, pleas of guilty and plea bargaining, and trial and appellate procedures. For instance, the inquisitorial system relies on code provisions rather than case precedent; pleas of guilty and plea bargaining are absent in this system. For detailed information, see ibid 8–15; Ambos (n 21), § 8, Rn 40; Guerra and others (n 25) 1 ff.

65 Schabas (n 37) 251.

66 Guerra and others (n 25) 2, 4.

67 Cryer and others (n 4) 426.

68 Vogler, *A World View of Criminal Justice* (n 5) 147.

While the accused/suspect is put ahead in the adversarial system[69], the judge is held superior in the inquisitorial system.[70] The cooperation system is based on the collaboration between the prosecutor, defence counsel and judge. To put in another saying, the judge does not make decisions regarding only the prosecutor and defence counsel as in the adversarial system; and he/she does not monopolise research as in the inquisitorial system. That is, the verdict is neither the dialogue of the parties nor the monologue of the judge; it is rather a colloquium held by all of them.[71] Consequently, the prosecutor prepares the indictment, the defence counsel gives counter-opinions and at the end of the trial, the judge takes all of them into consideration and renders a verdict given collectively in the criminal procedure by researching the material truth.[72]

4. The Convergence of Systems: A Drift towards a Mixed System?

It is argued that the historical development of criminal procedural law is "analogous to the evolutionary development of mankind" in a natural progression. Accusatory justice is the former model of criminal justice. This form of justice is pursued in England[73] and the United States (USA).[74] The third and more contemporary development is the mixed stage. A hybrid model combines two systems importing the efficiency[75] and the truth of the inquisitoriality and the equality arms of the adversariality.[76] *Esmein* underlines this argument as follows:

> *Three fundamental types of procedure are, in effect, distinguishable, - the accusatorial type, the inquisitorial type, and the mixed type. The criminal law of almost every nation has begun with the accusatory procedure and has changed to the inquisitorial procedure*.[77]

Osakwe rephrases this point:

> *The modern adversary (accusatorial) system is only one historical step from the private vengeance system and retains some of its characteristic*

69 Eser (n 26) 818; Guerra and others (n 25) 1 ff.

70 Guerra and others (n 25) 1–2.

71 Kunter, Yenisey and Nuhoğlu (n 15) 79.

72 Yenisey and Nuhoğlu, *Ceza Muhakemesi Hukuku Ders Kitabı* (n 34) 216; Yenisey and Nuhoğlu, *Ceza Muhakemesi Hukuku* (n 34) 248.

73 A comparative study in the adversarial-inquisitorial dichotomy in respect of proof with the examples of England and Turkey see Cesur (n 8) 156 ff.

74 Vogler, *A World View of Criminal Justice* (n 5) 146.

75 For the comparison of criminal procedural models related to the efficiency of the criminal process see Eser (n 26) 821–822.

76 Vogler, *A World View of Criminal Justice* (n 5) 146.

77 Adhémar Esmein, *A History of Continental Criminal Procedure with Special Reference to France*, vol 5 (John Murray 1914) cited in Vogler (n 12) 146. A mixed system including jury trials was adopted by judicial reforms made in 1866. Nevertheless, all reforms containing jury trial provisions were repealed after Bolsheviks came to power. See Diehm (n 28) 21–22.

> *features. By contrast, the inquisitorial system begins historically where [when] the adversary system stopped its development. It is two historical steps removed from the system of private vengeance. Therefore from the standpoint of legal anthropology, it is historically superior to the adversary system*.[78]

Vogler concludes that there is no basis for the aforementioned "developmental approach". This approach represents a fallacy. The author implies two misunderstandings, which arise from the concept of adversariality. One is the "developmental fallacy". The other is the "accusatorial fallacy" about the developmental approach. The second one arises from a "misunderstanding of the dominant mode of trial in the Anglo-American world". The historical development is adversarial rather than accusatorial. Even though it is a common misunderstanding, it comes from the interchange of accusatorial and adversarial terms. However, the adversariality, as a radical criminal procedure model in England in the 18th century, was almost not related to early accusatorial tradition.[79]

In our days[80], there is a stream from the classic neo-inquisitorial system to a modern neo-inquisitorial justice system in Western European countries. Because judicial investigation has been controversial and unfavourable, many countries have eliminated or made limitations on its use. For instance, Germany disapplied judicial examination and the duty of directing investigations carried out by police was given to the prosecutor with amendments in 1974. In Germany, a trial managed by a "powerful and impartial judge" is inquisitorial rather than adversarial.[81] As stated by *Solomon* "the conduct of the judge reflected legal demands for full independence from the parties; judges were not part of a team effort to convict the accused. The judge had the right to seek and generate evidence, but only after the sides presented their cases".[82]

When one is concerned about a modernized inquisitorial pre-trial with an adversarial trial, namely a mixed system, the criminal justice system in Italy is the first to come to one's mind. As in Germany, the prosecutor functions as an investigating magistrate and the main figure in the pre-trial stage. On one hand, the system in Italy is currently based on "the formal opening of cases" and "construction of a file"; on the other hand, the dossier prepared by the prosecutor does not send directly to the judge before/during the trial. A smaller file including merely the indictment and the list of documents-but,

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78 Osakwe (n 27) 447.

79 Vogler, *A World View of Criminal Justice* (n 5) 146.

80 An ideal procedural model does not represent criminal procedural types in continental Europe or Anglo-American procedures. See Cesur (n 8) 159.

81 Solomon, Post-Soviet Criminal Justice, p. 162. Solomon Jr (n 46) 162.

82 ibid.

not evidence- is received by the judge, which means a "two-file system".[83] In the words of *Solomon*, it means to ensure that "judges were not predisposed to the prosecutor's case before he/she established it through oral examination of witnesses. This facilitated an adversarial trial, what journalists in Italy called."

Since the end of the 20th century, Germany and Italy have had a modern neo-inquisitorial model that relies on a pre-trial system in which an investigating magistrate does not create the dossier. It is created by police who works under the authority of the prosecutor. The evidence is assessed by the prosecutor and cases could be dismissed by employing alternatives to the trial or directed to the judge. An adversarial trial with reliance on oral testimony is required in Italy. However, in Germany, it relies on the judge to treat the dossier critically and to make trial proceedings stop.[84]

The approach of convergence[85] between Anglo-American and civilian styles of the criminal justice system is interpreted as a movement toward the civilian criminal procedure.[86] However, *McEvan* suggests a convergence which is "not towards a centre ground between the two kinds of system, but possibly towards a new model sharing elements inimical to both". It appears that the distinction between the inquisitorial and adversarial criminal justice systems represents some rooted in-depth views regarding the convenient functionality of criminal proceedings about "the relative importance of ascertaining the true facts as opposed to using party control over the process as a protection against state power".[87]

II. THE PROCEDURAL REGIME OF THE INTERNATIONAL CRIMINAL COURT

A. Functions of the International Criminal Court: A Brief Overview

It is a well-known fact that the ICC was a "major success" for international criminal law at the beginning of the 2000s. The ICC is not only an institution to give a verdict upon individual guilt of international crimes' perpetrators. It is claimed that the court has three different functions, that is, three different faces. *Jessberger/Geneuss* describes these faces as *"Three hats on one hand"*.[88]

First, distinctively, the ICC works as a "criminal court" on the international scale by carrying out investigation, prosecution and conviction for specific international crimes under its jurisdiction. Today, "individual criminal

83 ibid 162–163.
84 ibid 163.
85 Eser (n 26) 813.
86 McEwan (n 52) 543.
87 ibid 520, 523.
88 Florian Jessberger and Julia Geneuss, 'The Many Faces of the International Criminal Court' (2012) 10 Journal of International Criminal Justice 1081, 1083, 1084.

responsibility" and "the jurisdiction of international tribunals", especially by establishing the ICC, have been settled in international law. This function of the court has a broad and more general meaning in terms of both goals of criminal law and punishment. It is significant to highlight that the action of the court in investigations, prosecutions, trials and punishment does not only have a symbolically broader effect but also the performance of the court raises global awareness. It is clear that the court carries out "an integrative action". Nonetheless, the ICC is a treaty-based international court rather than a supranational legal institution.[89]

Secondly, the ICC has a role named "watchdog court". The ICC is an integration of international and local powers based on legality through merging the sovereignty and the legal enforcement of the international system. The court acts within a horizontal[90] framework using vertical elements and interacts with its parties. This second function is related to the "complementarity principle", which designates the judicial relationships between states and the court. The purpose is to push state parties according to their international obligations to investigate, prosecute and punish perpetrators who commit international crimes. Additionally, an indirect contribution to ending impunity and the prevention of international crimes is aimed in this manner.[91]

Lastly, it is claimed that the ICC is a "world security court". It means that when the Security Council under Chapter VII of the United Nations Charter addresses a situation to the court, the court acts as an institution to establish international peace and to help for security regarding an ongoing conflict between different groups. This function could mean that the ICC is a judicial body considering its organs.[92] I would say that "just being in existence is not enough" while people arise their demands and expectations related to justice. An apparent gap between theoretical promises and achievements of the ICC in reality could be seen clearly considering the practice of the court for more than twenty years. Regarding global, political and legal developments, on one hand the ICC has a significant role in the (post)-conflicts, on the other hand it seems difficult to bridge the gap between its desires in theory and achievements in reality. In this sense, it is worthy to discuss whether the ICC is a proper international institution or not.[93]

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89 ibid 1085–1087.

90 ibid 1083, 1084.

91 See more ibid 1087–1090. For more information about "the ideology of deterrence" related to the aims of the ICC see Dawn L Rothe and Victoria E Collins, 'The International Criminal Court: A Pipe Dream to End Impunity?' (2013) 13 International Criminal Law Review 191, 191 ff; Zafer (n 4) 304.

92 See more Jessberger and Geneuss (n 88) 1090–1092. For the answer to the following question: Has the ICC a role in the phenomenon of impunity? See Telli (n 4) 13 ff.

93 Sercan Tokdemir, 'International Criminal Court within Global Realities, And Desires

B. Origins of the Procedural Regime at the International Criminal Court

Procedural systems at international tribunals (*ad hoc*[94] and *mixed tribunals)* before the arrival of the ICC were based on adversariality.[95] However, as stated by *Kress*, the procedural structure of the ICC is a 'truly unique' system, which is neither an inquisitorial system nor is it adversarial.[96] The procedural models for the ICC were discussed by many states implicated in drafting the Rome Statute. For example, a draft by France (*so-called 'French Draft'*) included important elements from common and civil law and provided for both systems' meeting in the Statute and the Rules of Procedure and Evidence[97]. Initially, attorneys in common law drafted the *ad hoc tribunals'* law and the Statute of the International Law Commission (ILC) based on adversariality and discussed the common law-oriented procedure for the ICC in the first Preparatory Committee negotiations (1995). Fundamentals of inquisitoriality were also presented during discussions, such as the issue of '*in absentia trials'* principled in *Romano-Germanic* justice culture (civil law).[98]

It is important to realize that the original ideologies of the ICC were built upon the adversarial culture; of course, to a lesser degree than the ICTY and the ICTR. However, drafters offered essential materials from the context of both terms.[99] In other words, the procedural system at the ICC is primarily adversarial, but there are many inquisitorial elements in terms of victim participation and the position of the judge. For example, the judge can order "the production of evidence" or "the testimony or attendance of witnesses" as required. It is so obvious that the adversarial/inquisitorial dichotomy cannot restrict the international criminal procedure.[100]

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beyond the Cuff Mountain: "Is the ICC A Proper International Institution?' (2013) XVII EÜHFD 163, 163 ff.

94 Ambos (n 21), § 8, Rn 1.

95 In *Prosecutor v. Tadic* case, the rules of the ICTY "are more akin to the adversarial common law system and such systems contain a general exclusionary rule against hearsay", which is argued by the defence. Though, it is approved by the Trial Chamber that the ICTY "does not strictly follow the procedure of civil law or common law jurisdictions" cited in Souresh (n 10) 81.

96 Kress (n 18) 605.

97 Rules of Procedural and Evidence,
<https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf> accessed 07 December 2022.

98 Ambos (n 17) 5–10.

99 Gordon (n 64) 41; Vladimir Tochilovsky, 'Proceedings in the International Criminal Court: Some Lessons to Learn from ICTY Experience' (2002) 10 European journal Crime Criminal Law & Criminal Justice 268, 268; Schabas (n 10) 249–252; Cryer and others (n 6) 428–429.

100 Souresh (n 10) 85. *"...ICC has adopted a largely adversarial trial procedure, but like many inquisitorial systems, it allows victim participation and appoints lawyers to represent them. This shows how the adversarial and inquisitorial models have converged in order to achieve the ICC's aims."* See ibid 84.

Schabas believes that the 'fight between common law and civil law has been replaced by an agreement on common principles and civil behaviour'[101]. *Cryer et al.* reject the sharp contrast at the ICC citing the decision of the ICTY Trial Chamber as follows:

The procedures were a 'unique amalgam of common and civil law features' and did not strictly follow the procedure of common law or civil law.[102]

Last but not least; the first procedural decisions of the ICC were made under inquisitorial model. In this regard, the main reference to distinguish both inquisitoriality and adversariality is the role of the judge, who is like a fact-finder. The *judges* at the ICC presents the main features of inquisitorial proceedings, similarly, the *prosecutor* acts independently and impartially while conducting the investigation (*so-called proprio motu*[103]). Those 'interventionist judges' keep judicial control in their hands. As for *victims*, they play a vital role in the proceedings of the ICC. The function of this body of the court has been granted and fascinated by the inquisitorial rules and still remains today, such as in terms of participation-*partie civile*.[104]

It is now clear that the ICC is a judicial institution which follows "a highly formulized specific procedure and commands only the classical 'tools' of a criminal judicial system"-such as arrest warrants, indictments and judgements.[105]

C. The Position of the Judge, the Prosecutor and Victims

For a functional procedure model on a universal scale, one needs to look at the role of some actors in different domestic procedures: the judge, the prosecutor, and victims.[106]

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101 Schabas (n 37) 249–252.

102 Cryer and others (n 4) 428–429. See also Souresh (n 10) 84.

103 Rome Statute art.76, 77 and 121/2.

104 Cryer and others (n 4) 436–440; Schabas (n 37) 242–252. Rome Statute art.15/3, 19/3 and 82/4.

105 Jessberger and Geneuss (n 88) 1085.

106 *Glasius* points out that "prosecutors and judges of international criminal courts may be able to strengthen the empowering dynamics pointed … not just as to the socio-political and cultural environment, but also the wider legal environment they operate in, without reifying what appear to be the tenets of local tradition." See Glasius Marlies, 'Do International Criminal Courts Require Democratic Legitimacy' (2012) 23 The European Journal of International Law 43, 57.57.","plainCitation":"Glasius Marlies, 'Do International Criminal Courts Require Democratic Legitimacy' (2012 In a criminal justice system, one can say that there are three subjects by right of office: Judge, prosecutor and defendant. The system is carried out in cooperation with them. See Soyaslan (n 16) 154.

1. The Role of the Judge: The Fact-Finder[107]

Let us remember that inquisitorial proceedings are mandated by a 'directive manager'[108] while adversarial proceedings are guarded by parties.[109] The role of the judge differs in terms of the criminal procedural system.[110] This differentiation is as well reflected in the criminal procedure of international courts. Regarding those roles, an important inquisitorial 'drift' from adversarial justice to inquisitorial justice has engendered noticeably in the international courts.[111]

The ICTY and the ICTR judges' role was influenced by the adversarial proceedings. At the outset, they acted as a referee, but some provisions of their statutes made them more active, such as ordering the parties to present their additional evidence and calling witness *ex officio*. Over time, the judges became more active, taking the proceedings completely under their control.[112] As maintained by *Kress,* amongst more experiences of *ad hoc* tribunals, the judge played a dynamic role in the administration of trials even though 'textual' initial points were reflecting the adversarial procedure. Hence, a 'sliding scale' occurred between the two models. 'Investigative dossier' approach has also enhanced the directive role.[113]

The role of the judge at the ICC, on the other side, is from the outset created by the Rome Statute as "more interventionist in nature". Leaving the activities related to preparations for trial and presenting evidence aside, the ICC judges play a certain limited role in the phase of criminal investigations. Although it does not seem to reflect the role of the investigative judge in Civil Law, it actually reflects the presence of additional inquisitorial elements in the criminal procedures.[114] It is clear that the judge plays a much more active role in the trial phase examining the art.62 of the Rome Statute and further while she/he has a limited role in the investigation phase. The judge at the trial phase has the authority to use her/his broad powers of giving directions in order to

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107 Eser (n 26) 825; Guerra and others (n 25) 1.

108 Vogler, *A World View of Criminal Justice* (n 5) 313.

109 Cryer and others (n 4) 426; Tochilovsky (n 99) 271; Daryl A Mundis, 'From "Common Law" Towards "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence' (2001) 14 Leiden Journal of International Law 367, 369; Freiberg (n 8) 95–96.

110 Eser (n 26) 817–818.

111 Kress (n 18) 613.

112 Cryer and others (n 4) 436.

113 Kress (n 18) 613. See also McClelland (n 8) 16; Vogler, *A World View of Criminal Justice* (n 5) 313; Tochilovsky (n 99) 271 (Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634 of 22 November 1999).

114 Cryer and others (n 4) 436.

conduct the proceedings.[115] The judge [at the ICC] is the person who intervenes in a case and decides about the dispute in the light of claim and defence.[116] The position of the judge at the hearing is shaped within the framework of this definition. For example, the judge has the power to demand some definite evidence to be put forward in the art.69/3 of the Rome Statute.[117]

2. The Role of the Prosecutor

A realistic approach to tackle the matter of a proper procedural system on an international scale could be to consider the role of the international prosecutor[118] and the judge together. As said by *Vogler*:

> *The whole controversy was part of an ongoing struggle between the Office of the Prosecutor and the judges, one that is underpinned by the great cultural debates in comparative criminal procedure.*[119]

The main issue addressed at this stage is the *proprio motu*. In the statutes of the ICTY[120], the ICTR and the ICC, the prosecutor opens an investigation in the light of gathered information and decides whether the evidence is satisfactory to make the first move for the procedure. As *Kress* and *Ambos* stressed the importance of 'impartiality, the prosecutor has to be a 'non-partisan' in the pre-trial investigation.[121] What the authors mean is that the dossier of the prosecutor must include both *inculpatory* and *exculpatory* proofs. In this case, a chamber

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115 ibid 469.

116 ibid 469–470. For the definition see Yener Ünver and Hakan Hakeri, *Ceza Muhakemesi Hukuku* (19 bs, Adalet Yayınevi 2022) 61; Öztürk and others (n 31) 175; Soyaslan (n 16) 75.

117 Tezcan, Erdem and Önok (n 1) 423.

118 The prosecutor is the person who carries out the activity of allegation on behalf of the public. For more about the role of the prosecutor in the domestic procedural system (such as the Turkish criminal justice system) see Ünver and Hakeri (n 116) 216 ff. See also Öztürk and others (n 31) 218 ff; Tokdemir, 'The Powers of the Prosecutor in the Turkish Criminal Justice System' (n 16) 1 ff. For prosecution by right of office see Soyaslan (n 16) 178 ff. As said by Tokdemir, *"It would not be incorrect to say that the prosecutor is getting more power and becoming a key player through the criminal process in Romanic- Germanic countries in which the prosecutor has two important functions. The first function is to perform 'as prosecutor' in the conduction of the investigation… As to the second function, it is to act as a 'public servant' in the best interests of the public".* See Tokdemir, 'The Powers of the Prosecutor in the Turkish Criminal Justice System' (n 16) 1. For fundamental international documents on the principles of the role of the prosecutor, see ibid 40, endnote 5 . For details about prosecutorial powers in Turkey see ibid 1 ff.

119 Schabas (n 37) 272. Cited in also Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 108.

120 According to *Schrag*, prosecutorial decisions are needed to be immune to "political influence and considerations". "Many prosecutorial choices have been made with insufficient appreciation of political issues and perceptions" throughout the ICTY's jurisprudence. See Schrag (n 2) 429.

121 Respectively, Kress (n 18) 612; Ambos (n 17) 9.

of the ICTY accepted immediately. As to the ICC, the prosecutor must conduct the investigation considering these criteria: 'a reasonable suspicion of a crime' and 'the admissibility of the case'. In civil procedural law, the two-sided investigation is the duty of the state while the prosecutor does not have to gather 'exonerating evidence' in the common law.[122]

As said by *Ambos*, *the presentation of the charges* by the prosecutor is also a matter of inquisitorial and adversarial models. After affirmation of the indictments, if a change is called for, would it be altered by the prosecutor or by the court?[123] According to *Kepreskic*, the ICTY accepted its authority merely for less serious crimes, as for serious crimes the prosecutor is responsible.[124] When it comes to the ICC, art. 74(2) of the Statute takes 'facts and circumstances' into consideration. It can be seen that the former is much closer to common law while the latter reflects civil law.

Finally, creating an office for an international prosecutorial body "with a common approach to substantive and procedural issues" is not easy and is the "greatest challenge".[125]

3. The Role of Victims

The role of victims[126] is at the heart of our understanding of the 'shift away from adversariality'[127] because a significant amendment linked to the

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122 Tochilovsky (n 99) 629; Cryer and others (n 4) 437–439, 443–444. Rome Statute art. 53/4.

123 Ambos (n 17) 11, 12.

124 14 January 2000 (IT-95-T), para.728 et seq. (744 et seq), *Kepreskic* <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf > accessed 14 December 2022.

125 Schrag (n 2) 432.

126 Eser (n 26) 820–821. Victim refers to a person/persons to whom the subject of the crime belongs. In other words, it means the person against whom the crime was committed. For more information about the victim in substantive criminal law, see Mahmut Koca and İlhan Üzülmez, *Türk Ceza Hukuku Genel Hükümler* (15 bs, Seçkin Yayıncılık 2022) 116–118. For the difference between the victim and "the person affected by crime" see Öztürk and others (n 31) 237. With the participation of the victim, the ICC can be defined as a "reparations court". See Jessberger and Geneuss (n 88) 1083. To provide a democratic basis, victims must be given a voice. See Marlies (n 106) 51, 52; Eser (n 26) 821."volume":"23","author":[{"family":"Marlies","given":"Glasius"}],"issued":{"date-parts":[["2012"]]},"locator":"51, 52","label":"page"},{"id":259,"uris":["http://zotero.org/users/10024986/items/4D7XPAA9"],"itemData":{"id":259,"type":"chapter","container-title":"Prof. Dr. Feridun Yenisey'e Armağan","edition":"1 bs","event-place":"İstanbul","page":"807-833","publisher":"Beta Yayınevi","publisher-place":"İstanbul","title":"\"Adversatorish\" Versus \"Inquisitorisch\"- Auf der Suche nach Optimalen Verfahrensstrukturen","volume":"I","author":[{"family":"Eser","given":"Albin"}],"issued":{"date-parts":[["2014"]]},"locator":"821"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

127 Almost all-European countries embrace adversarial elements by adopting the principles of counsel-led evidence and cross-examination at trial in their inquisitorial justice systems

participation of the victims happened and this is 'one of the greatest innovations of the Rome Statute'. In the view of *Schabas*, continental justice models encourage victims to participate in the courts (*partie civile*).[128] *Vogler* also indicates that '…in many senses [here, for example, the participation of the victims] they reflect a basic dynamic of the contemporary law reform process.' For instance, the pre-trial of the ICC enabled victims to participate in the court directly in January 2006.[129]

The issue of victims' involvement[130] in proceedings has grown in importance in the light of "restorative justice system", which is a very new discipline for international criminal justice as regards restorative approaches

to protect victims in the process. This tendency from the adversarial model manifested itself clearly in domestic law after the Directive of the European Parliament and the Council, (2012) 2012/29/ EU, 25 October 2012 under which minimum standards on the rights, support and protection of victims of crime have been established. Victims had many significant rights,-namely "access to information to interpretation and translation, to review a decision not to prosecute, to restorative justice, to legal aid, to compensation, and protections during proceedings"-under the Framework Directive of 2012 by which the integration of inquisitorial procedures was taken courage on the local level of member states. As seen, those rights are recognised normally in the inquisitorial procedural model where victims preserve the right to accessory and adhesive prosecution. Kirchengast (n 13) 518, 519. This tendency had been also recognised by the European Court of Justice in the procedure of the *Pupino case* [2005] 3 WLR 1102. For more about the case see ibid 519. A notable and cross-national example in the context of the participation of victims in criminal proceedings is ECHR, which reflects a challenge to pure adversarial proceedings. ibid 520 ff.

128 Schabas (n 37) 342.

129 Vogler, *A World View of Criminal Justice* (n 5) 315. *Damaska* makes a significant evaluation on identifying the "retributive" or "restorative" character of the Court in modern criminal justice whispering the "transitional justice" concept. See Mirjan R Damaška, 'International Criminal Court between Aspiration and Achievement' (2009) 14 University of California Los Angeles Journal of International Law and Foreign Affairs 19, 26. *Damaska*'s paper has been evaluated in a review paper in which the issue of whether the international criminal court is a proper international institution is dealt with indicating not only the paradoxical points of the court in global realities and desires but also a restorative character of the court. For a review paper see Tokdemir, 'International Criminal Court within Global Realities, And Desires beyond the Cuff Mountain: "Is the ICC A Proper International Institution?' (n 93) 163–176. For the difference between the concepts of retributive and restorative justice see Tokdemir, 'Ceza Adaleti Sistemine Yeni Bir Yaklaşım: Tamamlayıcı Bir Sistem Olarak "Onarıcı Adalet" Mekanizması' (n 9) 100 fn 68.

130 The involvement of victims has been influenced by the development of the concept of human rights. A striking shift can be seen over the past few decades. The victim has progressively played an important role in criminal procedure law. In domestic law, the rise of civil-part applications has accommodated them to become involved in criminal hearings to provide "interest in punishment". All mentions about the participation of victims in criminal trials lead us to a summary that it is aimed to coincide with the desire to get "practical redress" and "symbolic satisfaction". See Tulkens (n 6) 594, 595.

by the ICC inspired by "restorative and therapeutic forms", such as victim-offender mediations in European domestic jurisdictions. It is important to emphasize that "the reparation of harm" to victims can be seen as a brand in this discipline.[131] In this regard, the two main goals of the international courts are "to provide a safe forum for victims to tell their stories" and "to provide a forum for considering restitution and reparations".[132]

According to the Art.68 (3) of the Rome Statue:

> *Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, [following] the Rules of Procedure and Evidence.*

The article, which speaks generally about the victims' protection and their involvement in the judicial process, is built on two prominent concepts related to their participation: the "views" and "concerns". This provision seems to be saying that the judges render the most important roles of such kinds of stakeholders, as well as witnesses. Nonetheless, the judge regarding every case's circumstances evaluates the participation of the victims, and ultimately a decision by the ICC is called for absolute participation in the proceeding. The ICC Appeals decided in the *Lubanga* case that *"under certain conditions, victims may offer and examine ('lead') evidence relating to the guilt of the accused, and challenge the evidence's admissibility and relevance".* Due process[133] in the trial phase takes longer than the pre-trial stage and victims do not have any guarantee of a real implication in due process. The proceedings in the first cases of the ICC have been deferred because more than a hundred applications had been received from the victims. The admissibility of an application by a victim takes one year or more. It would be interesting to compare the practices of ad hoc tribunals (here the ICTY) and the ICC amongst their experiences. For example, the pre-trial stage in the case, *Dusko Tadic* in the ICTY was completed in 360 days whereas the *Lubanga* case lasted more than 800 days in the ICC.[134]

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131 Freiberg (n 8).

132 Schrag (n 2).

133 One of the international tribunals' goals is "to demonstrate fairness and the highest standarts of due process". See ibid 428.

134 For more information see Damaška (n 129) 19 ff; Tokdemir, 'International Criminal Court within Global Realities, And Desires beyond the Cuff Mountain: "Is the ICC A Proper International Institution?' (n 93) 171–173.

Lastly, it is undeniable that victims have limited permission to be able to take part in *ad hoc* tribunals.[135]

D. An Analysis: The "Drift" To Civil Law-Inquisitorial Justice?

The foregoing discussion related to the drift[136] away from adversariality is the very subject that has been a big 'procedural revolution' in the international courts. Some have described this shift as a 'tempered adversariality' some described it as 'cafeteria inquisitorialism'; and some even as 'harmonic convergence'[137].[138] Some commentators enjoy this change, especially because of the direct participation of victims, which means 'real community involvement'[139].

On one hand, *Ambos* and *Delmas-Marty* advocate a harmonic legal system defined as a *mixed/hybrid*[140] model containing fundamentals of both,

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135 Tochilovsky (n 99) 273; Vogler, *A World View of Criminal Justice* (n 5) 318; Cryer and others (n 4) 479.

136 Although the issue of drift in domestic criminal law is outside the scope of our study, let us note briefly as follows: it is argued that, the drift to inquisitorial justice has not only occurred in international criminal law but also in domestic criminal law. Some countries such as the USA, Canada, England and Wales, and Australia, which once held their criminal legal positions as the adversarial system are on the path of considering the legal process of Europe and international tribunals adopted to and expanding their legal process towards new ways. In those common law countries, an interventionalist justice model labelled as the inquisitorial procedure has been adopted to a considerable extent. Kirchengast (n 13) 514, 524. The deviation in the criminal procedure has also occurred in substantive criminal law. For example, a radical change in criminal law in America where the law was under the influence of the English legal system until the middle of the 19th century, was made in the Model Penal Code (1962) prepared by the American Law Institute. The issue of complicity is one of the areas where change takes place. While the classical distinctions in the Anglo-Saxon legal system continued to prevail in the legal systems of the provinces which did not adopt the law, these distinctions in the provinces that adopted the law were abandoned. It could be said that the system of complicity in the Model Penal Code is in favour of the German complicity system. See Sercan Tokdemir, *Ceza Hukukunda Akim Kalmış Azmettirme* (1. bs, Seçkin Yayıncılık 2022) 550–551. One can state that it is not a one-way change or one-sided drift. Similarly, most European States, including Turkey, have incorporated into their laws many features borrowed or at least inspired by Common Law. Therefore, it is possible to talk about the convergence of systems through mutual exchange. In this regard, cross-examination is an example of a convergence of adversariality and inquisitoriality in Turkey. The cross-examination, which is accepted in the scope of the art.201 of the Turkish Criminal Procedure Code, regulated under the title of "Direct Questioning", is a kind of criminal procedure in Common Law.

137 Such as Ambos see Ambos (n 17) 37; such as Delmas Marty, see Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 116.

138 Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 113–117.

139 Such as Vogler, *A World View of Criminal Justice* (n 5) 318.

140 Eser (n 26) 815; Tezcan, Erdem and Önok (n 1) 414. The first judge of the ICTY, *Mcdonald* claimed: 'We merged elements of common and civil law into 129 Rules'

which is called *sui generis*[141] emerged from experiences and practices[142] of *ad hoc* tribunals.[143] One might as well say, in the words of *Kirchengas*t, that the development of domestic practices and procedures, which "fuse aspects of adversarial and inquisitorial procedure into a mixed and hybrid model of justice", are encouraged by the ICC's criminal procedural model and practices. The criminal procedural model adopted by ICC provided the affiliation of adversarial and inquisitorial elements.[144] Also, *Knoops* suggests a hybrid approach as key for the functions of the ICC, by stating the following sentences:

> *A significant aspect of the ICC Statute is that, during its drafting stage, delegates made a conscious effort to negotiate a statute and set of RPE [rules of procedure and evidence] that were acceptable to all. One could say that the battle between common law and civil law was there replaced by an agreement on common principles and civil behaviour. It can therefore be said that the ICC Statute and RPE represent a truly international set of procedures, acceptable to the major legal systems of the world and drawing on the experiences of the ICTY and ICTR. Some novel procedures were created with predominantly civil law features, these being: admissibility of evidence and defences, pre-trial proceedings, supervisory responsibility of the ICC over arrested individuals and rights of victims and witnesses*[145]

According to *Tezcan et al*., in general, a mixed model of adversariality and inquisitoriality is applied in international criminal proceedings. However, the traces of the adversarial system in terms of the ICTY, the ICTR and the ICC are much stronger and seeking the material truth is the task of the parties. The authors state that although a mixed approach is pursued in terms of the criminal procedural model at the ICC, the system is closer to the adversarial model with a general evaluation. In other saying, adversariality still maintains its weight. The art. 64/8-a and 65/1 of the Rome Statute reflect the adversarial approach.[146] Nevertheless, in my opinion, there are also traces of the inquisitorial system, and most importantly, the jury system and plea-bargaining in common law

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141 Souresh (n 10) 86.

142 Eser (n 26) 815. Tadic at the ICTY <https://www.icty.org/en> accessed 19 December 2012. *Souresh* draws our attention to the fact that a homogenous system can be said to be neither adversariality nor inquisitoriality. See Souresh (n 10) 81.

143 See respectively Kai Ambos and Stefanie Bock, 'Germany' in Alan Reed and Michael Bohlander (eds), *Participation in Crime (Domestic and Comparative Perspectives)* (1st edn, Ashgate 2013) 37; Delmas-Marty (n 11) 290; see also Mundis (n 109) 367; Askin (n 11) 907; Ambos (n 21), § 8, Rn 61; Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 116. See also Souresh (n 10) 86.

144 Kirchengast (n 13) 514, 522.

145 cited in ibid 522.

146 Tezcan, Erdem and Önok (n 1) 414.

were not inserted in the Rome Statute. It should be noted that more obvious signs of the inquisitorial system can be seen after examining the art. 15/3 and 61 concerning the acceptance of the indictment and art.56-60 concerning the establishment of a *Pre-Trial Chamber* to make a decision on the admissibility of preliminary investigation measures. One of the most important indicators of the inquisitorial system is the art.54 of the Rome Statute related to the role of the prosecutor. The obligation of the prosecution office is to collect not only the evidence against the accused, but also the evidence in favour of him/her. The prosecutor is not the opponent of him/her; on the contrary, the purpose of the prosecutor is to seek the truth. The investigation phase and the role of the judge in the trial phase reflects the inquisitorial system. After all, although the criminal procedure at the ICC can be described as *hybrid*, it does not seem possible to say that it is closer to the adversarial system.

Vogler indicates that if the two systems reflect an epistemological disagreement, the hybridisation makes no sense. As seen by the author, one of the further and equal problems for the hybridisation is the polarity of inquisitoriality and adversariality.[147] *Zappala* expands this last sentence as follows:

> *...two opposing epistemological beliefs: while for the inquisitorial paradigm there is an objective truth that the "inquisitor" must ascertain, for the accusatorial approach the truth is the natural and logical result of a pre-determined process*.[148]

Suffferling claims a new international criminal procedure "with the completely unjustified ascertain" in support of the following sentences: An international procedure must be searched on the grounds of two main systems of domestic criminal procedure; namely the Anglo-American and the Continental European models. For providing a suitable criminal procedural structure for the ICC, the prosecution and trial phases could be derived from the indicated traditions.[149] *Souresh* stated that international courts are limited by just a focus on differences between adversariality and inquisitoriality and this focal approach prevents them from arriving at a truly international scale.[150]

On the other hand, the concepts 'post-adversarial' and 'post-inquisitorial' are suggested by *Freiberg* whether a *transformative system* might be envisaged instead of a merged system on the ground of a 'participative approach' to discover the truth.[151] Moreover, the issue has grown in importance in the

147 Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 114.
148 cited in ibid 114.
149 cited in ibid 115; Souresh (n 10) 81.
150 Souresh (n 10) 81.
151 Freiberg (n 8) 83.

light of 'popular justice'[152] from a global aspect as suggested by *Vogler* who lists three principal methodologies in the criminal procedure: interests of the individual, the community and the state.[153]

However, *Ambos* draws our attention to another important point. Whatever opinions or definitions are taken, it is important to know whether 'fair trial standards' and a high procedural level have been accomplished within their legal structure or not. Thus, the origin of this subject is of no importance (common or civil law).[154] It should also be considered that the inquisitoriality and adversariality divide has been overcome, so this deep issue is a worthwhile subject regarding the purposes of every procedural stage in the light of recent attempts. The same drift away from 'orality' at trial is also another arguable topic in those tribunals' procedures.[155]

Souresh suggests a procedural regime, which is not based on a purely adversarial or inquisitorial system. In a well telling[156]:

> *...the adversarial/inquisitorial dichotomy becomes less relevant when assessing the procedures of international criminal tribunals. Each national judicial system has incorporated elements that it deems to suit its history, needs, purposes and resources, and international criminal tribunals should base their assessment of procedures on the same factors. The amalgamated systems of national jurisdictions show that it is possible to combine traditionally "adversarial" or "inquisitorial" elements into a single judicial system. As such, the distinctions are irrelevant when setting up and evaluating procedural designs for international criminal tribunals.*

Apart from the aforementioned remarks, *Ambos* mentions another problem as 'in the future, a much greater problem may be to accommodate legal systems not based on western traditions as, for example, the Islamic law.'[157] "Islamic

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152 *Kirchengast* claims that the responsibility of the prosecutor is the main difference in community justice based on the notion of community prosecution. That is, prosecutors have broader accountability in terms of public safety, crime prevention and developing public confidence in the justice system even though they must respond to particular cases. In this context, prosecutors work differently here than in traditional cases. They, therefore, work with different persons, for example, victims, residents, community groups and government agencies. See Kirchengast (n 13) 528.

153 Vogler, *A World View of Criminal Justice* (n 5) 21–23; Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 118–121.

154 Ambos (n 17) 35; Ambos (n 21), § 8, Rn 61; Tezcan, Erdem and Önok (n 1) 415.

155 Vogler, *A World View of Criminal Justice* (n 5) 315; Ambos (n 17) 34; Deu (n 16) 5; Cryer and others (n 4) 476; Mundis (n 109) 367 ff.

156 Souresh (n 10) 83.

157 Ambos (n 17) 37.

law is simply absent from the structure of the ICC'[158] whilst a hybrid model, based on the rules and procedures of civil and common systems proposed by both *Ambos* and *Delmas-Marty*.

Consequently, as stated before, it is important to guarantee fundamental rights and freedoms, whichever system is preferred, rather than making criminal justice systems a dichotomous difference.[159]

CONCLUSION

In the study, to understand the procedural regime of the ICC whose foundation is seen as a great success for criminal responsibility on a global level, the first section of the paper was devoted to the examination of criminal procedural models known as inquisitorial and adversarial procedural systems with a comparative perspective. In the second part, our focus has been on the criminal procedural system of the ICC, having a brief overview of its functions. Having examined the criminal procedural systems in the first part, the criminal procedure of the ICC, which adheres to procedural criminal law, is analysed with a broad perspective.

All of the points concerning the foundation and the procedure of the ICC lead us to the conclusion that international criminal procedural law is like a 'fledgling discipline'. Hence, we need 'the best truth-seeking vehicle' to overcome difficulties in procedural scope in practice, such as the problems of judges from inquisitorial culture. If we assert that inquisitoriality is a conducive tool that provides service for international criminal justice, we must also bear in mind that firstly substantive international criminal law without practice would be like a single winged-bird. Based on this, seeking the truth seems a paramount reference to compare two legal justice models. When the inquisitorial model feels the need to discover the truth, its partner, adversariality presents 'competing values'. Thus, to me, a non-adversarial system should be the preferred because regarding the structure of the courts in those procedures, adversarial trials depend on 'Hegelian dialectic' therefore the court might be seen as a *battleground.* This philosophy is based on two opinions: 'Life is conflict' and 'everything owns itself'. Conversely, the inquisitorial (non-adversarial) model depends on the mutual help of constituents in the criminal proceedings with an interventionist judge. Participants in the court should be in cooperation, bearing in mind that the judge, the prosecutor and the victim/

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158 Shahrzad Fouladvand, 'Complementarity and Cultural Sensitivity: Decision-Making by the ICC Prosecutor in Relation to the Situations in the Darfur Region of the Sudan and the Democratic Republic of the Congo (DRC)' (Doctoral Dissertation, University of Sussex 2012) 69.

159 See also Souresh (n 10) 84; Tezcan, Erdem and Önok (n 1) 415.

victims are all in the same boat in the midst of finding the truth.[160] In addition, *Vogler*[161] emphasises that mixing these opposing procedural traditions is 'hardly internationalism'.

One might also say that a more effective criminal procedure model can be created with the cooperation of constituents in international criminal procedure. From my point of view, the system, which will ensure this stability, should be inquisitorial. Although inquisitoriality can be seen more functional as a national and balancing model for criminal procedure, it does not mean that a plural criminal procedural model cannot be accepted at international level in the future. The term pluralism refers to a new international procedural model based on a cooperation of procedural justice systems within inherently a sense of separation. Considering the political and social developments taking place at the global scale, it seems possible to mention plurality. A pluralist procedural structure based on avoiding a unilateral approach to the course of justice for the ICC concerning global developments in our day and particularly in post-conflicts through the transformation of politics and legal changes can be feasible while the court is on the way to progressive procedural changes.

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[160] For more assessments see Schabas (n 37) 251; Jackson (n 8) 22; Freiberg (n 8) 95.

[161] Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 115.

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INVALIDITY OF GEOGRAPHICAL INDICATIONS UNDER TURKISH LAW*

Türk Hukukunda Coğrafi İşaretlerin Hükümsüzlüğü

Ufuk TEKİN**

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ABSTRACT

With the entry into force of the Industrial Property Code no. 6769 in 2017 (IPC), the Decree Law No. 555 on the Protection of Geographical Indications was repealed. Geographical indications are regulated between the articles 33-54 of IPC. These regulations are prepared under the effect of the international regulations such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the EU Regulation No 1151/2012 on Quality Schemes for Agricultural Products and Foodstuffs. In the presence of certain conditions, the invalidity, which is explained as the legal protection provided by this Code for the registered geographical sign shall be deemed not to have arisen, is regulated in the art. 50 and 51 of IPC. In this article, invalidity request, grounds for invalidity and effects of invalidity on geographical indications will be explained under Turkish law with the light of court decisions and aforementioned international regulations about geographical indications.

Key Words: Geographical Indications, Appellation of Origin, Designation of Origin, Invalidity.

ÖZET

2017'de 6769 sayılı Sınai Mülkiyet Kanunu'nun (SMK) yürürlüğe girmesiyle Coğrafi İşaretlerin Korunması Hakkındaki 555 sayılı Kanun Hükmünde Kararname yürürlükten kaldırılmıştır. Coğrafi işaretler bu Kanun'un 33 ila 54. maddelerinde düzenlenmiştir. Söz konusu hükümlerin hazırlanmasında Ticaretle Bağlantılı Fikri Mülkiyet Anlaşması (TRIPs) ile Avrupa Birliği'nin Tarım Ürünleri ve Gıda Maddelerinde Kalite Planlamasına İlişkin 1151/2012 sayılı Tüzük hükümlerinden yararlanılmıştır. Belirli koşulların varlığı halinde, tescil edilen coğrafi işarete bu Kanun ile sağlanan hukuki korumanın hiç doğmamış sayılacağı şeklinde açıklanan hükümsüzlük, SMK m. 50 ve

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51'de düzenlenmiştir. Bu çalışmada, hükümsüzlük talebi, hükümsüzlük nedenleri ve hükümsüzlüğün coğrafi işaretler üzerindeki etkileri, mahkeme kararları ve coğrafi işaretlerle ilgili yukarıda belirtilen uluslararası düzenlemeler ışığında açıklanacaktır.

Anahtar Kelimeler: Coğrafi İşaretler, Menşe Adı, Mahreç İşareti, Hükümsüzlük.

I. Invalidity Request

According to art. 50.1 of Industrial Property Code no. 6769 (IPC)[1], invalidity of a geographical indication may be requested from the court by people who have interest. In other words, people with an interest are eligible to be claimant of invalidity action without any restriction. On the other hand, contrary to repealed decree-law no. 555 it is clearly regulated in the IPC that legal proceeding concerning the invalidity of geographical indication shall be instituted against the person who is recorded in the register as the registrant (IPC art. 50.3). However, in such proceeding, the Turkish Patent and Trade Mark Office (PTO) shall not be addressed as a party to these proceedings. It should also be noted that invalidity action is not only a declaratory action but also an action for performance. Namely, in this action, not only is it determined that the geographical indication is invalid, but also the geographical indication whose invalidity has been decided is canceled from the registry.

The courts commissioned for legal proceedings regarding invalidity of a geographical indication shall be civil courts of intellectual and industrial property rights and criminal courts of intellectual and industrial property rights (IPC art. 156.1[2]). In legal proceedings to be instituted against third parties by the owner of industrial property right, competent court shall be the court where plaintiff is domiciled or where the action violating the law has taken place or where the impacts of this action are observed (IPC art. 156.3). In legal proceedings to be instituted against the owner of industrial property right by third parties, competent court is the court where the defendant is domiciled (IPC art. 156.5). In case the plaintiff does not have domicile in Turkey, competent court shall be the court where, at the instituting date of the legal proceeding, the business place of the attorney registered in registry is located, and if the record of the attorney has been deleted, competent court is the court where the headquarters of the Office is located (IPC art. 156.4, also see IPC art. 156.5).

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1 Official Journal, 10.01.2017, No. 29944 <https://www.resmigazete.gov.tr/eskiler/2017/01/20170110-9.htm> accessed on 12 April 2023.

2 Art. 156 is one of the common provisions that is eligible to be applied for all of the industrial property rights which are regulated in IPC. Therefore unless otherwise indicated, it is possible to apply common provisions of IPC for geographical indications, see. Hayrettin Çağlar, Burçak Yıldız and Dilek İmirlioğlu, *6769 sayılı Sınai Mülkiyet Kanununa Göre Marka Vekilliği Sınavına Hazırlık* (2 nd edn, Adalet 2019) 263.

It should also be emphasized that contrary to invalidity of trade marks[3], designs[4], patents[5] and utility models[6], a term of litigation is not regulated for an invalidity request regarding geographical indications in the IPC. In other words, there is no time limit for invalidity request regarding geographical indications in the IPC.

II. Grounds for Invalidity

A. The register is not in compliance with any one of the conditions set out in the Articles 33, 34, 35, 37 or 39 of IPC

Geographical indications are regulated between the articles 33 and 54 of IPC (in the Second Book) with Traditional Speciality Guaranteed protection. According to art. 33, food, agricultural, mining, handicraft and industrial products resulting from unification of natural and human factors, which comply with the provisions in the second book of IPC, shall be entitled to geographical indication protection provided that they are registered. Geographical indication is the sign indicating a product that has become associated with a locality, area, region or country where it originates due to an apparent characteristic, its reputation or other features (IPC art. 34.1). Accordingly, for a geographical indication, there must first be an area with defined geographical boundaries means "soil" and a "product" originating from the natural and human elements belonging to this restricted area[7].

According to art. 34 of IPC, geographical indications are divided into two subcategory: Appellation of origin and designation of origin[8]. The names that identify products, which originate from a locality, region or in exceptional cases a country with designated geographical boundaries; that derive their all or principal characteristics from the natural or human factors exclusively attributed to this

3 See IPC art. 25.6.

4 See IPC art. 78.3.

5 See IPC art. 138.5.

6 See IPC art. 144.3.

7 Gonca Ilıcalı, "Coğrafi İşaretlere İlişkin Temel Yenilikler ve Geleneksel Ürün Adları" [Fundamental Improves About Geographical Indications and Traditional Speciality Guaranteed] (6769 sayılı Sınai Mülkiyet Kanunu Sempozyumu 9-10 Mart 2017, Banka ve Ticaret Hukuku Araştırma Enstitüsü, 2017) 224.

8 For the usage of the terms geographical indications, appellation of origin and designation of origin with a comparative perspective regarding the Turkish geographical indication law see: Burçak Yıldız, "Coğrafi İşaretlere ve Coğrafi Köken Gösteren Diğer İşaretlere İlişkin Olarak Uluslararası Sözleşmelerde ve Avrupa Birliği Hukukunda Kullanılan Kavramların Kapsamı ile Bu Kavramların Hukukumuza Uyarlanması Sorunu" [The Scope of the Consepts Used inInternational Treaties and European Union Law Regarding Geographical Indications and Other Indications of Geographical Origin and the Adoption Problem of these Consepts to Turkish Law] (FMR 2007/4) 33-95.

geographical area where their production, processing and all other operations take place, are appellation of origin. Namely, if the production, processing and other operations of the product take place *completely* in the said area, the geographical indications in this situation are called *appellation of origin*. In the case of appellation of origin, products take their "*all or essential characteristics*" from the geographical area from which they originate [e.g. Bordeaux Wine, Cuban Cigar, Antep (a city in the south east of Turkey) Pistachio[9]][10].

The names identifying products, which originate from a locality, region or in exceptional cases a country with designated geographical boundaries; that is associated with this region due to an apparent characteristic, its reputation or other features; where at least one of the steps from production, processing or other operations take place within the boundaries of the designated geographical area, are designation of origin. Namely, if *at least one* of the production, processing and other operations of the product takes place in this area, the geographical signs in this situation are called *designation of origin*. In the case of designation of origin, the products take their "*distinctive* -not all- *quality, reputation or other characteristics*" from the geographical area they originate from [e.g. Adana (a city in the south of Turkey) Kebab, Bafra (a town in the north of Turkey) Pita].

In summary, the appellation of origins are able to be used by the producers of a certain region, while the designation of origins are eligible to be used by anyone who produces according to the method of the relevant region, regardless of whether she/he is a producer of that region or not[11]. Also, names that are traditionally used to designate products which fulfil the conditions stated in the first paragraph of IPC art. 34.1, which are used in daily language and do not contain a geographical name may also be considered as appellation of origin or designation of origin even if those names do not include a geographical name[12].

Names that are not within above mentioned scope are not eligible to be registered as geographical indication. Nevertheless, if there are signs that are somehow registered as geographical indications, it is possible to request the invalidation of these signs. Except this, names that have become generic names of products[13]; plant species and varieties or animal breeds or other similar

9 Siirt (a city in the south east of Turkey) Pistachio is not eligible to be registered as geographical indication because it is one of the five types of Antep Pistachio, 11. Civil Chamber of Turkish Court of Cassation, decision no. 2018/6588 dated on 23 October 2018 (Banking and Commercial Law Journal, 2018/4) 381.

10 Ilıcalı (n 7) 224.

11 Cahit Suluk, Rauf Karasu and Temel Nal, Fikri Mülkiyet Hukuku [Intellectual Property Law] (3 rd edn, Seçkin, 2019) 344.

12 This exception was acceptable only for appellation of origin in the repealed decree-law no. 555 regarding geographical indications, Ilıcalı (n 7) 224.

13 e.g. Cheddar cheese, Eau de Cologne, Çağlar and others 208.

names, which may mislead the public as to the true origin of the product; names contrary to public order or general principles of morality; names that are not protected, whose duration of protection have expired or not used in their own country although having been applied by persons fulfilling the conditions set out in article 3 of IPC and names that are wholly or partially homonymic with a name that is registered or has already been filed, and which may mislead the public are subject of the invalidation request of a geographical indication (IPC art. 35.1).

In addition, it is possible to request the invalidity of the geographical indications in the absence of some of the geographical indication application documents counted in art. 37 of IPC. These documents are: Application form that contains information on the identity of the applicant and which category he is associated with concerning the persons with the right to apply within the meaning of Article 36 of IPC; in case the applying natural or legal entity is the only producer of the product, information and documents proving this case; the name of the geographical indication requested to be registered, information and documents about the eligibility of the product as an appellation of origin or as a designation of origin, the product group[14] that it belongs to, and its compliance with the definition of geographical indication; description of the product; technical information and documents describing the physical, chemical, microbiological and organoleptic properties of the product, and if necessary its raw materials; information and documents clearly identifying and designating the boundaries of the geographical area; information and documents regarding the production method of the product, and if relevant, local production techniques, practices and traditions which give the product its speciality; information and documents proving the link between the characteristics, reputation or other features of the product subject to the registration within the meaning of geographical indication definition and the defined geographical area; information and documents related to the historical background of the product in the specified geographical area; information and documents explaining the control procedures in detail in accordance with the provisions of Article 49 of IPC; information explaining the use of geographical indication, and if any, the procedures on labeling and packaging; information that the application fee has been paid. In addition to these conditions, it is possible to request the invalidity of geographical indications of which applications originating from foreign countries under the conditions regulated in the art. 39 of IPC.

[14] The term product group is used to obtain statistical information by classifying the products subject to geographical indication application and cannot be used to determine the scope of the right arising from registration, ibid 226.

B. The registration has not been made by those who have right to apply in line with the Article 36 of IPC

Producer groups; public institutions and organizations as well as Professional organizations accepted as public institutions related with the product or geographical area of the product; associations, foundations and cooperatives operating for public interest in relation to the product or authorized to protect the economic interests of their members and the relevant producer in case the product is produced only by a single producer, provided that he proves this case shall have the right to apply for registration of a geographical sign (IPC art. 36). As a result of that and as regulated in IPC art. 50.2 (b), it shall be accepted as a ground for invalidity whether the registration has not been made by one of these.

C. Controls are not carried out as set out in Article 49 of IPC

According to art. 49 of IPC[15], control of use of geographical indications shall cover; any type of operation related to controlling the conformity of their use to the specifications indicated in the register during production, marketing or distribution stages or their use in the market. In general, the inspection is carried out within the framework of the geographical boundary, raw material, production method and all other information in the registration certificate of the relevant product[16]. It is necessary to use the registered geographical indication together with the product to consider the product to be controlled[17]. When the relevant product is not used with the registered geographical indication, the control of the product in question is outside the scope of the industrial property law[18].

Control shall be carried out by the control authority specified in the application and whose competence has been approved by the Office. The control authority is the authority that is determined under the title of control in each registration document and is obliged to perform the control of the registered geographical

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15 For the control of use also see art. 45 of the Bylaw on the Application of the Industrial Property Code, Official Journal, 24.4.2017, No. 30047 <https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=23528&MevzuatTur=7&MevzuatTertip=5> accessed on 12 April 2023.

16 Türk Patent ve Marka Kurumu, Coğrafi İşaretler ve Geleneksel Ürün Adları Denetim Raporu Hazırlama Kılavuzu [Turkish Patent and Trade Mark Office, Geographical Indications and Traditional Specialties Guaranteed Control Report Preparation Guide], 1 < https://www.turkpatent.gov.tr/TURKPATENT/resources/temp/065ECF3E-E235-4AAE-BD97-C2918E916653.pdf> accessed on 12 April 2023.

17 ibid 1.

18 ibid 1. For example, when the words "Malatya (a city in the east of Turkey) Apricot" is not used with the product when an apricot produced in Malatya is put on the market, this product does not need to be subject to control.

indication[19]. The applicant is responsible for establishing a control authority consisting of specialized institutions and organizations in order to carry out the control process and to carry out the control duly[20]. The control authority must consist of objective institutions or organizations that are experts in their fields with commitments in the registration application[21]. The control authority is eligible to consist of any association, union, similar organization or company regardless of the legal form of establishment[22]. Namely, control authority is able to be a public or private legal person[23]. Change of the control authority stated in the register may be made upon approval of the Office.

The control authority should have sufficient personnel, equipment and other facilities to perform the control effectively. In addition to the production stages, the control authority is able to control also in case of complaint[24].

Control reports shall be submitted to the Office once a year after registration is published in the Bulletin. However, in case of complaints, the Office may request earlier submission of the reports. Whether a deficiency is found upon examination of the control reports, the registrant shall be notified and asked to correct the deficiencies within six months. Whether the deficiency is not remedied within the prescribed period or it is determined that control activities were not carried out in line with the procedure, the provisions of art. 43 of IPC shall be applied.

The registrant may claim the costs related to the controls from the parties subject to those controls. Procedure and rules for control shall be determined by the implementing regulation. The control stated in this (second) book covers the controls made by the control authority established by the applicant and shall not prejudice the provisions of the Code on Veterinary Services Plant Health Food and Feed dated 11.06.2010 numbered 5996 and other codes related to the control of geographical indications.

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19 ibid 1.

20 Türk Patent ve Marka Kurumu, Coğrafi İşaret Tescil Başvurusu Hazırlama ve İnceleme Esasları, [Turkish Patent and Trade Mark Office, Preparation and Examination Principles of Geographical Indication Registration Application] 4 < https://www.turkpatent.gov.tr/TURKPATENT/resources/temp/533E7857-C773-461F-B8DF-CD2BA8AA76B5.pdf > accessed on 12 April 2023; Türk Patent ve Marka Kurumu, Coğrafi İşaretler ve Geleneksel Ürün Adları Başvuru Kılavuzu, [Turkish Patent and Trade Mark Office, Application Guide of Geographical Indications and Traditional Specialties Guaranteed] 14 < https://www.turkpatent.gov.tr/TURKPATENT/resources/temp/6B3F914C-E72C-437C-8A30-F50C51DE0A23.pdf > accessed on 12 April 2023.

21 Application Guide (n 20) 15.

22 Çağlar and others (n 2) 254.

23 ibid 254.

24 Application Guide (n 20) 15.

In case the control procedures are not carried out as specified or the deficiencies are not completed within the given time, it is possible to be decided to deem the registered geographical indication invalid[25].

III. Effects of Invalidity (IPC art. 51)

In case a geographical indication has been decided as invalid by the court, the legal protection provided by IPC for the registered geographical sign shall be deemed not to have arisen. Without prejudice to claims of compensation by persons having the right to use a registered geographical sign for damages caused by bad faith, the retroactive effects of invalidity shall not extend to the following:

a. Any final judgements for infringement of registration rights reached and enforced prior to the decision of invalidity;
b. Contracts concluded and executed prior to the decision of invalidity.

However, partial or total reimbursement of sums paid under the contracts may be claimed on grounds of equity, in scope of contracts concluded and executed prior to the decision of invalidity. Final court decision shall be notified to the Office by the Court ex officio. The geographical sign deemed as invalid, shall be cancelled from the register and information regarding the cancellation is published in the Bulletin. Where invalidity of a geographical indication is claimed, decisions in legal proceedings may not be executed until the final verdict and verdict annexes (IPC art. 162).

CONCLUSION

According to art. 50 and 51 of the IPC, it is possible to request the invalidation of a geographical indication in the presence of certain conditions. First of all, according to art. 50.1 of IPC, invalidity of a geographical indication may be requested from the court by people who have interest. The courts commissioned for legal proceedings regarding invalidity of a geographical indication shall be civil courts of intellectual and industrial property rights and criminal courts of intellectual and industrial property rights (IPC art. 156.1). It should also be emphasized that contrary to invalidity of trade marks, designs, patents and utility models, a term of litigation is not regulated for an invalidity request regarding geographical indications in the IPC. In other words, there is no time limit for invalidity request regarding geographical indications in the IPC. Grounds for invalidity of geographical indications are regulated in art. 50.2 of IPC. According to this article, the court shall decide the registered geographical indication or traditional specialty guaranteed invalid, in case, the register is not in compliance with any one of the conditions set out in the art.

[25] ibid 15.

33, 34, 35, 37 or 39; the registration has not been made by those who have right to apply in line with the art. 36; controls are not carried out as set out in art. 49 of IPC. In case a geographical indication has been decided as invalid by the court, the legal protection provided by IPC for the registered geographical sign shall be deemed not to have arisen (art. 51.1 of IPC). In principle, invalidity decision of a geographical indication has a retroactive effect. However, any final judgements for infringement of registration rights reached and enforced prior to the decision of invalidity and contracts concluded and executed prior to the decision of invalidity are exceptions of this retroactive effect. Finally, where invalidity of a geographical indication is claimed, decisions in legal proceedings may not be executed until the final verdict and verdict annexes (IPC art. 162).

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THEORETICAL FRAMEWORK TO INTERFERE FREE SPEECH AND TURKISH CONSTITUTIONAL LAW PRACTICE*

İfade Özgürlüğünün Kısıtlanmasının Teorik Çerçevesi ve Türk Anayasa Hukukundaki Uygulaması

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ABSTRACT

The right to free speech is an indispensable part of human rights which promotes the values such as democracy, self-fulfilment, the marketplace for ideas/search for truth, tolerance, and pluralism. These values reflect the interrelation between the right to free speech and other rights. Speech act has a consequentialist nature and might create harm to or conflict with the rights of others. This means the right to free speech is a qualified right rather than an absolute one. The process of limiting free speech is not well defined and tends to bear different meanings and necessities based on the situation, time, and place. The consequentialist nature of the speech act is subject to intervention. There are various theoretical justifications for why and how to make legitimate interventions on the right to free speech. Thus, harm, danger, threat, or crime caused by speech can be prevented based on theoretical justifications such as the militant democracy, the conflict of liberties, the true threat test, the clear and present danger test, the harm principle, and criminalising speech. First, these justifications will be evaluated. Following, Turkish jurisdiction is assessed as a case considering these justifications and to analyse how Turkish constitutional law justifies restricting the right to free speech.

Key Words: Freedom of Speech, Justifications to Interfere, Turkish Constitutional Law

ÖZET

İfade özgürlüğü diğer hakların uygulanmasının ayrılmaz bir parçası olarak demokrasi, bireyin kendini gerçekleştirmesi, fikirler piyasası/doğrunun arayışı, tolerans ve çoğulculuk gibi değerlerin gerçekleşmesini sağlamaktadır. Bu değerler ifade özgürlüğü ve diğer hakların karşılıklı ilişkisini yansıtması açısından çok önemlidir. Gerek bu ilişki gerekse de ifadelerin sonuçsal doğası sebebiyle ifadeler zarar, tehlike, tehdit, suç

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veya diğer haklarla bir çatışma doğurabilmektedir. Bunun anlamı ifade özgürlüğünün mutlak bir hak olmaktan ziyade kısıtlı/şartlı bir hak olması anlamına gelmektedir. Bu minvalde meşru bir kısıtlamanın yapılabilmesi için farklı yargı sistemlerince teorik gerekçeler geliştirilmiştir. İfade özgürlüğünün sınırlandırılma süreci yer, zaman, ve durum gibi unsurlara bağlı olarak farklı anlam ve bağlamda kullanılabilmektedir. İfadelerin sonuçsal doğası gereği sınırlandırılabilir olduğu bir gerçekliktir. Tüm bu nedenlerle, ifadelerin zarar, tehlike, tehdit veya suç oluşturmaları halinde nasıl sınırlanabileceği sorunsalı militan demokrasi, özgürlükler arası çatışma, açık ve mevcut tehlike testi, gerçek tehlike testi ve zarar prensibi gibi prensipler/gerekçeler ile değerlendirilmiştir. Ayrıca Türk Anayasa hukuku bir olay çalışması olarak, tarihsel olarak öne çıkan bu prensipler/gerekçeler dikkate alınarak değerlendirilmektedir. Turk hukuk sisteminin ifade özgürlüğünü hangi teorik gerekçelere dayandırdığı ele alınması gereken bir husutur.

Anahtar Kelimeler: İfade Özgürlüğü, Kısıtlama Gerekçeleri, Türk Anayasa Hukuku

INTRODUCTION

The right to free speech is a highly valuable human right due to being a necessity of many values such as democracy, self-fulfilment, the marketplace for ideas/search for truth and tolerance, and pluralism. These are the justifications for the right to free speech and reflect the interrelation between the right to free speech and other rights such as freedom of thought, conscience, religion and association and assembly. Free speech produces individual and social good by contributing to these values. But, consequences of speech acts are not always good or positive as they might create harm, danger, threat, or crime conflicting with the rights and interests of others. Thus, free speech should be balanced against the rights and benefits of others. This means the right to free speech is a qualified right rather than an absolute one. For this reason, the right to free speech can be exceptionally limited to protect the rights of others or to resolve the conflict between the rights. There are various theoretical justifications for why and how to make legitimate interventions on the right to free speech. For instance, many jurisdictions have never considered obscenity, child pornography, hate speech and incitement to terrorism and violence as free speech due to their conflict with other rights. So *"speech ... is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of a conflict."*[1] Thus, the jurisdictions have developed prominent justifications to interfere with the right to free speech to prevent harm, danger, threat, or crime that undermines the rights of others. The US, the Council of Europe (the European Court of Human Rights), and Turkey, with their legal doctrine, have developed and used

[1] Fish, S., There's No Such Thing as Free Speech…and it's a good thing too. (New York: Oxford University Press 1994) 104

these prominent justifications even though they are not well defined and tend to bear different meanings and necessities based on the conditions, time, and place. Here the question appears to be how the right to free speech is restricted based on these theoretical frameworks and how these frameworks influence Turkish Constitutional law and justice.

This paper starts by explaining the definition of speech act and highlights its consequentialist nature, which is subject to intervention. This reveals that speech acts might cause harm, danger, threat, or crime, and the right to free speech can be restricted based on theoretical justifications such as the militant democracy, the conflict of liberties, the true threat test, the clear and present danger test, the harm principle, and criminalising speech. Both legal scholars and judges develop these theoretical justifications. In the last part of this paper, Turkish Constitutional law will be evaluated as a case study based on these theoretical justifications.

A. The Nature of Speech Act

The subject of law is the act which may cause disputes with others. Speech is one of the acts that humans conduct for many reasons to produce consequences and outcomes. Austin classifies speech acts into three categories; 1) locutionary act means saying words in the normal sense, and speech is delivered; 2) illocutionary act covers that saying words explains `the meaning of the word` on the way we use the locution; the words are used on occasion. The illocutionary act comes forward with locutionary act itself; 3) perlocutionary act is that saying words produces consequences on feelings, thoughts or actions of the listeners or the speakers with or without the intention of speakers.[2] These three acts show that using language is not only about producing meaningful sounds but also individuals can produce consequences from speech. Thus, the extent of the philosophical, societal, political, or legal meaning of free speech relies on the analysis of this act to define its scope.

Austin`s categorisation of speech act is based on a narrow sense but exchanging ideas and opinions as a communication act does not mean only words spoken and written; it is broader than words - `what is being said through behaviour`.[3] Scanlon considers the scope of speech acts comprehensively, including displays of symbols, demonstrations, musical performances and even some bombings and assassinations. In short, any attempt to propose or behave is regarded as an act of expression.[4] From the perspective of the self-expressive

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2 Austin J. L., How to Do Things with Words (OUP, 1962) 101-6.

3 Trager R. and Dickerson D.L., Freedom of Expression in the 21st Century (Pine Forge Press 1999) 18.

4 Scanlon Thomas, 'A Theory of Freedom of Expression' (1972) 1 Philosophy & Public Affairs 204-226, 206.

aspect of communication, occupation, preference, residence, hobbies, other recreations, and so on can all be considered acts of speech.[5] As a result of such a broad definition of speech act, the law on free speech appears with unclear and vague boundaries; for example, if bombings and assassinations are subject to the law on free speech, governments commit to broadly restrict freedom of speech with criminal law or anti-terror law justifications.[6]

In this matter, the principle of free speech is the core element to drive the boundaries of the meaning of the speech act. Here, the meaning of speech act adopted by jurisprudence and constitutional philosophy determines what to include in the term 'speech act' by using a categorical definition, deciding case by case, or combining both methods.[7] This determination process draws the extent of the definition of a speech act; a doctrine of freedom of speech decides to what extent a speech act can be defined in a broader or narrower sense.[8]

Also, speech acts can be categorised by the law as protected (for instance, political, artistic, commercial speech etc.) or unprotected (incitement to violence and terrorism and hate speech etc.).[9] Inciting speech, for example, is in the classification of the perlocutionary act due to its possible convincing nature. Here, the success of inciting speech depends not only on the speaker but also on the listener.[10] The speaker's intention is not core for the consequence; it may occur without the intention of the speaker or listener. In a perlocutionary act, there must be persuading and persuaded persons, and the success of the persuasion process.[11] Those elements are enough to constitute a perlocutionary act. Likewise, 'by doing x, I was doing y',[12] - persuading or convincing others by speaking. The condition for such influence/convince is the success of incitement to be a perlocutionary act; if there is no success, incitement will be an illocutionary act. Thus, the consequentialist nature of speech acts reveals that free speech can be restricted to prevent harm/crime to others.

B. Rationales to Interfere Free Speech

Generally, if an action is deemed harmful or potentially harmful, this is the most fundamental reason to restrict such action.[13] For instance, "driving

5 Schauer, Frederick, 'Must Speech Be Special' (1983) 78 Northwestern University Law Review 1284-1306, 1291.
6 Barendt Eric, Freedom of Speech (UOP, second Ed, 2005) 79.
7 Trager (n 3) 28.
8 Barendt (n 6) 2.
9 Scanlon (n 4) 207.
10 Kurzon Dennis, 'The Speech Act Status of Incitement: Perlocutionary Acts Revisited' (1998) 29 Journal of Pragmatics 571-591, 574.
11 Ibid, 576.
12 Austin (n 2) 107.
13 Greenawalt Kent, Speech, Crime, and the Uses of Language (OUP, 1989) 9.

a car 100 miles per hour is forbidden because people are likely to get hurt."[14] Therefore, freedom of action can be legitimately restricted for individual or social good. As in the case of freedom of action, freedom of speech can be restricted for legitimate reasons.[15] Here, it is essential to indicate Mill`s opinion about the limitation of freedom of action; there is a limit for any action if there is justifiable cause such as `harm to others`, `unfavourable sentiments` and being a nuisance to other people.[16] Mill justifies the limits of free speech by giving a famous example in his work `On Liberty` is:

> *"No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed about among the same mob in the form of a placard."*[17]

The limits of freedom of expression are predominantly justified because speech might cause harm rather than realising democracy, self-fulfilment, tolerance, or pluralism.[18] Harmful speech, as Mill claims in his example, should be criminalised.

Justice Holmes uses the example of *"falsely shouting fire in a theatre and causing a panic"* demonstrates the potential of a speech act in the case of harm to others. A real incident occurred with the same effect: an unknown agitator shouted fire at a Christmas party by striking workers for their kids. The panic at the party caused the death of sixty-two children and eleven adults in 1913.[19] This instance shows that speech may have a consequence demonstrated by the likelihood of a casual or intended relationship between the speech and the action. Some speech content may provide a legitimate reason for restricting

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14 Ibid

15 McCloskey H.J, 'Liberty of Expression: Its Ground and Limits (I)' (1970) 13 Inquiry 219-237, 220.

16 Mill J.M., On Liberty (fist published 1859, Batoch Books 2001) 52.

17 Ibid

18 Feinberg, J., Freedom and Fulfilment: Philosophical Essays – The Moral Limits of the Criminal Law (Princeton University Press 1992) 128.

19 Schenck v. United States, 249 U.S. 47, 52 (1919), 5; Philip S. Foner, History of the Labour Movement in the United States (New World Paperbacks 1980) 221-22; Vernon H. Jensen, Heritage of Conflict (Cornell University Press 1950) 285-86; Baker C. Edwin, `Harm, Liberty, and Free Speech` (1979) 70 Southern California Law Review 979-1020, 982-3.

speech, and it is agreed by most liberal scholars that there must be protection against such harmful speech.[20] The free speech clauses of any legal code or constitution never provide protection which covers all speech. For instance, speech such as fighting words, obscenity, child pornography, incitement, and hate speech is not protected by law.

Furthermore, the law requires restrictions on speech to prevent harm in order to promote and ensure the justifications of free speech. These aims have been clearly shown `by a twofold dictum: do not harm others; promote respect for others`.[21] Speech content requires respecting others` beliefs and ideas to deserve the same respect from others. Interfering free speech has been justified by *"the probability of serious harm of injustices, or lack of respect for persons, their happiness, and welfare, or of loss of progress, e.g."*[22] The restrictions on free speech can be determined depending on the necessity, desirability and legitimacy of the circumstance in which speech is made. For instance, if the speech instils a specific idea in others, causes panic, breaches the peace, or incites crime or violence, then such speech would be restricted. The legitimate aim is to prevent such harm by using criminal law. In this case, anyone who counsels, commands, encourages or incites other(s) to commit a crime will be subject to criminal law or will be guilty if the person is an integral and essential part of the commission of a crime.[23] While limiting free speech, the importance of social good is achieved by restriction, or in other saying, the relation between restriction and achievement is essential for legitimating the limitation.[24] So, a legitimate reason is essential to limit speech to prevent harm, danger or threat caused by speech. There are plenty of formulations to justify interfering with free speech in different jurisdictions.

C. Theoretical Justifications to Interfere the Right to Free Speech

Various justifications to interfere with rights have emerged through historical and philosophical differences between legal traditions and jurisdictions.[25] Certain types of speech have been excluded from legal protection based on different theoretical justifications, such as the militant democracy, the harm principle, the clear and present danger test, the true threat test, the conflict of liberties, and the criminalisation of speech. These justifications are not

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20 McCloskey (n 15) 221.

21 Cohen-Almagor Raphael, Liberal Democracy and the Limits of Tolerance: Essays in Honour and Memory of Yitzhak Rabin (The University of Michigan Press, 2000) 2.

22 McCloskey (n 15) 227.

23 Feinberg, (n 18) 141.

24 Sadurski Wojciech, Freedom of Speech and Its Limits (Kluwer Academic Publishers 2001) 38-39.

25 Sottiaux Stefan, Terrorism and the Limitations of Rights: the ECHR and the US Constitution (Hart Publishing 2008) 20.

independent of political theory or jurisprudence.[26] For instance, drafting the Bill of Rights was prompted by apprehension about the federal government abusing its powers.[27] The Council of Europe prompted the European Convention on Human Rights as a reaction against European totalitarianism and the horror of the Second World War. The objective of the Council was to develop and guarantee democracy and fundamental rights in every Member State.[28] The US Constitution formulates freedom of speech standards as an absolute right with no responsibilities.[29] The European Convention is based on a political tradition that balances individual and public interests to guarantee all citizens' equality and dignity and maintain the features of democratic government.[30] Due to this, the European tradition is more interventionist than the US tradition. The European Convention would limit liberties by using the reasonings of national security and public order. Restriction clauses of the Convention are outlined not only by limitation and derogation clauses but also by Article 17 of the Convention, which prohibits the abuse of rights and represents the militant democracy approach.[31]

The European Convention generously defines its approach to freedom of speech by giving the scope of freedom of speech in Article 10 (1). At the same time, Article 10 (2) of the Convention highlights that free speech is not an absolute right by carrying duties and responsibilities. The Convention provides a clear mechanism restricting the right to free speech. In contrast, the First Amendment uses absolute terms: "Congress shall make no law (…) abridging the freedom of speech or the press". Some Supreme Court Judges stated that the Supreme Court should read the law literally and regard freedom of speech as an absolute right, but most other judges did not consider free

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26 Feinberg, (n 18) 128.

27 John E Nowak and Ronald D Rotunda, Constitutional Law (St Paul, West Group, 2000) 339–46; Geoffrey R Stone, Louis M Seidman, Cass R Sunstein and Mark V Tushnet, `Constitutional Law` (New York, Aspen Law & Business, 1996) 1–23.

28 Robertson AH., Human Rights in Europe (Manchester University Press, 1963) 1; Pierre-Henri Teitgen, 'Introduction to the European Convention on Human Rights' in RStJ Macdonald, F Matscher and H Petzold, The European System for the Protection of Human Rights (Leiden/Boston, Martinus Nijhoff, 1993) 3

29 Glendon Mary Ann, Rights Talk: The Impoverishment of Political Discourse (Northampton, The Free Press, 1991) 34, Birks Peter (ed), Pressing Problems in the Law, vol 1 (OUP 1995) 109, 125, 149; David Feldman, 'Content Neutrality' in Loveland I (ed), Importing the First Amendment: Freedom of Expression in American, English and European Law (Hart Publishing, 1998) 139; Aernout Niewenhuis, 'Freedom of Speech: USA vs Germany and Europe' (2000) 18 Netherlands Quarterly of Human Rights 195.

30 Claire L'Heureux-Dube, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 Tulsa Law Journal 15-40, 35, see also Sottiaux (n 25) 21.

31 Sottiaux (n 25) 22.

speech absolute.[32] A majority of Supreme Court Judges have accepted that all speech is not protected under First Amendment despite the absence of a limitation clause.[33] These two jurisdictions have sought to balance free speech and other conflicting rights and interests. Free speech is directly concerned with the political background formed by a military coup in Turkey in 1980. With an evolving process, Turkish jurisdiction has erased such guardianship relying on more systematic and legitimate justifications to interfere with free speech. The following theoretical justifications have been developed based on their conditions and context in their time and places. This means these are not the final and best practice of such justifications, even some are depreciated and outdated, but others might become on the front, and new justifications can be developed.

1. The Militant Democracy

The modern democratic states are designed by the experience of the totalitarian and inter-war periods. Democracy is an indispensable vehicle for the enjoyment and development of fundamental rights.[34] It is an essential system for guaranteeing rights and liberties but can be abused and deteriorated by anti-democratic sets.[35] This approach is a process to decide which sorts of speech, associations or political ideas are compatible with democracy. If political activity or speech is not compatible with democracy, then it does not deserve protection under the democratic system. If yes, they would be guaranteed by law and the government. The militant democracy is based on an active stance to prevent anti-democratic actors from using rights as the principal values of democracy before "the Trojan Horse by which the enemy enters the city".[36] The militant democracy approach prefers to dissolve political parties which are extreme and contrary to the state system to prevent the destruction of democracy. To protect democratic principles, militant democracy is to restrict the freedom of speech and association of groups and individuals based on the threat of destruction of democracy.[37] The Militant democracy is a type of

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32 Ibid 71. see also, for absolutist approach; Justice Black in Koningsberg v. State Bar, 366 US 36 (1961) at 61, see also, Hugo L Black, A Constitutional Faith (New York, Knopf, 1968) 45 ('I simply believe that "Congress shall make no law" means Congress shall make no law.'), for non-absolutist position; Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) Supreme Court Review 245-266, 253

33 Sottiaux (n 25) 72.

34 Ibid 6.

35 See more, Communist Party of Germany (KPD Case), the Commission approved of the prohibiting of the Communist Party in the Federal Republic of Germany.

36 Loewenstein Karl, 'Militant Democracy and Fundamental Rights' (1937) 31 the American Political Science Review 417-432, 424.

37 Karagoz Kasım, 'The Dissolution of Political Parties Under the Jurisdiction of The European Court of Human Rights and Examining the Case of Welfare Party According to

constitutional democracy pre-emptively limiting the rights to protect political and civil freedoms for democracy.[38] The provisions related to anti-terror, association (expressly political parties), assembly, or hate-speech laws, are used by this approach to prevent anti-democratic sets.[39] The European Court of Human Rights interpreted the European Convention as a militant democracy tool to prevent the political parties that run counter to the Convention's values and democracy.[40] The state has positive obligations to protect individual freedoms before such an anti-democratic political party gets hold of power.[41] For instance, in the case of the German Communist Party, which aimed to establish a totalitarian regime and advocate an anti-democratic regime, The European Court decided its closure was compatible with the Convention as an application of Article 17.

2. Conflict of Liberties

Free speech might conflict with other rights even though rights are clearly defined; they might be in conflict because their outer boundaries are not stable.[42] Restricting free speech can be a solution to end such conflict and injury to the rights of others.[43] Speech might violate personal security, liberty, privacy, reputation, citizenship, and equality by producing harm and injustice to these rights. It may also conflict with self-fulfilment, such as happiness, moral development, values, and moral rights, by insulting and harassing them.[44] Yet, the law sets the balance between these rights to secure fundamental rights reasonably. For instance, the aim of the US Supreme Court is not to maximise free speech at all costs but to balance the rights and harmonise free speech with other rights.[45] Free speech promotes the good of society and individuals,[46] but other rights such as personal security, privacy, and reputation also promote the good of society and individuals. It is because a society or an individual can't enjoy the good of all rights at an unlimited level. One will be sacrificed for another to attain the good of one of these rights.[47] Human rights are not arrayed

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the Venice Commission Reports' (2006) 1 Gazi Üniversitesi Hukuk Fakültesi Dergisi 311-348, 322.

38 Loewenstein (n 36) 424.

39 Macklem Patrick, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-determination' (2006) 4 International Journal of Constitutional Law 488-516, 488-9.

40 Ibid 507.

41 The classic "militant democracy" case under the ECHR is Communist Party (KPD) v. the Federal Republic of Germany at 101-103

42 Jeremy Waldron, Liberal Rights; Collected Papers 1981-1991 (CUP 1993) 203-224.

43 Heyman J. Steven, Free Speech and Human Dignity (Yale University Press 2008) 70.

44 McCloskey (n 15) 47.

45 Heyman (n 43) 77.

46 Ibid 80. See also, Abrams v. United States, 250 U.S. 616, 630 (1919)

47 Heyman (n 43) 80.

vertically in constitutional law; thus, there is no basis for defining which right is more important than the other.[48]

When the rights conflict with each other, judicial bodies have difficulty determining which right deserves more protection than the other.[49] Several criteria have been developed by the European Court of Human Rights to decide which right will be weighed or limited after considering all the circumstances of a particular case.[50] Firstly, the 'impact criterion' is used to restrict the rights which produce harmful impact or infringement on the rights of others. In other words, it is better to protect the right Y, whose exercise is less harmful than the right X, leading to severe impairment.[51] It is about preferring/protecting the less harmful exercise of the right between the conflicting ones. Secondly, the `core/periphery criterion` determines which right has a core aspect of deserving more protection than the other. The third one is the `additional rights criterion`, assessing the conflict between more than two rights. When the right Y of person A and additional right Z of person A is violated by exercising right X of person B, the right Y of person A will be weighed against the right X of person B.[52] The fourth criterion is the `general interest criterion`. Here general interest or public good play a significant role in determining which right will deserve more protection. The fifth one is the `purpose criterion`. When the exercise of a particular right depends on the exercise of another`s right, the Court requests the individual to exercise a certain right to protect the right of another.[53] Lastly, the `responsibility criterion` dictates that one exercises his right because of the responsibility to exercise the right.[54]

These criteria provide specific guidelines while determining which right will be weighed in the case of a conflict of rights. The conflict between freedom of speech and other rights has been solved by using these criteria. For instance, the dispute between free speech and the right to reputation can often be resolved by impact criterion. This is because individuals are responsible for protecting the reputation of others. Here, the conflict is easily resolved by preserving the right of reputation because the duties and responsibilities for the right of a reputation, as stated in 10(2) ECHR, allow restricting speech to protect the reputation of others. In the case of incitement to terrorism and violence, the conflict between free speech and the right to life, personal security, property

48 Bork H. Robert, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Indiana Law Journal 1-35, 11-12.

49 Smet Stijn, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict' (2010) 26 American University International Law Review 183-236, 189.

50 Ibid

51 Ibid

52 Ibid 190.

53 Ibid

54 Ibid 191.

etc., can be solved by using these criteria because each criterion provides a different viewpoint while solving the conflict. The conflict between inciting speech and other rights may require using more than one of these criteria. There could be a comprehensive and fair determination for the right that deserves to be protected against other rights.

Speech might threaten the rights of others and their exercise due to its harmful consequences. For instance, hate speech might produce emotional distress and psychological harm to others. Even such speech might establish an environment which creates physical threats by inciting hatred between individuals and among society. Likewise, incitement to terrorism creates disorder and national security problems by producing violence and oppression of individuals to affect its political will. As a result, such speech could be restricted to protect the right of others. In this sense, national and personal security is essential for individuals to express themselves freely. Free speech and other rights may not be valid or indicated within this environment when faced with the absence of security. For that reason, when speech incites insecure social and political intentions, it could be restricted to protect human rights in general.[55] However, if the restriction on free speech does not rely on reliable and well-founded criteria, the restriction itself will harm these rights and values. Hence, the purpose of the restrictions should be in line with the consequence of the restrictions.

Indeed, there can be no clear answer while weighing one right against the other; it is a many-sided procedure. In some cases, the answer is simple because the threat and danger caused by speech are imminent and clear, but in other cases, deciding which right will be weighted is complicated.[56] Thus, balancing rights or solving conflicts must concentrate on significant issues, such as different forms of liberties and their relative values, which should be considered.[57] There is an attempt to draw the boundaries of free speech from time to time, and this time process changes the limits of freedom of speech. It is because; the restriction on free speech is a reality but the extent of limits of free speech is not clear and is based upon the needs of the time.[58] This criticism leads to the debate to what extent free speech is limited as a subject to politics, law, economy, sociology, etc.

3. The True Threat Test

Some speech content can produce threats based on its possible influence to cause physical force or violence to the chosen victims or those related to

55 Heyman (n 43) 72.
56 Ibid 73.
57 Ibid
58 McCloskey (n 15) 221.

the victims and property.[59] Determining the potential consequences of speech acts is an essential criterion to define a true threat. A threat to someone means a psychological fear in the person and people around him (family or relatives etc.). Those under the fear could have a myriad of psychological and health problems, such as nightmares, heart problems, inability to work, loss of appetite, and insomnia.[60] Such psychological problems disrupt the victim, his circle and the general public.[61] Therefore, free speech regulations aim to limit threatening speech in individual and public spheres by criminalising such speech.[62] The regulation of free speech is necessary because firstly, to secure people from fear of violence; secondly, to prevent the conditions which cause panic, threat, and scare; thirdly, to imprison individuals who threaten to commit a crime before they have a chance to commit the crime; and fourthly, to protect people from being forced to do something that is against their self-control.[63] The law should identify such a threat, and be sanctioned before the threat is committed as a crime. Limiting speech crime can be defined as `pre-crime` or early prevention of crime, which requires more surveillance of speakers. Legal institutions are willing to reduce the possibility of crime by interfering with a crime in its very early stage to fulfil the necessity of their own free speech regulations and criminal laws.[64]

4. The Clear and Present Danger Test

Justice Holmes established the clear and present danger test in Schenck v. United States, which was about anti-war propaganda by the general secretary of the Socialist Party. He attempted to mail fifteen thousand leaflets to the men enrolled for military service to get involved in the First World War. As a result, he was convicted under the 1917 Espionage Act for discouraging the recruitment of soldiers and causing disobedience in the army by distributing these leaflets.[65] The conviction of Schenck was affirmed based on Holmes` test:

> *"is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring*

59 Greenawalt (n 13) 111.

60 Arne Ohman, `Fear and Anxiety as Emotional Phenomena: Clinical Phenomenology, Evolutionary Perspectives, and Information-Processing Mechanisms, in Handbook of Emotions` (Michael Lewis & Jeanette M. Haviland, 1993) 512-14; see also Rotiman Jennifer E., 'Freedom of Speech and True Threats' (2011-2012) 25 Harvard Journal of Law and Public Policy 283-367, 291.

61 Greenawalt (n 13) 290.

62 Ibid

63 Rotiman Jennifer E., 'Freedom of Speech and True Threats' (2011-2012) 25 Harvard Journal of Law and Public Policy 283-367, 290.

64 Zedner Lucia, 'Pre-crime and Post Criminology' (2007) 11 Theoretical Criminology 261-281, 265.

65 Schenck v. United Stated, 249 US at 48-49 (1919)

about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree".[66]

This test is to define whether speech is likely to cause unlawful action. If the tendency and purpose of the speech act constitute a clear and present danger, the speech will be perceived as a cause for the criminal act.[67] In contrast, Justice Hand criticised the degree and proximity approach, and he came up with the `direct incitement` standard, which was constituted in the case of Masses v. Patten.[68] Direct incitement test focuses on the examination of the actual words of the speaker, not on the possible consequence of the speech.[69] The clear and present danger test focuses on the probable consequence of the speech, valid only as a post hoc description of unlawful speech. Still, this standard does not draw the prospective direction for the line between lawful and unlawful speech.[70]

It should be borne in mind that the clear and present danger test has two sets of problems which emerged in the decisions issued. Firstly the test is strictly consequentialist based on the result produced by the speech and absent of consideration of the speaker`s intent.[71] Another problem is that the consequence is regarded as adequate justification for the suppression of speech, and the test needs a precise definition for the clarity and presentness of the danger.[72] Likewise, Hand exaggerated his alternative `direct incitement test` because it is also based on the consequentialist approach, which allows the Court to restrict speech when it encourages others to break the law.[73] It seems the criminalisation of the `direct incitement` test considers the speaker's intent as a part of the test process. Brandenburg is another relevant case to the clear present danger test; the Court limited the test to `advocacy of the use of force or law violation` unless the advocacy has caused imminent lawless action.[74]

Only where the 'clear and present danger test' aims to minimise the potentially harmful consequence of speech.[75] Yet, in the case of Dennis, Justice Douglas stated that the Communist Party`s activities in the US created consequences

66 Ibid
67 Ibid
68 Kretzmer David and Hazan F. K., Freedom of Speech and incitement Against Democracy (Kluwer Law International, 2000) 16.
69 Ibid
70 Ibid 17.
71 Ibid 20.
72 Ibid
73 Ibid
74 Brandenburg v. Ohio, 395 U.S. 447, see also Hans Linde, 'Clear and Present Danger Re-examined: Dissonance in the Brandenburg Concerto' (1970) 22 Stan. L. Rev. 1163-1186, 1163.
75 Kretzmer (n 68) 22.

but no real danger to the government.[76] Here, the Court defined unwanted ideas rather than that speech is likely to cause unlawful action. Thus, when the court evaluates harmful consequences, it should be aware of subjectivity. The court can reach a more objective evaluation by not making a general illustration of long-standing harm but specific illustrations of imminent harm. In the case of Dennis, the danger test construed the harm in a broad sense.[77] But, the clear and present danger test and the direct incitement tests were the attempts to describe the proper limits of the criminalisation of speech and to prevent the commission of a crime.[78]

5. Harm Principle

The harm principle is also based on the consequentialist approach that speech may harm other rights and interests. Speech is harmless or less harmful than other acts because speech act is possibly harmless in a physical way: speech cannot directly create physical harm to someone, except for high volume sound. Yet, speech act might cause harm, or it may constitute the conditions of harmful actions: "sticks and stones can break my bones, but words ..."?[79] Speech causes or is to likely cause harm if we extend the definition of harm in cover indirect physical or no-physical harm. The life, body, property, health and personal integrity of others could be harmed by an act of a person.[80] In this sense, harm means `set back of a person's interests`, which consists of two components: first, it must create a sort of unfavourable influence or danger on its victim`s interests; second, it must be caused wrongfully in violation of the victim`s freedom.[81] This definition contributes to regulating certain speech content, which harms the exercise of liberties. The harm principle provides legitimate and relevant reasons for panel legislation while limiting liberties. This legitimate reasoning comes with the principle that,

> *"(1) it is necessary to prevent hurt or offence (as opposed to injury or harm) to others (the offense principle); (2) it is necessary to prevent harm to the very person it prohibits from acting, as opposed to "others" (legal paternalism); (3) it is necessary to prevent inherently immoral conduct whether or not such conduct is harmful or offensive to anyone (legal moralism)."*[82]

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76 Dennis v. United Stated 341 U.S. 495 (1951)
77 Kretzmer (n 68) 23.
78 Ibid 24.
79 Baker (n 19) 987
80 Persak Nina, Criminalising Harmful Conduct the Harm Principle, its Limits and Continental Counterparts (Springer 2007) 48.
81 Feinberg, (n 18) 3-4.
82 Feinberg, J., Offence to Others: The Moral limits of Criminal Law (OUP, 1985) IX.

In this case, speech can be subject to criminal prohibitions in a legitimate and reasonable sense.

Therefore, the harm principle is one of the reasons to justify limiting free speech. Here, interference with free speech is to prevent the harm produced by speech to other individuals and the public interest. Similarly, Joel Feinberg asserts that,

> *"[i]t is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values*".[83]

Hence, insulting, offensive or inciting speech may increase the possibility of harmful conduct such as assault, murder, or terror.[84] When the speech causes pain, injury, or a severe setback of interest, such harmful speech will be regulated.[85]

The seriousness of the harmful conduct is a core factor in determining which conduct can be criminalised. The harm principle must provide a criterion to determine the seriousness of harm to overcome the challenge of establishing legal limits on harmful speech. Feinberg determines the seriousness of harm by knowing,

> *"(1) the intensity and durability of the repugnance produced, and the extent to which repugnance could be anticipated to be the general reaction to the conduct that produced it ... (2) the ease with which unwilling witnesses can avoid the offensive displays; and (3) whether or not the witnesses have willingly assumed the risk of being offended either through curiosity or the anticipation of pleasure."*[86]

These criteria do not give a specific answer to the questions of "How is the seriousness of harm defined?" and "What harm does it do?".[87]

Furthermore, likelihood is the primary determinant in the harm principle. Here, harm depends on the extent to which the speech increases the probability of harm. And this focuses on the determination of the seriousness of the harm. Likelihood entails that an act is likely to cause harm. Hence cause is vital to

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83 Feinberg, J., Harmless Wrongdoing – The Moral Limits of the Criminal Law (Oxford University Press, 1988) xix.

84 Kretzmer (n 68) 48.

85 Baker (n 19) 987

86 Feinberg, (n 82) 26.

87 Dudley R., 'A Reformulation of the Harm Principle' (1978) 6 Political Theory 233-246, 245.

understand harm and criminalisation of speech; it is a precondition to creating guilt and crime.[88] When the person`s conduct generates a likelihood of harm, he is responsible for that act. This gives rise to the question of what constitutes likelihood. The answer might be based on the chosen theory of causality relying on the philosophy of fair imputation of criminal responsibility rather than mechanical and physical causation.[89] It is unclear what sort of likelihood or dangerousness (enough to cause harm) is considered harmful, which is legitimately criminalised under the harm principle.[90] It is important to note that direct physical harm is easy to count as harm under the harm principle. Yet, a qualification of indirect non-physical harm is unclear under the same principle. What sort of harm is to be considered under the harm principle? and which interest may be set back by harm?[91], these questions are at the heart of the debate on the harm principle.

`Probabilistic conception`[92] is crucial to clarify the link between the likelihood of harm and speech. If the speech causes harm to the targeted person, the harm will be limited to only the targeted person. In contrast, if the speech affects many people, then there will be many harmful acts such as disorder, terrorism, or riot. If the right to free speech regulations protects such harmful speech, fear, scare and panic will spread in a larger space and affect more of the population.[93] Peaceful life of the population and personal security will be threatened, and the standards of democracy will be damaged by such terrorism and violent acts. Therefore, the law should prevent harm and crime in its early formation process. The role of law is to ensure public peace, security, and fundamental rights.

6. The Criminalising Speech

Criminal law has its own methods to determine the crime, but how about when it comes to the liability of the speaker in terms of free speech? There are some problematic areas in the coverage of the use of criminal sanctions and the boundaries of reasonable legislative accommodation.[94] For instance, the men's rea of the speaker is one of the criminal elements in weighing freedom of speech against competing interests and the speaker`s culpability.[95] As a result, several legislative positions could be related to pure solicitation, which

88 Mueller, G.O.W. (ed.), Essays in Criminal Science (Sweet & Maxwell Ltd 1961) 185. see also, Persak (n 80) 41.
89 Persak (n 80) 41.
90 Ibid 43-4.
91 Ibid
92 Kretzmer (n 68) 49.
93 Ibid 117.
94 Greenawalt (n 13) 110.
95 Kretzmer (n 68) 32.

explains the relationship between crime and speech acts. Greenawalt states the following five positions:[96] First, if a jurisdiction finds the justification is adequate to prohibit criminal solicitation, and if encouragement to commit a crime is serious, then illegal solicitation can be punished. Punishing unlawful solicitation could deter people from pursuing someone with an expressed criminal will. This is the way to make such a speech ineffectual.[97] Secondly, pure solicitations can be defined as a legal action, not an unlawful act. Yet, an expression encouraging and promoting a crime will be legally persuasive among others. This can be afforded by criminal law at an acceptable price. Yet, it is not certain what acceptable price is paid for drawing the boundaries of such speech in the context of criminal law. It could be said that the stretch of criminal law should not go too far.[98] Thirdly, pure solicitation could be punished in the event of its success. In this case, many serious encouragements can be punished after the crime occurs. Still, a law might need to regulate other sorts of solicitations which have not successfully caused the crime.[99] Fourthly, if the solicitation is about felonies, its criminality can be limited as it was under traditional English common law.[100] Fifthly, a solicitation could be formed where there is a high possibility of achieving crime and where the relations among people involved increase the influence of solicitation. Only pure encouragement of crime should be prevented, especially when they are the subject of serious crimes and have a substantial likelihood of success.[101]

Criminals are prosecuted after committing a crime, meaning individual and public interests are already harmed. In many cases, the needs of criminal laws are satisfied by the prosecution of persons who commit a crime, but speech is not the crime but advocates the crime.[102] So, harm caused by speech also means that criminal law should be able to prevent crime or minimise the damage of any violence before the crime is committed. In other words, criminal law persecutes an inciter who does not commit a crime but incites a crime. Thus, the law requires punishing such persons to ensure justice and peace. Criminal law minimises the culture of violence by punishing the person responsible for advocacy.[103] For instance, the inciter of terrorism and violence is the 'spiritual father' of the criminal acts, and an instigator is the `spiritual father` of the

96 Greenawalt (n 13) 112.
97 Greenawalt (n 13) 112.
98 Greenawalt (n 13) 112.
99 Greenawalt (n 13) 112.
100 Greenawalt (n 13) 112., Greenawalt, Kent, 'Speech and Crime' (1980) 5(4) American Bar Foundation Research Journal 645–785, 656-7.
101 Greenawalt (n 13) 112.
102 Cohen-Almagor (n 21) 75.
103 Ibid

criminal offence.[104] Instigation is the subject of criminal law after the crime is successfully committed.[105] In the case of instigation, the relation between the instigator and instigate is clear, but a listener of incitement is not identified; this can be a small or large number of people.[106] For that reason, it is nearly impossible to determine the audience of inciters. In other words, it is difficult to know who will be encouraged by the inciter as a criminal. But in both cases of incitement and instigation, the spirit of speech plays the leading role when the commitment of the criminal act is in the process.

Incitement and encouragement should be prosecuted when they meet with three factors: (1) the publicness of the encouragement, (2) the nature of its appeal, and (3) the mood of the audience.[107] These aspects of incitement/encouragement might influence both the crime's success and seriousness. It is important to note that the speaker might play a significant role while creating criminal acts. If the criminal law can prevent the one who incites/encourages the crime, the criminal law may not need to engage with the one who will commit a crime due to encouragement. By doing this, criminal law might prevent crime before its occurrence and stop the harmful consequence of crime on individuals and society.

However, the distinction between hyperbolic speech and incitement/punishable political expression is difficult to identify in the sense of conductive speech; the boundaries of these two sorts of speech are hard to draw.[108] Kalven warns the governments and courts not to use the power of criminal law to suppress radical critiques.[109] It is crucial to note that such 'critiques' helps to make democracy a reality rather than an illusion in a society. In a non-democratic society, criminal law represses such speech to protect the government or non-democratic institutions rather than individuals' rights. Criminal law is to detect, prevent and persecute harmful speech rather than suppressing hyperbolic political speech, radical critiques, or free speech in general. Besides this, the open-ended definition of the harm principle makes criminal law unclear while drawing the boundary of criminalisation.[110] Such tendency will stretch the harm principle making the criminal act a vague action in the legal context. This impels individuals to fear not acting in a permitted and socially acceptable way because they are unsure whether their actions

104 Kretzmer (n 68) 162.
105 Ibid 161-2.
106 Ibid 161.
107 Greenawalt (n 13) 115.
108 Kretzmer (n 68) 32.
109 Kalven Harry, A Worthy Tradition: Freedom of Speech in America (New York: Harper and Row, 1987) 119-120.
110 Persak (n 80) 87.

are the subject of criminal prohibition.[111] A vague definition of criminal acts impedes enjoying fundamental rights.

D. Turkey's Justification to Interfere the Right to Free Speech

The right to free speech plays a crucial role in practising and implementing many values, such as democracy, self-fulfilment, the marketplace for ideas/search for truth and tolerance, and pluralism. Thus, the right to free speech is essential to build a democratic and human rights-respecting country. Thus, the right to freedom of speech is restricted exceptionally with a theoretical basis. So, it is worth asking how the Turkish legal system restricts the right to free speech with any theoretical basis. This is directly associated with implementing these values and having a narrow or broader scope of the right to free speech in the country.

Turkish Constitution guarantees the right to free speech in Article 26 with limitation clauses as a qualified right rather than an absolute one. This presents an evolution from a highly restrictive practice to a more liberal stance. Interfering with the right to free speech is directly concerned with the political setting formed by military coups d'état in 1960 and 1980 and the military interventions in 1971 and 1997.[112] The military coups d'état have been the most challenging and devastating reason in the Turkish political realm that totalitarian tendencies emerged. In particular, the military coup d'état on 12 September 1980 designed the constitution and obtained the authoritarian nature of the system. The legal system was formatted to defend and protect the 'unalterable core' of the Constitution through the legal doctrine.[113] These military coups d'état was made to preserve the military tutelage through constitutional settings and without concern regarding human rights to protect official ideology.[114] So, the

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111 Kretzmer (n 68) 153.

112 Despite the lack of evidence about the role of NATO and the US in military coups d'état in Turkey throughout the Cold War, NATO and the US got involved in these military coups d'état to reorient Turkey into NATO-US-centric policies. Especially the US took a significant role in such an oppressive political and legal environment in Turkey by supporting the plotters. See for instance, Kasapsaraçoğlu Murat, 'Soğuk Savaş Döneminde Türkiye'de Yapılan Askeri Darbeler ve ABD' (2020) 19(3) Gaziantep University Journal of Social Sciences 1342-1356; Bakan, S. ve Çimen, H. 'Türkiye'de Askeri Darbe Statükosunun Kurulmasi' (2017) 6(2) İnönü Üniversitesi Uluslararası Sosyal Bilimler Dergisi 1-15.

113 Thiel Markus, The `Militant Democracy` Principle in Modern Democracies (Ashgate, 2009) 264.

114 Özbudun Ergun, 'Türk Anayasa Mahkemesinin Yargısal Aktivizmi ve Siyasal Elitlerin Tepkisi' (2007) 63 Ankara Üniversitesi SBF Dergisi, 257-268, 265, see also Özbudun Ergun, 'State Elites and Democratic Political Culture in Turkey' in ed. Larry Diamond, Political Culture and Democracy in Developing Countries (Lynne Rienner Publishers, 1993) 247-68.

state was treated not as a civil institution that served the country's people.[115] Indeed, these coups have deteriorated democracy and the rule of law at most in Turkey by totalitarianism which posed severe limitations and restrictions on the right to freedom of expression.[116] Terrorism has been another long-lasting and major problem challenging and deteriorating Turkey's practice of human rights and free speech. Since the 1980s, the Kurdish Worker's Party (PKK) has been responsible for escalating terrorism in Turkey.[117] Due to the political instabilities in Syria and Iraq, the other terrorist organisations Al-Qaida, ISIS (DAESH), and PYD (the Democratic Union Party-PKK's branch in Syria) have also committed terrorist attacks against Turkey. Terrorism in Turkey since the 1980s has led the legal system to take restrictive measures on the right to free speech.

Turkish legal doctrine was formed to interfere with ideologicalism, such as political speech advocating 'communism/bolshevism', 'socialism', 'anarchism', 'fascism', 'racism', or 'authoritarianism', 'promoting Islamism', and 'anti-secularism (irtica)'.[118] These were perceived as a risk to the integrity and security of the Turkish State. Here, the speech was restricted without reasonable and moderate justification and prosecuted if it was perceived as "weakening and destroying feelings of being a nation", "destroying the secular system", or "establishing a theocratic system".[119] Interestingly, the national courts regarded these ideologies as identical to the advocacy of political violence without addressing any actual link between speech and violence/terrorism.[120] The national courts considered such speech undermining or contradicting official ideology and justified their restrictions based on being inherently 'destructive', 'separatist', 'reactionary', 'dangerous', 'violent', 'insurgent' or 'revolutionary'.[121]

Turkiye Büyük Millet Meclisi (TBMM) aimed to broaden the realm of freedom by making legal reforms through amendments to the constitution,

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115 Coşkun Vahap, 'Turkey`s Illiberal Judiciary: Cases and Decisions' (2010) 12 Insight Turkey 43-67, 48

116 Özhan H.Ali, and Özipek B.Berat, Yargıtay Kararlarında İfade Özgürlüğü (LDT, 2003) 4.

117 Mango Andrew, Turkey and the War on Terror: For Forty Years We Fought Alone (London: Routledge, 2005) 31-57.

118 Cengiz İlyas Fırat, Legal Responses to 'Terroristic Speech': An Evaluation of The Turkey's Law in The Light of ECtHR And UNHRC Standards (Adalet Yayınevi, 2022) 144.

119 Acar Bulent, 'Hukuk Düzenimizde Düsüncenin Acıklanmasının Cezalandırılması ve Cezalandırmanın Sınırı' (1995) 3 Ankara Barosu Dergisi 14-45, 32.

120 Cengiz İlyas Fırat, Legal Responses to 'Terroristic Speech': An Evaluation of The Turkey's Law in The Light of ECtHR And UNHRC Standards (Adalet Yayınevi, 2022) 45.

121 Alacakaptan Uğur, 'Demokratik Anayasa ve Ceza Kanunu`nun 141 ve 142`inci Maddeleri' (1966) 1 Ankara Hukuk Fakultesi Dergisi 3-20, 9; Tanör Bülent, Siyasi Düşünce Hürriyeti ve 1961 Türk Anaysası (Phd Thesis, Oncu Kitabevi, 1969) 100; Özhan (n 100) 4; See also, Turkish Constitutional Court, Judgment No. E.1963/173 K.1965/40, 26/09/1965.

criminal law, and anti-terror law to promote and protect the right to freedom of speech.[122] There are various restrictive clauses in Article 13,[123] 14[124] and 26[125] of the Turkish Constitution, which authorises limiting freedom of expression. Before the amendment in 2001, there were much more subjective and general restrictions clauses in Article 13 such as 'national security', 'public order', 'general order', 'public good', 'public morals', 'public health', 'indivisible integrity of the State with its territory and nation' and 'protecting the republic' to preserve state ideology. Article 14 is kept as a militant democracy formulation which does not allow any rights listed in the Constitution to be used to destroy fundamental rights and freedoms. The Constitutional Court has interpreted these articles without effective and efficient theoretical formulation in terms of promoting the right to free speech for a long time.[126]

All provisions (criminal, anti-terror, media, assembly, association, political party laws etc.) regarding free speech were implemented with the concept of militant democracy set forth under the Constitution. These constitutional

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122 TBMM Tutanak Dergisi, 106. Birleşim, 11/04/1991 p.233-4, 236; TBMM Tutanak Dergisi, Dönem 21/3, 132. Birleşim, 25.9.2001, p.70-83

123 Article 13: "(As amended on October 3, 2001; Act No. 4709) Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

124 Article 14 of the Constitution prohibits using rights and freedoms in the Constitution against "… the indivisible integrity of the state with its territory and nation and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights."

125 Article 26 of Turkish Constitution: "Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing. (As amended on October 3, 2001; Act No. 4709) The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary. (Repealed on October 3, 2001; Act No. 4709) Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented. (Paragraph added on October 3, 2001; Act No. 4709) The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

126 Turhan Mehmet, 'Düşünce Özgürlüğü ve 1982 Anayasası' 1988 4(4) Dicle Üniversitesi Hukuk Fakültesi Dergisi 87-117, 105

clauses through criminal law led to significant restrictions on freedom of expression in Turkey, especially before 1990. These were the limitation clauses under the offences of the Turkish Panel Code (1926) (TPC): the offence of domination of one social class over other social classes under Article 141, the offence of propaganda under Article 142 and the offence of indoctrination under Article 163 and the offence of incites hatred and animosity under Article 312 of TPC, which represent how Turkish legal system under the effects of the military tutelage.[127] These articles of the Turkish Criminal Code (1926) were essentially treated as 'thought crimes' to suppress dissenting political speech with unclear legal boundaries. These articles were the provisions used at most to interfere with the right to free speech until 1991.[128] These criminal provisions were used to suppress organised or individual political dissents. The Military Martial Law Courts formed by the coup plotters implemented these provisions to interfere with political dissents.[129] In this regard, the courts did not develop any justification (such as a clear and present danger test) while implementing these criminal provisions, which caused interference of a wide range of speech with general restrictions.[130]

Democratic struggles started right after the transition of the constitutional system in 1982 to defeat the totalitarian nature of the system and flourish democracy and the rule of law in Turkey. TBMM introduced many amendments to the first form of the Constitution (formed by the military plotters in 1982) three times in the 1980s, almost every year in the 2000s, and another three times in the 2010s. This shows that the Turkish people have demanded more freedom and liberties through constitutional revisions. There were plenty of amendments promoting the right to free speech and press. Firstly, the Constitutional Amendment ended the state's radio and television broadcasting monopoly in 1993.[131] The most important constitutional amendment about the right to free speech was made in 2001, which softened the militant nature of the Turkish Constitution; Preamble consists of *"That no protection shall be accorded to thoughts and opinions contrary to Turkish national interests..."* and replaced the phrase *"thoughts and opinions"* with the word '*activity'*. With the same amendment, the limitation clauses were added specificaly for

127 See, Örnek Cangül 'Türk Ceza Kanunu'nun 141 ve 142. Maddelerine İlişkin Tartışmalarda Devlet ve Sınıflar' (2014) 69(1) Ankara Üniversitesi SBF Dergisi 109-139

128 Arslan Zühtü, 'Türkiye'de İstisna Hâli, Terör Ve İfade Özgürlüğü' (2007)71 Tbb Dergisi 201-226, 204.

129 Örnek Cangül, Turk Ceza Kanunu'nun 141 ve 142. Maddelerine İlişkin Tartisşmalarda Devlet ve Siniflar Ankara Üniversitesi (2014) 69(1) SBF Dergisi, 109-139, 133

130 Paçaçı İrfan, '1982 Anayasası Mayınlı Alanı: Düşünce Özgürlüğü, Anayasa MAdde 25 ve 26'nın Analz ve Yorumu' (1995-1996) 21(17-18) TODAIE İnsan Hakları Yıllığı 127-149, 141

131 The Law on the Amendment of Article 133 of the Constitution of the Republic of Turkey No: 3913 Official Gazette Date: 10.7.1993 – Issue:21633

the Freedom of Expression and Dissemination of Thought in Article 26.[132] The freedom of association in Article 33 was amended in 1995 and 2001 to abolish the ban on the political activities of associations and their collaborations with political parties.[133] Article 34 of the Right to Hold Meetings and Demonstration Marches was also amended in 2001 by abolishing the wide range of discretion given to the government and bringing limitation clauses like the right to free speech.[134] The Constitutional Amendment in 2004 regarding the freedom of the press was made as "*a printing press or its annexes duly established as a publishing house under law shall not be seized, confiscated, or barred …*".[135] Another striking Constitutional Amendment in 2004 puts an international agreement regarding fundamental freedoms and liberties, duly into effect, in case of conflict with domestic laws.[136]

This was important for the European Convention on Human Rights to become binding in Turkish jurisdiction. Another milestone Constitutional amendment introduced in 2010 and enacted in 2012 is the Constitutional Court individual application right.[137] This right is guaranteed by the Constitution for anyone who claims that their right/s set forth under the Constitution and the ECHR were violated by public power. By this procedure, the Constitutional Court interprets the implementation of the rights considering the case law of the European Court with the liberal prospect. For instance, the Turkish Constitutional Court changed its understanding of a "strict interpretation of laicism" to a "libertarian interpretation of laicism" in 2012.[138] The Turkish legal system with the constitutional basis was oppressive against a wide range of expression, especially before 2001.

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132 The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey, No: 4709 Official Gazette Date: 22.10.2001 – Issue: 2456

133 The Law on the Amendment of the Preamble and Some Articles of the Constitution of the Republic of Turkey No: 4121 Official Gazette Date: 26.07.1995 – Issue:22355; The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey, No: 4709 Official Gazette Date: 22.10.2001 – Issue: 2456

134 The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey, No: 4709 Official Gazette Date: 22.10.2001 – Issue: 2456

135 The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey, No: 5170 Official Gazette Date: 22.5.2004 – Issue: 25469

136 The Law on the Amendment of the Preamble and Some Articles of the Constitution of the Republic of Turkey No: 4121 Official Gazette Date: 26.07.1995 – Issue:22355; The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey, No: 4709 Official Gazette Date: 22.10.2001 – Issue: 2456

137 The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey, No: 5982 Official Gazette Date: 7.5.2010 – Issue: 27659

138 Turkish Constitutional Court, Judgment No. E.2012/65 K.2012/128, 20.09.2012; see more in Karaoğlu Ali Osman, 'Margin of Appreciation as a Hindrance to Transformative Impact of International Law: Change in Interpretation of Laicism by Turkish Constitutional Court' (2020) 20 Law & Justice Review, 163-193.

Indeed, there are many other improvements in the criminal law doctrine, particularly after the collapse of the Soviet Union. This collapse made Turkish legal doctrine perceive communism as a minor danger. Therefore, Articles 141, 142 and 163 of the Turkish Criminal Code (1926) were repealed in 1991 to provide more space for the right to free speech. Yet, the repealed articles were effectively retained under the offence 'incitement to hatred and animosity' of Article 312[139] of the TPC.[140] Since the escalation of terrorism in the 1980s, in addition to Article 312, Anti-terror law was introduced in 1991 and brought offences of 'propaganda' for, 'disclosure' and 'publication' of, 'inciting', 'justifying', and 'praising' terrorism under Articles 6, 7 and 8 (article 8 was repealed in 2003) of the anti-terror law. Similar prosecutions of Article 312 were brought with these offences under the Anti-terror law. At the ECtHR level regarding Turkey, the European Court found numerous freedom of expression violations due to these articles under TPC and Anti-terror law.[141]

Since the late 1990s, the Anti-terror law (1991) had several amendments, and TPC (1926) was renewed with a new TPC (2004), which moderated the impact of its restrictive approach to freedom of speech. TPC (2004), for instance, highlights its objective "to protect individual rights and freedoms, public order and security, the rule of law, peace in the community, public health and the environment and to prevent the commission of offences."[142] To achieve this objective, "clear and present danger" criteria has been used to determine the offences under Article 216 and 312 of TPC. This is a formulation to make these sorts of offences concrete danger crimes rather than abstract. This means speech can be restricted if it causes clear and present danger. Yet, this criterion is not alone adequate to prevent illegitimate restrictions on free speech due to discretion given to the Judges who decide what a clear and present danger is. For instance, Yargıtay explained that a clear and present danger exists when concrete facts and evidence prove an act causes danger.[143] Here, Yargıtay seeks the answer to whether the concrete facts and evidence in relation to speech create a clear and present danger. This is a matter of defining 'proximity and degree' of harm. In Addition to this criterion, the Constitutional Court and Yargıtay set a principle to construe the link between speech and violence by evaluating the aim of speech, the content of speech, the context in which the

139 Article 312 of 765 TPC (revealed TPC), "(1) Any person who openly incites hatred and animosity between people belonging to different social class, religion, race, sect, or coming from another origin …in case that such act causes danger to public order."

140 Alemdar Zeynep, ''Modelling' for Democracy? Turkey's Historical Issues with Freedom of Speech' (2014) 50 Middle Eastern Studies 568-588, 574

141 Arslan (n 128) 207.

142 Article 1 of 5237 TPC

143 Yargıtay Assembly of Criminal Chamber 2004/8-130 E., 2004/206 K., 23/11/2004; Yargıtay Assembly of Criminal Chamber 2007/8-244 E, 2008/92 K. 29/04/2008

speech was made, and the measure taken against the speech.[144] This content-context-based assessment provides a potential objective evaluation process for Turkish courts to determine the probability and temporal proximity of harm, danger or crime to prevent. Since the 1990s, Turkey has gradually completed a bunch of legal amendments to erase the effects of military domination in its legal doctrine and to provide more space for the right to free speech through legal criteria and principles.

However, Turkish jurisdiction requires much more developed theoretical justifications to interfere with freedom of speech. As mentioned above, various theoretical justifications have been developed by Western jurisdictions to bring reasonable and legitimate restrictions on freedom of expression. Without such justifications, free speech restrictions became arbitrary and subjective. Turkey's endeavour in this regard is significant, but more political-legal reforms and changes are needed to promote the right to free speech. Turkish legal circles should develop consistent, liberal, and Turkey-oriented justifications to restrict free speech with a broader spectrum for the right to free speech.

CONCLUSION

Freedom of speech is essential to democracy, self-fulfilment, the marketplace for ideas/the search for truth, tolerance, and pluralism. But speech act has a consequentialist nature which means speech might cause harm, danger, threat, or crime contrary to the rights of others. Thus, free speech is not an absolute right with exceptional and conditional limitations. It is easy to argue that sticks and stones can hurt people, but it is equally easy to see that words might cause harm and crime. There are prominent justifications for interfering with the right to free speech; the militant democracy, the conflict of liberties, the true threat test, the clear and present danger test, the harm principle, and criminalising speech. The review of these justifications reveals to what extent the speech is limited. These justifications are set to draw the boundary of free speech.

Each of these justifications brings limitation sets by focusing on different angles that consider how speech may cause harm, danger, threat, or crime. The militant democracy is a justification for preventing anti-democratic actors from using their rights to overcome democracy. The Militant democracy relies on a type of constitutional democracy authorised to protect political and civil freedoms by pre-emptively limiting freedoms through political party law, criminal law, and anti-terror law. The European Court of Human Rights interpreted Article 17 of the Convention as a legal basis for militant democracy to protect European democracies from anti-democratic ideological

[144] The Constitutional Court, Judgment No. 2013/2602, 23/01/2014; Yargıtay, 9. Criminal Chamber, E.2010 / 4243 K.2012 / 1683, 08.02.2012; 8. Criminal Chamber, E.2012/882 K.2012/6067, 10.05.2012; 8. Criminal Chamber, E. 2009/13825, K. 2012/23385, 04.07.2012; 8. Criminal Chamber, E.2013/1567 K.2013/5627, 15.02.2013

speech and organisations. Another rationale, the US Supreme Court balanced free speech with other rights, such as personal security, privacy, and reputation, to promote the good of society and individuals. The true threat test determines future consequences of speech that may create psychological fear (nightmares, heart problems, inability to work, loss of appetite, insomnia etc.) in the person and people around him. Thus, free speech regulations should limit such speech through the criminalisation of speech. The clear and present danger test determines speech that brings substantive evils. The danger relies on the question of proximity and degree and then to prevent. The harm principle is another justification to restrict free speech that relies on the logic of "sticks and stones can break my bones, but words ..."? Here, harm is simply defined as `set back of a person's interests` meaning a sort of unfavourable influence or danger on its victim`s interests and a violation of the victim`s freedom. In this case, speech can be subject to criminal prohibitions in a legitimate and reasonable sense. Criminalising speech through criminal law also minimises the danger of advocacy. Here, criminal law is satisfied when prosecuting persons who commit a crime, but still, in the case of speech acts (propaganda, incitement, encouragement, or glorification), the satisfaction of criminal law is not adequate because there is someone who advocates the crime, not commits the crime. For instance, the inciter of terrorism and violence is the `spiritual father` of the criminal acts, as an instigator is the `spiritual father` of the criminal offence. The relation between the instigator and instigate is clear but a listener of incitement needs to be identified. But in both cases, the spirit of speech plays the main role. So, speech like incitement can be restricted due to being the 'spiritual father' of the criminal acts.

Returning to the relationship between these theoretical justifications and Turkey's interference with the right to free speech, Turkey struggles to remove the military domination in its jurisdiction through legal reforms and amendments, which suggest an evolution departing from highly restrictive practice to a more liberal stance. Indeed, the military coups d'état have had challenging and devastating effects on the right to free speech practice. The constitutional, criminal, and anti-terror laws amendments have played a major role in this shift. As a result, the military tutelage has been weakened over the jurisdiction and within the Turkish legal doctrine, and then the clear and present danger test and content-context-based assessment have been set through case law.

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RIGHTS-BASED LITIGATION IN TACKLING CLIMATE CHANGE: CAN THE ECtHR BE EFFECTIVE IN PROTECTING HUMAN RIGHTS IN THE CONTEXT OF CLIMATE CHANGE?*

İklim değişikliği ile mücadelede hak temelli davalar: İklim değişikliği bağlamında insan haklarını korumak için İHAM etkili bir merci olabilir mi?

*ubi jus ibi remedium***

Engin FIRAT, LL.M***

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ABSTRACT

The impacts of climate change have emerged as one of the most pressing challenges facing the global community today. As a result, the protection of human rights in the context of climate change has become an increasingly important issue, particularly in light of the potential for climate change to exacerbate existing human rights challenges. The European Court of Human Rights (ECtHR) has emerged as a key legal institution in the protection of human rights in Europe. However, the question remains: Can the ECtHR be effective in protecting human rights in the context of climate change? This research article aims to examine the potential for litigation in the ECtHR as a means of protecting human rights in the context of climate change after establishing nexus between the climate change phenomenon and human rights. Through a comprehensive analysis of environmental case law and legal frameworks, this article explores the extent to which the ECtHR has the potential to engage with pending climate cases and future litigation in this area. The article concludes that, despite the fact that technical legal hurdles, both procedural and substantive, must be overcome during the review phases, the Court may still have significant potential to address climate cases. Furthermore, this research highlights the importance of utilising litigation as a means of protecting human rights in the context of climate change for the sake of the role that the ECtHR can play in promoting greater awareness of the human rights implications of climate change.

Key Words: Climate change, human rights, environmental case law, rights-based climate litigation, European Court of Human Rights

* There is no requirement of Ethics Committee Approval for this study.
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** Latin phrase: 'Where there is a right, there is a remedy.'

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ÖZET

İklim değişikliğinin etkileri, günümüzde küresel toplumun karşı karşıya olduğu en acil sorunlardan biri olarak ortaya çıkmaktadır. Bu nedenle, özellikle iklim değişikliğinin mevcut insan hakları zorluklarını şiddetlendirme potansiyeli dikkate alındığında, iklim değişikliği bağlamında insan haklarının korunması giderek daha önemli bir konu haline gelmiştir. İnsan Hakları Avrupa Mahkemesi (İHAM), insan haklarının Avrupa'da korunması için kilit bir yargısal kurum olarak ortaya çıkmıştır. O halde, İHAM, iklim değişikliği bağlamında insan haklarının korunması için etkili bir merci olabilir mi? Bu araştırma makalesi, iklim değişikliği olgusu ile insan hakları arasında bağ kurduktan sonra, İHAM'ın iklim davalarıyla başa çıkma potansiyelini, iklim değişikliği bağlamında insan haklarını koruma aracı olarak, incelemeyi amaçlamaktadır. Çevre hukuku içtihadı ve ilgili hukukî çerçevelerin kapsamlı bir analizi yoluyla, bu makale Strazburg Mahkemesi'nin derdest iklim başvuruları ve gelecekteki başvurularla ne ölçüde ilgilenme potansiyeline sahip olduğunu araştırmaktadır. Makale, hem usûl hem de esas bakımından inceleme aşamalarında karşılaşılacak teknik hukukî engellerin aşılması gerektiği gerçeğine rağmen, Mahkeme'nin iklim davalarını ele alma konusunda hâlâ önemli bir potansiyeli olabileceği sonucuna varmaktadır. Ayrıca, bu araştırma, İHAM'ın iklim değişikliğinin insan hakları üzerindeki etkileri konusunda daha fazla farkındalığın teşvik edilmesinde oynayabileceği rol adına, iklim değişikliği bağlamında insan haklarını korumanın bir yolu olarak dava açmanın önemini vurgulamaktadır.

Anahtar Kelimeler: İklim değişikliği, insan hakları, çevre hukuku içtihadı, hak bazlı iklim davaları, İnsan Hakları Avrupa Mahkemesi

INTRODUCTION

International efforts to address greenhouse gases (GHGs)[1] remain insufficient, despite the gravity of the climate change phenomenon as an environmental threat. Given this halting progress, it is imperative to explore additional means to tackle the climate crisis. In the face of elusive and insufficient political efforts to tackle the climate crisis,[2] litigation has become an important tool, with the potential to hold states and other actors accountable for the failure to limit GHG emissions and to force them to act.[3] However, climate litigation involves distinctive challenges as it differs from conventional

1 In this article, the term 'GHGs' is used as an umbrella term, encompassing methane (CH4), nitrous oxide (N2O), and fluorinated gases, as well as carbon dioxide (CO2) which is widely recognised as carbon emissions.

2 See, Robert Hales and Brendan Mackey, 'The ultimate guide to why the COP26 summit ended in failure and disappointment (despite a few bright spots)' (*The Conversation*, 14 November 2021) <https://theconversation.com/the-ultimate-guide-to-why-the-cop26-summit-ended-in-failure-and-disappointment-despite-a-few-bright-spots-171723> accessed 28 November 2022.

3 See UN Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), Art2.

litigation.[4] According to Colombo and Wegener, these challenges arise due to the global and intergenerational nature of the issue, the blurred lines between perpetrators and victims, the importance of climate for modern society and the economy, and the existential threat that climate change poses to humanity and the environment.[5]

The profound impact of climate change on the environment has inevitably given rise to implications for human rights, leading to the discovery of the vital role played by rights-based arguments in lawsuits brought before local, regional, and international judicial mechanisms. The use of human rights to litigate climate change has gained momentum following the adoption of the Paris Agreement in 2015 and notable domestic cases formed the beginning of 'a rights turn'.[6] Following the *Urgenda* case in 2019,[7] rights-based arguments emerged as a prominent trend in climate litigation.[8] Because of the obligations owed by states to uphold human rights, particularly in the context of the environment, human rights law tends to serve as a gap-filler in a manner that other fields of law are less able to do.[9]

This study highlights the crucial role of rights-based litigation in addressing climate change and demonstrates that the European Court of Human Rights (ECtHR),[10] a regional human rights tribunal, can handle climate cases despite legal obstacles. The rationale for selecting the ECtHR as the focal point of this study stems from its instrumental role in shaping the advancement of international human rights law, renowned for its remarkable effectiveness, as well as the Court's extensive environmental jurisprudence, despite the absence of an explicit right to a healthy environment.

This study focuses on technical barriers specific to the Court's process and suggests ways to overcome them to become an effective forum for climate

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4 Elizabeth Fisher, Eloise Scotford, Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 (2) The Modern Law Review, p. 177.

5 Gastón Médici Colombo and Lennart Wegener 'The Value of Climate Change-Impacted Litigation: An Alternative Perspective on the Phenomenon of "Climate Change Litigation"'(*Strathclyde Centre for Environmental Law and Governance*, Working Paper, No. 12, October 2019), p. 3.

6 Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 (1) Transnational Environmental Law, pp. 37-67.

7 *Urgenda Foundation v. The State of the Netherlands*, The Supreme Court of the Netherlands (20 December 2019), Case: 19/00135 (English translation) <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> accessed 28 November 2021.

8 Joana Setzer and Catherine Higham 'Global trends in climate change litigation: 2021 snapshot' (*Grantham Research Institute*, Policy Report, 2021), p.6.

9 Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9(3) Climate Law, p. 244.

10 Hereinafter, 'the ECtHR', 'Strasbourg Court' or 'the Court'.

litigation. To develop its transformative role on this issue, the study concludes that the Court must adopt a moral approach that eases the admissibility stage's difficulties and recognises a narrower margin of appreciation (MoA) for governments, particularly in climate matters. The execution of the ECtHR's climate judgments and separation of powers issues are excluded, as it is considered more appropriate to analyse them elsewhere. Instead, it concludes that states have positive obligations under Art(s) 2 and 8 due to the climate crisis, and it focuses on admissibility issues in pending applications and the MoA in general, inspired by environmental case-law.

Following a discussion of the interrelated and interconnected nature of climate change and human rights, Section 1 outlines both the place of human rights in international climate instruments and the place of climate change in international human rights instruments, and that there is a moral link between them. The section argues that the aforementioned moral link and legislative initiatives are requirements for the presentation of human rights arguments in climate litigation. Subsequently, it emphasises that human rights arguments are generally promising in climate litigation, referring to the decisions of different local courts across the world in which human rights arguments formulated in this context were used. The second section unpacks the Court's environmental case-law. Noting that the right to a healthy environment is not explicitly protected under the ECHR, it sets out how the right to life (Art2) and the right to respect for private life (Art8) are 'greened' by virtue of the Court's interpretation methods. Section 3 explores some of the technical barriers to the examination of climate cases at the ECtHR and argues that a softer, less strict, and less formal approach at the admissibility stage would improve the effectiveness of rights-based litigation in tackling the climate crisis. The section concludes that causality is irrelevant in finding violations in the ECtHR, and similarly, that scientific certainty should not be considered an essential prerequisite. It also suggests adopting the current approach of the Inter-American Court of Human Rights (IACtHR) regarding responsibility for extraterritorial territory. In addition, it is emphasised that there is a need for a realist (legal) perspective rather than a pragmatic one in tackling the climate crisis.

The study concludes that the ECtHR can be an effective judicial forum for climate cases. However, to achieve this, the Court must make some important procedural concessions for some hurdles, for the sake of the urgency of the climate crisis. In support of this, it concludes that mechanical hurdles should be handled flexibly in the light of morality and legal pragmatism and that the Court should avoid a purely formalist approach. It further argues that a facilitative, yet natural interpretation of relevant international human rights mechanisms can be achieved.

A. RIGHTS-BASED CLIMATE CHANGE LITIGATION

1. Climate Change and Human Rights

It has been demonstrated by the best available science that the observed and predicted effects of human-induced climate change on physical infrastructure and human settlements, livelihoods, and health and safety will inevitably and negatively affect nature and all humanity dependent on it.[11] As a result of the melting of glaciers due to global warming, the expected rise in sea levels at the end of this century will destroy many settlements, including commercial and agricultural areas.[12] Fishing lagoons will be submerged in water due to rising sea levels, floods, rainfall and rising temperatures.[13] When evaporation and drought caused by increasing temperatures are added to this, there will be serious water and food scarcity.[14] Accordingly, migrations and conflicts will arise due to limited resources,[15] not to mention the increasing frequency of epidemics with the disappearance of natural barriers. These dire consequences obviously concern, besides nature, human life, access to fundamental necessities such as food, water and shelter, our standard of living, health, property, self-determination of peoples, security, development, and culture, either directly or indirectly. These impacts will be felt more prominently by disadvantaged groups such as women, children, people with disabilities and ethnic minorities.[16] Moreover, these catastrophic effects concern not only the present but also future generations.[17]

Indeed, despite the ecocentric nature of climate change, this relationship should not be particularly hard to see, as humans are biological creatures that are both part of nature and dependent upon it. Every issue that concerns nature is directly or indirectly a matter of humanity. At this point, the reasoning behind UN Special Rapporteur John Knox's view that the environment and human rights are 'interrelated' and 'intertwined' may help us to understand the

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11 IPCC *Climate Change 1995: The Science of Climate Change* (J.T. Houghton et al. [eds.], Cambridge University Press, 1996) pp.14-20

12 *See* Sandra Cassotta et al. 'Chapter 3: Polar Regions.' in Hans-Otto Pörtner et al. (eds) *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (IPCC, 2019).

13 K. Sian Davies-Vollum, Debadayita Raha, and Daniel Koomson 'Climate Change Impact and Adaptation: Lagoonal Fishing Communities in West Africa' in Walter Leal Filho et al. (eds) *African Book Climate Change Adaptation* (Springer, 2021).

14 *See* World Bank Group, 'High and Dry: Climate Change, Water, and the Economy' (The World Bank, 2016)

15 *See* Ashok Swain et al. *Climate Change and the Risk of Violent Conflicts in Southern Africa* (Global Crisis Solutions, 2011).

16 *See* Rose Mwebaza, 'Climate Change and the International Human Rights Framework in Africa', in Rose Mwebaza and Louis J. Kotzé (eds), *Environmental Governance and Climate Change in Africa: Legal Perspectives,* (Institute for Security Studies, Monograph 167, 2009).

17 Pierre Friedlingstein and Susan Solomon, 'Contributions of past and present human generations to committed warming caused by carbon dioxide' (2005) 102(31) PNAS, pp. 10832-10836, p. 10835.

relationship between climate change and human rights.[18] As he explains, it is an undeniable fact that while a safe, clean, healthy and sustainable environment is a natural necessity to enjoy human rights, enjoyment of human rights makes it more possible to enjoy a safe, clean, healthy and sustainable environment.[19]

Human rights are essentially moral claims that go beyond the constraints of positive law.[20] According to Hart's perspective, human rights find their foundation and legitimacy in moral principles and values, rather than being solely based on legal rules and statutes established by a particular legal system. [21] In other words, the moral underpinnings and ethical considerations serve as the primary basis for the existence and recognition of human rights, suggesting that they transcend mere legal norms and are rooted in fundamental moral principles. Following this approach, Roschmann argues that it is a moral obligation to recognise new rights and to make structural changes to existing rights in order to effectively protect humanity against climate change impacts.[22] Thus, the severity of the consequences of the climate crisis justifies moral demands such as protection and prevention. Ultimately, despite their anthropocentric focus, it may be feasible to link current human rights provisions with climate change via judicial interpretation. Such an approach would require an examination of whether states possess obligations under human rights law to respect, protect, and fulfil the rights of individuals in the context of climate change's harmful consequences. However, recognising the link between climate change and human rights alone does not imply a sufficient legal basis for finding violations of such rights.[23]

Having identified the key relationship between climate change and human rights, it is now necessary to look at the international legislation that also contributes to the basis of rights-based litigation.

2. Human Rights and Global Climate Framework

2.1. Before the Paris Agreement

Although concerns about environmental issues had been made progress since the early 1970s[24], the first explicit and specific consideration of climate

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18 UNGA 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' UN GAOR 37th Session UN Doc A/HRC/37/59 (2018).

19 Ibid.

20 Christian Roschmann, 'Climate Change and Human Rights' in Oliver C. Ruppel, Christian Roschmann and Katharina Ruppel-Schlichting (eds) *Climate Change: International Law and Global Governance - Volume I: Legal Responses and Global Responsibility* (Nomos, 2013), p. 210.

21 Ibid, p.211.

22 Ibid, pp. 212-215.

23 Peel and Osofsky, [Rights Turn] (n.6), p. 42.

24 *See*, UN 'Report of the United Nations Conference on the Human Environment' UN Doc

change was in the UN Framework Convention on Climate Change (UNFCCC), which was adopted in 1992 under the auspices of the UN's Earth Summit.[25]

The Rio Declaration was one of the major achievements of this summit.[26] The right to development for present and future generations, as a human right, is recognised in the Rio Declaration, which states that the protection of the environment is the only way to ensure long-term economic progress.[27]

The UNFCCC requires States Parties to hold regular meetings each year, and since 1995, sessions have been held annually. Significant efforts to reduce GHGs have been observed at these annual conferences. The first of these was the adoption of the Kyoto Protocol in 1997, the first international legal binding instrument on climate change.[28] This protocol, which entered into force in 2005, took into account the necessity of going below the 1990 level of emissions and adopted different emission restriction rates for each country, alongside various flexibility mechanisms.[29] However, what was seen as one of the most important shortcomings of this protocol was that it did not impose any responsibility on developing countries.[30] As far as human rights were concerned, the protocol did not contain any substantive rights nor any relevant references.

In search of a more comprehensive and binding treatment, the UN held the Copenhagen conference of 2009 (COP15) which, whilst initially promising, ultimately failed,[31] despite the acceptance of the Copenhagen Accord within it.[32] However, this failure turned into an important milestone as we now

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A/Conf.48/14/Rev.1 (1972) (known as 'Stockholm Declaration'); UN Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals (adopted 24 June 1998, entered into force on 29 December 2003) 2237 UNTS 4; UN Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293' UN Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, 1 January 1989) 1522 UNTS 3.

25 UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

26 UN 'Conferences: Environment and Sustainable Development: Rio 1992, A new blueprint for international action on the environment' (UN) <https://www.un.org/en/conferences/environment/rio1992> accessed 27 August 2021

27 UNGA 'Report of the United Nations Conference on Environment and Development' UN Doc A/Conf.151/26 (Vol. I) (1992), Principle 3. (Rio Declaration).

28 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

29 For 'mechanisms' *see* Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, 'Kyoto Protocol', *International Climate Change Law* (Oxford University Press, 2017), pp.179-193.

30 *See* Jon Hovi, Detlef F. Sprinz, and Guri Bang, 'Why the United States did not become a party to the Kyoto Protocol: German, Norwegian, and US perspectives', (2010) 18(1) European Journal of International Relations, pp. 129-150.

31 Peter Christoff, 'Cold climate in Copenhagen: China and the United States at COP15' (2010) 19(4) Environmental Politics, pp. 637-656.

32 UNFCCC, 'Copenhagen Accord' UN Doc UNFCCC/CP/2009/11/Add.1 (2010), *see* Decision 2/CP.15, §§1,2.

recognise it as the start of an acceleration in climate litigation.[33]

The first, albeit small, achievement in recognising human rights under the UNFCCC was experienced in 2011. In Cancun, in a decision taken within the scope of the work of the *Ad Hoc* Working Group on Long-term Cooperative Action, it was agreed that there was a link between climate change and human rights with reference to the UN Human Rights Council's resolution[34] on human rights and climate change.[35] It was also emphasised in the decision that parties must fully respect human rights in all actions related to climate change.[36]

These instances spurred calls for human rights language to be included in climate legislation, and for this purpose, an open letter to the UNFCCC States Parties was issued by the UN Special Procedures Mandate-Holders, at the meeting of the *Ad Hoc* Working Group on the Durban Platform which was created to prepare a binding agreement.[37] Intensive efforts were made at Cancun to ensure that human rights arguments entered into a binding climate agreement.[38] Whilst the end result provided only a small gain, it is important to note the attention paid to participation in the decision-making process as it demonstrates an improved awareness of the importance of participatory and procedural and substantive human rights in protecting environmental rights.[39]

2.2. The Paris Agreement

The Paris Agreement, which can be considered a marginal victory in terms of linking climate change and human rights,[40] was finally adopted in 2015,

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33 Jacqueline Peel and Hari M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015), p.13; Joana Setzer and Rebecca Byrnes, 'Global trends in climate change litigation: 2020 snapshot' (*Grantham Research Institute*, Policy Report, 2020), p.7.

34 UNHRC Res 'Human Rights and Climate Change' UN Doc 10th Session A/HRC/10/4 (2009).

35 UNFCCC, 'Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010' UN Doc FCCC/CP/2010/7/Add.1 (2011), *see* Decision 1/CP.16.

36 Ibid.

37 'A New Climate Change Agreement Must Include Human Rights Protections for All' (17 October 2014) (Open letter) <https://unfccc.int/resource/docs/2014/smsn/un/176.pdf> accessed 28 August 2021; Benoit Mayer 'Human Rights in the Paris Agreement', (2016) 6 Climate Law, pp.110-112.

38 Mayer, (n.37) pp.110-112.

39 Open letter (n.37). See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447. *See* Norwegian Institution for Human Rights, 'Climate and Human Rights' (Norwegian National Human Rights Institution, 19 May 2021) Chapter 7.

40 Annalisa Savaresi, 'The Paris Agreement: a new beginning?' (2016) 34(1) Journal of Energy & Natural Resources Law, p. 24.

and entered into force in 2016 as a result of meeting the condition that at least 55 parties ratified the Agreement, in turn representing 55% of global GHG emissions.[41] Yet, it can be said that the ambitious human rights advocacy carried out in the pre-agreement process reaped fewer rewards than expected.[42] Indeed, human rights, which were not included in the final main text,[43] only found a place for themselves in the preamble of the Agreement.[44] Accordingly, when state parties take action to address climate change, they should 'respect, promote and consider their respective obligations on human rights'. In the Agreement, the positive obligations of the states were referred to in the climate context by the addition of 'promote and consider'.[45] Mayer argues that the recital, even if located in the preamble rather than an article of the Agreement, holds considerable human rights value in comparison to the 'respect' win through a COP decision in Cancun.[46] Nevertheless, the proposition of extraterritorial application of human rights treaties in general faces resistance from multiple states, raising doubts about the genuine significance of this preambular phrase.[47]

Thus, the inquiry arises as to whether the human rights methodology espoused in the preamble is sufficient to confer legal enforceability. According to international customary law, the preamble should be considered in the interpretation of the Agreement, even though this does not create new human rights obligations for state parties that have not previously recognised them as such.[48] Thus, the human rights reference in the preamble obliges state parties to comply with human rights (and obligations) adopted previously alongside

41 Paris Agreement (n.3), Art21.

42 For 'the build-up of human-rights advocacy before the Agreement' *see* Mayer, (n.37) pp.110-112.

43 The human rights reference added to Art2 in the earlier draft was removed from the final text, *see* Sumudu Atapattu, 'Climate Change, Human Rights, and COP 21: One Step Forward and Two Steps Back or Vice Versa?' (2016) 17 (2) Georgetown Journal of International Affairs, p.48.

44 *See* Paris Agreement (n.3), Preamble paragraph 11.

45 Mayer, (n.37) p.113.

46 Ibid.

47 While certain human rights bodies have supported the notion that states may bear human rights responsibilities towards individuals beyond their jurisdiction, the majority of states uphold the belief that their human rights obligations are restricted to those within their territorial boundaries. Consequently, these states are unlikely to acknowledge the need for positive measures to ensure the safeguarding of human rights linked to climate change impacts outside their own territories. See, Savaresi, (n.40) p.24.

48 See UN International Law Commission (ILC), 'Second Report on Identification of Customary International Law by Michael Wood, Special Rapporteur', UN Doc A/CN.4/672 (2014), §76. *See* Sam Adelman, 'Human Rights in the Paris Agreement: Too Little, Too Late?' (2018) 7(1) Transnational Environmental Law, p.23, *fn.38*. Also see Mayer, (n.37) p.113-114.

those adopted in the Agreement for purposes such as mitigation, adaptation, or loss and damage.[49]

Knox, who supported the incorporation of human rights into the text during the negotiation phase, emphasised two different (and successful) aspects of this recognition of human rights in the Agreement, one being that climate change should not be a threat to the full enjoyment of human rights, and another being that the steps taken towards climate change do not impose a burden on human rights.[50] Savaresi claims that in both cases, human rights law and its practice are able to achieve what is intended by climate law, considering substantive and procedural obligations under international human rights.[51] The climate regime faces several obstacles, including but not limited to the Paris Agreement's contested legal bindingness because of the flexibility of some clauses.[52] In this regard, human rights can serve as a catalyst, offering a facilitating function and serving as effective instruments to secure favourable outcomes in climate litigation.

In the next subsection, the proliferation of 'climate change' within international human rights law (IHRL) will be briefly taken into account.

2.3. Climate Change within IHRL

Adverse impacts of climate change are avowedly related to the values protected under human rights: the right to life, the right to private life, the right to an adequate standard of living (which includes the right to water, food and housing), the right to the highest attainable standard of health, the right to property, the right to self-determination, the right to development, the right to culture and so forth.[53] Upon scrutiny of the principal sources of IHRL, it is discernible that a majority of these rights are incorporated within legal documents.[54] However, it is extremely rare to see a right such as the right to the

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49 Similarly *see* Savaresi, (n.40) p.25.

50 UNHRC, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', UN Doc A/HRC/31/52, (2016), § 22.

51 Savaresi, (n.40) p.25.

52 The Paris Agreement incorporates flexible clauses besides legally-binding ones, exemplified by the inclusion of Nationally Determined Commitments and a Review Mechanism, granting countries the ability to establish their own climate change targets and actions based on national circumstances, thereby resulting in varying interpretations and debates about the enforceability of the agreement's provisions, which, in turn, engender uncertainties and challenges concerning legal obligations and accountability. See Christina Voigt, 'The Paris Agreement: What is the standard of conduct for parties?' (2016) 26 Questions of International Law, pp. 17-28.

53 UNGA 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' UN GAOR 74th Session UN Doc A/74/161 (2019).

54 *See* UN OHCHR, Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights, No. 2

environment that would enable climate change to be addressed directly in the context of human rights under IHRL, with the exception of the African Charter of Human and Peoples' Rights. Although this right is also enshrined in the International Covenant of Social Economic and Cultural Rights, the Additional Protocol of the American Convention on Human Rights, and the Convention on the Rights of the Child (CRC), they confined to the context of human health.[55] This right is not explicitly recognised under the International Covenant on Civil and Political Rights (ICCPR) or the ECHR. Therefore, the majority of aforementioned human necessities -even aspirations- affected by the climate crisis need to be associated with classical anthropocentric human rights.

The first step that could help this was taken – albeit belatedly – at the UN Human Rights Council (UNHRC) in 2008, which expressed concern that climate change is a direct and long-term threat to individuals and communities, with consequences for the full enjoyment of human rights.[56] The same concern was reiterated and the need for a comprehensive international agreement was expressed in a subsequent report by the OHCHR.[57] In addition to rights being affected generally, the determination that climate change may have a greater impact on certain vulnerable groups of society in terms of age, gender, disability, ethnicity, nationality, and indigenousness was highlighted later reports and decisions by the HRC.[58] As mentioned in my outline of climate law, this approach of IHRL bodies has also had an impact on climate legislation from time to time.[59] The most important of these to date is that some human rights, albeit limited ones, were clearly included in the preamble of the Paris Agreement:

'The right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities, and people in vulnerable situations, and the right to development, as well as gender equality, empowerment of

(Rev.1) (1996).

55 See ICESCR Art12, AmCHR Art11, CRC Art24; Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 (3) European Journal of International Law, pp.613-642, p. 614.

56 UNHRC Res (28 March 2008) UN Doc A/HRC/7/23. *See* John H. Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 Harvard Environmental Law Review, pp. 477-498.

57 *See* UN OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights', UN Doc A/HRC/10/61 (2009).

58 *See* UNHRC Res 'Human Rights and Climate Change' UN Doc 10th Session A/HRC/10/4 (25 March 2009); 'Report of the Independent Expert on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, J.H. Knox, Mapping Report', UN Doc A/HRC/25/53 30 (2013); UNHRC Res 'Human Rights and Climate Change' UN Doc 29th Session A/HRC/29/L.21 (2015).

59 *See* supra note 34.

women and intergenerational equity'.[60]

3. Rights-Based Climate Litigation

The COP15 failure in Copenhagen and the adoption of the Paris Agreement are considered to have triggered climate litigation in general.[61] Both the failure to reach an agreement on a binding treaty, and the successful agreement of a binding treaty caused litigation to flare up. Although this situation may seem paradoxical, it has been demonstrated that a binding treaty is not 'a miraculous cure for all the maladies'.[62] In such a scenario, the non-compliance of states in fulfilling their individual commitments, such as those outlined in the Nationally Determined Contributions (NDCs), as per the Agreement, can readily serve as grounds for litigation. This is due to the fact that the targets are determined at the national level rather than being imposed, and the true challenge lies in effectively implementing these commitments.[63] It also highlights the notion that litigation can be seen as a remedy at every stage of the fight against the climate crisis.

The link between human rights and climate change dates back more than a decade,[64] however the reflection of this on rights-based litigation has not been very quick. Despite a relatively late acceleration in numbers, this 'human rights turn' in climate litigation owes a great deal to the process and negotiations that started before and continued beyond the Paris Agreement.[65] Subsequently, applicants have become more willing to put forward their human rights arguments, and courts have likewise been more receptive to this approach, at least in some cases.[66] Indeed, even the preambular reference to human rights in the Paris Agreement provides very fruitful justifications for rights-based arguments. Some of the rights-based cases after the Paris Agreement illustrate that the plaintiffs' claims that their fundamental rights and freedoms had been violated, mostly relied on the paragraph 11 of the preamble to the Agreement. These cases considered as follows: failure to protect forests as carbon sinks[67], permits for activities that

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60 *See* Paris Agreement (n.3), Preamble paragraph 11.

61 *See* Peel and Osofsky (n.33).

62 Savaresi, (n.40), p.26.

63 Lord Carnwath 'Climate Change Adjudication after Paris: A Reflection' (2016) 28 (1) Journal of Environmental Law, pp. 5-9.

64 *See* supra note 34.

65 Peel and Osofsky, [Rights Turn] (n.6), p.48.

66 Ibid, p.40, See *Urgenda*, Supreme Court (n.7); also *Asghar Leghari v. Federation of Pakistan,* The Lahore High Court (Judgment, 25 January 2018) Case: W.P. No. 25501/2015 <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180125_2015-W.P.-No.-25501201_judgment.pdf> accessed 1 September 2021.

67 See *Future Generations v. Ministry of the Environment and Others* [Colombia], The Supreme Court of Colombia (4 April 2018), Case: 11001-22-03-000-2018-00319-01, (English translation)

increase global GHG emissions[68], negligence due to non-adoption of climate policies that protect rights and freedoms[69], negligence of public authorities in their obligation to protect the lives of individuals or vulnerable groups in the face of climate crises and to inform them of dangerous situations[70]. After all, it cannot be denied that the Paris Agreement creates moral obligations to respect human rights even if one claims that the preamble is not binding.

Rights-based litigation has recently taken its place as a dominant trend in litigation.[71] The purpose of rights-based litigation in combating the climate crisis is simply to reveal that duty-bearers - in the context of this study, states - do not comply with their human rights obligations to protect, respect and fulfil.[72] However, this may not always be easy, nor may its success merely depend on this single outcome. The contentions of litigation based on rights can be structured into two distinct categories: assertions of infringements upon negative obligations arising from governmental actions that impinge upon protected rights, such as the issuance of permits or licenses, and allegations of breaches of positive obligations due to governmental inaction in addressing the climate crisis.[73] In addition, 'mitigation', 'adaptation', and 'loss and damage' measures adopted by climate legislation, may be used in climate litigation as arguments, including rights-based litigation.[74] As a rule, human rights cases should not come into play before the harms have occurred.[75] However, rights-based climate litigation tries to circumvent this as human rights law is considered to have a gap-filling function, providing remedies where other

<http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision-1.pdf> accessed 2 September 2021.

68 *Earthlife Africa Johannesburg v. Ministry of Environmental Affairs and Others*, Hight Court of South Africa, no. 65662/16, 8 March 2017.

69 *Kelsey Cascade Rose Juliana v. USA*, District Court, [Oregon, USA] Case no. 6 :15-cv-01517-TC <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210923_docket-615-cv-01517_declaration.pdf> accessed 25 September 2021.

70 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECtHR, App no.53600/20, 17 March 2021.

71 Setzer and Higham (n.8), p.14.

72 Savaresi and Auz, (n.9), p. 244.

73 Annalisa Savaresi 'Plugging the enforcement gap: The rise and rise of human rights in climate change litigation' (2021)77 Questions of International Law, p. 2.

74 Setzer and Higham (n.8), pp.32-33; for 'loss and damage' see Patrick Toussaint, 'Loss and damage and climate litigation: The case for greater interlinkage', (2021) 30(1) RECIEL, pp.16-33.

75 Julie H. Albers, 'Human Rights and Climate Change: Protecting the Right to Life of Individuals of Present and Future Generations'(2017) 28, Security and Human Rights, p.120.

areas of law cannot.[76]

Climate litigation in general, the first examples of which were encountered in 1986, started to gather pace from the mid-2000s.[77] Looking at climate litigation databases, there had been over 1800 ongoing or concluded climate cases worldwide to 2021, with over 100 categorized as human rights cases, and more than 90 of them filed against governments.[78] The numbers are on the rise, indicating an increasing trend in the use of litigation to hold governments accountable for their actions related to climate change.[79] By 2021, 55 of the rights-based cases had been concluded, with positive judgments being given in 25 cases, while negative judgments were given in 32 cases.[80] Considering that 29 of these cases were filed in 2020 alone, it is clear that there has been an increase in rights-based litigation in recent years.[81] It is widely observed that the most notable acceleration in these cases occurred in 2020, the year following the final judgment of the Dutch Supreme Court in the Urgenda case.[82]

3.1. The Urgenda Case

The *Urgenda* Foundation filed a rights-based climate lawsuit against the Dutch Government before The Hague District Court in 2015, where the Court ordered the state to reduce GHG emissions because it violated its own international commitment.[83] According to this decision, GHG emissions should be mitigated up to at least 25% by the end of 2020 compared to 1990. The decision was upheld by the Court of Appeal in 2018,[84] and the matter came to an end once the decision was upheld in the final judgment of the Dutch

76 Savaresi and Auz, (n.9), p. 245.

77 Setzer and Higham (n.8), p.7; Some key cases in the early 2000s are considered as emblematic, so it is believed that they triggered that increase, see Kim Bouwer and Joana Setzer, 'Climate litigation as climate activism: what works?' (The British Academy, CoP 26 Briefings, 2020), p.5.

78 Setzer and Higham (n.8).

79 See, Joana Setzer and Catherine Higham 'Global trends in climate change litigation: 2022 Snapshot' (*Grantham Research Institute*, Policy Report, 2022)

80 Setzer and Higham (n.8).

81 Ibid.

82 See Setzer and Byrnes (n.26), p.1.

83 *The State of the Netherlands v. Urgenda Foundation*, District Court of The Hague (24 June 2015) Case: C/09/456689 (English translation) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196> accessed 1 September 2021.

84 *The State of the Netherlands v. Urgenda Foundation*, The Hague Court of Appeal (9 October 2018) Case: 200.178.245/01 (English translation) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610> accessed 1 September 2021.

Supreme Court at the end of 2019.[85]

The *Urgenda* case is essentially a private law matter based on the Dutch Civil Code; the case centred on whether the state had fulfilled its duty of care to the individuals the Urgenda Foundation was representing. While evaluating the state's fulfilment of this duty of care, human rights served as a basis for interpretation.[86] In this direction, it was decided that the Dutch state was partially responsible for the unjust actions that occurred within other states resulting from the climate crisis, as a matter of cumulative causality.[87]

The Dutch Government acknowledged its shared culpability in the anthropogenic warming phenomenon and recognised the imperative to curtail GHG emissions within the range of 25% to 40% by 2020, consistent with its international obligations and informed by climate science,[88] in order to prevent the breach of the critical warming threshold.[89] Subsequently, an assessment was made that this objective was pressing and essential, and that it ought to be accomplished on a global scale.[90] However, it was determined that the state could not achieve this target. Moreover, it limited its mitigation commitment rate, and failed to submit any legitimate reason for this.[91] Thus, the Court concluded that there was a known, real, and imminent threat to both the right to life protected by ECHR Art2, and the right to respect for private and family life under ECHR Art8.[92] So, the state could not fulfil its *duty of care*[93] to protect current generations due to its positive obligation.[94] As far as the victim status of the applicants was concerned, being one of the procedural hurdles in the trial, it was reiterated that the case filed by *Urgenda*, a legal person, on behalf of more than 800 individuals must be regarded as an *actio popularis* according to the ECHR Art34, and ECtHR case-law.[95] However, the case was not rejected on

85 See *Urgenda*, Supreme Court (n.7).

86 See *Urgenda*, District Court (n.83), § 4.46.

87 *Urgenda*, Supreme Court (n.7) §5.7.6, *fn.*35; also see Jolene Lin 'The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment' (2015) Climate Law, pp.65-81.

88 *See* IPCC, *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (R.K. Pachauri et al. [eds.] IPCC, 2007).

89 *Urgenda*, Supreme Court (n.7) §2.1.

90 Ibid.

91 *Urgenda*, Court of Appeal (n.84), §60.

92 *Urgenda*, Supreme Court (n.7), §5.3.2.

93 See *Urgenda*, District Court (n.83), §§ 4.52-4.53. 'Article 21 of the Dutch Constitution imposes a duty of care on the State relating to the liveability of the country and the protection and improvement of the living environment.' Ibid § 4.36.

94 Ibid, §§5.2.1-5.4.3.

95 *Urgenda*, Court of Appeal (n.84), §35.

the grounds that it also concerned domestic law.[96]

The result was ground-breaking; it was an explicit success for rights-based climate litigation and encouraging for future litigation. Nevertheless, it has since faced some criticisms. As an illustration, it is contended that the principle of separation of powers[97] was disregarded by necessitating a political course of action in response to a judicial order on a given matter.[98] Additionally, Art2§1(a) of the Paris Agreement was deemed a binding provision in a strict and literal sense,[99] among other arguments. Some scholars, on the other hand, criticise the decision, saying that bolder steps should be taken by the Court with respect to its approach to positive obligations.[100]

This case is a first in the successful use of the tort of negligence to hold a state accountable for its failure to mitigate climate change,[101] and historic in terms of containing many important achievements. One of these significant achievements is Dutch District Court's attempt to expand environmental law through the ECHR by putting forward a 'precautionary principle'[102] as an argument.[103] This recognises that a traditional human rights law approach alone might be frail without an ecocentric climate approach. Moreover, with this argument, the Court puts the burden of proof firmly on the state.[104] Also, if the *Urgenda* case is not destined to remain as an exceptional case engaging in judicial activism, it may be essential to fill in the gaps with more thorough legislation.

3.2. The Leghari Case

Another successful rights-based climate case is the *Leghari* case, which, like the *Urgenda* case, was brought before the national courts.[105] In this case, a Pakistani farmer, Mr Leghari brought a case before the Lahore High Court

96 Ibid.

97 Ibid, §§67-68.

98 Ingrid Leijten, 'The Dutch Climate Case Judgment: Human Rights Potential and Constitutional Unease' (Verfassungsblog, 19 October 2018) <https://verfassungsblog.de/the-dutch-climate-case-judgment-human-rights-potential-and-constitutional-unease/> accessed 1 September 2021.

99 Chris W. Backes and Gerrit A. van der Veen 'Urgenda: the Final Judgment of the Dutch Supreme Court' (2020) 17 Journal for European Environmental & Planning Law, p. 312.

100 Ingrid Leijten, 'Human rights v. Insufficient climate action: The Urgenda case', (2019) 37(2) Netherlands Quarterly of Human Rights, p.118.

101 Lin (n.87), p.80.

102 See Rio Declaration (n.26), Principle 15.

103 See *Urgenda*, District Court (n.83), §43, §63, and §73; similarly Peel and Osofsky, [Rights Turn] (n.6), p.50.

104 Suryapratim Roy and Edwin Woerdman Dr 'Situating Urgenda v the Netherlands within comparative climate change litigation', (2016) 34(2) Journal of Energy & Natural Resources Law, p.177.

105 *Leghari,* Judgment (n.66).

complaining of the state's failure to fulfil the national climate change policy and its implementation framework adopted by the Pakistani Government. Subsequently, the High Court decided to assign a commission in order to monitor the state's practices regarding the aforementioned policy and framework, and to appoint climate change focal persons in some ministries.[106] By a supplemental decision, the High Court also appointed members to the said commission and determined its duties.[107] Based upon the subsequent report of this commission, the High Court concluded that the constitutional rights and freedoms of individuals had been violated due to the state's unsatisfactory realisation of climate policy and the 2014-2030 framework adopted by the Pakistan Government in 2012.[108]

Firstly, in its judgment, the court referred to current climate science and recognised that climate change was a 'real' issue that had adverse effects for water, food and energy security in Pakistan.[109] Secondly, it concluded that the state did not take sufficient adaptation measures for these vital requirements,[110] and due to this inaction of the government, the right to life, the right to human dignity, the right to a healthy and clean environment, the right to property, and the right to information, which are guaranteed in the national constitution, had been breached.[111]

In the *Leghari* case, unlike the *Urgenda case*, human rights law was not viewed as an ancillary element applied in interpretation, but rather it was a central issue put forward through 'public interest litigation' in which it was examined whether the state had fulfilled its positive obligations.[112] One of the criticised aspects of this case is that the link between the state's inaction and the violations alleged by Mr Leghari were not adequately addressed in terms of causation.[113] Similarly, it is difficult to identify any meaningful analysis in terms

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106 *Asghar Leghari v. Federation Of Pakistan,* The Lahore High Court (Decision, 4 September 2015) Case: W.P. No. 25501/2015<http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150404_2015-W.P.-No.-25501201_decision.pdf> accessed 1 September 2021.

107 *Asghar Leghari v. Federation Of Pakistan,* The Lahore High Court (Supplemental Decision, 14 September 2015) Case: W.P. No.25501/2015<http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150414_2015-W.P.-No.-25501201_decision.pdf> accessed 1 September 2021.

108 *Leghari*, judgment (n.66), §19.

109 Ibid, §1, §10.

110 Ibid, §22.

111 *Leghari*, decision (n.106), §7.

112 Peel and Osofsky, [Rights Turn] (n.6), p.38.

113 Janne Dewaele, 'The Use of Human Rights Law in Climate Change Litigation: An Inquiry into the Human Rights Obligations of States in the Context of Climate Change; and the Use of Human Rights Law in Urgenda and Other Climate Cases' Dissertation p.52.

of jurisdiction or standing in the case.[114] The uncomplicated acknowledgement of this nature may garner recognition among other climate-related cases founded on rights-based claims, owing to the adaptability of public interest litigation afforded to the judiciary.[115]

On the other hand, it is quite remarkable that the Lahore High Court appealed to the *mandamus* doctrine[116] before rendering a judgment, and issued an order to appoint a commission and focal persons as mechanisms to evaluate the government's compliance with climate targets. Alongside human rights, the case took into account international environmental law principles, namely the doctrine of public trust, sustainable development, the precautionary principle, intergenerational equity principles, and even climate justice. This successful blend of principles may reflect the Pakistani judiciary's well-known history of activism in environmental matters.[117]

3.3. The Future Generations Case

Another rights-based national climate case was filed in Colombia.[118] The applicants made an application of *tutela*[119] alleging that the right to life, the right to health, the right to a healthy environment, and the right to food and water had been violated because the Colombian state had failed to realise its goal of zero deforestation by 2020 which was the NDCs adopted in accordance with the Paris Agreement.[120] Contrary to the dismissal decision of the District Court[121], the Supreme Court accepted the allegations and concluded that the government had failed to meet its deforestation commitment which caused an increase in GHG emissions, contributing to climate change, and violating the rights claimed by the applicants.[122]

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114 Ibid.

115 Birsha Ohdedar, 'Litigating Climate Change in India and Pakistan: Analysing Opportunities and Challenges' in Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci (eds) *Climate Change Litigation: Global Perspectives* (Brill-Nijhoff, 2021), p.122.

116 A writ of mandamus is a legal directive issued by a court to an inferior government official, compelling them to fulfil their official duties in a proper manner or rectify an instance of discretionary misconduct. This legal concept is exemplified in cases such as Cheney v. United States District Court for D.C. (03-475) 542 U.S. 367 (2004) 334 F.3d 1096.

117 Ohdedar (n.115), p. 106: also see Peel and Osofsky, [Rights Turn] (n.6), p.52.

118 See supra note 67.

119 *Tutela* is a domestic human rights protection mechanism in Colombia, for more *see* Patrick Delaney, 'Legislating for Equality in Colombia: Constitutional Jurisprudence, *Tutelas*, and Social Reform' (2008) 1 The Equal Rights Review, pp.50-59.

120 *Future Generations* (n.67) §§1-2.5.

121 Ibid, pp.10-13; For the original District Court decision in Spanish see <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180212_11001-22-03-000-2018-00319-00_opinion-1.pdf> accessed 2 September 2021.

122 *Future Generations* (n.67) §§11.1-13.

The District Court's conclusion that the complaint was not suitable for a *tutela* trial because it was of a collective rather than an individual nature was superseded by the decision of the Supreme Court which referred to the exceptional nature and gravity of the issue.[123] Despite the collective nature of the subject matter, the Supreme Court noted that the threat was not hypothetical but proven; therefore, it was possible for the plaintiffs to be directly and individually affected.[124] The court then moved on to its merits-based review, following which it delivered its judgment in favour of the plaintiffs. The most specific feature of this case is that besides present generations, future generations[125] and even Amazon forests - referred to as the *lungs of the world*- were recognised as subjects of the rights.[126] Although there have still been criticisms that satisfactory evaluations pertaining to standing and causality remain insufficient,[127] some argue that the success of the judgment can be attributed to the constitutional recognition of the right to a clean and healthy environment.[128]

4. Legal Hurdles

As previously discussed, climate litigation has encountered several legal obstacles. It is also possible to encounter such obstacles in rights-based cases, regardless of whether they ultimately succeed or not.

Early rights-based climate change litigation also faced a number of legal hurdles, such as a purported lack of causality between a state action (or inaction) and human rights violations, as well as jurisdictional issues arising from a state's extraterritorial activities.[129]

To provide an example, the *Inuit* case, which was among the initial cases concerning climate change and human rights, saw the rejection of the petitioners' claim by the Inter-American Commission on Human Rights due to the inadequacy of information provided to evaluate the alleged violation.[130] This approach suggests that the state's negative obligations were addressed

123 Ibid, p.13.
124 Ibid, pp. 10-13.
125 Ibid, §14.
126 Ibid, §10.
127 Dewaele (n.105), p.54.
128 Samvel Varvastian, 'The Human Right to a Clean and Healthy Environment in Climate Change Litigation' (2019) 9 MPIL Research Paper Series, p.11; Dewaele (n.105), p.54.
129 See OHCHR Report (n.48), also Siobhán McInerney-Lankford, 'Climate Change and Human Rights: An Introduction to Legal Issues' (2009) 33(2) Harvard Environmental Law Review, p. 433; Peel and Osofsky, [Rights Turn] (n.6), p.46.
130 See Commission's decision (short letter), (16 November 2006) <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision.pdf> accessed 31 August 2021

rather than positive obligations in examining this particular rights-based climate complaint.[131]

In *Teitiota v. New Zealand* case heard by the UN Human Rights Committee, a person from the island state of Kiribati in the Pacific Ocean, whose application for refugee status was rejected by New Zealand, claimed that due to climate change, the sea water level had risen in his country, among many other problems, and that it had become difficult to access fresh water[132] and food[133]. He also claimed that violent clashes had occurred following land disputes due to the rising water level.[134] He complained that these issues violated his right to life as protected under ICCPR Art6.[135] The Committee did not find any violations,[136] but noted that the victim, facing a real and reasonably foreseeable risk to their life due to climate change, should have been protected by ICCPR Art6 (right to life).[137]

In *The People's Climate Case*, ten families, including children, filed a lawsuit in the European General Court (ECG) to force the European Union (EU) to reduce emissions. The plaintiffs argued that the EU's existing target of reducing local GHG emissions by 40% by 2030, compared to 1990 levels, was insufficient to avoid the danger zone and thus their life, health, occupation and property rights were threatened. However, the ECG noted that the plaintiffs were not sufficiently and directly affected by these policies and found the case inadmissible on procedural grounds.[138] The decision was upheld by the Court of Justice of the European Union.[139]

Notwithstanding the technical challenges encountered, these setbacks have acted as a catalyst for initiating novel litigations, and proactive measures have been subsequently undertaken to surmount these impediments.[140] As a result,

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131 Marguerite E. Middaugh, 'Linking Global Warming to Inuit Human Rights', (2006) 8, San Diego International Law Journal, p. 194.

132 *Teitiota v. New Zealand*, UN Human Rights Committee (24 October 2019), CCPR/C/127/D/2728/2016, §2.1.

133 Ibid, §2.3.

134 Ibid, §2.4.

135 Ibid, §3.

136 Ibid, §9.9.

137 *See* Ibid, §§9-10.

138 For inadmissibility decision, see *Armando Carvalho and Others v. European Parliament and Council of the European Union*, General Court [European Union], Case no. T-330/18, 8 May 2019; Also see Plaumann & Co. v Commission of the European Economic Community, Case 25-62, 15 July 1963, ECJ.

139 *Armando Carvalho and Others v. European Parliament and Council of the European Union*, Court of Justice [European Union], Case no. C 565/19 P, 25 March 2021.

140 Peel and Osofsky, [Rights Turn] (n.6), pp.47-48.

some of these cases, especially those at the national level, have the potential to serve as models for international human rights frameworks.

5. The Role of a Rights-Based Approach

It is ideal for states to spontaneously take political steps against the phenomenon of climate change. However, due to the importance of the economy in our daily life and the fact that it has taken us captive, it would be naive to expect governments, whose success criteria are focused on mostly economic parameters, to include climate crisis in their legislative programmes. Therefore, it is necessary to take steps at the international level to combat the climate crisis, which is a global and urgent issue. In doing so, a binding international climate legislation is important. However, as seen above, the Paris Agreement, the most comprehensive binding treaty adopted to date, has some gaps that need to be filled. Climate litigation is important as the gaps in the legislation can be filled by judicial action. However, climate litigation also has tough legal hurdles to overcome. We have observed how local courts in diverse regions of the world have courageously addressed these impediments. One of the elements behind their success is undoubtedly the manoeuvrability that human rights arguments provide. These arguments make it easier to deal with difficulties such as causality, attribution, standing and extraterritoriality, all of which we shall unpack in the final section.

Despite its increasing success, rights-based litigation has been severely criticised on the grounds that traditional human rights law fulfils a remedial function rather than a preventive one. Adopting applicable and consistent principles is vital if this traditional approach is to be reformed using human rights. Difficulties such as standing and causation can be eased with the help of the principles of climate and environmental law, as in the *Leghari* case. Or, as in the *Future Generations* case, it may be more convincing to illustrate the imminence of the potential risk to human rights with an emphasis on environmental rights and an ecocentric approach. Thus, these cases, which owe some of their success to the activist attitudes of domestic courts, should not be marginalised, and can provide common principles for litigation for the climate crisis that will have international impact. This could create a critical impetus for tackling the climate crisis, noting that the international success of rights-based litigation will have binding implications for all.[141]

Also, rights-based litigation may be viewed with suspicion due to bias towards the legitimacy of IHRL.[142] However, it should be noted that the threat

[141] Norwegian Institution, Report (n.32) §9.1.

[142] *See* Joana Setzer, Lisa C. Vanhala 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) Wiley, p.10.

level of the issue is almost equivalent to that posed by an enormous asteroid heading straight for Earth. Therefore, the urgency associated with this issue is of a scientific nature rather than a political one.

There might be also a pragmatic aspect to using human rights arguments in climate litigation. Given the hegemonic and selfish attitude of humankind who still sees itself in the centre of the universe,[143] it may be more striking and dissuasive, and therefore successful, to explain the threat to the public through right-based arguments.

In tackling the climate crisis, international collaboration is both an urgent need and an effective one. However, its progression is disappointingly slow and painful. Therefore, litigation in general is an important complement. In persuading states to comply with their climate commitments, rights-based litigation has been found to be an important tool. Also, the enlargement of IHRL in favour of the environment, and international climate legislation in which human rights are adopted (despite its shortcomings) has played an important role in the victories achieved in the local courts.

Rights-based litigation has a very strong potential to contribute to mitigating the factors that cause climate change and adapting to its adverse effects. It will be examined next section whether the ECHR, as a well-known regional human rights mechanism, can contribute to climate litigation thanks to its relatively rich jurisprudence and interpretative tools, considered in the context of its interaction with IHRL. Despite the failure of the *People's Climate* case[144], the ECtHR remains a potential mechanism that may influence the national judiciaries in Europe.

B. The Environmental Protection of ECHR

1. The ECHR and ECtHR

The ECHR, signed by the 46 member states[145] of the Council of Europe (CoE), is one of the most important regional human rights treaties in existence. Membership of the CoE includes EU and non-EU states from mainland Europe in addition to member states at the outer limits of the continent such as Turkey, Ukraine, Azerbaijan, Georgia and Armenia. As such, the ECHR protects the human rights of more than 700 million individuals, a significant responsibility which reveals the ECtHR's extraordinary sphere of influence.[146]

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143 *Future Generations* (n.67) p.16.

144 See supra note 138.

145 Subsequent to its expulsion from the Council of Europe on March 16, 2022, the Russian Federation discontinued its status as a signatory to the ECHR on September 16, 2022.

146 'The European Convention on Human Rights - how does it work?' (CoE) <https://www.coe.int/en/web/impact-convention-human-rights/how-it-works> accessed 30 March 2023.

States within the jurisdiction of the ECtHR are deemed to be in a category composed of either developed or transitional economies.[147] However, the distinction between developed and developing countries has largely lost its importance due to the universal need to combat the climate crisis[148] and it can be argued that all member states have the potential to significantly impact the fight against the climate crisis by fulfilling their climate-based human rights obligations voluntarily or at the command of the ECtHR. This potential warrants an examination of the significant capacity of the Strasbourg Court for positive transformative climate litigation.

Before diving into the relevant case-law, the next subsection will shed light on the right to a clean and healthy environment and demonstrate how this is relevant to addressing climate cases.

2. The Right to a Clean and Healthy Environment

There is no reference to the concept of 'environment' in the ECHR and its protocols, which is not surprising considering the period in which the ECHR was signed.[149] The main purpose of this text and the CoE, after the Second World War and the great destruction caused by the Nazi regime, was to guarantee the rights of physical and moral integrity, security, liberty, and so on. Therefore, the right to a healthy environment was not considered a serious concern in these circumstances.

Since its adoption in 1950, the ECHR has been amended many times through additional protocols, and new rights have been added to the main text. However, although the importance of including a right to a clean environment in the ECHR has been considered, a concrete proposal to include the right to a healthy environment through an additional protocol was rejected by the CoE Committee of Ministers in 2010.[150]

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147 UN 'World Economic Situation and Prospects 2021-Statistical Annex' (UN, 2021), pp. 125-126 <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2021_ANNEX.pdf> accessed 16 September 2021.

148 *See* Paris Agreement (n.3).

149 'The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953.' See <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c> accessed 6 September 2021.

150 See 'Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment' (Parliamentary Assembly of the Council of Europe), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24830&lang=en> accessed 6 September 2021. Also *see* A high-level panel taking place in Strasbourg from 27 to 30 September 2021 by Autumn Session of the Parliamentary Assembly of the Council of Europe, including 'Council of Europe's action to anchor a "right to a healthy environment"' <https://pace.coe.int/en/pages/session-202110> accessed 6 September 2021.

Having said that, the UN General Assembly's recent declaration that everyone has a right to a healthy environment is a significant development in the protection of environmental rights.[151] The resolution highlights the urgency of addressing climate change and environmental degradation as a threat to humanity's future, and calls on states to ensure access to a clean, healthy, and sustainable environment.[152] Although not legally binding, the resolution has the potential to prompt states to adopt similar measures at the national and regional levels. If this were to happen, it could lead to a positive change in the approach of the CoE. Thus, the UN's recognition of the right to a healthy environment may ultimately have implications for the development of environmental law at the European level.

The fact that a right to the environment is not explicitly included in the text of the ECHR does not mean that this right is not protected or that it has been completely ignored. On the contrary, it can be argued that the ECtHR has interpreted the Convention text to accommodate the development of an environmental right, in parallel with the increase in environmental issues. Indeed, the ECtHR has given judgment in around 300 cases addressing various complaints about environmental threats and harms and it has already demonstrated a willingness to incorporate environmental considerations in its judgments.[153]

3. Environmental Human Rights

The ECtHR identifies the rights it guarantees as substantive and procedural rights. To define these groups simply, the enjoyment of substantive rights requires only basic measures to be taken, while procedural rights require either effective domestic procedures that enable their exercise or sufficient domestic remedies in the event of infringement.[154] The greening of rights that has occurred under the ECHR has included rights from these two categories. Substantive examples are the right to life (Art2), prohibition of inhuman or degrading treatment (Art3),[155] respect for private and family life (Art8), protection of property (Art1 of Protocol No.1 to the ECHR),[156] and prohibition of discrimination (Art14).[157] Also, it should be noted that these rights may also have procedural dimensions.[158] Procedural and participatory rights, on the other

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151 *See* UNGA Res 76/300 (26 July 2022) UN Doc A/76/L.75.

152 Ibid.

153 CoE 'Protecting the environment using human rights law' (CoE) <https://www.coe.int/en/web/portal/human-rights-environment> accessed 7 September 2021.

154 See David Harris et al., *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, (4th edn, Oxford University Press, 2018), p.502.

155 *Florea v. Romania*, ECtHR, App no. 37186/03, 14 September 2010.

156 See *Öneryıldız v. Turkey*, ECtHR [GC] App no.48939/99, 30 November 2004.

157 See *Roche v. United Kingdom,* ECtHR [GC], App no.32555/96, 19 October 2005.

158 See, ECtHR, 'Factsheet-Environment and the ECHR' (ECtHR, Press Unit, July 2021).

hand, include freedom of expression and the right of access to information[159] (Art10), freedom of assembly and association[160] (Art11), the right to a fair trial[161] (Art6), and the right to an effective remedy[162] (Art13). Of these rights, the case-law for Art(s)2 and 8 will be considered in greater depth.

To better understand its frequent application in climate litigation that focuses on rights, it is essential to briefly examine the Court's previous rulings on environmental cases, particularly on the right to life and right to private life, which are among the environmental rights pertaining to substantive rights.

3.1. Right to Life

In numerous previous environment-related cases, applicants have applied to the ECtHR, alleging that their right to life was threatened due to the inaction of either the state or private actors during environmental events and disasters. In the *Budayeva and Others* case, many people were injured, died, or disappeared as a result of landslides and mudslides in Russia.[163] The ECtHR determined that the right to life had been violated, and while the state had been aware of the danger, it had failed to take the necessary precautions. Additionally, the state had neglected to alert the public about the issue and continued to display negligence even after the event had occurred.[164] As it can be seen that the Court examines not only environmental disasters caused by human activities[165] but also determines if the state has a positive obligation in cases of environmental disasters arising from natural causes. However, according to the Court, natural disasters, which are beyond human control, do not require the same level of state involvement.[166] Moreover, the state's obligation to safeguard property from weather-related threats may not extend as far as it does in the case of dangerous human-made activities.[167]

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159 *Guerra and Others v. Italy,* ECtHR App no.14967/89, 19 February 1998; *McGinley and Egan v. United Kingdom*, ECtHR, App no.21825/93 and 23414/94, 9 June 1998; *Brincat and Others v. Malta*, ECtHR, App no. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, 24 July 2014; *Öneryıldız v. Turkey* (n.156).

160 *The Argeş College of Legal Advisers v. Romania,* ECtHR, App no. 2162/05, 8 March 2011.

161 *Zander v. Sweden,* ECtHR, App no. 14282/88, 25 November 1993. *Taşkın and Others v. Turkey*, ECtHR, App no. 46117/99, 10 November 2004.

162 *Hatton and Others v. United Kingdom*, ECtHR [GC], App no. 36022/97, 8 July 2003; *Öneryıldız v. Turkey*, (n.156).

163 *Budayeva and Others v. Russia*, ECtHR, App no15339/02; 21166/02; 20058/02; 11673/02 and 15343/02, 20 March 2008.

164 Ibid, §§147-160.

165 See *Öneryıldız v. Turkey*, (n.156). For a case in which the right to life was discussed due to radiation as a result of nuclear tests, see *L.C.B. v. the United Kingdom*, App no.14/1997/798/1001, 9 June 1998.

166 Ibid, §174.

167 Ibid.

Examining whether the state has a positive obligation to protect the right to life in both environmental disasters caused by human activities and environmental destruction resulting from natural disasters is promising in addressing climate change, as demonstrated in the *Öneryıldız v. Turkey* case. Indeed, complaints related to climate change should be assessed not only as natural disasters but also as human-induced phenomena. It is important to note that in cases where the violation of the right to life is alleged, the court seeks to establish a sufficient and scientific causal link between the resulting deaths and the state's action or inaction, as indicated in the *Smaltini v Italy* case.[168]

3.2. Right to Private Life

The right to private life (Art8) is frequently invoked in environmental cases before the ECtHR, as it is regarded as the most flexible provision, reflecting the dynamic nature of the instrument.[169] The ECtHR has interpreted this right expansively, recognising that the detrimental impacts of environmental issues on individuals can be addressed under this provision. Various forms of interference, including noise, emissions, odours, and other environmental disruptions, can be grounds for invoking this right.[170] The Court has classified environmental cases related to Art8 under several themes, such as noise pollution, industrial wastes and emissions, landfills, and environmental disturbances caused by base stations and antennas.[171] Given the practical flexibility of Art8 in shaping climate-related cases, it is highly likely that climate change will be considered by the Court within the scope of this right.

The first judgments rendered by the ECtHR in environmental rights matters arose after people living near airports complained about the noise pollution caused by night flights. In the *Powell and Rayner* case as well as the *Hatton and Others* cases, the Court recognised that aeroplane noise interfered with nearby residents' privacy and tranquillity under Art8.[172] Nonetheless, in both cases, the Court accepted the legal basis of the interference, namely the economic

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168 *Smaltini v. Italy*, ECtHR [Decision], App no. 43961/09, 24 March 2015. *Smaltini v Italy* is a case related to industrial emissions that was found manifestly ill-founded and inadmissible. The case involved the impact of environmental nuisance caused by the operation of a steelworks on the health of the first applicant, who had died of leukaemia. The applicant claimed that the harmful emissions from the facility were the cause of the cancer and violated the procedural aspect of the right to life. However, the Court found that proper investigations and judicial process were carried out after the applicant's initial complaint to the authorities. The Court concluded that there was insufficient scientific evidence to establish a causal link between the death and the operation of the facility.

169 See Factsheet (n.158) pp.8-24.

170 *See* Boyle (n.55); also Harris et al. (n.154), p.502.

171 See Factsheet (n.158) pp.8-24.

172 *Powell and Rayner v. United Kingdom*, ECtHR App No. 9310/81, 21 February 1990, §40; *Hatton and Others v. United Kingdom* (n.162), §118.

well-being of the country, and found the state's conduct proportional. The Court emphasised the broad MoA enjoyed by states in environmental matters, particularly in the *Hatton and Others* case.[173] In contrast, in a case about noise pollution from other vehicles, the Court ruled in favour of the applicant, finding the state's measures inadequate and depriving the applicant of the right to home and private life.[174] The Court also found a violation of the state's positive obligation regarding increased noise levels from rail traffic in a separate case.[175] These cases illustrate the Court's broad interpretation of the positive measures states must take to prevent land transportation noise pollution while taking a narrower approach to aviation matters. Although the primary concern in those cases pertains to noise pollution, it is evident that the ECtHR considers legitimate reasons, as outlined in the second paragraph of Art8, in its various approaches. However, claiming that a state has a MoA for climate change - a global issue - based on certain legitimate reasons such as the state's exclusive economic interest and sovereign right, would pose potential difficulties.

In a separate case, *Moreno Gomez* case,[176] concerning noise pollution, the city council of the applicant's residence had issued a resolution to address the noise issue and improve the quality of life for local residents. However, the council also continued to grant licenses for discotheques to operate in violation of the rules it had established. The Court therefore concluded that the right to respect for the applicant's home and her private life had been violated.[177] This approach demonstrates that simply having legislation may not suffice for states. According to this ruling, granting licenses for activities that result in GHG emissions beyond the scope of existing legal regulations that conforms to international regulations governing mitigation and adaptation with regard to climate change may also constitute a violation.

The ECtHR has examined environmental pollution caused by industrial waste in several cases, given its serious nature and the threat it poses to private and family life. One such case is *López Ostra* case, where unlicensed waste facilities near the applicant's home caused severe harm to the environment, depriving the applicant of the enjoyment of his home and right to family and private life.[178] Although the Court stated that the pollution must reach a 'minimal level', [179] it was ruled that it was unnecessary to demonstrate that

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173 *See Hatton and Others v. United Kingdom* (n.162), §§116-130.

174 *Dées v. Hungary,* ECtHR, App no.2345/06, 9 November 2010, §§23-24.

175 See *Bor v. Hungary*, ECtHR, App no.50474/08, 18 June 2013.

176 *Moreno Gomez v. Spain,* ECtHR, App no.4143/02, 16 November 2004.

177 Ibid, §§57-63. For similar, see *Martinez Martinez v. Spain*, ECtHR, App no.21532/08, 18 October 2011.

178 *López Ostra v. Spain*, ECtHR App no.16798/90, 9 December 1994.

179 Ibid; *Guerra and Others v. Italy* (n.159); *also see Fadeyeva v. Russia,* ECtHR, App no.55723/00, 9 June 2005.

the pollution posed a serious threat to health.[180] Similarly, in the *Giacomelli* case,[181] the applicant suffered long-term exposure to persistent noise and harmful emissions due to a waste treatment plant operating without proper environmental impact assessments. The authorities took action but delayed its proper implementation, resulting in a violation of Art8.[182] In the *Fadeyeva* case,[183] the operation of a steel plant near the applicant's home endangered their health and well-being, and the state failed to strike a fair balance between the interests of society and the effective enjoyment of the applicant's right to respect for their home and private life, resulting in another violation of Art8.[184] The Court noted the state's MoA but found no evidence that it had taken effective measures to reduce industrial pollution to acceptable levels.[185]

The ECtHR has dealt with cases where states failed to protect applicants from prolonged exposure to severe pollution caused by private third parties operating illegally.[186] The Court found the states to be liable for not imposing sanctions on the perpetrators and failing to provide relocation solutions for affected people in the *Fadeyeva* and *Dubetska* cases[187], while in the *Tătar* case, cyanide gold extraction's effects on human health were not properly assessed before commencement.[188] The Court relied on objective data in its judgments, considering the level of pollution, proximity to the source, and exposure duration.[189] The precautionary principle was referred to in the *Tătar* case,[190] and the Court stressed that a lack of certainty regarding scientific and technical information could not delay the adoption of effective measures.[191] While the Court's application of this principle has been limited,[192] Omuko argues that it

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180 *López Ostra v. Spain,* (n.178).

181 *Giacomelli v. Italy*, ECtHR, App no.59909/00, 2 November 2006.

182 Ibid, §§76-98.

183 *Fadeyeva v. Russia*, (n.179).

184 Ibid, §93.

185 Ibid, §§116-134; also see *Ledyayeva and Others v. Russia*, ECtHR, App no. 53157/99, 53247/99, 53695/00 and 56850/00, 26 October 2006.

186 *See* Factsheet (n.158).

187 *Fadeyeva v. Russia,* (n.179) §121; *Dubetska and Others v. Ukraine,* ECtHR, App no. 30499/03, 10 February 2011, §§140-156.

188 *Tătar v. Romania,* ECtHR, App no.67021/01, 27 January 2009.

189 *Dubetska and Others v. Ukraine*, (n.208) §118; *Băcilă v. Romania*, ECtHR, App no.19234/04, 30 March 2010, §§63-73.

190 *Tătar v. Romania,* (n.188) §69.

191 Ibid, §120.

192 Natalia Kobylarz, 'The European Court of Human Rights, an Underrated Forum for Environmental Litigation' in Helle Tegner Anker and Birgitte Egelund Olsen (eds.) *Sustainable Management Of Natural Resources:Legal Instruments And Approaches* (Intersentia, 2018), pp.118-120; also see *Tătar v. Romania,*(n.188); also see *Hardy and Maile v. The United Kingdom*, App no.31965/07, 14 February 2012.

has the potential to alleviate scientific uncertainty in climate litigation.[193]

The significant contribution of Art8 to environmental protection is evident from the Court's existing environmental case law. The various interpretations of the article that have accumulated over time can also be key and mobilised in climate litigation pending before the ECtHR, especially given that complaints in such cases often involve both Art(s)2 and 8.[194] Roagna attributes the expansion of Art8's scope in the past decade to its historical position as the first article to introduce the balancing of human rights protection and the states' MoA.[195] Therefore, determining which interest prevails in this balancing act has become a critical issue in climate litigation within the ECtHR.

The ECHR has been increasingly utilised at the domestic level to prompt governments to take greater measures in addressing climate change and environmental degradation.[196] Within the ECtHR, which boasts a significant body of environmental case-law and effective techniques for incorporating environmental considerations into rights-based discourse, the manner in which climate-related cases will be adjudicated remains uncertain, as no decisions have been rendered to date.[197] The following section will discuss the potential of the Strasbourg Court as a viable forum for rights-based climate litigation given its existing jurisprudence.

C. POTENTIAL HURDLES BEFORE THE ECtHR

1. Pending Cases

As a result of the ECtHR being considered a suitable forum for climate litigation, individual applications have started to be filed at the Court with the allegation that states have not mitigated their GHGs sufficiently and have, therefore, violated their human rights obligations.

In *Duarte Agostinho and Others,* which is pending at the time of writing[198] a single application has been directly filed at the ECtHR against 33 Contracting States, without the usual confirmation that domestic remedies have been

193 Lydia Omuko, 'Applying the Precautionary Principle to Address the "Proof Problem" in Climate Change Litigation', (2016) 12(1) Tilburg Law Review, pp. 52-71; Margaretha Wewerinke-Singh 'Remedies for Human Rights Violations Caused by Climate Change' (2019) 9 Climate Law, p.232.

194 Factsheet (n.158) p.12.

195 Ivana Roagna, *Protecting the right to respect for private and family life under the European Convention on Human Rights-Council of Europe human rights handbooks* (Council of Europe, 2012), p.7.

196 Section 1.3.1.

197 April, 2023.

198 *Duarte Agostinho and Others v. Portugal and Others,* ECtHR, App no.39371/20, App date: 13 November 2020.

exhausted.[199] The applicants have alleged that there is essentially a lack of an adequate domestic remedy.[200] One contention put forth is that due to the urgent nature of the matter at hand, it would be impractical for each petitioner to pursue legal action before their respective national courts in order to fulfil the requirement of exhausting domestic remedies. They further claim that such an expectation would impose an unreasonable and disproportionate burden on the applicants. The application, which is still pending before the Court, has been communicated by the Court relayed to the states concerned, and the Court has put questions to the defending governments under Art(s)1, 2, 3, 8, 14, 34, and Art1 of Protocol No. 1. Although the applicants did not make such a request with regard to Art 3, it is important that the Court requests a defence under Art3 so that the prohibition of inhuman or degrading treatment can be properly considered.[201] Having received the respondent governments' respective defences, the Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber on June 30, 2022, as the case presents a significant issue concerning the interpretation of the Convention.

Another relevant application is the *Verein KlimaSeniorinnen Schweiz and Others case* which makes history with the first-ever climate case to be heard before the ECtHR.[202] One of the applicants is an association, and the others are four elderly women. The women, who have health problems, have complained that their living conditions have been negatively affected by GHGs.[203] In contrast to the aforementioned cases, the present application does not concern any claims of extraterritorial liability. Various queries pertaining to the eligibility of the applicants and their legal entity to be recognised as victims have been raised, among other admissibility issues, which have been conveyed to the state. In this particular case, the state has been called upon to justify its

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199 *Duarte Agostinho and Others v. Portugal and 32 other States*, ECtHR Application Form, p.10 <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint.pdf> accessed 16 September 2021.

200 Ibid.

201 See Corina Heri, 'The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?' (EJIL:Talk!, 22 December 2020), <https://www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/> accessed 21 September 2021.

202 See *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,* (n.70). Following the written stage of the proceedings was completed, the case was moved to proceed to the oral stage, where a hearing was held on March 29th, 2023, by the Grand Chamber. However, the Court's final decision on the case is still pending. See, <https://echr.coe.int/Pages/home.aspx?p=hearings&w=5360020_29032023&language=en&c=&py=2023> accessed 2 April 2023.

203 Factsheet (n.158), pp. 2-3.

defence of the right to a fair trial (Art. 6) and an effective remedy (Art. 13) as procedural rights within the context of environmental claims. Additionally, positive obligations under Arts. 2 and 8 are also being contested. This case holds significant importance in establishing a causal link between adverse climate change impacts and elderly individuals. If the court rules in favour of the applicants, it may provide legal recognition to the fact that vulnerable groups, such as the elderly, are disproportionately affected by climate change.

The *Carême v. France* case is also presently awaiting adjudication by the Grand Chamber.[204] The case pertains to a grievance filed by an individual who is both a resident and a former mayor of the Grande-Synthe municipality. The claimant alleges that France has failed to take adequate measures to mitigate climate change, resulting in a violation of Art(s) 2 and 8.

After conducting a series of procedural meetings related to climate cases, which were distinct from those awaiting a hearing by its Grand Chamber, the Court decided to suspend the assessment of six other cases until the Grand Chamber delivers its judgment on the current issue.[205] Additionally, the Court found two other cases inadmissible, which will be mentioned in the *Ratione Personae* subsection.

These applications highlight a number of issues that need to be resolved, including the exhaustion of domestic remedies, victim status, jurisdiction, positive obligations and procedural rights. These matters, alongside *ratione personae*, *ratione loci*, causality and the MoA, are highly interrelated and interdependent and we will therefore consider them carefully in the remaining part of this section. In doing so we will pay close attention to the MoA, the interpretation of which has been problematic.

2. Procedural Hurdles

2.1. Exhaustion of Domestic Remedies

As previously mentioned, the ECtHR can only be appealed to after the

[204] *Carême v. France*, ECtHR, App no. 7189/21, App date: 28 January 2021.

[205] See, ECtHR, 'Factsheet-Climate Change' (ECtHR, Press Unit, March 2023); six cases adjourned are as follows: *Uricchiov v. Italy and 31 Other States,* ECtHR, App no.14615/21; *De Conto v. Italy and 32 Other States* ECtHR, App no.14620/21; *Müllner v. Austria*, ECtHR, App no.18859/21; *The Norwegian Grandparents' Climate Campaign and Others v. Norway*, ECtHR, App no. 19026/21; *The Norwegian Grandparents' Climate Campaign and Others v. Norway*, ECtHR, App no.19026/21; *Soubeste and four other applications v. Austria and 11 Other States*, ECtHR, App nos. 31925/22, 31932/22, 31938/22, 31943/22 and 31947/22; *Engels v. Germany*, ECtHR, App no. 46906/22.

exhaustion of domestic remedies.[206] This is a result of the recognition of subsidiarity principle followed by the ECHR system. The Court has confirmed that the protection mechanism is based on this principle.[207] Accordingly, the protection of the rights in the ECHR is primarily the duty of states. As the Court's main role is the supervision of national systems, it is more appropriate for the national courts to determine first whether the issues complained of fall within the protection of the ECHR.[208] The rationale of this criterion is to give an opportunity to the national authorities to repair or prevent violations.[209]

Applications filed without the exhaustion of domestic remedies are found inadmissible as a rule. However, it has been noted that this rule should not be applied with an overly formalistic approach.[210] Therefore, some circumstances may be accepted where the exhaustion requirement is not necessary. For instance, the Court has emphasised that the domestic remedies in question must be effective, adequate and accessible for applicants.[211] States cannot, therefore, claim that remedies remain available where said remedies are inaccessible or do not provide a chance of reparation and reasonable prospects of success. Nevertheless, the Court has confirmed that mere doubts about success are not a sufficient reason to set aside the exhaustion of remedies requirement.[212]

Cases in which it would not be reasonably practicable to ask applicants to exhaust a particular remedy and where it would constitute a disproportionate obstacle to the effective exercise of the right of individual application pursuant to Art34, are also considered exempt.[213] Notably, there are additional situations in which the generally accepted rules of international law may dictate a waiver of the usual exhaustion requirement. [214] Naturally, such exceptions require an independent examination of the specific facts of each case.

It is important to acknowledge that the functioning and speed of domestic remedies provided by judicial system of each state may differ. Notwithstanding, it is crucial to recognise that urgent and global concerns, such as climate change,

206 ECHR, Art35§1.

207 ECHR 'Practical Guide on Admissibility Criteria' (CoE, Updated on 1 August 2021), p. 1; also see Protocol No.15 of the ECHR.

208 *A, B and C v. Ireland*, ECtHR [GC], *App no.25579/05,* 16 December 2010, §142.

209 *Selmouni v. France*, ECtHR [GC] App no. 25803/94, 28 July 1999, §74.

210 *Ringeisen v. Austria*, ECtHR, App no. 2614/65*,* 23 June 1973, §89; *Gherghina v. Romania*, ECtHR [GC] App no. 42219/07, 9 July 2015, §87.

211 See *Sofri and Others v. Italy,* ECtHR, App no.37235/97 4 March 2003; *Sejdovic v. Italy*, ECtHR, App no.56581/00, 1 March 2006, §46.

212 *Sejdovic v. Italy* (n.211) §45.

213 *Veriter v. France*, ECtHR, App no.25308/94, 2 September 1996, §27.

214 Admissibility (n.207), p.32.

should also be regarded as relevant factors to be taken into consideration by the Court. In addition, the contribution of GHGs to climate change has been proven as a scientific fact,[215] and efforts -whether realistic or not- are continuing internationally in consideration of this catastrophic fact.[216] In this regard, the ECtHR may draw inspiration from the Paris Agreement[217] which reflects an international consensus on the seriousness of the matter and can be considered to promote the generally recognised rules of international law despite ongoing discussion of the provisions' binding force.[218] In light of the potential aggravation of environmental damage resulting from the pursuit of domestic remedial measures hence the loss of time, it behooves one to contemplate the applicability of the precautionary principle in this context, which was successfully employed to surmount the causality impediment in the *Urgenda* case[219] as well as *Tătar v. Romania* case of the ECtHR[220], may serve as a pertinent point of reference.

Referring to the number of cases and their chances of success before local judiciaries across the Europe, Pedersen claims that, climate applications, such as the *Duarte Agostinho and Others* case, are likely to be found inadmissible due to the strict procedural stance of the ECtHR, thus putting rights-based climate litigation at stake.[221] Indeed, the rule of exhaustion of domestic remedies is a procedural instantiation of the subsidiarity principle the procedural aspect of the subsidiarity principle.[222] However, it should be noted that the underlying cause of the Court's strict attitude towards this rule, among others, is the consideration that the ECtHR should not be 'a victim of its own success', rather than the objective of ensuring legal discipline.[223] In other words, the procedural rigidity adopted by the Court is predominantly designed to deal with an increased workload, and therefore results in a restriction in access to justice. Wewerinke-Singh argues that climate change victims should be entitled to access legal institutions and procedures that guarantee a fair trial and an

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215 See UN Environment, *Global Environment Outlook – GEO-6: Healthy Planet, Healthy People* (Paul Ekins et al. [eds], Cambridge University Press, 2019).

216 Section 1.2.

217 *See* Paris Agreement (n.3) Art2.

218 Ibid.

219 See supra note 103.

220 *Tătar v. Romania,* ECtHR, App no.67021/01, 27 January 2009.

221 Ole W. Pedersen, 'The European Convention of Human Rights and Climate Change – Finally!' (EJIL:Talk!, 22 September 2020) <https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/> accessed 19 September 2020.

222 *See* ECHR 'Interlaken Follow-Up: Principle of Subsidiarity' (ECtHR, 8 July 2010), pp. 6-9.

223 *See* Oddný Mjöll Arnardóttir 'The 'Procedural Turn' Under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15(1) International Journal of Constitutional Law, pp. 9-35.

effective remedy.[224] The rights of these victims to a fair trial and a substantive remedy should be better protected by removing any unfair procedural step. In the *Sacchi et. al* case, for instance, the UN Committee on the Rights of the Child was presented with a petition by sixteen children, which asserted that Argentina, Brazil, France, Germany, and Turkey had violated their rights under the UN Convention on the Rights of the Child by not making sufficient cuts to GHGs and by failing to encourage the world's largest emitters to reduce carbon pollution.[225] While the Committee acknowledged that the children had demonstrated, for the purposes of jurisdiction, that the State parties' acts or omissions regarding carbon emissions originating within their respective territories could reasonably foreseeably result in the impairment of their rights, it concluded that the petition was inadmissible due to the failure to exhaust domestic remedies.[226] By ensuring access to legal avenues for redress, marginalised individuals, including children in this regard, who often suffer the most severe impacts of climate change, should be able to seek justice, address power imbalances that contribute to environmental harm, and safeguard their fundamental human rights. Consequently, the formalistic approach taken by the Committee in the *Sacchi et al.* case ought not to be applied in forthcoming climate-related cases before the ECtHR as its substantive law might be potentially sufficiently effective in tackling the climate crisis.

In fact, due to the urgency of the matter, it is best to apply directly to the Strasbourg Court, whose decisions are legally binding and relatively effective in Europe - even beyond. Clark et al. argue that filing applications directly at the ECtHR would provide 'subsidiarity in action', that is, it would encourage the domestic courts to deliver *Urgenda*-like decisions.[227] Therefore, it is submitted that compromising 'procedural subsidiarity' ensures 'subsidiarity in action', and that this does not actually infringe on the subsidiarity principle. The ECtHR's ideal role is not to occupy the position of national courts, but rather to work in partnership with them.

The ECtHR has also noted that once a state claims that domestic remedies have not been exhausted, it bears the burden of proof to prove that the remedy was both available and effective.[228] At this stage, the Court will consider whether or not the state provided remedies for the violation of substantive rights, as well as remedies for the violation of procedural and participatory

224 Wewerinke-Singh (n.193) p. 227.

225 *Sacchi et al. v. Argentina, et al.,* UNCRC, CRC/C/88/D/108/2019, (8 October 2021).

226 Ibid.

227 Paul Clark *et al.*, 'Climate change and the European Court of Human Rights: The Portuguese Youth Case' (EJIL:Talk!, 6 October 2020), <https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/> accessed 18 September 2021.

228 *Dalia v. France*, ECtHR, App no.154/1996/773/974, 19 February 1998, §38; *McFarlane v. Ireland*, ECtHR, [GC] App no. 31333/06, 10 September 2010, §107.

rights, depending on the nature of the complaint. Since the number of cases of loss and damage caused by climate change is almost certain to increase, evidence of an effective national compensation mechanism to provide redress could be a crucial first step for states seeking to defend themselves.[229]

2.2. Time-Limit

Following the 'exhaustion of domestic remedies' hurdle has been overcome, the Court questions whether the climate application has been filed within the time-limit; a procedural requirement reviewed under the wider test of admissibility.[230] In cases where complaints are founded on a state's negligence to address climate change mitigation or adaptation, the state's behaviour might be identified as a continued violation. In line with the Court's case law, the time limit rule should not be applied in this situation.[231] Otherwise, the issue of access to justice may arise here as well. In terms of access to justice, any formal requirements, such as time-limits, have the potential to be restrictive, as they may hinder individuals from being able to access the court. When it comes to the substantive point of view, the issue focuses on whether domestic remedies are sufficiently available to provide effective protection for the rights, as mentioned above.[232] Indeed, the Court noted in its case law that procedural rules should not be interpreted inflexibly.[233]

3. Jurisdiction

3.1. Ratione Personae: Standing

The ECtHR acknowledges the occurrence of victimisation in three forms, namely direct, indirect, and potential victimisation.[234] However, for potential victimisation, applicants must present reasonable and convincing evidence that the violation may personally affect them.[235] The consequences of the

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229 Wewerinke-Singh (n.193) p.243.

230 ECHR, Art35§1. As a result of all Member States of the CoE have ratified Additional Protocol No. 15, with effect from 1 February 2022 the time-limit will be *four months* from the date of the final domestic decision, instead of *six months*, *see* The European Court of Human Rights 'Questions & Answers for Lawyers' (Council of Bars and Law Societies of Europe, 2020), p.6 <https://www.echr.coe.int/Documents/Q_A_Lawyers_Guide_ECHR_ENG.pdf> accessed 17 September 2021.

231 *Sabri Güneş v. Turkey*, ECtHR [GC] App no. 27396/06, 29 June 2012.

232 Janneke H. Gerards and Lize R. Glas, 'Access to justice in the European Convention on Human Rights system' (2017) 35(1) Netherlands Quarterly of Human Rights, p.13.

233 *Centre For Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, ECtHR [GC], App no.47848/08, 17 July 2014, §112; *Roman Zakharov v. Russia,* ECtHR, App no.47143/06, 4 December 2015, §164.

234 *See* Admissibility (n.207), pp.11, 12, and 15.

235 Ibid, p.15; *Senator Lines GMBH v Austria and Others,* ECtHR App no.56672/00, 10 March

phenomenon of climate change have been felt much more recently and if action is not taken, science tells us that the situation will deteriorate further. Despite the international commitments made by states in response to this bleak outlook, many commentators still believe that further mitigation and adaptation steps must be taken to lessen the effect of climate change on the health, private lives, family and home lives of humanity. In particular, concern has been expressed about the protection of certain minorities and vulnerable groups and individuals. Considering how existing green case-law of the ECtHR approaches environmental threats, it is not difficult to accept that these adverse impacts and trends constitute potential harms for the people under the jurisdiction of the ECtHR. The fact that there are strong scientific predictions that these effects will increase and cause worse results if no action is taken, highlights the potential risk even more clearly.

With the above in mind, one can see that 'the risk is not hypothetical but proven' approach adopted in the *Future Generations* case could be helpful in establishing a clear case for victimisation in cases brought before the ECtHR.[236] Again, the *Teitiota* case also articulated that the adverse effects of climate change would affect human rights protected by IHRL despite the dismissal of plaintiffs' case.[237]

Similarly, in the *Urgenda* case, it was emphasised that a known, real, and 'imminent' threat existed.[238] Perceiving the 'immediate risk' highlighted by the ECtHR[239] as an 'imminent risk' as stated in the *Urgenda* case may be useful in establishing victimisation. Indeed, the term 'imminent' is not used here to mean that the risk will occur in a short time, but to mean that the risk in question directly threatens the individuals concerned; it is, therefore, a suitable concept for covering long-term risks.[240]

The public interest litigation approach adopted in the *Leghari* case is not suitable for evaluating the *ratione personae* requirement within ECtHR cases because applications which are *abstracto* or *actio popularis* have no chance of admission[241] as a result of the victim-centred approach of the Court[242].

2004.

236 *See* Section 1.3.3.

237 *See* Section 1.4.

238 *See* Section 1.3.1.

239 *See Mastromatteo v. Italy,* ECtHR [GC], App no. 37703/97, 24 October 2002, §68; also, *Paul and Audrey Edwards v. the United Kingdom*, ECtHR, App no.46477/99, 14 March 2002, §55.

240 Monica Feria-Tinta 'Climate Change Litigation in the European Court of Human Rights: Causation, de and Other Key Underlying Notions' 2021(1) 3, Europe of Rights & Liberties/ Europe des Droits & Libertés, pp.65-66.

241 *Klass and Others v. Germany*, ECtHR, App no. 5029/71, 6 September 1978, §33.

242 Evadne Grant 'International Human Rights Courts and Environmental Human Rights:

As a rule, individual applications brought by legal persons must consist of complaints with respect to their legal personality.[243] Litigants hoping to secure a merits-based review of their claim should note that non-governmental organisations, associations or companies whose applications are not clearly related to their own legal personality's rights may face a problem. Accordingly, it can be argued that the *Urgenda* case would have been found inadmissible on the basis that the applicant's lacked standing before the ECtHR. Indeed, in January 2023, the Court declared *Humane Being* case inadmissible as per Art35§3(a), stating that the applicant, Humane Being, an NGO, was not affected enough by the alleged breach of Art(s)2, 3, and 8 of the ECHR to claim a violation, within the meaning of Art 34.[244] The merits of the case concerned whether 'factory farming' violates human rights due to the risks of the climate crisis, future pandemics, and antibiotic resistance.[245] However, the case was dismissed on the ground that the complaints were incompatible *ratione personae,* meaning that the applicant did not demonstrate sufficient harm resulting from the alleged breaches to establish a claim of violation. *Plan B. Earth and Others v. the United Kingdom* case is another climate case that was found inadmissible by the Court on the same grounds.[246]

3.2. Ratione Loci: Territorial Jurisdiction

In terms of *ratione loci*, a state's jurisdiction is presumed to be exercised throughout the national territory and allegations of incidents and related violations must take place -as a rule- within the national borders of the relevant state.[247] However, there are various exceptions to this rule. For example, states may also be held liable for their attributable acts or omissions that cause impacts out of their territories.[248] Another exception the ECtHR has recognised

Re-Imagining Adjudicative Paradigms' (2015) 6(2) Journal of Human Rights and the Environment, p.161.

243 *Centre For Legal Resources on Behalf of Valentin Câmpeanu v. Romania* (n.233), §96. However, particular considerations may arise in applications concerning Art(s)2, 3 and 8, *see* Ibid, §§103-114.

244 *Humane Being v. the United Kingdom,* ECtHR, App no. 36959/22 (dismissed in January 2023) <http://climatecasechart.com/non-us-case/factory-farming-v-uk/> accessed 15 February 2023.

245 Ibid.

246 *Plan B. Earth and Others v. the United Kingdom*, ECtHR, App no. 35057/22 (dismissed in January 2023) <http://climatecasechart.com/non-us-case/plan-bearth-and-others-v-united-kingdom/> accessed 15 February 2023.

247 ECHR, Art1; *Banković and Others v. Belgium and Others*, ECtHR [GC], App no.52207/99, 12 December 2001, §§61-67.

248 See *Ilaşcu and Others v. Moldova and Russia* ECtHR [GC] App no. 48787, 8 July 2004, §311; *Al-Skeini and Others v. the United Kingdom*, ECtHR [GC] App no. 55721/07, 7 July 2011, §130.

is the 'effective control' of a state over territory outside its borders, as seen in the well-known case of Turkey's conduct in Northern Cyprus.[249] Considering that jurisdiction is an aspect of sovereignty, and thus encompasses the activities of all organs of the state,[250] it should be possible to file a complaint against states before the Strasbourg Court for their contribution to the emission of extraterritorial GHGs.

In certain instances, involving climate-related matters, discerning the *ratione loci* of states to assert responsibilities within their territorial boundaries may prove to be a rather uncomplicated task.[251] As such, NDCs mandated under the Paris Agreement could furnish a pertinent foundation for each state to uphold human rights under its jurisdiction. Nevertheless, as exemplified by the *Duarte Agostinho and Others* case, petitioners contended that they suffered the impact of states' actions outside of their domicile, and that these actions contravened their human rights;[252] an inquiry that poses a considerably more arduous challenge.

The ECtHR has emphasised that 'jurisdiction' in Art1 refers states' rulemaking and enforcement powers in the public international law sense.[253] This type of jurisdiction is understood to be an instantiation of traditional sovereignty. However, there may be geographical areas of international common use that states have not yet regulated in detail.[254] In climate cases, 'diagonal' obligations arising from these unregulated areas have been highlighted.[255]

Hartmann and Willers claim that there is no obstacle for states seeking to regulate incidents outside their borders as long as they do not adversely affect the rights of other states.[256] The main problem here is how to determine the obligations that arise when a government acts or fails to act in a way that creates a transboundary impact.[257] For this purpose, it is important to determine the proper extent of the jurisdiction in question. In order to be able to overcome this hurdle, the reasoning of the Court in previous decisions may

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249 *Loizidou v. Turkey*, ECtHR [GC], App no. 15318/89, 23 March 1995, §62; also see *Cyprus v. Turkey*, ECtHR [GC], App no. 25781/94, 10 May 2001.

250 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th edn, 2019), p. 441.

251 See *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (n.171).

252 *Duarte Agostinho and Others v. Portugal and Others* (n.198)

253 Jacques Hartmann and Marc Willers, 'Protecting Rights in Climate Change Litigation before European Courts' (SSRN, 2021), p.14 <https://ssrn.com/abstract=3832674 or http://dx.doi.org/10.2139/ssrn.3832674> accessed 18 September 2021. Also *see Banković and Others v. Belgium and Others* (n.247), §59.

254 Feria-Tinta (n.240), p.54.

255 Ibid.

256 Hartmann and Willers (n.244), p.14.

257 Ibid.

be useful. In the *Banković* case, the Court's approach to the interpretation of jurisdiction was generally quite narrow.[258] Nevertheless, it is noteworthy that the Court found that actions taken by a state, and their consequences, should be evaluated as if they had occurred within the scope of the national territory, regardless of where they actually occurred or were felt by the victim.[259] Even though it was emphasised that the jurisdiction could not be adapted to the changing conditions of each case, the Court was inspired by international law in its acceptance of the 'effective control' criterion,[260] which, in turn, softened its strict stance.

Focusing in on IHRL, it is clear that relevant rules of international law and interpretations of other human rights mechanisms can be useful in determining the jurisdiction of extraterritorial climate cases, as in fact demonstrated by the case-law of the ECtHR.[261] Indeed, it is submitted that this is the right course of action in 'hard cases' involving issues such as the global effects of the climate crisis. For instance, as Feria-Tinta suggests, the successful jurisdictional position of the Advisory Opinion on Environment and Human Rights of the IACtHR could be adopted by the Strasbourg Court[262] given that it has adopted the most flexible stance on jurisdiction of all working papers and judicial decisions issued to date.[263] According to the IACtHR's opinion, individuals whose rights under the Inter-American Convention on Human Rights have been violated owing to transboundary harm, are subject to the jurisdiction of the state from which the harm originated, due to the state's effective control over the activities.[264] The jurisdictional issue to be determined is whether the perpetrator state has effective control over the activities that produce GHGs, not territorial control over the country where the victims are located.[265] Taking the second option in a formalist approach to jurisdiction, would have caused the 'unconscionable' result of allowing a state to violate victim's rights so long as they are located outside of its physical or traditional jurisdiction.[266] Utilising international law as a backdrop for interpretation is eminently reasonable,

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258 *Banković and Others v. Belgium and Others* (n.247), §§59-61.

259 Ibid, §75.

260 See supra note 249.

261 Ibid. For the Court's changed approach, see *Pad and Others v. Turkey,* ECtHR App no.60167/00, 28 June 2007; Also see Clark *et al.* (n.227).

262 *The Environment and Human Rights*, IACtHR Advisory Opinion OC-23/17, 15 November 2017 (English translation) <https://www.elaw.org/IACHR_CO2317> accessed 18 September 2021. Also see Feria-Tinta (n.240), pp. 56-58.

263 Ibid.

264 Advisory Opinion (n.262), §§95-103.

265 *See* Feria-Tinta (n.240), p.57.

266 *Sergio Euben Lopez Burgos v. Uruguay*, UN Human Rights Committee (1981), Communication No. R.12/52, U.N. Doc Supp. No. 40 (A/36/40) at 176, §12.3.

encompassing not only legal instruments but also judicial determinations.

Lastly, in all jurisdiction matters, there is a moral imperative to adopt such flexibility, and in dealing with the severity of the climate crisis, this should not be considered as an extraordinary legal turn. This moral approach has been touched on before in establishing the link between human rights and climate change.[267] In applying this moral perspective to the issue of jurisdiction, it is argued that courts must not be merely huge, formalistic comparison machines that make narrow and mechanical interpretations.[268] Judges taking the narrower approach simply are little more than the spokespersons of previously adopted rules. With this in mind, climate litigation needs some legal realism advocacy, given that law is not a value in itself, being fed by many other disciplines, and being shaped by ideologies, public opinion and even the personal preferences of legal practitioners.[269] In other words, it is important for the ECtHR to learn from some of the more persuasive insights from the field of American Legal Realism in order to overcome the jurisdiction hurdle and examine rights substantively in climate cases.

It should also be noted that in examining *ratione loci* in climate cases, *ratione personae* and positive obligations should also be taken into consideration under the relevant right[270] to make the rule of jurisdiction a little more flexible.[271] In the next section we shall consider how deeper arguments regarding causation might be invoked in dealing with the jurisdiction and attribution of harm by states.

4. Causation

A major challenge in climate litigation is to establish the factual basis of causation.[272] In order to reveal the harm caused by climate change in the trial process, reliable evidence must be put forward.[273] Reliability is crucial in terms of both admissibility and proving one's substantive case in judicial processes in general.[274] Climate science has a significant role in providing this reliability.

In the context of climate-related tort claims, establishing a causal nexus between the tortious conduct and resulting harm is a key objective. That

267 *See* Section 1.1.

268 Vitalius Tumonis, 'Legal Realism & Judicial Decision-Making' (2012) 19(4) Jurisprudence, p.1363.

269 Ibid, pp. 1366-1367.

270 Admissibility (n.207), p.59.

271 See applicants' arguments *Banković and Others v. Belgium and Others* (n.247), §52.

272 See *City of Oakland v. BP*, United States District Court for the District of Northern California, 25 June 2018; *Lliuya v RWE*, District Court Essen, 15 December 2016.

273 Tobias Pfrommer et al., 'Establishing causation in climate litigation: admissibility and reliability' (2019) 152 Climatic Change, p. 69.

274 Ibid.

is, scientific certainty may be necessary in tortious claims to determine the identity of the perpetrator and the extent to which the defendant is responsible. In the *Luciano Lliuya* case, the plaintiff, a Peruvian farmer living in the Andes, filed a lawsuit against a major electricity producer, claiming that his home and livelihood were at risk of flooding from a glacial lake, and requesting declaratory and injunctive relief as well as damages.[275] The source of the problem in such cases is that the perpetrators' emission contributions that cause harm and damage cannot be accurately calculated.[276] Therefore, particular technical legal solutions are typically sought in such cases, due to the difficulty of reaching the aforementioned scientific certainty.[277] Nevertheless, the gap-filler function of human rights-based arguments and interpretive techniques in human rights law, as employed in rights-based litigation, may serve as a catalyst for overcoming the hurdle of causation.[278] In cases where only human rights law is in question, especially in climate applications within the ECtHR, such certainty may be a supporting factor when identifying a violation, rather than a *sine qua non.* If it were otherwise, an absurd situation would arise in which contributors are not held responsible due to the cumulative nature of the GHGs that are causing the climate crisis.[279]

Art47 of The Internationally Wrongful Act of a State of the ILC, which regards the plurality of responsible states, clearly explains that each state can be held responsible for the same wrongful act.[280] The Article's commentary refers to the *Corfu Channel* case and gives an example of multiple states contributing to the pollution of a shared river.[281] According to the instrument, each state's responsibilities must be determined individually, and one can see

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275 *Luciano Lliuya v. RWE AG*, District Court of Essen [Germany] File no. 2 O 285/15 [English translation] <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision-1.pdf> accessed 20 September 2021; similarly, see *City of Oakland v. BP*, US District Court for the District of Northern California, 25 June 2018.

276 Petra Minnerop and Friederike Otto, 'Climate Change and Causation Joining Law and Climate Science on the basis of Formal Logic' (2020) SSRN Electronic Journal, p. 51.

277 For the suggestion of *Daubert standard*, see Pfrommer et al. (n.264) pp. 67-84.

278 See Third Runway at Vienna International Airport case, Case No. W109 2000179-1/291E, Federal Administrative Court, Austria, 2 Feb. 2017; also *Earthlife Africa Johannesburg v. Ministry of Environmental Affairs and Others*, Hight Court of South Africa, no. 65662/16, 8 March 2017.

279 Feria-Tinta (n.240), p.61.

280 UN ILM, 'Report of the Commission to the General Assembly on the work of its fifty-third session' Yearbook of the International Law Commission 2001(2)2, A/CN.4/SER.A/2001/Add.1 (Part 2) (2007), p. 124.

281 Ibid, p.125. For *Corfu Channel* case, see *United Kingdom v. Albania,* [Merits], International Court of Justice, 9 April 1949.

how this principle could be applied to extraterritorial claims filed at the ECtHR. *Savaresi* suggests that the aforementioned 'river' example may be equated with the states' contributions to global GHGs. [282] Indeed, this point has also been highlighted in the *Urgenda* case as mentioned before.[283] In that case, every state was found to have a duty of care on the basis of the need for mitigation and adaptation measures due to GHGs regardless of their specific emission rate. If one takes this approach, the only remaining function of causation is to determine attribution which is a hurdle to be overcome at the admissibility stage.[284]

The ECtHR has acknowledged its intention to scrutinise whether a state has taken adequate measures to mitigate the detrimental impacts of uncontrollable natural occurrences such as earthquakes.[285] In this regard, the duty to forestall necessitates the implementation of strategies to enhance resilience towards unforeseen and tumultuous natural events. This paradigm is not only applicable to ecological events occurring independently of human activity, but also extends to environmental phenomena resulting from or anticipated to arise due to anthropogenic GHGs.

The case under consideration, *Humane Being v. the United Kingdom*, also pertains to causation as it introduced novel climate arguments emphasising the risks associated with agricultural methane emissions and underscoring the role of soy feed consumption in UK factory farming as the primary contributor to deforestation in the Amazon basin.[286] Nonetheless, as the case has been deemed incompatible in terms of the *ratione personae* criterion, it is still unclear how the ECtHR would have approached the link between the adverse effects on the Amazon and soy feed consumption in UK factory farms.

5. Margin of Appreciation (MoA)

In individual applications filed within the scope of Art8 and based on climate action failure, the MoA doctrine is seen as one of a number of potential hurdles.[287] The issue is that the Court has repeatedly stressed that, with regard to environmental risks, it is not duty-bound to second-guess policy choices in the difficult social and technical field of environmental law.[288] Pedersen argues

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282 Annalisa Savaresi, 'Inter-State Climate Change Litigation: "Neither a Chimera nor a Panacea"' in Ivano Alogna, Christine Bakker, Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (BRILL, 2021), pp. 366-392.

283 Section 1.3.1.

284 Feria-Tinta (n.240), p.61.

285 *M. Özel and Others v. Turkey*, ECtHR App no(s) 14350/05, 15245/05 and 16051/05, 17 November 2015, §173.

286 *Humane Being v. the United Kingdom* (n.244).

287 Pedersen (n.221).

288 *Powell and Rayner* (n.172), §44; *Hatton and Others v. the United Kingdom* (n.162), §100.

that this will happen in climate cases as well, emphasising that the Court typically recognises a wide MoA of states.[289] This argument alone, however, is not sufficient for a pessimistic prediction about pending climate cases.

There is no doubt that the adverse effects of climate change are 'environmental risks'. However, in the context of noise pollution in *Hatton and Others*,[290] it could not be assumed that the environmental risk to the residential area around the airport was the same as the risk posed by climate change, which had global consequences. Thus, it appears that states will not be automatically given a broad MoA in environmental risk complaints based on the rights of Art8. In any event, it is noted that environmental interests have occasionally prevailed in the Court despite the application of a broad MoA.[291] Additionally, in assessing MoA, the Court might take into account that states have positive obligations to remain under the temperature limits determined by the Paris Agreement. In doing so, it might note that the Agreement clearly states that - despite a preambular reference - human rights are one of the affected values due to the threat of climate change.

In any impact on human rights resulting from either action or inaction, states are obligated to weigh the interests of the public against those of individuals. An illustration of this can be found in the *Hatton and Others* case, where the state's consideration of economic interests was part of the balancing exercise. After conducting a balancing exercise of the competing interests at stake, the Court arrived at the conclusion that the state had carried out this evaluation with the advantage of a wide MoA.[292] The balancing exercise involved an assessment of the economic welfare of the nation, which is recognised as a legitimate aim under the §2 of the Art8, and it was deemed to be given greater weight than the right to respect for one's home.[293] Adopting the approach used in this case, an evaluation of a climate case would require the Court to determine if there existed an urgent 'social need' for the state's failure to meet its obligations on national emission contributions.[294] The Court would also need to assess if the measures or lack thereof undertaken by the state were effective in addressing that need and whether the response was proportionate to the situation at hand.[295] As Clark *et al.* emphasise, the threat of climate change as predicted by the best available science is highly unlikely to be seen as 'necessary in a

289 Pedersen (n.221).

290 See *Hatton and Others v. the United Kingdom* (n.162).

291 *Budayeva and Others v. Russia* (n.163); also see *Fredin v. Sweden*, ECtHR App no. 12033/86, 18 February 1991.

292 *Hatton and Others v. the United Kingdom* (n.162), §129.

293 Ibid, §98.

294 See, ECHR 'Guide on Article 8 of the Convention – Right to respect for private and family life' (CoE, Updated on 31 August 2022), §§ 29-31.

295 *Hatton and Others v. the United Kingdom* (n.162), §§116-130.

democratic society' in its interference with Art8 rights, especially in the light of the temperature limits and commitments stipulated in the Paris Agreement.[296]

In addition, the MoA has been interpreted narrowly where there was evidence of European consensus among the states party to the ECHR.[297] The Court's deference to European consensus is considered to be implemented in accordance with the MoA doctrine and the principle of dynamic interpretation.[298] Considering that the majority of CoE members are from EU member states, and that the climate change issue is among the political priorities of the current EU policymakers' agenda,[299] the existence of this consensus can be delineated quite easily. Ongoing efforts within the CoE to draft an additional protocol on the right to a healthy environment are also very helpful in demonstrating this shared ambition.[300]

The doctrine of MoA has been addressed in several cases, yet its inconsistent application by the Court has rendered the doctrine controversial. [301] Nonetheless, when used appropriately, it can be a valuable tool to fulfil the principle of subsidiarity. Although this doctrine typically favours the state rather than individuals, it holds the potential to make a positive contribution to legal pluralism. [302] However, it is submitted that the MoA is highly irrelevant in climate cases as the solution to the climate crisis requires national measures, while the impacts of the crisis are global. In addition, it is argued that the ECtHR is better positioned to tackle the climate crisis than national courts.[303] In this regard, the 'subsidiarity in action' argument, as mentioned before, may be relevant here as well. One suggestion is that climate-related legal disputes ought to be directed towards regional courts with jurisdiction, rather than domestic courts, for more effective resolution.

The Court's existing jurisprudence in environmental matters, particularly positive obligations within the scope of the right to life and the right to respect

296 Clark *et al.* (n.227).

297 Luzius Wildhaber et al. 'No Consensus on Consensus' (2013) 33 Human Rights Law Journal, p. 249.

298 Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015) p. 129.

299 'A European Green Deal' is listed as (number) one of the 6 Commission priorities for 2019-24, see <https://ec.europa.eu/info/strategy/priorities-2019-2024_en> accessed 25 September 2021.

300 See supra note 150.

301 *See* Paul Mahoney 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998)19(1) Human Rights Law Journal, pp.1-6.

302 *See* Chris Hilson 'The margin of appreciation, domestic irregularity and domestic court rulings in ECHR environmental jurisprudence: Global legal pluralism in action' (2013) 2(2) Global Constitutionalism, pp.262-286.

303 Similarly *see*, Clark *et al.* (n.227).

for private life, provides a solid foundation for invoking ECHR law to compel states to take political action on climate change issues. The precautionary principle, as one of the principles of international environmental law, could be practical, albeit rarely, to overcome the causation hurdle. The adoption of the position of other human rights mechanisms, such as the IACtHR, in matters of jurisdiction and attribution, and the consideration of successful interpretations from local courts, even if based on different legal systems, can also enable the barriers to climate cases before the ECtHR to be lifted.

CONCLUSION

This study has proposed that it may be feasible to link current human rights provisions with climate change through judicial interpretation. However, recognising the link between climate change and human rights is not enough to provide a sufficient legal basis for finding violations of such rights.

Several technical hurdles for the review of climate cases before the ECtHR have been considered, such as admissibility criteria, the doctrine of MoA and the principle of subsidiarity, and the rigid positivist approach of the Court. While the ECtHR's role is more limited than that of domestic authorities due to the principle of subsidiarity, a softened attitude is still needed for the sake of the fight against global and urgent issues such as the climate crisis.

The Court's prior actions regarding the application of environmental law principles could be revisited as a point of reference. For instance, the precautionary principle could be practical, albeit rarely, to overcome the causation hurdle. Apart from this, interpretations of other human rights mechanisms, including rights-based local court decisions across the world, provide important precedents to follow. The Court has previously considered the jurisprudence of other human rights mechanisms in accordance with its established practice. Adoption of the position of the IACtHR in this regard, particularly in matters of jurisdiction and attribution, can enable the barriers to climate cases before the ECtHR to be lifted.

Regarding the MoA doctrine, there is a prevailing inclination to prioritise state interests over individual rights in environmental matters, often stemming from a broad interpretation of the doctrine. Nevertheless, there exist functional methods of interpretation, such as the principle of dynamic interpretation, which empower the Court to continually evolve its jurisprudence and respond to the contemporary needs of the global community. This allows for the Court to update its understanding and strike a balance between individual rights and state discretion in environmental cases.

Since these hurdles are essentially interdependent, flexibility adopted in one might easily affect another. Overcoming *ratione personae* and causation hurdles could contribute to a re-definition of extraterritorial jurisdiction. These hurdles

are also vital in the merit review of climate applications before the ECtHR. It is possible that an interpretation taken to overcome a procedural barrier may also be utilised as a justification for decisions involving infringements.

In conclusion, the ECtHR certainly has the potential to tackle the climate crisis through its existing legal capacity. A legal revolution is unnecessary to address these issues. Rather, a flexible approach is required to complement the Court's formalistic attitude, particularly at the admissibility review stage. While formal procedures are necessary for the quick resolution of less serious complaints, a softened attitude is required to address global and urgent issues such as the climate crisis. The Court has significant potential to trigger a transformation that could be the subject of further research focused on states' legislation and conduct, regardless of which decision is taken by the Court. Therefore, it is important to continue researching ways to overcome the technical challenges associated with climate cases before the Court.

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PSYCHOLOGY OF INVESTIGATIVE INTERVIEWING: IMPLICATIONS OF MENDEZ PRINCIPLES IN ADVANCING THE FIELD*

Ceza Soruşturmaları Bağlamında İfade Yöntemlerinin Psikolojik Boyutları: Mendez Prensiplerinin Alanın İlerlemesine Katkıları

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ABSTRACT

While procedural regulations describe legal frameworks in obtaining suspect statements, forensic psychological research has refined suspect interview methods around the world. Historically, suspect interrogations have evolved from third degree tactics (e.g., physical pressure) to psychological coercive methods (e.g., REID model) and finally evidence based inquisitory models (e.g., PEACE). Following the abolishment of third degree methods, the psychological coercive methods (e.g., REID model) became prevalent in North America. This approach aims to obtain confessions via a nine-step protocol. Initially, the REID model training modules were in demand around the world as authorities were able to obtain confessions without resorting to physical coercion. However, a significant number of these confessions were found to be false, thanks to DNA evidence. Contemporary empirical findings suggest that criminal investigators should focus on facilitating information gathering process rather than striving to obtain confessions from suspects. For instance, the PEACE model from England and Wales appears to be more effective than unstructured interviews or coercive models. This model also fit well with legal frameworks in Türkiye and in many other jurisdictions. In a 2016 appeal to the U.N. General

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Assembly, former U.N. Special Rapporteur Jean E. Mendez underlined the international concern for coercion in interviews. This paper argues that psychological research has much to offer in assisting criminal proceedings by refining suspect interview procedures. In this framework, this paper examined the evolvement of investigative interview methods. The findings suggest that coercive models compromises human rights and also ineffective in obtaining admissible evidence in comparison to inquisitory models.

Key Words: False Confessions, Investigative Inverview Methods, the REID, the PEACE, and the Mendez Principles

ÖZET

Ceza muhakemeleri usulleri şüpheli ifadelerinin yasal çerçevelerini çizerken, dünya genelinde adli psikolojik araştırmalar ifade alma yöntemlerinin geliştirilmesine katkı sağlamıştır. Tarih içinde şüpheli ifadeleri üçüncü derece taktiklerden (örn., fiziksel cebir) psikolojik baskı içeren sorgu yöntemlerine (örn., REİD) ve son olarak kanıt temelli araştırıcı modellere (örn., PEACE) dönüşmüştür. Amerika Birleşik Devletleri'nde fiziksel şiddet içeren üçüncü derece ifade yöntemlerinin yürürlükten kaldırılmasını takiben Kuzey Amerika'da REİD ve benzeri sorgu modelleri yaygınlaşmıştır. Söz konusu yöntemler fiziksel şiddet kullanmaksızın şüphelilerin isnat edilen suçları itiraf etme olasılıklarını artırdığı için ilk yıllarda dünya genelinde rağbet görmüştür. Bununla birlikte, ilerleyen yıllarda DNA analizleriyle elde edilen deliller söz konusu itirafların bir kısmının sahte (asılsız) olduğunu göstermiştir. Güncel araştırma sonuçları ceza soruşturması yürüten yetkililerin şüpheli itiraflarına odaklanmak yerine bilgi toplama süreçlerini kolaylaştırmaya odaklanmalarını önermektedir. Örneğin, İngiltere ve Galler'de geliştirilen ve kanıt temelli araştırıcı modellerden biri olan PAECE yapılandırılmamış ve REİD modelinden daha etkili yöntemleri içermektedir. Bu model aynı zamanda Türkiye ve diğer ülkelerdeki ceza muhakemeleri usullerine de uygun görünmektedir. 2016 yılında dönemin B.M. özel raportörü Jean E. Mendez'in B.M. Genel Kuruluna yaptığı çağrıda şüpheli ifadelerinde zorlama ve kötü muameleler ilgili uluslararası endişelerin altını çizmiştir. Bu makale psikolojik araştırmalarının kanıt temelli şüpheli ifade alma yöntemlerin geliştirmesi yoluyla ceza yargılamalarına katkı sağlayabileceğini önermektedir. Bu çerçevede, bu çalışmada suç soruşturmalarında etkili şüpheli ifade yöntemlerinin gelişim süreçleri ve uluslararası uygulamalar değerlendirilmiştir. Araştırma bulguları psikolojik veya fiziksel baskı ve şiddet içeren modellerinin evrensel insan hakları prensiplerine aykırı uygulamalara yol açabildiği ve kanıt temelli araştırıcı modellere kıyasla hukuki delil niteliğinde bilgi toplama yönünden de yetersiz olduğunu göstermektedir.

Anahtar Kelimeler: Asılsız İtiraflar, İfade Alma Yöntemleri, REİD Sorgu Modeli, PEACE modeli, Mendez Prensipleri.

INTRODUCTION

The primary objective of forensic psychology has historically been assisting criminal justice systems around the world.[1] For instance, in 1908 German psychologist Hugo Munsterberg wrote a seminal book of forensic psychology *"On the Witness Stand"*.[2] Munsterberg's arguments on the applicability of psychological research in legal context initially was not popular among legal scholars; however, in the following years the role of psychology in justice systems has exponentially expanded.[3] Accordingly, psychological research has made significant contributions to the development of interrogation and interview models and the development of in-service training for law enforcement officers as well as other justice authorities.[4] It should be noted that the nature of these contributions vary in accordance with a given legal context. On this note, for instance, suspect interview processes involve distinctive procedures in adversarial and inquisitory justice systems. It is beyond the scope of this paper to review the detailed account of these differences; however, a brief review of the impact of distinct legal procedures on suspect interview practices is presented in order to provide a comprehensive perspective on the subject. In adversarial criminal justice systems police officers are authorized to arrest a person based on reasonable grounds (e.g., Canadian Criminal Code).[5] Also, in this legal context (e.g., USA, Canada, and UK) suspect interviews are conducted by law enforcement officers.[6] The suspect interrogations typically take place in a designated interview room privately without the presence of legal counsel, often with video and audio recording without the limitations of court room proceedings.[7] In this framework, the distinction between an

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1 Joanna Pozzulo, Craig Bennell, and Adelle Forth, *Forensic Psychology* (5th ed. Pearson Canada 2018), p. 3.

2 Hugo Munsterberg, *On the Witness Stand* (Garden City, NY: Doubleday 1908).

3 Curt R. Bartol and Anne M. Bartol, "History of Forensic Psychology" in Irving B. Weiner and Allen K. Hess (eds), *Wiley Series on Personality Processes. Handbook of Forensic Psychology* (Oxford 1987) 3-21.

4 Dennis Howitt, Introduction to Forensic and Criminal Psychology (6th edn, Pearson Canada 2018) 2-3.

5 Criminal Code of Canada, R.S.C., 1985, c. C-46 (Arrest without warrant by peace officer 495 (1) A peace officer may arrest without warrant **(a)** a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence; **(b)** a person whom he finds committing a criminal offence).

6 R. v. Oickle, 2000 SCC 38 (CanLII), [2000] 2 SCR 3, <https://canlii.ca/t/525h>, retrieved on 2021-10-02

7 Watts v. Indiana, 338 U.S. 49 (1949) (Suspect held incommunicado without arraignment for seven days without being advised of his rights. He was held in solitary confinement in a cell with no place to sleep but the floor and questioned each day except Sunday by relays of police officers for periods ranging in duration from three to nine-and-one-half hours); Turner v. Pennsylvania, 338 U.S. 62 (1949) (suspect held on suspicion for five days without arraignment and without being advised of his rights. He was questioned by relays of officers

interview and interrogation can be ambiguous. A person of interest[8] who came in for an interview may be subject to an interrogation once the interviewing officer has reasonable grounds to believe that this person is the perpetrator.

In addition, prosecutors have a relatively passive role in interviewing witnesses and interrogating suspects in adversarial justice system in comparison to inquisitory justice systems. In adversarial justice systems, the prosecution office takes charge of the case when the accused is about appear before courts.[9] Furthermore, prosecutors do not typically take statements from witnesses or interview suspects outside of court settings. However, prosecutors cross-examine witnesses alongside of defense attorneys during the court proceedings. Similarly, should the accused waive their right to remain silent in courtrooms, they are cross-examined by the prosecutor and defense attorney before the presiding Judge. On the other hand, in inquisitory justice systems (e.g., Türkiye), prosecutors are authorized to interview suspects outside of courtrooms, while interrogations are conducted by a presiding Judge during court proceedings.[10] In this legal context, prosecutors and law enforcement officers are also authorized to interview suspects with the presence of often legal counsels.[11] Irrespective of the aforementioned procedural differences, the objective of suspect interviews in criminal investigations is manifold: to construct suspect cooperation in the process, to obtain the detailed account of criminal occurrences, including a confession, and to assess the reliability

for periods briefer than in *Watts* during both days and nights); Harris v. South Carolina, 338 U.S. 68 (1949) (Suspect in murder case arrested in Tennessee on theft warrant, taken to South Carolina, and held incommunicado. He was questioned for three days for periods as long as 12 hours, not advised of his rights, not told of the murder charge, and denied access to friends and family while being told his mother might be arrested for theft). Justice Jackson dissented in the latter two cases, willing to hold that a confession obtained under lengthy and intensive interrogation should be admitted short of a showing of violence or threats of it and especially if the truthfulness of the confession may be corroborated by independent means. 338 U.S. at 57.

8 The term "person of interest" is used by law enforcement officials to refer to a person who has not yet been arrested or accused of crime, but who is still being investigated in a criminal investigation. The police are said to be "interested" in that person. While some terms, like "suspect" and "target" are clearly defined, the term "person of interest" is an informal term that remains undefined by the Department of Justice. To explore this concept, consider the following person of interest definition.**Definition of Person of Interest (Noun)** A person who is "of interest" to law enforcement officials during a criminal investigation. **Origin:** The term was first used at least as early as 1996 to describe Richard A. Jewell, a suspect in the Atlanta Olympic bombings. <https://legaldictionary.net>, retrieved on 2021-10-03.

9 Statutes of Canada 2006, Chapter 9, Bill C-2. < https://www.parl.ca/DocumentViewer/en/39-1/bill/C-2/royal-assent>, retrieved on 2021-09-01.

10 E.g., in Turkish CMK 2/h. < https://www.mevzuat.gov.tr/mevzuatmetin/1.5.5271.pdf>, retrieved on 2021-10-03

11 ibid 2/g

of suspect statements.[12] In 1930s, some jurisdictions (e.g., the U.S.A) authorized the use of third degree (i.e., physical pressure) techniques in interrogations, partially owing to the conviction that interrogators should get tough on criminals since the state was at war with crime. However, in the following years, confessions obtained by physical coercion were deemed to be inadmissible evidence in criminal proceedings.[13] Nevertheless, physically coercive tactics had not totally seized in suspect interrogations. For instance, in 1970's the City of Chicago has paid out millions of dollars in settlements in relation to Chicago police officers using a wide range of tortures in suspect interrogations.[14] In contemporary justice systems, third degree coercive tactics are clearly not admissible in legal proceedings. Yet, there is still a concern in relation to the practice of psychological trickery and physical coercive tactics in suspect interrogation worldwide. In a 2016 appeal to the U.N. General Assembly, then U.N. Special Rapporteur Jean E. Mendez, voiced out the international apprehension for ill-treatment and coercion in suspect interrogations.[15] In response to this appeal, an expert-led action was initiated "The Mendes Principles: Principles on effective interviewing for investigations and information gathering".[16] In the following part, I will first review the REID model of interrogation as an example of adversarial suspect interview, followed by the presentation of an alternative information gathering model, the PEACE model. Finally, I will critically examine the Mendes principles in light of contemporary research findings.

A. The REID Model

Following a court ruling that deemed the third degree interrogation techniques (e.g., physical violence) inadmissible in the USA[17], experts strived

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12 Aldert Vrij, Christian A. Meissner, Ronald P. Fisher, Saul M. Kassin, Charles A. Morgan, and Steven M. Kleinman, "Psychological Perspectives on Interrogation" in Perspectives on Psychological Science [2017] 12(6), 927.

13 Brown v. Mississippi (1936) , 297 U.S. 278. Syllabus: "Convictions of murder which rest solely upon confessions shown to have been extorted by officers of the State by torture of the accused are void under the due process clause of the Fourteenth Amendment".

14 Flint G. Taylor, "Chicago Police Torture Scandal: A legal and Political History" in The CUNY Law Review [2013]17, 329.

15 U.N. General Assembly, 71 session, Item 69(b) [2016]. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/250/31/PDF/N1625031.pdf?OpenElement>, retrieved on 2021-09-03.

16 Association for the Prevention of Torture. https://www.apt.ch/en/resources/publications/new-principles-effective-interviewing-investigations-and-information, retrieved on 2021-09-03.

17 Brown v. Mississippi (1936) , 297 U.S. 278. Syllabus: "Convictions of murder which rest solely upon confessions shown to have been extorted by officers of the State by torture of the accused are void under the due process clause of the Fourteenth Amendment".

to develop admissible means to obtain confessions from suspects. In 1962, Reid, a polygrapher from Chicago, and Inbau developed one of the most popular adversarial suspect interrogation training manuals, namely known as the REID.[18] This model is mainly based on psychological coercion and manipulation (i.e., second degree interrogation techniques) that have become very popular in North America, owing to the fact that the investigators were able to get admissible confessions from suspects without resorting to violence.[19] The REID is still popular in North America with many criminal investigators continue utilizing some of the REID techniques in interrogations.[20] Therefore, the following section will examine the main assumptions and structure of this model. This REID model includes three stages;

- Gathering evidence in preparation of the interview,
- Implementing the behaviour analysis interview in order to assess deception in statements, and
- Conducting accusatory interrogation to obtain confessions.

As expected, the model does not provide guidance on comprehensive evidence collection methods; however, underlines the importance of getting ready for suspect interrogations by obtaining the details of the criminal investigation. The training manual encourages investigators begin the Behaviour Analysis Interview only after they are well informed on a given criminal investigation.[21]

1. The Behaviour Analysis Interview (the BAI)[22]

The BAI is a nonaccusatory phase in the REID model.[23] According to the training manual "*This* (nonaccusatory style) *should be the case even when the investigator has clear reason to believe that the suspect is involved in the offence or has lied to him*". [24] In this soft approach, investigators are suggested to establish a better rapport with suspects, which is expected to be instrumental in an interrogation that might follow the BAI. Another purpose of the BAI is to gather relevant investigative and behavioral information. Thus, this protocol includes three types of questions; (I) non-threatening questions, (II) investigative questions, and (III) behaviour provoking questions. Investigators

18 Fred E. Inbau and John E. Reid, *Criminal Interrogation and Confession*, (Baltimore, Williams & Wilkins Co.,1962).

19 Vrij, Meissner, Fisher, Kassin, Morgan, and Kleinman, 2017, p. 927.

20 Pozzulo, Bennell, and Forth, 2018, p. 62.

21 Fred E. Inbau, John E. Reid, Joseph P. Buckley, and Brian C. Jayne, "Criminal Interrogation and Confessions" (5th ed.), (Jones & Bartlett Learning, 2013), p. 76.

22 İbid at 153-184.

23 Inbau & Reid, 1962, p. 57.

24 Inbau, Reid, Buckley, Jayne, 2013, p. 3.

closely observe the suspects' posture, eye contact, facial expression, and word choice for evidence of deception. The BAI may be conducted in various settings, but the ideal environment is an area specifically designated for that purpose. Another important characteristic of the BAI is that it should be free-flowing and comparatively unstructured. Investigator should have specific topics of interest in interviews; however, an interview is mostly led by the response of suspects that facilitate the exploration of unexpected areas. Finally, the BAI should be documented in writing, video, or audio recording. In this phase, the note taking serve several purposes; recording the suspect's responses, slowing down the interview and allowing investigators to closely observe suspects, creating silence between questions that is likely to increase anxiety in guilty suspects.

The main objective of the BAI is to provide investigators clues to assess evidence of deception. For this purpose, investigators ask non-accusatory questions and observe suspects for non-verbal and behavioral evidence of deception. The proponents of the BAI assert that trained investigators can achieve a significantly high accuracy rates at detecting deceptions and consequently they can effectively differentiate between offenders and innocent suspects. In this approach, investigators look for three channels of communication;

- Verbal (i.e., word choice and arrangement of words to convey a message),
- Paralinguistic (i.e., characteristics of speech outside the expressed word), and
- Nonverbal behaviors (i.e., posture, arm and leg movements, and eye contact etc.).[25]

The manual underlines the importance of adherence to the following five principles in order to increase the probability of deception detection;

- There are no exclusive behaviors related with deception,
- The consistency between three channels of communication must be assessed,
- Paralinguistic and nonverbal behaviors must be examined in relation to verbal message,
- All behaviors throughout the interview should be reviewed, and
- Suspects' normal (i.e., common) behavioral pattern must be established.

The BAI postulates that innocent suspects generally provide lengthy and free flowing accounts, whereas the accounts of guilty suspects are often guarded. Furthermore, innocent suspects express appropriate emotions in

[25] İbid 101-136.

interview in all three communication channels (i.e., verbal, paralinguistic, and nonverbal behaviors) and they are also more realistic in their assessments of the crime. For instance, it is not threatening for them to conclude that the fire next door was an arson. Furthermore, innocent suspects appear as being very concerned during interviews and they are more likely to perceive the process as an opportunity to be exonerated. In relation to verbal behavior, truthful suspects answer questions directly, deny allegations more broadly and offer confident definite responses, whereas guilty suspects are more likely to be more evasive in their answers and suggest specific denials for allegations and offer qualified responses. Assessment of paralinguistic behaviour involves the following assumptions of this model;

- **Response latency:** The time delay between the last word in the question and the first word of suspects will be longer in deceptive suspects compared to truthful suspects,
- **Early response:** Deceptive suspects tend not to repeat early responses, whereas a truthful suspects will be consistent in their early answers,
- **Response length:** Truthful suspects offer longer responses in comparison to deceitful suspects.
- **Response delivery:** Truthful suspects tend to increase his rate and pitch as they describe criminal incidents. On the other hand, deceitful suspects are more likely to talk quietly and relates allegations in a monotone response delivery.
- **Continuity of the response:** Truthful responses are more likely to be spontaneous and free flowing, whereas deceitful responses tend to have *a stop and start flow*.

According to this model, nonverbal behaviors have two sources of origin learned and genetically inherited behaviors. The main assumption is that lying and acts of wrongdoings result in internal anxiety. In addition, mind and body work together in experiencing this high level of anxiety. Investigators observe signs of anxiety in guilty suspects as they are more likely to have a closed and tensed posture, an avoidance of facing investigator, an avoidance of forward leans, and a more static posture. In this model, the BAI is a vital component of the REID model owing to the fact that suspects who are believed to be deceitful in this phase are consequently taken into interrogation.

2. The REID Model of Interrogation

The REID model underlines that interrogation is an accusatory phase in which deceptive suspects are likely to deny the allegations in self-interest unless they are certain that the investigator is convinced of their guilt. [26] Therefore,

[26] Inbau, Reid, Buckley and Jayne, 2013. p. 157.

investigators are instructed to start and continue the accusatory approach throughout interrogations. This is an active persuasion process, in which an interrogation is commenced only when investigator believes the suspect had been deceitful in a non-confrontational interview. In order to persuade suspects to be truthful, investigators turn to manipulative tactics (e.g., offering moral justification or providing alternative motivations for offences) rather than exclusively asking questions. The training manual highlights that the purpose of an interrogation is not to elicit confession, but to discover the details of the truth. However, the Cambridge Dictionary defines interrogation as "*a process of asking someone a lot of questions for a long time in order to get information, sometimes using threats or violence*."[27] Given that investigators only enters interrogations once they are convinced that suspects had been deceitful and that the only acceptable outcome of interrogations is confession, it is unlikely that the main objective of REID interrogation would be to discover the truth. Also, investigators are instructed not to take any notes until suspect confessed so that they are not distracted from the objective of obtaining confessions in interrogations. Furthermore, research reveals that in active investigations the main objective of investigators is in fact obtaining confessions from suspects.[28] It should be noted that the concept of interrogation may have different implications based on different legal contexts. For instance, in Turkish Criminal Procedures an interrogation is defined as a process in which suspects or accused make statements before a presiding judge.[29] Also, the presence of legal counsel in suspect interviews facilitates being able to focus on gathering details in investigations rather than focusing on getting confessions from suspects.

According to the REID, guilty suspects can be characterized either as emotional or non-emotional individuals. Emotional people experience a significant amount of remorse, mental agony, or regret for their illegal acts.[30] Therefore, the most effective interrogation tactics with emotional offenders is a sympathetic approach (i.e., minimization tactics). That is the expression of moral justification for the commission of the offence. On the other hand, with non-emotional offenders (i.e., no expression of emotional remorse or mental agony), the most effective tactic is built upon a factual analysis approach (i.e., maximization tactics). That is striving to reason with suspects instead of appealing to their emotions by presenting two different alternative charges for

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27 Cambridge Dictionary. https://dictionary.cambridge.org/tr/sözlük/ingilizce/interrogation, retrieved on 2021-09-02.

28 Vrij, Meissner, Fisher, Kassin, Morgan, and Kleinman, 2017, p. 927.

29 Criminal Procedure Code 2h: "Interrogation: Listening to suspects or accused in relation to criminal investigation or prosecution on allegations by court or presiding judge" (Translation from Turkish) <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.5271.pdf, retrieved on 2021-09-15.

30 Inbau, Reid, Buckley, and Jayne, 2013, p. 185.

the alleged offence and urging them to take responsibility for the lesser charge. The REID model of interrogation framework comprises of the following 9 step procedure;

i. **Direct Confrontation:** At the start of the interrogation, suspects are made aware of the investigator's confidence in their guilt. This is accomplished by making a direct statement that suspects committed the alleged offences. The investigator should convey his/her confidence to the suspect. That is their verbal, paralinguistic, and body language should communicate their confidence in the suspects' guilt.

ii. **Theme Development:** Suspects are of course expected not to confess readily. Therefore, following a direct confrontation, investigators begin developing psychological themes in which moral excuses for the commission of the offence or minimizing the moral implications of the criminal act are provided. Alternatively, rationalization for the commission of the offence can be included in this phase. As indicated above, these themes are developed in accordance with whether suspects are perceived to be emotional or non-emotional offenders.

iii. **Dealing with Denials:** As indicated earlier, the REID model asserts that suspects do not typically confess alleged offences. Consequently, investigators should expect denial of guilt and make it clear that they will not be convinced of these denials unless suspects can present evidence in their innocence. Investigators are instructed to interrupt any statements of denials so that suspects would not get a leverage in interrogations. This phase is likely to result in complications not only for legal reasons, but also for facilitating cognitive biases owing to the fact that investigators are likely to have an increased *confirmation bias tendency* with this approach. That is while suspects are expected to present evidence for their innocence in which investigators are motivated to look for incriminating evidence instead.

iv. **Overcoming Objections:** Investigators are to differentiate objections from denials. Innocent suspect are more likely to insist on denial alone rather than providing specific objections for the alleged offences. Investigators should turn around objections and use them in their persuasion attempts to convince suspects to provide confession. For instance, a fraud suspect may state that "*I have money and I don't need to steal*". In such case, investigators may express his agreement with suspects and provide moral justification for the offence such as "*I believe that is true, because if you did not give in the brief temptation, you would not have transferred the company money into your account*."

v. **Retention of Suspect's Attention***:* The worst scenario in interrogations is when investigators are unable to have suspects engaged in conversations.

Without some type of interactions with investigators (e.g., denials or verbalizing non-cooperative attitudes), the likelihood of obtaining confessions is very low. Therefore, investigators should always have suspects psychologically and physically engaged in interrogations. This objective may be achieved by leaning forward, directly facing the suspect, establishing eye contact, encouraging responses, and active listening.

vi. **Handling the Suspect's Passive Mood***:* Some suspects are likely to become passive in interrogations. Similar to the retention of suspect's attention phase, investigators should maintain the active participation of suspects. Facing with passive suspects, investigators may show understating and urge suspects to tell the truth for the sake of their conscience and significant others. This strategy is believed particularly to be effective with emotional suspects.

vii. **Presenting an Alternative Question:** This step involves providing suspects with two alternative explanations for committing the offence. This can be also described as a face-saving opportunity for suspects that can make it easier for the them to tell the truth. For instance, in a theft charge with emotional suspects, an investigator may ask "*Did you spend the money for partying and alcohol, or did you need it for your family*?" Thus, investigators make it morally easier for the suspect the confess the alleged offence. Presenting an alternative question may also involve alternative charges with non-emotional suspects.

viii. **Having Suspects Verbally Relate Details of the Offence***:* Suspects are also less likely to provide details of their crime, even after confession owing to the fact that psychological impact of accepting full responsibility would be too significant for many. Thus, investigators have to be patient with these individuals, allowing them to provide details of offences at their own pace. While developing corroborative confession, investigators must be vigilant that the details presented by suspects have not been disclosed in questioning process, news media or any other source. The best type of verification would be in the form of new evidence that was unknown prior to the confession. This step also involves prior to interrogation considering the types of independent evidence should be sought in a statement.

ix. **Converting a Verbal Confession into a Written Confession:** The interrogation process may be described as an endeavor to persuade suspects to tell the full account of the alleged offence (i.e., confess). This is the step where the procedures and legal considerations of transforming a verbal confession into a written confession are taken into account.[31] This step also decreases the risk of facing retrieved confessions in court.

[31] İbid 310.

In North America, the REID model has been utilized in investigative interviews. Some investigators are use the full model whereas many others apply only some of the techniques. Kassin and colleagues surveyed 631 police investigators on their interrogation tactics.[32] The findings reveal that in relation to REID themes, while 60% of the participants reported appealing to suspect's pride with flattery, no one exaggerated the seriousness of the offence. On the other hand, 80% of the participants confront suspects with evidence of their guilt, whereas less than 5% used *a good cop bad cop strategy*.[33] Since many investigators have been trained to use the REID model, this model has been extensively examined. These studies reveal that there are a number of significant issues associated with this model.

3. Assessment of the REID Model

Manipulative and coercive nature of the REID model have raised some concerns in relation to the validity of this model. One of the main issues relates to the model's capacity of deception detection. As underlined earlier, the REID model of interrogation begins only after investigators discern deceitful suspects from truthful ones in a non-accusatory Behaviour Analysis Interview. Consequently, the training manual focuses on the detection of deception cues in the BAI. However, these cues have not been found to have a discriminative value to distinguish truthful individuals from deceitful ones.[34] The REID postulates that guilty suspects would be more anxious in interrogations, compared to those of innocent and that signs of anxiety reveals guilty mind. However, both innocent and guilty suspects are likely to display similar sings of anxiety in interrogations.[35] Furthermore, a meta-analysis on 100 studies examining body language signs for deception cues revealed that the results are inconsistent.[36] Therefore, there is a practical significant concern with utilizing verbal, paralinguistic, or behavioral cues in recognizing innocent and guilty suspects as recommended by the REID. In other words, the REID model of interrogation can potentially be based on faulty judgements in deception detection.[37]

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32 Saul M. Kassin, Richard A. Leo, Christian A. Meissner, K D. Richman, Lory H. Colwell, Amy-May Leach, and Dana La Fon, "Police interviewing and interrogation: A self-report survey of police practices and beliefs" in Law and Human Behaviour [2007], 31, 381.

33 Ibid , 390.

34 Maria Hartwig, Charles F. Bond Jr, "Why do lie-catchers fail? A lens model meta-analysis of human lie judgements" in Psychological Bulletin, [2011], 137(4), 643.

35 Aldert Vrij, Ronald Fisher, Samantha Mann, and Sharon Leal, "Detecting deception by manipulating cognitive load" in Trends in Cognitive Sciences, [2006], 10(4), 141.

36 Siegfried L. Sporer, Barbara Schwandt, " Paraverbal indicators of deception: A meta-analytic synthesis" in Applied Cognitive Psychology, [2006], 20(4), 421.

37 Saul M. Kassin, "The social psychology of false confessions" in Social Issues and Policy Review, [2015], 9(1), 25.

Some also raised concerns about using psychological coercive methods in the REID. There are of course procedural protections in place to guard suspects in cases of the transition to the interrogation phase from that of an interview such as Miranda Rights[38] in the United States and Charter of Rights and Freedoms in Canada[39]. In this legal context, statements including confession are only admissible when suspects waive these rights *knowingly* and *voluntarily*.[4041] However, the aforementioned psychological manipulations in the REID model (e.g., presenting moral justification, minimization or maximization of allegation, and presenting false evidence etc.) can be so coercive that some individuals may utter false confessions. In fact, some of these confessions were later found to be false, only after the introduction of DNA evidence.[42] Some individuals are also vulnerable to suggestive interrogations. Archival studies have indicated that juvenile suspects and suspects with intellectual and psychological disabilities are over represented among false confessors.[43] In other words, the personal characteristics of suspect (e.g., age, intellectual, or psychological disabilities) can increase the risk of false confessions by making suspects more vulnerable to psychological pressure and manipulation.[44]

Investigator bias is another concern with the REID. Investigators begin interrogation when they are formed an opinion that suspects committed

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38 Miranda v. Arizona, 384 U.S. 436 [1966] (Under the Fifth Amendment, any statements that a defendant in custody makes during an interrogation are admissible as evidence at a criminal trial only if law enforcement told the defendant of the right to remain silent and the right to speak with an attorney before the interrogation started, and the rights were either exercised or waived in a knowing, voluntary, and intelligent manner). https://supreme.justia.com/cases/federal/us/384/436, retrieved on 2021-09-01.

39 Legal rights 10: Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor, (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful) https://publications.gc.ca/collections/Collection/CH37-4-3-2002E.pdf, retrieved on 2021-09-4.

40 Lesley King, Brent Shook, "Peering inside a Canadian interrogation room" in Criminal Justice and Behaviour, [2009], 36(7), 674.

41 Saul M. Kassin, Gisli H. Gudjonsson, "The psychology of confessions: A review of the Literature and Issues" in Psychological Science in the Public Interest, [2004], 5(2), 33.

42 https://innocenceproject.org/justice-2018 "Sufficient force and coercion will force anyone to crack under pressure, but that doesn't solve crimes." Bryce Benjet, Senior Staff Attorney, retrieved on 2021-09-5.

43 Drizin & Leo, "The problem of false confessions" (footnote 7). S.R. Gross, K. Jacoby, D.J. Matheson, N. Montgomery, &
S. Patil, "Exonerations in the United States 1989 through 2003", Journal of Criminal Law & Criminology, vol. 95, No. 2 (2005).

44 A. Vrij, Detecting Lies and Deceit: Pitfalls and Opportunities, 2nd ed. (West Sussex, England, John Wiley & Sons, 2011);
Vrij et al. "Psychological perspectives on interrogation" (footnote 5); Gudjonsson, The Psychology of False Confessions (footnote 5).

the alleged offences. The major problem with this conviction is that when individuals construct a perception about something prior to entering in a situation, they inadvertently tend to seek out and interpret information in a way that it confirms their initial beliefs (i.e., confirmation bias).[45] This investigative bias has been found to lead to coercive interrogation strategies that resulted in suspects look guilty to both investigators and other observers, even when they were innocent.[46] Given that significant potential problems with the REID model of interrogation has been reported, psychologists and investigators strived to develop evidence based investigative interview models. One approach is a non-accusatory investigative interview model that can be conducted not only with suspects but also victims and witnesses to obtain information.[47] In what follows, the PEACE model of interview is discussed as an example of a non-accusatory investigative interview model.

B. The PEACE Model

In Great Britain, public outrage to miscarriages of justice due to false confessions became a significant factor in modifying investigative interview methods that is followed by the Royal Commission on Criminal Procedure in 1981.[48] The commission concluded that physical and psychological manipulative techniques used by interrogating investigators produced these miscarriages of justice and that there was a pressing need for developing a non-accusatory model.[49] In 1984 in response to this finding, the Police and Criminal Evidence Act (PACE)[50] was created that explicitly restricted the application of psychologically manipulative tactics and mandated that all suspect interviews be audio recorded. In the following years, the PEACE model of interview has been developed by experienced psychologists and detectives working in collaborations.[51] This model may be described as an inquisitorial framework, as opposed to an accusatory approach in conducting investigative interviews.[52]

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45 Pozzulo, Bennell, and Forth, 2018, p. 67.

46 Carole Hill, Amina Memon, & Peter McGeorge, "The role of confirmation bias in suspect interviews: A systematic evaluation" in Legal and Criminological Psychology [2008], 13(2), 357.

47 Dave Walsh, Mick King, Andy Griffiths, "Evaluating interviews which search for the truth with suspects: But are investigators' self-assessments of their own skills truthful ones?" in Psychology Crime and Law, [2017], 23(7), 1.

48 Vrij, Meissner, Fisher, Kassin, Morgan, and Kleinman, 2017, p. 930.

49 Barrie Irving, "Police interrogation. A case study of current practice" (London, UK: Her Majesty's Stationery Office 1980), 58.

50 Police and Criminal Evidence Act 1984, s 5 https://www.legislation.gov.uk/ukpga/1984/60/contents, retrieved on 2021-10-01.

51 British Psychological Society, "United Nations may recommend PEACE approach" in The Psychologist, [2016] 29, 896.

52 Christian A. Meissner, & Melissa B. Russano, "The psychology of interrogations and

PEACE is an acronym for five steps in this model; (i) Preparation and Planning, (ii) Engage and Explain, (iii) Account, (iv) Closure, and (v) Evaluation. In the PEACE model, the concept of *interrogation* is replaced with *investigative interview* in line with the main objective of the PEACE that is gathering probative information rather than obtaining confessions. The interviewers are taught to be open-minded with an objective of collecting information, not to focus on detecting deception or use mental coercive tactics in order to manipulated suspects.

1. Structure of the PEACE Model

Planning and Preparation: The first phase of the PEACE focuses on planning and preparation for the interview. Investigators are to create a written plan that outlines the following information:

- In what ways the information obtained from a suspect will assist to the investigation?
- What is already known about suspects (e.g., presence of mental disability and prior history with the police)?
- What are the legal obligations that need to be followed during the interview (e.g., rights to counsel and caution)?
- What are the investigative objectives (e.g., information that need to be checked and facts that need to be established)?

Investigators are also encouraged to make practical arrangements for investigative interviews, including developing a chronology of events, preparing an opening question, establishing an outline on how they will proceed. Lastly, interviews with suspects ideally should not begin until all witnesses and complainants have been spoken to and all available evidence has been gathered. [53]

Engaging and Explaining: In this phase, investigators engage suspects in conversational approach and explain the interview process. Investigators also try to build rapport by engaging in self-disclosure and acting in a professional and considerate manner in this phase. It needs to be noted that this step is not designed to trick suspects in uttering confession. The main objective is to foster the development of a relationship and atmosphere to facilitate a working

confessions: Research and recommendations" in Canadian Journal of Police & Security Services, [2003] 1(1), 53.

53 Todd W. Barron, "The PEACE model of investigative interviewing: A comparison trained and untrained suspect interviewers" Unpublished MA Thesis, Memorial University of Newfoundland [2017] 25-28. https://research.library.mun.ca/12911/1/thesis.pdf, retrieved on 2021-09-25.

alliance.[54] This objective aligns well with Turkish Criminal Justice Procedures in which suspects have a right to have a legal counsel present in interviews.[55] Another interrelated objective is to ensure that suspects understand the purpose of investigative interview and their legal rights in the investigation.[56] Investigators also explain the outline of the interview, including the interview routines (e.g., audio recording and breaks schedules), and expectations (e.g., no rushing or judgements).

Account: Suspects are expected to have a more active role in investigative interviews. The process begins with a yes/no question on whether the suspect committed the alleged offence. If the response is *yes*, the investigator asks open ended follow up questions for a full account of the incident. If the response is *no*, the investigator then asks open-ended questions on various themes including the following;

- The suspect's whereabouts during the incidents;
- Trailer questions that do not include hold-back evidence. This involves information that the suspect and authorities know about;
- Appraising questions, may include hold-back evidence that are evaluated for deception detection. The PEACE model recommends the importance of utilizing content analysis in deception detection instead of behavioral cues. The model specifically underlines not to rely on non-verbal cues for deception detection such as signs of anxiety or stress during the interview.

In this stage, the close ended questions are kept to a minimum. The initial goal is to get an uninterrupted account of the incident. If a free account is not forthcoming, investigators should ask pre- planned open-ended questions to discern the detailed actions of the suspect. Investigator should also actively listen to accounts of incidents and take notes of the points of interest such as other persons, locations, or action that may need to be followed up later in interviews. Each identified points of interest then should be explored in the following structured method:

- **Opening**: Introduction of a point with an open-ended question (i.e., questions starting with tell, explain, define),
- **Probing**: Exploratory questions (who, what, where, when, why, and how), and
- **Summarizing**: Overview of the information gathered on a topic.

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54 Roger Collins, Robyn A. Lincoln, & Mark Frank, "The effect of rapport in forensic interviewing" in Psychiatry Psychology and Law [2002] 9(1), 69.

55 Turkish Criminal Code 147(c)

56 Joseph Eastwood, & Brent Snook, "The effect of listenability factors on the comprehension of police cautions" in Law and Human Behavior [2012] 36(3), 83.

If an investigator identifies inconsistent points, follow up questions are posed not in an aggressive manner, but rather in a manner of clarification seeking task. Investigators are also instructed to recognized resistance and directed not engage in arguments with suspects. Finally, investigators are not allowed to lie to suspects. This model recognizes the inevitable challenge that some suspects may not be willing to provide any statement or cooperate with investigators; however, officers are not allowed to use manipulative tactics or lie to suspects.

Closure and Evaluating: Once investigators ask all their questions, they summarize the main points of the interview, thus, provide suspects with an opportunity to correct, modify or add information. Officers also consider the impact of new information on the investigation and whether this information is consistent or inconsistent with all of the available evidence. They are to maintain professional conduct throughout the interview and assess the probative value of statements based on *context analysis* and *available evidence*.

2. Assessment of the PEACE

The PEACE model of investigative interview is fundamentally different from manipulative or coercive accusatory models owing to the approach that it promotes the engagement of hypothesis testing method, as appose to focusing on obtaining confessions which is likely to increase the risk of high confirmation bias among investigators. Also, the PEACE adapts a fact finding perspective, essentially based on building rapport with suspects, as oppose to a coercive and manipulative evaluation; hence, the concept of interrogation is replaced by that of interview. Thus, this strategy may mitigate the negative effects of confirmation bias in investigative interviews. Some policy makers and practitioners have argued that soft approaches based on rapport building with suspects that categorically dismiss interrogation tactics may not be effective with all hardcore criminals (e.g., terrorism suspect).[57] This is a valid concern; however, preliminary research suggest that the soft approaches can be effective even with violent offenders. Alison and colleagues assessed the five aspects of rapport building process, namely, (i) autonomy, (ii) acceptance, (iii) adaptation, (iv) evocation, and (v) empathy in 418 interviews with 29 terrorism suspects in the U.K.[58] The findings indicate that conversational rapport and adaptive interpersonal skills are positively correlated with both a significant reduction in resistance strategies by the suspects and an increase in

[57] Vrij, Meissner, Fisher, Kassin, Morgan, and Kleinman, 2017, p. 931

[58] Laurance J. Alison, Emily Alison, Geraldine Noone, Stematis Elntib, Paul Christiansen, "Why tough tactics fail and rapport gets results: Observing rapport based interpersonal techniques (ORBIT) to generate useful information from terrorists" in Psychology Public Policy and Law [2013] 19(4), 411.

investigative information, whereas accusatory strategies associated with the increased use of counter intelligence tactics by the suspects.[59]

False confession is another important issue in criminal justice systems.[60] Accusatory interrogation strategies have been shown to significantly associate with false confessions. [61] Actually, the exclusion of coercive and manipulative techniques may decrease the likelihood of obtaining false confessions investigative interviews. However, a legitimate question is "does the PEACE really work in criminal investigations?" There has not been systematic research examining effectiveness of the PEACE; however, preliminary findings are promising. In a meta-analytic research, for instance, Meissner and colleagues found that the PEACE not only reduces the risk of obtaining false confessions, but also increases the amount of accurate information revealed in interviews.[62] Field studies also indicate that when the PEACE is properly implemented, suspects are more likely to disclose complete accounts of incidents.[63] In another novel study, researchers interview 83 sexual offenders in relation to their experiences in interrogations.[64] The findings suggest that interviews that do not use coercive or manipulative techniques were associated with confessions, whereas interrogations viewed as judgmental and accusatory were more likely to elicit resistance and denials. Also, structured questioning protocols are used in inquisitory approaches, as oppose to accusatory methods, enhance the elicitation of verbal diagnostic cues to deceit.[65] In accordance with research findings, calls have been made by researchers to replace interrogation strategies in different countries with the PEACE model of interview (e.g., Canada [66] and the U.S.A[67]).

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59 Ibid, 424.

60 Kassin, and Gudjonsson, 2004, 33.

61 Christian A. Meissner, Allison D. Redlich, Stephen Michael, Jacqueline R. Evans, Catherine R. Camilletti, Sujeeta Bhatt, Susan Brandon "Accusatorial and information gathering interrogation methods and their effects on true and false confessions: a meta analytic review" in Journal of Experimental Criminology [2014], 10(4), 459.

62 Ibid, 459.

63 Dave Walsh, & Ray Bull, "What really is effective in interviews with suspects? A study comparing interview skills against interviewing outcomes" in Legal and Criminological Psychology, [2010] 15, 305.

64 Ulf Holmberg, & Sven Christianson, "Murderers' and sexual offenders' experiences of police interviews and their inclination to admit or deny crimes" in Behavioral Sciences & the Law [2002], 20(1-2), 31.

65 Aldert Vrij, & Par Anders Granhag "Interviewing to detect deception" in S.A: Christianson (ed), Offenders' memories of violent crimes (John Wiley & Sons Ltd. 2007), 279-304.

66 Brent Snook, Joseph Eastwood, and Todd W. Barron "The next stage in the evaluation of interrogations: The PEACE model" in Canadian Criminal Law Review [2014], 18(2) 219.

67 Vrij, Meissner, Fisher, Kassin, Morgan, and Kleinman, 2017, 926.

3. Turkish Procedural Regulations and The PEACE Model

As discussed above psychological research on suspect interviewing have made significant contributions to the field. Social and legal context in a given jurisdiction is paramount in relation to the applicability of these contributions. The PEACE model has been developed in an adversarial justice system (i.e., England and Wales). Given that legal regulations may differ in various justice system, the model needs to be examined and tested to evaluate whether it can effectively function in Turkiye. In this section, I will briefly examine the feasibility of the PEACE model in the Turkish Criminal Justice Context.

In Turkish Criminal Justice System, suspect interview and interrogation is regulated by The Criminal Procedure Code (5271).[68] This procedure provides a legal framework for admissibility of suspect and accused statements. The procedural code defines a suspect as a person who is "*under suspicion of committing criminal act during a [criminal] investigation*" whereas accused is defined as a person who is "*under suspicion of committing criminal act during a [criminal] prosecution until a court judgement is rendered*."[69] The distinction between suspect interview and interrogation is also important since the concept of interrogation implies a focus on obtaining confessions in adversarial justice systems. Turkish Criminal Procedure Code 5271 (2) defines interview as a process of "*the listening of a suspect by law enforcement or prosecutor in relation to alleged offences in a criminal investigation*." Whereas interrogation is defined as a process of "*the listening of a suspect by a judge or court during investigation or prosecution in relation to alleged offences*". In both definitions there is an underlined focus on listening to suspects as well as accused with no expressed objective of obtaining confessions. These definitions clearly provide a practical framework for the "Account" phase of the PEACE model, owing to the fact that there is no emphasis on getting confession, but the objective is obtaining the information from suspects and accused. The only information suspects are legally required to provide is to state their identity.[70] The question is how we can operationalize the process of *listening suspects* to facilitate the process of obtaining admissible information from them. The PEACE model may be instrumental in refining the process of *listening* suspects in interviews by providing the aforementioned operational definitions of the process.

The PEACE underlines the importance of hypothesis testing process in order to avoid *confirmation bias* tendencies of investigators. As indicated above, this objective aligns well with Turkish Criminal Justice Procedures in which suspects have a right to have a legal counsel present during interviews

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68 Turkish Code of Criminal Procedure Code 5271(147-148). <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.5271.pdf>, retrieved on 2021-09-03.

69 Ibid, item 2 (a, b)

70 İbid, item 147 (a, b, c)

(this is not the case in adversarial justice systems such as Canada and USA) and further, interrogations take place in a court setting or carried out by a judge.[71] This regulation also facilitates the prevention of physical or psychological coercion in interviews or interrogations. Furthermore, the Code 5271 (148) explicitly prohibits any kind of manipulation or coercion during an interview and interrogation, including physical or psychological coercion and illicit promises, and specifies that any evidence obtained by these prohibited methods may not be used as evidence in court.[72]

As discussed earlier, suspects interviews and interrogations are risky processes that call for strong regulations to prevent coercive practices in an attempt to obtain confessions or probative evidence. At times of crisis people's cognitive and emotional capacities are compromised and consequently they may not be able to effectively process new information. When charged or being accused of a criminal offence, a suspect or an accused may not be able to process information and understand their rights and legal obligations.[73] In relation to suspect interviews, Turkish Criminal Procedure Code provides suspects with an opportunity to have a legal counsel present (i.e., a professional who can advocate for suspects)[74] and submissions obtained without the presence of a defense counsel may not be used as evidence unless confirmed as accurate statement by suspects in court.[75] This procedure provides suspects with an option to give a statement without presence of a defense counsel, but also protects them from legal ramifications in court. It needs to be noted that Case Law of Turkish Court of Cessation confirmed this in a judgement by excluding the statement of a suspect that suspect recanted in court.[76]

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71 Turkish Criminal Procedure Code 147(c)

72 Procedures prohibited during the interview and interrogation Code 148 (1)The submissions of the suspect or accused shall be stemming from his own free will. Any bodily or mental intervention that would impair the free will, such as misconduct, torture, administering medicines or drugs, exhausting, falsification, physical coercion or threatening, using certain equipment, is forbidden. (2) Any advantage that would be against the law shall not be promised. (3) Submissions obtained through the forbidden procedures shall not be used as evidence, even if the individual had consented. https://sherloc.unodc.org/cld/uploads/res/document/tur/2005/turkish_criminal_procedure_code_html/2014_Criminal_Procedure_Code.pdf, retrieved on 2021-09-03.

73 Eastwood and Snook, (2012), 85.

74 Turkish Criminal Procedure Code 147(c)

75 Turkish Criminal Procedure Core 148(4)

76 Turkish Court of Cessation, Division (4), 2020/10632E., 2020/18317K "... in this incident, however the suspect admitted his defamatory remarks to the complainant in this statement to the law enforcement officers, owing to the fact that this statement is not taken in the presence of a defense counsel and that the suspect did not confirm this statement in front of a principle court, his statement shall not be read in front of court and shall not be admitted as evidence..." <https://karararama.yargitay.gov.tr>

As discussed earlier in England and Wales, suspects do not have a right to have a defense lawyer present during statements which, prior to the PEACE model, have resulted in miscarriages of justice that created a public outrage.[77] The PEACE model technically may not fit in Turkish Criminal Justice System, but in principle it can provide a general framework on improving the effectiveness of suspect interviews and interrogations. The PEACE model has two main objectives: (i) to prevent practices of physical and psychological coercion in suspect interviews and (ii) to facilitate information gathering process during investigations. The current procedures in Turkiye (e.g., requirement of a legal counsel in interviews and conducting interrogations in a court setting or by a judge) appear to provide effective procedural regulations in preventing the admission of evidence, obtained by coercive methods in suspect interviews. However, evidence based inquisitory interview methods such as the PEACE model may facilitate to effective *listening* of suspects in criminal investigations and prosecutions. In this context, effective listening may be operationally defined as the most legally appropriate and effective way to listen suspects in relation to their capability, opportunity, motivation and PLAT[78] (people, location, action, and temporal) in Turkiye or elsewhere. This calls for effective listening and rapport building with suspects which is extensively discussed elsewhere.[79]

The use of coercive and manipulative tactics in criminal investigations around the world is an international concern that has been criticized by the U.N. In 2016, then UN Special Rapporteur on Torture, Juan Mendez who voiced out an international concern for ill-treatment and coercion in suspect interviews.[80] As a result of this appeal, an expert-led action was initiated "The Mendez Principles: Principles on effective interviewing for investigations and information gathering".[81] An examination of the operationalization of the Mendez Principles in line with current research and best practices around the globe is significant as it can provide practitioners with perspectives on the implementation of effective and humane interview methods.

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77 Vrij, Meissner, Fisher, Kassin, Morgan, and Kleinman, 2017, p. 900

78 PLAT is coined by Kerry Marlow of South Wales Police as a mnemonic

79 Lawrence J. Alison, Emily Alison, Neil Shortland, Frances Surmon-Bohr, "ORBIT: The Science of Rapport-Based Interviewing for Law Enforcement, Security, and Military". (Oxford University Press 2020).

80 U.N. General Assembly, 71 session, Item 69(b) [2016]. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/250/31/PDF/N1625031.pdf?OpenElement>, retrieved on 2021-09-03.

81 Association for the Prevention of Torture (2021). https://www.apt.ch/en/resources/publications/new-principles-effective-interviewing-investigations-and-information, retrieved on 2021-09-03.

C. The Mendez Principles: Principles on Effective Interviewing for Investigations and Information Gathering[82]

The Mendez Principles are drafted by 80 experts from over 40 countries. These experts have particularly underlined the extensive body of scientific research indicating that non-coercive and rapport based interview methods are more effective in comparison to accusatory models. In this report, an investigative interview is defined as *"a structured conversation where one person (the 'interviewer') seeks to gather information from another (the 'interviewee') as part of any investigation or intelligence operation. The objective is to obtain accurate and reliable information while respecting human rights; eliciting facts is the aim, not a confession*."[83] This definition has important implications for criminal investigations owing to the fact that it underlines the significance of respecting human rights while seeking to obtain probative information. Another critical implication is that the main aim of investigative interview is specified as eliciting relevant facts rather than a confession. The Mendez principles also recognize that despite contrary evidence stemming from applied research and practice, there is still a widespread misconception that manipulative and accusatory techniques are effective in interviews. It needs to be underlined that in this framework torture and ill treatments include physical as well as psychological manipulations and coercive tactics. The Mendez Principles highlight the practical need to review evidence based methods and share good practices among experts and practitioners in investigative interviews. In line with this objective, in the following part Mendez Principles are discussed in relation to promoting evidence based models as well as operational definitions of these principles in investigative interview.

1. Foundations: Effective Interviewing is Instructed by Science, Law, and Ethics

Psychological research on false confessions reveal that coercive techniques are likely to increase resistance on the part of the suspect and, if continued, may increase the risk of getting false information and even false confessions in investigative interviews.[84] Also, coercive tactics are likely to inhibit individuals' memory retrieval capacity[85] that in turn decrease the quality of

82 Ibid, 1.

83 Ibid, 1.

84 Gisli H. Gudjonsson, The Psychology of False Confessions: Forty Years of Science and Practice (Hoboken, NJ, John Wiley & Sons, 2018); Vrij, Meissner, Kassin, Morgan, Fisher, & Kleinman, 2017; S. O'Mara, Why Torture Doesn't Work: The Neuroscience of Interrogation (Cambridge, Harvard University Press, 2015); S.M. Kassin, S.A. Drizin, T. Grisso, Gisli H. Gudjonsson, R.A. Leo, & A.D. Redlich, "Police-induced confessions: risk factors and recommendations" Law & Human Behavior, vol. 34, No. 1 (February 2010).

85 O'Mara, Why Torture Doesn't Work (footnote 5); C.A. Morgan III, S. Southwick, G.

episodic memories of suspects. However, coercive strategies (e.g., the REID model) are still utilized in criminal investigations around the world. Given that policy makers and practitioners must value evidence based methods in general and that psychologically coercive tactics have been found to be both ineffective and detrimental by aforementioned research and archival data (e.g., increasing the likelihood of false confessions and decreasing the quality of recollection), current investigative interview models must be based on empirical findings. The PEACE model of interview appears to be a viable alternative to intimidating interrogation models, owing to the fact that ceasing the use of coercive tactics does not reduce the number of confessions obtained in investigative interviews.[86] It needs to be noted that there has not been substantial research supporting the effectiveness of the PEACE mode in various criminal justice systems; however, preliminary findings on the effectiveness of soft approaches are promising. This paper argues that the dissemination of these findings among decision makers and practitioners can promote the implementation of evidence based interview methods.

This principle also highlights the importance of forming effective interviewing tactics (i.e., operational definitions of the principles) in international human rights law and standards.[87] Few criminal justice systems, including Turkiye, grand suspects with a right to have a defense attorney during interrogations or investigative interviews. In Turkish Criminal Justice proceedings, suspect statements in investigative interviews are admissible in court with a condition that these statements are given in the presence of a defense attorney or the suspects confirm these statements as accurate before a judge or in a presiding court.[88] This standard in relation to admissible suspect statements in criminal investigations ensures law enforcement practices are more likely to be in line with international human rights law and standards. However, as indicated earlier, such high standards are not available in all justice systems and the standard on admissibility of suspects statements vary

Steffian, G.A. Hazlett, & E.F. Loftus, "Misinformation can influence memory for recently experienced, highly stressful events", International Journal of Law and Psychiatry, vol. 36, No. 1 (January/February 2013); K. Young, W. Drevets, J. Schulkin, K. Erickson "Dose dependent effects of hydrocortisone infusion on autobiographical memory recall", Behavioral Neuroscience, vol. 125, No. 5 (October 2011).

86 Meissner and Russano, 2003, p. 53.

87 Particularly the Universal Declaration of Human Rights (UDHR), General Assembly resolution 217 A (III) of 10 December 1948; the International Covenant on Civil and Political Rights (ICCPR), General Assembly Resolution 2200 A (XXI), of 16 December 1966.

88 Turkish Justice Criminal Proceedings, Statute 5271, item 148(4) "Statements taken by investigators without a presence of defense attorney are not admissible in court unless confirmed as accurate by suspects or accused before a judge or presiding court".

among states. There are also concerns that suspects may not fully comprehend their rights in criminal investigations. Therefore, a systematic assessment on the effectiveness of applicable policies ensuring suspect interview practices are in line with international human rights law and standards is a must.

2. Practice: Effective Interviewing is a Comprehensive Process for Gathering Accurate and Reliable Information while Implementing Associated Legal Safeguard

Investigative interview is a process, rather than a discreet event, which commences as soon as a person is identified as a suspect and continues throughout the completion of interviews in criminal investigations. Thus, the interactions with suspects prior, during and after interviews are critical stages with respect to the integrity of the process. This includes preliminary information gathering step on the suspect, as well as physical (e.g., size and design of holding cells) and social (e.g., interactions with others suspects and investigators) settings of the environment where interview takes place. Moreover, investigative interviews are integrative part in comprehensive information gathering efforts in criminal investigations. Therefore, both coercive and soft interview models underline the importance of gathering evidence and speaking with witnesses prior to suspect interviews. Practical inconsistencies between adversarial and soft models in gathering accurate and reliable information stem from the fact that coercive techniques focus on obtaining confessions and confirmatory information from the suspects. In fact, the REID training manual instructs investigators to have an open mind in interviews; however, the aforementioned nine interrogative techniques emphasize the importance of obtaining confessions from suspects once investigators are convinced on their guilt, rather than gathering accurate and reliable information. This approach practically minimize the legal rights of suspects to remain silent while facing criminal allegations. On the other hand, as a soft interview model, the PEACE techniques involve continuous hypothesis testing approach that is more likely to promote a comprehensive perspective, in which there is a focus on gathering admissible evidence in criminal proceedings. This principle also underlines the importance of building rapport with suspects prior and during the interview. Adversarial models also highlight the importance of building rapport with suspects; however, with an objective of obtaining confessions from them. The focus on obtaining confession is actually likely to impede the rapport building process with suspects. Whereas, the PEACE model utilizes the rapport building strategies with a different objective that is facilitating episodic memory of suspects, thus, gathering as detailed information as practicable.[89] This aim may not be fulfilled with people who remain silent during interviews. Yet, it is more

[89] Alison, Alison, Noone, Elntib, 2013, p. 411.

likely to assist individuals with the recollection of events who are willing to provide statements.

3. Vulnerabilities: Effective Interviewing Requires Identifying and Addressing the Needs of Interviewees in Situations of Vulnerability

Suspects may also have vulnerabilities in relation to either situational or individual differences. Firstly, all suspects involve inherently uneven balance of power with investigators (i.e., situational factors). Moreover, individual vulnerabilities of suspect including young age, difficulties with communication (e.g., language barrier), intellectual or physical disabilities can also play deteriorating roles. For instance, in Turkish criminal justice system, children who are suspected of a criminal by virtue of age is defined as "children who are led to committing an offence".[90] Given that situational and individuals vulnerabilities of suspects need to be taken into account in criminal proceedings, this principle underlines the importance of implementing enhanced protections designed to address needs and legal rights of vulnerable suspects in criminal investigation. Significant concerns exist on using psychological coercive methods in the REID in relation to both situational and individual vulnerabilities of suspects. There are of course legal protections in place to guard suspects in adversarial interrogations such as Miranda Rights[91] in the United States and Charter of Rights and Freedoms in Canada.[92] In this legal context, statements including confession are only admissible when suspects waive these rights *knowingly*[93] and *voluntarily*.[94] However, the aforementioned psychological manipulations in the REID model (e.g., presenting moral

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90 Child Protection Act (Turkiye), Number 5395, Item 3(2) **Child led to an offence:** "*A child who is under investigation or prosecution for allegedly committing an offence as described in statutes or a child who is convicted an offence facing judicatory security sanctions*." https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=5395&MevzuatTur=1&MevzuatTertip=5, retrieved on 2022-01-30.

91 Miranda v. Arizona, 384 U.S. 436 [1966] (Under the Fifth Amendment, any statements that a defendant in custody makes during an interrogation are admissible as evidence at a criminal trial only if law enforcement told the defendant of the right to remain silent and the right to speak with an attorney before the interrogation started, and the rights were either exercised or waived in a knowing, voluntary, and intelligent manner). https://supreme.justia.com/cases/federal/us/384/436, retrieved on 2021-09-01.

92 Charter of Rights and Freedoms (Canada), **Legal rights 10**: Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor, (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful) https://publications.gc.ca/collections/Collection/CH37-4-3-2002E.pdf, retrieved on 2021-09-4.

93 Lesley King, Brent Shook, "Peering inside a Canadian interrogation room" in Criminal Justice and Behaviour, [2009], 36(7), 674.

94 Kassin and Gudjonsson, 2004, p. 33.

justification, and presenting false evidence etc.) can be so coercive that some suspects are likely to utter false confessions. Research findings show that some individuals are more susceptible to suggestive interrogations, owing to their specific vulnerabilities.[95] That is certain characteristics of suspects (e.g., age, intellectual, or psychological disabilities) increase their vulnerability in adversarial interrogation to provide self-incriminating evidence even false confessions. For instance, juveniles and suspects with intellectual and psychological disabilities have been found to be over represented among false confessors.[96] This is a particularly significant concern that calls for a decisive legal action in ensuring protections of individuals in relation to both situational and individual vulnerabilities in criminal investigations. In light of the above-mentioned evidence, this paper maintains that the REID model of interrogations does not fit in legal and psychological framework to effectively address these vulnerabilities whereas soft models can provide additional protective factors.

4. Training: Effective Interviewing is a Professional Undertaking that Requires Specific Training

Around the world, many investigators who are in charge of suspect interviews do not receive a formal training or receive interrogation training that promote psychological coercion strategies in order to secure confessions from suspects.[97] This is a noteworthy obstacle in relation to ensuring current interview practices are kept in line with evidence based models. Conceptual and practical investigative interview training can fulfill important roles in promoting institutional change towards current findings in the literature. In other words, trainings on soft approach of investigative interview may facilitate adaptation of open minded of strategies via basic and in-service advanced training modules for investigators and prosecutors. Also, ongoing training and experience sharing activities at both national and international levels should be a part of professional undertaking of effective interviewing. This paper suggest that the PEACE model provides us with an appropriate framework in developing specific investigative interview models for various justice systems; however, given that this model was developed in the UK (i.e., adversarial justice system), the adaptation of the PEACE requires a systematic review in accordance with a given legal framework (e.g., inquisitory justice system).

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95 Aldert. Vrij, Detecting Lies and Deceit: Pitfalls and Opportunities, 2nd ed. (West Sussex, England, John Wiley & Sons, 2011); Vrij et al. "Psychological perspectives on interrogation" (footnote 5); Gudjonsson, The Psychology of False Confessions (footnote 5).

96 Drizin & Leo, "The problem of false confessions" (footnote 7). S.R. Gross, K. Jacoby, D.J. Matheson, N. Montgomery, & S. Patil, "Exonerations in the United States 1989 through 2003", Journal of Criminal Law & Criminology, vol. 95, No. 2 (2005).

97 Inbau, Reid, Buckley, and Jayne, 2013, p. 87.

5. Accountability: Effective Interviewing Requires Transparent and Accountable Institutions

Judicial and law enforcement authorities play a crucial role in preventing physical and psychological coercion in investigative interviews. Accordingly, judicial authorities are required by law to keep the records of current rules, methods, and practices with regards to investigative interviews.[98] Based on this requirement, investigative authorities are ultimately responsible for adopting structured procedures and the code of conducts to establish standards for investigators conducting interviews. This is particularly related to operational records of interviews. In this framework, the best type of investigative interview evidence would be a video and audio recording of the process, in which the actions of both suspects and investigators could later be verified. Given the current technological developments such as widely available body worn camera technologies, the video and audio recording of investigative interviews can be conducted even in the field. This transparency would be particularly functional in evaluating the admissibility of these statements in court proceedings as well as maintaining public confidence in legal institutions. External oversight bodies (e.g., Ombudsperson and Human Rights and Equity Institution) can also play a critical role in maintaining accountability. These external bodies should be authorized to have a confidential contact with any individual in custody without fear of reprisals, provided that this oversight does not compromise security and integrity of criminal investigations.

In relation to the accountability principle, the accusatory interrogation models do not appear to be promoting transparency and accountability at institutional as such coercive practices are likely to generate toxic environments in which the exclusive focus is on obtaining confessions from suspects. This perspective in turn facilitate lack of accountability and ill treatments among practitioners. On the other hand, inquisitory models can be relatively easily modified to promote accountability and transparency as the measurement of success is not related to confessions but information gathering process.

6. Implementation: The Implementation of Effective Interviewing Requires Robust National Measures

The implementation principle recognizes that effective interview strategies require vigorous local measures and operational definition of processes. In this framework, states need to adopt suitable legal, policy, regulatory and institutional strategies. Investigative interview techniques should be based on empirical findings, archival research, and good practices. Effective interviewing techniques should also be protected in legal procedures. The prohibition of

[98] Art. 11 of the UNCAT; see also A/HRC/RES/31/31, paras. 11-12; A/HRC/RES/46/15, para. 10.

accusatory interrogation models is key to promote evidence based inquisitory interview techniques. As per international legal requirement, states must hold accountable those responsible for coercion and abuse.[99] The implementation of effective interviewing essentially require operational definitions of soft model strategies where applicable tactics can be objectively observed, measured, and repeated by practitioners.

CONCLUSION

Investigative interviewing is an important process in criminal investigations in which officers are potentially able to pursue a number of different objectives. Some strive to obtain a confession, detect lies, assess the reliability of statements, while others attempt to facilitate recollection of incidents, or build rapport with suspects. This paper examined contributions of psychological research and findings in refining effective investigative interviewing by comparing two widely practices suspect interview models, the REID (accusatory model of interrogation) and the PEACE (inquisitory model of interview). It needs to be noted that there are many other inquisitory investigative model such as ORBIT.[100] However, this paper comparatively examined the PEACE and the REID models in order to present systematic findings. The initial perceived effectiveness of the REID model related to its success in generating confessions in criminal investigations without resorting physical violence. The initial promise, however, faded away as significant number of these confessions were confirmed to be false. Consequently, the REID model was criticized for implementing psychologically coercive techniques as well as increasing confirmation bias of investigators. Following these findings, a number of soft inquisitory (i.e., soft) models have been developed around the globe. For instance, partly owing to public reactions to miscarriage of justice in the UK in adversarial interrogations, the PEACE model was developed by a team of experts including psychologists and police officers. As an inquisitory investigative interview model, the PEACE aims to facilitate information gathering process in suspect interviews without focusing on obtaining confessions from suspects. Furthermore, according to the PEACE model, deception detection and reliability of statements are assessment with content analysis rather than relying on the so-called behavioral deception clues.

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[99] Art. 15 of the UNCAT; A/HRC/RES/31/31, para. 13; A/HRC/RES/46/15, para. 22; A/HRC/25/60, para. 68; A/71/298/, para. 100 (footnote 3) in Association for the Prevention of Torture (2021), page 41. https://www.apt.ch/en/resources/publications/new-principles-effective-interviewing-investigations-and-information

[100] Lawrence J. Alison, Emily Alison, Neil Shortland, Frances Surmon-Bohr, "ORBIT: The Science of Rapport-Based Interviewing for Law Enforcement, Security, and Military". (Oxford University Press 2020)

Many aspects of investigative interviewing involve mental processes. While investigators construct judgements on the veracity of allegations and strive to persuade suspects to cooperate, the accounts of suspects involve memory limits, cognitive biases, recollection cues, and self-preservation motivation. These mental processes have been extensively studies in various sub-fields of psychology. For instance, while cognitive psychology focuses on memory recollection processes, social psychological research examines the process of rapport building and interpersonal relationships. Therefore, it is imperative to build a bridge between legal authorities and psychologists to investigative applicability of these findings in a given jurisdiction. As reviewed earlier, empirical evidence suggest that even with high value detainees (e.g., terrorist suspects) coercive techniques are not effective in comparison to evidence based inquisitory approach. However, we do not appear to learn the lessons over time. For example, as revealed by Lord Parker Inquiry[101] the infamous *Five Techniques* (hooding, sleep deprivation, food deprivation, white noise, and stress positions) were first developed in Kenya in 1950s by the British[102]. Such inhumane tactics are not only clear violation of Human Rights and democratic values but also do not consistently yield actionable intelligence or admissible evidence in court. Nevertheless, similar techniques have still being implemented around the world, including during the war against terrorism. These robust (i.e., coercive) techniques feed violent radical propaganda and compromise international and domestic reputation. It needs to be underlined that there may be underlying psychological assumptions to believe coercive tactics should be used with criminal suspects, particularly with high value detainees. For instance, according to "fundamental attribution error" postulates that we tend to attribute our own behaviors to environmental factors, whereas behaviors of others are often believed to be driven by internal forces and are less impacted by environmental variables.[103] Interviewers who are making fundamental attribution error are more likely to think that suspects' lack of cooperation are not influenced by their coercive tactics (social/environmental variable) but rather by internal forces (e.g., violent ideology, free will). Consequently, interviewers are more likely to resort to adversarial tactics to break the internal forces of suspects in order to elicit information from them.

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101 "Report of the Committee of Privy Counsellors appointed to consider authorized procedures for the interrogation of persons suspected of terrorism" Chairman Lord Parker of Waddington (1972)

102 Lawrence J. Alison, Emily Alison, Neil Shortland, Frances Surmon-Bohr, "ORBIT: The Science of Rapport-Based Interviewing for Law Enforcement, Security, and Military". (Oxford University Press 2020) p. 123.

103 Gibert Harman, Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error, in Proceedings of the Aristotelian Society [1999], 315-331.

Inquisitory investigative interview models mainly rely on building a rapport with suspects in an attempt to generate reliable information. Empirical evidence support the assumption in fact rapport building is essential factor in both increasing the amount of information and reliability in investigations.[104] This is of course not to suggest that rapport building will generate reliable information in every interviews. Some suspects use various counter intelligence tactics (e.g., discussion unrelated topic, providing well-known information, silence, scripted responses, claiming lack of memory). The use of counter intelligence tactics may be reduced by rapport building approach, but some offenders may remain silent and not indulge in any information regardless of the investigators attempts to generate rapport with them. However, this is still an important outcome as their rights to remain silent would have been respected in such inquisitory interview.

Investigative interview practices are regulated by both national and international human rights regulations as stipulated by United Nations (UN) covenants, principles, and standers.[105] In conclusion, this paper argues that investigative interview models based on accusatory approaches and unstructured methods are far from fulfilling these objectives, whereas inquisitory models have been found to be very promising[106] In this framework, research findings show that inquisitory models are more functional in assessing reliability and accuracy of statements, detecting lies, increasing witness and suspect cooperation with officials, and facilitating the recollection of suspects.[107] The underlying assumptions of inquisitory models are also in line with the Mendes principles. For instance, the objective of suspect interview is to gather admissible evidence and facilitate the recollection incidents without resorting physical or psychological coercive techniques. However, inquisitory models and the Mendes principles can only provide a general framework for investigative interview practices based on psychological findings. The inquisitory techniques in line with the Mendes principles should be pinpointed (i.e., operationally defined) by multidisciplinary teams, including legal experts, practitioners, and psychologists in a given justice system. We appear to be heading in the right direction for emphasizing the importance of rapport

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104 Alison, Alison, Shortland, Surmon-Bohr, 2020), p. 125.

105 The International Covenant on Civil and Political Rights (ICCPR) Article14, Clause 3 "In the determination of any criminal charge against him, everyone shall be entitled . . .: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him" (UN General Assembly, 1966). A similar statement is made in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN General Assembly, 1988)

106 Ray Bull, "Roar of PEACE" in Ray Bull and Iris Blandon-Gitlin (eds), *The Routledge International Handbook of Legal and Investigative Psychology* (Routledge 2019) 2-17.

107 Vrij, Meissner, Fisher, Kassin, Morgan, and Kleinman, 2017, p. 927.

building and facilitating recollection efforts in investigative interviews. In this complex process, the implementation of legally and psychologically refined interview techniques, evidence based in-service training for the practitioners as well as modifications or elimination of existing ineffective practices are among essential steps.

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